MINUTES

CIVIL RULES ADVISORY COMMITTEE

NOVEMBER 17-18, 2008

1 The Civil Rules Advisory Committee met on November 17 and 18, 2008, at the
2 Administrative Office of the United States Courts in Washington, D.C. The meeting was attended
3 by Judge Mark R. Kravitz, Chair; Judge Michael M. Baylson; Judge David G. Campbell; Judge
4 Steven M. Colloton; Hon. Thomas H. Dupree, Jr.; Professor Steven S. Gensler; Daniel C. Girard,
5 Esq.; Judge C. Christopher Hagy; Robert C. Heim, Esq.; Peter D. Keisler, Esq.; Chief Justice
6 Randall T. Shepard; Anton R. Valukas, Esq.; Chilton Davis Varner, Esq.; and Judge Vaughn R.
7 Walker. Professor Edward H. Cooper was present as Reporter, and Professor Richard L. Marcus
8 was present as Associate Reporter. Judge Lee H. Rosenthal, chair, Judge Diane P. Wood, and
9 Professor Daniel R. Coquillette, Reporter, represented the Standing Committee. Judge Eugene R.
10 Wedoff attended as liaison from the Bankruptcy Rules Committee. Laura A. Briggs, Esq., was the
11 court-clerk representative. Peter G. McCabe, John K. Rabiej, James Ishida, and Jeffrey Barr
12 represented the Administrative Office. Thomas Willging represented the Federal Judicial Center.
13 Ted Hirt, Esq., Department of Justice, was present. Andrea Kuperman, Rules Clerk for Judge
14 Rosenthal, attended. Observers included Alfred W. Cortese, Jr., Esq.; Jeffrey Greenbaum, Esq.
15 (ABA Litigation Section liaison); Chris Kitchel, Esq. (American College of Trial Lawyers liaison);
16 and Ken Lazarus, Esq..

17 *Hearing*

18 The morning began with the first hearing on the proposals to amend Rules 26 and 56 that
19 were published for comment in August 2008. Seventeen witnesses testified, concluding at 1:15 p.m.
20 The hearing transcript is filed separately.

21 *Meeting*

22 Judge Kravitz began the meeting by noting membership changes.

23 Robert Heim has served two terms, bringing his depth and breadth of experience to bear with
24 invaluable advice on the many complex and sensitive issues that have come to the Committee over
25 these years. He is held in very high regard both by other lawyers and by judges; his current
26 appointment by the Third Circuit in a highly delicate matter speaks volumes of his stature.

27 The Chief Justice has reappointed Judge Campbell and Professor Gensler for richly deserved
28 second terms. Peter Keisler, who served in the highest tradition of ex officio members, has returned
29 to the fold as an appointed member; his homecoming is warmly welcomed.

30 The Committee regularly faces questions that would benefit from guidance by a court clerk.
31 Laura Briggs, Clerk for the Southern District of Indiana, has become the clerk representative to the
32 Committee. Her experience and insights into the inner workings of the district courts will be most
33 helpful.

34 *Report on Standing Committee*

35 Judge Kravitz reported on the June Standing Committee meeting. The proposals to publish
36 amendments of Rules 26 and 56 were both discussed at length. Differing viewpoints were expressed
37 on several aspects of the proposals. Publication was approved, but the Committee asked that pointed
38 questions be framed by the invitation for comment. There was considerable support for changing
39 "should" to "must" in proposed Rule 56(a) — when the required showing is made, the court must
40 grant summary judgment. The Rule 26 proposals elicited several expressions of concern about the
41 role of trial expert witnesses as little more than the attorney's alternative voice. The Committee was
42 impressed by the work that had gone into the proposals, but has some abiding concerns.

43 The rule changes published for comment in August 2007 and proposed for adoption were
44 all approved by the Standing Committee, and since have been approved by the Judicial Conference.
45 The only exception is the proposal to strike "discharge in bankruptcy" from the list of affirmative
46 defenses in Rule 8(c), which the Advisory Committee held back for further consultation with the
47 Department of Justice.

48 *April 2008 Minutes*

49 The draft Minutes for the April 7-8, 2008 meeting were approved, subject to correction of
50 typographical and similar errors.

51 *Hearing Review*

52 The testimony at the morning hearing was briefly reviewed, recognizing that two additional
53 hearings are scheduled and that many more written comments are likely to be made.

54 *Summary Judgment Study*

55 It was noted that we now have the final version of the Federal Judicial Center Report on their
56 study of summary-judgment practice. The study compares practice and outcomes in three groups
57 of districts: those that have local rules adopting some form of the point-counterpoint procedure
58 proposed for Rule 56(c), those that require a statement of undisputed facts by the movant but do not
59 require a counterpoint response, and those that do not have either requirement. Judge Kravitz
60 recognized that the report is important for the hard work that went into it and for the data it
61 produced. It shows that there are few differences across the different local practice patterns, and that
62 it is not possible to show whether such differences as appear are caused by the different regimes.
63 The Committee is deeply grateful to the FJC for a task that proved to require more work than was
64 expected.

65 The "must"-"should" question was noted by referring to Rule 50, which uses "may." It was
66 pointed out that "may" in Rule 50(a) is used to express the valuable opportunity to defer ruling on
67 judgment as a matter of law until the jury has returned a verdict; discretion is an essential element
68 of this practice. In Rule 50(b), "may" has a different aspect. It does not recognize authority to enter
69 judgment on a jury verdict that fails the standard for judgment as a matter of law. Instead it
70 recognizes the "discretionary second chance" authority to order a new trial, or even dismissal
71 without prejudice, when the verdict winner has failed to present sufficient evidence to avoid
72 judgment as a matter of law but for some reason seems to deserve a second chance to do so.

73 The "slice-and-dice" theme that recurred repeatedly in the morning testimony was noted.
74 Several witnesses expressed concern that the point-counterpoint procedure will diffuse attention to
75 congeries of isolated facts, blinding the court to the overall view that relates the facts to determine
76 what inferences they may support. These comments may reflect contemporary insistence that the
77 logic of legal rules needs to give way to the value of narrative as a means of expressing social
78 experiences and inequalities. Because the comments often address employment discrimination
79 cases, they also may reflect the "prima facie case" elements that yield to "articulated explanation";
80 this body of doctrine can generate real confusion on summary judgment. One specific suggestion
81 was that "inferences" should be added to the nonmovant's opportunity to respond, using the
82 response itself rather than the brief to point not only to "additional facts" but also to the inferences
83 that might be drawn from the complete array of fact assertions. Judges responded that they read the
84 brief — or even the reply brief — first, to get the broad gestalt picture before venturing into the fact
85 statements. This approach avoids the risk of a disaggregated view of the case. A practitioner
86 suggested that the rule should give better guidance to the proper place to tell the story as a whole
87 — whether in the response or the brief.

The disaggregation question has a parallel in the fear that the movant may produce an unreasonably long statement of facts that cannot be genuinely disputed. That can be a problem, but the solution is not to write into the rule a motion to strike on the ground that nonmaterial facts have been included.

Practice in the District of Arizona was addressed by written comments provided by two judges from the District of Alaska who regularly accept assignments to Arizona. Arizona has a point-counterpoint practice akin to proposed Rule 56(c). Alaska does not. The Alaska judges report that their experience with many cases and many summary-judgment motions in both districts show the disadvantages of the point-counterpoint procedure. The judges in Arizona have considered these comments, and despite having thought for many years that the point-counterpoint procedure is a good thing have become persuaded that they should begin to experiment with other approaches. They have the highest respect for the Alaska judges, and have begun to wonder whether it is too early to adopt point-counterpoint as a national rule. They want to be free, after experimenting, to adopt a local rule that dispenses with point-counterpoint practice; the authority under proposed Rule 56(c) to depart on a case-by-case basis may not suffice. It was pointed out that other judges have submitted comments that experience with point-counterpoint practice has shown its shortcomings.

Turning to Rule 26, it was noted that a group of law professors are working on a letter to comment on the Rule 26 proposals; "we have the attention of the academy." But the bar is mostly on board. Lawyers "on both sides of the v" agree. Judge Kravitz had the opportunity to discuss the proposals with the Law and Science Working Group of the National Academy of Sciences and found them very receptive. Opposition in the academy seems to arise from concern that the proposal accepts and may further entrench the role of the expert witness as the lawyer's puppet, misleading credulous jurors by masquerading as a detached truth-seeker.

Enabling Act Birthday

1938 brought dramatic changes to federal practice. On April 25 the decision in Erie v. Tompkins abandoned federal common law on matters of substance. On September 16 the Federal Rules of Civil Procedure took effect. The 70th Birthday is an important milestone.

Judge Kravitz observed that reading a collection of essays by Judge Clark, the Reporter for the original Advisory Committee, underscores the lesson that creation of the Rules was a project of heroic proportions. It was a turning point in the history of procedure. We are no longer in the heroic era. The "big bang" is not to be repeated. But Judge Clark recognized the need for continuing revision of the work. Procedure is a means to an end, not an end in itself. It must be continually reexamined and reformed if it is to accomplish the objects of Rule 1 in resolving litigation brought to enforce ever-changing substantive rights. Causes for popular discontent remain. There are challenges ahead. But the Enabling Act process provides the continual reexamination that will ensure the ongoing success of the enterprise.

Peter McCabe presented a time line of major steps in the Enabling Act process, beginning with adoption of the Civil Rules in 1938. The process has developed into one that is open, participatory, thoroughly deliberative, and exacting. It goes through multiple stages and repetitions, and that is good.

Criticisms were made of the process in the 1970s, growing from controversy over the Rules of Evidence. The criticisms initially went to substance, but the process was also criticized as not open and as difficult to penetrate. The Federal Judicial Center began a study of the process in 1981 and made recommendations. In 1983 Representative Kastenmeier initiated what became a five-year study. The Enabling Act amendments adopted in 1988 essentially enacted the procedures prescribed in 1983 by the Judicial Conference. The supersession power was challenged but, in the end, was retained. Local rules were challenged, and some measure of control was established.

135 Criticisms during this period included complaints that rules were considered and adopted
136 without empirical support. Now it is routine to seek as much empirical information as can be had.

137 Records of rules committee proceedings have been public since 1983. Now they are
138 available electronically, making public access a great deal easier. Old records are being added, and
139 an arduous search is being made in an attempt to establish a complete collection of all records back
140 to 1935.

141 The Style Project has brought real improvements to rule language. It will be important to
142 maintain its successes going forward.

143 In 1995 the Judicial Conference adopted a long-range plan. It emphasizes the need to adopt
144 rules changes through the Enabling Act process, not through legislation. Rules should be national
145 and uniform. The bench and bar should have ready opportunities to participate in the amending
146 process.

147 The process yields good products. It is no stretch to say that the products are better than the
148 legislative process can often produce because of the painstaking nature of the Enabling Act
149 machinery. Congress generally respects the process; most of the bills introduced to amend rules of
150 procedure fail. The credibility the process has acquired over the years helps.

151 Professor Coquillette spoke of experiences with other advisory committees and the Standing
152 Committee to illustrate the challenges that confront the Enabling Act process. The illustrations are
153 of crises committees have faced, typifying generic challenges to the system. He arrayed his
154 illustrations around categories of "Sex, Violence, Death, Attorney Conduct, and the Rules System."

155 The perennial resurgence of efforts to legislate court rules is illustrated by Evidence Rules
156 412 through 415. Early efforts to amend Rule 412 in Congress were successfully stalled. But in
157 1994 Congress, prodded by groups actively pressing to address evidence rules in child molestation
158 cases, considered specific proposals. Limited success was achieved in winning first a 150-day
159 waiting period, then a second 150-day waiting period, but in the end Congress acted. The rules it
160 produced are not well integrated with the other Evidence Rules. The Sunshine in Litigation bills that
161 are introduced in every Congress may yet achieve sufficient support to add another illustration.

162 A somewhat reduced form of Congressional action occurs when Congress directs that rules
163 be adopted on a particular subject, but does not dictate the actual rule language. The Crime Victims'
164 Rights Act is an example. Special interest groups are strongly interested in these rules, and bring
165 to bear considerable pressure to conform to their preferences. Similar examples have occurred in
166 such areas as the E-Government Act and bankruptcy rules.

167 Relations with the executive branch also are an important part of the Enabling Act process.
168 Top-ranking officials in the Department of Justice serve as ex officio members of the advisory
169 committees and the Standing Committee. It has proved very important to have active participation
170 by these high-placed people, who are able to reconsider initial Department positions in light of
171 ongoing discussions. The Civil Rules Committee has been admirably served by the participation
172 of the Assistant Attorneys General for the Civil Division over the last many years. The Department
173 has far-flung litigating experience and is able to provide invaluable insights into how the rules are
174 working and how proposed revisions might work. And, particularly with the Criminal Rules, they
175 may be in a position to affect rules revisions by adjusting their own practices. Consideration of a
176 rule that would codify the Brady rule, for example, has been deferred because the Department
177 adopted changes to the United States Attorneys Manual that addressed the concerns that focused the
178 Committees' interest.

179 "Local Rules are as inevitable as death." In 1988 Congress came down hard on local rules.
180 Local rules must be consistent with the national rules, but the separate Local Rules Projects
181 undertaken by the Standing Committee have found significant violations of this policy. Under 28
182 U.S.C. § 331, the Judicial Conference, moreover, has responsibility for reviewing rules prescribed
183 by courts other than the district courts and the Supreme Court. This responsibility was delegated
184 to the Standing Committee when challenges were made to a Ninth Circuit rule adopted to address
185 last-minute habeas corpus petitions filed on the brink of scheduled executions. The rule was
186 designed to provide a very fast means to review stays calculated to defeat implementation of the
187 execution warrant by avoiding review until the warrant had expired. The chair of the Standing
188 Committee, Judge Stotler, is a district judge in the Ninth Circuit. She had the delicate task of telling
189 the Ninth Circuit that the local rule was invalid; she carried on a magnificent negotiation and
190 persuaded the Ninth Circuit to voluntarily withdraw the rule and redraft it to meet the objections that
191 had been found. Local rules will continue to be a challenge. Related problems may be presented
192 by the "standing orders" of individual judges that have the effect of establishing a judge-specific
193 local rule. Professor Capra, Reporter for the Evidence Rules Committee, is working on a project that
194 addresses standing orders.

195 Attorney conduct matters raise issues that cross all of these concerns. Every district has a
196 local rule governing attorney conduct. Often they incorporate local state practice, either on a static
197 basis as of the time of adopting the local rule or on a dynamic basis that incorporates ongoing
198 changes in state practice. Congress has addressed specific questions of attorney conduct. The
199 Department of Justice has had particular concerns with several rules, especially Rule 4.2 on contact
200 with represented persons and Rule 8.4 on dishonest conduct. In dealing with members of organized
201 crime groups, for example, it may be important that the Department be enabled to help a member
202 obtain truly independent representation, free from representation by an attorney loyal to the group
203 rather than the member. Several years ago, one state interpreted Rule 8.4 to prevent attorneys from
204 participating in undercover or sting operations, even by directing nonattorneys. These problems led
205 to a lengthy project that drafted Federal Rules of Attorney Conduct. It remains unclear whether such
206 rules are rules of practice and procedure within the Enabling Act; legislation was prepared to
207 expressly authorize adoption of rules of attorney conduct. The problems subsided, however, and
208 the project remains on indefinite hold.

209 The credibility of the Enabling Act committees has been earned over time. It has been
210 earned with Congress, the executive, and the judiciary. It is essential to the continuing success of
211 the enterprise. So long as it is maintained, the committees will be able to meet successfully most
212 challenges of the sort that have been encountered and will be renewed in the future.

213 Professor Marcus offered a few remarks drawn from his article proclaiming that the Enabling
214 Act process is "Not Dead Yet." The first observation was that for the last twenty-five years the
215 prevalent academic view of the process has been negative. The negative views seem to derive from
216 desires to achieve ideal rules, overlooking the real-world imperfections that make the theoretical best
217 an enemy of the achievable good. Thus nascent criticisms of the current expert-witness proposals
218 rest on dissatisfaction with the roles often played by expert witnesses, failing to recognize that
219 whatever fundamental reforms might be desirable probably are beyond the reach of any court rules
220 and certainly are beyond the reach of the Civil Rules. The next observation was that Congress
221 adopted as statutory command the public comment and hearing process that the Judicial Conference
222 initiated in response to the criticisms described by Peter McCabe. The great strengths and
223 contributions of public involvement have been demonstrated repeatedly, as shown by the hearing
224 on Rules 26 and 56 held this morning. The third observation was that the administrative and
225 research support provided to Enabling Act committees by the Administrative Office and the Federal
226 Judicial Center have been essential to the committees' work. Finally, "big bangs" do not happen
227 very often. The revolution of 1938 will not soon be repeated. But those who object to one proposal

228 or another often accuse the committees of attempting a revolution. Not infrequently, antagonism
229 toward one proposal will distract attention from another that in fact is more truly transformative.
230 In addressing the 1993 disclosure rules, for example, opposition focused intensely on initial
231 disclosure — later developments, including the substantial dilution of initial disclosure, proved
232 wrong the predictions of disaster. Little attention was directed, on the other hand, to the package
233 that transformed discovery of expert trial-witness testimony, including the Rule 26(a)(2)(B) report
234 requirement. Events have shown that these changes were far more important.

235 The Reporter offered observations on two topics. First was the relationships among the
236 Enabling Act process, the common-law procedural powers of individual judges, and the local
237 rulemaking authority. The two-way interdependence between national rulemakers and district courts
238 is familiar. Many rules amendments draw on experience as reflected in judge-made practices or in
239 local rules; often these rules are the most securely founded rules. At the same time, drafting the
240 terms of national rules repeatedly encounters the limits of drafting and foresight — it is possible to
241 identify policy and purpose, but not to prescribe detailed answers for specific problems both
242 foreseen and unforeseen. These limits are met by framing rules that rely on district-court discretion
243 to elaborate real procedure through application. Apart from this familiar phenomenon, it also is
244 useful to reflect on a different relationship. An individual district judge, informed primarily by two
245 adversaries and often with scant additional help, may adopt procedures that are beyond reach in the
246 Enabling Act process. This authority stems from the fundamental principle recognized in Marbury
247 v. Madison: having jurisdiction, the judge must decide the case. Decision requires not only
248 identification of substantive principles but also implementing those principles by devising
249 procedures that will bring the case to decision. The Enabling Act process does not face this
250 imperative, and is properly limited in relation to the underlying authority of Congress when
251 procedure intrudes too far into the realm of substance.

252 The second observation reflected on three areas of current dissatisfaction. The most
253 profound disquiet is reflected in occasional protests that the time has come to abandon the 1938
254 framework and start over. There are many reasons to believe that present procedures are not ideal.
255 And it may be a lesson of history that the lifetimes of entire systems of procedure, like the lifetimes
256 of empires, are gradually diminishing. Seventy years is a long time in the life of a procedure system.
257 But these reflections are inevitably called up short by an invitation to describe the founding
258 principles and starting point in designing a new system. There is little point in setting off the next
259 big bang until there is a good chance that the destruction will be creative, not chaotic. That leaves
260 two more discrete dimensions of dissatisfaction, both of them familiar. One arises from procedures
261 for cases that simply cannot support the full sweep of The Federal Rules of Civil Procedure. There
262 may be some analogy to the decision to abandon any amount-in-controversy requirement for federal-
263 question cases. If simple federal-question cases deserve access to federal tribunals, it may be
264 increasingly important to find procedural accommodations that enable meaningful access. The
265 attempt to create a set of simplified rules, put on the shelf years ago, illustrates the concern. At the
266 other end of the spectrum lie the huge litigations that impose enormous costs on the parties and
267 courts, and often enough on nonparties as well. Discovery has been a source of profound disquiet
268 almost continually since the 1970 amendments, and repeated efforts through successive rounds of
269 amendment have not quieted the disquiet. The questioning of notice pleading in last year's
270 Twombly opinion seems in large part a response to discovery problems — if discovery continues
271 to elude reasonable control in too many cases, perhaps it is time to limit access to discovery by
272 raising higher pleading barriers. The time may have come, and almost certainly will soon come,
273 when the Committee must reconsider the central parts of the 1938 revolution. Even if summary
274 judgment practice is left with the focused procedural changes published for comment this summer,
275 the package of relaxed notice pleading and intense discovery must be examined once more.

276 *Class Action Fairness Act: Federal Judicial Center Study*

277 Thomas Willging presented a progress report on the Federal Judicial Center study of the
278 impact of the Class Action Fairness Act on federal courts. The first phase looked to the effect on
279 initial filings and removals. The study is now in the beginning stages of Phase II, which will
280 compare dispositions in a two-year sample of cases filed in the two years before the effective date
281 of CAFA with a two-year sample of cases filed on and after the effective date. The work is well
282 advanced for the cases filed from February 18, 2003 through February 17, 2005. The numbers will
283 change a bit, however, with termination of cases that have not yet terminated. It is too early to do
284 much with the cases filed from February 18, 2005 through February 17, 2007, because not enough
285 of them have terminated. When most of these cases have terminated, the comparisons will show
286 how CAFA has impacted the courts.

287 The findings are detailed in the executive summary. Some of them are surprising in relation
288 to the findings in earlier studies. But the earlier studies used different methods, asked different
289 questions, and considered different variables. Because conclusions can be expressed for these
290 studies only within confidence intervals, it is possible that some apparent differences will fall into
291 the category where no firm conclusion can be drawn because the differences lie within the
292 confidence intervals. Still, the apparent differences can help in framing questions to be asked at the
293 next stage.

294 231 diversity actions are included in the sample analyzed for this report.

295 One surprising finding was that plaintiffs filed motions to certify a class in fewer than one
296 in four actions. A 2005 study showed rulings on motions to certify in 43% of class actions, and it
297 seems likely that motions to certify were made in other cases but not ruled upon. Similarly higher
298 frequencies of motions to certify were found in the FJC 1995 study, but the differences may be
299 accounted for by the fact that the 1995 study surveyed only four districts selected for having high
300 levels of class-action activity. It may be that actions in those courts were more often brought by
301 lawyers with special familiarity with class-action litigation, and a higher propensity to seek prompt
302 certification. In addition, the 2003 amendment of Rule 23(c), relaxing the time at which certification
303 must be sought, may account for part of the change.

304 A second finding was that a "litigation class" — one not limited to settlement only — was
305 certified in five of the 231 cases. All five resulted in settlement. The 1995 study showed that 23%
306 of the actions studied resulted in certification of a litigation class. The 2005 study found litigation
307 classes certified in 11% of the actions; because it covered actions filed in 1999 to 2002, some of the
308 certification practice may have been affected by the 2003 amendments.

309 A third finding was that before a class settlement, plaintiffs typically had to overcome at least
310 one challenge on the merits advanced by a Rule 12(b)(6) motion to dismiss or by a summary-
311 judgment motion. This result was similar to the findings in the 2005 study.

312 The fourth and fifth findings were that the parties proposed class settlements in 21 of the 231
313 actions; judges approved all, although only after modifications in 3 of them. This 9% figure
314 addresses all cases; the percentage is higher in relation to the number of cases that remained in
315 federal court without remanding to state court.

316 A sixth finding was that plaintiffs filed motions to remand in 75% of the removed cases;
317 almost 70% of the remand motions were granted. More than half of the removed cases were
318 remanded.

319 A seventh finding was that voluntary dismissal disposed of 38% of the cases not remanded,
320 the most frequent disposition of those cases.

321 An eighth finding was that motion practice was relatively infrequent; in 56% of the actions
322 there was no motion or only one motion.

323 Finally, it was found that one in five of the cases was terminated by a successful dispositive
324 motion.

325 The pre-CAFA federal-question cases will be analyzed next.

326 One Committee member observed that the study focuses on outcomes in federal court. It
327 would be useful to know whether outcomes are different in state courts. The impetus for adopting
328 CAFA was claims that some state courts misuse class actions in serious ways. An examination of
329 outcomes in at least one of the state courts held up as a bad example would provide a useful basis
330 for advising Congress the next time efforts are made to transfer a class of litigation from state courts
331 to federal courts. But the FJC does not have the capacity to generate state-court information.
332 Professor Gensler is working on a study of Oklahoma state-court practice. California has advanced
333 a long way in a study of its state-court experience. But it would be very difficult to generate
334 meaningful comparative data. One difficulty in attempting to measure the impact of CAFA will be
335 that a plaintiff who would prefer to file in one state if the action could not be removed will now file
336 instead in a federal court in a different state because the choice among federal courts may be
337 different from the choice among state courts.

338 On an anecdotal level, it was noted that the press in California reports that state-court judges
339 have absorbed one feature of CAFA practice by refusing to approve "coupon" settlements. The
340 result is said to be that class-action settlements approved by California state court include cash
341 payments to class members, while parallel class-action settlements in the courts of other states
342 provide class members with only coupons.

343 It was agreed that it is important to attempt an understanding of possible impacts of
344 legislation like CAFA both on court selection and on actual practice. One long-range purpose of
345 FJC study will be to determine whether the influx of diversity class actions teaches lessons that
346 should be reflected in Rule 23.

347 *Agenda Review*

348 The agenda materials summarized many proposals that have lain fallow, often for a number
349 of years. The cycle of periodic review has come around to the point of undertaking to consider
350 whether some items might better be removed because, however meritorious they might be, the time
351 is not ripe for action even in the near-term future. Other items may deserve to be carried forward
352 for future consideration but without planning immediate work. These topics involve issues that may
353 become important, but that seem better deferred. Deferral may reflect no more than a sense that the
354 issue is not urgent, but it also may reflect a sense that it is better to wait while a problem matures
355 to a point where it is resolved on its own or to a point where developing experience provides a better
356 foundation for considering a rule amendment. Similarly, the time has come to consider whether still
357 other of these items might be advanced for present deliberate consideration, including bundled
358 consideration of related suggestions.

359 A draft of the memorandum suggesting the approach to many of these items was circulated
360 to the Committee in September, with a request that Committee members nominate any items they
361 think appropriate for further discussion. All members responded. The responses were incorporated
362 in the revised memorandum included in the agenda.

363 The first group of ten items was suggested for removal from the agenda. Eight of them were
364 set for removal without further discussion, including 03-CV-E, 04-CV-J, 06-CV-B, 06-CV-F, 07-
365 CV-B, 07-CV-C, 07-CV-F, and 08-CV-A. One, 06-CV-H, was discussed briefly. It advances two

366 suggestions. The first involves a question that seems to have been resolved. Several district courts
367 in the District of Columbia had ruled that the United States is not a "person" that can be subjected
368 to a nonparty subpoena under Rule 45, but the Court of Appeals for the District of Columbia Circuit
369 overruled these decisions. There is no apparent present need to amend Rule 45 on this account. The
370 other suggestion is that something should be done about the questions that arise when a government
371 agency relies on agency regulations to resist compliance with a subpoena on confidentiality
372 grounds. These questions do not seem likely subjects of Enabling Act rulemaking. They involve
373 the rulemaking authority of different agencies. Any one agency may act under a number of different
374 statutes. Most of the issues — and perhaps virtually all of them — will involve substantive
375 questions that in part are peculiar to the particular agency and statute and in part involve general
376 administrative law. The Committee concluded that the prospects for action in this area within the
377 foreseeable future are too remote to hold these topics on the agenda.

378 Another item in the first category, 97-CV-V, included two items that have long since been
379 acted on, plus a suggestion that the notice provisions for an in rem action in Supplemental Rule C(4)
380 be considered for amendment. It was agreed that the Maritime Law Association should be consulted
381 to help determine whether the time has come to reconsider this provision. It seems anomalous in
382 relation to the notice requirements for other civil actions, but it may still be justified by concerns
383 peculiar to admiralty practice. The question will remain on the active agenda only if the MLA
384 suggests that it is ripe for consideration now or in the near future.

385 It was noted that several of the suggestions involve the integration of CM/ECF practices with
386 rules provisions adopted before electronic filing was introduced. Several of the topics are worthy
387 of consideration. But it seems better to wait until CM/ECF is fully integrated with the operations
388 of all federal courts, and then approach the questions by a process that should involve all of the rules
389 committees and perhaps other Judicial Conference committees as well.

390 A second group of three items was recommended to be carried forward without advancing
391 for immediate consideration. Two, 04-CV-H and 06-CV-D, relate to the offer-of-judgment
392 provisions of Rule 68. It was agreed that they should be considered as part of the accumulating
393 study of Rule 68. The third, 04-CV-I, suggests that Rule 7.1 disclosure statements should be eligible
394 for electronic filing. This suggestion will be carried forward only because the Committee on Codes
395 of Conduct has suggested that Rule 7.1 might be amended in some ways not yet determined. If Rule
396 7.1 indeed comes on for possible revision, any possible need to address filing methods can be taken
397 up at the same time.

398 The third set of agenda items listed matters that might deserve present consideration, either
399 to advance for further study or to remove. These items were separated into those relating to
400 discovery and others.

401 One nondiscovery item, 05-CV-I, asks whether Rule 5 should be amended to allow service
402 by third-party commercial carrier in some manner similar to Appellate Rule 25(c)(1)(C). This
403 question ties to more general questions surrounding service of papers not covered by Rules 4, 4.1,
404 and 45. Some courts already want to rely on electronic service without requiring consent of the
405 person to be served. There has been substantial interest in limiting or deleting the Rule 6(d)
406 provision that allows an additional three days to act after service by most of the means recognized
407 in Rule 5. The Appellate Rules Committee is interested in the parallel 3-day provision in the
408 Appellate Rules. It was agreed that these matters should be carried forward for consideration as a
409 package.

410 Another nondiscovery item, 06-CV-C, relates to the practice of sealing entire cases. A
411 Standing Committee subcommittee is considering this topic with the help of a comprehensive
412 research project by the Federal Judicial Center. The study will examine all cases sealed in 2006.

413 An initial report concerning the frequencey of sealing entire cases should be ready by the time of
414 the June 2009 meeting of the Standing Committee. Follow-up research on the reasons and process
415 for case sealing will be done after that. Then it will be time to determine whether rules provisions
416 should be adopted, recognizing that it will be desirable to adopt at least similar provisions in
417 different sets of rules.

418 A third nondiscovery item, 07-CV-D, is a suggestion from the Maritime Law Association
419 that the final sentence of Supplemental Rule E(4)(f) has been superseded. This sentence states that
420 "this subdivision" does not apply to suits for seamen's wages when process is issued under two
421 named statutes; the statutes were repealed in 1983. It also states that "this subdivision" does not
422 apply to actions by the United States for forfeitures in violation of any statute of the United States.
423 New Supplemental Rule G establishes comprehensive procedures for civil forfeiture actions,
424 including provisions for hearings requested by persons claiming an interest in property that has been
425 arrested or attached. The Committee agreed that the forfeiture experts at the Department of Justice
426 should be consulted to determine whether there is any remaining use for this provision in light of
427 Rule G. If not, deletion of the sentence can be put on the spring agenda with a recommendation to
428 publish.

429 A final item was a reminder of a matter not in the agenda materials. A proposal to amend
430 Rule 8(c) by striking "discharge in bankruptcy" from the list of affirmative defenses was published
431 in August 2007. The Department of Justice responded with a lengthy statement of reasons why the
432 change should not be made. Bankruptcy judges and the Reporter for the Bankruptcy Rules
433 Committee responded that the reasons advanced by the Department were simply wrong. The
434 Department replied that they were not wrong. Rather than attempt to sort through the confusion in
435 time to make a recommendation to the Standing Committee, this proposal was held back for further
436 consideration in further consultation with the Department and bankruptcy experts. Judge Wedoff
437 conferred at some length with Department representatives, but failed to achieve consensus.
438 Consultations will continue in hopes of reaching agreement, or at least an explanation of the problem
439 in terms that can be understood by those who are not experts in bankruptcy law.

440 The discovery items include 06-CV-G, a suggestion by Judge Wilson that the Committee
441 should restore pre-1993 discovery rules by repealing the 1993 and 2000 amendments that he voted
442 to approve while a member of the Standing Committee. His concerns address problems with
443 discovery that will continue to occupy the Committee, and perhaps the tie to notice pleading as well.
444 This item will be carried forward with the ongoing long-term consideration of discovery.

445 Another discovery item is 07-CV-E, submitted in the form of a law review article reviewing
446 practice under Rule 30(e)(1)(B). The rule allows a deposition witness to review the deposition
447 transcript or recording and "if there are changes in form or substance, to sign a statement listing the
448 changes and the reasons for making them." Some courts are wary of changes that seem simple flat
449 contradictions of the deposition testimony. At least at times the concern is similar to the concerns
450 underlying the "sham affidavit" doctrine that allows a court to disregard a self-contradicting and
451 self-serving affidavit offered by a party to oppose summary judgment by changing earlier deposition
452 testimony. The Committee agreed to remove this item from the agenda. One observation was that
453 when the matter is important, the deposition testimony is often corrected during the deposition itself
454 — perhaps after a break in the proceedings. Another observation was that the need to revise an
455 answer often arises from a poorly framed question. Yet another observation was that if the witness
456 is going to change the story, it is better to learn of the change before trial than at trial.

457 Other discovery-related items arise from Rule 45, although the questions extend to trial
458 subpoenas as well as discovery subpoenas. The decision at the end was that all of these questions
459 should be referred to the Discovery Subcommittee for a recommendation whether any should be
460 taken up with an eye to possible amendments. The process will include a broader solicitation to see

461 whether there are additional Rule 45 changes that should be considered, and whether it is possible
462 to do something to shorten and perhaps further clarify this lengthy rule.

463 One question is raised by 05-CV-H, which addresses the Rule 45(b)(1) provision that serving
464 a subpoena requires "delivering a copy to the named person." A majority of courts interpret delivery
465 to require personal in-hand service; a significant number of decisions depart from this reading. The
466 proposal is that service should be permitted by any of the means recognized for service of the
467 summons and complaint under Rule 4. There may be reasons to stop short of the full reach of Rule
468 4, or perhaps to recognize methods not generally available under Rule 4. Some sense of accepted
469 present practice, and of practice under state rules, should be gathered. And it will be important to
470 remember that Criminal Rule 17(d) requires that the server deliver a copy of the subpoena to the
471 witness. The Criminal Rules Committee should be advised of any serious consideration of these
472 questions.

473 A second question is raised by 05-CV-G. Rule 45(b)(2) defines the territorial reach of a
474 subpoena. Service may be made within the district; outside the district [and also outside the state]
475 but within 100 miles of the place of the deposition, trial, production, or inspection; or within the
476 state at a place authorized by state practice. Rule 45(c)(3)(A)(ii) seems to limit this authority further
477 by requiring the court to quash or modify a subpoena that requires "a person who is neither a party
478 nor a party's officer to travel more than 100 miles," except that the person may be required to travel
479 more than 100 miles from a point within the state to attend a trial. (Rule 45(c)(3)(B)(iii) provides
480 for modification of a subpoena that requires a person who is neither a party nor a party's officer to
481 incur substantial expense to travel more than 100 miles to attend trial.) The rule seems clear. But
482 a number of courts have read a negative implication into Rule 45(c)(3)(A)(ii) — because it does not
483 refer to a subpoena addressed to a party or a party's officer, it implies nationwide subpoena power
484 to command attendance at trial. This interpretation has created great anxiety in corporate parties.
485 The question has become prominent only in the last two or three years. The Vioxx litigation brought
486 it to the front. This question has produced a major split at the district-court level, although there
487 may be a trend back toward the obvious interpretation that the explicit Rule 45(b)(1) limits are not
488 somehow expanded by the further limits expressed in 45(c)(3)(A)(ii). The best outcome, however,
489 may lie somewhere in the middle. The docket memorandum points out that the 100-mile limit dates
490 back to the First Judiciary Act and to circumstances in which most 100-mile journeys would be far
491 more arduous than transcontinental travel is today. The problem, further, may be more complicated
492 than the obvious questions of cost and distance. Trial subpoenas may be used in ways akin to the
493 pre-Rule 30(b)(6) notices to depose top corporate officials, aimed in part to flush out the identity of
494 persons with actual knowledge and perhaps in part as a means of harassment. And there may be
495 some temptation to use a Rule 45(a)(1)(C) subpoena to produce as a way around Rule 34 limits.

496 Another question arises when a nonparty resists a subpoena issued by a court in proceedings
497 ancillary to an action pending in another district. Rule 45(c)(2)(B) says that when a person
498 commanded to produce makes an objection, "the serving party may move the issuing court for an
499 order compelling production or inspection." Rules 45(c)(3)(A) and (B) likewise provide for relief
500 by "the issuing court." (See also Rule 37(a)(2), directing that a motion for an order to a nonparty
501 compelling discovery must be made in the court where the discovery is or will be taken.) Rule
502 26(c), on the other hand, provides that a motion for a protective order may be made by a party or any
503 person in the court where the action is pending, or as an alternative in the court where a deposition
504 will be taken. Most — but not all — courts read these provisions together to mean that if a
505 nonparty objects or moves to quash a subpoena in an ancillary discovery court, the discovery court
506 must decide the motion. If the request is framed as one for a protective order, on the other hand, the
507 discovery court may be able to defer to the court where the main action is pending. Circumstances
508 arise in which it is important to defer to the main-action court no matter what the means chosen to
509 raise the objection. The main-action court should have primary control over discovery management,

510 and may be in a much better position to assess the need for the discovery and the strength of the
511 objections. A denial of discovery in the discovery court may effectively terminate the action. It
512 would be useful to address this question in the rules.

513 Yet another question mingled into these questions arises from the relationship between an
514 objection and a motion to quash. Rule 45(c)(2)(B) sets a 14-day limit for objecting to a subpoena
515 to produce documents or tangible things or to permit inspection. There is some confusion whether
516 a motion to quash can be used after expiration of the 14-day period to raise matters that could have
517 been raised by objection.

518 Discussion included the observation that Rule 45 confuses practicing lawyers. It is used for
519 things that should be done otherwise, as with the example of attempting to substitute for Rule 34
520 discovery in order to evade the 30-day response period built into Rule 34. "We should not have
521 rules that lawyers need to work their way around." Rule 45 may be used to evade a discovery cut-
522 off by attempting to use a purported trial subpoena as a discovery device.

523 *Sunshine in Litigation Act*

524 Judge Kravitz summarized his testimony last summer on the bill that would become the
525 Sunshine in Litigation Act. Similar bills have been regularly introduced for many years. They seem
526 to be moving gradually toward a point where one may be adopted. The Judicial Conference has
527 steadily opposed adoption, relying on extensive study and lengthy deliberations by the Civil Rules
528 Committee several years ago. Research by the Federal Judicial Center played an important role in
529 this work. There is no empirical evidence to support the fear that protective orders have any
530 significant effect on the public health and safety.

531 One aspect of the Act would limit the use of sealed settlement orders. Such orders occur in
532 only a tiny fraction of federal cases. Although there is little apparent reason to fear that such orders
533 as courts do enter will conceal information useful to protect the public health or safety, it is not clear
534 how important it is to enable the parties both to ask that their settlement be entered as a court order
535 and that the settlement be sealed.

536 The other major aspect of the Act addressed protective discovery orders. This part of the Act
537 will create massive problems if enacted. It will impose an impossible task on the district judge at
538 the beginning of an action. At a time when it is difficult to form much idea of what the action will
539 involve, and impossible to determine what sorts of information may be available for discovery, the
540 judge must decide whether a protective order would defeat access to information that would protect
541 the public health or safety, whether any need for privacy outweighs the usefulness of the
542 information, and whether a requested protective order is no broader than necessary to protect the
543 privacy interest. Confronted with a demand for findings that cannot be supported, the result
544 commonly would be denial of a protective order. Denial of a protective order would in turn
545 exacerbate problems with discovery. Information that now is turned over in reliance on a protective
546 order would be carefully screened at great cost in time and money, refusals to produce information
547 would proliferate, and courts would be called upon to resolve ever more discovery disputes.

548 It is clear that this legislation will be introduced in the next Congress. The challenge will
549 be to find ways to educate Congress in the careful attention that this topic has won in the Enabling
550 Act process and in the reasons that make enactment a very bad idea.

551 *Discovery Privilege Logs*

552 At the April meeting Professor Gensler observed that the cases show confusion about several
553 aspects of privilege log practice, and suggested that the Committee might want to explore the
554 possible opportunities to address one or more troubling issues. The practicing lawyers agreed that

555 problems do arise, but were uncertain whether there is much opportunity to provide solutions by rule
556 provisions. Professor Gensler volunteered to explore the matter and report to the Committee. Judge
557 Kravitz thanked him for providing a terrific memorandum to launch the topic.

558 Professor Gensler began by noting that "anxiety and frustration are out there," anxiety arising
559 from uncertainty about the mechanics of complying with Rule 26(b)(5)(A) requirements and
560 frustration at the expense. Most of the expense seems to arise from screening documents for
561 privilege, work product, and other grounds for protection. It is not clear that rules changes can
562 address this problem, although new Evidence Rule 502 may reduce fears about inadvertent privilege
563 waiver.

564 The questions of mechanics begin with the need to say what is being withheld from
565 discovery and why. At first blush, these questions of how to comply appear to begin with the
566 seeming gap in the failure of Rule 26(b)(5)(A) even to refer to a privilege log. But it seems clear
567 that the manner of asserting privilege will depend on the mode of discovery. Assertions of privilege
568 at deposition will be made on the spot. With Rule 34 requests, responses will vary with the
569 circumstances. Withholding a single document is quite different from withholding many documents;
570 producing part of a document in redacted form is different from withholding the entire document.
571 There does not seem to be much room to improve on the directions now provided by the rule.

572 The question of timing is less certain. It seems clear that the claim of privilege must be made
573 when responding to the discovery request. It is not as clear when the elements required by Rule
574 26(b)(5)(A) must be provided. This uncertainty seems to arise most persistently with document
575 production. The possible choices include insistence that the required information be provided at the
576 time of responding to the document request; or that it be provided at the time of producing; or that
577 it be provided within a reasonable time from the response or from the production.

578 The consequences of failing to comply properly or timely in making the assertion or
579 providing the log also are uncertain. The 1993 Committee Note refers to Rule 37(b)(2) sanctions,
580 and adds that withholding materials without the required notice "may be viewed as a waiver of the
581 privilege or protection." In practice, courts seem to take a flexible approach. The case law tends
582 to say that waiver is possible, but courts consider many factors. The usual result is a stern direction
583 to comply, but waiver may be found. Here too it is unclear whether any rule revisions would
584 provide for anything different than courts are doing now.

585 That leaves the possibility of amending the rule to provide clear directions as to timing. The
586 most likely approach would be to establish a clear provision subject to alteration by agreement of
587 the parties or court order. Similar provisions could be added to Rule 45, subject to the complication
588 that Rule 45 remains obscure on the opportunity to present a belated — untimely — objection in the
589 guise of a motion to quash.

590 Discussion began with the observation that the District of Connecticut has a local rule
591 addressing the timing requirements. There do not seem to be any problems.

592 A practitioner noted that in the last couple of years clients have started to "push back hard"
593 on the costs of screening documents. Some clients take the chore inside. It may be divided up
594 among contract attorneys rather than firm associates, or farmed out to independent screening firms.
595 Vendors have become insistent that electronic screening software can do the job at much lower cost
596 — the software may have developed to a point about equal to screening by a first-year associate.
597 The cost of screening is being reduced. As for privilege logs themselves, the rule itself seems OK.
598 The parties often reach informal agreements. "You want it before the depositions. Usually it is the
599 last thing produced before depositions." One reason for delay is that documents that on their face
600 seem privileged may be unprotected because they have been circulated outside the privilege circle.

601 It may be that nonparties deserve greater consideration and protection than parties, but it would be
602 better to put off consideration for a year.

603 Another practitioner also noted that there are software programs for identifying privileged
604 documents. At least one in-house lawyer for a client believes that software can screen at least as
605 well as people. Screening takes as much time for a lawyer as it does for a judge, and the task is
606 expanded across far more documents than will be logged or disputed after being logged. In most
607 big document cases it is possible to work out serial production of documents and serial production
608 of privilege logs. The great fear driving the huge amounts of time is subject-matter waiver. As
609 massive volumes of documents come to be involved, correspondingly enormous amounts of time
610 have been required. And it could be even worse — Georgia state-court rules, for example, require
611 an affidavit to support every claim of privilege. All of this can engender boilerplate objections to
612 the log, then review by a special master or magistrate judge, further review by a district judge, and
613 then collateral-order appeals. But there is not a big body of law on abuse of privilege claims.

614 It was suggested that one reason to keep this topic on the agenda is to see what consequences
615 flow from new Evidence Rule 502. Lawyers are beginning to craft Rule 502 agreements to protect
616 discovery responses.

617 It was recalled that in the 1980s there was a move to expedite the process by agreeing to a
618 "quick peek" at less sensitive documents without waiver. The next step would be a no-waiver quick
619 peek at sensitive documents, but on an "eyes only" basis. "That got slapped down." Perhaps that
620 can be revived.

621 Review by outside vendors was noted again. They can do a first review of documents
622 identified by a software program. "They will give you a price per page." But there are reasons to
623 be reluctant. "I cannot imagine relying on a vendor for the final review." A judge noted that he had
624 recently had a hearing in a case in which the software screening failed miserably — it failed to
625 identify a thousand privileged documents.

626 Another judge noted that party agreements work in big, sophisticated cases. But it would
627 be useful to have rule guidance for smaller scale, less sophisticated litigation.

628 Still another judge observed that the problems that arise are not those of timing but of failure
629 to produce a log at all. Yet another judge said that he does not encounter log problems.

630 An observer suggested that an effort to come up with a rule will only intensify costs. There
631 is no real problem. "People work it out." The log is the last thing produced. And in some cases the
632 parties may tacitly agree not to produce them at all, or to generate them only for particular categories
633 of documents. Consider a case that claims an ongoing conspiracy: is counsel obliged to create a log
634 for every letter written to the client while the litigation carries on?

635 A lawyer member suggested that the only default time that would not be unreasonably early
636 would be "within a reasonable time."

637 Occasional references to Rule 33 interrogatory answers were picked up at the close of the
638 discussion. Those who spoke agreed that privilege logs are not used for interrogatory answers —
639 the answers simply provide nonprivileged information.

640 The discussion concluded by agreeing that the Rule 45 privilege log questions would be
641 among those considered by the Rule 45 working group, and that the remaining questions would be
642 carried forward on the agenda.

643 *Rule 68*

644 Judge Kravitz introduced the Rule 68 discussion by noting a recent article by Professor
645 Robert Bone. The article provides a great discussion of the history. Rule 68 was designed not so
646 much to encourage settlement as to deal with recalcitrant plaintiffs. The conclusion is that if
647 promoting settlement has become an important goal, the present rule should be scrapped in favor
648 of starting over.

649 Four options are presented in the agenda materials: Do nothing; abrogate the rule; undertake
650 relatively modest revisions; or undertake a thorough revision.

651 Connecticut state courts have a rule that allows offers by plaintiffs as well as defendants, and
652 that imposes big penalties for guessing wrong in the form of prejudgment interest at high rates. The
653 interest award can easily double a jury verdict. The rule "has turned into a game." A plaintiff with
654 a $1,000,000 claim will make an offer of $750,000 before the defendant's attorney even knows what
655 the action is about. The inevitable ignorance-induced rejection then opens the way for further
656 bargaining in the shadow of rule-based sanctions. One challenge will be whether it is possible to
657 develop a rule that is much used without becoming the occasion of gamesmanship.

658 The history of Committee efforts to address Rule 68 in the 1980s and 1990s was reviewed.
659 The proposal to adopt strong sanctions in the 1980s led to the proverbial firestorm of protest. One
660 concerned and thoughtful observer of the Enabling Act process, John P. Frank, feared that continued
661 pursuit of the subject might lead Congress to alter or abandon the Enabling Act process. The effort
662 in the 1990s made a serious attempt to address many of the complexities that could be foreseen. The
663 work was supported by Federal Judicial Center research. In the end the draft became so complex
664 as to be abandoned. The discussions led several members to the view that abrogation might be the
665 best solution, but the question was never put to a vote.

666 It is common ground in Rule 68 discussions that offers are seldom made. Even in fee-
667 shifting cases empirical studies have repeatedly shown that offers are made in only a relatively small
668 minority of cases. Recent empirical work by Professors Eaton and Lewis shows that attorneys with
669 long experience in civil rights and employment-discrimination litigation, where offers can cut off
670 statutory fee rights, agree that ADR mechanisms are more effective than Rule 68 in promoting early
671 settlement. It also is common ground that no possible version of Rule 68 could do much to increase
672 the number of cases that actually settle; the most that might be hoped is that cases that settle will
673 settle earlier and at lower cost.

674 The list of topics that might be addressed by a modest revision has a way of expanding. One
675 obvious candidate is the ruling that a plaintiff who fails to better a rejected Rule 68 offer loses the
676 right to statutory attorney fees incurred after the offer if — but only if — the fee statute refers to fees
677 as "costs." Turning the consequence on the happenstance of statutory language seems a puzzling
678 use of "plain meaning" interpretation — no plausible reason can be advanced for believing that the
679 wording choice of fee statutes is made with an eye to invoking, or rejecting, Rule 68 consequences.
680 More fundamentally, it is difficult to agree that Rule 68 should become a vehicle for cutting off fee
681 rights established for prevailing plaintiffs enforcing specially favored rights. This effect seems to
682 abridge or modify important substantive statute-based rights. The fear of losing statutory fees,
683 moreover, may create at least a tension between the interests of counsel and the party's interests.

684 Another seemingly modest change would be to provide an opportunity for plaintiffs to make
685 offers. The difficulty is that sanctions would be available only when the defendant loses more than
686 the offer. The plaintiff would be entitled to statutory costs in any event, so a Rule 68 sanction would
687 have to be something additional. The most common suggestion is to award attorney fees, a
688 manifestly sensitive prospect. Multiple costs might be provided instead. California provides expert
689 witness fees. Finding the right sanction might not be easy, but at least it would make the rule seem

690 more fair if all parties can make offers. Of course expanding the opportunities to offer would also
691 expand the opportunities for strategic game playing.

692 Other relatively modest changes could begin by changing the procedure to one offering
693 settlement, not judgment. The lawyers surveyed by Eaton and Lewis often said that they do not
694 make offers of judgment because their clients do not want the career-blighting effects of an adverse
695 judgment. The time to consider the offer could be extended from the 14 days available under the
696 day-counting approach of the present rule or the explicit provision of the Time Project revision.
697 Extending the time to consider would be an obvious occasion to answer a question that has divided
698 the courts by allowing retraction of an offer before acceptance. Class actions might be removed
699 from Rule 68's reach.

700 The Second Circuit has asked for consideration of the complications that arise when offer
701 or judgment include specific relief as well as money. The draft that was put aside in 1994 offered
702 a relatively simple solution to what could be an enormously complicated comparison — judgment
703 and offer are compared by recognizing a judgment for a plaintiff as more favorable than the offer
704 only if it includes all of the nonmonetary relief offered, or substantially all of the offered relief and
705 additional relief as well.

706 More thorough revision would address such questions as offers made to multiple parties; the
707 opportunity to make successive offers — which could greatly complicate not only the rule, but also
708 the consequent strategic use of the rule; and adoption of a margin of error, hoping to reduce the
709 problems of uncertainty by invoking sanctions only if the offer beats the judgment by a factor of
710 20% or 25%.

711 Dissatisfaction with Rule 68 at its core arises in part from the unpredictability of litigation.
712 Imposing sanctions — and particularly imposing sanctions severe enough to create meaningful
713 incentives — may seem unfair when a party simply guesses wrong within an often wide range of
714 plausible outcomes. More fundamental concerns focus on risk aversion and endowment. A poorly
715 endowed plaintiff, in great need of some remedy and unable to bear the risk of relief, may be
716 pressured to accept an offer well below the reasonable range.

717 Discussion began with the suggestion that one approach would be to amend Rule 68 to
718 provide only § 1920 cost consequences. Overruling statutory fee-shifting consequences would be
719 the next closest thing to abrogation, leaving the rule to wallow in obscurity.

720 It was noted that Indiana has a bilateral rule that "is not much used." Proposals to add
721 greater sanctions have proved controversial. Calling it settlement rather than judgment might make
722 a difference, but the more likely guess is that if the dollars are right the existence or nonexistence
723 of an offer-of-judgment (settlement) provision will not much affect the parties' ability to settle.

724 Another member noted that Florida has a procedure that can be used effectively.

725 An observer noted that six years ago New Jersey adopted attorney fee sanctions, with a 20%
726 safety margin of difference. Use of the rule "has become complex." The rule was amended to
727 exclude nonmoney judgments and statutory fee shifting. The rule can be useful in addressing the
728 obstinate party who clings to a meritless position.

729 A member noted that Rule 68 offers are made on rare occasions in class actions, usually in
730 a seeming attempt to moot the individual claim of the class representative. The offer is inherently
731 coercive. And it creates a conflict between attorney and client. If it is carried forward, class actions
732 should be explicitly excluded from its reach.

733 Another member suggested that it will be very difficult and controversial to make Rule 68
734 effective. Even small changes will open up controversy.

735 A judge noted that lawyers very seldom use Rule 68.

736 Another judge thought it may be worthwhile to explore the option of changing from an offer
737 of judgment to an offer of settlement. An attorney replied that it was difficult to imagine that Rule
738 68 would make a difference; "if you're talking, you're talking."

739 A motion to do nothing now carried unanimously. Rule 68 will be carried forward on the
740 agenda, perhaps for more detailed consideration in the fall of 2009.

741 *Notice Pleading: Twombly's Aftermath*

742 Judge Kravitz noted that notice pleading and the Twombly decision remain on the
743 Committee docket. The Supreme Court is aware that the Twombly decision has created uncertainty
744 in the lower courts. It has granted review of the Second Circuit decision in the Iqbal case and it
745 seems better to defer Committee consideration until the Iqbal case is decided. The Court might rule
746 that Twombly is limited to antitrust cases; it might adopt the "contextual plausibility" test applied
747 by the Second Circuit; it might do something different in elaborating the Twombly opinion; or it
748 might go off on appeal jurisdiction grounds and let pleading matters lie where Twombly leaves
749 them. A "mailbox" suggestion for pleading rule revisions provided by Ken Lazarus will be carried
750 with the agenda.

751

752 *Discovery of Electronically Stored Information*

753 Professor Marcus reported on current events in the practice of discovering electronically
754 stored information.

755 There are no signs that anything done in the discovery rules adopted to address electronically
756 stored information has added to the problems that continue to be reported.

757 But there continues to be "a lot of anguish" about e-discovery. The survey by the American
758 College of Trial Lawyers reports some strange responses. Forty percent of the respondents said they
759 have had no experience with e-discovery. Others said it is a headache. Some of them say that the
760 e-discovery rules are a disaster, but these responses seem to address the phenomenon of e-discovery,
761 not anything inherent in the rules.

762 Rule 26(f)(3)(C) seems to have had the greatest impact because it forces people to think
763 about all they have to do to be prepared for e-discovery.

764 One reason to think the time has not come to revise the rules is that the e-discovery rules
765 proposed by the Uniform Law Commission and the practices endorsed by the Conference of Chief
766 Justices largely track the federal rules.

767 E-discovery came to attention as a concern of corporate defendants. It has become a problem
768 for ordinary litigation. Issues of retaining and unearthing electronically stored information are likely
769 to become more pervasive. An example may be things such as e-mail messages from an accident
770 victim sent to friends a day after the accident. "Don't worry, I'm fine" reassurances in such
771 messages will be much desired.

772 Judge Kravitz observed that it may be useful to build on the work being done by the
773 American College of Trial Lawyers and the Institute for the Advancement of the American Legal
774 System to put together a 2-day conference. Empirical data on the cost of discovery would be
775 important. A major focus would be to find out whether discovery really is out of control. Is there
776 anything that can be done to reduce the costs, whether or not the problems might be characterized
777 so dramatically? Do pleading reforms offer a meaningful alternative by limiting access to

778 discovery? Is it possible to develop a simplified procedure for cases that are harmed, not helped,
779 by full-blown discovery? We are told there is a flight from federal courts to state courts — is that
780 true? Why might it be true?

781 Judge Rosenthal noted that the Standing Committee will have a panel discussion of these
782 issues at its January meeting. The idea of a conference is promising. The conference on discovery
783 at Boston College was a great success, as was the conference on e-discovery at Fordham.

784 Judge Kravitz asked whether the Federal Judicial Center might be able to help in building
785 foundations for the conference. Thomas Willging replied that the American College survey tends
786 to draw from elite lawyers. Empirical inquiry by the Center would give quite a different picture of
787 what goes on day by day by covering the full variety of cases and practice. The work would have
788 to begin almost immediately if it is to be ready in time for a conference in the spring of 2010.

789 The Committee endorsed the idea of holding a conference, most likely at an academic
790 institution, in spring 2010.

791 *Report on Use of Subcommittees*

792 The Judicial Conference Executive Committee has asked that all Judicial Conference
793 committees review its draft Best Practices Guide to Using Subcommittees and report on each
794 existing subcommittee. The agenda materials include a draft Report from Judge Kravitz to the
795 Executive Committee. Discussion did not elicit any suggestions to change the report. Noting that
796 some time remained before the report must be submitted, Judge Kravitz urged that Committee
797 members review the draft again and offer comments and suggestions. It is important that the report
798 fully describe the many ways in which subcommittees have advanced Committee work without in
799 any way deflecting de novo consideration and independent action by the full Committee.

800 *Appellate Rules Committee Report*

801 Judge Kravitz noted that several projects of the Appellate Rules Committee are again
802 intersecting with matters of interest to the Civil Rules. Professor Struve, Reporter for Appellate
803 Rules, has provided a very helpful summary of matters discussed during the November 13 part of
804 their most recent meeting.

805 <u>Manufactured Finality</u>: One topic on which the Appellate Rules Committee has sought input from
806 the Civil Rules Committee is "manufactured finality." This topic arises from strategies used to
807 achieve a final judgment for appeal purposes when, if it were not for the desire to appeal, ordinary
808 practice would not establish a final judgment. These strategies arise from dissatisfaction, shared by
809 lawyers and trial judges, with some applications of the final-judgment rule. One problem is that
810 attempts to enter a partial final judgment under Civil Rule 54(b) are not always successful — it may
811 be found that the part chosen for judgment is not a "claim" separate from matters that remain in the
812 trial court, or (less often) that entering judgment was an abuse of discretion. The circuits disagree
813 as to some of the methods that might be used to manufacture finality. One tactic is to rely on a
814 conditional dismissal with prejudice of claims that have not been decided. The condition is that the
815 dismissed claims can be revived if the judgment is reversed. The Second Circuit recognizes this
816 tactic. Some other circuits do not. The Appellate Rules Committee believes that one approach to
817 these questions might be revision of Rule 54(b); it may be that Civil Rule 41 also could be used.
818 These questions must be considered further, beginning with the helpful materials developed for the
819 Appellate Rules Committee.

820 <u>Attorney Fees as Costs for Appeal Bonds</u>: The Appellate Rules Committee undertook a study of
821 Appellate Rule 7, which authorizes the district court to require an appellant to post a bond to ensure
822 payment of costs on appeal. The broad question was whether "costs" can properly include attorney

823 fees under fee-shifting statutes. The question came to focus on possible use of appeal bonds
824 addressed to attorney fees as a means of regulating appeals by objectors to class-action settlements.
825 The Committee concluded that the questions surrounding objector appeals are very complex, and
826 that an attempt to address the questions by rule might have unintended consequences. They voted
827 to remove this item from the study agenda.

828 Discussion of appeals by objectors to class-action settlements began by noting that any class
829 member who objects can stall implementation of a settlement by appealing. This can produce real
830 difficulties when class members have been actively engaged in the litigation and are waiting for
831 distribution of their settlement shares. "The current system doesn't work." Appeals can be taken
832 for strategic reasons. But there are legitimate objections, and legitimate objectors. Attempting
833 regulation through appeal cost bonds does not seem desirable. One approach would be to require
834 intervention to establish a right to appeal. The Supreme Court resolved disagreement among the
835 Circuits by ruling in Devlin v. Scardelletti that a class member who objects to a class settlement may
836 appeal. The Court deliberately began by setting aside standing theory and framing the question as
837 whether a nonnamed class member can be considered a party for purposes of the general rule that
838 only a party can appeal a judgment. The results may be undesirable.

839 It was observed that Rule 23 drafts addressing objector appeal rights were suspended while
840 the Devlin case was pending on appeal, and discarded after it was decided. Rule 23 drafts also
841 addressed the role of objectors in broader terms, struggling with the tension between "good" and
842 "bad" objectors. The only result was the provision in Rule 23(e)(5) that an objection may be
843 withdrawn only with the court's approval.

844 Discussion returned to the theme that there can be "shake-down appeals," but also good
845 appeals. The appeal bond "is a very blunt instrument." Requiring intervention would open the door
846 to discovery that would "help show what kind of objector this is." The district court is in a good
847 position to determine whether there is a solid reason to pursue unsuccessful objections through
848 appeal. Often the objector should be sent away with thanks for showing how sound the settlement
849 actually is.

850 It was asked whether the Devlin decision, for all the disclaimers about "standing," involves
851 matters that can be governed by court rule. One response was that before the Devlin decision, the
852 Seventh Circuit had thought that intervention should be required. The question can easily be seen
853 in Rule 23 terms. The ambiguity whether unnamed class members should be seen as "parties"
854 extends beyond appeal rights to such matters as discovery and counterclaims. Intervention should
855 not be required to lodge objections in the district court, but it might well become a requirement to
856 support a right to appeal. This requirement might seem particularly attractive in Rule 23(b)(3) class
857 actions and objections by a class member who could have opted out of the class. Of course there
858 is a prospect that a denial of intervention would itself be appealed, but the appeal might be resolved
859 readily at the threshold by affirming the denial.

860 It was agreed that Andrea Kuperman would undertake research on the feasibility of requiring
861 intervention to support appeal by an objecting but unnamed class member.

862 <u>"Mandatory and Jurisdictional" Appeal Time Limits</u>: "[T]here is a nascent circuit split" concerning
863 the consequences of the Supreme Court's explicit reaffirmation of the rule that appeal time periods
864 set by statute are "mandatory and jurisdictional." At least up to now, it continues to be accepted that
865 court rules can affect these statutory periods by suspending appeal time to allow orderly disposition
866 of post-judgment motions. Thus a timely motion for a new trial suspends appeal time. Appellate
867 Rule 4(a)(4) lists six post-judgment motions that suspend appeal time if timely filed, and provides
868 that "the time to file an appeal runs for all parties from the entry of the order disposing of the last
869 such remaining motion." The potential question is whether the requirement that these post-judgment

870 motions be timely filed is itself mandatory and jurisdictional, or whether a court might — on finding
871 sufficient justification — recognize a tolling effect for a motion not timely filed. The Appellate
872 Rules Committee is considering a project to draft a statute that would address the effect of statutory
873 appeal deadlines. The effect of post-judgment motions might be considered in this project.

874 Rule 58's Separate Document Requirement: The Appellate Rules Committee considered two
875 questions arising from Rule 58's separate document requirement. This requirement has been a
876 perennial fixture in the parallel work of the Civil and Appellate Rules Committees.

877 One question is a variation on the "time bomb" problem that prompted the 2002 amendment
878 of Rule 58. Failure to enter judgment on a separate document meant that appeal time never started
879 to run; in theory a timely appeal could be filed years after final decision. The rule was amended to
880 provide that if a required separate document is not filed, judgment "is entered" when it is entered
881 on the civil docket and after "150 days have run from the entry in the civil docket." Appeals often
882 are filed before entry of a separate document. Because the entry of judgment sets the time for post-
883 judgment motions as well as for appeal, it remains possible to file a timely post-judgment motion
884 for a considerable period after an appeal has been taken. The belated motion may disrupt orderly
885 processing of the appeal. The Appellate Rules Committee concluded that it is not now necessary
886 to amend Rule 58. Instead, it will recommend that appropriate steps be taken to raise awareness of
887 the importance of honoring the separate document requirement.

888 A separate question arises from the 2002 amendment and the Committee Note. As amended,
889 Rule 58(a) directs that every judgment and amended judgment must be set out in a separate
890 document, "but a separate document is not required for an order disposing of a motion" in a list of
891 five post-judgment motions. The problem is that the order disposing of the motion, which does not
892 have to be entered in a separate document, often also leads to an amended judgment, which does
893 have to be entered in a separate document. The question is whether appeal time should start to run
894 from entry of the order disposing of the motion — which at least ordinarily will include all of the
895 terms of the amended judgment, but also may include additional material that defeats
896 characterization as a "separate document" — or only from entry of the amended judgment in a
897 separate document. The Seventh Circuit has addressed this question, concluding that a separate
898 document is required. Its approach is explored and explained in Kunz v. DeFelice, 538 F.3d 667
899 (7th Cir.2008). The Appellate Rules Committee asks for guidance on the desirability of further rules
900 amendments.

901 *Next Meetings*

902 The Committee was reminded that a hearing on the pending Rule 26 and 56 proposals will
903 be held in San Antonio on January 14, 2009, following the Standing Committee meeting. The next
904 hearing will be held in San Francisco on February 2; time should be held open to enable the
905 Committee to meet on February 3 to discuss the information provided by the November 17 hearing
906 and the two remaining scheduled hearings.

907 Dates for the spring meeting were tentatively discussed. At the moment, the week beginning
908 April 20 seems the most likely convenient time. (Shortly after the meeting the date was set for April
909 20-21, 2009, in Chicago.)

910 *Adjournment*

911 The Committee adjourned without further work.

912 Respectfully submitted,

913 Edward H. Cooper
914 Reporter