COMMITTEE ON RULES
OF
PRACTICE AND PROCEDURE

Washington, DC
June 14-15, 2010

Volume I

AGENDA
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
JUNE 14-15, 2010

1. Opening Remarks of the Chair

   A. Report on the March 2010 Judicial Conference session
   B. Transmission of Supreme Court-approved proposed rules amendments to Congress

2. **ACTION** – Approving Minutes of January 2010 committee meeting

3. Report of the Administrative Office

   A. Legislative Report
   B. Administrative Report

4. Report of the Federal Judicial Center

5. Report of the Civil Rules Committee

   A. Report on 2010 Conference at Duke Law School
   B. Minutes and other informational items

6. Report of the Criminal Rules Committee

   A. **ACTION** – Approving publishing for public comment proposed amendments to Criminal Rules 5 and 58 and new Rule 37
   B. **ACTION** – Approving and transmitting to the Judicial Conference proposed amendments to Criminal Rules 1, 3, 4, 6, 9, 32, 40, 41, 43, and 49 and new Rule 4.1
   C. Minutes and other informational items

7. Report of the Evidence Rules Committee

   A. **ACTION** – Approving and transmitting to the Judicial Conference proposed "style" amendments to Evidence Rules 101-1103
   B. Minutes
   C. Summary of Public Comments
   D. Professor Kimble's articles on Style Project

8. Oral report on work of Subcommittee on Privacy

9. **ACTION** – Approving and transmitting report and recommendations of Subcommittee on Sealed Cases to Committee on Court Administration and Case Management for their consideration

10. Report of the Bankruptcy Rules Committee

    A. **ACTION** – Approving and transmitting to the Judicial Conference proposed amendments to Bankruptcy Rules 2003, 2019, 3001, 4004, 6003, new Rules 1004.2 and 3002.1, and amendments to Official Forms 20A, 20B, 22A, 22B, and 22C
    B. **ACTION** – Approving publishing for public comment proposed amendments to Bankruptcy Rules 3001, 7054, and 7056, revisions to Official Forms 10 and 25A, and new Official Forms 10 (Attachment A), 10 (Supplement 1), and 10 (Supplement 2)
    C. Minutes and other informational items

11. Report of the Appellate Rules Committee

    A. **ACTION** – Approving and transmitting to the Judicial Conference proposed amendments to Appellate Rules 4 and 40
    B. **ACTION** – Recommending that Judicial Conference seek legislation amending 28 U.S.C. § 2107 consistent with proposed change to Rule 4
    C. Minutes and other informational items

12. Long-Range Planning Report

13. Next Meeting: January 6-7, 2011 (tentative dates)

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

CHAIRS and REPORTERS

Effective October 1, 2009

Chairs:	**Reporters:**
Honorable Lee H. Rosenthal United States District Judge United States District Court 11535 Bob Casey U.S. Courthouse 515 Rusk Avenue Houston, TX 77002-2600	Professor Daniel R. Coquillette Boston College Law School 885 Centre Street Newton Centre, MA 02459
Honorable Jeffrey S. Sutton United States Circuit Judge United States Court of Appeals 260 Joseph P. Kinneary 85 Marconi Boulevard Columbus, OH 43215	Professor Catherine T. Struve University of Pennsylvania Law School 3400 Chestnut Street Philadelphia, PA 19104
Honorable Laura Taylor Swain United States District Judge United States District Court Daniel Patrick Moynihan U. S. Courthouse 500 Pearl Street - Suite 755 New York, NY 10007	Professor S. Elizabeth Gibson Burton Craige Professor of Law 5073 Van Hecke-Wettach Hall Univ. of North Carolina at Chapel Hill C.B. #3380 Chapel Hill, NC 27599-3380
Honorable Mark R. Kravitz United States District Judge United States District Court Richard C. Lee United States Courthouse 141 Church Street New Haven, CT 06510	Professor Edward H. Cooper University of Michigan Law School 312 Hutchins Hall Ann Arbor, MI 48109-1215
Honorable Richard C. Tallman United States Court of Appeals 902 William Kenzo Nakamura United States Courthouse 1010 Fifth Avenue Seattle, WA 98104-1195	Professor Sara Sun Beale Duke University School of Law Science Drive & Towerview Road Box 90360 Durham, NC 27708-0360
Honorable Robert L. Hinkle Chief Judge, United States District Court United States Courthouse 111 North Adams Street Tallahassee, FL 32301-7717	Professor Daniel J. Capra Fordham University School of Law 140 West 62nd Street New York, NY 10023

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

Standing Committee

Chair: Honorable Lee H. Rosenthal United States District Judge United States District Court 11535 Bob Casey U.S. Courthouse 515 Rusk Avenue Houston, TX 77002-2600	Reporter: Professor Daniel R. Coquillette Boston College Law School 885 Centre Street Newton Centre, MA 02459
Members: Dean C. Colson, Esquire Colson Hicks Eidson 255 Aragon Avenue Second Floor Coral Gables, FL 33134	 Douglas R. Cox, Esquire Gibson, Dunn & Crutcher LLP 1050 Connecticut Avenue, N.W. Washington, DC 20036-5306
Honorable Gary Grindler Deputy Attorney General (ex officio) U.S. Department of Justice 950 Pennsylvania Ave., N.W., Room 4111 Washington, DC 20530	Honorable Harris L Hartz United States Circuit Judge United States Court of Appeals 201 Third Street, N.W., Suite 1870 Albuquerque, NM 87102
Honorable Marilyn L. Huff United States District Court Edward J. Schwartz U. S. Courthouse 940 Front Street - Suite 5135 San Diego, CA 92101	Honorable Wallace Jefferson Supreme Court of Texas Supreme Court Building 201 W. 14th Street, Room 104 Austin, Texas 78701
John G. Kester, Esquire Williams & Connolly LLP 725 Twelfth Street, N.W. Washington, DC 20005-5901	David F. Levi Duke Law School Science Drive and Towerview Road Room 2012 Durham, NC 27708
William J. Maledon, Esquire Osborn Maledon, P.A. 2929 North Central Avenue, Suite 2100 Phoenix, AZ 85012-2794	Honorable Reena Raggi United States Court of Appeals 704S United States Courthouse 225 Cadman Plaza East Brooklyn, NY 11201-1818

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

Standing Committee (CONT'D.)

Honorable James A. Teilborg United States District Judge United States District Court 523 Sandra Day O'Connor United States Courthouse 401 West Washington Street Phoenix, AZ 85003-2146	Honorable Diane P. Wood United States Court of Appeals 2688 Everett McKinley Dirksen United States Courthouse 219 South Dearborn Street Chicago, IL 60604
Advisors and Consultants: Professor Geoffrey C. Hazard, Jr. Hastings College of the Law 200 McAllister Street San Francisco, CA 94102	 Professor R. Joseph Kimble Thomas M. Cooley Law School 300 South Capitol Avenue Lansing, MI 48933
  Joseph F. Spaniol, Jr., Esquire 5602 Ontario Circle Bethesda, MD 20816-2461	**Secretary:** Peter G. McCabe Secretary, Committee on Rules of Practice and Procedure Washington, DC 20544

LIAISON MEMBERS

Appellate:	
Judge Harris L Hartz	(Standing Committee)
Bankruptcy:	
Judge James A. Teilborg	(Standing Committee)
Civil:	
Judge Eugene R. Wedoff	(Bankruptcy Rules Committee)
Judge Diane P. Wood	(Standing Committee)
Criminal:	
Judge Reena Raggi	(Standing Committee)
Evidence:	
Judge Judith H. Wizmur	(Bankruptcy Rules Committee)
Judge Michael M. Baylson	(Civil Rules Committee)
Judge John F. Keenan	(Criminal Committee)
Judge Marilyn Huff	(Standing Committee)

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

John K. Rabiej Chief Rules Committee Support Office Administrative Office of the U.S. Courts Washington, DC 20544
James N. Ishida Senior Attorney-Advisor Rules Committee Support Office Administrative Office of the U.S. Courts Washington, DC 20544
Jeffrey N. Barr Attorney-Advisor Rules Committee Support Office Administrative Office of the U.S. Courts Washington, DC 20544
Henry Wigglesworth Attorney-Advisor Rules Committee Support Office Administrative Office of the U.S. Courts Washington, DC 20544
James H. Wannamaker III Senior Attorney Bankruptcy Judges Division Administrative Office of the U.S. Courts Washington, DC 20544

Scott Myers Attorney Advisor Bankruptcy Judges Division Administrative Office of the U.S. Courts Washington, DC 20544
Ms. Gale B. Mitchell Administrative Specialist Rules Committee Support Office Administrative Office of the U.S. Courts Washington, DC 20544
Ms. Denise London Administrative Officer Rules Committee Support Office Administrative Office of the U.S. Courts Washington, DC 20544

FEDERAL JUDICIAL CENTER

Joe Cecil (Rules of Practice & Procedure) Senior Research Associate Research Division One Columbus Circle, N.E. Washington, DC 20002-8003	Marie Leary (Appellate Rules Committee) Research Associate Research Division One Columbus Circle, N.E. Washington, DC 20002-8003
Robert J. Niemic (Bankruptcy Rules Committee) Senior Research Associate Research Division One Columbus Circle, N.E. Washington, DC 20002-8003	Thomas E. Willging (Civil Rules Committee) Senior Research Associate Research Division One Columbus Circle, N.E. Washington, DC 20002-8003
Laural L. Hooper (Criminal Rules Committee) Senior Research Associate Research Division One Columbus Circle, N.E. Washington, DC 20002-8003	Tim Reagan (Evidence Rules Committee) Senior Research Associate Research Division One Columbus Circle, N.E. Washington, DC 20002-8003

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

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

Members	Position	District/ Circuit	Start Date	End Date
Lee H. Rosenthal, Chair	D	Texas (Southern)	Chair: 2007	2011
Dean C. Colson	ESQ	Florida	2010	2013
Douglas R. Cox	ESQ	Washington, DC	2005	2011
Harris L Hartz	C	Tenth Circuit	2003	2010
Marilyn L Huff	D	California (Southern)	2007	2010
John G. Kester	ESQ	Washington, DC	2004	2010
David F. Levi	ACAD	North Carolina	2009	2012
Wallace Jefferson	C JUST	Texas	2010	2013
William J. Maledon	ESQ	Arizona	2005	2011
Gary Grindler Acting	DOJ	Washington, DC	2010	----
Reena Raggi	C	Second Circuit	2007	2010
James A. Teilborg	D	Arizona	2006	2012
Diane Wood	C	Seventh Circuit	2007	2010
Daniel Coquillette, Reporter	ACAD	Massachusetts	1985	Open
Principal Staff:				
Peter G. McCabe		(202) 502-1800		
John K. Rabiej		(202) 502-1820		

TAB

1

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

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

JAMES C. DUFF
Secretary

PRELIMINARY REPORT
JUDICIAL CONFERENCE ACTIONS
March 16, 2010

****

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

****

At its March 16, 2010 session, the Judicial Conference of the United States —

Elected to the Board of the Federal Judicial Center for a term of four years: Judge Edward Prado of the Court of Appeals for the Fifth Circuit to succeed Chief Judge William R. Traxler, Jr., of the Court of Appeals for the Fourth Circuit.

COMMITTEE ON THE ADMINISTRATION OF THE BANKRUPTCY SYSTEM

With regard to bankruptcy duty stations:

a. Authorized the transfer of the duty station for Chief Judge Randy Doub in the Eastern District of North Carolina from Wilson to Greenville, and the designation of Wilson as an additional place of holding court; and

b. Authorized the transfer of the duty station of the bankruptcy administrator in the Eastern District of North Carolina from Wilson to Raleigh, subject to approval by the Judicial Council of the Fourth Circuit.

Agreed that the following recommendation would be withdrawn:

That the Judicial Conference:

a. Formally encourage chief circuit judges, chief district judges, and circuit executives, in consultation with chief bankruptcy judges, to contact each bankruptcy judge two years prior to his or her eligibility for retirement and discuss recall opportunities;

b. Formally encourage judicial circuits to offer recall status, if warranted, to a bankruptcy judge one year before the bankruptcy judge is eligible for retirement, effective upon retirement; and

c. Formally encourage judicial circuits to authorize recalled bankruptcy judges who are assigned a workload that is substantially equal to the workload of a full-time bankruptcy judge in the same district to have full chambers staff (i.e., judicial assistant and law clerk).

COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT

With regard to the *Civil Litigation Management Manual*:

a. Approved a revised version of the *Manual*; and

b. Delegated to the Court Administration and Case Management Committee the authority to make technical and/or conforming, non-controversial amendments to the *Manual*.

Approved a records disposition schedule that contains a retention period of 14 to 30 days before disposal of routine courtroom security surveillance recordings, as well as the authority, in the case of a security incident, for the security video to be maintained until the conclusion of the investigation or such time as determined by order of the chief judge of the court.

Amended Item I of the Electronic Public Access Fee Schedule to read, in part, as follows: "No fee is owed under this provision until an account holder accrues charges of more than $10 in a quarterly billing cycle."

Approved a one-year pilot project with the Government Printing Office (GPO), consisting of no more than 12 courts, to provide public access to court opinions through GPO's FDsys system. The Committee on Court Administration and Case Management is delegated the authority to extend the pilot for up to one additional year, if necessary to ensure sufficient data to evaluate the program.

With regard to digital audio files of court hearings:

a. Agreed to allow district and bankruptcy judges who use digital audio recording as the means of taking the record to provide, at their discretion, access to digital audio files via PACER;

b. Established a fee for public access to such recordings commensurate with the maximum fee for downloading a single file from PACER (currently $2.40); and

c. Delegated to the Administrative Office the authority to establish appropriate language in the Electronic Public Access Fee Schedule to effectuate this fee.

COMMITTEE ON CRIMINAL LAW AND COMMITTEE ON DEFENDER SERVICES

Agreed to take no position on pending tribal court legislation, but to communicate to Congress concerns about the impact on the federal courts of portions of the legislation, as set forth in a draft letter presented at the Conference session.

COMMITTEE ON DEFENDER SERVICES

Approved a proposed community defender organization severance pay policy, which is based on one applicable to federal public defender organization employees.

COMMITTEE ON FEDERAL-STATE JURISDICTION

Rescinded its position favoring the exclusion of non-economic damages in determining the amount in controversy for diversity jurisdiction under 28 U.S.C. § 1332.

Took no position on H.R. 4335, the Prison Abuse Remedies Act of 2009 (111th Congress), or similar legislation, that would amend the Prison Litigation Reform Act of 1995, with the exception of opposition to the provision that would amend 28 U.S.C. § 1915(b) to eliminate the requirement in current law that a prisoner proceeding *in forma pauperis* be assessed the filing fee upon the filing of a civil action. Should Congress proceed to modify the current filing fee requirement, the Conference respectfully urges Congress to retain the requirement for the assessment of fees upon the filing of a civil action, with allowance for the refund of the filing fee for those actions that are not dismissed under 28 U.S.C. § 1915A, 28 U.S.C. § 1915(e)(2), or 42 U.S.C. § 1997e(c)(1).

With regard to federal legislation to implement the Hague Convention on Choice of Court Agreements (Hague Convention), consistent with principles of federalism:

a. Supported the inclusion of language to provide that actions do not, solely by virtue of the fact that they have been brought for the resolution of contract disputes or for the enforcement of judgments of other courts under the Hague Convention, qualify for federal question jurisdiction;

b. Opposed the inclusion of language that would allow parties to remove actions brought pursuant to the Hague Convention to federal court at any time, but supported the application of current law governing removal to such actions; and

c. Opposed the inclusion of language that would provide for federal district court interlocutory review of state court decisions concerning conflicts between the federal and state statutes implementing the Hague Convention.

Approved lifting the current aggregate pay cap for court employees only to allow receipt of the full amount of a national judiciary award.

Approved revised procedures when a grade reduction for a court unit executive is supported by application of the grading formula, as follows:

a. Calculate a three-year average using the data from the current year and from the two previous years;

b. Retain the current grade if the three-year average falls above the respective threshold;

c. Retain the current grade for a one-year grace period if the three-year average falls below the respective threshold by less than five percent of the threshold;

d. Downgrade the position at the end of the one-year grace period if the new three-year average remains below the threshold; and

e. Downgrade the position if the original three-year average falls more than five percent below the threshold.

Approved the following stratified pay caps for application to the optional pay tables for circuit and court unit executives if the salary of a district judge increases (other than through anticipated annual Employment Cost Index-based pay adjustments), with the understanding that the aggregate pay cap of court employees cannot exceed the salary of a district judge:

a. EX-I ($196,700 in 2009) as the cap for circuit executive positions and court unit executive positions at Judiciary Salary Plan (JSP)-18;

b. EX-II ($177,000 in 2009) as the cap for court unit executive positions at JSP-16 and JSP-17; and

c. EX-III ($162,900 in 2009) as the cap for court unit executive positions at JSP-15 and below.

Agreed to seek legislation to allow unit executives to accrue eight hours of annual leave per pay period prospectively, regardless of length of service.

Approved a change to the current Court Personnel System promotion policy to set at one percent the minimum salary promotion rate, to be applied for a fiscal year at a uniform, unit-wide rate in keeping with existing policy.

Approved a revised federal judiciary 2010 *Model Employment Dispute Resolution Plan.*

Approved a request of the District of Hawaii for an exception to the March 2009 Conference policy limiting re-employment of a retired law enforcement officer to only a single period for a maximum of 18 months to allow the district to re-employ its deputy chief probation officer for a second 18-month period from November 1, 2010 to April 30, 2012.

COMMITTEE ON THE ADMINISTRATION OF THE MAGISTRATE JUDGES SYSTEM

Agreed to amend Section 1.01(b)(4) of the Regulations of the Judicial Conference of the United States Establishing Standards and Procedures for the Appointment and Reappointment of United States Magistrate Judges to provide that only two years' experience as a staff attorney or pro se law clerk in a court may be used toward meeting the five-year active-practice-of-law requirement.

Approved recommendations regarding specific magistrate judge positions (1) to redesignate one magistrate judge position, authorize adjoining district jurisdiction for that position, and make no other change in the magistrate judge positions in that district court; and (2) to make no changes in the magistrate judge positions in the other nine district courts reviewed by the Magistrate Judges Committee.

April 28, 2010

Honorable Nancy Pelosi
Speaker of the House of Representatives
Washington, D.C. 20515

Dear Madam Speaker:

I have the honor to submit to the Congress the amendments to the Federal Rules of Criminal Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying these rules are excerpts from the report of the Judicial Conference of the United States containing the Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code. The Supreme Court recommitted proposed amendment to Rule 15 of the Federal Rules of Criminal Procedure to the Advisory Committee for further consideration.

Sincerely,

/s/ John G. Roberts, Jr.

April 28, 2010

SUPREME COURT OF THE UNITED STATES

ORDERED:

1. That the Federal Rules of Criminal Procedure be, and they hereby are, amended by including therein amendments to Criminal Rules 12.3, 21, and 32.1.

[See infra., pp. __ __ __.]

2. That the foregoing amendments to the Federal Rules of Criminal Procedure shall take effect on December 1, 2010, and shall govern in all proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That the CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Criminal Procedure in accordance with the provisions of Section 2072 of Title 28, United States Code.

April 28, 2010

Honorable Nancy Pelosi
Speaker of the House of Representatives
Washington, D.C. 20515

Dear Madam Speaker:

I have the honor to submit to the Congress the amendments to the Federal Rules of Appellate Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying these rules are excerpts from the report of the Judicial Conference of the United States containing the Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

/s/ John G. Roberts, Jr.

April 28, 2010

SUPREME COURT OF THE UNITED STATES

ORDERED:

1. That the Federal Rules of Appellate Procedure be, and they hereby are, amended by including therein amendments to Appellate Rules 1, 4, and 29, and Form 4.

[See infra., pp. __ __ __.]

2. That the foregoing amendments to the Federal Rules of Appellate Procedure shall take effect on December 1, 2010, and shall govern in all proceedings in appellate cases thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Appellate Procedure in accordance with the provisions of Section 2072 of Title 28, United States Code.

April 28, 2010

Honorable Nancy Pelosi
Speaker of the House of Representatives
Washington, D.C. 20515

Dear Madam Speaker:

I have the honor to submit to the Congress the amendments to the Federal Rules of Bankruptcy Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2075 of Title 28, United States Code.

Accompanying these rules are excerpts from the report of the Judicial Conference of the United States containing the Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

/s/ John G. Roberts, Jr.

April 28, 2010

SUPREME COURT OF THE UNITED STATES

ORDERED:

1. That the Federal Rules of Bankruptcy Procedure be, and they hereby are, amended by including therein amendments to Bankruptcy Rules 1007, 1014, 1015, 1018, 1019, 4001, 4004, 5009, 7001, and 9001, and new Rule 5012.

[See infra., pp. __ __ __.]

2. That the foregoing amendments to the Federal Rules of Bankruptcy Procedure shall take effect on December 1, 2010, and shall govern in all proceedings in bankruptcy cases thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Bankruptcy Procedure in accordance with the provisions of Section 2075 of Title 28, United States Code.

April 28, 2010

Honorable Nancy Pelosi
Speaker of the House of Representatives
Washington, D.C. 20515

Dear Madam Speaker:

I have the honor to submit to the Congress the amendments to the Federal Rules of Civil Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying these rules are excerpts from the report of the Judicial Conference of the United States containing the Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

/s/ John G. Roberts, Jr.

April 28, 2010

SUPREME COURT OF THE UNITED STATES

ORDERED:

1. That the Federal Rules of Civil Procedure be, and they hereby are, amended by including therein amendments to Civil Rules 8, 26, and 56, and Illustrative Civil Form 52.

[See infra., pp. __ __ __.]

2. That the foregoing amendments to the Federal Rules of Civil Procedure shall take effect on December 1, 2010, and shall govern in all proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Civil Procedure in accordance with the provisions of Section 2072 of Title 28, United States Code.

April 28, 2010

Honorable Nancy Pelosi
Speaker of the House of Representatives
Washington, D.C. 20515

Dear Madam Speaker:

I have the honor to submit to the Congress the amendment to the Federal Rules of Evidence that has been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying this rule are excerpts from the report of the Judicial Conference of the United States containing the Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

/s/ John G. Roberts, Jr.

April 28, 2010

SUPREME COURT OF THE UNITED STATES

ORDERED:

1. That the Federal Rules of Evidence be, and they hereby are, amended by including therein an amendment to Evidence Rule 804.

[See infra., pp. __ __ __.]

2. That the foregoing amendment to the Federal Rules of Evidence shall take effect on December 1, 2010, and shall govern in all proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendment to the Federal Rules of Evidence in accordance with the provisions of Section 2072 of Title 28, United States Code.

TAB

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COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of January 7-8, 2010
Phoenix, Arizona
Draft Minutes

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ATTENDANCE

The winter meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Phoenix, Arizona, on Thursday and Friday, January 7 and 8, 2010. All the members were present:

Judge Lee H. Rosenthal, Chair
Dean C. Colson, Esquire
Douglas R. Cox, Esquire
Judge Harris L Hartz
Judge Marilyn L. Huff
John G. Kester, Esquire
Dean David F. Levi
William J. Maledon, Esquire
Deputy Attorney General David W. Ogden
Judge Reena Raggi
Judge James A. Teilborg
Judge Diane P. Wood

In addition, the Department of Justice was represented by Karen Temple Clagget and S. Elizabeth Shapiro.

Also participating in the meeting were Judge Anthony J. Scirica, former chair of the committee and current chair of the Judicial Conference's Executive Committee; committee consultants Joseph F. Spaniol, Jr. and Professor Geoffrey C. Hazard, Jr.; and committee guests Professor Robert G. Bone, Dean Paul Schiff Berman, Dean Georgene M. Vairo, and Professor Todd D. Rakoff.

Providing support to the committee were:

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

Representing the advisory committees were:

Advisory Committee on Appellate Rules —
Judge Jeffrey S. Sutton, Chair
Professor Catherine T. Struve, Reporter
Advisory Committee on Bankruptcy Rules —
Judge Laura Taylor Swain, Chair
Professor S. Elizabeth Gibson, Reporter
Advisory Committee on Civil Rules —
Judge Mark R. Kravitz, Chair
Professor Edward H. Cooper, Reporter
Advisory Committee on Criminal Rules —
Judge Richard C. Tallman, Chair
Professor Sara Sun Beale, Reporter
Advisory Committee on Evidence Rules —
Judge Robert L. Hinkle, Chair
Professor Daniel J. Capra, Reporter

INTRODUCTORY REMARKS

Judge Rosenthal welcomed the committee members and guests.

Judge Scirica reported that all the rule changes recommended by the committee had been approved without discussion by the Judicial Conference at its September 2009 session. The fact that rule amendments are so well received, he said, is a sign of the great esteem that the Conference has for the thorough and thoughtful work of the rules committees.

Judge Rosenthal added that the rules approved by the Conference in September 2009 included: (1) important changes to FED. R. CIV. P. 26 (disclosure and discovery) that make draft reports of expert witnesses and conversations between lawyers and their experts generally not discoverable; (2) a major rewriting of FED. R. CIV. P. 56 (summary judgment); and (3) amendments to FED. R. CRIM. P. 15 (depositions) that would allow, under carefully limited conditions, a deposition to be taken of a witness outside the United States and outside the physical presence of the defendant. She explained that the advisory committees had reached out specially to the bar for additional input on these amendments and had crafted them very carefully.

Judge Rosenthal reported that the Judicial Conference also approved proposed guidelines giving advice to the courts on what matters are appropriate for inclusion in standing orders vis a vis local rules of court. Professor Capra, she noted, deserved a great deal of thanks for his work on the guidelines.

She noted that several new rules had taken effect by operation of law on December 1, 2009, most of them part of the comprehensive package of time-computation amendments. She thanked Judges Kravitz and Huff and Professor Struve for their extensive work in this area.

Judge Rosenthal pointed out that the agendas for the January meetings of the Standing Committee are customarily lighter than those for the June meetings because most amendments are presented for publication or final approval in June, given the cycle prescribed by the Rules Enabling Act. The January meetings, therefore, give the committee an opportunity: (1) to discuss upcoming amendments that the advisory committees believe merit additional discussion before being formally presented for publication or approval; and (2) to consider a range of other matters and issues that may impact the federal rules or the rule-making process.

Judge Rosenthal also noted that Mr. McCabe had just reached the milestone of 40 years of service with the Administrative Office, including 27 years as assistant director and 18 as secretary to the rules committees.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee without objection by voice vote approved the minutes of the last meeting, held on June 1-2, 2009.

LEGISLATIVE REPORT

Adjustment of Legislative Responsibilities

Judge Rosenthal reported that the Director of the Administrative Office had assigned Mr. Rabiej to take a more visible and extensive role in coordinating legislative matters that affect the federal rules. She explained that Congress appears to be taking greater interest in, and giving greater scrutiny to, the federal rules. She noted that most of the bills in Congress that would affect the rules involve difficult and technical issues. For that reason, it is essential that the Administrative Office coordinate its communications with Congressional staff through a lawyer who has a deep, substantive knowledge of the rules themselves, of the rule-making process, and of the agendas of the rules committees.

She noted that communications between the rules committees and Congress are different in several respects from those of other Judicial Conference committees. The rules committees, she noted, do not approach Congress to seek funding or to advance the needs of the judiciary, but to explain rule amendments that benefit the legal system as a whole. As a structural matter, she said, it is better to separate the staff who present bread and butter matters to Congress from those who explain rules matters. She pointed out that the new arrangements are working very well.

Proposed Sunshine in Litigation Act

Judge Rosenthal reported that the proposed Sunshine in Litigation Act would prohibit sealed settlements in civil cases and impose substantial restrictions on a court issuing protective orders under FED. R. CIV. P. 26(c). Under the legislation, a judge could issue a protective order only if the judge first finds that the information to be protected by the order would not affect public health or safety. That provision, she said, has been introduced in every Congress since 1991, and Judge Kravitz testified against the legislation at hearings in 2008 and 2009. But, she added, there had been little activity on the legislation for the last several months.

Judge Rosenthal explained that the Judicial Conference opposed the legislation because it would amend Rule 26 without following the Rules Enabling Act process. Moreover, the legislation: (1) lacks empirical support; (2) would be very disruptive to the

civil litigation process; and (3) is unworkable because it would require a judge to make important findings of fact without the assistance of counsel and before any discovery has taken place in a case.

Judge Kravitz added that Congressional staff now appear to understand the serious problems that the bill would create. But, he noted, it is the members of Congress who vote, not the staff, and it is difficult for members to oppose any bill that carries the label "sunshine." He noted that he had presented Congress with a superb, comprehensive memorandum prepared by Ms. Kuperman detailing the case law on protective orders in each federal circuit and demonstrating that trial judges act appropriately whenever there is a question of public health or safety.

Congressional Activity on the Rules that Took Effect on December 1, 2009

Judge Rosenthal pointed out that there has been increased Congressional scrutiny of the rule-making process. The rules committees, she said, have taken pains to make sure that Congress knows what actions the committees are contemplating early in the rules process, especially on proposals that may have political overtones or affect special interest groups.

She noted that Congressional staff in late 2009 had voiced two separate sets of concerns over the rule amendments scheduled to take effect on December 1, 2009, and they had suggested that implementation of the rules be delayed until their concerns were resolved. Staff asserted, for example, that some of the bankruptcy rules in the package of time-computation amendments might create a trap for unwary bankruptcy debtors and lawyers by reducing certain deadlines from 15 days to 14 days.

Judge Swain explained that it is common for debtors to file only a skeleton petition at the commencement of a bankruptcy case. The rules currently give debtors 15 additional days to file the required financial schedules and statements. The amended rules, though, would reduce that period to 14 days. Some bankruptcy lawyers may not be aware of the shortened deadline and may fail to file their clients' documents on time.

She said that the Advisory Committee on Bankruptcy Rules had persuaded the legislative staff to allow the rules to take effect as planned on December 1, 2009, by taking two visible steps to assist attorneys who may not be aware that they will have one day less to meet certain deadlines. First, the committee wrote to all bankruptcy courts to inform them of the committee's position that, during the first six months under the revised rules, missing any of the shortened time deadlines should be considered as "excusable neglect" that justifies relief. Second, the committee recommended adding a notice to CM/ECF and asking the courts to add language to their respective web sites

warning the bar of the revised deadlines in the rules. Letters were sent to Congress documenting these steps.

Judge Rosenthal reported that the second set of concerns voiced by Congressional staff focused on proposed new Rule 11 of the Rules Governing Section 2254 Cases and a companion new Rule 11 of the Rules Governing Section 2255 Proceedings. The new rules require a district court to issue or deny a certificate of appealability at the same time that it files the final order disposing of the petition or motion on the merits. The concern expressed through staff related to two sentences of the new rules, stating that: (1) denial of a certificate of appealability by a district court is not separately appealable; and (2) motions for reconsideration of the denial of a certificate of appealability do not extend the time for the petitioner to file an appeal from the underlying judgment of conviction.

The new rules, Judge Tallman said, were relatively minor in scope and designed to avoid a trap for the unwary in habeas corpus cases brought by pro se plaintiffs. Perfecting a challenge to a conviction is a byzantine process, and petitioners will lose appeals if they do not understand the complicated provisions.

By statute, a petitioner may not appeal to a court of appeals from a final order of the district court denying habeas corpus relief without first filing a certificate of appealability. Even if the district court denies the certificate of appealability, the court of appeals may grant it. Separately, the petitioner must also file a notice of appeal from the final order denying habeas corpus relief within the deadlines set in FED. R. APP. P. 4(a). So, in order for an appellate court to have jurisdiction over an appeal, the petitioner must have both: (1) filed a timely notice of appeal; and (2) received a certificate of appealability from either the district court or the court of appeals.

The trap for the petitioner occurs because once a district judge denies the habeas corpus petition itself, the clock begins to run on the time to file a notice of appeal, regardless of any action on the certificate of appealability. The accompanying committee note explains to petitioners that the grant of a certificate of appealability does not eliminate their need to file a notice of appeal.

Judge Tallman pointed out that the concerns brought to Congressional staff were misplaced. He explained in a memorandum for them that the new rules do not in any way alter the current legal landscape regarding the tolling effect of motions for reconsideration or the deadlines for filing a notice of appeal challenging the underlying judgment. All that they do, he noted, is codify and explain the existing law for the benefit of petitioners in response to reports received by the advisory committee that many forfeit their right to appeal, especially pro se filers, because they unwittingly file their appeals too late.

Judge Rosenthal emphasized the importance of the advisory committees: (1) reaching out to affected groups to give them a full opportunity to provide input on proposed rules; and (2) fully documenting on the record how their concerns have been addressed. Some committee members suggested that the recent communications from Congressional staff on the 2009 rules may portend new challenges in the rules process. Last-minute communications with Hill staff, they said, may become a new strategy for parties whose views are not adopted on the merits through the rule-making process. A participant added that it is particularly difficult to predict problems of this sort in advance because staff may be hearing from their friends or from individuals in an organization, rather than the organization itself.

Civil Pleading Standards

Judge Rosenthal reported that legislation had been introduced in each house of Congress to restore pleading standards in civil cases to those in effect before the Supreme Court's decisions in *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544 (2007), and *Ashcroft v. Iqbal,* 556 U.S. ___, 129 S. Ct. 1937 (2009). The Senate and House bills are phrased differently, but both attempt to legislatively supersede the two decisions and return the law on pleading to that in effect on May 20, 2007. But, she said, the drafting problems to accomplish that objective are truly daunting, and both bills have serious flaws. Both would impose an interim pleading standard that would remain in place until superseded by another statute or by a federal rule promulgated under the Rules Enabling Act process.

The short-term challenge, she suggested, was to identify the proper approach for the rules committees in light of the pending legislation, recognizing that much of the discussion in Congress is intensely political. She reported that she and Judge Kravitz had written a carefully drafted letter to Congress that avoids dragging the committees into the political fray, but accepting the committees' obligation to consider appropriate amendments to the rules. She added that the letter had provided a link to Ms. Kuperman's excellent memorandum documenting the extensive case law developed in the wake of *Twombly* and *Iqbal.* The memorandum, she said, is continually being updated, and it shows that the courts have responded very responsibly in applying the two decisions.

The letter also provided a link to Administrative Office statistical data on the number of motions to dismiss filed before and after *Twombly* and *Iqbal*, the disposition of those dismissal motions, and the breakdown of the statistics by category of civil suit. But no data were available to detail whether the motions to dismiss had been granted with prejudice or with leave to amend and whether superseding complaints were filed. That information will be gathered by staff of the Federal Judicial Center, who will read the docket sheets and case papers and prepare a report for the May 2010 civil rules conference at Duke Law School.

Judge Rosenthal noted that the Advisory Committee on Civil Rules was closely monitoring the intensive political fight taking place in Congress, the substantive debate unfolding among academics and within the courts, and the actions of practicing lawyers in response to *Twombly* and *Iqbal.* She predicted that there will be a substantial effort in Congress to get the legislation enacted in the current Congress, and a number of organizations have made it a top priority. The rules committees, she said, have two goals: (1) to protect institutional interests under the Rules Enabling Act rule-making process; and (2) to fulfill their ongoing obligation under the Act to monitor the operation and effect of the rules and recommend changes in the rules, as appropriate. She suggested that Congress is likely to leave the eventual solution to the pleading controversy up to the rules process. Therefore, the Advisory Committee on Civil Rules will have to decide whether the current pleading standard in the rules is fair and should be continued or changed.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Sutton and Professor Struve presented the report of the advisory committee, as set forth in Judge Sutton's memorandum and attachments of December 7, 2009 (Agenda Item 6). Judge Sutton reported that the advisory committee had no action items to present.

Informational Items

FED. R. APP. P. 4(a)(1) and 40(a)

Judge Sutton reported that the advisory committee had been considering proposed amendments requested by the Department of Justice to FED. R. APP. P. 4(a)(1) (time to file an appeal in a civil case) and FED. R. APP. P. 40(a) (time to file a petition for panel rehearing). Both rules provide extra time in cases where the United States or its officer or agency is a party. The proposed amendments would make it clear that additional time is also provided when a federal officer or employee is sued in his or her individual capacity for an act or omission occurring in connection with official duties.

The advisory committee, he said, had presented proposed amendments to the Standing Committee. But the Standing Committee returned them for further consideration in light of the Supreme Court's recent decision in *United States ex rel. Eisenstein v. City of New York,* 129 S. Ct. 988 (2009). The problem is that the time limits in FED. R. APP. P. 4(a)(1) are fixed by statute, 28 U.S.C. § 2107, and therefore may be jurisdictional for the court of appeals under *Bowles v. Russell,* 551 U.S. 205 (2007).

The Department of Justice recommended proceeding with the proposed amendment to Rule 40, but deferring action on Rule 4 because of the *Bowles* problem. The advisory committee, however, was reluctant to seek a change in one rule without a corresponding change in the other, since both use the exact same language. Therefore, it is considering a coordinated package of amendments to the two rules and a companion proposal for a statutory amendment to 28 U.S.C. § 2107. A decision on pursuing that approach has been deferred to the committee's April 2010 meeting in order to give the Department of Justice time to decide whether seeking legislation is advisable. Judge Rosenthal pointed out that the recent time-computation package of coordinated rule amendments and statutory changes provides relevant precedent for the suggested approach.

INTERLOCUTORY APPEALS FROM THE TAX COURT

Judge Sutton reported that the advisory committee was considering a proposal to amend the rules to address interlocutory appeals from decisions of the Tax Court. A 1986 statute, he explained, had authorized interlocutory appeals, but the Federal Rules of Appellate Procedure have never been amended to take account of such appeals. Permissive interlocutory appeals from the Tax Court appear to be very few in number. The advisory committee, he said, will informally solicit the views of the judges of the Tax Court, the tax bar, and others regarding proposed amendments.

OTHER ITEMS

Judge Sutton reported that the advisory committee had deferred action on suggestions to eliminate the three-day rule in FED. R. APP. P. 26(c) (computing and extending time) that gives a party an additional three days to act after a paper is served on it by means other than in-hand service.

The committee had received suggestions to require that briefs be printed on both sides. But, Judge Sutton said, there are strong differences of opinion on the subject, and courts are divided on whether to allow double-sided printing of briefs. As the courts continue to move away from paper filings, he said, time may overtake the suggestions.

Judge Sutton reported that the advisory committee was responding to a suggestion that Indian tribes be added to the definition of a "state" in some of the rules, particularly Appellate Rule 29 (amicus briefs), and the committee is researching how the state courts are handling amicus filings by Indian tribes.

Finally, Judge Sutton reported that the advisory committee was collaborating with the Advisory Committee on Bankruptcy Rules on the bankruptcy appellate rules project and with the Advisory Committee on Civil Rules on overlapping issues that affect both the appellate and civil rules.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Swain and Professor Gibson presented the report of the advisory committee, as set out in Judge Swain's memorandum and attachment of December 7, 2009 (Agenda Item 9). Judge Swain reported that the advisory committee had no action items to present.

Informational Items

HEARING ON PUBLISHED RULES

Professor Gibson reported that three of the rules published for comment in August 2009 had attracted substantial public interest and several requests had been received to testify at the hearing scheduled in New York in February 2010.

The proposed amendments to FED. R. BANKR. P. 3001 (proof of claim) and new FED. R. BANKR. P. 3002.1 (notice relating to claims secured by a security interest in the debtor's principal residence) would, among other things: (1) prescribe in greater detail the supporting documentation that must accompany certain proofs of claim; and (2) require a holder of a home mortgage claim in a chapter 13 case to provide additional notice of post-petition fees, expenses, and charges assessed against a debtor.

The proposed amendments to FED. R. BANKR. P. 2019 (disclosure) would require committees and other representatives of creditors and equity security holders to disclose additional information about their economic interests in chapter 9 and chapter 11 cases.

She added that many of the persons requesting to testify represent organizations that purchase consumer debt in bulk and are opposed to the additional disclosures.

BANKRUPTCY APPELLATE RULES

Professor Gibson said that the advisory committee had conducted two very successful conferences with members of the bench, bar, and academia to discuss whether Part VIII of the bankruptcy rules needs comprehensive revision. (Part VIII governs appeals from a bankruptcy judge to the district court or a bankruptcy appellate panel.)

She reported that the committee had decided to move forward on the project with two principal goals in mind: (1) to make the Part VIII rules conform more closely to the Federal Rules of Appellate Procedure; and (2) to recognize more explicitly that records in bankruptcy cases are now generally filed and maintained electronically. She said that the

committee would work closely on the project with the Advisory Committee on Appellate Rules and would like to work with the other advisory committees in considering the impact of the new electronic environment on the rules.

BANKRUPTCY FORMS MODERNIZATION

Judge Swain reported that the advisory committee's other large project is to modernize the bankruptcy forms. It had created a joint working group of members and others: (1) to examine all the bankruptcy forms for their substance and effectiveness; and (2) to consider how the forms might be adapted to the highly technological environment of the bankruptcy system. She explained that, unlike the illustrative civil forms appended to the civil rules, the bankruptcy official forms are mandatory and must be used in bankruptcy cases under FED. R. BANKR. P. 9009 (forms).

She noted that the working group had started reviewing the forms in January 2008 and had retained a nationally recognized forms-design expert as a special consultant. The focus of the group's initial efforts has been on improving the petition, schedules, and statements filed by an individual debtor at the outset of a case. The consultant, she said, has substantial experience in designing forms used by the general public and has really opened up the eyes of the judges and lawyers on ways that the bankruptcy forms could be simplified, rephrased, and reordered to elicit more accurate information from the public.

Judge Swain reported that the forms working group was also examining trends in technology and how they affect the way that lawyers, debtors, creditors, trustees, judges, clerks, and others use the bankruptcy forms and the pieces of information contained in them. To that end, she said, the Federal Judicial Center had drafted a survey for the committee to send to lawyers and the courts. In addition, the working group was working closely with both the Court Administration and Case Management Committee of the Judicial Conference and the functional-requirement groups designing the "Next Generation" replacement project for CM/ECF (the courts' electronic files and case management system).

Judge Swain noted that the advisory committee had recommended that the Next Generation CM/ECF system be capable of accepting bankruptcy forms, not just as PDF images, but as a stream of data elements that can be manipulated and distributed. The new electronic system must be capable of providing different levels of access to different users in order to guard privacy and security concerns. She noted that the working group would meet again in Washington in January 2010.

FORM 240A

Professor Gibson reported that, in addition to drafting the official, mandatory bankruptcy forms, the advisory committee assists the Administrative Office in preparing optional "Director's Forms." One of the most important of these optional forms, she said, is Form 240A – which includes the reaffirmation agreement and related documents. Among other things, it sets forth the disclosures explicitly required by the Bankruptcy Code. During the course of the forms modernization project, a number of judges commented on the need to revise Form 240A, which is organized in a manner that makes it difficult for a court to find the most important information it needs to review a reaffirmation agreement.

Therefore, the advisory committee worked with the Administrative Office to revise Form 240A and make it more user-friendly. In December 2009, a revised form was posted on the Internet. Professor Gibson said that some lawyers have suggested that the revised form is deficient because it rewords some of the disclosures required by the statute. She said, however, that the advisory committee had recommended the revisions to improve clarity, and she noted that the statute itself permits rewording and re-ordering of most of the required disclosures as long as the meaning is not changed. She added that the advisory committee was taking the suggestions seriously, though, and it would recommend further changes if it determines that the revised form is unclear or inaccurate.

After the meeting, the advisory committee recommended some modest changes to the December 2009 version of Form 240A. It also recommended that the January 2007 version of the form be retained as an alternative version to provide statutory disclosures for those parties that elect to use their own reaffirmation agreement – a practice that the statute allows. The advisory committee concluded that an alternate version of the form was necessary because the December 2009 version was designed as an integrated set of documents that could not be used as a "wrap around" to provide all the necessary disclosures if the parties decide to use their own reaffirmation agreement.

AUTHORITATIVE VERSION OF THE BANKRUPTCY RULES

Judge Swain reported that there has never been an official version of the Federal Rules of Bankruptcy Procedure. The Administrative Office, however, had just succeeded in creating an authoritative version of the rules after months of intensive effort by interns under the leadership of Mr. Ishida. They compared the different commercial versions on the market and researched the original source documents, including rules committee minutes and reports, Supreme Court orders, and legislation to verify the accuracy of each rule. The new, authoritative rules, she said, would be posted shortly on the federal courts' Internet web site.

MASTERS

Professor Gibson noted that FED. R. BANKR. P. 9031 (masters not authorized) makes FED. R. CIV. P. 53 (masters) inapplicable in bankruptcy cases. She reported that the advisory committee had recently received suggestions to abrogate Rule 9031 and allow the appointment of masters in appropriate bankruptcy cases. The committee, she said, had reviewed and rejected the same suggestion on several occasions in the past. After careful deliberation, it decided again that the case had not been made to change its policy on the matter. Among other things, the committee was concerned about adding another level of review to the bankruptcy system, which already has several levels of review.

A member asked whether bankruptcy judges use other bankruptcy judges to assist them in huge cases. Judge Swain responded that judges usually have excellent lawyers and thorough support in large cases, and other judges frequently volunteer to help in various settlement matters. Professor Gibson added that the Bankruptcy Code authorizes the appointment of examiners in appropriate cases. Unlike masters, though, examiners are not authorized to make judicial recommendations.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Kravitz and Professor Cooper presented the report of the advisory committee, as set out in Judge Kravitz's memorandum and attachment of December 8, 2009 (Agenda Item 5). Judge Kravitz reported that the advisory committee had no action items to present.

Informational Items

MAY 2010 CIVIL LITIGATION REVIEW CONFERENCE

Judge Kravitz reported that after completing work on the proposed amendments to FED. R. CIV. P. 26 (disclosure and discovery) and FED. R. CIV. P. 56 (summary judgment), the advisory committee decided to step back and take a hard look at civil litigation in the federal courts generally and to ask the bench and bar how well it is working and how it might be improved. About the same time, the Supreme Court rendered its decisions in *Twombly* and *Iqbal* regarding notice pleading, and bills were introduced in Congress to overturn those decisions.

The advisory committee agreed that the most productive way to have a dialogue with the bar and other users of the system would be to conduct a major conference and invite a broad, representative range of lawyers, litigants, law professors, and judges.

Judge Kravitz noted that Judge John G. Koeltl, a member of the advisory committee, had taken charge of arranging the conference, scheduled for Duke Law School in May 2010, and he was doing a remarkable job.

Judge Kravitz reported that the conference will rely heavily on empirical data to provide an accurate picture of what is happening in the federal litigation system. In addition, the committee wants to elicit the practical insights of the bar. To that end, it had asked the Federal Judicial Center to send detailed surveys to lawyers for both plaintiffs and defendants in all federal civil cases closed in the last quarter of 2008. The response level to the survey, he said, has been high, and the information produced is very revealing. In addition, Center staff has been conducting follow-up interviews with lawyers who responded to the surveys.

Additional data will be produced for the conference by the American College of Trial Lawyers and the Institute for the Advancement of the American Legal System. RAND, Fortune 200 companies, and some bar groups, such as the National Employment Lawyers Association, may also submit data. Among other things, the data may provide insight on whether new computer applications and techniques might be able to drive down the cost of discovery.

Judge Kravitz noted that the majority opinion in *Twombly* had cited a 1989 law review article by Judge Frank H. Easterbrook, based on anecdotal evidence, arguing that discovery costs are out of line and that district judges are not attempting to rein them in. The preliminary survey results from the Federal Judicial Center, however, show that little discovery occurs in the great majority of federal civil cases, and the discovery in those cases does not appear to be excessively costly, with the exception of 5% to 10% of the cases. That result, he said, is surprising to lawyers, but not to judges. Nevertheless, the extensive discovery in a minority of federal civil cases has caused serious discovery problems. The biggest frustration for lawyers, he said, occurs when they are unable to get the attention of a judge to resolve discovery issues quickly.

Judge Kravitz noted that Judge Koeltl had gathered an impressive array of topics and panelists for the conference, and several of the panelists have already written papers for the event. He said that the conference will hear from bar associations and from groups and corporations that litigate in the federal system. It will also examine the different approaches that states such as Arizona and Oregon take in civil litigation, as well as recent reform efforts in other countries, including Australia and the United Kingdom. The conference's proceedings will be recorded and streamed live, and the Duke Law Journal will publish the papers.

He added that enormous interest had been expressed by bench and bar in participating in the conference, and more than 300 people have asked to attend. Space,

though, is limited, and the formal invitation list is still a work in progress. A web site has been created for the conference, but is not yet available to the general public because several papers are still in draft form.

Judge Kravitz predicted that the conference will elicit a number of proposals for change that will be a part of the agenda for the Advisory Committee on Civil Rules for years to come. One cross-cutting issue, for example, is whether the civil rules should continue to adhere to the fundamental principle of trans-substantivity. He noted that several participants have suggested that different rules, or variations of the rules, should apply in different categories of civil cases. In addition, he said, the advisory committee may resurrect its work on a set of simplified procedures that could be used in appropriate civil cases.

PLEADING STANDARDS FOLLOWING *TWOMBLY* AND *IQBAL*

Judge Kravitz noted that pleading standards have been on the advisory committee's study agenda for many years. The committee, however, started looking at notice pleading much more closely after *Twombly* and *Iqbal*. At its October 2009 meeting, moreover, it considered a suggestion to expedite the normal rules process and prepare appropriate rule amendments in light of pending legislative efforts. Nevertheless, the committee decided that it was essential to take the time necessary to see how the two Supreme Court decisions play out in practice before considering any rule amendments. Therefore, it has been monitoring the case law closely, reaching out to affected parties for their views, and working with the Federal Judicial Center, the Administrative Office, and others to develop needed empirical data.

He reported that the statistics gathered by the Administrative Office show that there has been no substantial increase since *Twombly* and *Iqbal* in the number of motions to dismiss filed in the district courts or in the percentage of dismissal motions granted by the courts. He added that the motions data, though relevant, are not determinative, and the Federal Judicial Center will examine the cases individually.

In addition, Judge Kravitz noted that every circuit had now weighed in with in-depth analysis on what the Supreme Court cases mean. A review of court opinions shows that the case law is nuanced. Few decisions state explicitly that a particular case would have survived a motion to dismiss under *Conley v. Gibson*, but not under *Iqbal*. What is clearly important, he said, are the context and substance of each case.

There is the possibility, he suggested, that through the normal development of the common law, the courts will retain those elements of *Twombly* that work well in practice and modify those that do not. Accordingly, decisional law, including future Supreme Court decisions, may produce a pleading system that works very well in practice. By way

of example, he noted that *Conley* by itself was not really the pleading standard before *Twombly*. It had to be read in conjunction with 50 years of later case law development.

For the short term, he said, the committee cannot presently determine, and the Federal Judicial Center's research will not be able to show, whether people who would have filed a civil case in a federal court before *Twombly* are not doing so now. For example, it would be helpful to know from the plaintiffs' bar whether they are leaving the federal courts for the state courts or adapting their federal practices to survive motions to dismiss.

Judge Kravitz said that members of Congress and others involved in the pending legislation had expressed universally favorable comments about the rules process. Moreover, several members of the academy have argued pointedly that the Supreme Court did not respect the rule-making process in *Twombly* and *Iqbal*. Nonetheless, despite their support for the rules process, they are concerned that the process is too slow and that some people will be hurt by the heightened pleading standards in the next few years while appropriate rule amendments are being considered.

A member added that even though the great body of case law demonstrates that the courts are adapting very reasonably to *Twombly* and *Iqbal* and are protecting access to the courts, it will always be possible to find language in individual decisions that can be extracted to argue that immediate change is necessary. Even one bad case, he said, in an area such as civil rights, could be used to justify immediate action.

Judge Kravitz explained that the pleading problems tend to arise in cases where there is disparity of knowledge between the parties. The plaintiff simply does not have the facts, and the defendant does not make them available before discovery. As a result, he said, he and other judges in appropriate cases permit limited discovery and allow plaintiffs to amend their complaints.

Judge Kravitz stated that drafting appropriate legislation in this area is very difficult. Legislation, moreover, is likely to inject additional uncertainty and actually do more harm than good. All the bills proposed to date, he said, have enormous flaws and are likely to create additional litigation as to what the new standard means.

Judge Scirica expressed his thanks on behalf of the Executive Committee to Judges Rosenthal and Kravitz for handling a very difficult and delicate problem for the rules process. He said that what they have been doing is institutionally important to the judiciary, and they have acted with great intelligence, tact, and foresight.

PROFESSOR BONE'S COMMENTARY ON *TWOMBLY* AND *IQBAL*

Professor Bone was invited to provide his insights on the meaning of *Twombly* and *Iqbal* and his recommendations on what the rules committees should do regarding pleading standards. His presentation consisted of three parts: (1) a review of the two cases; (2) a discussion of the broader, complex normative issues raised in the cases; and (3) a discussion of whether, when, and how the rules process should be employed.

He explained that both *Twombly* and *Iqbal* adopted a plausibility standard. Both require merits screening of cases, and both question the efficacy of case management to control discovery costs. But, he said, there are significant differences between the two cases. *Twombly's* version of plausibility, he said, is workable on a trans-substantive basis, but *Iqbal's* is not.

Twombly, he suggested, had made only a minor change in the law of pleading, requiring only a slight increase in the plaintiff's burden. The allegations in the complaint in *Twombly* had merely described normal behavior. Under the rules, however, the plaintiff must tell a story showing that the defendant deviated in some way from the accepted baseline of normal behavior.

Twombly applied a "thin" screening model that does not require a high standard of pleading and calls for a limited inquiry by the court. Essentially, the purpose of the court's review is to screen out frivolous cases by asking the judge to interpret the complaint as a whole to see whether it is plausible and may have merit. *Twombly* did not adopt a two-pronged approach to the screening process, even though the opinion in *Iqbal* states that it did. In screening under *Twombly,* judges do not have to discard legal allegations in the complaint. Rather, the conclusory nature of any allegations is taken as part of the court's larger, gestalt review of the total contents of the complaint.

Iqbal, on the other hand, adopted a more substantial, "thick" pleading standard. The allegations in the *Iqbal* complaint did in fact tell a story of behavior that deviated from the accepted baseline conduct. The context of the complaint, taken as a whole, supported that conclusion. Yet *Iqbal* turned the plausibility standard into a broader test – not just to identify objectively those suits that lack merit, but also to screen out potentially meritorious suits that are weak.

Professor Bone asserted that *Iqbal's* two-pronged approach – of excluding legal conclusions from the complaint and then looking at the plausibility of the rest of the complaint – does not make sense. The real inquiry for the court has to be whether the allegations in the complaint, taken as a whole, support a plausible inference of wrongdoing.

He added that much of the academic analysis of the cases has been shallow and polarized. Many critics, for example, have framed the normative issues as a mere test between efficiency on the one hand and fairness and access rights on the other – weighing the potential costs of litigation against the need to maintain access to the courts. This analysis, however, is too simplistic. It does not work because economists, in fact, care deeply about fairness, and rights-based or fairness advocates care about litigation costs and fairness to defendants. It is really a balance between the two in either event.

As a matter of process, plaintiffs have a right of access to the courts that is not dependent on outcome. The "thin" *Twombly* screening process can be justified on moral grounds, as it requires the court to apply a moral balance between protecting court access for plaintiffs and considering fairness to defendants in having to defend against the allegations. The approach of *Iqbal,* on the other hand, is based on outcome and whether a case is strong or weak.

Professor Bone said that a normative analysis should be grounded in explaining why plaintiffs file non-meritorious suits. In reality, he said, this occurs in large measure because of the asymmetric availability of information between the parties. That asymmetry causes the problem that the stricter *Iqbal* standard of review is trying to address.

Professor Bone suggested that the central substantive question for the rules committees will be to specify how much screening a court must apply in order to dismiss non-meritorious suits at the pleading stage. Procedurally, he said, the committees need to address three key questions: (1) whether to get involved; (2) when to do so; and (3) how to do so.

The first question, he said, had already been decided, for the rules committees are already deeply involved in the pleading dispute. Indeed, he said, they should be involved forcefully – with or without Congressional action. And they should be prepared to confront political interest groups on the merits, if necessary. On the other hand, they also have to be pragmatic in protecting the integrity of the rules process itself, and they need to take the time necessary to achieve the right results.

Professor Bone emphasized that it was important to gather as much empirical information as possible. But considerable care and insight must be given to interpretation of the data. Even if the statistics reveal no significant change in dismissal rates since *Twombly* and *Iqbal,* the numbers are not definitive if they do not show whether plaintiffs are discouraged from filing cases in the first place. The ultimate metric for judging whether a pleading standard is working well is whether case outcomes are fair and appropriate, not whether the judges and lawyers are pleased.

He added that the Advisory Committee on Civil Rules should seriously consider deviating from the traditional trans-substantive approach of the rules in drafting a revised pleading standard. A revised rule, for example, might exclude certain kinds of cases, such as civil rights cases, from any kind of "thick" screening standard. It might also focus specifically on complex cases, or enumerate facts that courts should consider, such as informational asymmetry and the stakes and costs of litigation. In addition, the committee should use the committee notes more aggressively and cite examples to explain how and why the rule is being amended. It should not, however, try to develop pleading forms.

COMMITTEE DISCUSSION OF *TWOMBLY* AND *IQBAL*

Judge Kravitz pointed out that trans-substantivity has been a basic foundation of the Federal Rules of Civil Procedure for more than 70 years. Deviating from it would upset current expectations and entail serious political complications. Interest groups that use the federal courts, he said, have polar opposite views on certain issues. Some plaintiffs believe that the rules currently favor defendants, while some defendants believe that they are forced to settle meritless suits that should be dismissed on the pleadings. He added that the whole discussion is influenced in large part by discovery costs, and he noted that some corporations have designed their computer systems to accommodate potential discovery needs, rather than to address core business needs.

A participant agreed that it would be extremely difficult to deviate from trans-substantivity and to specify different rules for different categories of cases. For one thing, it is not always clear cut what category a case falls into. A more fruitful approach, he suggested, would be for a rule to focus on the parties' relative access to information, rather than on the subject nature of a case. Fundamental differences exist, he said, between those cases where the litigants have equal access to information and those where the plaintiff does not have access to the facts necessary to plead adequately. He suggested that this asymmetry prevails in many civil rights and employment discrimination cases. It also occurs in antitrust cases where the plaintiff alleges, but does not know for sure, that the defendant has engaged in a conspiracy or agreement. The plaintiff knows only that the defendants' behavior suggests it.

In addition, he said, it is difficult to isolate pleading from other aspects of a civil case – such as discovery, summary judgment, and judicial case management. The civil rules are linked as a whole, and if the pleading rules are changed, it may affect the application of several other rules. Another approach that the committee could consider in addressing information asymmetry would be to link pleading with preliminary discovery. Thus, in appropriate cases, the court could permit the plaintiff to frame a proper pleading by allowing some sort of preliminary inquiry into information that only the defendant possesses.

A lawyer member said that one of the great strengths of the rules process is that the advisory committees rely strongly on empirical evidence. He reported that he had not detected any changes or problems in practice as a result of *Twombly* and *Iqbal,* even though many interesting intellectual issues have been raised in the ensuing debates. A reasonable judge, he said, can almost always detect a frivolous case. Therefore, before proceeding with potential rule adjustments, the committee should obtain sound empirical data to ascertain whether any real problems have in fact been created by *Twombly* and *Iqbal.* Judge Kravitz added that the advisory committee needs to hear from lawyers directly, especially plaintiffs' lawyers, about any changes in their practice. For example, it would be relevant to know whether they have declined any cases that they would have taken before *Twombly* and *Iqbal* and whether they now must devote more pre-pleading work to cases.

A judge member concurred that, despite perceptions, there did not appear to have been much change since *Twombly* and *Iqbal,* except that the civil process may well turn out to be more candid. The trans-substantive nature of the civil rules, he said, is beneficial and allows for appropriate variation from case to case. The context of each case is the key. Thus, a plaintiff may have to plead more in an antitrust case than in a prisoner case. Instead of mandating different types of pleadings for different cases, the trans-substantive rules – which now incorporate an overarching plausibility standard – can be applied effectively by the courts in different types of cases. The bottom line, he suggested, is that even though plaintiffs may be concerned about *Twombly* and *Iqbal*, they are really not going to suffer.

Another member suggested, though, that the two Supreme Court opinions had in fact changed the outcome of some civil cases and may well affect the outcome of future cases. Use of the term "plausibility," moreover, is troubling because it borders on "believability" – which lies within the province of the jury. It may be that FED. R. CIV. P. 8 will become more like FED. R. CIV. P. 56, where practice in the courts has developed so far that it bears little resemblance to the actual language of the national rule. Procedural rules, she said, are sometimes made by Congress or the Supreme Court. But the rules committees are the appropriate forum to draft rules because the committees demand a solid empirical basis for amendments, seek public comments from all sides, and give all proposals careful and objective deliberation. Therefore, the Advisory Committee on Civil Rules should proceed to gather the empirical information necessary to support any change in the pleading rules.

Mr. Ogden reported that the Department of Justice had not taken a position on the debate, but it is very interested in the matter and has unique perspectives to offer since it acts as both plaintiff and defendant. In addition, he said, important government policies may be at stake.

A judge member suggested that a number of federal civil cases, especially *pro se* cases, are clearly without merit and do not state a federal claim. But where there is a genuine imbalance of information, dismissal of the case should be addressed at the summary judgment phase. The problem is that a dismissal motion normally occurs before any discovery takes place. Accordingly, a revised rule might borrow a procedure from summary judgment practice to specify that plaintiffs who oppose a motion to dismiss be allowed to explain why they cannot supply the missing allegations in the complaint and to seek some discovery to respond to the motion.

Other participants concurred in the suggestion. One recommended that a procedure be adapted from FED. R. CIV. P. 11(b)(3), which specifies that an attorney may certify to the best of his or her knowledge that the allegations in a pleading "will likely have evidentiary support after a reasonable opportunity for further investigation or discovery." That standard might be borrowed for use in dealing with motions to dismiss. A participant added, however, that the same suggestion had been made by the court of appeals in *Iqbal* and was rejected by the Supreme Court.

A lawyer member explained that, in current practice, plaintiffs confronting a motion to dismiss use the summary judgment mechanism and submit an affidavit to the court specifying what evidence they have and what they need. For many defendants, winning the motion to dismiss is really the entire ball game – not because of the merits of the case, but because the potential costs of discovery often exceed the value of the case to them. Therefore, if a dismissal motion is denied, a quick settlement of the case usually follows. This practical reality, he said, will not appear in the statistics. He concluded that the two Supreme Court decisions have not made a change in the law. Nor, he said, will allowing plaintiffs additional discovery make a difference.

Another lawyer member concurred that the two decisions had not affected his practice. The principal danger, he warned, is that Congress has already injected itself into the dispute and will likely try to resolve the matter politically at the behest of special interest groups. He asked what the committees' strategy should be if Congress were to enact a statute in the next month or so.

Judge Rosenthal explained that the committees have been concentrating on providing factual information to Congress, including statistical information on dismissal motions. She noted that the committees and staff have been working hard in examining the case law and statistics to ascertain whether there has been an impact since *Twombly* and *Iqbal*. The research to date, she said, shows that there has been little measurable change, even in civil rights cases. In addition, the committees have been commenting informally on proposed legislation and exploring less risky legislative alternatives, without getting involved in the politics. The central message to Congress, she said, has been to seek appropriate solutions through the rules process.

Judge Kravitz added that the rules committees cannot suggest appropriate legislation, even though they have been asked to do so, because they simply do not know what problems Congress is trying to solve. Interestingly, lawyers and other proponents of legislation have professed great confidence in the rules process and are urging action in part because they assert that the Supreme Court was not sufficiently deferential to the process. At the same time, though, they do not want to wait three years or more for the rules process to play out. They want to turn the clock back immediately while the rules process unfolds in a deliberate manner. He added that the committees have been reaching out to bar groups and others for several years, and the outreach efforts have been very beneficial for the rules process.

A participant reported that when the Private Securities Litigation Reform Act was being developed a few years ago, the rules committees decided that the most important interest was to protect the Rules Enabling Act process. Therefore, they chose not to participate, at least in a public way, with any statement or position on the proposed legislation. Instead, they concluded that it was an area of substantive law that Congress was determined to address, and anything the committees would say would not be given much weight. Moreover, any statement or position taken by the judiciary would likely be used by one side or the other in the political debate to their advantage, and to the ultimate detriment of the judiciary. In fact, he said, Congress did change the pleading standard in securities cases by legislation. In retrospect, the sky did not fall. Securities cases are still being filed and won, but now the pleadings contain more information.

Mr. Cecil reported that the research being conducted by the Federal Judicial Center will provide the committees with needed empirical structure, rather than anecdotal advice, in a very complex area. He said that Center staff are examining motions to dismiss filed from September to December during each of the last five years, *i.e.,* before and after *Twombly* and *Iqbal.* They are examining the text of the docket sheets and the text of the case documents themselves. They will look at whether dismissal motions were granted with leave to amend, whether the plaintiffs in fact amended the complaints, and whether the cases were terminated soon afterwards. Unfortunately, though, it may be impossible to ascertain some types of relevant information, such as whether there was differential access to information in a particular case, whether cases have shifted to the state courts, or whether the heightened pleading standards have discouraged filings.

FED. R. CIV. P. 45

Judge Kravitz reported that the advisory committee was considering several suggestions from the bar to revise FED. R. CIV. P. 45 (subpoenas). He noted that a subcommittee had been appointed to address the suggestions, chaired by Judge David G. Campbell and with Professor Richard L. Marcus as reporter.

Judge Kravitz said that the subcommittee had considered many different topics, but is focusing on four potential approaches. First, the subcommittee is considering completely reconfiguring Rule 45 to make it simpler and easier to use. It is a dense rule that is not well understood. Second, the subcommittee is examining a series of notice issues because the current notice requirements in the rule are often ignored. Third, it is exploring important issues concerning the proper allocation of jurisdiction between the court that has issued a subpoena and the court where a case is pending. Fourth, it is considering whether courts can use Rule 45 to compel parties or employees of parties to attend a trial, even though they are more than 100 miles from the courthouse.

On the other hand, there are two other issues that the committee probably will not address: (1) the cost of producing documents and sharing of production costs; and (2) whether service of the subpoena should continue to be limited to personal service or be broadened to be more like the service arrangements permitted under FED. R. CIV. P. 4 (service).

Judge Kravitz explained that if the committee decides to reconfigure the whole rule, it will not have a draft ready to be presented to the Standing Committee at the June 2010 meeting. But if it decides to address only a limited number of discrete issues, it might have a proposal ready by that time for publication.

Professor Cooper added that Rule 45 is too long and difficult to read. Moreover, it specifies that the full text of Rule 45(c) and (d) be reproduced on the face of the subpoena form. The advisory committee, he said, should at least attempt to simplify the language of the rule, and in doing so it will focus on three key issues: (1) which court should issue the subpoena – the district where it is to be executed or the court having jurisdiction over the case; (2) which court should handle issues of compliance with the subpoena; and (3) where the subpoena should be enforced when there is a dispute. He suggested that the rule might also contain a better transfer mechanism, such as one that would consider the convenience of parties.

A member stated that the rule needs a good deal of attention because substantial satellite litigation arises over these issues, especially in complex cases. In addition, the advisory committee should focus on notice issues. Under the current rule, he explained, subpoenas must be noticed to the other party. In practice, though, they are generally issued without notice to the other party, and there is no notice that the documents have been produced. He concluded that the advisory committee should take all the time it needs to revise this important rule carefully and deliberately.

OTHER ITEMS

Judge Kravitz reported that the advisory committee had formed an ad hoc joint subcommittee with the Advisory Committee on Appellate Rules, chaired by Judge Steven M. Colloton, to deal with common issues affecting the two committees.

He noted that the advisory committee was looking to see whether FED. R. CIV. P. 26(c) (protective orders) needs changes. He noted that the courts appear to be handling protective orders very well. Nevertheless, the text of the rule itself might need to be amended to catch up with actual practice, as with FED. R. CIV. P. 56 (summary judgment).

He reported that the advisory committee was considering whether to eliminate the provision in FED. R. CIV. P. 6(d) that gives a party an extra three days to act after receipt of service by mail and certain other means. The committee has decided, though, to let the new time-computation rules be digested before hitting the bar with another rule change that affects timing.

Finally, he said, the advisory committee was re-examining its role in drafting illustrative forms under authority of FED. R. CIV. P. 84 (forms), especially since the illustrative forms are generally not used by the bar. It might decide to reduce the number of illustrative forms, or it might turn over the forms to the Administrative Office to issue under its own authority. He cautioned, though, that any change in the pleading forms at this juncture might send a wrong signal in light of the *Twombly-Iqbal* controversy.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Tallman and Professor Beale presented the report of the advisory committee, as set forth in Judge Tallman's memorandum and attachment of December 11, 2009 (Agenda Item 8). Judge Tallman reported that the advisory committee had no action items to present.

Informational Items

FED. R. CRIM. P. 16 – BRADY MATERIALS

Judge Tallman reported that the advisory committee had wrestled for more than 40 years with a variety of proposals to expand discovery in criminal cases. Most recently, in 2007, it had recommended, on a split vote, an amendment to FED. R. CRIM. P. 16 (discovery and inspection). The proposal, based on a suggestion from the American College of Trial Lawyers, would have codified the prosecution's obligations to disclose to the defendant all exculpatory and impeaching information in its possession.

He explained that the Department of Justice does not appear to have serious difficulty with a rule that would merely codify its obligations under *Brady v. Maryland,* 373 U.S. 83 (1963) – but only if the proposed rule were limited to exculpatory information and if it contained a materiality standard. On the other hand, the Department objects strongly to codifying disclosure of impeachment materials under *Giglio v. United States,* 405 U.S. 150 (1972). He added that a counter-proposal had been made within the advisory committee to limit disclosure under the proposed amendment to "material" information, but it failed to carry.

Judge Tallman reported that in 2007 the Standing Committee had received a lengthy letter from then-Deputy Attorney General Paul J. McNulty objecting to the rule proposed by the advisory committee. The Standing Committee, he said, recommitted the proposed amendment to the advisory committee on the explicit assurance from the Department of Justice that it would strengthen the advice it gives to prosecutors in the U.S. Attorneys' Manual regarding their *Brady-Giglio* obligations and undertake additional training of prosecutors. The Standing Committee believed that the Department would need time to assess the effectiveness of these measures, so it remanded the amendment to the advisory committee with a broad directive to continue monitoring the situation.

Not long afterwards, the celebrated case against Senator Theodore F. Stevens unfolded. It was alleged that a key prosecution witness in the case had changed his story. But the defense had not been notified of that fact, and it moved for a new trial. In early 2009, the new Attorney General, Eric H. Holder, Jr., authorized the prosecutor to move to dismiss the case because of the failure to disclose. He also directed that a working group be established within the Department of Justice to review fully what had happened in the Stevens case and whether the Department had faithfully carried out the promises made to the Standing Committee in 2007. In addition, Judge Emmet G. Sullivan, the trial judge in the Stevens case, wrote to the advisory committee and urged it to resubmit the proposed amendment to FED. R. CRIM. P. 16 that had been deferred by the Standing Committee.

Judge Tallman reported that the written results of the Department's review had just been made available. They include a comprehensive program of training and operational initiatives designed to enhance awareness and enforcement of *Brady-Giglio* obligations. He commended the Department and Deputy Attorney General Ogden for their enormous efforts on the project and the breadth of the proposed remedial measures. He emphasized that the proposed amendments to FED. R. CRIM. P. 16 would make a major change in criminal discovery, and he pointed out that criminal discovery poses very different concerns from civil discovery. Among other things, criminal discovery implicates serious issues involving on-going investigations, victims' rights, security of witnesses, and national security.

Deputy Attorney General Ogden thanked the committee for its careful and measured approach and explained that the Department continues to oppose any rule that goes beyond *Brady* and the requirements of the Constitution. He assured the committee that the Department and its leadership are very serious about disclosure and have made it a matter of high priority. He pointed out that after the Stevens violations had been uncovered, the Department moved to dismiss the case, even though that was not an easy decision for it to make. It also convened a high-level working group of senior prosecutors and members of the Attorney General's team to study the Department's practices and make recommendations to minimize *Brady* violations going forward.

The group, he said, had met frequently and surveyed the U.S. attorneys on a regular basis. It endeavored to pinpoint the scope of the problem and measure the state of compliance. In so doing, it asked the Office of Professional Responsibility to examine not only those cases brought to its attention, but also to search for potential issues of non-compliance. The results of the Department-wide study, he said, reveal that there are no rampant violations or serious problems with compliance. The Office, for example, reported that there had been findings of violations in only 15 instances out of 680,000 criminal cases filed by the Department over nine years – an average of only one or two a year out of the thousands of cases prosecuted. The numbers, he said, put the scope of the problem in proper perspective.

Mr. Ogden said that the Department believes that the violations reflect a handful of aberrational occurrences that could not be averted by a new federal rule. Instead, a more comprehensive approach should be taken, including strict compliance with the existing rules, enhanced training of prosecutors and staff, and a number of other efforts. In addition, the Department will strive for greater uniformity in disclosure practices among the districts.

Training, he said, is extraordinarily important. Until recently, he noted, the U.S. Attorneys' Manual had not included instructions on *Brady* and *Giglio*, nor had *Brady* and *Giglio* obligations been included specifically in the Department's training. In 2006, however, the Department substantially revised the manual to address disclosure of both exculpatory and impeaching materials. In addition, a comprehensive new training program is now in place that requires all prosecutors to attend a seminar on *Brady* and *Giglio*. To date, 5,300 prosecutors have been trained in the new curriculum, and every prosecutor will be required to attend a refresher program every year.

Mr. Ogden reported that the Department had just sent detailed guidance to all prosecutors on disclosure obligations and procedures. It is also developing a central repository of information for all U.S. attorneys and a new disclosure manual that will incorporate lessons learned and inform prosecutors on what kinds of information they must disclose, what they must not disclose, and what they should bring to the attention of

the court. A single official will be appointed permanently to administer the disclosure program on a national basis. At the local level, the Department has mandated that each U.S. attorney focus personally on the importance of the issue, designate a criminal disclosure expert to answer questions and serve as a point of contact with Department headquarters, and develop a district-wide plan to implement the Department's national plan and adapt it to local circumstances. Other plans include training of paralegals and law enforcement officers and developing a case management process that incorporates disclosure. The Department is also speaking with the American Bar Association about ways to promote additional transparency.

A member suggested that the Department might also want to consider pulling some U.S. attorney files randomly for review, following the standard practice that many hospitals have in place. That step, he said, would provide a positive motivation for U.S. attorneys' offices to comply with their disclosure obligations.

Another member asked whether the Department's plan specifies the nature of the discipline that will be applied to prosecutors who violate *Brady* and *Giglio* obligations. Thus, if assistant U.S. attorneys know clearly that they could be terminated for violations, it could have a real impact on deterring inappropriate behavior.

Mr. Ogden said that in considering impeachment information under *Giglio*, it is essential to balance the value of disclosing the particular information in a case to the defense against the impact that disclosure may have on the privacy and security needs of witnesses. In many situations, he said, the information is dangerous or very embarrassing to a potential witness, and it is not central to the outcome of the case. It should not be disclosed because turning it over would chill witnesses from giving information in the future. The prosecutor, he said, is the appropriate officer to make the disclosure decision.

Judge Tallman reported that the advisory committee had met most recently in October 2009. At the meeting, Assistant Attorney General Lanny A. Breuer presented a preview of the Department's comprehensive program. The committee decided that it should also reach out and solicit the views and experiences of interested parties. To that end, it will convene an informal discussion session in Houston in February 2010 with a small group of U.S. attorneys and other Department of Justice officials, a representative of crime victims' rights groups, the president of the National Association of Criminal Defense Lawyers, a federal public defender, and other lawyers having substantial practical experience with *Brady* issues.

Judge Tallman said that one of the key questions for the participants at the session will be whether a change in the federal rules is needed, or indeed would be effective in preventing abuses. He noted that any rule change would have to be carefully drafted to be

consistent with the Jencks Act, the Crime Victims' Rights Act, and statutes protecting juvenile records and police misconduct records.

Another important issue to be discussed at the session will be whether discovery should be required at an earlier stage of the process. In addition, he reported, the advisory committee will continue to conduct empirical research by surveying practitioners and examining the procedures in those districts that have expanded disclosure practice on a local basis.

FED. R. CRIM. P. 5 - VICTIMS' RIGHTS

Judge Tallman reported that the advisory committee was continuing to make sure that the rights of victims are addressed on a regular, ongoing basis. He noted that he had reported to the Standing Committee in June 2009 that there was no need to recommend amending FED. R. CRIM. P. 5 (initial appearance) to specify that a magistrate judge take into account a victim's safety at a bail hearing because that requirement is already set forth in the governing statute and followed faithfully by judges. Nevertheless, he said, the advisory committee continues to be sensitive to the interests of the victims and will continue to reach out to them. Among other things, it has invited a victims' representative to participate in its upcoming Houston session on disclosure.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Hinkle and Professor Capra presented the report of the advisory committee, as set forth in Judge Hinkle's memorandum and attachment of December 14, 2009 (Agenda Item 7). Judge Hinkle reported that the advisory committee had no action items to present.

Informational Items

RESTYLED EVIDENCE RULES

Judge Hinkle reported that the advisory committee's major initiative was to complete work on restyling the Federal Rules of Evidence. The revised rules, he said, had been published, and the deadline for comments is in February 2010. Written comments had been received, including very helpful suggestions from the American College of Trial Lawyers. But only one witness had asked to appear at the scheduled public hearing. Therefore, the hearing will likely be cancelled and the witness heard by teleconference. He added that the Style Subcommittee has been doing an excellent job, and it has been working closely with the advisory committee on the revised rules.

The advisory committee, he explained, plans to complete the full package of style amendments at its April 2010 meeting and bring the package forward for approval at the June 2010 Standing Committee meeting. Judge Rosenthal added that the restyled evidence rules will be circulated to the Standing Committee in advance of the rest of the agenda book to give the members additional time to review the full package. Judge Hinkle recommended that if any member of the committee identifies an issue or a problem with any rule, the member should let the advisory committee know right away so the issue may be addressed and resolved before the Standing Committee meeting.

CRAWFORD V. WASHINGTON

Judge Hinkle added that the advisory committee was continuing to monitor developments in the wake of the Supreme Court's decision in *Crawford v. Washington,* 541 U.S. 36 (2004), dealing with the admissibility of out-of-court "testimonial" statements under the Confrontation Clause of the Constitution. The case law, he said, is continuing to develop.

REPORT OF THE SEALING SUBCOMMITTEE

Judge Hartz, chair of the subcommittee, explained that the Federal Judicial Center had just filed its final report on sealed cases in the federal courts, written by Mr. Reagan. The report, he said, was excellent, and he recommended that all participants read it. At the subcommittee's request, the Center had examined all cases filed in the federal courts in 2006, and it identified and analyzed all cases that had been fully sealed by a court. The subcommittee members, he said, had reviewed the report carefully, and they take comfort in the fact that it reveals that there are very few instances in which a court appears to have made a questionable decision to seal a case. Nevertheless, he said, any error at all in improperly sealing a case is a concern to the judiciary.

He reported that the subcommittee was now moving quickly to have a report ready to present to the Standing Committee in June 2010. It will focus on several issues. First, he said, it will discuss whether there are cases in which sealing was improper. He noted that there appear to have been fewer than a dozen such cases nationally among hundreds of thousands of cases filed in 2006. Second, it will address whether sealing an entire case was overkill in a particular case, even though there may have been a need to seal certain documents in the case, such as a cooperation agreement with a criminal defendant. He noted, too, that in some districts juvenile cases are not sealed, but the juvenile is simply listed by initials. Third, the report will discuss cases in which sealing a case was entirely proper at an early stage of the proceedings, such as in a qui tam action or a criminal case with an outstanding warrant, but the court did not get around to unsealing the case later.

The subcommittee, he said, will not likely recommend changes in the rules, but it may use Professor Capra's recent report and guidelines on standing orders as a model to propose that the Judicial Conference provide guidance to the courts on sealing cases. For example, guidelines might specify that sealing an entire case should be a last resort. Courts should first consider lesser courses of action. Guidelines might also recommend developing technical assistance for the courts, such as prompts from the courts' electronic case management system to provide judges and courts with periodic notices of sealed cases pending on their dockets. Guidelines might also recommend a procedure for unsealing executed warrants.

In addition, he said, there should be some type of court oversight over the sealing process. For example, no case should be sealed without an order from a judge. In addition, procedures might be established for notifying the chief judge, or all the judges, of a court of all sealed cases.

Judge Rosenthal added that the sealing subcommittee and the privacy subcommittee have been working very well together. Both, she said, are deeply concerned about protecting public access to court records, while also guarding appropriate security and privacy interests. She expressed thanks, on behalf of all the rules committees, to the Federal Judicial Center for excellent research efforts across the board that have provided solid empirical support for proposed rule amendments.

REPORT OF THE PRIVACY SUBCOMMITTEE

Judge Raggi, chair of the privacy subcommittee, reported that the subcommittee had been asked a year ago to review whether the 2007 privacy rules are working well, whether they are protecting the privacy concerns that they identify, and whether additional privacy concerns are being addressed by the courts on a local basis. In conducting that inquiry, she said, the subcommittee's first task had been to gather as much information as possible from the experiences of the 94 federal district courts. Therefore, it had asked the Federal Judicial Center to survey judges and clerks, and the Department of Justice to survey U.S. attorneys' offices.

She reported that the subcommittee had received superb staff assistance from Mr. Cecil and Meghan Dunn of the Federal Judicial Center in preparing and executing the surveys, Heather Williams of the Administrative Office in collecting all the local rules of the courts and comparing them to the national rules, and Mr. Rabiej of the Administrative Office in coordinating these efforts. In addition, she thanked Professor Capra for serving very effectively as the subcommittee's reporter.

Judge Raggi reported that the preliminary results obtained from the survey reveal that there have been no serious compliance problems with the new privacy rules, although there may be a need to undertake additional education efforts and to tweak some local rules and practices. But the subcommittee sees little need for major changes in the national rules.

Nevertheless, she said, two concerns have emerged. First, there are serious issues involving cooperating witnesses in criminal cases, and the courts have widely different views and practices on how to treat them. Some courts, for example, do not file cooperation agreements, which do not appear on the public records. Others make them all public, at least in redacted form. Since the courts feel so strongly about the matter, she said, it seems unlikely that the subcommittee will recommend a specific course of action. But the subcommittee may at least identify the issues and provide the courts information about what other courts are doing.

Second, there are concerns about juror privacy. For example, the current national rule requires redaction of jurors' addresses from documents filed with the courts, but not redaction of jurors' names. Therefore, their names are available widely on the Internet. She noted that the courts themselves are responsible for protecting jurors, while the Department of Justice is responsible for the safety and privacy of cooperating witnesses.

Judge Raggi pointed out that the privacy subcommittee includes three members from the Judicial Conference's Court Administration and Case Management Committee, and the joint effort has proved to be very constructive. Some of the matters being examined by the subcommittee, she said, may be directed to the rules committees, while others may be handled by the court administration committee. The subcommittee, she said, plans to write a single report and is not concerned at this point about specific committee responsibilities.

She added that the subcommittee wants to hear directly from people who have given serious thought to the privacy rules and related issues. Public hearings, she said, are not necessary, but the subcommittee will conduct a conference at Fordham Law School in April 2010 with a representative group of knowledgeable law professors, practicing lawyers, and other court users. After hearing from the participants, she said, the subcommittee will be better able to report on the issues that need to be pursued.

PANEL DISCUSSION ON LEGAL EDUCATION

Dean Levi of Duke Law School moderated a panel discussion on trends in legal education and the legal economy, how they may affect the judiciary, and how academia and the judiciary may help one another. The panel included Professor Coquillette of Boston College, Dean Berman of Arizona State, Professor Vairo of Loyola Los Angeles, and Professor Rakoff of Harvard.

Professor Coquillette stated that it is not possible to have a first-class justice system without good legal education. He pointed out that many changes have occurred in law schools over the last several years. He noted that Max Weber, the great prophet of legal education who died in 1920, had made three predictions that have come to pass. First, he proclaimed that the world of law, driven by simple economic necessity, would shift over time from a system of local law to a system of state law, then to a national system of law, and then to an even broader system of international law.

Second, he suggested that legal systems would become less formal, as people will resort more to systems of private mediation and informal dispute resolution or negotiation. Students now engage in more hands-on application of law, not only with moot court competitions, but also in negotiation and dispute resolution classes and competitions.

Third, the law would become more specialized. It would also lose its sacredness of content, as lawyers and judges will come to be seen more as political actors, rather than priests of a sacred order. In a sense, he anticipated the critical legal studies movement, as law schools today are more infused with critical legal studies and with "law and economics" approaches.

He noted that at Boston College Law School, five of the last seven faculty appointments had been given to experts in international law. Most of them, he said, have foreign law degrees and bring an international perspective to the academy. In addition, the school has established programs in London and Brussels.

Dean Berman reported that a series of new initiatives have been undertaken at Arizona State University Law School. The core of the new efforts consists of three parts.

First, the model of what counts as legal education has been expanded greatly. The law school obviously has to train lawyers to practice law, but it also deals with many students who are not going to become lawyers but want to know about the law. To that end, the school is teaching law to non-lawyers, undergraduates, and foreign students. A full B.A. program in law is being developed for undergraduates and will be administered by the law school. In the past, he said, undergraduate courses in law had generally been taught by professors in other disciplines, but they are now being taught by lawyers.

Second, he said, the school wants to focus more on public policy and what it can do to contribute to the world. The law school, he suggested, should be a major player in public policy, and it is working with other faculties on joint programs to help train students to be players in public-policy debates. It has created a campus in Washington, D.C., and is creating think-tank experiences in which ten or so students work with a faculty member and focus on some aspect of public policy. In addition, he said, lawyers will benefit in their eventual legal careers by receiving training in statistics and data analysis. The law school is looking to participate in conducting university research on public policy areas for others, and it is asking companies and other organizations for modest funds to underwrite university research for them that the companies would not undertake on their own.

Third, the school is focusing on bridging the gap from law school to law practice. The students help start-up enterprises to incorporate, and they work with other parts of the university, including social work students, to help people with their legal problems. The law school, he said, has a large number of clinics, a legal advocacy program with dispute-resolution components, and a professional development training course that includes networking, starting up a law practice, performing non-legal work, and training in a variety of other areas that may be helpful to a student's career path. The school plans to do more to connect third-year students directly with members of the legal profession, such as by giving the students writing projects and having lawyers critique them. The school has added post-graduate fellowships and gives students a stipend to serve as fellows or volunteer interns to get a foot in the door of a legal career. It is also considering developing an apprentice model, where recent graduates do specific work in internships to develop their skills.

Professor Vairo reported that the Socratic model is still very much in place and dominant, at least in the first year of law school. She emphasized that the changes taking place in the legal profession and the economy will affect law schools. Most importantly, she said, law school is very expensive, and some commentators advocate moving toward an accelerated two-year program for economic reasons. Her school, she added, has a core social justice mission and is placing graduates in public service jobs. The traditional big-firm model, she said, is starting to collapse, as many students go into solo practice and are doing well at it.

The law school curriculum, she said, is changing, and the school has three main goals – to improve the legal experience, to improve the students' job prospects, and to cope with the costs of legal education. Like other schools, it is looking at de-emphasizing traditional courses to devote more time to problem solving, legislation, and regulation. She said that the faculty sees students engage in social networking every day in the classroom and should take advantage of the practice to keep students' attention in the current, wired world.

The law school will focus more on trans-national and international matters and on cross-disciplinary courses. It has been hiring more combination J.D.-Ph.D.s as faculty and will offer more advanced courses. The students, she said, particularly like the kinds of simulations that are offered in the third-year curriculum, where they are called upon to act as lawyers and represent clients. For the future, she suggested, the schools also need to consider what role distance-learning may play as part of the law school model, and whether schools can continue to pay law professors what they are currently being paid.

Professor Rakoff reported that the atmosphere at Harvard is less uncomfortable for students than it used to be. The school also offers new required courses and workshops in international law, legislation and regulation, and problem solving. In the latter, the students deal with factual patterns that mirror what happens when a matter first comes to a lawyer's attention. The focus is not just on knowing the law, but also on appreciating the practical restraints imposed on a lawyer and the institutions that may deal with a problem.

In short, the substance and doctrines of the law, which were central to the Langdellian system, are emphasized less now. Moreover, students are now absorbed with being online. They do not look at books, but instead conduct legal research completely online. Word searches, though, only supply a compilation of facts and results. They do not provide the conceptual structure emphasized in the past – when treatises were consulted and legal problems researched through analysis of issues and analogy. Nevertheless, he said, much of the core curriculum remains, such as basic courses in contracts, torts, and civil procedure. About two-thirds of a student's first year experience would be about the same as in the old days.

Dean Levi suggested that the several themes mentioned by the panel keep arising in discussions on law school reform – problem solving, working in teams, knowing international law, being ready to practice on Day One, building leadership skills, having a comfort level in other disciplines, and understanding business and public policy. All have been around in one form or another for generations. Yet teaching students to be analytical thinkers and to identify issues remains the core school function, and it continues to be difficult to accomplish.

He observed that the traditional role of a trial lawyer and the courtroom experience now have far less relevance to students. Moreover, the dominance of court actions and judicial decisions in the curriculum has decreased over the years.

A member asked the panel whether the legal profession will be able to absorb all the law school graduates being produced, or whether the number of schools and graduates will shrink. A panelist suggested that some law schools may well close or merge, and there will be fewer positions available for law professors. Some schools already are receiving fewer applications and are in serious financial trouble.

Nevertheless, many people in the community continue to be under-served by lawyers, and there is more need for legal services as a whole. Therefore, more lawyers in the future may serve in small units, rather than in traditional firms. A panelist added that it is not a bad idea for law students to strike out alone or in smaller units, rather than in large firms. He said that many law-firm associates are unhappy people.

A professor added that the current business model of many law schools will have to change. There will be fewer legal jobs available, but no less need for lawyers. Students are already changing their expectations of what they will get out of law school and how they will practice. There is likely to be more emphasis on public service.

A lawyer member observed that he is not sure that the young lawyers today think the way that older lawyers do. Experienced lawyers, he said, have been ingrained with substantive law and doctrines. But the newer attorneys have grown up with computers. They are skilled at finding cases online, but they do not necessarily know what to do with all the information they succeed in compiling. A professor added that it is getting tougher to teach legal doctrines and analysis. He agreed that students generally are great at gathering piles of information quickly, but not in putting it all together or conducting deep analysis. Another added that some students now have a different view of what constitutes relevant knowledge. They do not draw as sharp a distinction between the legal rule and the rest of the world. This is clearly a different approach, but not necessarily a worse one.

A member asked how students can be encouraged to have a passion for the law. A panelist responded that her school encourages externships with local judges. The students are really enthusiastic about these experiences, and the schools need to expand them to include similar experiences with law firms. Law schools, moreover, should decrease the emphasis placed on monetary rewards.

A professor pointed out that judges provide a huge educational service through law clerkships. Law clerks, he said, generally perform better than non-clerks when they enter the legal world. Nevertheless, there is a disturbing trend towards hiring permanent law clerks in the judiciary, thereby reducing the clerkship opportunities for law school graduates.

A judge explained that he has to rely on his law clerks to keep up with his heavy docket. He expressed concern that since many law school reforms have lessened the emphasis on doctrinal law and critical analysis, judges may not be able to obtain the quality of law clerks they need to deal effectively with the cases before them. He noted that federal judges are hiring more permanent clerks today because they are a known quantity, and they know how to apply the law to cases.

A panelist said that many judges are now hiring law clerks who have a few years of law practice, and that is a good development. Another added that judges should participate actively with law school groups to let them know how well they are doing in training new lawyers.

A professor said that the benefits to the judiciary from law clerks are enormous. Among other things, law clerks provide a large pool of talented lawyers who understand and admire judges because they have worked for them. Another added that law schools need the federal judiciary to serve this important educational function. But the judiciary also benefits greatly because the law clerks are life-long friends who understand the courts and are important, natural political allies.

A member argued that the practice of law has really changed, and students' law school expectations are not being met. There are far fewer trials than in the past, and far fewer opportunities for lawyers to develop their courtroom skills. Young lawyers, moreover, are generally not allowed by courts to practice on their own.

A member said that the changes in the law school curriculum are beneficial. But the schools should be urged to continue to teach the law with rigor and offer a wide variety of high-content classes. The law requires a good lawyer to be able to analyze across different areas of the law. Thus, students who have taken soft courses or only a particular line of courses, do not have the same ability to analogize as students who have had a more rounded, rigorous curriculum.

Other members cautioned against reducing the substantive content of law school classes, and especially opposed the suggestion to move to a two-year law school curriculum for financial reasons. They said that it is essential to have three years of critical thinking and substantive courses in law school. A panelist added that his school was creating more mini-courses of one credit each rather than full semester three-credit courses.

In addition, many very bright judges' law clerks want to teach, without first ever having practiced law. Many professors may have Ph.D. degrees and other educational achievements, but too many lack actual practice experience.

A panelist added that many of the faculty assigned to hire new law professors have an ingrained prejudice against practitioners. Interviewees with practical legal experience, he said, just do not sound like scholars to them. Many law schools, he added, are now introducing fellowships and visiting professorships for practitioners.

NEXT MEETING

The members agreed to hold the next meeting in June 2010. By e-mail exchange after the meeting, the committee fixed the dates as Monday and Tuesday, June 14-15, 2010. The meeting will be held in Washington, D.C.

Respectfully submitted,

Peter G. McCabe,
Secretary

TAB

3A

JAMES C. DUFF
Director

JILL C. SAYENGA
Deputy Director

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
Chief

Rules Committee Support Office

May 18, 2010

MEMORANDUM TO THE STANDING COMMITTEE

SUBJECT: *Legislative Report*

Nineteen bills were introduced in the 111th Congress that affect the Federal Rules of Practice, Procedure, and Evidence. A list of the relevant pending legislation is attached. Since the last Committee meeting, we have been focusing on the following matters:

Notice Pleading

On July 22, 2009, Senator Arlen Specter (D-PA) introduced the "Notice Pleading Restoration Act of 2009." (S. 1504, 111th Cong., 1st Sess.) The legislation provides that courts must not dismiss a complaint under Civil Rule 12 except under the standards set forth in *Conley v. Gibson*, 355 U.S. 41 (1957), effectively overruling the Supreme Court's decisions in *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009). Although several hearings have been held on the legislation, no further action has been taken.

On November 19, 2009, Representative Jerrold Nadler (D-NY) introduced a similar bill, "Open Access to Courts Act of 2009." (H.R. 4115, 111th Cong., 1st Sess.) The bill provides, among other things, that a court must not dismiss a complaint under Civil Rule 12 unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim which would entitle him or her to relief. On December 11, 2009, H.R. 4115 was referred to the Subcommittee on Courts and Competition Policy. The subcommittee held a hearing on the bill on December 16, 2009.

In March 2010, Judge Rosenthal and Judge Kravitz wrote to Representative Henry C. "Hank" Johnson (D-GA), chair of the Subcommittee on Courts and Competition Policy, and Representative John Conyers, Jr. (D-MI), chair of the House Judiciary Committee, commenting on the legislation and informing them of the work of the Rules Committees in this area. (See attached.)

On May 11, 2010, Secretary Duff on behalf of the Judicial Conference wrote to Chairman Conyers and Representative Lamar Smith (R-TX) opposing the legislation and urging them to allow the Rules Enabling Act process to work through the Supreme Court's decision in *Twombly* and *Iqbal*. (See attached.) A mark-up of the bill has been scheduled for May 25.

Cameras in the Courtroom

On March 19, 2009, Senator Charles Grassley (R-IA), joined by Senators Charles Schumer (D-NY), Patrick Leahy (D-VT), Arlen Specter (R-PA), Lindsey Graham (R-SC), Russ Feingold (D-WI), John Cornyn (R-TX), and Richard Durbin (D-IL), introduced the "Sunshine in the Courtroom Act of 2009." (S. 657, 111th Cong., 1st Sess.) On June 25, 2009, Representatives William Delahunt (D-MA) and Dan Lungren (R-CA) introduced a similar bill, the "Sunshine in the Courtroom Act of 2009." (H.R. 3054, 111th Cong., 1st Sess.) The legislation is similar to bills introduced in the past two Congresses and generally provides that the presiding judge of proceedings in the district court, court of appeals, and Supreme Court, may, at his or her discretion, permit the photographing, electronic recording, broadcasting, or televising of any court proceeding over which that judge presides. The bill also provides that the presiding judge must not allow electronic media coverage if it is determined that such coverage would constitute a violation of any party's due process rights.

The legislation also authorizes the Judicial Conference to promulgate advisory guidelines on the management and administration of electronic media coverage. Under the Senate bill, the Conference must also promulgate mandatory guidelines, no later than six months after enactment, that shield certain witnesses from electronic media coverage, including minors, crime victims, and undercover law enforcement officers. Media coverage is not permitted until the Conference promulgates the mandatory guidelines. On April 29, 2010, the Senate Judiciary Committee reported favorably without amendment S. 657.

On February 13, 2009, Senator Specter introduced S. 446, a bill to permit the televising of Supreme Court proceedings. (111th Cong., 1st Sess.) This bill is identical to H.R. 429, which was introduced on January 9, 2009, by Representative Ted Poe (R-TX). The bills require the Supreme Court to permit television coverage of all open sessions unless the Court decides, by majority vote of the justices, that allowing such coverage would constitute a violation of the due process rights of one or more parties before the Court. On November 5, 2009, Senator Specter introduced S. Res. 339, a resolution expressing the sense of the Senate that the Supreme Court should permit live television coverage of its proceedings unless it decides that allowing such coverage would constitute a due process violation of the rights of one or more parties. (111th Cong., 1st Sess.) The Senate Judiciary Committee reported favorably without amendment both S. 446 and S. Res. 339 on April 29, 2010.

On July 23, 2009, Secretary Duff sent a letter on behalf of the Judicial Conference to the Senate Judiciary Committee expressing strong opposition to the Senate camera bill. Secretary Duff sent a second letter to the Senate Judiciary Committee on September 23, 2009, stating that the Conference would oppose S. 448, the "Free Flow of Information Act of 2009," if S. 657, the "Sunshine in the Courtroom Act of 2009," was added as an amendment to S. 448.

The Judicial Conference does not speak for the Supreme Court on the issue of cameras or other policy matters. The Conference strongly opposes cameras in the trial courts (*see, e.g.*, JCUS-SEP 94, p. 46; JCUS-SEP 99, p. 48), but has authorized each court of appeals to decide for itself whether to permit the taking of photographs and allow radio and television coverage of oral argument. (JCUS-MAR 96, p. 17.) (The Second and Ninth Circuits allow broadcast coverage of

their proceedings upon approval of the presiding panel.) There is no provision governing the televising of proceedings in the Civil Rules, but Criminal Rule 53 prohibits the use of cameras in criminal proceedings.

Costs

On April 20, 2010, Representative Johnson introduced the "Fair Payment of Fees Act of 2010." (H.R. 5069, 111th Cong., 1st Sess.) H.R. 5069 amends Civil Rule 68 and Appellate Rule 39 to authorize the waiver of court fees if the court determines that the interests of justice justifies such a waiver, and that "the interest of justice includes the establishment of constitutional or other important precedent." The Supreme Court granted certiorari in the underlying case that prompted the legislation. It is expected that no further action on the legislation will be taken until the Court decides the case.

Other Developments of Interest

Extensions of Time for Federal Officers/Employees Sued in their Individual Capacity. In 2003, the Department of Justice proposed amending Appellate Rules 4 and 40. Both rules provide extra time when the United States or its officer or agency is a party. The Department's proposal would make clear that additional time is provided when a federal officer or employee is sued in his or her individual capacity for an act or omission occurring in connection with official duties. In November 2004, the Appellate Rules Committee approved the proposed amendments to Rules 4 and 40 for publication. The Standing Committee approved them for publication, and the proposals were published for public comment in August 2007.

After the proposed rules amendments were published for public comment, the Supreme Court issued its decision in *Bowles v. Russell*, 551 U.S. 205 (2007). *Bowles* held that the limits set forth in 28 U.S.C. § 2107(a) to reopen the time to file an appeal are jurisdictional in nature. The advisory committee concluded that it did not have the authority to amend Appellate Rule 4 because they are based on the statutory deadline. The Department eventually withdrew its proposal to amend Appellate Rule 4, but recommended moving forward on its proposal to amend Appellate Rule 40 because Rule 40 did not raise *Bowles* concerns. The advisory committee, however, was reluctant to seek an amendment to Rule 40 without a corresponding change in Rule 4 because both rules use the same language. The advisory committee eventually decided, with the Department's concurrence, to seek legislation that would amend 28 U.S.C. § 2107, in addition to a coordinated package of proposed amendments to Rules 4 and 40.

James Ishida

Attachments

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

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

JAMES C. DUFF
Secretary

May 11, 2010

Honorable John Conyers, Jr.
Chairman
Committee on the Judiciary
United States House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

On March 17, 2010, Judge Lee H. Rosenthal, Chair of the Judicial Conference Committee on Rules of Practice and Procedure, and Judge Mark R. Kravitz, Chair of the Advisory Committee on Civil Rules, sent Representative Henry C. Johnson, Jr., a letter briefly commenting on the "Open Access to Courts Act of 2009" (H.R. 4115). I write now on behalf of the Judicial Conference to urge you not to proceed on this legislation to rewrite the pleading rules for the federal courts. We urge you instead to allow the Rules Enabling Act rulemaking process a fair opportunity to finish the thorough, transparent, and inclusive work that is well under way to understand the impact of the Supreme Court's decisions in *Twombly* and *Iqbal*.[1]

Under the Rules Enabling Act, proposed amendments to federal court rules are subjected to extensive examination by the Rules Committees, the public, the bar, and the bench, as well as by Congress. It is an exacting and deliberative process, designed to provide exhaustive scrutiny of every proposed rule amendment by many knowledgeable individuals and entities, so that problems can be identified and addressed and inconsistencies and ambiguities uncovered and removed. It is a process in which empirical research is a vitally important component in identifying problems and ensuring that the solutions are fair, workable, and effective and do not create unintended consequences. Amending the federal rules through legislation circumvents these careful safeguards that Congress itself established in the Rules Enabling Act. The safeguards are especially critical in considering changes to rules as fundamental and delicate as those setting the pleading standards in the federal courts.

H.R. 4115 would effectively amend the Rules of Civil Procedure that set the standard for pleading a cause of action and for dismissing a complaint because it fails to do so – Rules 8(a)(2), 12(b)(6), 12(c), and 12(e) – and would significantly impact other rules that address pleading.

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[1] *Ashcroft v. Iqbal*, --- U.S. ---, 129 S. Ct. 1937 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

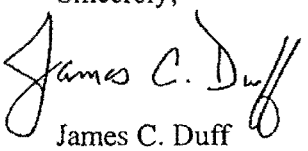
H.R. 4115 uses a literal application of a phrase from the 1957 case of *Conley v. Gibson*. By stating that a court "shall not dismiss a complaint ... unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim which would entitle the plaintiff to relief," H.R. 4115 essentially forbids a court from dismissing any complaint unless its allegations are clearly impossible or clearly defeat liability. This phrase was not literally applied, even before *Twombly* was decided. H.R. 4115 thus conflicts with its stated purpose of providing a "restoration of notice pleading in Federal courts." Implementing the standard in H.R. 4115 would result in confusion, uncertainty, and consequent delays and inconsistencies.

Because the Rules Committees swiftly undertook the work of gathering information necessary to understand the impact of *Twombly* and *Iqbal*, the study contemplated by the Rules Enabling Act is well under way, but additional time is needed. Rule 8(a), which sets the pleading standards in the federal courts, has not been substantively changed since 1938. The difficulties in drafting the pleading standard that applies to the many different kinds of cases in the federal courts are exemplified by the different bills that have been introduced and that have been circulated for discussion. It is essential to understand the impact of the latest Supreme Court interpretations before any decision can be made on changing the pleading rules.

In addition, the case law has continued to develop for almost three years since *Twombly* and a year since *Iqbal*, particularly in the appellate courts. Interrupting that case-law development with a legislatively imposed pleading standard will itself engender confusion and uncertainty, impairing the rights of those who seek redress in the federal courts.

Thank you for considering our views on H.R. 4115 and the information the Committees' work has and will produce. As part of that work, the Advisory Committee on Civil Rules held a conference at the Duke Law School just this week. That conference examined extensive empirical studies and brought together lawyers, judges, and academics with diverse views and experience to analyze whether changes should be made to realize the goal stated in Rule 1 of the Federal Rules of Civil Procedure: "the just, speedy, and inexpensive determination of every action and proceeding." We look forward to continuing to work with you on these issues, which are vital to the federal civil justice system we are all dedicated to preserving and improving.

Sincerely,



James C. Duff
Secretary

cc: Honorable Henry C. Johnson, Jr.

Identical letter sent to: Honorable Lamar S. Smith

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

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

JAMES C. DUFF
Secretary

May 11, 2010

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

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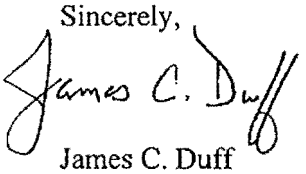
Sincerely,



James C. Duff
Secretary

cc: Honorable Howard Coble

Identical letter sent to: Honorable John Conyers, Jr.

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

LEE H. ROSENTHAL
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

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RICHARD C. TALLMAN
CRIMINAL RULES

ROBERT L. HINKLE
EVIDENCE RULES

March 16, 2010

Honorable Henry C. "Hank" Johnson, Jr.
Chairman
Subcommittee on Courts and
Competition Policy
Committee on the Judiciary
United States House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

This letter briefly comments on the "Open Access to Courts Act of 2009" (H.R. 4115) and the "Notice Pleading Restoration Act of 2009" (S. 1504) on behalf of the Judicial Conference Standing Committee on Rules of Practice and Procedure and the Advisory Committee on the Federal Rules of Civil Procedure. Both H.R. 4115 and S. 1504 would effectively amend the Rules of Civil Procedure that set the standard for pleading a cause of action and for dismissing a complaint because it fails to do so. The bills would affect Rule 12(b)(6), Rule 12(c), Rule 12(e), and Rule 8, other related rules, and statutes.

Both H.R. 4115 and S. 1504 recognize the important role of the Rules Committees of the Judicial Conference under the Rules Enabling Act (28 U.S.C. §§ 2071-2077) in drafting the procedural rules that apply in the federal courts, including the rules for pleadings and motions to dismiss. Seventy-five years ago, Congress enacted the Rules Enabling Act. The Act charged the judiciary with the task of neutral, independent, and thorough analysis of the rules and their operation. Congress designed the Rules Enabling Act rulemaking process in 1934 and reformed it in 1988 to produce the best rules possible by ensuring broad public participation and thorough review by the bench, the bar, and the academy. The internet has made this process truly transparent and inclusive. As recent experience with Civil Rules 26 and 56 has demonstrated, the Rules Committees are dedicated to obtaining the type of reliable empirical information

needed to enact rules that will serve the American justice system well and will not produce unintended harmful consequences. The different House and Senate bills demonstrate some of the difficulties in an area as fundamental and delicate as articulating the pleading standard for the many different kinds of cases filed in the federal courts.

The Civil Rules Committee and the Standing Committee are at this moment deeply involved in precisely the type of work Congress required in the Rules Enabling Act. The Committees, working with the Federal Judicial Center, are gathering and studying the information needed both to understand how Rule 8, Rule 12, and other affected rules – which have not been changed substantively since 1938 – have in fact worked since the Supreme Court decided *Twombly* and *Iqbal* and to consider changes to the text of these rules and other related rules.

At the request of the Civil Rules Committee, the law clerk for the Chair of the Standing Committee wrote a memorandum describing the case law since *Iqbal* was decided. That memorandum sets out circuit court opinions issued to date that examine *Iqbal* or discuss how district courts are to apply *Iqbal* to different kinds of cases, and sets out many district court opinions discussing *Iqbal*. The memorandum is attached in a separate bound volume and is also available on the Rules Committees' website.[1] The memorandum will be regularly updated as additional cases are decided, and the updates will be posted on the Rules Committees' website as well.

Charts and graphs setting out preliminary data from the federal courts' dockets on the filing, granting, and denying of motions to dismiss after *Twombly* and *Iqbal* are also on the Rules Committees' website.[2] This data will be updated periodically, and those updates will be posted on that website. The Federal Judicial Center is gathering more detailed data on motions to dismiss, which will also be made available.

The Center has recently completed a survey of attorneys on the impact on their practice of *Twombly* and *Iqbal*.[3] One finding from that survey was "[m]ost plaintiff attorneys indicated that there had been no impact on their practice, explaining that for a variety of reasons. . . . they do not use notice pleading in their practice and have always satisfied the standards laid out in the *Twombly/Iqbal* line of cases." (See survey, page 25.) As part of a study of Attorney Satisfaction with the Federal Rules of Civil Procedure, the Center also surveyed members of the National Employment Lawyers Association, a predominately plaintiff employment lawyers group.[4] The work of the Center continues and will be posted on the website.

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[1] http://www.uscourts.gov/rules/Memo%20re%20pleading%20standards%20by%20circuit.pdf

[2] http://www.uscourts.gov/rules/Motions%20to%20Dismiss.pdf

[3] http://www.fjc.gov/public/pdf.nsf/lookup/costciv3.pdf/$file/costciv3.pdf

[4] http://www.fjc.gov/public/pdf.nsf/lookup/costciv2.pdf/$file/costciv2.pdf

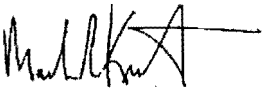
Even before *Iqbal*, the Rules Committees had begun a thorough reexamination of how pleading and discovery are actually working in federal cases and what changes should be considered. Major empirical work on discovery costs and burdens – which are inextricably linked to pleading standards – is underway in preparation for a May 2010 conference at the Duke Law School hosted by the Civil Rules Committee. The Rules Committees will of course make the results of this work available to all.

Thank you for considering these comments and the information the Committees' work will produce.

We look forward to continuing to work with you on these issues, which are vital to the federal civil justice system that we are all dedicated to preserving and improving.

Sincerely,

Lee H. Rosenthal
Chair
Standing Committee on
Rules of Practice and Procedure



Mark R. Kravitz
Chair
Advisory Committee on Civil Rules

cc: Honorable Lamar S. Smith
Honorable Howard Coble

Identical letter sent to: Honorable John Conyers, Jr.

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

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CHAIR

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CRIMINAL RULES

ROBERT L. HINKLE
EVIDENCE RULES

March 23, 2010

Honorable John Conyers, Jr.
Chairman
Committee on the Judiciary
United States House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

This letter briefly comments on the "Open Access to Courts Act of 2009" (H.R. 4115) and the "Notice Pleading Restoration Act of 2009" (S. 1504) on behalf of the Judicial Conference Standing Committee on Rules of Practice and Procedure and the Advisory Committee on the Federal Rules of Civil Procedure. Both H.R. 4115 and S. 1504 would effectively amend the Rules of Civil Procedure that set the standard for pleading a cause of action and for dismissing a complaint because it fails to do so. The bills would affect Rule 12(b)(6), Rule 12(c), Rule 12(e), and Rule 8, other related rules, and statutes.

Both H.R. 4115 and S. 1504 recognize the important role of the Rules Committees of the Judicial Conference under the Rules Enabling Act (28 U.S.C. §§ 2071-2077) in drafting the procedural rules that apply in the federal courts, including the rules for pleadings and motions to dismiss. Seventy-five years ago, Congress enacted the Rules Enabling Act. The Act charged the judiciary with the task of neutral, independent, and thorough analysis of the rules and their operation. Congress designed the Rules Enabling Act rulemaking process in 1934 and reformed it in 1988 to produce the best rules possible by ensuring broad public participation and thorough review by the bench, the bar, and the academy. The internet has made this process truly transparent and inclusive. As recent experience with Civil Rules 26 and 56 has demonstrated, the Rules Committees are dedicated to obtaining the type of reliable empirical information

needed to enact rules that will serve the American justice system well and will not produce unintended harmful consequences. The different House and Senate bills demonstrate some of the difficulties in an area as fundamental and delicate as articulating the pleading standard for the many different kinds of cases filed in the federal courts.

The Civil Rules Committee and the Standing Committee are at this moment deeply involved in precisely the type of work Congress required in the Rules Enabling Act. The Committees, working with the Federal Judicial Center, are gathering and studying the information needed both to understand how Rule 8, Rule 12, and other affected rules – which have not been changed substantively since 1938 – have in fact worked since the Supreme Court decided *Twombly* and *Iqbal* and to consider changes to the text of these rules and other related rules.

At the request of the Civil Rules Committee, the law clerk for the Chair of the Standing Committee wrote a memorandum describing the case law since *Iqbal* was decided. That memorandum sets out circuit court opinions issued to date that examine *Iqbal* or discuss how district courts are to apply *Iqbal* to different kinds of cases, and sets out many district court opinions discussing *Iqbal*. The memorandum is attached in a separate bound volume and is also available on the Rules Committees' website.[1] The memorandum will be regularly updated as additional cases are decided, and the updates will be posted on the Rules Committees' website as well.

Charts and graphs setting out preliminary data from the federal courts' dockets on the filing, granting, and denying of motions to dismiss after *Twombly* and *Iqbal* are also on the Rules Committees' website.[2] This data will be updated periodically, and those updates will be posted on that website. The Federal Judicial Center is gathering more detailed data on motions to dismiss, which will also be made available.

The Center has recently completed a survey of attorneys on the impact on their practice of *Twombly* and *Iqbal*.[3] One finding from that survey was "[m]ost plaintiff attorneys indicated that there had been no impact on their practice, explaining that for a variety of reasons. . . . they do not use notice pleading in their practice and have always satisfied the standards laid out in the *Twombly/Iqbal* line of cases." (See survey, page 25.) As part of a study of Attorney Satisfaction with the Federal Rules of Civil Procedure, the Center also surveyed members of the National Employment Lawyers Association, a predominately plaintiff employment lawyers group.[4] The work of the Center continues and will be posted on the website.

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[1] http://www.uscourts.gov/rules/Memo%20re%20pleading%20standards%20by%20circuit.pdf

[2] http://www.uscourts.gov/rules/Motions%20to%20Dismiss.pdf

[3] http://www.fjc.gov/public/pdf.nsf/lookup/costciv3.pdf/$file/costciv3.pdf

[4] http://www.fjc.gov/public/pdf.nsf/lookup/costciv2.pdf/$file/costciv2.pdf

Even before *Iqbal*, the Rules Committees had begun a thorough reexamination of how pleading and discovery are actually working in federal cases and what changes should be considered. Major empirical work on discovery costs and burdens – which are inextricably linked to pleading standards – is underway in preparation for a May 2010 conference at the Duke Law School hosted by the Civil Rules Committee. The Rules Committees will of course make the results of this work available to all.

Thank you for considering these comments and the information the Committees' work will produce.

We look forward to continuing to work with you on these issues, which are vital to the federal civil justice system that we are all dedicated to preserving and improving.

Sincerely,

Lee H. Rosenthal
Chair
Standing Committee on
Rules of Practice and Procedure

Mark R. Kravitz
Chair
Advisory Committee on Civil Rules

cc: Honorable Lamar S. Smith
Honorable Howard Coble

Identical letter sent to: Honorable Henry C. "Hank" Johnson, Jr.

LEGISLATION AFFECTING THE FEDERAL RULES OF PRACTICE AND PROCEDURE[1]
111th Congress

SENATE BILLS

- S. 61 - *Helping Families Save Their Homes in Bankruptcy Act of 2009*
  - Introduced by: Durbin
  - Date Introduced: 1/6/09
  - Status: Referred to the Senate Committee on the Judiciary (1/6/09).
  - Related Bills: H.R. 200, H.R. 225
  - Key Provisions:

    —The legislation would authorize bankruptcy courts to modify both the interest and principal amount due on a mortgage on a debtor's principal residence. It would also require the mortgage lender to give notice to the debtor and the court of certain fees and charges incurred during the pendency of a Chapter 13 bankruptcy proceeding, and eliminate the pre-petition credit counseling requirement for chapter 13 filers facing foreclosure. (Under current law, a mortgage on a debtor's principal residence cannot be modified by a bankruptcy court.) The proposal to prohibit the addition of fees without notice to the court addresses situations in which lenders have added to the balances of mortgages fees that were imposed during the Chapter 13 proceedings, but without notice to the debtor or bankruptcy trustee.

S. 445- *Attorney-Client Privilege Protection Act of 2009*
  - Introduced by: Specter
  - Date Introduced: 2/13/09
  - Status: Read twice and referred to the Senate Committee on the Judiciary (2/13/09).
  - Related Bills: None
  - Key Provisions:

    — Section 3 amends **18 U.S.C. Chapter 201** by adding a new § 3014 that prohibits a federal agent or attorney in a federal investigation, civil enforcement matter, or criminal proceeding from demanding from an organization attorney-client privilege or work product protection materials. Section 3 also prohibits the government from basing its decision to file a charging document in a civil or criminal case on whether: (1) the attorney-client privilege or work product protection is asserted; (2) the organization provides counsel or pay attorney's fees

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[1]The Congress has authorized the federal judiciary to prescribe the rules of practice, procedure, and evidence for the federal courts, subject to the ultimate legislative right of the Congress to reject, modify, or defer any of the rules. The authority and procedures for promulgating rules are set forth in the Rules Enabling Act. 28 U.S.C. §§ 2071-2077.

for counsel appointed to represent an employee of the organization; (3) the organization enters into a joint defense, information sharing, or common-interest agreement with an employee in an investigation or enforcement matter; (4) the sharing of information with an employee in relation to an investigation or enforcement matter involving that employee; and (5) the organization fails to terminate an employee because that employee invoked his or her fifth amendment right against self incrimination or other legal right in response to a government request. Section 3 also states that it does not prohibit an organization from voluntarily offering to share "internal investigation materials of such organization."

- S. 446 - *To Permit the Televising of Supreme Court Proceedings*
  - Introduced by: Specter
  - Date Introduced: 2/13/09
  - Status: Referred to the Senate Committee on the Judiciary (2/13/09). Reported favorably without amendment (4/29/10).
  - Related Bills: H.R. 429
  - Key Provisions:

    — Section 1 amends **28 U.S.C. Chapter 45** by inserting a new section 678 requiring the Supreme Court to permit television coverage of all open sessions of the Court unless the unless the Court decides, by a majority vote of all justices, that allowing such coverage in a particular case would violate the due process rights of one or more of the parties.

- S. 448 - *Free Flow of Information Act of 2009*
  - Introduced by: Specter
  - Date Introduced: 2/13/09
  - Status: Read twice and referred to the Senate Committee on the Judiciary (2/13/09). Committee on the Judiciary ordered to be reported favorably with amendments (12/10/2009). Senator Leahy reported with an amendment in the nature of a substitute, without written report (12/11/2009). Placed under General Orders on Senate Legislative Calendar [Calendar No. 225] (12/11/2009).
  - Related Bills: H.R. 985
  - Key Provisions:

    — Section 2 provides that a federal entity may not compel a "covered person" to testify or produce documents in any proceeding unless a court determines by a preponderance of the evidence that: (1) the party seeking the information has exhausted all reasonable alternative sources for the information; (2) in a criminal matter, there are reasonable grounds to believe that a crime has occurred, that the testimony or document sought is essential to the investigation, prosecution, or defense, and any unauthorized disclosure has caused significant, clear, and articulable harm to national security; (3) in a non-criminal matter, the testimony or document sought is essential to the successful completion of that matter; and (4)

nondisclosure of the information be contrary to public interest. The content of any testimony or document compelled under this section must be: (1) limited to the purpose of verifying published information or describing surrounding circumstances relevant to the accuracy of the published information, and (2) be narrowly tailored in subject matter and period of time so as to avoid compelling production of peripheral, nonessential, or speculative information.

— Section 2 does not apply to information obtained as a result of eyewitness observations of criminal conduct or commitment of criminal or tortious conduct by the covered person; information necessary to prevent or mitigate death, kidnaping, or substantial bodily harm; and information that a federal court has found by a preponderance of the evidence that would assist in preventing acts of terrorism in the United States or significant harm to national security.

- S. 537 - *Sunshine in Litigation Act of 2009*
  - Introduced by: Kohl
  - Date Introduced: 3/5/09
  - Status: Read twice and referred to the Senate Committee on the Judiciary (3/5/09).
  - Related Bills: H.R. 1508
  - Key Provisions:

    — Section 2 amends **28 U.S.C. Chapter 111** by inserting a new section 1660. New section 1660 provides that a court shall not enter an order pursuant to Civil Rule 26(c) that (1) restricts the disclosure of information through discovery, (2) approves a settlement agreement that would limit the disclosure of such agreement, or (3) restricts access to court records in a civil case unless the court makes findings of fact that: (A) such order would not restrict the disclosure of information which is relevant to the protection of public health or safety; or (B)(i) the public interest in the disclosure of potential health or safety hazards is outweighed by a specific and substantial interest in maintaining the confidentiality of the information or records in question; and (ii) the requested protective order is no broader than necessary to protect the privacy interest asserted.
    — Section 2 also provides: (1) there is a rebuttable presumption that the interest in protecting a person's financial, health, or other similar information outweighs the public interest in disclosure, and (2) the bill must not be construed to permit, require, or authorize the disclosure of classified information.]
    — Section 3 states that the Act takes effect 30 days after enactment or applies only to orders entered in civil actions or agreements entered into on or after the effective date.

- S. 603 - *Frivolous Lawsuit Prevention Act of 2009*
  - Introduced by: Grassley
  - Date Introduced: 3/16/09
  - Status: Read twice and referred to the Senate Committee on the Judiciary (3/16/09).
  - Related Bills: None

- Key Provisions:

  — Section 2 amends directly amends Civil Rule 11 by: (1) making the imposition of sanctions mandatory if the court determines subdivision (b) has been violated; (2) deleting current Rule 11(c)(4), which describes the nature of the sanction, and substituting the following, "[a] sanction imposed for violation of this rule may consist of reasonable attorneys' fees and other expenses incurred as a result of the violation, directives of a nonmonetary nature, or an order to pay penalty into court or to a party"; and (3) amending Rule 11(c)(5) by making it explicit that monetary sanctions may be awarded against a party's attorney:

- S. 630 - *Statutory Time-Periods Technical Amendments Act of 2009*
  - Introduced by: Leahy
  - Date Introduced: 3/18/09
  - Status: Read twice and referred to the Senate Committee on the Judiciary (3/18/09).
  - Related Bills: H.R. 1626
  - Key Provisions:

    — The legislation makes changes to 28 separate statutory provisions to conform to the time computation rules amendments scheduled to take effect on December 1, 2009. The amendments made to the statutory deadlines take effect on December 1, 2009.

S. 657 - *Sunshine in the Courtroom Act of 2009*
- Introduced by: Grassley
- Date Introduced: 3/19/09
- Status: Read twice and referred to the Senate Committee on the Judiciary (3/19/09). Reported favorably without amendment (4/29/10).
- Related Bills: H.R. 3054
- Key Provisions:

  — Section 2 authorizes the presiding judge of an appellate court to permit the photographing, electronic recording, broadcasting, or televising of any public proceeding over which the judge presides. The presiding judge, however, may not permit the above: (1) in a proceeding involving only the presiding judge if that judge determines that the action would violate the due process rights of any party, or (2) in a proceeding involving more than one judge, a majority of judges determines that the action would violate the due process rights of any party. Section 2 also authorizes the presiding judge of a district court to permit the photographing, electronic recording, broadcasting, or televising of any public proceeding over which the judge presides. Upon request of any witness in a trial proceeding, the court must order that the face and voice of the witness be disguised. The presiding judge in a trial must inform each witness who is not a party that he or she has the right to request that his or her image or voice may be disguised. The presiding judge must not permit the televising of any juror in a trial.

The Judicial Conference may issue advisory guidelines on the broadcast of court proceedings.

Section 2 contains a sunset provision that terminates the authority of a district court judge to allow the broadcast of district court proceedings three years after enactment of the Act.

[On March 6, 2008, the Senate Judiciary Committee approved S. 352 by a vote of 10-8 after adopting several amendments to the bill: (1) the presiding judge must October 7, 2008 not allow camera coverage if the judge determines that it would violate the due process rights of any party; (2) the Judicial Conference must promulgate mandatory guidelines on shielding certain witnesses from camera coverage, including crime victims, families of crime victims, cooperating witnesses, undercover law enforcement officers, witnesses relating to witness relocation and protection, or minors under the age of 18; and (3) nothing in the bill limits the inherent authority of a court to protect witnesses, preserve the decorum and integrity of the legal process, or protect the safety of an individual. An amendment to remove the district courts from the legislation was defeated by a tie vote of 9-9].

- S. 1504 - *Notice Pleading Restoration Act of 2009*
  - Introduced by: Specter
  - Date Introduced: 7/22/09
  - Status: Read twice and referred to the Senate Committee on the Judiciary (7/22/09).
  - Related Bills: H.R. 4115
  - Key Provisions:

    — Section 2 provides that "[e]xcept as otherwise expressly provided by an Act of Congress or by an amendment to the Federal Rules of Civil Procedure which takes effect after the date of enactment of this Act, a Federal court shall not dismiss a complaint under rule 12(b)(6) or (e) of the Federal Rules of Civil Procedure, except under the standards set forth by the Supreme Court of the United States in *Conley v. Gibson*, 355 U.S. 41 (1957)." (The legislation effectively overrules the Supreme Court's recent decisions in *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal* re the pleading standards under Federal Rule of Civil Procedure 8.)

HOUSE BILLS

- H.R. 200 - *Helping Families Save Their Homes in Bankruptcy Act of 2009*
  - Introduced by: Conyers
  - Date Introduced: 1/06/09
  - Status: Referred to the House Committee on the Judiciary (1/609). Committee held hearings (1/22/09). Committee held mark-up session, adopted substitute, and reported

favorably by a vote of 21-15 (1/27/09). House passed H.R. 1106 by a vote of 234-191, a bill that included provisions of H.R. 200 (3/5/09).

• Related Bills: H.R. 225, S. 61

• Key Provisions:

—The legislation would authorize bankruptcy courts to modify both the interest and principal amount due on a mortgage on a debtor's principal residence. It would also require the mortgage lender to give notice to the debtor and the court of certain fees and charges incurred during the pendency of a Chapter 13 bankruptcy proceeding, and eliminate the pre-petition credit counseling requirement for chapter 13 filers facing foreclosure. (Under current law, a mortgage on a debtor's principal residence cannot be modified by a bankruptcy court.) The proposal to prohibit the addition of fees without notice to the court addresses situations in which lenders have added to the balances of mortgages fees that were imposed during the Chapter 13 proceedings, but without notice to the debtor or bankruptcy trustee.

- H.R. 429 - *To Permit the Televising of Supreme Court Proceedings*

• Introduced by: Poe

• Date Introduced: 1/9/09

• Status: Referred to the House Committee on the Judiciary (1/9/09).

• Related Bills: S. 446

• Key Provisions:

— Section 1 amends **28 U.S.C. Chapter 45** by inserting a new section 678 requiring the Supreme Court to permit television coverage of all open sessions of the Court unless the unless the Court decides, by a majority vote of all justices, that allowing such coverage in a particular case would violate the due process rights of one or more of the parties.

- H.R. 985 - *Free Flow of Information Act of 2009*

• Introduced by: Boucher

• Date Introduced: 2/11/09

• Status: Read twice and referred to the House Committee on the Judiciary (2/11/09). Mark up session held and House Judiciary Committee reported bill (3/25/09). H. Rept No. 111-61 filed (3/25/09). House passed by voice vote (3/31/09). Received in Senate and referred to Senate Committee on the Judiciary (4/1/09).

• Related Bills: S. 448

• Key Provisions:

— Section 2 provides that a federal entity may not compel a "covered person" to testify or produce documents in any proceeding unless a court determines by a preponderance of the evidence that: (1) the party seeking the information has exhausted all reasonable alternative sources for the information; (2) in a criminal matter, there are reasonable grounds to believe that a crime has occurred and that the testimony or document sought is essential to the investigation, prosecution, or defense; (3) in a non-criminal matter, the testimony or document sought is

essential to the successful completion of that matter; (4) in any matter in which the testimony or document sought could reveal the source's identity, disclosure is necessary to: (a) prevent imminent and substantial harm to national security, (b) prevent imminent death or significant bodily injury, or (c) determine who has disclosed a trade secret of significant value in violation of state or federal law, individually identifiable health information, or nonpublic personal information of any consumer in violation of federal law; and (5) nondisclosure of the information be contrary to public interest. Section 2 also requires that compelled disclosure of testimony or documents be limited and narrowly drawn.

- H.R. 1508- *Sunshine in Litigation Act of 2009*
  - Introduced by: Wexler
  - Date Introduced: 3/12/09
  - Status: Read twice and referred to the House Committee on the Judiciary (3/12/09). House Subcommittee on Commercial and Administrative Law held hearing (6/04/09).
  - Related Bills: S. 537
  - Key Provisions:

    — Section 2 amends **28 U.S.C. Chapter 111** by inserting a new section 1660. New section 1660 provides that a court shall not enter an order pursuant to Civil Rule 26(c) that (1) restricts the disclosure of information through discovery, (2) approves a settlement agreement that would limit the disclosure of such agreement, or (3) restricts access to court records in a civil case unless the court makes findings of fact that: (A) such order would not restrict the disclosure of information which is relevant to the protection of public health or safety; or (B)(i) the public interest in the disclosure of potential health or safety hazards is outweighed by a specific and substantial interest in maintaining the confidentiality of the information or records in question; and (ii) the requested protective order is no broader than necessary to protect the privacy interest asserted.

    — Section 2 also provides: (1) there is a rebuttable presumption that the interest in protecting a person's financial, health, or other similar information outweighs the public interest in disclosure, and (2) the bill must not be construed to permit, require, or authorize the disclosure of classified information.]

    — Section 3 states that the Act takes effect 30 days after enactment or applies only to orders entered in civil actions or agreements entered into on or after the effective date.

- H.R. 1626 - *Statutory Time-Periods Technical Amendments Act of 2009*
  - Introduced by: Johnson
  - Date Introduced: 3/19/09
  - Status: Read twice and referred to the House Committees on the Judiciary, and Energy and Commerce (3/19/09). Passed House by voice vote (4/22/09). Passed Senate (4/27/09). Presented to President (4/30/09). Signed into law (5/07/09).
  - Related Bills: S. 630
  - Key Provisions:

— The legislation makes changes to 28 separate statutory provisions to conform to the time computation rules amendments scheduled to take effect on December 1, 2009. The amendments made to the statutory deadlines take effect on December 1, 2009.

- H.R. 3054 - *Sunshine in the Courtroom Act of 2009*
  - Introduced by: Delahunt
  - Date Introduced: 6/25/09
  - Status: Read twice and referred to the House Committee on the Judiciary (6/25/09). Referred to the House Subcommittee on Courts and Competition Policy (7/23/09).
  - Related Bills: S. 657
  - Key Provisions:

  — Section 2 authorizes the presiding judge of an appellate court to permit the photographing, electronic recording, broadcasting, or televising of any public proceeding over which the judge presides. The presiding judge, however, may October 7, 2008 not permit the above: (1) in a proceeding involving only the presiding judge if that judge determines that the action would violate the due process rights of any party, or (2) in a proceeding involving more than one judge, a majority of judges determines that the action would violate the due process rights of any party.

  Section 2 also authorizes the presiding judge of a district court to permit the photographing, electronic recording, broadcasting, or televising of any public proceeding over which the judge presides. Upon request of any witness in a trial proceeding, the court must order that the face and voice of the witness be disguised. The presiding judge in a trial must inform each witness who is not a party that he or she has the right to request that his or her image or voice may be disguised. The presiding judge must not permit the televising of any juror in a trial. The Judicial Conference may issue advisory guidelines on the broadcast of court proceedings.

  Section 2 contains a sunset provision that terminates the authority of a district court judge to allow the broadcast of district court proceedings three years after enactment of the Act.

- H.R. 4115 - *Open Access to Courts Act of 2009*
  - Introduced by: Nadler
  - Date Introduced: 11/19/09
  - Status: Read twice and referred to the House Committee on the Judiciary (11/19/09). Referred to the Subcommittee on Courts and Competition Policy (12/11/09).
  - Related Bills: S. 1505
  - Key Provisions:

    — Section 2 amends 28 U.S.C. Chapter 131 to prohibit a court from dismissing a complaint: (1) unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim which would entitle the plaintiff to relief; or (2) on the basis of a determination by the judge that the factual contents of the complaint

do not show the plaintiff's claim to be plausible or are insufficient to warrant a reasonable interference that the defendant is liable for the misconduct alleged.

- H.R. 4513 – *Job Creation Act of 2010*
  - Introduced by: Buchanan
  - Date introduced: 1/26/2010
  - Status: Referred to House Judiciary Committee, Ways and Means Committee, and Financial Services Committee (1/26/2010).
  - Related Bills: None.
  - Key Provisions:

  — Title II directly amends Rule 11 of the Federal Rules of Civil Procedure (Sanctions for Filing a Frivolous Lawsuit) by: (1) making mandatory a court's award of reasonable expenses, including attorney's fees, to prevailing parties under Rule 11 claims; (2) eliminating the 21-day period allowed for withdrawing or correcting frivolous claims; (3) requiring state courts to apply Rule 11 sanctions to actions that substantially affect interstate commerce; (4) prohibiting courts from ordering nondisclosure of Rule 11 records unless there is a specific finding of fact made by the court to justify said order.

  —Title II limits venue for personal injury claims in both state and federal court to the county or district: (1) in which either party resides; (2) in which the plaintiff resided at the time of the claimed injury; (3) in which the claimed injury or circumstances giving rise to the injury occurred; or (4) in which the defendant's principal place of business is located

  —Title II creates additional sanctions for: (1) repeatedly re-litigating the same issue, and creates a rebuttable presumption that presenting a pleading, written motion, or other paper is in violation of Rule 11; (2) willfully and intentionally destroying documents in a pending Federal proceeding; (3) attorneys who commit multiple Rule 11 violations, and subjecting the attorneys to a "3-strike" rule and granting the court suspension authority.

- H.R. 5069 - *Fair Payment of Court Fees Act of 2010*
  - Introduced by: Johnson
  - Date Introduced: 4/20/10
  - Status: Read twice and referred to the House Committee on the Judiciary (4/20/10).
  - Related Bills: None
  - Key Provisions:

  — Section 2 amends Civil Rule 68(d) by giving a court the authority to waive payment of costs incurred after the offer of judgment was made if the court determines that it would be in the interests of justice to do so.

  — Section 3 amends Appellate Rule 39 by adding a new subdivision (f) that provides: "Waiver of Costs for Certain Appeals- The court shall order a waiver of costs if the court determines that the interest of justice justifies such a waiver. For the purpose of making such a determination, the interest of justice includes the establishment of constitutional or other important precedent."

SENATE RESOLUTIONS

- S.J. Res. 339 - *A resolution expressing the sense of the Senate in support of permitting the televising of Supreme Court proceedings*
    - Introduced by: Specter
    - Date Introduced: 11/5/09
    - Status: Referred to the Senate Committee on the Judiciary (11/5/09).
    - Related Bills: S. 446
    - Key Provisions:

HOUSE RESOLUTIONS

TAB

3B

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

JAMES C. DUFF
Director

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
Chief

Rules Committee Support Office

May 18, 2010

MEMORANDUM TO THE STANDING COMMITTEE

SUBJECT: *Report of the Administrative Actions Taken by the Rules Committee Support Office*

The following report briefly describes administrative actions and some major initiatives undertaken by the Rules Committee Support Office to improve its support service to the rules committees.

2010 Conference

The Civil Rules Committee hosted the 2010 Civil Litigation Conference on May 10-11, 2010, at Duke University School of Law in Durham, North Carolina. The conference brought together nearly 200 distinguished judges, private lawyers, corporate counsels, government attorneys, law professors, congressional staff, members of the press, and others to discuss the future of civil litigation in the United States.

To meet the demand for access to the conference, the proceedings were broadcast on closed-circuit television and streamed live on the internet via webcasts posted on Duke's website and the Judiciary's *Federal Rulemaking* website. In addition, many of the 70 panelists submitted papers in support of their presentations, which were posted on a website specifically designed and created for the 2010 Conference. Video clips of the conference have also been posted on the rules website.

Federal Rulemaking Website

On May 17, 2010, the judiciary's Federal Rulemaking website was completely redesigned, making it easier to use, navigate, and search for rules-related records. The redesigned website also includes new content and new functionality. Some of the enhancements include automatic delivery of significant content updates by email or RSS feeds; multimedia content (podcasts, webcasts, video clips, photos, and a link to the Judiciary's YouTube channel); "widgets" (which adds dynamic content); and a "read-aloud" service for the visually impaired.

We also posted on the web site almost 200 comments and requests to testify submitted on the proposed rules amendments published for comment in August 2009. The comments and requests are posted at
http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/comments0808.html

Committee and Subcommittee Meetings

For the period from December 2009 to May 2010, the office staffed numerous rules-related meetings, conferences, and a hearing, including one Standing Committee meeting, five advisory rules committee meetings, the 2010 Civil Litigation Conference, a public hearing on proposed Bankruptcy Rules amendments, a subcommittee meeting, a mini-conference on Criminal Rule 16, a mini-conference on privacy issues, a meeting of the Bankruptcy Forms Modernization Working Group, and a meeting of the informal working group on mass torts. We also arranged and participated in numerous conference calls involving rules subcommittees.

Miscellaneous

Rules Approved by the Supreme Court. On April 28, 2010, the Supreme Court approved the package of proposed rules amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure, and the Federal Rules of Evidence, as approved by the Judicial Conference at its September 2009 session. The Court recommitted the proposed amendment to Criminal Rule 15 to the Advisory Committee on Criminal Rules for further study. The approved amendments, which include the proposed amendments to Civil Rules 26 and 56, will take effect on December 1, 2010, unless Congress enacts legislation to reject, modify, or defer the amendments.

James N. Ishida

JAMES C. DUFF
Director

JILL C. SAYENGA
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May 24, 2010

MEMORANDUM TO THE STANDING COMMITTEE

SUBJECT: *Time Changes in Local Rules*

By memorandum dated May 1, 2009, Judge Rosenthal advised the chief judges of United States courts of the national time-computation amendments effective December 1, 2009. The memorandum pointed out that "[t]he amended rules will affect some local rules and standing orders, especially those that set short deadlines. To maintain consistency with the national rules and to avoid confusion, we ask courts to review their local rules and standing orders and make necessary adjustments. . . . Local provisions that are designed to fit with a period stated in the federal rules should be adjusted consistent with the federal rule changes."

At the request of the Standing Committee, this office – with the able help of student interns Heather Williams and Jessica Ritsick – has reviewed all of the courts' local rules in order to determine (1) how many courts have updated their local rules in light of the time-computation amendments effective December 1, 2009, and (2) how many local rules remain that contain time deadlines inconsistent with those set forth in the time-computation amendments. Specifically, we reviewed the local rules of the courts of appeals for consistency with the time changes to the Federal Rules of Appellate Procedure; the local rules of the district courts for consistency with the time changes to the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure; and the local rules of the bankruptcy courts for consistency with the time changes to the Federal Rules of Bankruptcy Procedure.

In general, we found that the overwhelming majority of courts have updated their local rules in light of the time-computation amendments. Even among the few courts that have not updated their local rules, there nevertheless remain only a small handful of local rules provisions that arguably may be inconsistent with the new time deadlines. In other words, we found that most sets of local rules that have not been updated do not contain any time deadlines inconsistent with the national time amendments.

Federal Rules of Appellate Procedure. All 13 of the circuits (including the Federal Circuit) have updated their local rules to mirror the national time-computation changes. We found no local circuit rule that retained a time deadline inconsistent with the December 1, 2009 time changes in the national rules.

Federal Rules of Civil Procedure. We found that 88 of the 94 district courts have updated their local rules to mirror the national time-computation changes in the Civil Rules. We found 3 districts that have not amended their local rules to mirror the national time changes in the Civil Rules. In addition, we found 3 districts that are currently in the process of amending their rules.

Among the 94 courts, we found only one local rule that may arguably be inconsistent with the time changes in the national Civil Rules.

We have provided the chair and reporter of the Advisory Committee on Civil Rules with more detailed information about the courts that have not updated their local rules.

Federal Rules of Criminal Procedure. We found that 87 of the 94 district courts have updated their local rules to mirror the national time-computation changes in the Criminal Rules. We found 4 districts that have not amended their local rules to mirror the national time changes in the Criminal Rules. In addition, we found 3 districts that are currently in the process of amending their rules.

Among the 94 courts, we found no local rule that retained a time deadline inconsistent with the December 1, 2009 time changes in the national Criminal Rules.

We have provided the chair and reporter of the Advisory Committee on Criminal Rules with more detailed information about the courts that have not updated their local rules.

Federal Rules of Bankruptcy Procedure. We found that 78 of the 92 districts that have local bankruptcy rules have updated their local rules to mirror the national time-computation changes in the Bankruptcy Rules (two districts, C.D. Ill. and S.D. Iowa, do not appear to have local bankruptcy rules). We found 9 districts that have not amended their local rules to mirror the national time changes in the Bankruptcy Rules. In addition, we found 5 districts that are currently in the process of amending their rules.

Among the 92 courts, we found only 5 local rules in three districts that arguably may be inconsistent with the national rules.

We have provided the chair and reporter of the Advisory Committee on Bankruptcy Rules with more detailed information about the courts that have not updated their local rules.

Jeffrey N. Barr

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Agenda Item 4
Committee on Rules of
Practice and Procedure
June 2010
Informational

Federal Judicial Center Activities

The Federal Judicial Center is pleased to provide this report on education and research activities since the Committee's last meeting.

I. Education

A. Education for Federal Judges

Orientations Programs. The Center held Phase I Orientations for district (1 orientation), bankruptcy (1 orientation), and magistrate judges (2 orientations).

Workshops and Conferences. The Center conducted one multi-subject national workshop each for district, bankruptcy, and magistrate judges. The Center also held conferences for chief district judges and chief bankruptcy judges.

Special-focus Programs. The Center produced six special focus seminars (with co-sponsors, identified in parentheses): employment law (New York University Law School), law and genetics (Stanford Law School), intellectual property (Berkeley Center for Law and Technology), law and neuroscience (with the Gruter Institute at Harvard Law School), law and terrorism (Duke Law School), and law and society (Harvard Law School).

Selected sessions at national workshops and special focus programs for judges are digitally recorded (audio only). These recordings are available at FJC Online (http://cwn.fjc.dcn).

In-Court Programs. The Center provided six in-court judicial programs for federal judges, on the request of individual districts three on the writing and editing of opinions, and three on early U.S. history.

Programs for Judges and Court Staff Together. Programs for judges and staff together included one executive team development program for chief district judges and the clerks of court, and one for chief bankruptcy judges and clerks of court; two strategic planning workshops—one for district courts and one for bankruptcy courts; and an information technology training-for-trainers workshop for teams of judges and court staff designed to teach district personnel how to help judges use IT to perform judicial functions.

Publications and Web-based Materials on FJC Online. The Center recently published *Immigration Law: A Primer* and will soon publish a revised (sixth) edition of the *Manual on Recurring Problems in Criminal Trials*. An updated version of *National Security Cases: Special Case Management Challenges* is available electronically on FJC Online. The Center also added a new FJC Online site on Legal Issues in Pandemic-Related Litigation. An outline of recent case law developments in bankruptcy litigation has been updated and posted on FJC Online.

B. Legal Education for Court Attorneys and Law Clerks

The Center held: a conference for federal defender administrators; a national seminar for federal defenders; a seminar for federal defender investigators & paralegals; and a workshop for appellate staff attorneys. The Center funded three career law clerks to attend the judicial clerkship institute program at Pepperdine Law School in March.

C. Education for Court Staff

National and Regional Programs. The Center held national and regional programs for court staff, including: an institute for chief deputy clerks, deputy chief probation and pretrial

services officers and circuit staff in comparable positions; a workshop for new court managers and supervisors; a workshop for experienced managers and supervisors; and a workshop for court executives in large districts on managing in the "mega" court environment.

Programs for probation and pretrial services officers included: an executive team seminar for chiefs and deputy chiefs; three experienced supervisors seminars, and one building outstanding supervisors program for newly appointed probation and pretrial services supervisors.

In-Court Programs. Courts held seventy five in-court programs using Center developed curricula and trained faculty. The most frequently used packaged programs were code of conduct, sexual harassment, and time management. In addition, thirty two probation and pretrial services officers and eighteen clerks of court enrolled in the foundations of management self-study program.

Technology-based Programs. To complement the national and regional travel-based programs mentioned above, the Center conducted eighteen web conferences for clerk's office staff and probation and pretrial services officers. Also, twelve newly appointed probation and pretrial services chiefs participated in an audio conference in April.

D. Training and Curriculum Development in Support of Judicial Conference Policies and Administrative Office Programs

The Center collaborates with or assists the AO on programs, including

- *Court Compensation Study Implementation.* The AO and the FJC jointly conducted three web conferences in December 2009 to follow up on the series of Performance Management training-for-trainers (T4T) programs conducted earlier in the year. In January the eighth Performance Management T4T in the series was attended by thirty one participants representing all court units.

- *Appropriations Law for Certifying Officers in the U.S. Courts.* The Center designed the curriculum for this program on appropriations law for court unit executives and their deputies.
- *Evidenced-Based Practices (EBP) Working Group.* The Center participated in the AO's EBP working group, developing polices and guidance for probation and pretrial services offices to use in implementing EBP. The AO and FJC will conduct training workshops on EBP.
- *National Space and Security Training Program.* The FJC has worked the AO and court staff on the to develop a space and security program for court unit executives and facility officials. The first program (pilot) was delivered in the fall of 2009. The program is scheduled to be delivered to all circuits by the end of fiscal year 2011.

E. Federal Judicial Television Network (FJTN) and Video Programs for Judges and Staff

Eight videos were produced and broadcast on the Federal Judicial Television Network and streamed on FJC Online: *A Review of Eight Circuit Bankruptcy Decisions* (2010); *A Review of Ninth Circuit Bankruptcy Decisions* (2009); *A Review of Fourth Circuit Bankruptcy Decisions* (2009); *A Discussion with Four Judicial Conference Committee Chairs*; *Habeas Corpus Review of Capital Cases*; *Defendant/Offender Workforce Development for U.S. Probation & Pretrial Services Chiefs and Managers; Defendant/Offender Workforce Development for U.S. Probation and Pretrial Services Officers;* and *FJC Resources for Probation and Pretrial Services.*

II. Research

Surveys of Attorneys and Bar Groups Regarding Discovery and Related Costs of Civil Litigation. The Center completed surveys of attorneys in support of the Advisory Civil Rules Committee's recent May 2010 conference on discovery and the related costs of federal civil

litigation. Center staff designed and conducted a case-based civil rules survey of a large sample of attorneys listed as counsel in federal civil cases terminated in the last quarter of 2008. The second survey was conducted of attorneys in the Litigation Section of the American Bar Association and the third involved members of the National Employment Lawyers Association. The reports of the survey results have been presented to the Civil Rules Committee and copies have been posted on FJC Online. The Center's survey-related findings helped to inform the discussions at the May conference held at the Duke University Law School.

Update of Center's 2004 Resource Guide to Managing State Habeas Cases. The Center updated this on-line resource guide for judges that covers management of federal habeas corpus review of state and federal capital convictions. The update includes a summary of relevant law and current case management procedures used by federal courts in these cases.

Evaluation of Pilot Public Access to Digital Audio Records of Court Proceedings via PACER. The Committee on Court Administration and Case Management (CACM) asked the Center to evaluate the experiences of courts that permit public access via PACER to the audio recordings of court proceedings. The Center completed interviews with judges who have had requests to have the audio of proceedings posted on-line to permit public access via PACER. The Center's final research report was presented to CACM at its winter 2009 meeting.

Research for the Privacy Subcommittee of the Committee on the Rules of Practice and Procedure. The Center completed a survey of a sample of district, magistrate, and bankruptcy judges and clerks of court, as well as a sample of attorneys, regarding the privacy rules and how they are working. The survey results were discussed at a recent conference on privacy and access to federal court files sponsored by the Privacy Subcommittee at the Fordham University School of Law. The Center also completed an examination of a sample of documents

filed in the federal courts to determine whether individual Social Security numbers have been properly redacted.

Update of the Judicial Conference's Civil Litigation Management Manual. Along with staff of the Administrative Office and under the direction of the Committee on Court Administration and Case Management, the Center completed an update of the *Civil Litigation Management Manual,* which was last issued by the Judicial Conference in 2001. The first version of this manual, the *Manual for Litigation Management and Cost and Delay Reduction*, was published by the Center in 1992. This manual has its origin in the Civil Justice Reform Act of 1990, which directs the Judicial Conference, with the assistance of the Administrative Office and the Federal Judicial Center, to "prepare, periodically revise, and transmit to the United States district courts a Manual for Litigation Management."

Sealed Cases Subcommittee Report. The Center concluded a study of completely sealed cases in the federal district courts, bankruptcy courts, and courts of appeals. The study was conducted for the Subcommittee on Sealed Cases of the Committee on Rules of Practice and Procedure. The study examined what types of cases are sealed; it did not entail examination of matters under seal. The Center's report, *Sealed Cases in the Federal Courts*, was submitted to the subcommittee and has been posted on FJC Online.

Study of Amicus Filings by Native American Tribes in the Appellate Courts. At its fall 2009 meeting, the Advisory Committee on the Appellate Rules asked the Center to study amicus filings in the courts of appeals and in several selected districts to determine whether and how often Native American tribes seek leave to file amicus briefs. The Committee has under consideration a proposal that federally recognized Native American tribes should be treated the

same as states for purposes of amicus filings under Fed. R. App. P. 29. The Center's findings were presented at the Committee's spring meeting.

Pocket Guide on Oversight of Protective Orders and Stipulations to Seal Documents. The Civil Rules Committee has asked the Center to produce a pocket guide for judges to fill some of the gaps between case law and the current provisions of Fed. R. Civ. P. 26(c). The pocket guide will also identify best practices for managing protective orders and agreements to seal documents that may affect public health and safety or other public interests.

Bankruptcy Courtroom Use Study. As noted in the Center's last report, as an addition to the FJC's research and report on the scheduling and use of courtrooms in the district courts, the Center was asked by CACM to undertake a similar study of courtroom use in the bankruptcy courts. The study is on schedule. Collection of data on courtroom scheduling and actual use concluded this past April. The Center's final study report is scheduled to be delivered to CACM by the end of 2010.

Bankruptcy Case-weighting Study. The Center's multi-year study to generate new statistical case weights for the bankruptcy courts is on schedule and near completion. The final results of the study will be considered by the Bankruptcy Committee at its upcoming June 2010 meeting.

Study of Case-budgeting Pilot Program in the Second, Sixth, and Ninth Circuits. The Center's evaluation of the Judicial Conference authorized pilot program on case-budgeting for the defense in capital cases in the three circuits continues on schedule. Most recently, the Center completed surveys of the judges in the 3 circuits as well as a sample of attorneys to get their views of the program. The final report is scheduled to be delivered this fall to the Defender Services Committee.

Study of Fed. R. Civ. P. 12: Motions for More Definite Statement and Motions to Dismiss. As noted in the Center's last report, the Civil Rules Committee has asked the Center to study Rule 12(b)(6) activity in the district courts, in light of the Supreme Court's decisions in *Ashcroft v. Iqbal* applying and *Bell Atlantic Corp. v. Twombly.* The Center is continuing to identify the outcome of orders responding to motions to dismiss for failure to state a claim under Rule 12(b)(6).

Study of Federal Reentry Project. The Criminal Law Committee asked the Center to conduct a multi-year study of federal reentry programs. A draft policy governing federal reentry programs has now been developed by the AO's Office of Probation and Pretrial Services. That policy will govern the operation of the five new reentry programs on which the Center's study will focus.

III. Federal Judicial History and International Rule of Law Functions

The Center provides assistance to federal courts and others in developing information, and teaching about, the history of the federal judiciary. The Center's website contains 9 units of the Center's Teaching Judicial History project, with materials related to notable federal trials and great debates. A tenth unit on Prohibition on Trial will be posted this spring. The Center recently published *A Guide to the Preservation on Federal Judges' Papers, Second Edition.* The Center has compiled a guide to conducting research on federal judicial history, which will be published this year.

The Center also engages in exchanges with foreign judiciaries, meeting with visiting delegations in D.C. and working on a limited number of technical assistance projects abroad. From September 30, 2009 through March 31, 2010, Center staff met delegations representing

over 30 countries, including a delegation of African legal professionals and judges, defense attorneys from Afghanistan, and a Superior Court Justice from Malta.

IV. Online Resources for Judges and Staff

The Center's judiciary intranet site, FJC Online, provides access to virtually all Center resources, including program materials, streaming audio and video programs, research reports, and special collections on topics of interest to judges and staff.

TAB

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

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CIVIL RULES

RICHARD C. TALLMAN
CRIMINAL RULES

ROBERT L. HINKLE
EVIDENCE RULES

MEMORANDUM

DATE: May 17, 2010

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 at the Emory University School of Law in Atlanta, Georgia, on March 18 and 19, 2010. 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: Introduction

The Committee sponsored a conference at the Duke University School of Law on May 10 and 11. The conference was a resounding success. More than 70 moderators, panelists, and speakers presented a wide array of views, achieving consensus on some issues and prompting vigorous discussion of many others. A list of the panels and participants is attached to show the breadth and depth of experience and talent assembled for the conference. In addition to members of the Civil Rules Committee, the conference was attended by Standing Committee chair and members Rosenthal, Colson, Hartz, Huff, Levi, Maledon, and Teilborg, as well as Reporter Coquillette and consultant Hazard. The other advisory committees also were represented, including Appellate (Struve), Bankruptcy (Gibson), Criminal (Beale), and Evidence (Hinkle and Fitzwater).

No summary can do justice to the conference. Text messages of congratulations and appreciation were already being delivered while the conference was under way. The fruits of the conference itself, and the massive set of papers prepared for it, will command the Civil Rules Committee's attention, and support its work, for years to come. They also will stimulate work by many other groups. Responses to the problems and opportunities presented at the conference will come not only in the Enabling Act process but also in other organizations of the bench and bar that

conduct research, develop statements of best practice, deliver programs of education for judges and lawyers, and seek to raise the standards of practicing lawyers. The final part of this Report will summarize many — but by no means all — of the suggestions, large and small.

Case management figured prominently in the conference discussions. This introduction cannot close without recognizing the astonishingly effective conference management Judge Koeltle provided at all steps in organizing the topics, identifying participants, and insisting on careful preparation by everyone involved. His efforts drew out the best every participant had to offer. We all are in his debt.

Pleading

The Committee continues active study of lower-court responses to the Supreme Court's decisions interpreting Civil Rule 8(a)(2) in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009).

It would be difficult to overstate the need to continue deep study of evolving pleading standards. "Notice" pleading has facilitated enforcement of many meritorious claims by providing a path into the discovery required to establish the underlying facts. It has protected against instinctive disbelief of claims that in the mind of a particular judge seem destined to fail. Fear that these opportunities will diminish has spurred vigorous criticism of "contextual plausibility" pleading standards in many segments of the plaintiffs' bar and among many academic proceduralists. This concern has been reflected in Congress, where bills have been introduced to restore pleading standards to a state imagined to have existed immediately before the *Twombly* decision. The bills recognize that any legislated standards should endure only until they might be changed by Civil Rules amendments adopted through the regular Enabling Act process. Whatever the fate of these bills, the Advisory Committee and Standing Committee must carry forward the ongoing work on pleading standards and related discovery issues.

One important phase of the work is the intense study of current pleading opinions undertaken by Andrea Kuperman, Judge Rosenthal's Rules Committee Law Clerk. Her detailed and lengthy study is available on the Administrative Office web site. All of the circuits have begun to explore the consequences of the *Twombly* and *Iqbal* decisions; some have rendered many decisions. Most of the decisions involve pleadings filed before *Iqbal* was decided. It is risky to attempt general impressions in the brief time courts have had. But, recognizing how tentative any impressions must be, it does not seem that any dramatic changes have occurred. If the pleading standard has been raised in some cases, there seem to be few decisions dismissing complaints that might well have survived under earlier approaches to "notice" pleading. There will be several intriguing questions of detail to be worked out. But it is clear that the evolutionary processes of judicial refinement are moving rapidly. They also seem to be working well.

More detailed empirical work provides important support for, illumination of, and a check on impressionistic evaluations of published and unpublished opinions. The Administrative Office has carried on a continually updated study of docket information for all civil actions filed in the federal courts, beginning two years before the *Twombly* decision. The study counts all motions to dismiss, divided among several case categories, and the dispositions. The findings show some increase in the rate of motions, and — for most case categories — no more than slight increases in the rate of granting motions. Two case categories that have drawn particular attention are "Civil Rights Employment Cases" and "Civil Rights Other Cases." The monthly average in employment cases for nine months before the *Twombly* decision was 1,147 cases, 527 motions to dismiss (46% of cases), 169 motions granted (15%), and 108 motions denied (9%). For nine months after *Iqbal*,

the monthly average was 1,185 cases, 533 motions to dismiss (45%), 185 motions granted (16%), and 80 motions denied (7%). The monthly average in other civil rights cases for nine months before *Twombly* was 1,334 cases, 903 motions to dismiss (68% of cases), 264 motions granted (20%), and 158 motions denied (12%). For nine months after *Iqbal*, the averages were 1,362 cases, 962 motions to dismiss (68%), 334 motions granted (25%), and 114 motions denied (8%). These figures show a substantial increase in the percent of motions granted. But they cannot show the explanation — whether, for example, the increase is largely in types of pro se cases that survived under notice pleading only because judges felt helpless to dismiss, no matter how manifestly implausible the claim might be.

In order to get behind bare docket statistics, the Federal Judicial Center has undertaken a closer examination of actual cases. The study is well along, but is not yet complete. Again, the tentative preliminary indications do not point to any drastic shift in pleading standards.

These rulemaking efforts have been supplemented by bar groups that have surveyed their members on pleading and discovery practices. The groups include the Litigation Section of the American Bar Association, the American College of Trial Lawyers working with the Institute for the Advancement of the American Legal System, and the National Employment Lawyers Association. The results of these surveys are mixed. Many of the divisions reflect predictable differences between those who typically represent plaintiffs and those who typically represent defendants. But there is no monotonic unity. The National Employment Lawyers Association's survey found that only a few members have encountered any problems in framing adequate complaints after the *Iqbal* decision. The most common response seems to be pleading more of the facts that have regularly been gathered before filing an action. The next most common response seems to be somewhat more intensive fact gathering before filing. As with many other rulemaking projects, these bar groups have contributed invaluable information and will continue to provide important help as work progresses.

Possible closer integration of pleading practice with discovery will be an important part of further work. Much of the uneasiness with the prospect of heightened pleading standards reflects cases in which the defendant controls access to much or most of the information that would enable the plaintiff to craft a complaint with well-pleaded facts. "Information asymmetry" has become a common term. Several opinions both recognize the problem and seek to cope with it in light of the concern expressed in *Twombly* and *Iqbal* with imposing extensive discovery costs on defendants who have done nothing wrong. At least some trial judges achieve a tacit accommodation by allowing discovery to proceed while considering a motion to dismiss. It may be that the most effective response for plaintiffs who lack equal access to essential information will be to focus on some new means of controlled discovery in aid of pleading, not on the 1938 language of Rule 8(a)(2) that was construed in the *Twombly* and *Iqbal* opinions.

Pleading will occupy an important place on the agenda for the Committee's November meeting. Depending on events during the summer, the materials may include drafts that illustrate possible approaches to revised pleading rules and discovery rules. Apart from Rule 8(a)(2), the drafts might extend Rule 9(b) by adding new categories of claims that must be pleaded with specificity. It is possible that attention will be paid to pleading on information and belief, reinforcing the Rule 8 directions that answers must fairly meet complaints, pleading affirmative defenses, and Rule 11(b)(3)'s permission to plead fact contentions that "will likely have evidentiary support after a reasonable opportunity for further investigation or discovery." Opportunities for discovery in aid of pleading also may be illustrated. One approach would be to integrate limited discovery procedures with Rules 8(a) or 12(b)(6), allowing a plaintiff to file with an initial complaint a statement of facts that require discovery, perhaps outlining the proposed discovery and inviting plaintiff and defendant to cooperate in the discovery or seek guidance from the court. Another

approach would be to expand Rule 27 to include discovery in aid of framing a complaint, or to adopt a new Rule "27.1" specifically designed and limited for the purpose. Still other approaches might be illustrated. Suggestions will be eagerly welcomed.

Pleading was addressed by many of the participants at the 2010 Conference. Because pleading has been the subject of intense work and active consideration since the *Twombly* decision three years ago, it suffices to report that the conference did not provide any clear sense of direction. Several thoughtful voices suggested that just one year after the *Iqbal* decision, practice is already settling down in patterns that reflect very little change in pleading standards. The increased flurry of motions that tested the standards may well abate once this lesson is learned. On this view, there is little to be gained by amending Rule 8, and a risk of generating further transient confusion by attempting any amendment. Others suggested that the new pleading standards reflect important differences from practice before 2007, and reacted in quite different ways. Some believe that access to federal courts has been reduced, and find it tragic. They protested that mere statistics counting dismissal rates cannot count the things that truly count: the number of cases that, if not dismissed, would have survived to victory on the merits; the cases that are not filed; the diminution in private enforcement of essential public policies. Others believe that the Court got it right, and that Rule 8 should be revised to express the new standard. Still others believe that the Court did not go far enough, that some version of "fact" pleading should be adopted. All of those who believe that pleading standards must be tightened beyond the relaxed practices followed under the banner of "notice" pleading believe that the occasional loss of a meritorious claim that would have succeeded under notice pleading will be outweighed by reducing the uncompensated burdens that unfounded litigation filed when there is no claim imposes on defendants who have done no wrong.

The conference discussion of pleading inevitably tied to discussion of discovery. Various proposals were explored to ensure an opportunity for targeted discovery before dismissal for failure to state a claim, particularly in "asymmetrical information" cases. Some proposals were made for pre-filing discovery. These approaches may become a substitute for, or a complement to, revision of the pleading rules.

The forceful expression of vigorously contested views at the conference will be most useful as the work carries on.

Discovery: Current Work
RULE 45

The most active discovery work continues to focus on nonparty discovery through Rule 45. The scope of the work was discussed at the Standing Committee meeting in January. Work is well advanced on proposals to enhance notice to all parties before serving document subpoenas, and to provide for transfer of disputes from an ancillary discovery court to the court where the main action is pending. Work also is well advanced on the question whether a party can be subpoenaed as a trial witness in circumstances that would not permit subpoenaing a nonparty. The party-trial-witness question will be explored further, however, at a miniconference to be held by the Discovery Subcommittee in Dallas on October 4.

The miniconference has been scheduled primarily to consider broader questions about Rule 45. The Committee and Subcommittee think it useful to explore expressions of broader dissatisfaction with Rule 45's complexities. Some observers fear that Rule 45 can be readily understood only by those who work with it regularly. One comment was that "Rule 45 problems arise just often enough that you have to refamiliarize yourself with the rule every time." Several models have been drafted to illustrate different approaches to simplifying Rule 45.

The most modest model seeks only to eliminate the "three-ring circus" aspect of Rule 45. Under Rule 45 subpoenas issue from the court for the district where compliance is expected. Enforcement is had, at least initially, in the issuing court, but a nonparty may seek Rule 26(c) protection in the court where the action is pending. Clarity and function both may be better served by providing that all subpoenas issue from the court where the action is pending. Present limits on the place of performance can be retained without change. Selecting the court for protection or performance can be governed by more direct and functional provisions.

Another model, vigorously championed by Judge Baylson, would adopt at least most parts of the first model but also cut away many of the details that have been engrafted on Rule 45 over the years. All of the discovery provisions in Rules 26 through 37 would be incorporated by reference, for use as they might be adapted to the particular needs of a particular problem.

A third model would attempt some separation of discovery subpoenas from trial subpoenas. Different versions have been explored. The current version is the simplest but also the most daring. Nonparty discovery of documents, electronically stored information, tangible things, and property would be folded into Rule 34, adding special provisions to protect nonparties in ways that parallel present Rule 45. This approach might, but need not, include new provisions identifying the place for producing the requested things. Deposition and trial subpoenas would continue to be governed by Rule 45. Whatever may be the conceptual attraction of this model, it will be important to learn whether the risk of unforeseen consequences can be justified by any practical advantages.

Scheduling the miniconference for early October will support careful work by the Subcommittee and Committee aiming at the November Committee meeting and the spring 2011 meeting. The scope of any Rule 45 proposals may well be determined in time for the Standing Committee meeting in June, 2011.

RULE 26(C) PROTECTIVE ORDERS

The Committees did extensive work on Rule 26(c) in the 1990s, culminating in two published proposals. After considering the extensive public comments on both proposals, the Advisory Committee concluded that there was no real need to amend Rule 26(c). In addition to the public comments, valuable information was provided by a Federal Judicial Center study. Actual practice seemed to be meeting all the goals that might be sought in revision. Protective orders played an essential role in enabling parties to manage discovery without constant need for judicial supervision. Protective orders did not have the effect of blocking information needed for public health and safety. They did not create unnecessary impediments to effective sharing of discovery information between related lawsuits. Motions to modify or dissolve protective orders were regularly entertained. Courts recognized interests in public access by readily recognizing standing and intervention by nonparties. Finally, courts drew sharp lines between protection of discovery materials as discovery materials and the much higher standards that must be met to seal information submitted to the court at trial or for consideration of motions addressing the merits.

Protective orders have been brought back to the agenda for renewed study. The topic is intrinsically important. The continuing introduction of "Sunshine in Litigation" bills in Congress reflects continuing concern with achieving a proper balance. Protective orders continue to provide vitally important lubrication for the smooth working of discovery, but that role does not automatically bless whatever may be done in the shadow of Rule 26(c). It is useful to seek reassurance that practice continues to adhere to the good standards found several years ago.

The groundwork for study was established by another of Andrea Kuperman's remarkably thorough memorandums. She surveyed practice in all the circuits, looking at standards for entering protective orders; the consistently much higher standards exacted for sealing information filed with the court to support consideration of the merits of an action; and practice on modifying or dissolving protective orders. This work shows that at least the opinions describing and implementing present practice carry forward the sound practices found in earlier work.

Looking back at the earlier proposals, and drawing added details from Ms. Kuperman's research, a draft Rule 26(c) was prepared for discussion. The aim was only to provide a model to support a determination whether further work will be useful. The draft is designed to bring into rule text a number of well-established practices that are not now made explicit. The need to protect personal privacy is added to the categories of protected interests, reflecting one of the most common uses of Rule 26(c). Other needs for protection are reflected by seeking closer integration with the certification provisions in Rule 26(g). A quite tentative provision reflects the common practice under which producing parties unilaterally designate information as confidential, providing that when another party challenges the designation the party seeking protection has the burden of justification. Filing discovery information subject to a protective order is addressed by allowing filing under seal of information offered to support or oppose a motion on the merits or offered as trial evidence, but only if the protective order directs filing under seal or if the court grants a motion to file under seal. The draft also carries forward, with some changes, the 1990s proposals for modifying or dissolving a protective order.

Discussion focused on the question whether Rule 26(c) provides a suitable occasion for amending a rule to express general good practices. There is good reason to feel confident about identifying and expressing present practices in revised rule text. The risk of unintended consequences is not great. At the same time, this is not a case like the pending Rule 56 proposals, which were developed in an effort to bring the national rule into line with diverging practice.

In the end, the Committee decided to carry Rule 26(c) forward without an immediate decision whether to develop the draft revisions. The 2010 Conference may have provided some guidance in a negative way: protective order practice was not discussed in any of the papers or presentations. That seems an implicit but strong indication that present practice is appropriate. It is possible that new problems may be identified by the continuing work of the Standing Committee Subcommittees that are considering the "privacy" rules (e.g., Civil Rule 5.2) and the rare practice of sealing entire cases. And important guidance could be provided if it should prove possible to find Federal Judicial Center resources to undertake a new study. Even without a new study, the Center may be able to find resources to develop a publication that would guide lawyers and judges to the best practices identified in Ms. Kuperman's research.

Other Agenda Items

Consideration of the Committees' roles and responsibilities with respect to the Rule 84 Forms is in some ways overdue. But the subject could not be approached now without casting shadows on pleading standards. The subject will be taken up when it can be freed from these complications, either in conjunction with further work on pleading standards or after that work has been accomplished.

The interplay between Appellate Rules and Civil Rules continues to provide occasions for joint work. A joint Subcommittee is working on a few current issues, and potential new issues continue to arise. The opportunity to work together is refreshing.

The Committee has considered the approach to be taken to addressing whatever missteps may be identified in the completed work of the Style Project and the joint Time Computation Project. Only a few questions have even been raised as yet, and such problems as may be found do not seem serious. Recognizing that some truly important mistake may yet emerge, calling for immediate response, it seems better for the time being to accumulate whatever issues seem to call for eventual rules amendments. It is possible that some difficulty common to different rules will emerge, calling for common disposition. And in any event it is good to preserve the occasional opportunities to go for a year — or possibly even longer — without publishing proposed amendments.

The 2010 Conference: [Some of] The Proposals

COST AND DELAY

Had there been any doubt about perceptions of cost and delay, the 2010 Conference participants and papers dispelled it. To be sure, the Federal Judicial Center closed-case study showed that most lawyers, in most cases, believe that the cost of civil litigation in the federal courts is fairly proportioned to their cases. But particularly for cases involving high stakes, multiple parties, and over-zealous advocates, there is widespread agreement that litigation is too often too costly. Costs are figured not only directly in attorney fees, expert fees, and e-discovery consultants, but also in the multiple burdens that litigation imposes on the parties. Diversion of resources from intended use is a problem most often emphasized by organizations — people who should be conducting a business, running a government agency, or otherwise contributing to the public weal are forced to devote themselves to the litigation. Distraction is a related but distinct problem — people anxious about the litigation are less able to focus on other things. Impact on reputation can be a further problem.

One word came to express the quest for speedier and less expensive procedure. "Proportionality" is the desideratum. How to achieve it is the question.

Many participants reflected that concerns about the cost and delay of legal proceedings, whatever the nature of the tribunal or procedure, have persisted from the beginning of efforts to resolve disputes without violence or dictatorial edict. The causes, however, may change over time, and become ever more troublesome. Current attention focuses not only on discovery in general, but particularly on the costs of retrieving and producing electronically stored information. In addition, there is growing concern that hourly billing practices generate incentives that impede appropriate professional behavior. However much worse the situation might be without past efforts to control cost and delay, continuing work is imperative. The question is not whether, but how to carry on the struggle to keep the "inexpensive" aspect of Rule 1 from becoming a sad mockery.

The means of addressing cost and delay divided the participants. Some expressed the view that the Civil Rules provide all the tools needed for the task. The Rules emphasize the need for cooperation of the parties, with the court's encouragement. What is needed is better-balanced use of available procedures, based on early agreement and cooperation. This behavior can be powerfully encouraged by adept use of the many management tools made available to judges. Rather than amend the Rules further, almost unavoidably making them longer and more complex, attention should turn to various ways of seizing the opportunities the rules provide. Several of the suggestions are sketched below in various categories of "non-Rules Responses."

Other participants believe that the Rules must be revised. The most fundamental suggestions would depart from the "transsubstantivity" that has characterized the Civil Rules from the beginning in 1938. Many focus on disclosure and discovery, and on pleading. A few address other topics, mostly familiar. Many of these suggestions are sketched below as "Rules Responses."

Still other issues were left in a state of perplexity. Many participants decry the steep reduction in the frequency of civil trials. But there is much less sense of cause, and little if any sense of means that might be used to increase the frequency of trials. And there was a rather widely shared fear that a self-reinforcing cycle may be at work, in which the lack of trials means that few lawyers acquire trial skills, leaving most lawyers unwilling to face the unfamiliar task and dedicated to achieving resolution by any other means. Although these questions are important, it will be difficult to address them by means other than continuing research.

The sketches that follow begin with a number of suggestions for actions that can be taken to improve administration of the present Civil Rules. Many of the suggestions are supported by most or all of the conference participants, even as they recognize that few of them will be easy to implement. They can be implemented by educational programs for judges and lawyers, by more intense judicial use of established procedures, by creating "best practices" guides, by developing widely adopted protocols for initial discovery or other matters, and the like. These modes of implementation often will encounter the familiar problem of resources — greater success will be achieved as more support is available.

The next set of sketches describe many suggestions for amending the Civil Rules. The suggestions cover a wide range of complexity and difficulty. The set is not complete, and will change as ever more time is devoted to digesting the conference materials.

Finally, the need for continuing research is noted. Renewed efforts to study and learn from state-court experience will claim an important place in this work.

BETTER IMPLEMENTING PRESENT RULES

Pleas for universalized case management achieved virtual, perhaps absolute, unanimity. The plea begins with assignment of each case at filing to a judge who will remain responsible for all steps in the case through to conclusion.

The one-case-one-judge regime is a prerequisite to the next step: the assigned judge should take control of the case at the beginning. The first Rule 16 conference should be a conference. It should be planned carefully by the lawyers, seized as an invaluable opportunity by the judge, and often attended by the parties. The parties should be made aware of the strengths and weaknesses of their positions, the costs of litigating, the means available to reducing the costs of litigating, and the availability of alternative dispute resolution methods.

There was some difference of views about the importance of setting firm deadlines at the initial Rule 16 conference. There was widespread agreement that it is valuable to set firm deadlines for all steps leading up to trial. The deadlines should hold firm against all but good reasons for extensions. There was some division of views, however, about the importance of setting a firm trial date at the beginning of the case. Everyone recognizes the compelling effect of a firm trial date as it grows closer. But some fear that it is difficult to set the trial date intelligently in the early stages of litigation, either in terms of the parties' ability to meet the deadline or the court's ability to honor it. On this view, the firm trial date should be set after discovery is concluded, and should be coordinated with disposition of any summary-judgment motions.

Case management should not end with the beginning. The parties should have regular and prompt access to the judge to resolve disputes that they cannot, with honest effort, resolve themselves. Lawyers and judges alike agreed that often less court time is required for cases in which the parties know that disputes will be promptly resolved. No lawyer wants to press a position that

seems unreasonable; knowing that the judge will promptly resolve any dispute causes most disputes to disappear. More than one described a practice of scheduling brief telephone conferences at regular intervals, subject to cancellation. One or two of the conferences may be held, but most are canceled — commonly on the basis of agreements reached by the lawyers on the eve of the scheduled call.

Discovery management is seen as critical. Those who believe it is possible within the present rules point to the management opportunities opened in the 1983 by amending Rule 16 and adding the proportionality provisions of what is now Rule 26(b)(2)(C). Rule 26(g) also is haled as a much under-appreciated direction for responsible party adherence not only to Rule 26(b)(2)(C) but also to the spirit of Rule 1. The e-discovery amendments of 2006 also are noted as substantially successful. Evidence Rule 502 is recognized as a further opportunity, not yet widely used, to facilitate review of discovery responses through use of court-approved agreements that protect against inadvertent privilege waiver in all actions and courts, state and federal.[1] The Rule 26(b)(1) division of discovery between lawyer-managed and court-managed discovery further emphasizes the role of case management.

Several specific practices were suggested within this discovery management framework. One is in line with the plea for ready availability of the judge: discovery disputes should not become the subject of motions. Instead, after consultation among the lawyers, disputes should be resolved as often as possible by conference call. If more is needed, the dispute should be submitted by short letters, not briefs, for prompt disposition.

The desire for prompt disposition is not confined to discovery disputes. Delay in deciding motions was frequently described as a cause of complication, confusion, wrangling, and delay. Particular concern was expressed about a phenomenon that was also measured and described in the recent project to amend Rule 56. Summary-judgment motions often languish without decision up to the eve of trial, or may not be decided at all. Some participants expressed a suspicion that rulings may be deliberately delayed to coerce settlement. The participants who complained of delayed rulings also recognized the many competing demands on a judge's time. Ordinarily there will be little reason to decide a motion ahead of earlier filed and pending motions in 29 other cases. No clearly helpful suggestions were made for addressing the constraints on judicial time.

A more pointed suggestion is for a preliminary testing of Rule 26(b)(5)(A) privilege logs. Each party picks 20 documents from the other party's log for in camera examination by the court. If most of the selected documents are found privileged, further disputes are likely to be greatly reduced. But if — as seems to be common — 85% to 90% of the documents are found not privileged, discovery is likely to be adjusted with far less friction.

Discovery of electronically stored information may soon become ripe for further rules provisions. But the 2006 ESI amendments provide many opportunities and encouragements for cooperation that can greatly reduce potential difficulties. Further education of lawyers and perhaps some courts may be very useful in this direction. Cooperation of the parties should be encouraged, perhaps beginning before a case is even filed. If not before, communication and agreement on preservation obligations should occur as promptly as possible after filing. Before the Rule 26(f) conference, an attorney should learn the characteristics of the party's electronic information systems,

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[1] The high hopes for Rule 502(d) orders were tempered by renewal of a fear expressed while Rule 502 was being developed. A judge should not enter a Rule 502 order as a tool to coerce production without taking the time needed for adequate review.

the custodians and sites where relevant information is most likely to be located, and the likely benefits and burdens of alternative search opportunities. The lawyers should be prepared at the Rule 26(f) conference to discuss the scope of preservation obligations, the form of producing information, the value of sampling to provide guidance for more focused searches, search methods and terms, initial search targets, and so on. It may prove important to have technical staff present at the conference, and even to have a structure for direct communication between technical staffs as discovery progresses. It also may be desirable to supplement hopes for such cooperation by promulgating a set of standard e-discovery interrogatories designed to gather the same information. Similarly, it may be useful to develop a standard spoliation instruction for cases in which electronically stored information is lost before it can be produced. And above all, it is essential that courts and lawyers keep current with changing search methods. "Key word" searching is rapidly giving way to more sophisticated methods that must be integrated as effectively as possible.

Pilot programs may prove a fertile source of information to guide e-discovery practices. Chief Judge Holderman addressed the conference to describe the development and initial successes of the Seventh Circuit Electronic Discovery Pilot Program in the Northern District of Illinois. Large numbers of practicing lawyers were enlisted and became deeply involved in designing the program. The ideas that work can be adopted in other courts, and in time may support further development of the Civil Rules.

Quite different opportunities to enhance discovery may be found in developing patterns for initial discovery requests. Pattern interrogatories developed by regular litigators on both sides of a particular type of litigation, for use by plaintiffs and defendants and recognized as proper without objection, may greatly facilitate effective and proportional discovery. It may prove easier to develop pattern discovery on a local basis, beginning with subjects that are regularly litigated and that present recurring issues. Samples for individual employment cases provided a good illustration.

Assigning cases to different "tracks" was suggested as another approach to rein in discovery. This approach might well begin outside the Civil Rules, reinvigorating or expanding on earlier tracking programs adopted by local rules. The failure of those efforts to achieve much success was one of the reasons for deferring further development of a set of "simplified rules" several years ago.

Experience with successful local efforts, and with state systems, might point the way to something suitable for national adoption.

Another suggestion for expediting discovery is adoption of a standard protective order to be entered in every case. This practice might be implemented by party stipulation, or by a model order. In either approach, care would be needed to ensure compliance with the "good-cause" requirement of Rule 26(c), but a suitably crafted model could go a long way to establishing good cause.

With all of the attention devoted to controlling excessive discovery, there were occasional reminders that requesting parties are not the only source of discovery problems. Responding parties are regularly accused of stonewalling and dumping. Requests are read as narrowly as possible, or narrowed even beyond the bounds of reasonably possible interpretation. Persons designated to testify for an organization at a Rule 30(b)(6) deposition are not the right persons, and are not properly prepared. Production of responsive documents is delayed long beyond the time they are identified and reviewed. When production does occur, it is often in the form of vast volumes of information, often irrelevant and irresponsive. These reminders, however, were not developed into suggestions of promising means of improvement. Education, best practices, even rules of professional responsibility may be explored. Vigorous enforcement of Rule 26(g) as it stands might effect real improvement. But rules amendments might also be considered.

Cooperation among adversary counsel is a common theme running through many of these observations. The consensus in favor of promoting cooperation is widespread and fervent. Cooperation founded on mutual trust can do more than rules or judicial management to achieve the purposes of Rule 1. Tales abounded of cases in which cooperation of counsel achieved better results, faster and at lower cost. Several participants urged the need to educate lawyers to understand that cooperation is not only consistent with zealous advocacy, but in fact can enhance the quality of advocacy on all sides. The Rules emphasize cooperation at many places. Some modicum of cooperation is in fact essential; without it, the process would fall apart. Whether more can be done through court rules is uncertain. But attempts to redirect all-too-common exaggerations and distortions of the duties of professional representation are vigorously supported. Standards of cooperation have been adopted by various professional groups. The need may be more for instruction and adherence than for developing still more articulations of the underlying principle.

A few participants renewed the plea for oral argument on motions, particularly motions for summary judgment.

Familiar concerns were expressed about the role of judges in promoting settlement. The broadest view was that the time has come to recognize that pretrial procedure is primarily a process designed to regulate settlement by enabling the parties to price the claims. It should be managed, perhaps with the guidance of rules changes, to encourage increased communication of the judge's view of the case as a useful influence on false optimism and false pessimism. Similar themes were sounded in calls to generalize local alternate dispute resolution programs, looking toward mediation or neutral evaluation. Arbitration found little favor, with a possible exception for "arbitration" that is subject to de novo court trial, with penalties for a party who fails to do better at trial than in arbitration. Judicial activities characterized as "coercing" settlement, on the other hand, are widely rejected. And participants echoed the familiar concern that the judge responsible for pretrial and trial proceedings should not become directly involved in settlement negotiations.

RULES PROPOSALS

Proposals for making new rules ranged from the highly ambitious to the narrowly detailed. The central packages are sketched here, along with some of the more detailed proposals. But it will remain essential to continue to prospect among the papers and conference presentations to identify other possibilities. Identification and description are only the beginning. Judge Higginbotham summarized a central point in a few words: "What we're hearing is the limits of rules." Rule text cannot do everything necessary to achieve the just, speedy, and inexpensive determination of every action. Good-faith and adept cooperative implementation by attorneys is essential. Strong judicial management is often needed to address problems that counsel cannot manage on their own, and is likely to be needed also to address problems that should be, but are not, managed by counsel. A closely related point is that it is a mistake to attempt to adopt too many rules changes, even very well crafted changes, all at once. Lawyers and judges alike need time to understand, implement, and explore the limits of new rules. Moreover, the Enabling Act process itself cannot do everything at once. The Advisory Committee and Standing Committee, the Judicial Conference, the Court, and Congress have inherently limited capacities. And the process of public comment, regularly a source of improvements, redirection, or abandonment of rules proposals cannot be asked to respond to overwhelming packages. Perhaps the greatest challenge will be to set the agenda for future work, taking account not only of importance but of achievability.

The theme of cooperation among lawyers, noted with the non-Rules proposals, was at times the subject of rather wistful suggestions for revising Rule 1. Without attempting actual drafting, the wish was to revise the second sentence to look something like this: "[These rules] should be

construed, employed by attorneys [and parties], and administered to secure the just, speedy, and inexpensive determination of every action and proceeding." A rather less ambitious recommendation to advance cooperation was that a "meet-and-confer" requirement should become a precondition for all motions.

A quite different suggestion was that Rule 1 should be revised to abandon the quixotic wish to achieve justice quickly and without great expense. Some justice takes time and money, and better justice demands more. The rules must be constructed to establish generally reasonable tradeoffs among these goals, on the way to achieving determination by some means — more often settlement than disposition by a motion on the merits or by trial. Interpretation and administration should be directed to reflect on the balance.

Many of the more specific suggestions aimed at disclosure and discovery. They are likely to prove controversial and difficult.

Initial disclosure under Rule 26(a)(1)(A) was the subject of widespread dissatisfaction. A few voices supported the initial disclosure of individuals and documents a party may use to support its claims or defenses in cases of just the right size, neither too small nor too large. But it was criticized as imposing an unnecessary burden in cases where the parties already have the required information or would not bother to pursue discovery to obtain it. More importantly, it was criticized as redundant in cases in which vigorous discovery will be pursued to identify all individuals and documents, not only those favorable to another party. Although the parties can stipulate out of these initial disclosures, this protection apparently proves inadequate. Suggestions for amendment run in both directions. One view is that the work begun by the 2000 amendments that sharply restricted the scope of initial disclosures should be completed by deleting the requirement. Another view is that the 1993 rule that first adopted initial disclosures had it right. Disclosures should be required as to all individuals with relevant knowledge and all documents, restoring disclosure to the intended function as a first wave of discovery that must inevitably be pursued in any event. The effect is to substitute for a uniform set of interrogatories inquiring into these matters, tailored to the circumstances of each action better than uniform interrogatories could be. Ample protection against unnecessary or redundant work would be provided not only by the Rule 26(a)(1)(B) exemptions but also by the parties' ability to discuss disclosure at the Rule 26(f) conference and agree to opt out. An alternative formulation, that might be sufficiently captured by restoring some version of the 1993 approach, is that the time has come to adopt a "civil Brady" rule requiring disclosure of information useful to support an adversary's position.

Discovery proposals were abundant. The most complex and daunting proposals address the duty to preserve information. Many requests were made for an express preservation rule during the work that led to the e-discovery amendments adopted in 2006. The topic was considered but put aside, apart from the protection against sanctions included in Rule 37(e). The duty to preserve was seen as an extraordinarily complex question, often addressed by statute or administrative regulation and connected to statutes of limitations. But it may be possible to focus on provisions that address only discovery obligations. The first issue is whether a rule addressing discovery obligations and sanctions can attach to conduct before an action is filed in a federal court. Many courts announce that a spoliation duty to preserve evidence arises before litigation begins, commonly looking for reason to expect that litigation may arise. The duty may be triggered by an express notice to preserve, or by explicit warnings that litigation may be brought, or by events that common experience suggests may lead to litigation, or by such open-ended circumstances as litigation brought against others to challenge conduct a nonparty may be involved with. Apart from the small number of subjects confided to exclusive federal jurisdiction, it may be difficult or impossible to guess whether the anticipated litigation will be filed in state court or federal court. Does the Enabling Act

authorize adoption of a rule that creates an obligation enforceable by discovery or other spoliation sanctions if, but only if, litigation is actually brought in federal court? And if a rule is within Enabling Act authority — a matter on which the Committees were asked to be bold, brave — is it possible to draft a rule that adequately defines the pre-litigation circumstances that generate a duty to preserve? For example, whose knowledge within an organization counts?

Whenever a duty to preserve is triggered, whether before an action is commenced, at commencement, or on service of the complaint, how far does it extend? Depending on the evolution of notice pleading, how does a rule relate the duty to preserve to the scope of possible discovery under Rule 26(b)(1), whether "claims or defenses" discovery or "subject-matter" discovery ordered by the court? When there are multiple sources of information within an organization — a problem greatly complicated by the migration of electronically stored information across many recipients — how many custodians and "key figures" must be brought within a litigation hold? How far back in time must preservation reach? What efforts should be made to intervene with automatic systems that routinely alter or destroy information? Can a rule usefully address recycling of backup tapes, or is that frustrating disaster-recovery technology so likely to disappear that it can be ignored? These and many other questions may be summed up by asking how is it possible to establish a meaningful concept of proportionality for data preservation, particularly in the early days before an action is filed or shortly after filing?

Another part of the preservation problem goes to defining the state of mind required to trigger spoliation sanctions. The common theme is that "case terminating" sanctions should be available only for deliberate, intentional destruction of evidence for the purpose of thwarting discovery and use in litigation or at trial. Gross negligence or recklessness might justify sanctions that are still severe. Some proponents might believe that a spoliation instruction is so devastating that it should be limited to cases of deliberate intent, perhaps in terms that allow adverse inferences only if the jury finds the required intent. Others might support the instruction for reckless or grossly negligent behavior. Merely negligent behavior would support lesser sanctions — the common suggestion is shifting the cost of proof by substitute means. The questions are difficult, and it is not clear whether the question of trial instructions is a matter for the Rules of Evidence, or whether it so far deals with procedural obligations that it is better addressed in the discovery preservation rule.

Many other issues must be dealt with in a preservation rule. The need large organizations feel for a rule, both for planning their affairs and for achieving some uniformity, is acute. It would be presumptuous to predict whether a reasonably useful rule can be developed, but this topic deserves a high priority for consideration as soon as there is a reasonable prospect that the task is feasible. One relatively modest suggestion may deserve consideration if more dramatic steps seem premature: preservation might be addressed by explicit provisions for protective orders under Rule 26(c), possibly including preservation before an action is filed and more obviously allowing for emergency application on filing the complaint. Another is that Rule 37(e) might be amended so as to bar sanctions against an attorney in the circumstances that now bar sanctions against a party.

Other e-discovery issues are likely to arise. The caution that delayed development of the 2006 amendments for a while deserves to be renewed. There are tentative signs that the continuing rapid advance of technology will begin to use computers to reduce the burdens caused by the exponential growth of computer-based information. Within the last few years, vendors of e-discovery services began to boast that electronic searching had achieved the same level of effectiveness as a first-year associate. It is conceivable that sophisticated search techniques will move beyond any human capacity for physical review, and that this process will overtake any rules developed on even the best possible anticipations. The 2006 amendments have been place for three

years and a half. Although they have not assuaged all resentments of e-discovery, they seem to be working well — at least as well as might reasonably have been hoped.

One specific ambiguity has been claimed in the Rule 34 e-discovery provisions. Rule 34(b)(2)(E)(ii) directs that if a request does not specify a form for producing ESI, a party must produce it in the form in which it is ordinarily maintained or in a reasonably usable form. Rule 34(b)(2)(E)(iii) directs that a party may not be required to produce the same ESI in more than one form. What happens if a party produces ESI in the form in which it is ordinarily maintained and that form is not reasonably usable by the requesting party? Having complied with (ii), does (iii) prohibit an order to produce in a reasonably usable form? Or is the problem solved by the general provision in subparagraph (E) that these procedures apply "[u]nless otherwise * * * ordered by the court"? There may be no ambiguity at all. If there is, this seems the sort of question that can be addressed in the course of a general revision undertaken for other purposes.

Apart from e-discovery, other discovery rules were discussed. A few participants urged a numerical limit on Rule 34 requests for documents and ESI. It is obviously difficult to adopt any useful general limit expressed in numbers of documents, numbers of pages or words, or mega- (or tera- or peta-) bytes of information. The alternative of limiting the number of requests could easily prove more difficult than counting the number of parts that may constitute a single interrogatory. It may be that this topic should be deferred until a cogent draft provides an inspiration for beginning.

Limitations on the number of requests for admission have also been suggested. The current compromise is expressed in Rule 26(b)(2)(A), allowing adoption of local rules limiting the number. It may be useful to survey experience under whatever local rules have been adopted to see whether there is a solid foundation in experience for picking a reasonable number.

Contention interrogatories also were decried. One concern addresses requests made at the beginning of an action; the provisions for deferring responses by court order under Rule 33(a)(2) Rule 36(a)(3) may deserve a new look. Another concern is that these requests are so often useless that they should either be eliminated or subjected to numerical limits.

Further limitations on depositions also have been suggested. Some have suggested reducing the 7-hour time limit to 4 hours. Another suggestion is to reduce the presumptive limit of 10 depositions per side. Yet another suggestion is that depositions of expert trial witnesses should be eliminated, to be complemented by a rule that at trial the witness may not deviate in any way from the matters disclosed in the Rule 26(a)(2)(B) report. A somewhat broader suggestion would require court permission to depose a nonparty.

The suggestions for reducing present presumptive limits on the number of discovery events, and for adding new limits, lead back to tracking systems. Some version of tracking could be added to the Civil Rules, either by building into the present sequence or by adding a separate set of "simplified" or "tracking" rules. So long as jury trial is preserved, the rules might be made mandatory. Experience with some past tracking programs in federal courts suggests that not many attorneys will voluntarily opt into a simplified track. An optional system, on the other hand, would reduce the difficulty of defining categories of cases for the track with abbreviated procedures.

Bolder suggestions ask for some narrowing in the scope of discovery as described in amended Rule 26(b)(1). These suggestions rely in part on the view that the 2000 distinction between "claims or defenses" discovery and "subject-matter" discovery has not had any noticeable effect in controlling excessive discovery.

It also has been suggested that although the rules include ample authority to "stage" discovery by confining initial efforts to specified topics, the authority might be made more explicit. These suggestions may be prompted in part by the skepticism expressed by the Court in its recent pleading decisions. They also tie to consideration of the pleading rules. As noted again below, staged discovery to support pleading may become a useful means of addressing the problems of a plaintiff who needs access to information controlled by the defendant in order to frame a complaint.

Yet another suggestion is that Rule 16(c)(2)(F) might be amended to direct consideration of a discovery budget: "controlling and scheduling discovery <u>and establishing a discovery budget</u>, * * *." This suggestion ties to the view that parties frequently should be included in pretrial conferences. Explicit exploration of discovery costs in the parties' presence might lead to more realistic discovery strategies. This prospect rests not only on a desire to enhance party control but also on a suspicion that an explicit budget will protect lawyers who fear later recriminations for not exhausting every conceivable avenue of inquiry.

Suggestions also have been made to expand the list of topics to be addressed in the Rule 26(f) conference. Rule 26(f)(2) might include a direction to prepare a plan that lists the disputed facts and legal issues. And it might direct the parties to consider the possibility of an Evidence Rule 502(d) order protecting against inadvertent privilege waiver.

Cost sharing also has been proposed in various terms. Cost sharing has become widely recognized in connection with e-discovery, but it has been urged that it should be adopted more aggressively, particularly if a party rejects initial sampling discovery, or if sampling discovery yields little useful information, or if inquiry is directed into sources that are difficult to exploit. Some observers would like to shift the actual costs of discovery more generally, conditioned either on the low yield of apparently useful information or on losing on the merits.

Discovery also may be tied to motions to dismiss. The more aggressive suggestions are that all discovery should be suspended automatically when a motion to dismiss on the pleadings is filed. A less aggressive suggestion is that discovery by the defendant should be suspended on filing a motion to dismiss.

The suggestions made for better enforcement of present Rule 26(g) are supplemented by some parallel suggestions that Rule 26(g) should be modified to express more clearly the lawyers' duty to keep discovery requests and responses within reasonable proportion to the case. This suggestion is as close as any to the wish to reduce obstructive behavior by parties who respond to discovery requests by stonewalling and dumping tactics.

It is noted above that pleading remains a central topic on the Civil Rules agenda. It also was noted that proposals at the conference covered a full range of conflicting possibilities. The time has come to develop sketches of many different approaches, including those that focus on pre-dismissal discovery rather than pleading standards. But it remains uncertain how soon the time to propose amendments for publication will come.

At least two proposals advanced at the conference offer previously unconsidered approaches to pleading. One would allow an intending plaintiff to serve a proposed complaint on the defendant before filing. The defendant would be invited to describe asserted deficiencies. Failure to respond would forfeit the defendant's right to challenge the sufficiency of the complaint. The plaintiff would remain free to file the complaint without responding to any deficiencies asserted by the defendant, or could instead file a complaint adjusted to meet the assertions. A different approach comes close

to reinstating an early version of the Rule 56 amendments that were explored in the late 1980s. This approach would add a motion for "summary adjudication" to the rules. A defendant could opt to seek dismissal under Rule 12(b)(6) as now, but instead could move for summary adjudication. Summary adjudication would be preceded by limited discovery. The case would be dismissed if the complaint and information found in the limited discovery show the plaintiff cannot prove facts necessary to prevail. And if the defendant chooses to make a Rule 12(b)(6) motion, the plaintiff can respond with a motion for summary adjudication that displaces the 12(b)(6) motion.

Concerns also were expressed with responsive pleading practice. One proposal that might be adopted in Rule 8(b) and (c) would require pleading affirmative defenses with the same level of elaboration as is required to plead a claim. Much of the dissatisfaction, however, seems to reflect failure of pleaders to meet the separate statement requirements that permit ready response to complaints, and to honor the detailed response requirements established by Rule 8(b). Defendants charge that plaintiffs plead with characterizations, adjectives, and adverbs that cannot be admitted. Plaintiffs respond that defendants seize any shortcomings as an excuse to deny the fact as well as the characterization. The prospects for successful rule amendments on this score may not be promising.

A number of narrowly focused rules amendments were also suggested. One would establish a time limit to decide any motion. Another would establish priority on the appeal calendar for appeals from orders granting dismissal on the pleadings. Such proposals arise from frustration with crowded dockets. Whether they count as realistic or useful is an important question.

RESEARCH AND PILOT PROJECTS

Empirical research has become an indispensable component of many Civil Rules projects. The invaluable work of the Federal Judicial Center is an integral part of the process. Bar groups, independent institutions, and academics are providing increasingly useful help as well. The many surveys and other works provided for the conference are sufficient demonstration of how important these endeavors are.

Continuing empirical work will help to sort through the many proposals made to further improve civil justice. Much of the work will be independent in inception and execution. Independence is itself important. But other projects will be tied more directly to the work of Enabling Act committees. It will be important to foster these ties, most obviously with the Federal Judicial Center but also with other groups. The current project on pleading standards and dismissals is a fine example.

One form of empirical "research" will be pilot projects to test new ideas. The projects will be most useful if they are planned with the help of researchers who can advise on structures that will facilitate analysis more rigorous than simple general impressions and anecdotes. When the projects occur in federal courts, the Administrative Office and the Federal Judicial Center often should be involved.

Several years ago, the Civil Rules Committee considered a proposal to amend Rule 83 to permit local rules experimenting with procedures conflicting with the Civil Rules. The hope was that carefully designed projects — perhaps requiring approval by the Judicial Conference or some other body — could provide important tests of new ideas. The idea, however, seems to flout the direction of 28 U.S.C. § 2071(a) that local rules "shall be consistent with * * * rules of practice and procedure prescribed under section 2072 of this title." It may be useful to consider a proposal to amend § 2071, although any such proposal must be weighed carefully against the risk of other and unwelcome amendments.

The benefits of actual experience with different rules can arise from practice in state courts as well as in federal courts. The conference included detailed research on practices in Arizona and Oregon. Arizona practice goes far beyond federal practice by requiring highly detailed initial

disclosures. Oregon, on the other hand, continues to have fact pleading and is convinced that it is valuable. Federal courts have much to study in state procedure, and perhaps much to learn from it. This strong beginning must not be allowed to languish.

CARRYING FORWARD

The 2010 Conference has provided more than could have been expected or even hoped for. Many different means will be used to seize its insights. Education programs for bench and bar will help achieve better use of present court rules. Best practices guides may serve the same purpose. Research programs will continue to provide the foundations for sound rules amendments. And continuing hard work by the rules committees will carry forward the momentum provided by the broad-based and carefully considered observations and proposals. The agenda for future work has been nearly filled.

Attachments

Agenda
2010 Litigation Review Conference
Duke Law School
May 10-11, 2010

Monday, May 10, 2010

8:30-8:45 **Welcome and Introduction:** Judges Rosenthal (S.D. TX), Kravitz (D. CT), and Koeltl (S.D. NY)

8:45-10:15 **The Empirical Research: Overview of Satisfaction or Dissatisfaction with the Current System, and Suggestions for Change Raised by the Data**

Moderator: Judge Rothstein (FJC/W.D. WA)

A. The FJC Data: Judge Rothstein, Emery Lee (FJC), and Tom Willging (FJC)

B. The Litigation Section Data: Lorna Schofield (ABA Litigation Section), Emery Lee, and Tom Willging

C. The NELA Data: Rebecca Hamburg (NELA)

D. Follow Up Lawyer Interviews: Emery Lee, Tom Willging

10:15-10:30 **BREAK**

10:30-11:45 **The Empirical Research: Continued**

Moderator: Justice Kourlis (IAALS)

E. Vanishing Jury Trial Data: Prof. Marc Galanter (Wisconsin)

F. The ACTL/IAALS Data: Justice Kourlis, Paul Saunders (Cravath, New York)

G. LJC Cost Data: Alex Dimitrief (General Electric)

H. RAND Data: Nick Pace (RAND)

I. Commentary on the Presented Research: Prof. Marc Galanter (Wisconsin), Prof. Ted Eisenberg (Cornell), Jordan Singer (IAALS), Tom Willging (FJC), Emery Lee (FJC)

11:45-1:00 **Pleadings and Dispositive Motions: Fact Based Pleading, *Twombly, Iqbal*, Efforts to Decide Cases on the Papers Either at the Beginning of the Process or at the End of the Process**

Moderator: Prof. Arthur Miller (NYU)

Participants: Judge Jon Newman (2nd Circuit), Prof. Adam Pritchard (Michigan), Prof. Geoffrey Hazard (Hastings), Dan Girard (Girard, California), Sheila Birnbaum (Skadden, New York), Jocelyn Larkin (Impact Fund, California)

1:00-2:00 **LUNCH**

2:00-2:25 **Speaker: Former Deputy Attorney General David W. Ogden**

2:30-3:45 **Issues With the Current State of Discovery: Is There Really Excessive Discovery, and if so, What are the Possible Solutions?**

Moderator: Elizabeth Cabraser (Lieff, California)

Participants: Judge David Campbell (D. AZ), Magistrate Judge Paul W. Grimm (D. MD), Jason R. Baron (Nat'l Archives), Patrick Stueve (Stueve, Missouri), Steve Susman (Susman, New York/Houston), Prof. Cathy Struve (Pennsylvania)

3:45-5:00 **Judicial Management of the Litigation Process: Is the Solution to Excessive Cost and Delay Greater Judicial Involvement?**

Moderator: Judge Patrick Higginbotham (5th Circuit)

Participants: Judge Michael Baylson (E.D. PA), Magistrate Judge David J. Waxse (D. KS), Jeff Greenbaum (Sills, New Jersey), Prof. Judith Resnik (Yale), William Butterfield (Hausfeld, DC), Paul Bland (Public Justice)

6:30-9:30 **Reception and Dinner**

Tuesday, May 11, 2010

8:30-9:45 **E-Discovery: Discussion of the Cost Benefit Analysis of E-Discovery and the Degree to Which the New Rules are Working or Not**

Moderator: Greg Joseph (Joseph, New York)

Participants: Judge Shira Scheindlin (S.D. NY), Magistrate Judge James K. Bredar (D. MD), John Barkett (Shook Hardy, Florida), Thomas Allman (retired GC of BASF), Joseph Garrison (Garrison, Connecticut), Dan Willoughby, Jr. (King & Spalding, Georgia)

9:45-10:30 **Settlement: Is the Litigation Process Structured for Settlement Rather than Trial and Should it Be? Should the Answers Depend on the Complexity of the Case including Whether the Action is a Class Action?**

Moderator: Judge Brock Hornby (D. ME)

Participants: Judge Paul Friedman (D. DC), Prof. Richard Nagareda (Vanderbilt), Prof. Robert Bone (Univ. TX), James Batson (Liddle, New York), Peter Keisler (Sidley, DC), Loren Kieve (Kieve, California)

10:30-10:45 **BREAK**

10:45-11:45 **Perspectives from the Users of the System: Corporate General Counsel, Outside Lawyers, Public, and Governmental Lawyers**

Moderator: Judge Koeltl (S.D. NY)

Participants: Alan Morrison (AU), Amy Schulman (Pfizer), Thomas Gottschalk (Kirkland & Ellis, DC), Ariana Tadler (Milberg, New York), Anthony West (DOJ Civil Division), Joseph Sellers (Cohen, DC)

11:45-1:00 **Perspectives from the States: Different Solutions for Common Problems and their Relative Effectiveness. This Panel should also consider the results of any Pilot Pograms by the IAALS**

Moderator: Justice Andrew Hurwitz (Arizona)

Participants: Justice Kourlis, Paula Hannaford-Agar (National Conf. for State Courts), Prof. Seymour Moskowitz (Valparaiso), William Maledon (Osborn, Arizona), Judge Henry Kantor (Oregon)

1:00-1:30 **LUNCH**

1:30-2:00 **Speaker: Chief Judge Holderman (N.D. IL)**

2:00- 3:15 **The Bar Association Proposals: ACTL, ABA Litigation Section, NYCBA, AAJ, LCJ, DRI**

Moderator: Lorna Schofield

Participants: Lorna Schofield, David Beck (ACTL), Pat Hynes and Wendy Schwartz (NYCBA), Bruce Parker (DRI, LCJ), John Vail (AAJ)

3:15-4:30 **Observations from Those Involved in the Rule Making Process over the Years**

Moderator: Dean Levi (Duke)

Participants: Judge Scirica (3rd Circuit), Judge Higginbotham, Prof. Paul Carrington (Duke), Prof. Dan Coquillette (Harvard/Boston College), Prof. Arthur Miller (NYU)

4:30-5:00 **Summary and Conclusions:** Judge Rosenthal, Judge Kravitz, Prof. Edward Cooper (Michigan), and Prof. Rick Marcus (Hastings)

2010
Civil Litigation Conference

Conference Panelist Professional Biographies

Tom Allman

Tom Allman served as a General Counsel and Chief Compliance Officer of BASF Corporation from 1993 to 2004 and was an early advocate of what became the 2006 Amendments to the Federal Rules of Civil Procedure. He currently serves as Editor of the Sedona Conference Best Practice Recommendations & Principles for Addressing Electronic Document Production (2nd Ed. 2007)(the "Sedona Principles") and is Chair *Emeritus* of Sedona Working Group One. Mr. Allman is a frequent speaker and writer on the topic of corporate compliance and electronic discovery. He is a graduate of the Yale Law School and resides in Cincinnati, Ohio and New York City.

John M. Barkett

Mr. Barkett is a partner at the law firm of Shook, Hardy & Bacon L.L.P. in its Miami office. He is a graduate of the University Of Notre Dame (B.A. Government, 1972, summa cum laude) and the Yale Law School (J.D. 1975) and served as a law clerk to the Honorable David W. Dyer on the old Fifth Circuit Court of Appeals. Mr. Barkett is an adjunct professor of law at the University of Miami Law School.

Mr. Barkett has, over the years, been a commercial litigator (contract and corporate disputes, employment, trademark, and antitrust), environmental litigator (CERCLA, RCRA, and toxic tort), and, for the past several years, a peacemaker and problem solver, serving as an arbitrator, mediator, facilitator, or allocator in a variety of environmental or commercial contexts. He has served or is serving as a neutral in more than fifty matters involving in the aggregate more than $450 million. He has conducted or is conducting domestic and international commercial arbitrations under AAA, LCIA, UNCITRAL, or CPR rules. He is a certified mediator under the rules of the Supreme Court of Florida and is an approved mediator for the United States District Courts for the Southern and Middle Districts of Florida, and is on the AAA, ICDR, and CPR Institute for Dispute Resolution's neutral panels. In November 2003, he was appointed by the presiding judge to serve as the Special Master to oversee the implementation and enforcement of the 1992 Consent Decree between the United States and the State of Florida relating to the restoration of the Florida Everglades. He also consults with major corporations on the evaluation of legal strategy and risk and conducts independent investigations where such services are needed.

Mr. Barkett has published two books on e-discovery, E-Discovery: Twenty Questions and Answers, (First Chair Press, Chicago, October 2008) and The Ethics of E-Discovery (First Chair Press, Chicago, January 2009). Mr. Barkett has also published or presented a number of articles in the e-discovery arena including: Zubulake Revisited: Pension Committee and the Duty to Preserve (ABA Section of Litigation News, February 26, 2010 (http://www.abanet.org/litigation/litigationnews/trial_skills/pension-committee-zubulake-ediscovery.html); Production of Electronically Stored Information in Arbitration: Sufficiency of the IBA Rules, (a chapter in a book published by JurisNet LLC, New York, September 2008); E-Discovery For Arbitrators, 1 Dispute Resolution International Journal 129, International Bar Association

(Dec. 2007); and Help Has Arrived...Sort Of: The New E-Discovery Rules, ABA Section of Litigation Annual Meeting, San Antonio (2007).

As an adjunct professor, Mr. Barkett teaches a course at the University of Miami Law School entitled "E-Discovery" and has served as an e-discovery Special Master in a Florida state court proceeding. Mr. Barkett is editor and one of the authors of the ABA Section of Litigation's Monograph, Ex Parte Contacts with Former Employees (Environmental Litigation Committee, October 2002). He has presented the following papers in the ethics arena: The Ethics of Web 2.0 (ABA Section of Litigation Annual Conference, New York, April 2010); Cheap Talk? Witness Payments and Conferring with Testify Witnesses, (ABA Annual Meeting, Chicago, Illinois, July 30, 2009); Fool's Gold: The Mining of Metadata (ABA's Third Annual National Institute on E-Discovery, Chicago, May 22, 2009); More on the Ethics of E-Discovery (ABA's Third Annual National Institute on E-Discovery, Chicago, May 22, 2009), and From Canons to Cannon, (Ethics Centennial, ABA Section of Litigation, Washington, D.C. April 18, 2008 commemorating the 100th anniversary of the adoption of the Canons of Ethics).

Jason R. Baron

Jason R. Baron has served for the past 10 years as Director of Litigation for the National Archives and Records Administration, and is an internationally recognized speaker and author on the preservation of electronic records. In 2009 he was named Co-Chair of The Sedona Conference® Working Group on Electronic Document Retention and Production (WG1), and has previously served as Editor-in-Chief of The Sedona Conference Best Practices Commentary on the Use of Search and Information Retrieval Methods in E-Discovery (2007) and Co-Editor-in-Chief of The Sedona Conference Commentary on Achieving Quality in the E-Discovery Process (2009). He is a founding co-coordinator of the TREC legal track, an international research project on search methods used in e-discovery. Mr. Baron has been a trial lawyer and senior counsel with the Department of Justice, a Visiting Scholar at the University of British Columbia, and is currently an Adjunct Professor at the University of Maryland. He also presently serves on the Georgetown University Law Center Advanced E-Discovery Institute Advisory Board.

James A. Batson

James A. Batson has been a partner of Liddle & Robinson, L.L.P. since 1998. He joined the firm upon his graduation from law school in 1993. Mr. Batson earned his law degree and M.B.A. from Fordham University. He graduated from Cornell University in 1988, where he majored in English and Economics.

Mr. Batson represents individuals in all aspects of litigation. Although employment disputes make up the majority of matters on which he works, his experience also encompasses a broad array of commercial disputes.

Mr. Batson is a leader in the field of electronic discovery. He was counsel of record for the plaintiff on all of the widely-followed Zubulake v. UBS Warburg decisions. (Click the link below for more information.) This expertise often proves critical to achieving a successful result in litigation, as e-mails and other forms of electronic communication increasingly become the critical evidence upon which cases are won and lost. For instance, in Zubulake V, the Court ordered UBS to pay monetary sanctions and granted plaintiff's request that an adverse inference instruction be given to the jury at trial. Ultimately, the jury returned a verdict in favor of Laura Zubulake in the amount of $29.2 million, which consisted of $9.1 million in compensatory damages and $20.1 million in punitive damages.

In addition to numerous state and federal courts, Mr. Batson has appeared in arbitrations at the NYSE, the NASD, the American Arbitration Association and the Chicago Board of Trade. He has also argued appeals before the New York Appellate Division and the Second Circuit Court of Appeals.

Judge Michael Baylson

Michael M. Baylson was appointed to the U.S. District Court for the Eastern District of Pennsylvania by President George W. Bush and took office on July 12, 2002. He was born in Philadelphia in 1939, and graduated from Cheltenham High School (1957), the Wharton School of Finance & Commerce (B.S. Econ., 1961) and the Law School (LL.B.,1964) of the University of Pennsylvania.

After clerking for Judge Joseph Sloane of the Philadelphia Court of Common Pleas and volunteering with the Defender Association, Judge Baylson began serving as an Assistant District Attorney under District Attorney Arlen Specter in January 1966, and became Chief of the Homicide Division in 1969. In January 1970, Judge Baylson joined Duane Morris and became a partner in 1974. He handled complex civil litigation matters and tried numerous cases, specializing in class actions, antitrust and securities issues.

After serving as United States Attorney for the Eastern District of Pennsylvania from October 1988 through January 1993, Judge Baylson returned to Duane Morris and resumed an active law practice. He served as Chair of the Trial Department and a member of the firm's Executive Committee.

Judge Baylson was a founder, and later counsel, to Gaudenzia, Inc., the largest non-profit provider of drug, alcohol and mental health rehabilitation services in Pennsylvania.

Judge Baylson is a member of the Advisory Committee on Civil Rules, the Committee on Model Criminal Jury Instructions within the Third Circuit, and is also Adjunct Professor at the University of Pennsylvania Law School, and Temple University Beasley School of Law (Tsinghua University Law School, Beijing, China, October 2010).

He is married to Frances Ruth Batzer Baylson, M.D, and resides in the East Falls neighborhood of Philadelphia.

David J. Beck

David J. Beck founded Beck, Redden & Secrest, L.L.P. in January, 1992. He was formerly a senior partner of Fulbright & Jaworski, L.L.P. in Houston, Texas.

Mr. Beck is a very active trial lawyer and has been throughout his professional career. He has been named by the National Law Journal as one of the top 10 trial lawyers in the United States, and one of the top trial lawyers in the Southwest. After a poll of Texas lawyers in 2002, he was listed by the Texas Lawyer as one of the "Go To Lawyers For Lawyers In Trouble." In November of 2003 – 2009, a statewide survey by Texas Monthly Magazine named him as one of Texas' "Top 10 Super Lawyers." He has been named one of "The Best Lawyers in America" by Woodward & White since the inception of the publication in 1990, and is currently one of the few attorneys listed in four areas of practice. Most recently, the "Best Lawyers" publication named him Houston "2009 Lawyer of the Year" in "Bet-the Company" litigation.

In 2004, United States Supreme Court Chief Justice William Rehnquist appointed Mr. Beck to the Judicial Conference Standing Committee on Rules of Practice and Procedure. In 2007, Chief Justice John Roberts re-appointed him to a 3 year term on the Standing Committee.

He recently served as President of the American College of Trial Lawyers (2006-07), a professional association skilled and experienced in the trial of cases and dedicated to maintaining and improving the standards of trial practice, the administration of justice, and the ethics of the profession, and whose membership is limited to the top 1% of the practicing Bar. He has been named a Fellow in the International Academy of Trial Lawyers, an Advocate in the American Board of Trial Advocates, and an "Honorary Overseas Member" of The Commercial Bar Association ("COMBAR"), a preeminent association of English barristers.

Mr. Beck served as President of the State Bar of Texas in 1995-96. In 2005, he was named as a member of the Board of Trustees of The Center for American and International Law, in 2007 he was appointed to the Center's Executive Committee, and in 2009 was named Vice Chair. In 2007, he received the Leon Green Award from the Texas Law Review Association "for outstanding contributions to the legal profession."

Mr. Beck was honored with the Anti-Defamation League's 2005 Jurisprudence Award. The Award is presented each year to legal professionals who demonstrate a devotion to the principles enshrined in the U.S. Constitution, commitment to the democratic values of the United States, and dedication to fair and equal justice for all.

Mr. Beck has published numerous law journal articles and has appeared as a lecturer on many bar association and law school continuing legal education programs.

Sheila L. Birnbaum

Sheila L. Birnbaum is co-head of Skadden Arps Complex Mass Tort and Insurance Group nationwide. Prior to becoming a Skadden, Arps partner, Ms. Birnbaum served as counsel to the firm while she was a Professor of Law and Associate Dean at New York University School of Law.

She has been national counsel or lead defense counsel for numerous *Fortune* 500 companies in some of the largest and most complicated tort cases in the country. Ms. Birnbaum has successfully argued two cases in the United States Supreme Court.

She was appointed by Chief Judge Kaye to chair the Commission on Fiduciary Appointments. She served as the Executive Director of the Second Circuit Task Force for Racial, Ethnic and Gender Fairness. She was appointed by Chief Judge Rehnquist to serve as a member of the Judicial Conference Advisory Committee on the Rules of Civil Procedure.

Ms. Birnbaum has received the Margaret Brent Women Lawyers of Achievement Award from the American Bar Association, the John L. McCloy Memorial Award from the Fund for Modern Courts, and the Law and Society Award from the New York Lawyers for the Public Interest. She is also the recipient of the New York University Law Alumni Award for outstanding achievement in the legal profession, the George A. Katz Torch of Learning Award and the Milton S. Gould Award for Outstanding Appellate Advocacy. She is a member of the Hunter College Hall of Fame.

Ms. Birnbaum was selected by *The National Law Journal* as one of the 100 most outstanding members of the legal profession. She has also been named by *Fortune* as one of the 50 most powerful women in American business, and by *Crain's New York Business* as one of the 75 most influential women in business and one of the 50 most powerful women in New York City.

F. Paul Bland, Jr

F. Paul Bland, Jr., is a Staff Attorney for Public Justice and Of Counsel at Chavez & Gertler. He handles precedent-setting complex civil litigation. He has argued or co-argued and won more than twenty reported decisions from federal and state courts across the nation, including cases in five of the federal Circuit Courts of Appeal and seven different state high courts. He was named the "Vern Countryman" Award winner in 2006 by the National Consumer Law Center, which "honors the accomplishments of an exceptional consumer attorney who, through the practice of consumer law, has contributed significantly to the well being of vulnerable consumers." He is a co-author of a book entitled *Consumer Arbitration Agreements: Enforceability and Other Issues*, and numerous articles. For three years, he was a co-chair of the National Association of Consumer Advocates. He was named the San Francisco Trial Lawyer of the Year in 2002 and Maryland Trial Lawyer of the Year in both 2001 and 2009. Prior to coming to Public Justice, he was a plaintiffs' class action and libel defense attorney in Baltimore. In the late 1980s, he was

Chief Nominations Counsel to the U.S. Senate Judiciary Committee. He graduated from Harvard Law School in 1986 and Georgetown University in 1983.

Robert G. Bone

Robert Bone is Professor of Law and holds the G. Rollie White Excellence in Teaching Chair at The University of Texas School of Law. He joined the UT faculty in January 2010. Previously he was the Robert Kent Professor in Civil Procedure at Boston University School of Law. Professor Bone received his B.A. degree from Stanford University in 1973 and his J.D. from Harvard Law School in 1978. Following law school, he clerked for United States District Court Judge W. Arthur Garrity, Jr. and served as an associate at the Boston law firm of Hill & Barlow, before joining the University of Southern California law faculty in 1983. Professor Bone became a member of the BU Law School faculty in 1987, where he served before moving to UT Law School in 2010. He was also a Visiting Professor at Columbia Law School for the fall term 1998 and at Harvard Law School for the fall term 2001. Professor Bone is a leading scholar in the fields of civil procedure, complex litigation, and intellectual property. He has published numerous articles in leading law journals, a book entitled *The Economics of Civil Procedure*, and several essays in other books, and he has given many lectures and talks. His writing spans a wide range of topics. In civil procedure, his published work deals with issues in the economic analysis of procedure, class actions, pleading, innovative case aggregation techniques, preclusion law, rulemaking, the nature of procedural rules, and procedure history. In intellectual property, his work focuses mainly on trademark law and trade secret law. Professor Bone was selected to give the 2000-2001 Boston University Lecture in honor of his scholarly achievements, and he received Boston University's highest teaching award, the Metcalf Award for Excellence in Teaching, in 1991. Professor Bone is a member of the American Law Institute and the American Law and Economics Association.

William P. Butterfield, Esq

Mr. Butterfield is a partner at Hausfeld LLP, a global claimants' law firm. He focuses his practice on antitrust litigation and electronic discovery. Mr. Butterfield developed his interest in electronic discovery in the early 1990's when led the design and implementation of an electronic document repository to manage more than 15 million pages of documents in *In re Prudential Securities Limited Partnerships Litigation*. He has testified as an expert witness on e-discovery issues, and speaks frequently on that topic domestically and abroad. Mr. Butterfield is on the Steering Committee of The Sedona Conference Working Group on Electronic Document Retention and Production, where he served as editor-in-chief of the *Case for Cooperation* (2009), and was a co-editor of *The Sedona Conference Commentary On Preservation, Identification and Management of Sources of Information that are Not Reasonably Accessible* (2008). He is also a member of Sedona Conference Working Group on International Electronic Information Management, Discovery and Disclosure. Mr. Butterfield also serves on the faculty of Georgetown University Law Center's Advanced E-Discovery Institute.

Elizabeth J. Cabraser

Elizabeth J. Cabraser, a founding partner of Lieff, Cabraser, Heimann & Bernstein, LLP, has 30 years experience representing plaintiffs in securities, investment, and consumer fraud; product liability; and human and civil rights litigation. Ms. Cabraser received her A.B. in 1975 and her J.D. in 1978, from the University of California at Berkeley. She has written and lectured extensively on federal civil procedure, complex litigation, securities litigation, class action trials and settlements, mass tort litigation, and substantive tort law issues. Her litigation experience includes leadership roles in the FPI/Agretech, Breast Implants, Telectronics, Cordis, Felbatol, Fen-Phen (Diet Drugs), Baycol, Bextra/Celebrex, Guidant, Vioxx, and Vytorin MDLs, and work for smokers, Attorneys General and the Cities and Counties of California in Tobacco Litigation. She has served as court-appointed lead or co-lead counsel in over 80 federal multidistrict proceedings, and has participated in the design, structure and conduct of eight nationwide class action trials in securities fraud, product liability, mass accident and consumer cases in state and federal courts.

Ms. Cabraser has served as Visiting Professor of Law at Columbia University and Adjunct Professor of Law at the University of California, Berkeley (Boalt Hall), teaching complex litigation, class actions, and mass torts. She currently teaches complex litigation at Berkeley. She has lectured and conducted seminars for the Federal Judicial Center, ALI-ABA, the National Center for State Courts, Vanderbilt University Law School, and the Practicing Law Institute. She serves on the American Law Institute (ALI) Council. She is Editor-in-Chief of the treatise California Class Action Practice and Procedure (LexisNexis). Her recent articles include "**Just Choose: The Jurisprudential Necessity to Select a Single Governing Law for Mass Claims Arising from Nationally Marketed Consumer Goods and Services,**" Roger Williams University Law Review (Winter 2009); "The Manageable Nationwide Class: A Choice-of-Law Legacy of Phillips Petroleum Co. v. Shutts", 74 UMKC L. Rev. 543 (Spring 2006), "The Class Action Counterreformation", 57 Stanford L. Rev. 1475, (April 2005); "Human Rights Violations As Mass Torts: Compensation As A Proxy For Justice In The United States Civil Litigation System", 57 Vanderbilt L. Rev. 2211 (November 2004).

Ms. Cabraser has received the Trial Lawyers for Public Justice Public Justice Achievement Award for her work as class counsel in the Polybutylene Pipe Litigation; the Consumer Attorneys of California's 1998 Presidential Award of Merit and 2008 Edward J. Pollock Award for her commitment to consumer protection; the Anti-Defamation League's Distinguished Jurisprudence Award for her work in the federal Holocaust Litigation in 2002; and the Boalt Hall Citation Award in 2003. She received the University of San Francisco School of Law's 2007 "Award for Public Interest Excellence." She has been named repeatedly as one of The National Law Journal's "100 Most Influential Lawyers in America," one of its "50 Most Influential Women Lawyers," and its "Top Ten Women Litigators." She has been annually included in the Daily Journal's "Top 100 Lawyers" since 1998; its 2005-2008 "Top Women Litigators," and its 2005 "Top 30 Securities Litigators." This year, Ms. Cabraser has been awarded the ABA Margaret Brent Award.

Judge David G. Campbell

Judge David G. Campbell was appointed to the United States District Court for the District of Arizona in 2003. He is a member of the Advisory Committee on the Federal Rules of Civil Procedure. Before his appointment to the bench, Judge Campbell was a commercial litigator with the Phoenix, Arizona law firm of Osborn Maledon. He also worked as a law clerk for Justice William H. Rehnquist of the Supreme Court and Judge J. Clifford Wallace of the Ninth Circuit. Judge Campbell currently is working with the judges of Botswana and South Africa on judicial case management. He has taught constitutional law and civil procedure at the Arizona State and Brigham Young University Law Schools.

Paul D. Carrington

Paul D. Carrington is a professor at the Duke University Law School. He served that school as dean from 1978 to 1988. From 1986 to 1992 he served as Reporter to the Civil Rules Committee. He is the author of numerous books and articles pertinent to the subject of the conference.

Edward H. Cooper

Edward H. Cooper is the Thomas M. Cooley Professor at the University Of Michigan Law School. He is Reporter for the Civil Rules Advisory Committee. He also is co-author, with the late Charles Alan Wright and with Arthur R. Miller, as well as later co-authors, of Federal Practice & Procedure: Jurisdiction, 1st, 2d, and 3d editions.

Daniel Coquillette

The author of Lawyers and Fundamental Moral Responsibility, The Anglo-American Legal Heritage, Francis Bacon, and The Civilian Jurists of Doctor's Commons and editor of Law in Colonial Massachusetts and Moore's Federal Practice, J. Donald Monan Professor of Law Daniel R. Coquillette teaches and writes in the areas of legal history and professional responsibility.

Professor Coquillette was a law clerk for Justice Robert Braucher of the Supreme Judicial Court of Massachusetts and Chief Justice Warren E. Burger of the Supreme Court of the United States. He taught legal ethics on the faculty of the Boston University Law School, taught as a Visiting Professor at Cornell Law School and Harvard Law School, and became a partner for six years at the Boston law firm of Palmer & Dodge, where he specialized in complex litigation. He served as Dean of Boston College Law School from 1985-1993, and was named J. Donald Monan, S.J. University Professor in 1996.

Among his many activities, Professor Coquillette is an Advisor to the American Law Institute's Restatement on Law Governing the Legal Profession, a member of the Harvard University Overseers' Committee to Visit Harvard Law School, and Reporter to the Committee on Rules of Practice and Procedure, Judicial Conference of the United States. For five years, he was Chairman of the

Massachusetts Bar Association Committee on Professional Ethics and Chairman of the Task Force on Unauthorized Practice of Law. He also served on the American Bar Association Committee on Ethics and Professional Responsibility, the Board of the American Society of Legal History, the Massachusetts Task Force on Model Rules of Professional Conduct and the Massachusetts Task Force on Professionalism. He was also a member of the Special Committee on Model Rules of Attorney Conduct of the Supreme Judicial Court of Massachusetts.

EDUCATION: A.B., Williams College; M.A., Oxford University; J.D., Harvard University.

Alex Dimitrief

Alex Dimitrief was appointed Vice President and Senior Counsel for Litigation and Legal Policy on February 1, 2007. He is responsible for litigation and enforcement proceedings in the United States and international jurisdictions against GE and its business segments. He also oversees the Company's worldwide compliance programs and serves as a member of GE's Policy Compliance Review Board and GE's Corporate Executive Council.

Mr. Dimitrief joined GE from Kirkland & Ellis LLP, where he had been a trial lawyer since 1986. Dimitrief's practice spanned many industries and subject areas, including regulatory matters, securities class actions and regulation, intellectual property disputes, environmental matters and bankruptcy litigation. By way of more recent examples, he defended Morgan Stanley and its senior executives against the far-reaching investigation of research - investment banking conflicts of interest spearheaded by then NY Attorney General Eliot Spitzer and served as lead trial counsel for United Airlines in its 3-year bankruptcy reorganization.

Prior to joining Kirkland & Ellis, Dimitrief was a White House Fellow in the Reagan Administration's Office of Political and Intergovernmental Affairs and an Honors Intern in the Office of the Solicitor General at the Department of Justice. He graduated from Yale College in 1981 with a degree in economics and political science and earned his J.D. at Harvard Law School, where he was the Managing Editor of the Harvard Law Review.

Theodore Eisenberg

Theodore Eisenberg has emerged in recent years as one of the foremost authorities on the use of empirical analysis in legal scholarship. After his graduation from University of Pennsylvania Law School, Eisenberg clerked for both the District of Columbia Circuit of the U.S. Court of Appeals, and Chief Justice Earl Warren of the U.S. Supreme Court. After three years in private practice, Professor Eisenberg began teaching at UCLA. A groundbreaking scholar in the areas of bankruptcy, civil rights, and the death penalty, Eisenberg has used innovative statistical methodology to shed light on such diverse subjects as punitive damages, victim impact evidence, capital juries, bias for and against litigants, and chances of success on appeal. He currently teaches bankruptcy and debtor-creditor law, constitutional law, and federal income taxation.

Judge John M. Facciola

John M. Facciola was appointed a United States Magistrate Judge in the District of Columbia in 1997. Prior to being appointed to the bench, he served as an Assistant District Attorney in Manhattan from 1969-1973, and was in private practice in the District of Columbia from 1974-1982. Judge Facciola joined the U.S. Attorney's Office in 1982 and served as Chief of the Special Proceedings section from 1989 until his appointment as Magistrate Judge. Judge Facciola is a frequent lecturer and speaker on the topic of electronic discovery. Judge Facciola is a member of the Sedona Conference Advisory Board, the Georgetown Advanced E-Discovery Institute Advisory Board and he is also the former Editor in Chief of The Federal Courts Law Review, the electronic law journal of the Federal Magistrate Judges Association. He has recently been appointed to the Board of Directors of the Federal Judicial Center. His most recent publication is with Jonathan M. Redgrave, Asserting and Challenging Privilege Claims in Modern Litigataion: The Facciola-Redgrave Framework, 2009 Fed. Cts. L. Rev. 19 (2009). He received his A.B from the College of the Holy Cross and his J.D. from the Georgetown University Law Center.

Judge Paul L. Friedman

Paul L. Friedman is a judge on the United States District Court for the District of Columbia. Before taking the oath of office on August 1, 1994, he was a partner in the firm of White & Case and the managing partner of its Washington, D.C. office. Judge Friedman was law clerk to Judge Roger Robb on the U.S. Court of Appeals for the D.C. Circuit and to Judge Aubrey E. Robinson, Jr., on the U.S. District Court. He was an Assistant U.S. Attorney for the District of Columbia, an Assistant to the Solicitor General of the United States, and Associate Independent Counsel for the Iran/Contra Investigation. Judge Friedman is a Past President of the District of Columbia Bar and chaired the U.S. District Court Civil Justice Reform Act Advisory Group, the D.C. Judicial Nomination Commission, and the U.S. District Court Grievance Committee. He is a member of the American Law Institute, its Council, and the Executive Committee of the Council; he chairs the ALI's Program Committee and is an advisor to its Model Penal Code Sentencing Project. He is also a member of the American Academy of Appellate Lawyers and a Fellow of

the American College of Trial Lawyers. He served on the American Bar Association Special Commission on Multidisciplinary Practice and is a Fellow of the American Bar Foundation.

As a federal judge, Judge Friedman has presided over the largest civil rights settlement in history, the class action lawsuit brought by African American farmers alleging decades of discrimination by the U.S. Department of Agriculture in connection with farm loans and credit programs; a number of class action suits against the District of Columbia government for alleged failings in the provision of special education services to disabled children; lawsuits by several foreign sovereigns against U.S. tobacco companies seeking damages for health care costs; hearings with respect to John Hinckley's requests for unsupervised release from St. Elizabeths Hospital; the merger of West Publishing Company and The Thomson Corporation; and many other noteworthy and interesting cases. Judge Friedman has served on the Advisory Committee on Criminal Rules of the U.S. Judicial Conference and has chaired the Rules Committee of the U.S. District Court for the District of Columbia.

Marc Galanter

Marc Galanter is John and Rylla Bosshard Professor Emeritus of Law and South Asian Studies at the University of Wisconsin-Madison and Centennial Professor at the London School of Economics and Political Science, Drawing on a background of comparative work on India, he has been engaged for many years in the empirical study of the American civil justice system. He has written extensively on patterns of litigation, on the organization of the legal profession, and on American legal culture.

Joe Garrison

From the beginning of his career, Mr. Garrison has represented individuals. Employment law became an important part of his activities, and after some early successes he has concentrated his practice in this field. Mr. Garrison has tried numerous employment cases to conclusion before juries, as well as before arbitrators in arbitration proceedings. He is experienced in the federal and state trial courts of Connecticut.

Since 2003, Mr. Garrison has increasingly acted as a mediator and an arbitrator. He is a panel member on the American Arbitration Association's selective list of mediators and arbitrators. His experience in these procedures has further enhanced his ability to represent clients at all levels of employment in negotiations and other settlement processes.

The year 2007 will be the 20th consecutive year that Mr. Garrison has been listed in The Best Lawyers In America. Placement in Best Lawyers results from peer selection and represents the top 1% of lawyers in the particular listed fields. In addition, Mr. Garrison was selected as a Connecticut Super Lawyer, and within that group he earned a spot in the top 50 lawyers in the state. Because of his jury trial work, he

has also been selected to the American Board of Trial Advocates, an honorary group in which he is the only lawyer selected in Connecticut who represents employees in employment matters.

Mr. Garrison has been writing a monthly column for the Connecticut Law Tribune since 2003, concentrating on issues in arbitration law and procedure. He contributed a chapter to Connecticut's Mediation Practice Book on mediation from the employee's perspective. He has acted as a book reviewer for works on alternate dispute resolution, arbitration, and jury instructions for employment litigation.

Mr. Garrison is also a nationally-known speaker. He has spoken annually at various seminars, including New York University Law School's employment law workshop for federal judges, the National Employment Lawyers Association's (NELA) conventions, and the Law Education Institute seminar for employment law. He has also spoken at many American Bar Association annual meetings and seminars, and is a frequent lecturer in Connecticut.

In his legal career, Mr. Garrison has been selected as an officer in a number of national and local organizations. The College of Labor and Employment Lawyers welcomes the most prominent lawyers in the field as its Fellows. Mr. Garrison was a Charter Fellow in the College's Board of Governors, and served as its national President. He has also served for three years as President of the National Employment Lawyers Association (NELA), the specialty bar for employee advocates. He is a member of the Board of Governors of the Connecticut Trial Lawyers Association.

Daniel Girard

Daniel Girard is the managing partner of Girard Gibbs LLP, a law firm with offices in San Francisco and New York. He specializes in federal securities litigation on behalf of investors and has represented and counseled some of the leading institutional investors in the United States and abroad. He has also represented plaintiffs in class actions arising under the civil rights, unfair competition, predatory lending and telecommunications laws. He has served since 2004 on the United States Judicial Conference Advisory Committee on Civil Rules.

Thomas A. Gottschalk

Thomas A. Gottschalk is Of Counsel to Kirkland & Ellis, LLP, having served previously as Executive Vice-President of Law & Public Policy and General Counsel of General Motors Company. He began his legal career in 1967, after graduating from Earlham College (B.A) and the University of Chicago Law School (J.D.), as a litigator initially in Kirkland's Chicago office and beginning in 1979 in the Firm's Washington, D.C., office. He joined General Motors as its Senior Vice-President and General Counsel in 1994 and retired from GM in 2007. His practice at Kirkland concentrated principally on federal court litigation, involving defense of government and civil antitrust actions, regulatory enforcement actions, class

actions, and commercial litigation. He served as a member of the Firm's management committee from 1980 until 1994. He currently serves as chair of the board of the Institute for Legal Reform of the U.S. Chamber of Commerce, and is a director of Justice at Stake, Transparency International - U.S.A., and the National Conference on Citizenship. He also chairs Kirkland's Pro Bono Management Committee.

Jeffrey J. Greenbaum, Esq.

Jeffrey J. Greenbaum is a member of the New Jersey and New York law firm of Sills Cummis & Gross P.C. where he co-chairs the firm's Business Litigation Section and chairs its Class Action Defense Practice Group. Mr. Greenbaum has handled class actions of national prominence, chaired the ABA Section of Litigation Class Actions & Derivative Suits Committee and is currently a national officer of the ABA Section of Litigation. He is a frequent lecturer in the class action field. Mr. Greenbaum was a member of the ABA President's Class Action Task Force, a group that developed the ABA position on federal legislation seeking class action reform, and was a presenter before the U.S. Supreme Court's Advisory Committee on Civil Rules at its Class Action Conference. Mr. Greenbaum is a Certified Civil Trial Attorney, a past President of the Association of the Federal Bar of New Jersey, and on the Advisory Board of the BNA Class Action Litigation Report. Mr. Greenbaum is listed in the Best Lawyers in America; Chambers USA Guide to America's Leading Lawyers for Business, New Jersey Super Lawyers and was also voted as one of the "Top 100 New Jersey Super Lawyers" in 2006 and 2008 by New Jersey Super Lawyers. He is a graduate of the Wharton School of the University of Pennsylvania and University of Michigan Law School (*cum laude*).

Chief Magistrate Judge Paul W. Grimm

Paul W. Grimm serves as a full-time Magistrate Judge for the United States District Court for the District of Maryland. He was appointed in February 1997. He was appointed as Chief Magistrate Judge in May 2006. In September, 2009 he was appointed by the Chief Justice of the United States to serve as a member of the Advisory Committee for the Federal Rules of Civil Procedure. Additionally, Judge Grimm is an adjunct professor of law at the University of Maryland School of Law, where he teaches evidence, and also has taught trial evidence, pretrial civil procedure, and scientific evidence. He also is an adjunct professor of law at the University of Baltimore School of Law, where he teaches a course regarding the discovery of and pretrial practices associated with electronically stored evidence.

Judge Grimm is a frequent lecturer at CLE programs on issues regarding evidence and civil procedure, and he has lectured throughout the United States regarding discovery of electronically stored information and its admissibility in civil and criminal proceedings. He has authored several opinions that have received national attention relating to electronically stored information, including: Thompson v. HUD, 219 F.R.D. 93 (D. Md. 2003) (discussing the factors that govern the scope of discovery of electronically stored evidence, and the duty to preserve such evidence, as well as spoliation sanctions

for failure to do so); Hopson v. Mayor and City Council of Baltimore, 232 F.R.D. 228 (D. Md. 2005) (addressing issues of inadvertent waiver of privilege by production of electronically stored evidence with respect to the recent amendments to the Federal Rules of Civil Procedure); Lorraine v. Markel American Insurance Company, 241 F.R.D. 534 (D. Md. 2007) (comprehensively discussing the evidentiary issues associated with admissibility of electronic evidence); CNA v. Under Armour, Inc. 537 F. Supp. 2d 761 (D. Md. 2008) (discussing the circumstances in which inadvertent disclosure of electronically stored information waives privilege and work product protection); Victor Stanley, Inc. v. Creative Pipe, Inc., 250 F.R.D. 251 (D. Md. 2008) (also discussing waiver of privilege regarding inadvertent production of electronically stored information, as well as proper methods of conducting search and information retrieval searches for ESI to fulfill preservation, production and privilege review functions); and Mancia v. Mayflower, 253 F.R.D. 354 (D. Md. 2008) (discussing the duty of counsel and parties to cooperate during the pretrial discovery process to reduce the cost and burden of discovery). He has authored numerous books, book chapters, and articles on these topics. He also is a frequent lecturer at the Maryland Judicial Institute, the continuing education arm of the Maryland State Judiciary, as well as at programs for the ABA, ALI-ABA, and the United States Department of Justice's National Advocacy Center, where he teaches courses on evidence, civil procedure, and trial advocacy.

In 2002 and 2006 Judge Grimm was awarded the Outstanding Adjunct Professor of the Year Award by the University of Maryland School of Law. In 2001, he was awarded the Maryland Bar Foundation's Professional Excellence Award for the Advancement of Professional Competence. In 1998, he received the Maryland Institute for Continuing Professional Education of Lawyer's Distinguished Service Award, and in 2004 he received the Daily Record Leadership in Law Award.

Before becoming a Magistrate Judge, Judge Grimm was in private practice in Baltimore for thirteen years, during which time he handled commercial litigation. He also served as an Assistant Attorney General for the State of Maryland, an Assistant State's Attorney for Baltimore County, Maryland, and a Captain in the United States Army Judge Advocate General's Corps. In 2001, Judge Grimm retired as a Lieutenant Colonel from the United States Army Reserve.

Judge Grimm is a graduate of the University of California (summa cum laude), and the University of New Mexico School Of Law (magna cum laude, Order of the Coif).

Rebecca M. Hamburg

Rebecca M. Hamburg joined the National Employment Lawyers Association (NELA) as Program Director in May 2009. Ms. Hamburg has been a NELA member since 2003, joining NELA's Board of Directors in 2008. Prior to joining the NELA staff, Ms. Hamburg was an associate with the law firms of Schonbrun DeSimone Seplow Harris & Hoffman, LLP, in Venice, CA, which represented employees as well as plaintiffs in civil rights and international human rights matters, including police misconduct cases; Berger & Montague, P.C., in Philadelphia, PA, where she litigated Title VII class actions on behalf of employees

around the country; and Gebhardt & Associates, LLP, in Washington, DC, where her practice focused on representing federal executive and legislative branch employees at both the administrative level and in federal court. She has also been an adjunct professor at The George Washington University Law School in the upper-division writing program. She received her J.D. from The George Washington University Law School and her B.A. in Political Science/International Relations from the University of California, San Diego (Eleanor Roosevelt College).

Paula L. Hannaford-Agor

Paula L. Hannaford-Agor, the Director of the Center for Juries Studies, joined the Research Division of the National Center for State Courts in May 1993. In this capacity, she regularly conducts research and provides technical assistance and education to courts and court personnel on the topics of jury system management and trial procedure; civil litigation; and complex and mass tort litigation. She is an adjunct faculty at the College of William & Mary School of Law, teaching seminars on the American Jury and on Selected Issues in Judicial Administration.

Ms. Hannaford-Agor received the 2001 NCSC Staff Award for Excellence. In 1995, she received her law degree from William & Mary Law School and a Masters degree in Public Policy from the Thomas Jefferson Program in Public Policy of the College of William and Mary.

Geoffrey C. Hazard, Jr.

Geoffrey C. Hazard, Jr., Professor of Law, Hastings College of the Law, University of California, and University of Pennsylvania. Director Emeritus, American Law Institute. Mr. Hazard is a consultant to the Standing Rules Committee.

Judge Patrick E. Higginbotham

Patrick E. Higginbotham was appointed to the United States District Court, Northern District of Texas, in 1975 and in 1982 to the United States Court of Appeals, Fifth Circuit. He commenced trying cases at the age of 22 and without interruption has worked in one courtroom or another for the past 48 years. He served as: faculty member of the Federal Judicial Center, Adjunct Professor Constitutional Law, SMU Law School; The University of Alabama School of Law fall semesters of 1995, 1997, and 1999 (Federal Jurisdiction); The University of Texas School of Law fall semester of 1998 (Constitutional Law); Texas Tech University School of Law spring of 1999 (Federal Jurisdiction); St. Mary's School of Law (2007 – to date) (Constitutional Law); B.A. and LL.B. University of Alabama; Dr. Laws (Hon.) SMU; life member ALI; Chair Board of Trustees Center for American & International Law; President, American Inns of Court Foundation (1996-2000); member Ethics 2000 Commission, ABA; former Chair, Appellate Judges Conference, ABA; member Bd. Ed., ABA Journal; advisor National Center for State Courts [habeas

corpus]; member, Board of Overseers, Institute for Civil Justice, RAND; former Chair Advisory Committee on Civil Rules; Samuel E. Gates Litigation Award, American College of Trial Lawyers (1997); Sherman Christensen Award American Inns of Court (2002); TEX-ABOTA, Judge of the Year Award (2006); Lewis Powell Award presented United States Supreme Court (2008); John Marshall Award, Judge Advocate General Association (2010); author of numerous articles and book reviews.

Judge D. Brock Hornby

Judge Hornby was born in Canada, obtained his B.A. from the University of Western Ontario, and graduated from Harvard Law School where he was Supreme Court Note and Developments Editor of *The Harvard Law Review*. He clerked for U.S. Fifth Circuit Judge John Minor Wisdom, taught at the University of Virginia Law School (he became a U.S. citizen during that period), practiced with Perkins, Thompson, Hinckley & Keddy in Portland, Maine, served as a United States Magistrate Judge, then as a Justice of the Maine Supreme Judicial Court and became a United States District Judge in 1990. He is a member of the Council of The American Law Institute. He is a fellow of the American and Maine Bar Foundations. He is a member of the National Academies Standing Committee on Science, Technology and the Law. He has served on both the United States Judicial Conference and its Executive Committee. He is a past chair of The Federal Judicial Center's Committee on District Judge Education and of the United States Judicial Conference Committee on Court Administration and Case Management. He was a member of the Judicial Conduct and Disability Act Study Committee (the Breyer Committee) established by Chief Justice Rehnquist to study the system of judicial discipline for federal judges (final report 2006). In 2005, the Chief Justice appointed him as chair of the Judicial Conference Committee on the Judicial Branch. In 2007, the Chief Justice appointed him as chair of an Ad Hoc Committee to secure judicial salary restoration. In 2009, Judge Hornby received the 27th Annual Edward J. Devitt Distinguished Service to Justice Award. Judge Hornby has presided over major Multidistrict Litigation (MDL) antitrust class action and data theft lawsuits. He has been a lecturer or consultant on United States judicial topics to judges in Argentina, Canada, China, the Czech Republic, England, Moldova and Thailand. Apart from his judicial opinions, he has written on a variety of legal and judicial topics.

Justice Andrew Hurwitz

Andrew D. Hurwitz was appointed to the Arizona Supreme Court by Governor Napolitano in 2003.

Justice Hurwitz received his undergraduate degree from Princeton University (A.B. 1968) and his law degree from Yale Law School (J.D. 1972), where he was Note and Comment Editor of the Yale Law Journal. He served as a law clerk to Judge Jon O. Newman of the United States District Court for the District of Connecticut in 1972; to Judge J. Joseph Smith of the United States Court of Appeals for the Second Circuit in 1972-73; and to Associate Justice Potter Stewart of the Supreme Court of the United States in 1973-74.

Before joining the Supreme Court, Justice Hurwitz was a partner in the Phoenix firm of Osborn Maledon, where his practice focused on appellate and constitutional litigation, administrative law, and civil litigation. He has argued two cases before the Supreme Court of the United States, including Ring v. Arizona, 536 U.S. 584 (2002), which held the then-existing statutory scheme for imposition of the death penalty in Arizona unconstitutional.

Justice Hurwitz served as Chief of Staff to Governor Bruce Babbitt from 1980 to 1983, and Chief of Staff to Governor Rose Mofford in 1988. He was a member of the Arizona Board of Regents from 1988 through 1996, and served as President of the Board in 1992-93.

Justice Hurwitz has regularly taught at the Arizona State University College of Law, and was in residence at the College of Law as Visiting Professor of Law in 1994-95 and as a Distinguished Visitor from Practice in 2001. Justice Hurwitz delivered the Willard H. Pedrick lecture at the College of Law in 1999. He is a member of the Advisory Committee on the Federal Rules of Evidence.

Gregory P. Joseph

Gregory P. Joseph is the President Elect of the American College of Trial Lawyers and former Chair of the Section of Litigation of the American Bar Association. He served on the Advisory Committee on the Federal Rules of Evidence from 1993-99. He is the author of Sanctions: The Federal Law of Litigation Abuse (4th ed. 2008; Supp. 2010); Civil RICO: A Definitive Guide (3rd ed. 2010); and Modern Visual Evidence (Supp. 2010). He is a member of the Editorial Board of Moore's Federal Practice (3rd ed.). He is the principal of Gregory P. Joseph Law Offices, LLC.

Judge Henry Kantor

Henry Kantor is a Judge of the Circuit Court of the State of Oregon for Multnomah County. He was appointed to the District Court in 1994, was elected to a six-year District Court term in 1996, became a Circuit Court Judge in 1998 and was elected to six-year Circuit Court terms in 2002 and 2008. Prior to taking judicial office, Judge Kantor practiced civil trial and appellate law in Oregon's state and federal courts, emphasizing class actions and other complex litigation, as well as serving as an arbitrator, pro-tem judge and reference judge. As a trial judge, he presides over civil, criminal and probate trials, sits on the court's Civil Motion Panel and, for several years, administered the court's Medical Negligence and Asbestos Dockets. During 2004-2005, Judge Kantor sat pro-tem on the Oregon Court of Appeals

Peter D. Keisler

Peter D. Keisler returned to Sidley Austin LLP after serving for several years at the United States Department of Justice. He is one of the global coordinators of Sidley's Appellate Practice and a member

of the firm's Executive Committee. Prior to rejoining Sidley, Mr. Keisler served as the Acting Attorney General of the United States. In that capacity, Mr. Keisler served as the chief law enforcement officer of the country and directed the work of the Department of Justice, including its investigative agencies and litigating divisions. Mr. Keisler had joined the Department of Justice in 2002 as the Principal Deputy Associate Attorney General and spent most of his more than five-year tenure as the Assistant Attorney General for the Civil Division.

As Assistant Attorney General for the Civil Division, Mr. Keisler oversaw the work of the Justice Department's largest litigating division, consisting of approximately 700 attorneys who represent the interests of the United States in federal and state courts throughout the country on a wide range of cases, including cases relating to administrative law, constitutional law, government contracts, False Claims Act and other civil fraud enforcement, bankruptcy, intellectual property, tort law, immigration law, foreign law, the constitutionality of federal statutes, the lawfulness of government programs and their implementation, national security matters, and civil and criminal enforcement of the Food, Drug and Cosmetic Act and other consumer protection laws. As head of the Civil Division, Mr. Keisler personally argued a number of significant cases on behalf of the government involving issues of constitutional, statutory, regulatory and common law.

Prior to his government service, Mr. Keisler had an extensive appellate and regulatory practice as a partner at Sidley and argued a wide range of federal constitutional, statutory, and administrative law cases in the federal courts. He represented the cable industry before the U.S. Supreme Court in successfully arguing National Cable & Telecommunications Association v. Gulf Power, in which the Supreme Court held that cable operators offering high-speed Internet access were entitled to access to electric utility poles at regulated rates. He also represented AT&T in a broad range of cases before the U.S. Courts of Appeals and District Courts, and in rulemakings and adjudications before the Federal Communications Commission, relating to competition, pricing and rate regulation, merger reviews and other regulatory and statutory matters.

Mr. Keisler serves as a member of the Advisory Committee on Civil Rules, the Committee which studies and develops proposed amendments to the Federal Rules of Civil Procedure for submission to the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States. Mr. Keisler also served as Associate Counsel to the President in the Office of White House Counsel under President Ronald Reagan.

Mr. Keisler holds a B.A., magna cum laude, from Yale University, and a J.D. from Yale Law School, where he was an officer of the Yale Law Journal. He served as a law clerk for Justice Anthony Kennedy of the United States Supreme Court and Judge Robert Bork of the United States Court of Appeals for the District of Columbia Circuit.

Loren Kieve

Loren Kieve is the founder and principal of Kieve Law Offices in San Francisco. For the eighth year in a row, *San Francisco Magazine* and *Law & Politics Magazine* have named him as one of the top "Super Lawyers" in the Bay Area. He attended Stanford University and has law degrees from Oxford University and the University of New Mexico. He clerked for two federal judges on three courts, including the Ninth and Tenth Circuits. Prior to forming Kieve Law Offices in 2008, he was a partner in the Quinn Emanuel firm and before that with Debevoise & Plimpton for 13 years in Washington, D.C. He is a Life Fellow of the ABA, as well as a member of its Standing Committee on Federal Judicial Improvements (2008-2011) and a California State Bar Delegate to the ABA House of Delegates.

He has been a primary author or major contributor to numerous ABA and Litigation Section standards, position papers and analyses, including the *ABA Civil Trial Practice Standards* (1998); *ABA Guidelines for Litigation Conduct* (1998); *ABA Discovery Practice Standards* (1999) (primary editor); *ABA Litigation Section Comments on the Final Report of the Commission on Structural Alternatives for the Federal Courts of Appeal* (1999); *ABA Policy on Expert Witness Reports* (2006); and the *ABA Standards for Final Pretrial Submissions and Orders* (2008) (primary editor).

Mr. Kieve has held leadership positions with the ABA Section of Litigation, including serving on its governing Council, since 1987. He was appointed by the President and confirmed by the Senate and continues to serve as a trustee (and as the current chair) of the Institute of American Indian and Alaska Native Culture and Arts Development, Santa Fe, New Mexico, a Congressionally-charted institution with four- and two-year college degree programs for Native Americans and Alaska Natives as well as the Museum of Contemporary Native American Art. Since 2001, he has been a member of the National Advisory Board of the Center for Comparative Studies in Race and Ethnicity at Stanford University.
He is also a member, director and past co-chair of the Lawyers' Committee for Civil Rights of the San Francisco Bay Area, as well as a member and audit committee member of the National Board of Trustees of the Lawyers' Committee for Civil Rights under Law.

Judge John Koeltl

Judge Koeltl was appointed United States District Judge for the Southern District of New York on August 11, 1994 and entered on duty on September 9, 1994. He graduated from Georgetown University with an A.B. degree *summa cum laude* in 1967 and received a J.D. degree *magna cum laude* from Harvard Law School in 1971, where he was an editor of the Harvard Law Review.

From 1971 to 1972, Judge Koeltl was a law clerk to the Hon. Edward Weinfeld United States District Judge, Southern District of New York, and from 1972 to 1973 he was a law clerk to Hon. Potter Stewart, United States Supreme Court. He served as an Assistant Special Prosecutor, Watergate Special Prosecution Force, and Department of Justice from 1973 to 1974. In February 1975 he became an

Associate with Debevoise & Plimpton until January 1979 when he became a partner with the firm. He remained at Debevoise & Plimpton until his appointment to the bench in 1994.

Judge Koeltl is a member of the American Bar Association, the American Law Institute, the Association of the Bar of the City of New York, the New York State Bar Association, the Bar Association of the Fifth Circuit, the American Society of International Law, the New York County Lawyers Association, the Federal Bar Council, the Federal Communications Bar Association, the Fellows of the American Bar Foundation, the American Judicature Society, Phi Beta Kappa Associates, the Supreme Court Historical Society and the Harvard Law School Association of New York. He is an Adjunct Professor of Law at New York University School of Law.

Justice Rebecca Love Kourlis

Rebecca Love Kourlis served Colorado's courts for nearly two decades—first as a trial court judge and then as a Justice of the Colorado Supreme Court. In January 2006, she established the Institute for the Advancement of the American Legal System (IAALS) at the University of Denver, where she is executive director.

IAALS is a national, non-partisan organization dedicated to improving the process and culture of the American civil justice system. The Institute conducts research and develops policy recommendations in the areas of civil justice reform, civil case management, judicial selection and judicial performance evaluation.

Most recently, the Institute announced the formation of the O'Connor Judicial Selection Initiative, in order to provide states with an interest in moving from direct election of judges to a commission-based system, with the tools to achieve this goal. Justice Kourlis holds B.A. and J.D. degrees from Stanford University.

Judge Mark Kravitz

Mark R. Kravitz is a Judge of the United States District Court for the District of Connecticut, having commenced his service on that Court in August 2003. Judge Kravitz sits in New Haven, Connecticut. Before his appointment to the District Court, Judge Kravitz was a partner at Wiggin & Dana, LLP, where he worked for nearly 27 years, most recently as the Chair of the firm's Appellate Practice Group. Before joining Wiggin & Dana, Judge Kravitz served as a law clerk to Judge James Hunter, III, Circuit Judge, of the United States Court of Appeals for the Third Circuit, and to Chief Justice (then Justice) William H. Rehnquist of the United States Supreme Court. From 2001 to 2007, Judge Kravitz served, by appointment of the Chief Justice of the United States, as a Member of the Standing Committee on the Rules of Practice and Procedure in the United States Courts. In June 2007, Chief Justice John G. Roberts, Jr. appointed Judge Kravitz to Chair the Advisory Committee on Civil Rules.

Jocelyn Larkin

Jocelyn Larkin is the Deputy Executive Director of the Impact Fund, a legal non-profit that provides grants, training and co-counseling for public interest complex litigation. Ms. Larkin oversees the organization's litigation and training programs. For more than 20 years, her practice has focused on civil rights class actions, and she has served as class counsel in many cases. She is currently co-lead counsel in the *Dukes v. Wal-Mart Stores* gender discrimination class action, the largest civil rights class action in history.

Emery G. Lee III

Emery G. Lee III is a senior researcher at the Federal Judicial Center. At the FJC, he has worked primarily with the Judicial Conference Committee on Federal-State Jurisdiction and the Advisory Committee on Civil Rules; his projects have included studies of processing times in capital habeas cases, the impact of the Class Action Fairness Act of 2005, and the impact of the Prison Litigation Reform Act of 1996, and a national, case-based survey of attorneys in recently closed civil cases. Prior to joining the FJC, Lee was the Supreme Court Fellow at the Administrative Office of the U.S. Courts, 2005-06. From 2003-05, he was assistant professor of political science and law at Case Western Reserve University in Cleveland, Ohio. He has published in both political science journals and law reviews, including the Journal of Politics, Justice System Journal, and University of Pennsylvania Law Review. Lee holds a Ph.D. in political science (Vanderbilt, 1996) and a J.D. from Case Western Reserve (2001), where he served as editor in chief of the law review, 2000-01. He served as a judicial law clerk for the Honorable Karen Nelson Moore, United States Court of Appeals for the Sixth Circuit, 2001-02.

David F. Levi

David F. Levi became the 14th dean of Duke Law School on July 1, 2007. Prior to his appointment, he was the Chief United States District Judge for the Eastern District of California with chambers in Sacramento. He was appointed United States Attorney by President Ronald Reagan in 1986 and a United States district judge by President George H. W. Bush in 1990.

A native of Chicago, Dean Levi earned his A.B. in history and literature, magna cum laude, from Harvard College. He entered Harvard's graduate program in history, specializing in English legal history and serving as a teaching fellow in English history and literature. He graduated Order of the Coif in 1980 from Stanford Law School, where he was also president of the Stanford Law Review. Following graduation, he was a law clerk to Judge Ben C. Duniway of the U.S. Court of Appeals for the Ninth Circuit, and then to Justice Lewis F. Powell, Jr., of the U.S. Supreme Court.

He has served as chair of two Judicial Conference committees by appointment of the Chief Justice. He was chair of the Civil Rules Advisory Committee (2000-2003) and chair of the Standing Committee on the

Rules of Practice and Procedure (2003-2007); he has been reappointed to serve as a member of that committee (2009-2012). He was the first president and a founder of the Milton L. Schwartz American Inn of Court, now the Schwartz-Levi American Inn of Court, at the King Hall School of Law, University of California at Davis. He is a member of the Council of the American Law Institute (ALI), was an advisor to the ALI's Federal Judicial Code Revision Project, and currently serves as an advisor to the Aggregate Litigation project. He was chair of the Ninth Circuit Task Force on Race, Religious and Ethnic Fairness and was an author of the report of the Task Force. He was president of the Ninth Circuit District Judges Association (2003-2005). In 2007, he was elected a fellow of the American Academy of Arts and Sciences. In 2010, he was named to the board of directors of Equal Justice Works. Dean Levi is the co-author of Federal Trial Objections (James Publishing 2002). At Duke Law, he teaches courses on Judicial Behavior and Ethics.

William J. Maledon

William J. Maledon is a member of the firm of Osborn Maledon, P.A., in Phoenix where he heads the firm's litigation practice. He received his J.D. degree, summa cum laude, from the University Of Notre Dame in 1972, where he was Editor-In-Chief of the Notre Dame Law Review. From 1972 to 1973, he served as a law clerk to Justice William J. Brennan, Jr., of the United States Supreme Court. Among other things, Mr. Maledon has been a member of several federal and Arizona State Bar committees, including the Arizona Supreme Court Committee on Jury Reform which brought innovative jury procedures to Arizona courts and the Arizona Supreme Court Committee on Complex Litigation which initiated Arizona's new complex litigation court. Since 2005, he has served on the Standing Committee for Rules of Practice and Procedure in the federal courts. He has served several times as judge pro tem on the Arizona Court of Appeals, and is an Adjunct Professor of Law at Arizona State University.

Rick Marcus

Rick Marcus is Associate Reporter for the Civil Rules Advisory Committee, and has been a Reporter for the Advisory Committee since 1996. He holds the Horace O. Cole ('57) Chair in Litigation at the University of California, Hastings College of the Law and is author of several volumes of the Federal Practice and Procedure treatise (mainly on discovery), as well as leading casebooks on Civil Procedure and Complex Litigation.

Arthur R. Miller, LL.B.

Mr. Miller is a University Professor at NYU School of Law, formerly Bruce Bromley Professor of Law at Harvard Law School, Cambridge, Massachusetts. Undergraduate Degree, University of Rochester; J.D., Harvard Law School. Formerly practiced law in New York City; Faculty, University of Minnesota, Faculty, University of Michigan; Host, Miller's Court (eight years); Commentator on legal matters, Boston's

WCVB-TV; Legal Editor, ABC's "Good Morning America" (1980-present); Former Host, "Miller Law" on Court TV. He is the author or co-author of numerous works on civil procedure, notably many volumes of the Wright & Miller Federal Practice & Procedure treatise; he has also written on copyright and on issues relating to privacy. Professor Miller carries on an active law practice, particularly in the federal appellate courts. His public interest activities include work as a member and reporter for the Advisory Committee on Civil Rules of the Judicial Conference of the United States, as Reporter for the American Law Institute's Project on Complex Litigation, and as a Commissioner on the United States Commission on New Technological Uses of Copyrighted Works.

Alan B. Morrison

Alan Morrison is currently the Lerner Family Associate Dean for Public Interest & Public Service at the George Washington University Law School, where he also teaches civil procedure and election law. He spent most of his career as the director of the Public Citizen Litigation Group, which he founded with Ralph Nader in 1972. The Group litigated law reform cases, often against federal or state agencies, mainly in federal court and generally on the plaintiff's side. Before establishing the Litigation Group, Mr. Morrison was an Assistant U.S. Attorney in the SDNY for almost four years, the last two of which as Assistant Chief of the Civil Division. He has taught litigation-related and other courses, on both a part and full-time basis, at Harvard, Stanford, NYU, Hawaii and American University Law Schools. He has been a Fellow of the American Academy of Appellate Lawyers since 1992 and was its president in 1999-2000. He is currently a member of the ALI,, where he was actively involved in the project on the Principles of Aggregate Litigation, and a member of the Committee on Science Technology & Law of the National Academies of Science. He is a graduate of Yale College and Harvard Law School and was a commissioned officer in the US Navy.

Seymour (Sy) Moskowitz

Seymour (Sy) Moskowitz is Professor of Law at Valparaiso (IN) University School of Law. He is a graduate of Columbia University and Harvard Law School. His practice experience includes Legal Services, the Valpo Law Clinical Program and private practice. He has litigated cases in both state and federal courts, including Supreme Court cases. He is the author of numerous treatises and more than 25 law journal articles.

Richard A. Nagareda

Richard A. Nagareda is a Professor of Law at Vanderbilt University Law School, where he also serves as Director of the Cecil D. Branstetter Litigation & Dispute Resolution Program. His research focuses on complex civil lawsuits, particularly aggregate litigation and mass torts. His articles have appeared in the *Columbia Law Review, Harvard Law Review, Michigan Law Review, New York University Law Review,*

Texas Law Review, University of Chicago Law Review, University of Pennsylvania Law Review, and *Vanderbilt Law Review*. In 2003, the American Law Institute appointed him as an Associate Reporter for its project *Principles of the Law of Aggregate Litigation,* ultimately published by the Institute in 2010. In 2007, the University of Chicago Press published his monograph *Mass Torts in a World of Settlement*. His 2009 casebook *The Law of Class Actions and Other Aggregate Litigation* from Foundation Press has been adopted for use at several leading law schools across the country.

Judge Jon O. Newman

Judge Jon O. Newman has been a federal judge for 38 years, serving initially on the District Court for the District of Connecticut and for the past 31 years on the Court of Appeals for the Second Circuit. He was Chief Judge for the Court of Appeals from 1993 to 1997. He has served as chair of the Advisory Committee on Appellate Rules.

Nicholas M. Pace

Nicholas M. Pace, a long-time RAND Institute for Civil Justice staff member, has contributed his expertise in civil justice-related research methodology to many ICJ projects, most recently leading a study that explored issues associated with class actions against insurers. Other recent work included examining the impact of statutory reforms on costs and outcomes in medical malpractice cases as well as leading a comprehensive study of the workers' compensation courts in California. He has also been involved in studying the dynamics of class action litigation generally and recommending new managerial approaches for judges in such cases; helping to accomplish an in-depth evaluation of the Civil Justice Reform Act of 1990 and its effects on judicial case management, cost, and delay in Federal district courts; analyzing jury verdict outcomes with a special focus on punitive damage awards; and developing national standards related to the electronic filing of pleadings and other legal documents in civil courts. Currently he is leading the ICJ's research agenda into civil jury verdicts, conducting a study of post-trial adjustments to jury awards, looking at the impact of the Class Action Fairness Act of 2005, and investigating issues related to public defender resource calculations.

Bruce R. Parker

Bruce R. Parker is a Partner in Venable's Products Liability Practice Group. He is a Fellow in the American College of Trial Lawyers. He has served on the national trial team in several mass tort litigations, including breast implants and latex gloves, in which he tried several cases to verdict and served as lead counsel in the MDL Daubert hearings.

He also served as the lead trial counsel in the Mirapex litigation in which he tried two MDL bellwether cases. He also served as national coordinating counsel for Pharmacia in its litigation involving Gel foam

and Navistar in connection with the diesel exhaust litigation. Mr. Parker had a significant role in developing the scientific/medical defense in the Vioxx litigation. He currently serves on the national trial team for a contact manufacturer in the contact lens solution litigation.

Mr. Parker served as President of the IADC (2006-07). He was also the President of the Maryland Defense Counsel in 1988 and served on DRI's Board of Directors (2005-08) and the Lawyers for Civil Justice (2006-07). He served as the Director of the IADC Trial Academy in August, 2004 and is the Appointed Dean for the IADC Corporate Counsel College in 2012.

Adam C. Pritchard

Adam C. Pritchard is the Frances and George Skestos Professor of Law and Director of the Empirical Legal Studies Center at the University of Michigan Law School. He teaches corporate and securities law. His current research focuses on the role of class action litigation in controlling securities fraud and the history of securities law in the Supreme Court.

Judith Resnik

Judith Resnik is the Arthur Liman Professor of Law at Yale Law School, where she teaches about federalism, procedure, citizenship, and equality. Her recent books include *Federal Court Stories* (co-edited with Vicki C. Jackson, Foundation Press, 2009) and *Migrations and Mobilities: Citizenship, Borders, and Gender* (co-edited with Seyla Benhabib, N.Y.U. Press, 2009). Her articles include *Detention, the War on Terror, and the Federal Courts* (Columbia Law Review, 2010); *Courts: In and Out of Sight, Site, and Cite* (Villanova Symposium on Transparency in the Courts); *Law's Migration* (Yale Law Journal, 2006), and *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III* (Harvard, 2000). Forthcoming is *Compared to What? ALI Aggregation, Procedural Contracts, Package Pleas, and Public Voice* (George Washington Law Review, 2010). Professor Resnik is also an occasional litigator; she argued *Mohawk Industries, Inc. v. Carpenter*, decided in 2009 by the United States Supreme Court. Professor Resnik has chaired the Sections on Procedure, on Federal Courts, and on Women in Legal Education of the American Association of Law Schools. She is a Managerial Trustee of the International Association of Women Judges and the founding director of Yale's Arthur Liman Public Interest Program and Fund. In 2001, she was elected a fellow of the American Academy of Arts and Sciences, and in 2002, a member of the American Philosophical Society. In 2008, she received the Fellows of the American Bar Foundation Outstanding Scholar of the Year Award.

Judge Lee H. Rosenthal

Judge Lee H. Rosenthal was appointed a United States District Court Judge for the Southern District of Texas, Houston Division in 1992. Before then, she was a partner at Baker & Botts in Houston. Chief Justice Rehnquist appointed Judge Rosenthal as a member of the Judicial Conference Advisory

Committee on Civil Rules in 1996. She served as chair of the Class Actions subcommittee during the development of the 2003 amendments to Rule 23. She was appointed chair of the Civil Rules Committee in 2003 and served during the "restyling" of the Civil Rules and the adoption of the electronic discovery amendments. In 2007, Chief Justice Roberts appointed Judge Rosenthal to chair the Judicial Conference Committee on the Rules of Practice and Procedure, which coordinates the work of the Advisory Committees for the Civil, Criminal, Evidence, Appellate, and Bankruptcy Rules. Judge Rosenthal is a member of the American Law Institute, where she serves as an advisor for the Employment Law project and the Aggregate Litigation project and was an advisor for the Transnational Rules of Civil Procedure project. In 2007, she was elected to the ALI Council. Judge Rosenthal serves on the Board of Trustees of Rice University in Houston, Texas. Judge Rosenthal has twice been named the "Trial Judge of the Year" by the Texas Association of Trial and Appellate Lawyers. Judge Rosenthal received her undergraduate and law degrees from the University of Chicago.

Judge Barbara Jacobs Rothstein

Judge Barbara Jacob Rothstein is a U. S. District Judge for the Western District of Washington and was appointed Director of the Federal Judicial Center in Washington, D.C., by the Board of the Center, chaired by Chief Justice William H. Rehnquist. She was chief judge of the Western District of Washington from 1987-1994. She graduated Phi Beta Kappa from Cornell University and attended Harvard Law School.

Before her appointment to the federal bench in 1980, she served as a King County Superior Court judge for the State of Washington. Before that she practiced law with a private firm in Boston, Massachusetts, and with the Consumer Protection and Antitrust Division of the State of Washington's Attorney General's office. Judge Rothstein taught trial practice at the University of Washington Law School.

Judge Rothstein is a member of the Avon Global Center for Women and Justice at Cornell Law School. She has trained women judges and lawyers from Afghanistan and Saudi Arabia and has trained judges in other countries to help improve the rule of law and the role of the judiciary. She has presided over many complex and controversial criminal and civil cases. She has served on a variety of committees including the Federal-State Relations Committee of the United States Judicial Conference and the Ninth Circuit Standing Committee on Gender, Race, Religious and Ethnic Fairness.

She is a frequent lecturer and is a member of the American Law Institute. She is currently on the Board of the Institute of Judicial Administration at New York University Law School. She also serves as member of the National Academy of Science's Committee on Science, Technology and Law. She is a Commissioner on the American Judicature Society's Commission on Forensic Science and Public Policy as well as a member of the Physicians and Lawyers for National Drug Policy Justice Education Advisory

Committee. She has also served on the Board of EINSHAC, an educational affiliate of the Human Genome Project dedicated to instructing judges on scientific issues connected with the role of genetics in litigation. She serves on the National Historical Publications and Record Commission; the American Society of International Law (ASIL) Judicial Advisory Board; The Sedona Conference Judicial Advisory Board, and on the Board of the Rule of Law Initiative of the American Bar Association.

Paul C. Saunders

Paul C. Saunders is a partner at Cravath, Swaine & Moore LLP. He is also a Distinguished Visiting Professor from Practice at Georgetown University Law Center. His practice includes complex litigation and international arbitration. He has written and lectured in areas of securities law, intellectual property, antitrust and church-state issues. He is a Fellow of the American College of Trial Lawyers and is currently Chair of its Task Force on Discovery and Civil Justice. He is also Chair of the New York State Judicial Institute on Professionalism in the Law. He is a former Co-Chair of the Lawyers' Committee for Civil Rights Under Law and has served as a member of the boards of the Legal Aid Society, Office of the Appellate Defender, Volunteers of Legal Service and The Constitution Project. He currently serves on the Board of Trustees of Fordham University and on the Board of Visitors of Georgetown University Law Center. He graduated from Fordham College in 1963 and from Georgetown University Law Center in 1966, where he was Notes Editor of the Georgetown Law Journal. He also attended the Institut d'Etudes Politiques in Paris. He served as a Captain in the United States Army Judge Advocate General's Corps from 1967 to 1971.

Judge Shira A. Scheindlin

Shira A. Scheindlin is a United States District Judge for the Southern District of New York. She was nominated by President Bill Clinton on July 28, 1994. Before taking her current seat on the Southern District bench in November, 1994, Judge Scheindlin worked as a prosecutor (Assistant United States Attorney for the Eastern District of New York), commercial lawyer (General Counsel for the New York City Department of Investigation and partner at Herzfeld & Rubin), and Judge (Magistrate Judge in the Eastern District of New York 1982-1986 and Special Master in the Agent Orange mass tort litigation). Judge Scheindlin is known for her intellectual acumen, demanding courtroom demeanor, aggressive interpretations of the law, and expertise in mass torts, electronic discovery, and complex litigation. During her tenure, Judge Scheindlin has presided over a number of high profile cases, many of which advanced important new positions in the common law. She also has been a member of the Judicial Conference of the United States Advisory Committee on the Federal Rules of Civil Procedure (1998-2005, where she served as a member of the Discovery Subcommittee and Chair of the Special Master Subcommittee). She is a member of the American Law Institute (where she served on the Advisors Consultative Group on the Aggregate Litigation Project), a former Chair of the Commercial and Federal Litigation Section of the New York State Bar Association ("NYSBA"), a former Board Member of the New

York County Lawyers Assocation ("NYCLA"), a member of the Advisory Board of the Sedona Conference, and a member or past member of several committees of the Association of the Bar of the City of New York. She is the recipient of the Brennan Award from the NYSBA, the Weinfeld Award and the William Nelson Cromwell Awards of the NYCLA, and the Judicial Recognition Award of the National Association of Criminal Defense Lawyers. She is the co-author of the first casebook on electronic discovery and digital evidence (Shira A. Scheindlin, Daniel J. Capra, & The Sedona Conference, Electronic Discovery and Digital Evidence, Cases and Materials 454 (2008)), a book on electronic discovery "Electronic Discovery and Digital Evidence in a Nutshell," many articles, including most recently an article on the intersection of recent amendments to Rule 53 and Rules 26-37 of the Federal Rules of Civil Procedure, a pamphlet supplement to Moore's Federal Practice on the Newly Amended Federal Rules of Civil Procedure and a chapter on this subject in the ABA's multi-volume treatise on Federal Civil Practice. Finally, she is an adjunct Professor of Law at Brooklyn Law School, and a frequent lecturer. On the subject of electronic records management, the opinions in Zubulake v. UBS Warburg LLC have come to be recognized as case law landmarks.

Lorna Schofield

Lorna Schofield is a partner at Debevoise & Plimpton whose practice focuses on litigation in complex commercial matters, particularly the defense of companies and individuals in regulatory and white collar criminal investigations. She is also an experienced trial attorney in civil lawsuits; her experience includes the successful defense at trial of celebrity Rosie O'Donnell in a $100 million lawsuit brought by the former publishers of Rosie magazine and a class action jury trial for a Big Four accounting firm in which the jury returned a favorable verdict after only 30 minutes. Ms. Schofield chairs the ABA Section of Litigation (approximately 68,000 members).

Amy W. Schulman

Amy W. Schulman is Senior Vice President and General Counsel of Pfizer. She leads the global biopharmaceutical company's Legal Division and is responsible for a wide range of legal and regulatory areas. Ms. Schulman has spearheaded the Pfizer Legal Alliance, an innovative approach to the delivery of legal services. She saw the company through its $68 billion acquisition of Wyeth and has reorganized the Legal Division to align with Pfizer's business unit structure and broadened its scope to include lawyers in all markets. Ms. Schulman joined Pfizer in 2008 from DLA Piper, where she was a partner, member of the Global Board and Executive and Policy Committees, and built and led the firm's mass tort/class action practice. Her clients included GE Healthcare, Cisco, Wyeth, Philip Morris, Kraft Foods and Pfizer, for whom she served as lead national counsel in multi-district litigation involving pain medicines Bextra and Celebrex.

Ms. Schulman has been recognized repeatedly for her commitment to clients, skill as a legal advocate and efforts to advance women in the profession. In 2009, *The National Law Journal* named her to its inaugural list of the 20 Most Influential General Counsel, and *Forbes* magazine listed her as one of The World's 50 Most Powerful Women. In 2004, *The American Lawyer* recognized her as one of the 45 legal superstars under the age of 45.

Ms. Schulman is a Phi Beta Kappa graduate of Wesleyan University and earned her J.D. from Yale Law School in 1989.

Wendy H. Schwartz

Wendy is a partner in the New York office of Reed Smith, LLP. She is an experienced trial lawyer, handling domestic and international dispute resolution. Her disputes practice includes U.S. federal and state court complex litigation, international commodities arbitrations and shipping disputes. Wendy also has an active internal and government investigations practice focusing on cross-border regulatory and enforcement matters, including FCPA and commercial bribery, international fraud and financial crimes. Her clients include significant multi-national companies in the financial services, life sciences, and energy and commodities trading arenas.

Wendy has tried a number of cases, including *Nextwave v. FCC*, a fraudulent conveyance case worth $4 billion. She has received numerous commendations and awards, including recognition by the *New York Lawyer* in 2001 as one of "Fifteen Lawyers Under 40 Shaping the Law for the 21st Century." She has throughout her career participated in public service and bar association activities, and currently serves as the Chair of the Federal Courts Committee of the Association of the Bar of the City of New York.

Wendy served for eight years as an Assistant United States Attorney in the civil division of the United States Attorney's Office for the Southern District of New York, ultimately as a deputy and acting chief of the division. She received her undergraduate and law degrees from the University of Pennsylvania.

Judge Anthony Scirica

Anthony Scirica is a United States Chief Appellate Judge for the Third Circuit. Nominated for appointment June 26, 1987 by President Ronald Reagan; received commission August 6, 1987; elevated to Chief Judge June 1, 2003.

Joseph M. Sellers

Joseph Sellers is a partner and head of the civil rights and employment practice in Washington, D.C. at the firm of Cohen Milstein Sellers & Toll PLLC. Before coming to that firm in 1997, he was the head of the Employment Discrimination Group at the Washington Lawyers' Committee for Civil Rights and Urban Affairs for 16 years. In nearly 30 years of legal practice, he has served as lead or co-lead counsel in more than 60 civil rights and employment class or collective actions where he has represented workers and others who claim to have been victims of discrimination or other forms of corporate or governmental misconduct. He has tried civil rights class actions to judgment before juries and courts and has argued more than 30 cases before appellate courts, including the U.S. Supreme Court. He has taught Professional Responsibility and Employment Discrimination. He has served as a mediator in a variety of matters.

Jordan M. Singer

Jordan M. Singer is the Director of Research at the Institute for the Advancement of the American Legal System (IAALS). He joined IAALS in August 2006, after several years of private practice. In addition to overseeing IAALS's major research initiatives, Singer is a frequent speaker and writer on the issue of civil practice, case flow management, and judicial performance evaluation. His articles have appeared in the Denver University Law Review, the Federal Courts Law Review, the Albany Law Review and Judicature, among others. He has spoken before a wide range of audiences, including the National Association of the Administrative Law Judiciary, the Western Social Science Association and the Ninth Circuit Conference of Chief District Judges. He has also testified before the Colorado House and Senate Judiciary Committees and the Utah Standing Committee on the Judiciary concerning legislation in those states.

Catherine Struve

Catherine Struve is a Professor of Law at the University Of Pennsylvania Law School. Professor Struve teaches and researches in the fields of civil procedure and federal courts. Prior to entering law teaching, she clerked for Judge Amalya L. Kearse on the U.S. Court of Appeals for the Second Circuit and then worked from 1996 to 2000 as a litigation associate at Cravath, Swaine & Moore. She serves as reporter to the Judicial Conference Advisory Committee on Appellate Rules and as reporter to a Third Circuit task force that has prepared model jury instructions in civil cases. Her recent research includes a study of jury instructions in employment discrimination cases.

Patrick J. Stueve

Patrick J. Stueve is co-founder of Stueve Siegel Hanson LLP headquartered in Kansas City, Missouri. SSH represents plaintiffs and defendants in complex antitrust, business, class action, securities, wage and hour, environmental, and product liability litigation and trials. Patrick began his career clerking for

United States District Court Judge John W. Oliver in the Western District of Missouri, Kansas City. He then joined the trial department of Stinson, Mag & Fizzell and became partner in 1994. He left Stinson in 1996 to found Berkowitz, Feldmiller, Stanton, Brandt, Williams & Stueve. Patrick had various management responsibilities at these firms before leaving to found Stueve Siegel in 2001. Patrick received his B.A. in Economics, with distinction, from Benedictine College in 1984, and his J.D. from the University of Kansas (Order of the Coif) in 1987, serving as an Editor of the Kansas Law Review and the Criminal Justice Review.

Patrick has served as lead trial and class counsel successfully prosecuting multi-million dollar claims in federal and state courts nationwide (and AAA arbitrations) in the areas of antitrust, trademark and patent infringement, class actions, securities fraud, telecommunications, franchise, and health care. Patrick has been elected by his peers as one of the Top 100 "Super Lawyers" in all of Missouri and Kansas and repeatedly named "Best of the Bar" by the Kansas City Business Journal. He is the past President of the Lawyers Association of Kansas City and currently is Vice-President of the Federal Courts Advocacy section of the KCMBA and serves on the Missouri Supreme Court's E-Discovery committee.

Stephen D. Susman

Stephen D. Susman founded Susman Godfrey in 1980 in Houston, TX. The firm now boasts 88 lawyers in offices in Houston, Dallas, Seattle, Los Angeles, and New York, and has had the privilege of being named one of the two top litigation boutiques in the nation by The American Lawyer in their "Litigation Boutique of the Year" competition.

Susman is among a small group included in ***The Best Lawyers in America*** for 25 years, and recognized for two consecutive years by ***Who's Who Legal: The International Who's Who of Business Lawyers*** as the 2006 and 2007 Leading Commercial Litigator in the World. ***Who's Who Legal: Texas*** acknowledged him in both the Commercial Litigation and Unfair Competition categories. Texas ***Monthly Magazine*** named Susman as one of the top 10 lawyers in Texas for six consecutive years as well as being listed in ***Lawdragon 500 Leading Lawyers in America*** with the comment: "This legendary litigator is hot when it comes to global warming suits, getting TXU reforms for 37 Texas cities and representing an Inuit tribe whose home was lost to environmental changes. Although the stakes are high and the demands immense in his private practice, that doesn't stop Susman from tirelessly pursuing issues of justice, reform and challenges to the profession as a whole." Currently serving on the Texas Supreme Court's Advisory Committee, Susman has been instrumental in discovery rule revision, making trials quicker and less expensive. Appointed in 2009 to serve on both the ABA's Section of Litigation Trial Attorney

Advisory Board and the Commission on the Impact of the Economic Crisis on the Profession and Legal Needs, Susman dedicates a tremendous amount of time and effort to these endeavors.

Other professional affiliations include: State Bars of Texas, District of Columbia, New York, and Colorado; American Bar Association (Section of Antitrust Law, Federal Practice Task Force, Committee to Improve Jury Comprehensive, and Section of Intellectual Property); National Council of Human Rights First; American Law Institute; Texas Supreme Court Advisory Committee; American Board of Trial Advocates; Warren Burger Society; Board Member of the American Constitution Society; The University of Houston Law Foundation; The University of Texas Health Science Center Development Board; MD Anderson University Cancer Foundation Board of Visitors; The University of Texas Development Board; and the Leadership Council of the Yale School of Forestry and Environmental Studies.

Ariana J. Tadler, Esq.

Ariana J. Tadler specializes in securities fraud and consumer class action litigation. She currently serves as one of plaintiffs' liaison counsel in *In re Initial Public Offering Securities Litigation*, 21 MC 92 (S.D.N.Y.), a consolidated class action against 55 of the nation's most prominent investment banks and more than 300 corporate issuers, in which the court, in October 2009, approved a $586 million cash settlement. She is an elected member of the Executive Committee of Milberg LLP. Ariana is a leading authority on electronic discovery, having chaired and spoken on this topic at numerous conferences both nationwide and abroad. She currently co-chairs The Sedona Conference® Working Group 1 on Electronic Document Retention and Production, the leading e-discovery "think tank," and serves on the Advisory Board of Georgetown University Law Center's Advanced E-Discovery Institute. Ariana is a provisional member of the Academy of Court-Appointed Masters and is an active board member for several charity and community organizations.

John Vail

John Vail represents clients in litigation challenging restrictions on the constitutional rights of access to justice and of trial by jury, appearing nationwide in state and federal courts, including the Supreme Court. Mr. Vail represents the American Association for Justice (AAJ) on constitutional matters and advises legislative advocates regarding pending legislation. His writings, such as *Blame it on the Bee Gees: The Attack on Trial Lawyers and Civil Justice*, 51 N.Y.L Sch. L. Rev. 323 (2006) (with Robert Peck) and *Big Money v. The Framers*, Yale L.J. (The Pocket Part), Dec. 2005, have illuminated issues affecting the civil justice system and have amused readers.

The legal services community recognized Mr. Vail's "inspired vision and outstanding leadership" with the Denison Ray Award. For his "outstanding work" defending the right of access to justice he received the Public Justice Achievement Award. Mr. Vail is Professorial Lecturer in Law at the George Washington University School of Law. He is a 1976 graduate of the College of the University of Chicago and a 1979 graduate of Vanderbilt Law School.

David J. Waxse

Dave Waxse is a United States Magistrate Judge for the United States District Court in Kansas City, Kansas, having been appointed in 1999 and reappointed in 2007. Judge Waxse received his B.A. degree from the University of Kansas and his J.D. degree from Columbia University.

Prior to his appointment as a Magistrate Judge he was a partner at Shook, Hardy & Bacon of Kansas City, Missouri, where his practice was concentrated in employment law and litigation. In addition, he mediated cases for the United States District Court for the District of Kansas.

Judge Waxse was a past chair and a member of the Kansas Commission on Judicial Qualifications [the state judicial disciplinary organization] from 1992-1999. During their existence, he was a member of the Civil Justice Reform Act Advisory Committee and the Mediation Panel for the United States District Court for the District of Kansas. He was a member of the Kansas Justice Commission established by the Kansas Supreme Court to implement the Citizens' Justice Initiative review of the state justice system.

He is a Past-President of the Kansas Bar Association and as a KBA delegate to the ABA House of Delegates was a member of the Board of Governors of the KBA from 1988 -2008. He is a member of the Earl E. O'Connor Inn of Court and is a Past-President of the Inn. He is also a member of the American Bar Association (Judicial Division), Johnson County Bar Association, Kansas City Metropolitan Bar Association, Wyandotte County Bar Association and Federal Magistrate Judge's Association. Judge Waxse is Chair-elect of the National Conference of Federal Trial Judges of the Judicial Division of the ABA and a member of the ethics committee of the Judicial Division. He is also a fellow of the Kansas Bar Foundation and the American Bar Foundation.

He is also an Observer to The Sedona Conference Working Groups on Electronic Document Retention and Production (WG1) and International Electronic Information Management, Discovery and Disclosure (WG6). He has been a lecturer in law at the University of Kansas School of Law and has made presentations on electronic discovery and other topics in programs presented by the American Bar Association, the American Association for Justice, the Defense Research Institute, the University of Kansas, the University of Missouri at Kansas City, Washburn Law School, Georgetown Law School, and various other organizations.

In addition, prior to becoming a judge he was a member of the national boards of the American Civil Liberties Union, the Lawyer's Committee for Civil Rights Under Law and the American Judicature Society. He is still a member of the Judicial Conduct Advisory Committee of AJS.

Tony West

Tony West was nominated by President Barack Obama to be the Assistant Attorney General for the Justice Department's Civil Division on January 22, 2009. He was confirmed by the U.S. Senate on April 20, 2009.

As the largest litigating division in the Department of Justice, the Civil Division represents the United States, its departments and agencies, Congress, Cabinet officers, and other federal employees in lawsuits across the country. Some examples include: defending the recent health care reform legislation against recent challenges; litigating habeas corpus petitions brought by detainees at Guantanamo Bay; and providing support and guidance to agencies responding to the recent oil spill in the Gulf of Mexico.

Mr. West has focused on these traditional areas, as well as bolstering the Civil Division's civil enforcement efforts, such as bringing civil actions to recover taxpayer money lost to fraud and abuse. Since April 2009, the Civil Division has recovered over $4 billion through affirmative civil enforcement.

In addition, Mr. West has emphasized the Civil Division's responsibility to enforce the nation's consumer protection laws. Since April 2009, the Office of Consumer Litigation has convicted 33 defendants and imposed criminal penalties exceeding $1.3 billion for illegal activities in connection with defrauding consumers. During this same time period, 23 defendants were sentenced to some form of incarceration, receiving a total of over 85 years.

Mr. West's most recent appointment marks his return to the Department of Justice. From 1993 through 1994, he served as a Special Assistant to the Deputy Attorney General under the direction of U.S. Deputy Attorneys General Philip Heymann and Jamie Gorelick, as well as Attorney General Janet Reno. As a Special Assistant, Mr. West worked on the development of national crime policy, including the 1994 Omnibus Crime Bill.

From 1994 to 1999, Mr. West served as an Assistant United States Attorney in the Northern District of California, where he prosecuted child sexual exploitation, fraud, narcotics distribution, interstate theft and high tech crime. As a federal prosecutor, Mr. West led the successful investigation, prosecution and appeal of the Orchid Club case, at the time the largest, Internet child pornography production and distribution ring prosecution in history.

Mr. West later served as a state Special Assistant Attorney General in California, advising the California Attorney General on matters including identity theft, the Microsoft antitrust litigation, civil rights, and police officer training. Prior to returning to the Justice Department, Mr. West was a litigation partner at Morrison & Foerster in San Francisco.

Mr. West graduated with honors from Harvard College, where he served as publisher of the Harvard Political Review, and received his law degree from Stanford Law School, where he was elected President of the Stanford Law Review.

Thomas E. Willging

Thomas E. Willging has been a Senior Researcher in the Research Division of the Federal Judicial Center since 1984. At the Center he has served as the principal liaison to the Advisory Committee on Civil Rules and has concentrated on empirical studies of the civil litigation process, including discovery, class actions, mass torts, dispositive motions, special masters, and court-appointed experts. He also worked closely with the Board of Editors in drafting and editing the Manual for Complex Litigation, Fourth and was one of three researchers providing staff support to the Judicial Conduct and Disability Act Study Committee chaired by Justice Stephen Breyer.

As part of a team of FJC researchers, Mr. Willging was instrumental in a comprehensive case-based survey of civil discovery and disclosure practices conducted for the Advisory Committee on Civil Rules for its September 1997 symposium at Boston College Law School. The results of that survey were published as An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments, 39 B.C. L. Rev. 525 (1998). He and his colleague Emery Lee are co-directors of the FJC's ongoing study of the impact of the Class Action Fairness Act of 2005 on the federal courts and recently published The Impact of the Class Action Fairness Act on the Federal Courts: An Empirical Analysis of Filings and Removals, 156 U. Pa. L. Rev. 1723 (2008), as part of a Symposium at the University of Pennsylvania Law School.

He has B.A and J.D degrees from Catholic University in Washington, D.C. and an LL.M from Harvard University Law School. He taught law and co-directed a civil law clinic at the University Of Toledo College of Law from 1968 through 1979 and has practiced law in various public interest and private law settings.

Dan Willoughby

Dan Willoughby joined King & Spalding in 1986 and was elected partner in 1994. Mr. Willoughby is a member of the firm's E-Discovery Group, and he heads up the firm's Discovery Center. The Discovery Center is an off-site facility located nearby the firm's offices in midtown Atlanta that houses 175 staff and project attorneys, paralegals, project assistants and technical staff. Under Mr. Willoughby's leadership, the Discovery Center has provided cost effective and centralized discovery services to over 200 clients over the last 15 years.

In addition to his work as a commercial and products liability litigator, Mr. Willoughby has devoted his career to the management of major discovery matters. Mr. Willoughby began his discovery work in 1986 in assisting Brown & Williamson Tobacco Corporation in collecting and coding millions of pages of documents in preparation for discovery demands in the second wave of the tobacco litigation in the late 1980's.

Over the ensuing 25 years, Mr. Willoughby has been at the leading edge of developments in discovery technology, adapting the firm's processes and client offerings as each new technology emerged.

TAB

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DRAFT MINUTES

CIVIL RULES ADVISORY COMMITTEE

MARCH 18-19, 2010

1 The Civil Rules Advisory Committee met in Atlanta, Georgia, at the Emory University
2 School of Law on March 18 and 19, 2010. The meeting was attended by Judge Mark R. Kravitz,
3 Chair; Judge Michael M. Baylson; Judge David G. Campbell; Judge Steven M. Colloton; Professor
4 Steven S. Gensler; Judge Paul W. Grimm; Daniel C. Girard, Esq.; Peter D. Keisler, Esq.; Judge John
5 G. Koeltl; Chief Justice Randall T. Shepard; Anton R. Valukas, Esq.; Chilton D. Varner, Esq.; Judge
6 Vaughn R. Walker; and Hon. Tony West. Professor Edward H. Cooper was present as Reporter, and
7 Professor Richard L. Marcus was present as Associate Reporter. Judge Lee H. Rosenthal, Chair, and
8 Professor Daniel R. Coquillette, Reporter, represented the Standing Committee. Judge Eugene R.
9 Wedoff attended as liaison from the Bankruptcy Rules Committee. Laura A. Briggs, Esq., was the
10 court-clerk representative. Peter G. McCabe, John K. Rabiej, Jeffrey Barr, and Henry Wigglesworth
11 represented the Administrative Office. Emery Lee and Thomas Willging represented the Federal
12 Judicial Center. Ted Hirt, Esq., Department of Justice, was present. Andrea Kuperman, Rules Clerk
13 for Judge Rosenthal, attended. Observers included Alfred W. Cortese, Jr., Esq.; Joseph Garrison,
14 Esq. (National Employment Lawyers Association liaison); John Barkett, Esq. (ABA Litigation
15 Section liaison); Ken Lazarus, Esq. (American Medical Association); Joseph Loveland, Esq.;
16 Professor Robert A. Schapiro; John Vail, Esq. (American Association for Justice); and Emory Law
17 School students.

18 Judge Kravitz opened the meeting with a general welcome to all present. He expressed deep
19 appreciation to Emory for making their school available for the meeting, noting that the Committee
20 enjoys meeting at law schools and the opportunity to interact with civil procedure teachers and
21 students. He noted that Emory is a distinguished school, with a reputation for changing legal
22 education and the profession. He also thanked Chilton Varner for helping to make the arrangements
23 for the meeting.

24 Dean David F. Partlett and Associate Dean Gregory L. Riggs provided warm and gracious
25 welcomes to Emory Law School. Dean Partlett observed that students seem to think that things like
26 the Civil Rules appear from a mountain top; it is good for them to be able to observe the effort and
27 talent brought to the work of rulemaking. Chilton Varner provided brief notes on the Law School's
28 history. The school was founded with the purpose of establishing an institution that would vie with
29 the best law schools in the country. It began with admissions requirements more demanding than
30 the general standards of the time. It has continually fulfilled its commitment to achieving diversity,
31 with high numbers of students from traditionally underrepresented minorities and with an even
32 balance between men and women. It led the way in invalidating a Georgia law denying tax
33 exemptions to private schools that integrate. It has continually moved upward in the much-watched
34 US News & World Report rankings.

35 Judge Kravitz welcomed Judge Wedoff back, fully recovered from the injury that kept him
36 from the October meeting. Judge Wedoff expressed his pleasure to be back. Judge Kravitz further
37 noted that Judge Diamond was unable to attend, as was Judge Wood. He also reported that Chief
38 Justice Shepard had recently received the Sixth Annual Dwight D. Opperman Award for Judicial
39 Excellence. The citation noted many of Chief Justice Shepard's achievements, including chairing
40 the National Conference of Chief Justices, serving the Indiana State Courts for more than 20 years,
41 winning many awards for his work to achieve diversity in the profession and to advance
42 professionalism, and recognition as an authority on judicial ethics. Judge Kravitz went on to
43 comment on the extensive press coverage devoted to Anton Valukas's recent report as examiner in
44 the bankruptcy proceedings for Lehman Brothers. The report concluded that the firm's failure was
45 "more the consequence than the cause of our deteriorating economic climate." One securities
46 litigator has called the report "porn for securities lawyers," so engrossed are they in exploring every
47 facet of its 3,000 pages. "Repo 105 has entered our vocabulary."

48 Judge Kravitz also reminded the Committee that September 30 would mark the end of the
49 Committee terms for members Baylson, Girard, Kravitz, and Varner. He hoped that all would be
50 able to attend the fall meeting to be suitably recognized for their service to the Committee's work.

51 The Time Computation amendments took effect December 1, 2009. So far lawyers seem to
52 be adjusting to the changes without difficulty.

53 The January Standing Committee meeting went well. Professor Robert Bone led a lively
54 discussion of the pleading decisions in the Twombly and Iqbal cases. Joe Cecil described his hopes
55 for the FJC study of those decisions. And all joined in congratulating "the most famous law clerk
56 in the world," Andrea Kuperman, for her work in tracking the evolution of lower-court pleading
57 decisions in the wake of Twombly and Iqbal. The sense of the Standing Committee seemed to be
58 that more information must be gathered before undertaking serious consideration of possible
59 rulemaking responses to these developments. It is important to carry on diligent work in assessing
60 practice, and to address the information in the Committees' usual deliberate process.

61 *October 2009 Minutes*

62 The Committee approved the draft Minutes for the October 8 and 9, 2009, meeting, subject
63 to correction of typographical and similar errors.

64 *2010 Conference*

65 Judge Kravitz introduced the plans for the 2010 Conference by observing that the conference
66 calls show that presenters and panelists are working very hard. "Judge Koeltl has the orchestra finely
67 tuned." The papers are being prepared. Data are being gathered and crunched. Participants are
68 already working to find consensus on proposals for change.

69 Judge Koeltl said that people have indeed done a great job in preparing for the conference.
70 The Administrative Office has done yeoman work in setting it up. The Duke Law School has been
71 deeply involved, and they seem excited to be hosting the conference. The FJC has done wonderful
72 work. The moderators and panelists are discussing the issues, working to make the conference more
73 than a two-day long continuing education course. Issues of cost and delay will be addressed with
74 the purpose of seeing how we can do better. The panels are well balanced, with lawyers who
75 regularly represent plaintiffs, those who regularly represent defendants, and those who dwell in the
76 academy. The response of people invited to attend has been strong; more want to come than the
77 facilities can accommodate. Duke, and perhaps the Administrative Office, will stream it live. The
78 Conference is open — the main meeting room will accommodate 160 people and there is an
79 overflow room.

80 The conference will begin with the empirical research. The Institute for the Advancement
81 of the American Legal System has a number of studies. First is the survey jointly administered with
82 the American College of Trial Lawyers that is already familiar. They also are doing surveys of
83 Arizona lawyers and of Oregon lawyers. Each of those states has a set of procedure rules that differ
84 markedly from the federal rules. Lawyers in each state seem pleased with their own rules, and to
85 prefer state courts over federal courts. The Oregon bar, moreover, is small and collegial — they seem
86 to like dealing with each other. The IAALS also is doing a survey on the cost of litigation, to be
87 completed this month.

88 The Searle Institute is working on a survey of litigation costs. The National Employment
89 Lawyers Association distributed to its members a survey based on a revised version of the American
90 College-IAALS survey; the FJC has looked at the results, and the NELA is doing a report. The ABA
91 Litigation Section is doing a report on its survey of section members, which also was based on the
92 American College-IAALS survey. RAND is studying the costs of individual cases; it will not have
93 a report in time for the conference, but the results will be presented.

94 A web site has been established for the conference. All papers and data can be downloaded.
95 Access to the site is currently limited to conference participants because many of the resources are
96 still in draft form. Eventually open access will be provided.

97 Other panels begin with one on pleading and dispositive motions. It is not easy to achieve
98 consensus on these topics. When consensus can be achieved, it is useful — it may provide a more
99 secure foundation for further work by the Advisory Committee on any topics that seem to call for
100 further work. Daniel Girard's paper on specific discovery abuse, in the form of evasive answers,
101 suggests some specific rules changes.

102 The next panel will address the current state of discovery. Elizabeth Cabraser's paper is one
103 of the seed papers for the conference. She presents a plaintiff's view of what is wrong. Defendants,
104 on her view, are refusing to produce and are running up the costs of discovery. She would accept
105 fact-based pleading, but only if discovery to facilitate pleading is made available. Judge Grimm's
106 paper is wonderful. The problem is seen to be one of attitude — the attitudes of clients who ask
107 lawyers to do things that lawyers should not do; the attitudes of plaintiff and defense lawyers; and
108 the attitudes of judges who do not enforce the rules. The concept of proportionality is not enforced
109 by judges, who have the tools but will not use them. All of this means that changing the rules
110 without changing attitudes will not fix much. Changing attitudes, however, is a task that must begin
111 as early as law school. Judge Campbell suggests that without major changes, still some changes
112 could be made in the matrix of the rules. "An idea is percolating that some things can be done
113 without big system changes."

114 Judge Higginbotham will moderate the panel on judicial management. His paper can be read
115 as highly critical of judges who are no longer trying cases. Judge Baylson responds that active
116 judicial management can reduce the costs of discovery and enable trial if the lawyers and parties
117 really want to go to trial. Judge Hornby's thesis is that people — clients — do not want to try cases;
118 judges should honor this desire to avoid trial.

119 Discovery of electronically stored information will be addressed by a panel led by Gregory
120 Joseph. They will address spoliation, sanctions, prelitigation preservation issues, and the like.
121 Joseph has led a series of panel meetings. He put a series of thirty questions to the panel members
122 asking for agreement, disagreement, and comments. Some of the propositions achieved unanimity,
123 or close to it. Others revealed deep splits. This is already a remarkable achievement.

124 The panel on settlement is likely to conclude that there is no need to change the rules for the
125 purpose of affecting settlements. The question is how the rules are applied, how judges and litigants
126 use them. They are likely to conclude that there should be no tilt to further encourage settlement,
127 nor to further encourage trial.

128 Users of the system — corporate counsel — will evaluate present practice from a perspective
129 different from the lawyers who provide services to them. The panel on perspectives from state
130 practice will similarly present views not often heard in these discussions.

131 The lunch speaker on the second day will be Judge Holderman of the Northern District of
132 Illinois. The Northern District has a pilot program on e-discovery. He is enthused about the
133 program. He believes that litigation in the 21st Century must have a concept of cooperation, not only
134 on e-discovery but on other things as well.

135 Several bar groups will present proposals. Then long-range perspectives will be presented
136 by a panel of people who have participated in the Civil Rules Committees over the years. Professor
137 Carrington has prepared a wonderful paper, concluding that the case has not yet been made for major
138 changes in the Rules. He draws support from the FJC study.

139 The Sedona conference is surveying magistrate judges; a report will be ready for the
140 conference.

141 "There are many themes out there, ranging from proposals for minor changes to proposals
142 for major changes." The Conference will provide an unparalleled opportunity to focus on directions
143 for the Civil Rules process over the next few years.

144 Judge Kravitz thanked Judge Koeltl for all of his hard and successful work in arranging the
145 conference. The next steps may involve many possibilities. Rules changes are an obvious range of
146 activity to be considered. But education also may prove an important tool, looking to educate both
147 judges and lawyers in the opportunities provided by the rules as they stand. Judge Rosenthal and
148 Professor Coquillette met with Chief Justice Roberts, who is excited about the opportunities
149 presented by the conference. He is anxious that the momentum built up by the conference not be
150 dissipated. The district court judges on the Judicial Conference also are excited. Some of them
151 think that some tweaking changes in the rules may be in order. Gregory Joseph's panel on e-
152 discovery has already reached consensus on some rules changes.

153 Judge Rosenthal joined the observations that there is great interest in the conference, and a
154 determination that all this great effort not be wasted. The momentum must be carried forward.
155 Judge Kravitz underscored the need to think creatively about how to make use of all this. This must
156 not be just another conference that disappears without consequence.

157 *Federal Judicial Center Reports*

158 Emery Lee and Thomas Willging presented three Federal Judicial Center reports based on
159 the FJC survey of lawyers in cases closed during the last quarter of 2008.

160 Multivariate Analysis of Litigation Costs in Civil Cases. Emery Lee presented this report. The
161 survey gathered a great volume of data, more than can be usefully summarized. It draws on
162 information about lawyers, judges, and clients. Multivariate analysis is the means to draw
163 meaningful associations with specific factors by holding other factors constant. The results often
164 represent centers around which real events cluster — as a simple analogy, no one person in a room
165 may be the average weight of all the people in the room. No single case may look like the center of
166 a broad range of cases.

167 One finding was that a 1% increase in the dollar stakes leads to a 0.25% increase in costs,
168 based on real dollar cost numbers as reported by the lawyers. There was no difference between
169 plaintiff lawyers and defendant lawyers in reporting on the relationship. When nonmonetary stakes
170 were important to the client, plaintiff lawyers reported a 42% increase in costs, while defendant
171 lawyers reported a 25% increase. It does not seem likely that revisions in the Civil Rules can do
172 anything to affect the stakes involved in litigation.

173 Time to disposition also increases costs. For each 1% increase in the time to disposition,
174 plaintiff costs go up 0.32%, and defendant costs go up 0.25%. These figures include all litigation
175 costs, including attorney fees; they do not reflect opportunity costs. (Attorney fees in contingent-fee
176 cases were based on estimates of dollar values.)

177 If a case actually goes to trial, plaintiff costs increase by 53%, while defendant costs increase
178 by 25%. It may be that the disproportionate effects between plaintiffs and defendants arises because
179 defendants incur greater costs before the eve of trial, while some plaintiffs defer "real preparation"
180 until it is evident that the case will go to trial.

181 If there is any court ruling on a motion for summary judgment — grant, deny, grant in part
182 — plaintiff costs are 24% higher, and defendant costs 22% higher. It may be that this reflects
183 discovery costs, because summary-judgment rulings are likely to be made only after discovery is
184 completed. The survey data do not support an inquiry into the relationship between the length of

185 time a case was pending and an actual ruling on a summary-judgment motion. Neither is it possible
186 to sort out cases in which there was a summary-judgment motion but no ruling before the case
187 actually went to trial.

188 Measuring discovery is difficult. The sample of cases was constructed to exclude cases not
189 likely to have any discovery. Cases where there was no answer or motion to dismiss were excluded,
190 as were categories of cases corresponding to the Rule 26(a)(1) categories in which initial disclosure
191 is not required. All cases that lasted more than four years, and all cases that went to trial, were
192 included; this oversampling likely increased the number of discovery events. The next step is to
193 distinguish different types of discovery. The study used 12 kinds — expert discovery, the number
194 of depositions, third-party subpoenas, e-discovery, and so on. Distinctions were drawn between
195 parties who requested or produced discovery, or those who did both. Eight types of disputes over
196 e-discovery were distinguished. In general, for each type of discovery used, there was a 5% increase
197 in costs for defendants, but no increase for plaintiffs. For depositions, plaintiffs found an 11%
198 increase in costs for each expert deposition, and a 5% increase for other depositions. For defendants
199 there was no increase for an added expert deposition, but a 5% increase for each other deposition.

200 E-discovery responses were mixed. Plaintiffs who only produced ESI reported no
201 significantly higher costs than those with no e-discovery. Plaintiffs who only requested ESI
202 experienced a 37% increase in costs, and those who both requested and produced experienced a 48%
203 increase. The pattern was different for defendants. There was no statistically significant increase
204 in costs for those who only requested, nor for those who only produced, ESI. Those who both
205 requested and produced, however, had 17% higher costs. For both plaintiffs and defendants, each
206 dispute over e-discovery increased costs by 10%. E-discovery, in short, is most costly when there
207 is reciprocal e-discovery and when there are disputes over production.

208 Other findings show, not surprisingly, that case complexity increases costs. Case
209 management might reduce costs, but it is difficult to control for the factors that have an influence;
210 it is easily possible that case management is most active in more complex cases, and is associated
211 with higher-cost cases even if in fact it holds the costs of those cases below the level that would
212 occur without management. Similarly, each case referred to a magistrate judge had a 24% increase
213 in costs, but that may be because the reference was based on the nature of the case, the level of
214 contentiousness, or other factors.

215 Plaintiff attorneys who bill by the hour reported higher costs than those who bill by other
216 methods. No similar association could be found for defense attorneys, but 95% of them bill by the
217 hour so there was no reliable basis to study the question. It is clear that costs vary directly with the
218 size of the law firm.

219 Differences in judicial workload had no meaningful correlation with costs. Nor were there
220 significant differences among the circuits.

221 Attorney Views About Costs and Procedures. Thomas Willging reported on interviews with
222 35 attorneys chosen from the much larger number who responded to the survey. Of the 35, 16
223 principally represent plaintiffs, 12 principally represent defendants, and 7 represent plaintiffs and
224 defendants about equally. These attorneys volunteered for the interviews; it cannot be known how
225 far they are representative of all who participated in the survey.

226 The report includes many quotes from the lawyers. The quotes are useful illustrations. They
227 may go some way toward explaining the survey results.

228 In discussing the relationship between costs and the stakes in the litigation, the attorneys said
229 that the stakes are the principal guide in deciding what to do. The level of discovery was the most

230 direct measure of costs. The best guess is that this behavior is economically based, not rule-based.
231 The stakes influence how much clients are willing to pay, or how much effort a contingent-fee
232 attorney is willing to invest.

233 The attorneys agreed that complexity affects costs, and that complexity is defined in terms
234 of the number of parties and the number of transactions underlying the litigation.

235 Types of suit do not tell much about the costs of litigation, apart from intellectual property
236 cases. Intellectual property cases often cost a lot. One lawyer said a company will spend $20 million
237 for the right to sell a drug for $1 billion.

238 The survey shows that a 500-lawyer firm incurs litigation costs double those incurred by a
239 solo practitioner. The survey lawyers confirmed this finding. "You have to feed the tiger" before
240 the case can be settled.

241 Hourly billing also affects costs. When lawyers on both sides bill by the hour, costs go up.
242 One of the interviewed lawyers said that hourly-billing lawyers lose all perspective on the value of
243 the case. But another said that what counts is really the size and resources of the client. Clients may
244 instruct the lawyer to engage in scorched-earth tactics. Some attorneys respond by holding
245 themselves out as scorched-earth litigators, and clients know who these lawyers are.

246 All of the interviewed lawyers agree that the volume of discovery presents cost problems.
247 It must be remembered that the lawyers in the survey generally said that the amount of discovery in
248 the survey case was just right, or was too low; only 25% of them said there was too much discovery.
249 So how do lawyers know when to stop? The typical response was that this is constantly assessed.
250 The quest is not for perfect information, but for enough information in relation to the stakes. This
251 is self-monitoring, not a result of enforcing the discovery rules. Lawyers also look to the scheduling
252 order, which they see as a major control. They do what they can within its constraints. But one
253 lawyer said that a scheduling order can actually increase costs when young lawyers think they are
254 obliged to do everything that is permissible within the limits of the order. Other lawyers say they
255 measure discovery by looking to the elements of the claim or defense — they pursue discovery to
256 the point of securing reliable information on each element. And specialists in particular types of
257 litigation often have protocols that they follow. An example is first to use interrogatories to find out
258 about sources of discoverable information, then requests to admit, then depositions.

259 The interviews also asked questions about pleading, building on the National Employment
260 Lawyers Association survey. In the survey, 94% of those who have filed an action after the
261 Twombly and Iqbal decisions report adding more facts to their complaints. Seventy-four percent
262 said they had responded to motions to dismiss that would not have been filed before the Twombly
263 decision. Fifteen percent reported doing more pre-filing investigation. Only 7% reported having
264 cases dismissed on the pleadings after Twombly, but the survey does not show whether the same
265 cases would have been dismissed under pre-Twombly practice.

266 A committee-member judge reported that Twombly and Iqbal had not changed the results
267 in rulings on motions to dismiss. The only change is that he now cites them as the current Supreme
268 Court statements of pleading standards. He asked whether the survey respondents counted it as a
269 dismissal if the complaint was filed with leave to amend. The answer is that it is not possible to tell
270 how the survey question was interpreted; that is one of the difficulties faced in attempting to measure
271 the results of a survey that was not designed by the FJC.

272 Another judge noted that in talking with the district-judge representatives at the Judicial
273 Conference this month, every judge said that Twombly and Iqbal had made no difference in what
274 they do. But it was noted that the possibility of surveying judges generally on this question must be
275 approached with care. The FJC is reluctant to intrude surveys into judges' busy lives unless there
276 is very good reason and it is possible to frame questions that will give clear guidance.

277 The interviews showed both plaintiff and defendant lawyers agreeing that motions to dismiss
278 are a waste of time. Several defendant attorneys said that in most cases they could not justify billing
279 for a motion to dismiss. The plaintiff attorneys said they generally survive motions to dismiss, and
280 even motions for summary judgment. Most also say that they seldom encounter notice pleading,
281 although one said that notice pleading often occurs in patent cases. One lawyer confessed to being
282 a notice pleader, meaning pleading that includes sufficient facts to tell the story but avoids adding
283 facts that might come back to haunt the pleader. Most lawyers want to tell a persuasive story, aiming
284 not only at the judge but also at the adversary.

285 Attorney Satisfaction. Emery Lee presented a summary of the results found by comparing
286 the surveys done by the American College of Trial Lawyers with the IAALS, by the ABA Litigation
287 Section, and by the National Employment Lawyers Association. The American College respondents
288 "are much more senior" than those who responded to the other two surveys, with an average of 37.9
289 years in practice. Respondents to the other two surveys averaged 22.9 years (ABA) and 21.4 years
290 (NELA), very close to the 20.9-year average in the FJC survey.

291 One question asked whether the Civil Rules are conducive to meeting the Rule 1 goals of
292 just, speedy, and inexpensive determination. Only about 35% of the ACTL respondents agreed, a
293 discouraging showing. About 40% of NELA respondents agreed. More than 60% of Litigation
294 Section respondents agreed. No explanation for these disparities is immediately apparent.

295 Many of the succeeding questions are presented as "net agreement" charts: if, for example,
296 50% of respondents agreed with a proposition and 20% disagreed, the net agreement would be 30%.

297

298 The second survey statement was that the Rules must be reviewed in their entirety and
299 rewritten to address the needs of today's litigants. All groups registered net disagreement; the
300 strongest net disagreement, more than 40%, was from Litigation Section lawyers who typically
301 represent defendants.

302 The next survey proposition was that one set of rules cannot accommodate every type of case.
303 ACTL respondents showed a modest net agreement. NELA respondents showed a modest net
304 disagreement, while ABA respondents showed substantial net disagreement.

305 The first three questions, in short, present a mixed picture. There was no net support in any
306 survey for drastic revision of the Rules, but the other questions did not suggest resounding approval
307 of the present system.

308 Another question stated that discovery is abused in almost every case. ACTL respondents
309 showed modest net disagreement. ABA plaintiff lawyers showed slight net disagreement, while the
310 defendant lawyers showed slight net agreement — 7.2 % — and those representing plaintiffs and
311 defendants about equally showed 10.9% net agreement. NELA respondents — representing
312 plaintiffs — showed 31.5% net agreement. The FJC survey showed very different results. It may
313 be that the FJC survey respondents were not in any of these organizations. And there can be an
314 "organization culture," propagated in organization magazines and at organization meetings, that
315 influence these views. Perhaps more importantly, different respondents may have quite different
316 views of what is abuse. Plaintiffs tend to find abuse in "stonewalling" by failing to provide
317 responsive information. Defendants tend to find abuse in overuse of discovery.

318 Respondents were asked to agree or disagree with the statement that the cumulative effect
319 of changes enacted since 1976 has significantly reduced discovery abuse. ACTL plaintiff
320 respondents showed a net disagreement of 12.4%, and defendants showed net disagreement of 22%.
321 Among the Litigation Section respondents, plaintiff attorneys agreed by a net of 0.4%, while
322 defendant attorneys showed net 17.9% disagreement and those who represent both plaintiffs and

323 defendants showed net 11.6% disagreement. NELA respondents showed net 39.5% disagreement.
324 However they defined abuse, then, most respondents thought rules amendments had not had any
325 effect. (It was pointed out that the median time in practice for the Litigation Section and NELA
326 respondents goes back to about 1988, some time after the 1983 amendment adding what is now Rule
327 26(b)(2)(C).)

328 The next statement was that early intervention by judges helps to limit discovery. All groups
329 of respondents in all three surveys agreed by wide margins; the highest net agreement was by
330 Litigation Section attorneys representing defendants, 56.6%, and those representing both plaintiffs
331 and defendants, 57.9%. Interpreting these responses is complicated by the possibility that "limit"
332 could be interpreted as no more than an arbitrary cut off rather than imposing focus and sensible
333 limits. But there are other indications that the respondents interpreted the question to mean that early
334 judicial intervention helps.

335 Summary judgment responses showed a clear divide between plaintiff and defendant
336 attorneys. The statement was that summary judgment practice increases cost and delay without
337 proportionate benefit. ACTL plaintiff attorneys showed net agreement at 26.2%, while the defendant
338 attorneys showed net disagreement at 59.6%. In the Litigation Section, plaintiff attorneys agreed at
339 a net of 26.9%, while defendant attorneys showed net disagreement at 77.2% and those who
340 represent both showed net disagreement of 45.1%. NELA respondents showed net agreement of
341 76.9%.

342 Another statement was that litigation costs are not proportional to the value of a case. The
343 ACTL survey did not distinguish between small-value cases and large-value cases. The plaintiff
344 respondents showed net 36.5% agreement, and defendant attorneys agreed 45.5% more than they
345 disagreed. The Litigation Section and NELA cases distinguished small-value case from large-value
346 cases. With respect to small-value cases, Litigation Section plaintiff attorneys showed net agreement
347 of 63.2%, defendants were at 85.3% net agreement, and those representing both had 89% net
348 agreement. NELA respondents had 69.8% net agreement. For large-value cases, Litigation Section
349 plaintiff attorneys registered net disagreement of 25.1%, defendants came in at 6.4% net
350 disagreement, and those representing both showed 11.2% net disagreement. NELA respondents
351 came in at 5.9% net disagreement. (It seems likely that the ACTL respondents were reading "small
352 value" into the question, but this is an example of the difficulty of interpreting a survey written by
353 someone else.)

354 The 2006 e-discovery rules also were discussed. The most common response was that they
355 provide for efficient and cost-effective discovery of electronically stored information "some of the
356 time." Defendant attorneys were more likely to say "no, never" across the different groups of
357 respondents.

358 Judge Kravitz thanked the FJC for its work, which will play an important role in the 2010
359 conference.

360 *Willging Retirement*

361 Judge Kravitz then noted that Thomas Willging "is purporting to retire." He has rendered
362 brilliant service to the Advisory Committee as FJC Senior Research Attorney over the course of 26
363 years. Judge Kravitz and Judge Rosenthal presented a plaque with this inscription

364 In recognition and appreciation of the

365 distinguished service of

366 **THOMAS E. WILLGING**

367 for his unsurpassed devotion to the administration of justice, dedication to the Rules Enabling Act,
368 and commitment to the federal judiciary while serving as a researcher to the

369 Advisory Committee

370 on the Federal Rules of Civil Procedure

371 Judicial Conference of the United States

372 1984 — 2010

373 During Tom's 26 years as a senior research associate with the Federal Judicial Center, the
374 Advisory Committee was involved in many important projects that have had a profound impact on
375 the judicial system. Tom worked on many of the projects at the request of the Advisory Committee,
376 providing comprehensive research and analysis on a wide range of subjects, including class actions,
377 mass torts, electronic discovery, special masters, Civil Rule 11, and general civil litigation practices.
378 His superb work informed the Committee's decision-making process and contributed to many
379 proposed rules amendments. Tom's departure will mark the end of a long and distinguished
380 association with the Judicial Conference Rules Committees. His diligence, wise counsel, and quiet
381 leadership have earned him the respect and admiration of all with whom he served. Tom was a
382 wonderful friend and colleague to the Rules Committees. He will be greatly missed. The Rules
383 Committees extend to Tom their very best wishes and congratulations on a well-earned retirement.
384

385 Honorable Lee H. Rosenthal, Chair, Commitee on Rules of Practice and Procedure

386 Honorable Mark R. Kravitz, Chair, Advisory Committee on Civil Rules

387 Judge Kravitz concluded that Willging has been a wonderful friend and colleague who will
388 be greatly missed.

389 Willging responded that he had never heard so many favorable adjectives in a single
390 paragraph.

391

392 *Pleading Standards*

393 Judge Kravitz introduced the discussion of pleading standards by noting that the Twombly
394 and Iqbal decisions have been a boon to academia. They have fostered more law reviews, and
395 supported more tenure awards, than any recent civil-procedure phenomenon. It is puzzling that some
396 of the writing calls for legislation to reverse the decisions — that could easily bring a halt to the train
397 of articles.

398 Andrea Kuperman continues to update her survey of judicial responses to Twombly and
399 Iqbal. Her current work will focus on decisions in the courts of appeals, where standards and
400 guidance are being threshed out.

401 The Administrative Office is continuing its monthly update of statistics on motions to
402 dismiss. The statistics track the number of cases filed, the number of motions to dismiss, and the
403 rate of granting motions to dismiss. The statistics are broken out into several case categories.

404 The FJC is working to dig deeper into the raw statistics provided by the Administrative
405 Office docket data. Joe Cecil is starting by separating out Rule 12(b)(6) motions from other motions
406 to dismiss in ten large districts. He will focus on statistics for the months from September through
407 December in 2005, 2006, 2007, 2008, and 2009. This will cover two years before the Twombly
408 decision, the two years between Twombly and Iqbal, and the end of the year in which Iqbal was
409 decided. The data will be divided by case types. A preliminary report should be ready for the 2010
410 Conference, and a detailed report should be ready for the fall Committee meeting. The report will
411 not include Rule 12(e) motions.

412 Peter McCabe noted that studying docket information remains a challenge because there is
413 no standardization in how information is reported. But "docket events" do seem useful in identifying
414 motions to dismiss. The Administrative Office is working toward the goal of establishing criteria
415 for uniform reporting that will support research in other fields comparable to the research now being
416 undertaken for pleading dismissals.

417 Judge Kravitz expressed appreciation for the FJC study that is ongoing. One important
418 feature will be to inquire whether dismissal is accompanied or followed by leave to amend, and —
419 when amendment is undertaken — what is the post-amendment disposition. Andrea Kuperman's
420 review of application in the lower courts suggests that the courts of appeals are sanding down the
421 rough edges that inevitably emerge as district courts respond in the immediate aftermath of
422 ambiguous opinions. The Supreme Court itself may be sending further signals; a per curiam opinion
423 this January cited the Leatherman "no heightened pleading" decision as the standard on a motion to
424 dismiss. And an opportunity for further clarification is presented by a pending petition for certiorari
425 that asks the question whether the Swierkiewicz decision remains good law. (Certiorari was denied
426 on March 22, Townes v. Jarvis, 2010 WL 1005965.)

427 The continuing work to gather data is important. We do not yet know whether there is a
428 problem, nor what the problem is if indeed there is a problem. It may be that future work should be
429 directed not so much at pleading standards as at developing means of enabling discovery to enable
430 sufficient pleading in cases in which plaintiffs with potentially good claims cannot frame an adequate
431 complaint because defendants (or perhaps others) control the necessary information. This problem
432 of information asymmetry is approached informally by many judges. Discovery may be permitted
433 while a motion to dismiss is taken under advisement. Or in an action with two defendants, one may
434 be dismissed with the express caveat that leave to amend and reinstate will be granted if discovery
435 against the remaining defendant provides information that supports a sufficient complaint.
436

437 Judge Rosenthal noted that bills to supersede Twombly and Iqbal are pending in the House
438 and the Senate. The initial draft of the Senate bill carries Conley v. Gibson forward in terms that
439 could be read to supersede the Private Securities Litigation Reform Act and the Prisoner Litigation
440 Reform Act. The bill expressly recognizes that Enabling Act rules can supersede the bill's standard,
441 an important matter. But it will be difficult to turn the clock back to 1957, ignoring everything that
442 happened in the half-century between 1957 and 2007. The Senate bill may be a place holder,
443 designed to introduce the topic while revised drafting is undertaken. A revised version is circulating
444 for discussion. This version would turn the clock back to May 20, 2007; it would clearly preserve
445 PSLRA standards, and may preserve PLRA standards. It still defers to any Rule adopted under the
446 Enabling Act after the statute's effective date. The draft includes legislative findings that accuse the
447 Supreme Court of violating the Enabling Act by amending the pleading rules in decisions that bypass
448 Enabling Act procedures. At different points it cites the Swierkiewicz and Leatherman decisions for
449 appropriate pleading standards. It says that only Rule 56 can resolve questions of fact insufficiency;
450 it is not clear what that means. The Senate has had a hearing, with witnesses supporting the bill
451 outnumbering those who oppose.

452 The House bill seeks to create a standard: "beyond doubt there is no set of facts that would
453 support the claim." It would supplant the PSLRA and PLRA. There have been two hearings in the
454 House. Again, the witnesses in support outnumber those who oppose.

455 The Committees' role in all this is to inform Congress that the Committees are pursuing
456 questions of pleading standards in a very careful way. The Committees are grateful that the bills
457 recognize the role of the Enabling Act process as the appropriate means to consider and, if change
458 is needed, adopt new pleading standards for the long run. The discussions in Congress are very
459 political. The Committees have constantly refused to be drawn into such political divisions, and
460 must continue to avoid entanglement. They must continue to focus on what they do best, founded
461 on careful and thorough study. The results can be presented to Congress. Providing Andrea
462 Kuperman's memorandum is an example.

463 Judge Kravitz added that the Kuperman memorandum shows there is little difference among
464 the circuits. There are a few district-court decisions saying there has been a big change in pleading
465 standards, but they are outliers.

466 Judge Rosenthal noted that the Administrative Office data are based on consistent
467 identification of all motions to dismiss. The accuracy of the data is shown by the spikes of activity
468 in March and September, when district judges address accumulating motions to be ready for their
469 six-month reports. The data show not much increase in rates of filing motions to dismiss, nor in the
470 rates of granting. There has been much concern about the effects on civil rights and employment
471 cases, but the data show the rates are flat in those cases. Surveys so far have been consistent with
472 this data. There is no apparent information that would support a need for immediate action. The
473 district courts that read the Iqbal decision more aggressively are being reversed.

474 Pleading is both fundamental and delicate. The Committees are gathering information in a
475 disciplined and thorough way. They are prepared to offer rule changes if good reason appears.

476 It was noted that pleading standards have become a topic of lively discussion in the
477 Department of Justice. A working group has been formed to gather views from different Department
478 components — civil, civil rights, environment, and so on. There is no sense yet whether any changes
479 are needed, but it is agreed that any changes should be effected through the Enabling Act process.

480 Judge Kravitz noted that the Second Circuit has established pretty good pleading guidelines.
481 Legislation — and particularly vague legislation — will delay attempts to determine where practice
482 is moving. The Committee will keep on moving, deliberately but as rapidly as possible. The
483 pleading rules are interrelated with all the other rules, most obviously discovery. This
484 interdependence will be a constant factor in Committee deliberations. It must be recognized not only

485 that some cases are dismissed on the pleadings, but also that some are wrongly dismissed. That
486 happened before Twombly and Iqbal. It is possible that there has been some increase in the number
487 of unwarranted dismissals. But there is nothing to suggest that there has been a large increase in
488 unwarranted dismissals.

489 A member asked how the Committee could evaluate the data if indeed it shows an increase
490 in the number of dismissals on the pleadings. How can we tell whether that is a good thing or a bad
491 thing?

492 A first response was that rules changes might be required if it were shown that district judges
493 think they cannot allow targeted discovery when the defendant controls the information needed to
494 frame a complaint. Another ground for rules changes might appear if judges become confused about
495 the relationship between Rule 12(b)(6) and the Rule 11(b)(3) standard that explicitly allows pleading
496 factual contentions that "will likely have evidentiary support after a reasonable opportunity for
497 further investigation or discovery." Another response was that it will be important to learn whether
498 dismissals seem randomly distributed, or instead whether there are big increases in identifiable
499 categories of cases. Concern continues to be expressed about employment cases and civil rights
500 cases. If it should be borne out — remember that present numbers do not seem to bear it out — that
501 would become a reason for close inquiry.

502 Those concerns focus on the fear that pleading standards may become too rigid. From the
503 time of the Leatherman decision in 1993, on the other hand, the Committee has considered the
504 Court's suggestion that heightened pleading standards might appropriately be adopted for some types
505 of cases by amending the Civil Rules. "Conspiracy" claims might be added to Rule 9(b), for
506 example, responding to the Twombly decision. Official-immunity cases are another example. These
507 two examples, not coincidentally, would address the concerns reflected in the Twombly and Iqbal
508 decisions, and indirectly in the Leatherman decision. Adopting specific rules for those cases might
509 have the effect of restraining any impulse to expand the Twombly and Iqbal decisions beyond the
510 specific problems they address.

511 The member who asked whether it is possible to determine whether any heightened rate of
512 dismissals is a good thing or bad agreed that it is important to gather data. "But in the end, it will
513 be a policy decision." It was agreed that this is a good caution to observe. It is distinctively difficult
514 for the rules committees to make policy decisions in a way that is not political, or seen to be political.

515 Another member agreed that the Committee must continue to wait while working hard to
516 learn more about evolving practice. When the time comes to act, one option may be to reaffirm Rule
517 8 notice pleading. Pennsylvania, a fact-pleading state, is actively considering a move toward notice
518 pleading. If careful study persuades the Committee that notice pleading, as it has been practiced, is
519 still the best choice, the Committee can report that.

520 It was noted that the academic literature says that there has been a change, and that the
521 change makes a difference. Some articles point to "statistics" claimed to show an increase in the rate
522 of dismissals. Others say simply that even dismissal of one case that would not have been dismissed
523 before Twombly and Iqbal is one too many. But it was noted that the "statistics" are derived from
524 WestLaw. WestLaw gets 3% of district-court opinions. Dismissals are more likely to be sent to
525 WestLaw than refusals to dismiss. The number of grants is far lower in relation to the number of
526 denials than reported. It would be helpful to have a critique of these "data," which are being used
527 at conferences now to paint an inaccurate picture of what is going on. "We should be in a position
528 to refute" the supposed data.

529 The focus on academic commentary continued by noting that after Conley v. Gibson,
530 "academic interest in pleading almost vanished. Now it's getting out of hand. There is little
531 correlation between the anguish in much of the writing and what courts are actually doing."

532 It was further observed that "academics are not the source of the political pressure. There
533 are powerful political sources at work here."

534 It was said that the Bankruptcy Rules Committee will be grateful for the Civil Committee's
535 work. A survey is important to find out whether lawyers are refraining from filing cases now that
536 would have been filed before Twombly and Iqbal. But that will be hard to pick up. A related effect
537 may be that the cases are still filed, but with 6 claims, not 19; with 3 defendants, not 7. The FJC
538 study will at least inquire whether dismissals involve only some claims, or only some defendants.

539 It was asked whether the studies will track pro se cases. They may be the most vulnerable
540 to dismissal. "The dynamic is different." This is indeed part of the FJC study. Pro se status may
541 be associated with a higher rate of dismissals, but there is little sign of change.

542 Discussion of pleading standards concluded by confirming that the Committee is taking the
543 subject most seriously. "We send Congress the information we have. But we see the need for
544 serious, careful, deliberate consideration before action." It cannot be foretold whether legislation
545 will be enacted in this session of Congress, or in the next. Either way, the Committees must
546 continue their ordinary processes.

547 *Rule 45*

548 Judge Kravitz introduced the Rule 45 report by thanking the Discovery Subcommittee —
549 members Campbell, Girard, Valukas, and Varner — and Reporter Marcus for the enormously hard
550 work that has gone into the report.

551 Judge Campbell introduced the report. A series of comments on Rule 45 prompted the
552 Subcommittee review. Andrea Kuperman did a literature search. With her help, and by canvassing
553 various bar groups, the Subcommittee identified 17 possible issues. The list was narrowed to 6.
554 Further work has narrowed it still further. Beyond these specific questions, there also were a number
555 of comments on the cumbersome, complex character of Rule 45. It may be the second longest rule
556 in the Civil Rules. The Subcommittee recommendations will be presented in four packages: What
557 issues are "off the list" for further action; recommendations for amendments that can be approved
558 now, without advancing them toward publication until other issues are resolved; the question raised
559 by district-court opinions asserting nationwide jurisdiction to compel a party or a party's officers to
560 appear as trial witnesses; and the possibility of restructuring Rule 45.

561 No Change. Two issues seem ready to be put aside without further work. One is whether
562 Rule 45 should require personal, in-hand service of a subpoena. As compared to Rule 4 methods
563 of service, the issue seems to be a theoretical point, "not a real problem." When service is on a
564 nonparty, "the drama of personal service may be useful." The other is cost allocation. Rule 45
565 addresses this in part now. Rule 45(c)(1) directs that a party or attorney issuing a subpoena must
566 take reasonable steps to avoid imposing undue burden or expense on a person subject to the
567 subpoena. Rule 45(c)(2)(B)(ii) says that if a person commanded to produce documents or other
568 things objects, an order enforcing the subpoena "must protect a person who is neither a party nor a
569 party's officer from significant expense resulting from compliance." Some lawyers say that
570 compliance costs a lot, and the cost is rarely recovered. Other lawyers — those who serve subpoenas
571 — complain that they are presented with big bills for the costs of compliance and are obliged to pay.
572 The Subcommittee could not find a principled basis for amending the rule; the problems seem best
573 worked out by the lawyers. This approach seemed to be pretty much approved at the Committee
574 meeting last October.

575 Discussion began with the means of serving a subpoena. It was noted that there is a good bit
576 of district-court law allowing "Rule 5-ish" service. These rulings are made in response to objections
577 to service by means other than delivery in hand. Do we want somehow to rein that in? It was further
578 observed that Rule 45(b)(1) is ambiguous. It says only that "[s]erving a subpoena requires delivering

579 a copy to the named person * * *." "[D]elivering" can easily encompass delivery by means other
580 than in-hand service. If indeed it is wise to limit service to in-hand delivery, a couple of words could
581 be added to the rule to make that direction unambiguous. Lawyers seem to think in-hand delivery
582 is not a big problem.

583 Discussion continued by asking whether the possible ambiguity is creating unnecessary work
584 for courts — are they being asked to resolve the problem by ruling on motions to quash, or motions
585 to compel? Do we need to add the "two words" to close this down? The response was that this does
586 not seem to be a huge problem in terms of burdening the courts. The issue may be a problem for the
587 lawyer who cannot accomplish in-hand service. Sometimes other means of service are made with
588 the judge's blessing. The most obvious problem arises when a nonparty is evading service. One
589 response is to adopt state-court methods of service.

590 It was further noted that in practice, subpoenas are often mailed when the lawyer expects
591 there will be no objection. In-hand service tends to be reserved for cases in which resistance is
592 expected. The Subcommittee will consider this question further.

593 As to costs of compliance, it was agreed that the Committee should keep an eye on the issue
594 to see whether problems emerge that might benefit from rule amendments.

595 Changes: Notice. Rule 45(b)(1) clearly provides that before a document subpoena is served,
596 "notice must be served on each party." But often the notice is not provided. The Subcommittee
597 recommends changes in wording and in location within Rule 45 to emphasize the notice requirement,
598 believing that one reason for noncompliance is that the obscure location at the end of present Rule
599 45(b)(1) causes lawyers to overlook the clear obligation.

600 The proposed change would transfer the present Rule 45(b)(1) direction to a new Rule
601 45(a)(4), giving it a more prominent position that may be less often overlooked. In addition, the
602 provision would be changed by adding a requirement that a copy of the subpoena be served with the
603 notice. The draft Committee Note includes in brackets an optional paragraph that would address the
604 consequences of failure to provide the required notice. This paragraph expresses an expectation that
605 courts will deal appropriately with such problems as arise, and confidence that ample remedies are
606 available.

607 The Subcommittee decided not to add a requirement that notice be provided some specified
608 number of days before service of the subpoena. There was some support at the October meeting for
609 adding such a requirement. Plaintiffs in employment cases may experience adverse consequences
610 when a subpoena is served on a former employer or a present employer. But the Subcommittee was
611 concerned about the costs of increasing the complexity of Rule 45. Leaving it to those who get
612 notice to act quickly seems about all that can be done. If specific requirements were added, the
613 occasions for seeking sanctions would multiply.

614 Similar concerns led the Subcommittee to decide against recommending that the party who
615 serves a subpoena give notice to other parties when documents are produced in compliance with the
616 subpoena. A particular problem would arise when documents are not produced all at once, but are
617 provided in batches. Notice before service alerts other parties to the need to follow up by later
618 inquiries for access to whatever has been produced.

619 A point of style was raised: the present rule follows the preface describing a document
620 subpoena with "then" before it is served, notice must be given. "Then" is omitted from the proposed
621 draft. The Subcommittee will consider the style choice.

622 Enforcing court. Rule 45 assigns responsibility for enforcement to "the issuing court." The
623 issuing court may not be the court where the action is pending — the present structure calls for
624 issuance by the court where a deposition is to be taken, or where documents are to be produced.

625 When disputes arise, there may be very good reasons to resolve them in the court where the action
626 is pending. The decision whether to enforce the subpoena may dispose of the case, and be tightly
627 bound up with ongoing management of the case. Or a single action may involve discovery in many
628 different districts, raising the prospect of inconsistent rulings on the same points and further
629 undermining management by the court where the action is pending.

630 These concerns lead to proposals for parallel amendments adding a new Rule 45(c)(2)(B)(iii)
631 and (3)(D). They would provide for transfer of a motion to compel production or a motion to quash
632 from the issuing court to the court in which the action is pending. The standard for transfer would
633 be "in the interests of justice." This standard is borrowed from the "interest of justice" standard in
634 §§ 1404 and 1406, but without the "convenience of parties and witnesses" language. The draft
635 Committee Note includes an optional bracketed paragraph at the end that would address the possible
636 objection that a Civil Rule cannot confer authority on a court sitting in another state to resolve
637 disputes involving a nonparty who has been served with a subpoena outside that state. The question
638 is analogous to personal jurisdiction issues. The Subcommittee thinks it clear that the Enabling Act
639 authorizes the proposed transfer provision. Whether it is useful to address the question in the
640 Committee Note remains open for discussion.

641 The Committee Note recognizes that it may be important to resolve disputes involving a
642 nonparty in the court local to the nonparty. But it also recognizes that transfer may be important for
643 a variety of reasons.

644 It was asked whether a court can transfer on its own, without providing a hearing? The
645 Subcommittee wants to guard against reflexive transfer simply to "get rid of" motions that burden
646 the issuing court. But adding a hearing provision might raise awkward questions about what is a
647 "hearing"? Many motions are "heard" on paper, without oral presentation. Responses to a transfer
648 order can easily qualify as an opportunity for hearing. It will be desirable to have a statement of
649 reasons for transfer, but that is not made explicit in the draft. It was agreed that the issuing court
650 should act only after knowing the positions of the parties and a nonparty served with a subpoena, and
651 to really assess the interest of justice rather than transfer to avoid work. Perhaps the Committee Note
652 should be revised to address this issue more specifically.

653 The "interests of justice" standard was discussed. The Subcommittee does not want transfer
654 to be "too easy." Does this phrase capture it? Would it be useful to add the parallel focus on the
655 convenience of parties and witnesses, even if only to avoid any negative implications from the
656 obvious comparison to the statutes governing transfer of venue?

657 It was stated that it is important to emphasize that there often are good reasons to decide
658 disputes locally, in the issuing court. "Exceptional circumstances" might be the test, but that seems
659 too strong. The Committee Note does emphasize the factors that often weigh against transfer. But
660 it may be important to focus the rule text on the convenience of the parties and, especially, a
661 nonparty witness. An alternative form might pick up the § 1407(a) standard which, for multidistrict
662 transfers, addresses both the convenience of the parties and witnesses and also asks whether transfer
663 "will promote the just and efficient conduct of such actions." The analogy to coordinated pretrial
664 proceedings lends weight to this alternative.

665 It was asked whether there should be a bias against transfer. The Subcommittee did not try
666 to quantify the balance. "We don't want it to be an easy out for the local judge." But transfer may
667 be important when sound resolution of the dispute requires close familiarity with the action. It is
668 hard to draw general formulas from the cases that struggle with these problems. There is a great
669 variety of circumstances. The Subcommittee will, however, consider further the choice of words to
670 express the standard for transfer.

671 Party Witnesses at Trial. Judge Campbell described the questions that have emerged from
672 the ruling in In re Vioxx Products Liability Litigation, 438 F.Supp.2d 664 (E.D.La.2006). Rule

673 45(b)(2) limits the place of serving a subpoena. The understanding has been that the limits on
674 service also limit the place where compliance can be enforced. Compliance cannot be required
675 outside the limits of service. When Rule 45 was extensively amended in 1991, Rule 45(c)(3)(A)(ii)
676 was added. This provision requires a court to quash or modify a subpoena that "requires a person
677 who is neither a party nor a party's officer to travel more than 100 miles from where that person
678 resides, is employed, or regularly transacts business in person," except that a trial subpoena can
679 command attendance by traveling from any such place within the state where the trial is held. The
680 Vioxx decision found by "inverse inference" that Rule 45(c)(3)(A)(ii) authorizes authority to compel
681 a party or a party's officer subpoenaed as a trial witness to travel from outside the state where the
682 trial is held. This inverse inference from the language of the rule was found to trump the 1991
683 Committee Note saying the amendments made no change. The court also said that the 100-mile limit
684 is antiquated in an era of easy travel over far greater distances. Andrea Kuperman's memorandum
685 shows that several cases agree, while it also shows several cases that disagree. One of the cases that
686 disagrees is from the same district as the Vioxx decision, Johnson v. Big Lots Stores, Inc., 251
687 F.R.D. 213 (E.D.La.2008).

688 Ms. Kuperman noted that although many cases describe the Vioxx rule as the majority rule,
689 they often support this statement by citing inapposite decisions. The more recent decisions tend to
690 reject the Vioxx ruling. There is no circuit authority. And all cases, no matter which side they take,
691 assert that the answer they choose is mandated by the plain language of Rule 45.

692 The Subcommittee recommends that the disagreement in these cases be resolved. It further
693 recommends that the resolution go back to the original meaning: a subpoena to testify at trial can
694 require travel only from a place within the state, whether the witness is a party, a party's officer, or
695 a nonparty. The only distinction appears in Rule 45(c)(3)(B)(iii) — a person who is neither a party
696 nor a party's officer can be required to travel more than 100 miles within the state, but the court may
697 modify or quash the subpoena if it requires the person to incur substantial expense.

698 Although the Subcommittee recommends restoration of the 1991 meaning, it recognizes that
699 the question is difficult. The desire to reach further for trial witnesses who are parties, or officers
700 of parties, is expressed not only in the Vioxx line of cases but also in some of the decisions that
701 reject the Vioxx reading of Rule 45. It will be important to provoke extensive discussion of this
702 question at the miniconference the Subcommittee recommends to explore Rule 45 issues. It may be
703 important to provide some resolution that allows a reach beyond state lines, but that does not
704 establish routine nationwide subpoenas for trial testimony by a party or a party's officer.

705 It was recognized that under present rules a subpoena is not required to take a party's
706 deposition. Parties, as well as their officers, directors, and managing agents often are subjected to
707 depositions in the court where the action is pending. But a deposition can be arranged on terms that
708 are less intrusive than trial testimony. Scheduling a deposition can adjust for the deponent's
709 schedule, and can avoid the need to wait around during the uncertain pace of trial. The burdens of
710 appearing as a trial witness may encourage strategic use of trial subpoenas naming high-level
711 organization figures, who often are far from the most useful witnesses in the organization, aiming
712 to increase settlement pressure. A more refined rule will be required if we aim to provide for live
713 testimony at trial by people within an organization who do know something useful.

714 One proposed draft,then, would do no more than overrule the Vioxx interpretation of Rule
715 45. Rule 45(3)(A) would begin by directing the court to quash or modify a subpoena "properly
716 served under Rule 45(b) that" requires travel from beyond the state. This would establish by express
717 language the link originally assumed between the place of serving and the place of complying with
718 a subpoena. In addition, to make twice sure, "subject to Rule 45(c)(3)(A)(ii)" would be removed
719 from the beginning of Rule 45(b)(2). This cross-reference to (3)(A)(ii) may be misread to suggest
720 that service can be made at places not actually authorized by (b)(2).

721 An alternative is presented to illustrate the possibilities of extending the reach of trial
722 subpoenas without going all the way to the Vioxx result of nationwide authority over a party or a
723 party's officer. This draft recognizes that there are circumstances in which a party, or a person
724 within an organization that is a party, may be an important witness. The desire to compel appearance
725 may be more than a mere tactical lever. This alternative, presented as a new Rule 45(b)(4), does not
726 rely on serving a subpoena. Instead it authorizes the court to order a party to attend and testify at
727 trial, or to order the party to produce a person employed by the party. Alternatives are presented to
728 identify the employees a party may be required to produce — one who is subject to the party's legal
729 control, or one who is a party's officer, director, or managing agent. The decision whether to order
730 appearance at trial should be made only after considering the alternatives of an audiovisual
731 deposition or of testimony by contemporaneous transmission under Rule 43(a). The court may order
732 reasonable compensation for attending the trial or hearing. And the court may impose sanctions
733 authorized by Rule 37(b) for a party's failure to appear and testify or to produce a person to appear
734 and testify.

735 The first question asked whether the authority to order appearance and testimony at trial is
736 intended to cross international boundaries to reach a party or the employee of an organization party.
737 There are cases dealing with this issue under the party deposition provisions in Rule 37(d). The
738 question often is framed by asking who should have to travel to whom. The organization is before
739 the court, and is subject to sanctions for failing to comply with discovery demands. The broader the
740 categories of people the organization can be ordered to produce at trial the greater the consequences
741 of the rule and the greater the need for care in considering it. As compared to the limited concept
742 of an employee "subject to the legal control" of an organization, is it fair to assume that a corporation
743 can compel any employee to travel to the place of trial?

744 One alternative might be to reconsider the tight limits that Rule 43(a) places on testimony
745 by contemporaneous transmission from a different location.

746 Members of the Subcommittee noted again that the primary concern is "to not encourage
747 gamesmanship." Remote transmission does alleviate the travel problem. But the CEO may or may
748 not have relevant information. If the testimony is important, it should be taken by video deposition.
749 Improving electronics and changing ways of presenting testimony should be recognized. The Vioxx
750 decision generates enormous practical problems, "holding CEOs and officers hostage to appear at
751 trial." Another Subcommittee member seconded these observations. Trials were fair before the
752 Vioxx ruling. No solid study shows important differences in the ability to evaluate testimony
753 presented by video deposition as compared to testimony presented live at trial. It is too easy for a
754 persuasive lawyer to win an order compelling appearance at trial. Consider, for example, the
755 president of a foreign automobile manufacturer whose products become embroiled in multiple
756 actions in this country. There is no reason for things to be different than they were before the Vioxx
757 ruling. An observer joined these remarks.

758 It was noted that the Criminal Rules authorize nationwide trial subpoenas, and that the
759 Criminal Rules Committee is working on rules that, despite Confrontation Clause problems, would
760 authorize presentation of trial testimony by deposition of a witness located outside the country when
761 circumstances prevent a witness from appearing live at trial.

762 A third Subcommittee member said that the circumstances of small organizations provide
763 persuasive reasons for simply returning to Rule 45 as it was understood before the Vioxx ruling.
764 Untoward burdens might be imposed by nationwide compulsion to appear at trial when the witness
765 is an officer of a small business or, for example, a small local union.

766 It was noted that at least one district court has asserted inherent power to punish a party who
767 does not produce a witness. This power is asserted without regard to the limits of Rule 45. But the
768 Subcommittee chose not to explore "the raw exercise of judicial power."

769 Discussion concluded by noting again that district-court opinions reflect a lot of sympathy
770 for the Vioxx ruling, without regard to the language of Rule 45. It will be important to explore these
771 questions in depth at the miniconference.

772 Simplify and Shorten. The Subcommittee has produced sketches of three approaches that
773 might be taken to shorten and simplify Rule 45. Rule 45 has been criticized as too long, too
774 elaborate, too much laden with details, too much beyond the understanding of lawyers — much less
775 nonparties who do not have lawyers — who have not struggled through to mastering its
776 complexities.

777 The criticisms may be justified, at least in part. But any attempt to simplify the rule must
778 reckon with the prospect of unintended consequences. One approach, set out in the October agenda
779 materials, suggested a number of small changes that might be made. It was abandoned as not worth
780 the risk that unforeseen consequences might outweigh the intended benefits. Another approach
781 would be to simply incorporate Rules 26 through 37 into Rule 45 to define the scope of nonparty
782 discovery and provide enforcement mechanisms. That approach would thwart "one-stop shopping,"
783 and might easily lead to confusion as courts and lawyers attempted to work out the intended
784 integration. Abandoning those possibilities, the sketches that have been developed are presented in
785 the agenda materials in progressive steps of aggressiveness.

786 Eliminate the Three-Ring Circus. Rule 45 identifies three courts that can issue a subpoena:
787 the court where a hearing or trial is to be held; the court where a deposition is to be taken; and the
788 court where documents are to be produced. Rule 45(b) creates four permutations on the place of
789 service. And Rule 45(c) establishes three different rules to identify the place where performance can
790 be required. Thirty-six combinations are possible. Since 1991, a lawyer in one place can "issue" a
791 subpoena "from" a court sitting in another place. Identification of an "issuing court" is essentially
792 a fiction. The solution offered by this sketch is to separate the three functions. All subpoenas issue
793 from the court where the action is pending; service may be made anywhere within the United States.
794 The place of performance is identified separately — in this sketch, there is no change in the place
795 of performance, except that the sketch cuts free from any reliance on state practice. And the place
796 of enforcement would be selected on the terms already suggested for choosing between the court for
797 the place where performance is required and the court where the action is pending.

798 Judge Campbell explained this approach by noting that Rule 45 is a workhorse. It does a lot,
799 governing all third-party discovery practice. It is amazing that it does not bring a great many
800 problems to the courts. But "it does have a three-ring circus aspect." The concept of an issuing
801 "court" is a fiction; the court does not know that the lawyer has issued the subpoena. A lawyer in
802 Illinois, moreover, can issue a subpoena incident to an action pending in a district court in Kansas
803 and arrange service anywhere in the country. The place of performance is governed, but by subtle
804 provisions that require some effort to untangle. Most of the difficulty with Rule 45 could be
805 eliminated by providing for nationwide service of subpoenas issued by the court where the action
806 is pending, limiting the place of performance to the places specified by present Rule 45 or to some
807 slight variations on those places, and providing for enforcement on the terms already suggested for
808 modifying present Rule 45.

809 Initial discussion suggested that this approach is good, but asked whether there are countering
810 considerations. The first response was that the approach indeed is good; the countering concern is
811 that there are no large problems now. One judge observed that the problems arise just often enough
812 that it is necessary to go back to close study of the rule to figure it out. And it was suggested that
813 one benefit might be to reduce tactical efforts to select a particular issuing court. The revision,
814 further, is fully consistent with the independent suggestions to address the Vioxx problem of
815 compelling a party to attend trial as a witness, "transfer" of enforcement disputes to the court where
816 the action is pending, and improving the notice requirement for document subpoenas. Those
817 provisions can readily be incorporated in the sketch.

818 An observer agreed that it is hard to read Rule 45. One source of the difficulty is treating
819 parties and parties' officers together, while separating nonparties. It might be better to establish three
820 categories, distinguishing between parties and officers or other persons affiliated with a party.

821 Another suggestion was that the provision for enforcement might be chosen as the court
822 where the witness is, rather than the court where compliance with the subpoena is to occur.

823 It was agreed that this sketch should be presented to the anticipated miniconference.

824 More Aggressive: Judge Baylson. The second sketch has been developed by Judge Baylson,
825 consulting with the Discovery Subcommittee, over the course of the last year. Judge Baylson
826 believes that Rule 45 is too complicated, not only for nonparties who do not have lawyers but also
827 for pro se litigants and even for lawyers who do not come into frequent contact with it. Sufficient
828 illustration is provided by the Rule 45(a)(1)(iv) direction that a subpoena must set out the text of
829 Rule 45(c) and (d). Lawyers who routinely engage in complex federal litigation have worked
830 through to an understanding of subdivisions (c) and (d). Other lawyers have to struggle with them.
831 Nonlawyers have little chance of unraveling them.

832 The proposed draft simplifies extensively. One of the means of achieving simplification is
833 to omit several provisions that have been added to Rule 45 over the years to resolve problems that
834 were causing difficulties in practice. The sketch also adds new things to Rule 45, such as invoking
835 all the provisions of Rules 26 through 37 to address objections or noncompliance by saying the court
836 "may refer" to them.

837 Judge Baylson said that the sketch is still a work in progress. It has been refined with the
838 help of the Discovery Subcommittee in a number of conference calls. The purpose is to provide a
839 model for consideration in the Rule 45 miniconference. Although seasoned lawyers and judges
840 understand Rule 45, a nonparty may not have a lawyer, may not want to pay one, and may not be able
841 to pay one. Compliance can be costly and burdensome. Rule 45 operates unfairly in these
842 circumstances. An illustration of the complexity of Rule 45 arises from the time that has been
843 devoted to achieving a clear understanding of its terms as a foundation for attempting revision.

844 The heart of simplification is elimination of the structure that calls for subpoenas to be issued
845 by a court different from the court where the action is pending. The first sketch, by eliminating this
846 distinction, goes a long way toward improvement. There are not many differences in what a
847 subpoena must cover.

848 This sketch leaves open the distance over which a person may be dragged to perform a
849 subpoena. That is a matter of detail.

850 The provision for objections, subdivision (e), is important. It takes the debatable position
851 that once an objection is made the burden falls on the party serving the subpoena to work it out or
852 to get an order directing compliance.

853 Subdivision (f) is central to the goal of simplification. It invokes Rules 26(c), 37(a)(1), and
854 37(a)(5) to govern any person seeking court action concerning a subpoena. It requires that all
855 disputes concerning a trial subpoena be resolved by the court where the action is pending. A party
856 seeking relief from any other subpoena also must apply to the court where the action is pending. A
857 nonparty may request relief from any subpoena other than a trial subpoena from the court where the
858 action is pending, but also may request relief from the court for the district where the subpoena is
859 served or is to be performed. That court may refer the dispute to the issuing court. In providing for
860 reference to Rules 26 through 37 the sketch also says that in considering the costs and burdens
861 imposed by compliance the court may require advancement or allocation of costs and expenses,
862 including attorney fees. Finally, the sketch directs that the court must act promptly in ruling on a
863 dispute concerning a subpoena and must state the reasons for any order.

864 It is true that the sketch omits several provisions found in present Rule 45. Some might be
865 restored, perhaps with language changes.

866 The first question asked how cross-reference to the Rule 26 through 37 discovery provisions
867 helps a pro se litigant? Judge Baylson replied that it does not help, but the rules generally are
868 adopted on the premise that a pro se litigant is responsible for achieving some understanding of
869 them. The question was then reframed — how does cross-reference help young lawyers or those
870 otherwise inexperienced with Rule 45? Judge Baylson replied that Rule 45 is too long because it
871 repeats many provisions of the discovery rules, often at length. The need to read Rules 26 through
872 37 is offset by avoiding the agony of determining whether the duplications are precise or whether
873 there are some variations.

874 The next observation was that the list of things omitted suggests it is better to omit them.
875 The cross-reference to the discovery rules is a good way to simplify. "Simpler is better." There is
876 a problem for a pro se witness who wants to quash a subpoena, but the judge has an obligation to
877 help.

878 In the same vein, it was speculated that the great majority of subpoenas are straight-forward:
879 they ask for a clearly identified set of documents, and compliance is simple. There will be no
880 occasion to pour over the cross-referenced rules.

881 Another observation was that a doctor's office may be served with hundreds of subpoenas
882 a year. They have confidentiality problems. It is difficult to minimize the burden on them. They
883 cannot easily reach the people who served the subpoena to work out the proper means of compliance.

884 Agreement was expressed with the concern that Rule 45 is long, and with the value of
885 discussing this sketch at a miniconference. But it was also noted that a review of the Committee
886 Notes over the years shows evident care in adding the details now in the rule. If this guidance is
887 removed, the same problems may emerge again. And if they emerge, absent guidance in the rule
888 different judges are likely to give different answers. "Economy of words is not the only goal."

889 This view was supported by observing that practice is well settled under present Rule 45.
890 An attempt to "simplify" the rule by omissions will lead to a lot of experimenting. "A shorter rule
891 may not be more effective."

892 It was agreed that the questions raised by this sketch deserve further discussion. "It is a
893 mistake to assume that cross-reference is a simplification."

894 "RULE 36.1" This sketch was introduced as one illustration of the most dramatic approaches that
895 have been considered. It would strip discovery subpoenas out of Rule 45, placing them somewhere
896 in the sequence of all the rest of the discovery rules. Rule 45 would be limited to subpoenas to
897 provide testimony at a hearing or trial. Separating these topics might promote clarification and
898 simplification, but that result is not assured. It is not clear that bright lines can be drawn to separate
899 discovery subpoenas from subpoenas to appear as a witness at a trial or hearing. Nor is it clear that
900 Rule 45 could be much simplified if discovery subpoenas were removed. Any variation on this
901 approach raises a number of fundamental issues.

902 The sketch was presented by focusing on two distinct aspects. The broad question is whether
903 the time has come to integrate discovery subpoenas more directly with the discovery rules, not by
904 cross-reference but by closer drafting. The sketch is one example of how this might be
905 accomplished; many variations are possible. A series of smaller questions are posed by including
906 provisions addressing questions that Rule 45 now leaves to be worked out by the parties. The ever-
907 present risks of inviting unintended consequences, or of disrupting the paths of negotiation that have
908 developed under present Rule 45, must be considered in reviewing these smaller questions.

909 There is little point in drafting rules that separate discovery subpoenas from subpoenas for
910 a hearing or for trial if the distinction has no real meaning in practice. Courts do confront attempts
911 to avoid discovery cut-offs by asserting that a subpoena is used for a trial or hearing, not for
912 discovery. When there is a trial, the distinction seems feasible. The court can enforce the discovery
913 cut-off by limiting compliance to trial itself, forbidding any attempt to examine the documents or
914 question the witness outside the trial. If that seems undesirable, the court can grant relief from the
915 cut-off; relief often will be desirable, for the benefit of all parties, when a trial subpoena is used to
916 secure information that the parties had thought to supply from other sources that have failed, or when
917 new issues at trial make it desirable to present information that were not anticipated during
918 discovery. There may be more difficulty in drawing lines, but perhaps also less need, when
919 witnesses or documents are subpoenaed for a "hearing" that is not a trial. A common illustration
920 would be a preliminary injunction hearing, held well before any discovery cut-off. An exotic
921 illustration would be the use of witnesses at a summary-judgment hearing, relying on Rule 43(c) —
922 summary judgment may be considered before the cut-off of all discovery. In these settings it may
923 be desirable to manage compliance by allowing discovery immediately before or even during the
924 hearing, separate from presentation of testimony or documents at the hearing. Complications might
925 arise from differences in the place for compliance. Compliance with a subpoena for hearing or trial
926 means producing or testifying, by one means or another, at the hearing or trial. Compliance with a
927 discovery subpoena often will be directed to a different place. There may be distinctions in the
928 extent of the burdens that can be imposed for discovery or for trial. But it may be possible to work
929 through these issues, and indeed it may be possible to address them more clearly than Rule 45 now
930 does.

931 There are many possible approaches to separating discovery subpoenas from trial subpoenas
932 if the separation is in fact useful. The current sketch combines deposition subpoenas and production
933 subpoenas in a single rule. It carries forward the opportunity to issue a subpoena to compel a party's
934 appearance at a deposition, despite the availability of sanctions under Rule 37(d) when a party fails
935 to comply with a deposition notice. It expressly limits discovery production subpoenas to nonparties,
936 relying on Rule 34 as the exclusive means for compelling production between the parties. This
937 approach might be carried further by adding nonparties to Rule 34. Rule 34 would have to be
938 expanded to some extent, at least by incorporating some variation on the Rule 45 provisions that
939 prohibit imposing unreasonable burdens and require a court to protect a nonparty from significant
940 expense if the nonparty objects. It likely would be desirable to add provisions addressing the place
941 of performance by a nonparty, and referring enforcement away from the court where the action is
942 pending but subject to transfer.

943 The sketch incorporates the Rule 45 revisions proposed for serious study even if no other
944 changes are made. It also incorporates the approach that has all subpoenas issued by the court where
945 the action is pending, separately governing the place for compliance and the court that resolves
946 disputes.

947 Apart from the overall relocation of discovery subpoenas, the sketch addresses some
948 questions not now addressed by Rule 45.

949 The place where an entity can be subjected to a Rule 30(b)(6) deposition is not clearly
950 addressed by Rule 45. The most likely relevant provision, Rule 45(c)(3)(A)(ii), directs the court to
951 quash or modify a subpoena that requires a person, not a party, "to travel more than 100 miles from
952 where that person resides, is employed, or regularly transacts business in person." Assuming that
953 an entity is a "person" covered by this rule, applying the concepts of residence, place of employment,
954 or regularly transacting business "in person" is not easy. Reliance on concepts of personal
955 jurisdiction seems an awkward fit when a nonparty is subpoenaed — general personal jurisdiction
956 may open the door too wide, and specific transaction-based personal jurisdiction may fit poorly. But
957 it may be difficult to identify any useful limit. The draft simply provides that the entity may be

958 compelled to produce a person designated to testify on its behalf at any reasonable place. Those
959 words foreclose an "anything goes" approach, but do little more.

960 Rule 45 also fails to specify the place for producing documents or electronically stored
961 information. The sketch provides for inspection and copying of documents or tangible things where
962 they are ordinarily maintained or at another convenient place chosen by the person producing them.
963 It also provides that the subpoena can designate another reasonable place if the requesting party pays
964 all the reasonable added expenses. For electronically stored information, the sketch provides for
965 transmission to an electronic address stated in the request. But it also recognizes that the parties may
966 agree on, or the court may order, participation by the requesting party in searching the nonparty's
967 storage system. It seems likely that similar terms are regularly worked out in practice; perhaps there
968 is no need to add these provisions.

969 The provisions for enforcement draw from both of the less aggressive models. Rule 37 is
970 incorporated more directly, by providing that a motion to enforce a subpoena against a nonparty must
971 be made under Rule 37(a). Rule 37(a) enforcement substitutes for the contempt procedure provided
972 by Rule 45(e). That means the requesting party must attempt to confer to resolve the problem before
973 moving for an order. The order must specify what must be produced. Sanctions are available only
974 after refusal to obey the order. It seems likely that most of the same incidents are used in contempt
975 enforcement, beginning with a motion to show cause, a hearing, an order that specifies what must
976 be done, and sanctions for disobedience. Rule 37(b) sanctions include contempt. It does not seem
977 likely that other Rule 37(b) sanctions will be appropriate, although some thought might be given to
978 the possibility of party-directed sanctions when the nonparty is closely affiliated with the party and
979 subject to its control.

980 Discussion began with the observation that any such surgery on Rule 45 can be justified, if
981 at all, only by showing clear benefits. It deserves to be explored only if the Committee decides to
982 explore relatively broad revisions. If broad revisions are explored, it seems useful to consider — if
983 only to exclude — all plausible alternatives. Any thorough revision should be designed to put Rule
984 45 to rest for many years, at least in its major design. Even then, the risk of unintended
985 consequences urges caution. The suggested distinctions between discovery subpoenas and
986 subpoenas for a hearing or trial may not prove workable. Attempts to define the place of
987 performance more clearly may hinder the process by which workable accommodations are worked
988 out by negotiations in the shadow of an opaque rule. Simply wrong answers might be adopted for
989 some questions. There is real reason for concern with the prospect that computer search programs
990 might not prove able to direct innocent inquiries framed around Rule 36.1 to earlier interpretations
991 of ancestral provisions in Rule 45.

992 The distinction between amending existing rules and drafting on a clean slate is uncertain.
993 The Rule 36.1 sketch draws in large part on present Rule 45, and on the current proposals to amend
994 or to explore. It deserves to carry forward as at least an exhibit in the materials for a miniconference,
995 but it is not likely to carry further unless there is a strong upswelling of support.

996 *Rule 26(c) Protective Orders*

997 Continuing introductions of "Sunshine in Litigation Act" bills have prompted renewed
998 attention to Rule 26(c). Similar bills prompted the Committee to study Rule 26(c) in depth and at
999 length in the 1990s. A proposed amended Rule 26(c) was published for comment. A revised
1000 proposal was sent back by the Judicial Conference because it had not been republished after making
1001 extensive changes to reflect the public comments. The revised proposal was then published. After
1002 considering the comments offered at this second round, the Committee concluded that there was no
1003 need to pursue amendments. The rule seemed to be working well as it was. The Committee has not
1004 devoted much attention to Rule 26(c) since then.

1005 Continuing Congressional attention provides reason to renew consideration of Rule 26(c).
1006 Judge Kravitz testified before Congress last year. Andrea Kuperman undertook a circuit-by-circuit
1007 study of current practices, looking to standards for initially entering protective orders, tests for filing
1008 under seal, and approaches to modifying or dissolving protective orders. This research suggests that
1009 there are few identifiable differences among the circuits. All recognize the need to adhere to a
1010 meaningful good-cause requirement in granting protective orders. All recognize flexible authority
1011 to dissolve or modify protective orders, although the Second Circuit adheres to a more demanding
1012 standard that has been expressly rejected by several circuits. All recognize that the tests for filing
1013 "judicial documents" under seal are far more demanding than the standards for entering protective
1014 discovery orders. This research is reassuring, and provides some ground for satisfaction with present
1015 Rule 26(c). Nonetheless, it is wise to explore possible revisions.

1016 A draft Rule 26(c) has been prepared by the Committee Chair and Reporter. The draft was
1017 presented solely for discussion purposes. If the Committee decides to take up this topic, more
1018 rigorous drafting will be attempted. Specific suggestions from Committee members will play an
1019 important role in improved drafting.

1020 Good reason may appear to do nothing. Not long after the Committee concluded its last
1021 thorough consideration of Rule 26(c), the Court of Appeals for the District of Columbia Circuit said
1022 this: "Rule 26(c) is highly flexible, having been designed to accommodate all relevant interests as
1023 they arise." United States v. Microsoft Corp., 165 F.3d 952, 959 (D.C.Cir.1999). That advice seems
1024 to hold good today. The purpose of placing this topic on the agenda is to determine whether it makes
1025 sense to take it up again. Courts are doing desirable things, but some of these good things do not
1026 have an obvious anchor in the rule. Expanded rule language might save time for bench and bar, and
1027 provide valuable reassurance. Some of the rule language seems antique. It expressly recognizes the
1028 need to protect trade secrets and other commercial information, but does not mention the personal
1029 privacy interests that underlie many protective orders. Some updating and augmentation may be in
1030 order. And it will always be important to be alert to signs that practice might somehow be going
1031 astray.

1032 The draft carries forward the "good cause" test established in present Rule 26(c). The text
1033 deliberately omits two topics that generated much discussion in the 1990s. The rule text might
1034 recognize the role of party stipulations, adopting some provision such as "for good cause shown by
1035 a party or by parties who submit a stipulated order." Party stipulations may show both that there is
1036 good cause for a protective order and that the order will facilitate the smooth flow of discovery
1037 without unnecessary contentiousness. But it is important to recognize that a stipulation does not
1038 eliminate the need for the court to determine that there is good cause for the order. There is no clear
1039 reason to believe that courts fail to understand these contending concerns or fail to act appropriately.
1040 It may be better to leave practice where it lies.

1041 It also would be possible to add rule text that points to reasons for not entering a protective
1042 order. Concern is repeatedly expressed that protective orders may defeat public access to
1043 information needed to safeguard public health and safety. But, both in the 1990s and today, there
1044 has been no persuasive showing that protective orders in fact have had this effect. The Federal
1045 Judicial Center studied protective orders and showed that most enter to protect information that does
1046 not implicate the public health or safety. When the protected information may bear on public health
1047 or safety, alternative sources of information have always been available. The pleadings in the cases
1048 are one source that is routinely available. This concern does not yet seem real.

1049 The draft rule text does make some changes in the traditional formula that looks to
1050 "annoyance, harassment, embarrassment, oppression, or undue burden or expense." Many protective
1051 orders enter to preserve personal privacy. In addition, Rule 26(g) recognizes other potential
1052 discovery dangers. Rule 26(c) might benefit from recognizing some of the same dangers, such as
1053 unnecessary delay and harassment.

1054 The draft also relegates to a footnote the question whether the rule should provide for
1055 disclosing information to state or federal agencies with relevant regulatory or enforcement authority.
1056 The footnote suggests that it may be better to leave it to the courts to continue working out the
1057 countervailing interests they have identified in this area.

1058 Present Rule 26(c) text does not address another familiar problem. Particularly when large
1059 volumes of documents or electronically stored information are involved, protective orders often
1060 provide that a producing party may designate information as confidential. Another party may wish
1061 to challenge the designation. The draft illustrates one possible approach, assigning the burden of
1062 justifying protection to the party seeking protection.

1063 Another familiar problem arises when a party seeks to file protected discovery information
1064 with the court. The standards for sealing court records are more demanding than the Rule 26(c)
1065 standards for entering a protective order. Sealing standards are much higher for records that are used
1066 as evidence at a hearing, trial, or on summary judgment. The draft provides that a party may file
1067 under seal information covered by a protective order and offered to support or oppose a motion on
1068 the merits or offered in evidence at a hearing or trial only if the protective order directs filing under
1069 seal or if the court grants a motion to file under seal. It does not attempt to restate the judicially
1070 developed tests for determining whether sealing is appropriate.

1071 The draft also carries forward, with some changes, the 1990s drafts that provided for
1072 modifying or dissolving a protective order. The 1990s drafts allowed a nonparty to intervene to seek
1073 modification or dissolution, and the Committee Note suggested that the standard for intervention
1074 should be more permissive than the tests for intervening on the merits. The present draft simply
1075 allows any person to seek modification or dissolution, reasoning that it is more efficient to consider
1076 the interests that may support relief all at once. Several factors are identified for consideration. One
1077 of them looks to "the reasons for entering the order, and any new information that bears on the
1078 order." This factor addresses in circumspect terms the need to distinguish between protective orders
1079 entered after thorough consideration of the interests implicated by a motion to modify or dissolve
1080 and orders entered after less thorough consideration. "New information" may include arguments that
1081 were not as fully presented as might have been. At the same time, reliance is identified as another
1082 factor bearing on modification or dissolution. Yet another factor reflects the common practice of
1083 modifying protective orders to facilitate discovery and litigation in related cases.

1084 A number of interesting questions are not addressed by the draft. At least some courts
1085 believe there is no common-law right of access to discovery materials not filed with the court. This
1086 view ties to the amendment of Rule 5(d) that prohibits filing most discovery materials until they are
1087 used in the proceeding or the court orders filing. The rule might say something about access to
1088 unfiled materials.

1089 Rule 29(b) provides that parties may stipulate that "procedures governing or limiting
1090 discovery be modified." Rather than seek a protective order from the court, the parties may stipulate
1091 to limited discovery and to restrictions on using discovery materials. It is also possible that parties
1092 may agree to exchange information voluntarily, entirely outside the formal discovery processes. It
1093 might prove difficult to address such agreements in Rule 26(c), but perhaps the topic deserves some
1094 attention.

1095 This introduction was summarized as identifying issues that probably should be considered
1096 if Rule 26(c) is to be studied further. But the question remains whether there is any reason to take
1097 on Rule 26(c) while "things seem to be working out just fine."

1098 The first question asked for a summary of the best reasons for taking up Rule 26(c).
1099 Responses suggested again the value of bringing well-established "best practices" into rule text, and
1100 the desire to modernize expression of some provisions. Rule 26(c) "was written in a paper world.
1101 Protecting privacy and access to information filed in court have become more important in the

1102 electronic era." Pressures grow both to protect the privacy of parties and other persons with
1103 discoverable information, and also to ensure public access. The right balance is difficult, and is likely
1104 to be different now than it was in 1938. Although courts are adjusting well, it may help to update
1105 the rule.

1106 It was further suggested that various provisions could address the concerns reflected in the
1107 Sunshine in Litigation Act proposals. Some are in the draft, including challenges to designations of
1108 information as confidential, modification or dissolution of protective orders, and sealing of filed
1109 materials. But the best reason to act may be to bring best practices into the rule.

1110 The "best practices" suggestion was countered by asking whether there is good reason to
1111 avoid an attempt to distill developed judicial practices into rule text. It is not possible to incorporate
1112 all of the case law. Litigants will argue that leaving some practices out of the rule reflects a
1113 judgment that they are not worthy of incorporation, and should be reconsidered.

1114 The rejoinder was that the case law is pretty consistent. It provides a secure foundation for
1115 incorporation into rule text. It will be useful to provide explicitly for modification or dissolution.
1116 Recognition of the procedure for challenging designations of confidentiality will be useful, even
1117 though a procedure is spelled out in "every protective order I've seen." The risk of doing more harm
1118 than good seems relatively low.

1119 Another reason for taking on Rule 26(c) may be persisting concerns in Congress. But this
1120 preliminary inquiry satisfies much of that burden — there is no apparent reason to revise the
1121 conclusions reached in the 1990s. Courts do consider public health and safety. They do allow access
1122 to litigants in follow-on cases. They do modify or dissolve protective orders. They are careful about
1123 sealing judicial documents. The reasons for going ahead now are more the values already described
1124 — bringing established best practices into rule text expressed in contemporary language.

1125 This suggestion was elaborated by noting that there is an important value in access to justice.
1126 That includes ensuring that the public in general has a chance to see what courts do. But it also
1127 includes providing ready access to the law for lawyers. Not all practitioners are familiar with case-
1128 law elaborations of Rule 26(c), and not all have the resources required to develop extensive
1129 knowledge. Capturing these values in rule text can be useful.

1130 Another comment began with the suggestion that there is a "wink and nudge" aspect of real
1131 practice, as compared to rule text. Expressing practice in rule text could be useful. But there are
1132 offsetting values in leaving things where they stand. It has been noted that the Second Circuit takes
1133 a distinctive approach to modifying or dissolving a protective order, emphasizing the need to protect
1134 reliance in particular cases so that litigants will be encouraged to rely on protective orders to
1135 facilitate discovery in future cases. So it is well understood that umbrella protective orders are
1136 entered, but the practice is questioned by some. Adopting rule provisions that address party
1137 designations of confidentiality may seem to bless more practices than should be blessed.

1138 Returning to the need for free access to judicial documents, it was observed that the draft
1139 provisions for modification or dissolution are open-ended. They do not interfere with the provision
1140 that a protective order for discovery does not automatically carry over. But it also was suggested that
1141 care should be taken in even referring to the possibility of sealing information offered as evidence
1142 at trial.

1143 The pending proposal to revise Rule 56 was recalled. One of the major reasons for
1144 undertaking revision was that the rule text simply did not correspond to the practices that had
1145 developed over the years. In contrast, Rule 26(c) text is not inconsistent with current practice. The
1146 proposed changes are obvious. There is little reason to revise a rule only to incorporate obvious
1147 present practice.

1148 An observer suggested that one of the most important concerns is that Rule 26(c) is now a
1149 very good thing for employment plaintiffs. If the Committee starts to tinker with it, interest groups
1150 will be stirred to press revisions that would distort the rule. Another observer agreed in somewhat
1151 different terms. There are some benefits in acting to improve Rule 26(c). But there are risks that
1152 once the topic is opened, the end result will make things worse. Sending a revised rule to Congress,
1153 for example, might provide an occasion for enacting the infeasible procedural incidents contemplated
1154 by the Sunshine in Litigation Act bills.

1155 Discussion resumed the next morning. A committee member asked whether it is wise to
1156 pursue Rule 26(c) in depth if the Committee thinks the end result will be to recommend no changes.
1157 Judge Rosenthal noted that the Committee had done that already. Several years were devoted to
1158 Rule 26(c), culminating in a decision to withdraw after two rounds of public comment because there
1159 was no apparent need to revise established practices. At the same time, Judge Kravitz is right in
1160 observing that the Committee should not feel obliged by political considerations to pursue a topic
1161 it thinks does not need attention.

1162 It seems better not to take Rule 26(c) off the agenda in a final way just yet. At a minimum,
1163 the Committee should continue to monitor developing case law. Congress should understand that
1164 the Committee recognizes the importance of Rule 26(c) and continues to monitor it. If the Federal
1165 Judicial Center research staff can free up some time, it might be useful to update their study. And
1166 whether or not there is a further study, it might be desirable to have the judicial education arm of the
1167 Center prepare a pocket guide that helps judges and lawyers through the case law by summarizing
1168 best practices.

1169 These proposals were supplemented by asking whether it would be useful to have an FJC
1170 survey of judges. The FJC prefers to survey judges only when there are compelling reasons. Judge
1171 time is a valuable resource that should not be lightly drawn on. When a survey seems justified, it
1172 seems better to do it by presenting a concrete proposal, not a general question whether there is some
1173 reason to revise a rule.

1174 The 2010 conference may generate ideas that would support a useful survey, most likely
1175 aimed at lawyers. Until then, the prospect seems premature.

1176 Further reason for carrying Rule 26(c) forward was found in the work of two Standing
1177 Committee subcommittees. One is examining privacy concerns, although without a direct focus on
1178 Rule 26(c). Another is examining the practice of sealing entire cases, as distinguished from sealing
1179 particular files or events. Exhaustive empirical investigation has shown that it is very rare to seal
1180 entire cases, but there may be reason to recommend that courts establish systems to ensure that
1181 sealing does not carry forward by default after the occasion for sealing has disappeared.

1182 *Forms*

1183 The October meeting considered the question whether the time has come to reconsider the
1184 Forms appended to the Rules. Rule 84 says the forms "suffice under these rules." For the most part,
1185 however, the Committee has paid attention to the Forms only when adding new forms to illustrate
1186 new rules provisions. Looking at the set as a whole, there are reasons to wonder why some topics
1187 are included, while others are omitted. Looking at particular forms raises questions whether they
1188 are useful. The pleading forms in particular seem questionable. The pleading forms were obviously
1189 important in 1938. The adoption of notice pleading, a concept not easily expressed in words,
1190 required that the Committee paint pictures in the guise of Forms to illustrate the meaning of Rule
1191 8(a)(2). That need has long since been served. The current turmoil in pleading doctrine, moreover,
1192 suggests that the Forms may provide more distraction than illumination.

1193 The benign neglect that has generally characterized the Committee's approach to the Forms
1194 is in part a consequence of the need to tend to matters that seem more important. There is reason

1195 to question whether the Committee should continue to bear primary responsibility for policing the
1196 forms. If responsibility were assigned elsewhere — for example, to the Administrative Office —
1197 it would be appropriate to reconsider Rule 84.

1198 These concerns are detailed at some length in the Minutes for the October meeting. The
1199 Committee was particularly concerned that any effort to revise the Forms, or to abandon them, might
1200 seem to be taking sides in ongoing debates about pleading standards. The Committee clearly is not
1201 yet prepared to address pleading standards in this way. It tentatively concluded that reconsideration
1202 of the Forms should be postponed until pleading practice settles down.

1203 This reaction was reported to the Standing Committee in January. The Standing Committee
1204 agreed that it would be better not to launch a Forms project just now.

1205 Discussion was limited to the question whether it would be useful, as some law review
1206 writers have suggested, to develop a series of forms that illustrate pleadings that just barely comply
1207 with minimum standards, and perhaps some that just barely fail to comply. The response was that
1208 it seems premature to do that. Negligence offers a simple example. The Form 11 automobile
1209 negligence complaint seems sufficient for such a case. A claim that a manufacturer negligently
1210 failed to recall a defective product as early as should have been, and negligently designed the recall
1211 campaign when it was launched, would likely require greater fact detail. And a newspaper report
1212 of an actual case suggests the need for still greater details in a negligence claim — this claim was
1213 that the SEC acted negligently in failing to discover and stop the Madoff ponzi scheme. The general
1214 utility of revised forms also seems open to doubt, at least for the cases that have stirred current
1215 debates. A model of a sufficient conspiracy complaint for the Twombly case, for example, might
1216 not provide much use to a plaintiff attempting to plead any other conspiracy.

1217 It was agreed that the Committee would continue to monitor the long run role of the Forms.

1218 *Style and Time Computation Glitches*

1219 The question of the approach to glitches discovered in the Style Project was opened for initial
1220 discussion. Throughout the course of the Style Project it was recognized that some inadvertent
1221 changes of meaning were likely to occur. Similar risks may appear with the much simpler changes
1222 effected by the Time Computation Project. It is heartening that few questions have yet appeared in
1223 the first two years of the Style Project, and none have appeared in the first three months of the Time
1224 Computation revisions. But Style questions have been raised, and others no doubt will appear.

1225 One example of a near-Style Project difficulty has been offered. In 2005, two years before
1226 the overall Style amendments, Rule 6(d) was revised in keeping with Style Project conventions.
1227 Until 2005 it allowed three extra days when a party had a right or was required to do some act, etc.,
1228 within a prescribed period after service of a notice or other paper "upon the party," and the paper or
1229 notice "is served upon the party" by designated means. Clearly that meant three extra days were
1230 available only to the party served. The 2005 amendment provides that three days are added
1231 "Whenever a party must or may act within a prescribed period after service and service is made by
1232 designated means." It is no longer clearly limited to acts by the party on whom service is made. It
1233 can be read to allow extra time to the party who makes service. One possible application: Rule
1234 15(a)(1) allows a party to amend a pleading once as a matter of course within 21 days after serving
1235 it. Similar opportunities to act after a party has served a paper appear in Rules 14(a) and 38(b)(1);
1236 Rule 38(c) may also fall into this camp. The result would be that a party could routinely add three
1237 days to its time to act by choosing the means of service.

1238 It is not clear whether any court or party has encountered this Rule 6(d) question, which is
1239 elaborated at great length in a draft law review article that was sent to Professor Kimble for
1240 comments. But there may be reason to revise the drafting.

1241 That leaves the question whether the Committee should scramble to respond immediately to
1242 each drafting misadventure as it appears. The present disposition is to wait a while to see how many
1243 examples appear, with an eye to accumulating them for disposition in a single package of proposals.

1244 Brief discussion confirmed the decision to allow time for other drafting lapses to appear. If
1245 a truly important problem arises, it can be dealt with promptly. Otherwise, there is little need to
1246 bombard the profession with a cascading series of amendments, if indeed many problems do appear.

1247 *Appellate-Civil Rules Subcommittee*

1248 Judge Colloton, Chair of the joint Appellate-Civil Rules Subcommittee, reported that the
1249 Subcommittee will report at the fall meeting.

1250 *2010 Conference Preparation*

1251 Judge Rosenthal noted Judge Kravitz's suggestion that the Committee should start thinking
1252 about various means of harnessing the fruits of the 2010 Conference. The Conference will generate
1253 momentum that should not be allowed to die. The first step after the Conference will be a report to
1254 the Chief Justice. The report should include suggestions about the next steps. Some steps may be
1255 relatively modest, focusing on judicial education and perhaps lawyers. "Best practices" guides might
1256 be devised. Of course consideration of rules amendments in the regular Enabling Act process may
1257 be important. Beyond that, thought should be given to other possibilities. A committee might be
1258 formed within the Judicial Conference, to include members from committees outside the rules
1259 committees, and perhaps representatives of Congress. The Federal Courts Study Committee was
1260 formed within the Judicial Conference by statute; a similar course might be wise now.

1261 *Thank yous*

1262 Judge Rosenthal expressed great thanks to Chilton Varner and the Emory Law School for
1263 making fine arrangements for the meeting. The Committee was made to feel welcome. The
1264 Thursday afternoon reception provided a good opportunity to meet students and faculty, and it was
1265 good to have some students attend the meeting.

1266 Thanks also were extended to the Discovery Subcommittee for all its hard work. The work
1267 has been of very high quality, and has covered many hard topics. Rule 45 remains in the beginning
1268 stages, but it is a very promising beginning.

1269 Judge Koeltl was thanked again for "an amazing amount of enormously effective work in
1270 putting the Conference together."

1271 The Committee voted thanks to Andrea Kuperman for her great research support for several
1272 Committee projects.

1273 *Next Meeting*

1274 The next regular meeting will be in late October or early November, most likely in
1275 Washington, D.C. A firm date will be set as soon as possible. If possible, the Discovery
1276 Subcommittee will attempt to schedule a Rule 45 miniconference in conjunction with the Committee
meeting.

Respectfully submitted

Edward H. Cooper
Reporter

TAB

6A

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

LEE H. ROSENTHAL
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

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MARK R. KRAVITZ
CIVIL RULES

RICHARD C. TALLMAN
CRIMINAL RULES

ROBERT L. HINKLE
EVIDENCE RULES

MEMORANDUM

Date: **May 19, 2010**

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

FROM: **Honorable Richard C. Tallman, Chair**
Advisory Committee on Federal Rules of Criminal Procedure

RE: **Report of the Advisory Committee on Criminal Rules**

I. Introduction

The Advisory Committee on the Federal Rules of Criminal Procedure ("the Committee") met on April 15-16, 2010, in Chicago, Illinois, and took action on a number of proposals. The Draft Minutes are attached.

Action items:

(1) approval to transmit to the Judicial Conference a package of proposed amendments incorporating technology in Rules 1, 3, 4, 6, 9, 40, 41, 43, and 49 as well as new Rule 4.1;

(2) approval to publish proposed Rule 37;

(3) approval to publish proposed amendments to Rules 5 and 58;

(4) approval to transmit to the Judicial Conference a technical and conforming amendment to Rule 32; and

(5) approval of a technical and conforming amendment to Rule 41 without need for republication and approval to then transmit the version as amended to the Judicial Conference.

The report also includes a discussion of the Committee's consideration of proposed amendments to Rule 16 (exculpatory evidence), Rule 12 (motions which must be made before trial), and Rule 11 (advice concerning the immigration consequences of a guilty plea), as well as its continued monitoring of issues concerning the implementation of the Crime Victims' Rights Act. We will also report on the return by the Supreme Court without comment of proposed revisions to Rule 15 to permit in limited circumstances the taking of testimony in foreign countries outside the physical presence of the defendant (to the extent we have learned in the interim why the rule was not endorsed and transmitted to Congress).

II. Action Items—Recommendations to Forward Amendments to the Judicial Conference

The Committee seeks Standing Committee approval to forward to the Judicial Conference a package of amendments that were developed after a comprehensive review of all of the Rules of Criminal Procedure to incorporate technological advances.

New Rule 4.1 (1) incorporates the portions of Rule 41 allowing a search warrant to be issued on the basis of information submitted by reliable electronic means, and (2) makes those procedures applicable to complaints under Rule 3 and arrest warrants or summonses issued under Rules 4 and 9. Rule 4.1 also contains an innovation that deals with the increasingly common situation where all supporting documentation is submitted by reliable electronic means, such as fax or email. The new rule requires a live conversation in which the affiant submitting the material is placed under oath, and also states that the judge may keep an abbreviated record of the oath, rather than transcribing verbatim the entire conversation and the material submitted electronically.

The remaining proposals amend existing rules, as follows:

- Rule 1: expanding the definition of telephone to include cell phone technology and calls over the internet from computers

- Rules 3, 4, and 9: authorizing the consideration of complaints and the issuance of arrest warrants and summonses based on information submitted by reliable electronic means as provided by new Rule 4.1

- Rules 4 and 41: authorizing the return of search warrants, arrest warrants, and warrants for tracking devices by reliable electronic means and providing for duplicate original arrest warrants

- Rule 6: authorizing taking of a grand jury return by video teleconference

- Rule 40: with defendant's consent, allowing his appearance by video teleconference in proceeding on arrest for failure to appear in other district

- Rule 41: deleting portions now covered by new Rule 4.1

• Rule 43: allowing arraignment, trial, and sentencing of misdemeanor to occur by video teleconference with defendant's written consent

• Rule 49: authorizing local rules permitting papers to be filed, signed, or verified by electronic means meeting standards of Judicial Conference.

The Committee also published for notice and comment a proposed amendment to Rule 32.1 that authorized a defendant—at his or her request—to participate by video teleconference in proceedings concerning the revocation or modification of probation or supervised release. After review of the public comments and further discussion, the Committee voted to withdraw this proposal, and it does not recommend its submission to the Judicial Conference.

Six written comments addressed to the technology rules were received during the public comment period. Most of the comments addressed new Rule 4.1, but there were also comments concerning Rules 6, 32.1, and 43. The full text of all of these rules and the public comments are included at the end of this memorandum. As appropriate, portions of individual rules and committee notes are excerpted in the body of this memorandum as well.

A. ACTION ITEM—Rule 1

The amendment expands the definition of "telephone" to include any technology enabling live voice conversations. No public comments were received, but the text was rephrased by the Committee to refer to the telephone as a "technology for transmitting electronic voice communications" rather than a "form" of communication. The revised language tracks the published Committee Note and was intended to clarify the rule.

The Committee adopted the following amended language by a unanimous vote.

Rule (1). Scope; Definitions

1 * * * * *

2 **(b) Definitions.** The following definitions apply to these rules:

3 * * * * *

4 (11) "Telephone" means any technology for transmitting live electronic voice communication.

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 1 be approved as amended following publication and forwarded to the Judicial Conference.

B. ACTION ITEM—Rule 3

The proposed amendment to Rule 3 authorizes the consideration of complaints based upon information submitted by reliable electronic means as provided by Rule 4.1. No comments on the proposed amendment were received, and the Advisory Committee voted unanimously to recommend that it be forwarded to the Standing Committee.

Rule 3. The Complaint

1 The complaint is a written statement of the essential facts constituting
2 the offense charged. ~~It~~ Except as provided in Rule 4.1, it must be made
3 under oath before a magistrate judge or, if none is reasonably available,
4 before a state or local judicial officer.

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 3 be approved as amended following publication and forwarded to the Judicial Conference.

C. ACTION ITEM—Rule 4

The proposed amendment to Rule 4 authorizes (1) the issuance of an arrest warrant or summons based on information submitted by reliable electronic means, (2) the preparation and use of duplicate original arrest warrants when the original warrant is issued electronically, and (3) the return of warrants by reliable electronic means.

No comments on the proposed amendment were received, and the Advisory Committee voted unanimously to recommend that it be forwarded to the Standing Committee.

Rule 4. Arrest Warrant or Summons on a Complaint

* * * * *

(c) Execution or Service, and Return.

1 * * * * *

2 **(3)** ***Manner.***

3 (A) A warrant is executed by arresting the defendant. Upon arrest,

4 an officer possessing the original or a duplicate original
5 warrant must show it to the defendant. If the officer
6 does not possess the warrant, the officer must inform
7 the defendant of the warrant's existence and of the
8 offense charged and, at the defendant's request, must
9 show the original or a duplicate original warrant to the
10 defendant as soon as possible.
11 * * * * *
12 **(4) *Return.***
13 (A) After executing a warrant, the officer must return it to the judge
14 before whom the defendant is brought in accordance with Rule
15 5. The officer may do so by reliable electronic means. At the
16 request of an attorney for the government, an unexecuted
17 warrant must be brought back to and canceled by a magistrate
18 judge or, if none is reasonably available, by a state or local
19 judicial officer.
20 * * * * *
21 **(d) Warrant by Telephone or Other Reliable Electronic Means.** In
22 accordance with Rule 4.1, a magistrate judge may issue a warrant or
23 summons based on information communicated by telephone or other
reliable electronic means.

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 4 be approved as published and forwarded to the Judicial Conference.

D. ACTION ITEM—Rule 4.1

The provisions in Rule 41 that authorize the issuance of search warrants on the basis of information submitted by reliable electronic means have been relocated in new Rule 4.1 and made applicable when the court reviews a complaint or determines whether to issue an arrest warrant or summons. Comments were received from the Federal Magistrate Judges Association (FMJA), the National Association of Criminal Defense Lawyers (NACDL), and the California State Bar Committee on Federal Courts.

On the basis of public comments, the Committee made the following changes.

(1) Subdivision (a). The published rule referred to the action of a magistrate judge as "deciding whether to approve a complaint." In response to the FMJA's comment that the judge does not "approve" a complaint, the Committee amended the rule to refer to the judge as "reviewing a complaint or deciding whether to issue a warrant or summons."

(2) Subdivisions (b)(2)(A) and (B). The FMJA recommended revision of subdivisions (b)(2) and (3), and the Committee's style consultant recommended additional clarifying changes. The Committee combined these two subdivisions into subdivisions (b)(2)(A) and (B). The change was to clarify the procedures applicable when the applicant does no more than attest to the contents of a written affidavit and those applicable when additional testimony or exhibits are presented. (Subsequent subdivisions were renumbered because of the merger of (b)(2) and (3).)

At the suggestion of the style consultant, the clauses in subparagraph (B) were further divided into items (i) through (iv), which were also reordered to keep together the provisions regarding recordings and records.

(3) Subdivision (b)(5). This subdivision (published as (6)) deals with modification. In response to a comment from the NACDL, the Committee added language requiring a judge who directs an applicant to modify a duplicate original to file the modified original. This change was intended to ensure that a complete record was preserved.

Additionally, at the suggestion of the style consultant, the clauses in this section were broken out into subparagraphs (A) and (B).

(4) Subdivision (b)(6) (published as (7)). The Committee eliminated the introductory language "If the judge decides to approve the complaint, or ...." As noted by the FMJA, a judge does not "approve" a complaint. Accordingly, the Committee revised the rule to refer only to the steps necessary to issue a warrant or summons, which is the action taken by the judicial officer.

In subdivision (b)(6)(A) the Committee amended the requirement that the judge "sign the original" to "sign the original documents." This phrase is broad enough to encompass the current practice of the judge signing the complaint forms (we noted the judicial signature is not required by

Rule 3 although there is a jurat for that purpose included on the AO form). The Committee discussed and did not favor spelling out each of the documents that might be involved in a particular case. These could include (a) the jurat on the affidavit(s); (b) the jurat on the complaint; (c) the summons; (d) the search warrant, if there is one; (e) the arrest warrant, if there is one; (f) the certifications of written records supplementing the transmitted affidavit; (g) any papers that correct or modify affidavits or complaints submitted initially; (h) trespass orders; and (i) authorizations to install pole cameras and "bumper beepers."

In subdivision (b)(6)(B), we deleted the reference to the "face" of a document as superfluous and anachronistic, and clarified that the action is the entry of the date and time of "the approval of a warrant or summons." Finally, as recommended by the NACDL, we modified (b)(6)(C) to require that the judge must direct the applicant not only to sign the duplicate original with the judge's name, but also to note the date and time.

Although there were multiple changes in Rule 4.1, the Committee concluded that republication was not warranted. All of these changes were responsive to the public comments received, and they were clarifying rather than substantive. However, to obtain additional feedback on the post-publication changes, the Committee sent a copy of Rule 4.1 and an explanation of the changes made following publication to each of the individuals and groups that had submitted comments on Rule 4.1. Only one substantive comment was received. The FMJA wrote that it agreed that the post-publication revisions to the Rule "appear to be consistent with [its] suggestions for making the Rule more accurate and workable" and noted that it was "gratified by the response" to its comments on the published version of the rule.

The proposed text and committee note to Rule 4.1 provide as follows:

Rule 4.1. Complaint, Warrant, or Summons by Telephone or Other Reliable Electronic Means

1 **(a) In General.** A magistrate judge may consider
2 information communicated by telephone or other
3 reliable electronic means when reviewing a complaint
4 or deciding whether to issue a warrant or summons.
5 **(b) Procedures.** If a magistrate judge decides to proceed
6 under this rule, the following procedures apply:

7 (1) ***Taking Testimony Under Oath.*** The judge must
8 place under oath — and may examine — the
9 applicant and any person on whose testimony the
10 application is based
11 (2) ***Creating a Record of the Testimony and***
12 ***Exhibits.***
13 (A) *Testimony Limited to Attestation.* If the
14 applicant does no more than attest to the
15 contents of a written affidavit submitted by
16 reliable electronic means, the judge must
17 acknowledge the attestation in writing on
18 the affidavit.
19 (B) *Additional Testimony or Exhibits.* If the
20 judge considers additional testimony or
21 exhibits, the judge must:
22 (i) have the testimony recorded verbatim
23 by an electronic recording device, by a
24 court reporter, or in writing;
25 (ii) have any recording or reporter's notes
26 transcribed, have the transcription
27 certified as accurate, and file it;

28 (iii) sign any other written record, certify
29 its accuracy, and file it; and
30 (iv) make sure that the exhibits are filed.
31 **(3)** ***Preparing a Proposed Duplicate Original of a***
32 ***Complaint, Warrant, or Summons.*** The
33 applicant must prepare a proposed duplicate
34 original of a complaint, warrant, or summons,
35 and must read or otherwise transmit its contents
36 verbatim to the judge.
37 **(4)** ***Preparing an Original Complaint, Warrant, or***
38 ***Summons.*** If the applicant reads the contents of
39 the proposed duplicate original, the judge must
40 enter those contents into an original complaint,
41 warrant, or summons. If the applicant transmits
42 the contents by reliable electronic means, the
43 transmission received by the judge may serve as
44 the original.
45 **(5)** ***Modification.*** The judge may modify the
46 complaint, warrant, or summons. The judge must
47 then:
48 (A) transmit the modified version to the
49 applicant by reliable electronic means; or

50 (B) file the modified original and direct the
51 applicant to modify the proposed duplicate
52 original accordingly.
53 **(6)** ***Issuance.*** To issue the warrant or summons, the
54 judge must:
55 (A) sign the original documents;
56 (B) enter the date and time of issuance on the
57 warrant or summons; and
58 (C) transmit the warrant or summons by reliable
59 electronic means to the applicant or direct the
60 applicant to sign the judge's name and enter
61 the date and time on the duplicate original.
62 **(c)** **Suppression Limited.** Absent a finding of bad faith,
63 evidence obtained from a warrant issued under this
64 rule is not subject to suppression on the ground that
65 issuing the warrant in this manner was unreasonable
66 under the circumstances.

Committee Note

New Rule 4.1 brings together in one Rule the procedures for using a telephone or other reliable electronic means for reviewing complaints and applying for and issuing warrants and summonses. In drafting Rule 4.1, the Committee recognized that modern technological developments have improved access to judicial officers, thereby reducing the necessity of government action without prior judicial approval. Rule 4.1 prescribes uniform procedures and ensures an accurate record.

The procedures that have governed search warrants "by telephonic or other means," formerly in Rule 41(d)(3) and (e)(3), have been relocated to this Rule, reordered for easier application, and extended to arrest warrants, complaints, and summonses. Successful experience using electronic applications for search warrants under Rule 41, combined with increased access to reliable electronic communication, support the extension of these procedures to arrest warrants, complaints, and summonses.

With one exception noted in the next paragraph, the new Rule preserves the procedures formerly in Rule 41 without change. By using the term "magistrate judge," the Rule continues to require, as did former Rule 41(d)(3) and (e)(3), that a federal judge (and not a state judge) handle electronic applications, approvals, and issuances. The Rule continues to require that the judge place an applicant under oath over the telephone, and permits the judge to examine the applicant, as Rule 41 had provided. Rule 4.1(b) continues to require that when electronic means are used to issue the warrant, the magistrate judge retain the original warrant. Minor changes in wording and reorganization of the language formerly in Rule 41 were made to aid in application of the rules, with no intended change in meaning.

The only substantive change to the procedures formerly in Rule 41(d)(3) and (e)(3) appears in new Rule 4.1(b)(2)(A). Former Rule 41(d)(3)(B)(ii) required the magistrate judge to make a verbatim record of the entire conversation with the applicant. New Rule 4.1(b)(2)(A) provides that when a warrant application and affidavit are sent electronically to the magistrate judge and the telephone conversation between the magistrate judge and affiant is limited to attesting to those written documents, a verbatim record of the entire conversation is no longer required. Rather, the magistrate judge should simply acknowledge in writing the attestation on the affidavit. This may be done, for example, by signing the jurat included on the Administrative Office of U.S. Courts form. Rule 4.1(b)(2)(B) carries forward the requirements formerly in Rule 41 to cases in which the magistrate judge considers testimony or exhibits in addition to the affidavit. In addition, Rule 4.1(b)(6) specifies that in order to issue a warrant or summons the magistrate judge must sign all of the original documents and enter the date and time of issuance on the warrant or summons. This procedure will create and maintain a complete record of the warrant application process.

Recommendation—The Advisory Committee recommends that proposed Rule 4.1 be approved as amended following publication and forwarded to the Judicial Conference.

E. ACTION ITEM—Rule 6

The proposed amendment to Rule 6 allows the return of an indictment by video teleconference "to avoid unnecessary cost or delay." Although having the judge in the same courtroom remains the preferred practice to promote the public's confidence in the integrity and solemnity of federal criminal proceedings, there are situations where no judge is present in the courthouse where the grand jury sits, and a judge would have to travel a long distance to take the return, in some instances in bad weather and dangerous road conditions. This amendment will be particularly useful when the nearest judge is hundreds of miles away from the courthouse in which the grand jury sits. The amendment preserves the judge's time and safety, and accommodates the Speedy Trial Act's requirement that an indictment be returned within thirty days of arrest. *See* 18 U.S.C. § 3161(b).

Two public comments were received. Magistrate Judges Stewart (09-CR-003) and Ashmanskas (09-CR-004) urged that the rule be amended to follow Oregon state practice, which allows the grand jury to file indictments with the clerk's office.

The Advisory Committee did not endorse this recommendation, which is inconsistent with an important tradition of a public return with solemnity. The Advisory Committee voted unanimously to recommend that the amendment be forwarded to the Standing Committee.

Rule 6. The Grand Jury

1 * * * * *

2 **(f) Indictment and Return.** A grand jury may indict only if at
3 least 12 jurors concur. The grand jury — or its foreperson or
4 deputy foreperson — must return the indictment to a magistrate
5 judge in open court. <u>To avoid unnecessary cost or delay, the</u>
6 <u>magistrate judge may take the return by video teleconference</u>
7 <u>from the court where the grand jury sits.</u> If a complaint or
8 information is pending against the defendant and 12 jurors do
9 not concur in the indictment, the foreperson must promptly and
10 in writing report the lack of concurrence to the magistrate
11 judge.

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 6 be approved as published and forwarded to the Judicial Conference.

F. ACTION ITEM—Rule 9

The proposed amendment to Rule 9 authorizes the consideration of an arrest warrant or summons upon the basis of information submitted by reliable electronic means as provided by Rule 4.1. No comments on the proposed amendment were received, and the Advisory Committee voted unanimously to recommend that it be forwarded to the Standing Committee.

Rule 9. Arrest Warrant or Summons on an Indictment or Information

1 * * * * *

2 **(d) Warrant by Telephone or Other Means.** In accordance with Rule

3 4.1, a magistrate judge may issue an arrest warrant or summons

4 based on information communicated by telephone or other reliable

5 electronic means.

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 9 be approved as published and forwarded to the Judicial Conference.

G. ACTION ITEM—Rule 40

Rule 40 requires a person to be taken without unnecessary delay before a magistrate judge in the district of his arrest if he has been arrested under a warrant issued in another district for either failure to appear or violating the conditions of release in that district. This procedure parallels the general requirement of an initial appearance in Rule 5. Rule 5(f) allows the initial appearance to be held using video teleconferencing if the defendant consents.

The amendment would allow a defendant to consent to video teleconferencing in proceedings under Rule 40, bringing procedures under that rule into conformity with Rule 5(f).

No comments were received on this rule, but Committee members questioned why the published rule was worded differently than Rule 5(f). The difference was attributed to restyling. Since the provisions were intended to be parallel, the Committee voted to amend the published language to track current Rule 5(f).

As approved by the Committee, the amendment provides:

Rule 40. Arrest for Failing to Appear in Another District or for Violating Conditions of Release Set in Another District

1 * * * * *

2 (d) **Video Teleconferencing.** Video teleconferencing may be used to

3 conduct an appearance under this rule if the defendant consents.

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 40 be approved as amended following publication and forwarded to the Judicial Conference.

H. ACTION ITEM—Rule 41

The published amendment makes two changes in Rule 41. First, it authorizes the return of warrants and inventories by reliable electronic means. Second, it deletes the material transferred to new Rule 4.1, which governs the use of reliable electronic means in connection with complaints, summonses, search warrants, and arrest warrants.

No comments were received from the public, and the Advisory Committee voted unanimously to recommend that the amendment be forwarded to the Standing Committee.

Rule 41. Search and Seizure

1 * * * * *

2 **(d) Obtaining a Warrant.**

3 * * * * *

4 (3) ***Requesting a Warrant by Telephonic or Other Reliable***

5 ***Electronic Means.*** In accordance with Rule 4.1, a magistrate

6 judge may issue a warrant based on information communicated by

7 telephone or other reliable electronic means.

8 ~~(A) *In General.* A magistrate judge may issue a warrant based~~
9 ~~on information communicated by telephone or other~~
10 ~~reliable electronic means.~~
11 ~~(B) *Recording Testimony.* Upon learning that an applicant is~~
12 ~~requesting a warrant under Rule 41(d)(3)(A), a magistrate~~
13 ~~judge must:~~
14 ~~(i) place under oath the applicant and any person on~~
15 ~~whose testimony the application is based; and~~
16 ~~(ii) make a verbatim record of the conversation with a~~
17 ~~suitable recording device, if available, or by a court~~
18 ~~reporter, or in writing.~~
19 ~~(C) *Certifying Testimony.* The magistrate judge must have any~~
20 ~~recording or court reporter's notes transcribed, certify the~~
21 ~~transcription's accuracy, and file a copy of the record and~~
22 ~~the transcription with the clerk. Any written verbatim~~
23 ~~record must be signed by the magistrate judge and filed~~
24 ~~with the clerk.~~
25 ~~(D) *Suppression Limited.* Absent a finding of bad faith,~~
26 ~~evidence obtained from a warrant issued under Rule~~
27 ~~41(d)(3)(A) is not subject to suppression on the ground that~~
28 ~~issuing the warrant in that manner was unreasonable under~~
29 ~~the circumstances.~~

30 **(e) Issuing the Warrant.**

31 * * * * *

32 ~~(3) *Warrant by Telephonic or Other Means.* If a magistrate judge~~
33 ~~decides to proceed under Rule 41(d)(3)(A), the following~~
34 ~~additional procedures apply:~~
35 ~~(A) *Preparing a Proposed Duplicate Original Warrant.* The~~
36 ~~applicant must prepare a "proposed duplicate original~~
37 ~~warrant" and must read or otherwise transmit the contents~~
38 ~~of that document verbatim to the magistrate judge.~~
39 ~~(B) *Preparing an Original Warrant.* If the applicant reads the~~
40 ~~contents of the proposed duplicate original warrant, the~~
41 ~~magistrate judge must enter those contents into an original~~
42 ~~warrant. If the applicant transmits the contents by reliable~~
43 ~~electronic means, that transmission may serve as the~~
44 ~~original warrant.~~
45 ~~(C) *Modification.* The magistrate judge may modify the~~
46 ~~original warrant. The judge must transmit any modified~~
47 ~~warrant to the applicant by reliable electronic means under~~
48 ~~Rule 41(e)(3)(D) or direct the applicant to modify the~~
49 ~~proposed duplicate original warrant accordingly.~~
50 ~~(D) *Signing the Warrant.* Upon determining to issue the~~
51 ~~warrant, the magistrate judge must immediately sign the~~

52 ~~original warrant, enter on its face the exact date and time it~~
53 ~~is issued, and transmit it by reliable electronic means to the~~
54 ~~applicant or direct the applicant to sign the judge's name on~~
55 ~~the duplicate original warrant.~~

56 **(f) Executing and Returning the Warrant.**

57 **(1)** ***Warrant to Search for and Seize a Person or Property.***

58 * * * * *

59 (D) *Return.* The officer executing the warrant must promptly
60 return it — together with a copy of the inventory — to the
61 magistrate judge designated on the warrant. The officer
62 may do so by reliable electronic means. The judge must,
63 on request, give a copy of the inventory to the person from
64 whom, or from whose premises, the property was taken and
65 to the applicant for the warrant.

66 **(2)** ***Warrant for a Tracking Device.***

67 (A) *Noting the Time.* The officer executing a tracking-device
68 warrant must enter on it the exact date and time the device
69 was installed and the period during which it was used.

70 (B) *Return.* Within 10 calendar days after the use of the
71 tracking device has ended, the officer executing the warrant
72 must return it to the judge designated in the warrant. The
73 officer may do so by reliable electronic means.

74 * * * * *

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 41 be approved as published and forwarded to the Judicial Conference.

I. ACTION ITEM—Rule 43

As published, the amendment made two changes.

1. Rule 43(a)

The published proposal amended Rule 43(a)'s list of exceptions to the requirement that the defendant "must be present," adding a cross reference to Rule 32.1. This change dovetailed with a proposed amendment to Rule 32.1 authorizing a defendant to request that he be permitted to participate by video teleconference in proceedings revoking or modifying probation or supervised release. After consideration of the public comments and extended discussion, the Committee voted to withdraw the proposed amendment to Rule 32.1, and accordingly it also withdraws the related amendment to Rule 43(a).

2. Rule 43(b)(2)

The published amendment also authorized the use of video teleconferencing with the defendant's written consent in misdemeanor proceedings, and the Committee recommends that this amendment be approved.

Rule 43(b)(2) currently allows the court to conduct arraignment, plea, trial, and sentencing "in the defendant's absence" with his written consent if the offense is punishable by a fine and/or imprisonment for not more than one year. These provisions are applicable to many minor offenses, including traffic offenses that occur in national parks. Requiring a defendant who faces a minor penalty to return for the arraignment, plea, trial, or sentencing can impose a significant hardship. The rules allow the court in such cases to permit a defendant to make a written waiver of his right to be present.

The amendment gives the court and the defendant an additional alternative limited to cases in which the maximum penalty is a fine or imprisonment of less than one year. It authorizes—but does not require—the court to permit a defendant to consent in writing to appear by video teleconferencing for those proceedings (arraignment, plea, trial, and sentencing) which can now occur in the defendant's absence. Although video teleconferencing is not the equivalent of physical presence, it allows a defendant who cannot be physically present to participate in these proceedings.

No public comments focused on Rule 43(b)(2). The Advisory Committee voted, with two dissents, to forward the amendment to the Standing Committee as published.

Rule 43. Defendant's Presence

1 * * * * *

2 **(b) When Not Required.** A defendant need not be present under any of
3 the following circumstances:
4 **(1)** ***Organizational Defendant.*** The defendant is an organization
5 represented by counsel who is present.
6 **(2)** ***Misdemeanor Offense.*** The offense is punishable by fine or by
7 imprisonment for not more than one year, or both, and with the
8 defendant's written consent, the court permits arraignment, plea,
9 trial, and sentencing to occur by video teleconferencing or in the
10 defendant's absence.
11 * * * * *

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 43(b)(2) be approved as published and forwarded to the Judicial Conference.

J. ACTION ITEM—Rule 49

This amendment authorizes the courts by local rule to allow papers to be filed, signed, or verified by reliable electronic means consistent with any technical standards of the Judicial Conference of the United States. It was based upon Civil Rule 5(d)(3).

One comment was received from the NACDL, which was supportive of the purpose of the amendment but proposed a change in wording as well as a new provision. NACDL's comments were discussed by the Committee (and its Technology Subcommittee), which declined to adopt the alternative language proposed by the NACDL.

The Committee voted unanimously to recommend the amendment to Rule 49 as published.

Rule 49. Serving and Filing Papers

1 **(a) When Required.** A party must serve on every other party any written
2 motion (other than one to be heard ex parte), written notice,
3 designation of the record on appeal, or similar paper.
4 * * * * *
5 **(e) Electronic Service and Filing.** A court may, by local rule, allow
6 papers to be filed, signed, or verified by electronic means that are
7 consistent with any technical standards established by the Judicial
8 Conference of the United States. A local rule may require electronic
9 filing only if reasonable exceptions are allowed. A paper filed
10 electronically in compliance with a local rule is written or in writing
11 under these rules.

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 49 be approved as published and forwarded to the Judicial Conference.

III. Action Items—Recommendations to Publish Amendments to the Rules

A. ACTION ITEM—Rule 37

New Appellate Rule 12.1 and Civil Rule 62.1 (which went into effect on December 1, 2009) create a mechanism for obtaining "indicative rulings." These rules are designed to facilitate remands to the district court to enable that court to consider motions after appeals have been docketed and the district court no longer has jurisdiction. At its October 2009 meeting, the Committee voted unanimously to approve a new Criminal Rule that would parallel Civil Rule 62.1. At its April 2010 meeting, the Committee considered proposed changes to the Committee Note to accompany Rule 37.

The Committee's deliberations in October and April focused on two questions: (1) whether it would be desirable for the Rules of Criminal Procedure to expressly authorize indicative rulings, and (2) if so, whether any specific provisions should be added to the rule or the note to minimize problems such as confusion among pro se petitioners or frivolous use by jailhouse

lawyers. In considering these issues, the Committee benefitted greatly from the advice of Professor Catherine Struve, the reporter for the Advisory Committee on Appellate Rules.

The Committee concluded that it would be desirable for the Criminal Rules to follow the lead of Rules 12.1 and 62.1 in authorizing and providing procedures for indicative rulings. An amendment to the Criminal Rules is not necessary in order for the parties in criminal cases to seek indicative rulings. (Indeed, the practice was recognized by the Supreme Court in *United States v. Cronic*, 466 U.S. 648, 667 n.42 (1984), and it was made applicable to criminal cases by the local rules in some circuits.[1]) But this was equally true of the use of indicative rulings in civil cases. The purpose of Rules 12.1 and 62.1 was to promote awareness of the possibility of indicative rulings, ensure that the possibility was available in all circuits, and render the relevant procedures uniform throughout the circuits. Those purposes are applicable to criminal cases as well. Indeed the case for an express authorization in the Criminal Rules was strengthened by the adoption of Civil Rule 62.1, because practitioners or courts might draw the erroneous conclusion that the absence of a parallel Rule of Criminal Procedure means that the procedure is not applicable in criminal cases. Adoption of a rule tracking Civil Rule 62.1 is also supported by the Judicial Conference's policy of consistency throughout the rules in dealing with the same general issue.

The Advisory Committee also found persuasive the action of the Appellate Rules Committee and the Standing Committee, which declined to exclude criminal cases from Rule 62.1 or to limit its applicability to certain kinds of cases. Former Solicitor General Seth Waxman, who first proposed an appellate rule on indicative rulings, favored explicitly excluding criminal cases. While Rule 62.1 was under consideration, the Department of Justice expressed concern that pro se prisoners would clog the system with inappropriate efforts to employ the indicative ruling procedure unless it was limited to a specific class of cases: (1) Rule 33 motions based upon newly discovered evidence, (2) government motions for substantial assistance sentence reductions under Rule 35(b), and (3) motions for a reduction based upon a retroactive change in the Sentencing Guidelines. After thorough consideration of these arguments, the Appellate Rules Committee and the Standing Committee concluded, as a policy matter, that the new indicative rulings procedure should not be restricted to certain classes of cases and should remain flexible. It was neither possible nor desirable to define in advance all of the situations in which courts might find it useful to employ the new procedure.

Mindful of this history, the Advisory Committee considered but rejected a suggestion to add language in the Committee Note indicating that the indicative rulings procedure was not available in actions brought under 28 U.S.C. § 2255. Instead, the Advisory Committee added language to the note accompanying proposed Rule 37 drawn from the Rule 62.1 Committee Note. It states that "the Committee anticipates that Criminal Rule 37 will be used primarily if not exclusively for newly discovered evidence motions under Criminal Rule 33(b)(1) (*see*

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[1] Those local rules may be repealed or revised because Rules 12.1 and 62.1 went into effect on December 1, 2009.

United States v. Cronic, 466 U.S. 648, 667 n.42 (1984)), reduced sentence motions under Criminal Rule 35(b), and motions under 18 U.S.C. § 3582(c)."

The proposed rule and accompanying committee note are reprinted below.

Rule 37. Indicative Ruling on a Motion for Relief That is Barred by a Pending Appeal

1 (a) **Relief Pending Appeal.** If a timely motion is made for relief that the
2 court lacks authority to grant because of an appeal that has been
3 docketed and is pending, the court may:
4 (1) defer considering the motion;
5 (2) deny the motion; or
6 (3) state either that it would grant the motion if the court of appeals
7 remands for that purpose or that the motion raises a substantial
8 issue.
9 (b) **Notice to the Court of Appeals.** The movant must promptly notify
10 the circuit clerk under Federal Rule of Appellate Procedure 12.1 if
11 the district court states that it would grant the motion or that the
12 motion raises a substantial issue.
13 (c) **Remand.** The district court may decide the motion if the court of
14 appeals remands for that purpose.

Committee Note

This new rule adopts for any motion that the district court cannot grant because of a pending appeal the practice that most courts follow when a party makes a motion under Rule 60(b) of the Federal Rules of Civil Procedure to vacate a judgment that is pending on appeal. After an appeal has been docketed and while it remains pending, the district court cannot grant a Rule 60(b) motion

without a remand. But it can entertain the motion and deny it, defer consideration, or state that it would grant the motion if the court of appeals remands for that purpose or state that the motion raises a substantial issue. Experienced lawyers often refer to the suggestion for remand as an "indicative ruling." (Federal Rule of Appellate Procedure 4(a)(4) lists six motions that, if filed within the relevant time limit, suspend the effect of a notice of appeal filed before or after the motion is filed until the last such motion is disposed of. The district court has authority to grant the motion without resorting to the indicative ruling procedure.)

This clear procedure is helpful whenever relief is sought from an order that the court cannot reconsider because the order is the subject of a pending appeal. The procedure formalized by Federal Rule of Appellate Procedure 12.1 is helpful when relief is sought from an order that the court cannot reconsider because the order is the subject of a pending appeal. In the criminal context, the Committee anticipates that Criminal Rule 37 will be used primarily if not exclusively for newly discovered evidence motions under Criminal Rule 33(b)(1) (*see United States v. Cronic*, 466 U.S. 648, 667 n.42 (1984)), reduced sentence motions under Criminal Rule 35(b), and motions under 18 U.S.C. § 3582(c). Rule 37 does not attempt to define the circumstances in which an appeal limits or defeats the district court's authority to act in the face of a pending appeal. The rules that govern the relationship between trial courts and appellate courts may be complex, depending in part on the nature of the order and the source of appeal jurisdiction. Rule 37 applies only when those rules deprive the district court of authority to grant relief without appellate permission. If the district court concludes that it has authority to grant relief without appellate permission, it can act without falling back on the indicative ruling procedure.

To ensure proper coordination of proceedings in the district court and in the appellate court, the movant must notify the circuit clerk under Federal Rule of Appellate Procedure 12.1 if the district court states that it would grant the motion or that the motion raises a substantial issue. Remand is in the court of appeals' discretion under Federal Rule of Appellate Procedure 12.1.

Often it will be wise for the district court to determine whether it in fact would grant the motion if the court of appeals remands for that purpose. But a motion may present complex issues that require extensive litigation and that may either be mooted or be presented in a different context by decision of the issues raised on appeal. In such circumstances the district court may prefer to state that the motion raises a substantial issue, and to state the reasons why it prefers to decide only if the court of appeals agrees that it would be useful to decide the motion before decision of the pending appeal. The district court is not bound to grant the motion after stating that the motion raises a substantial issue; further proceedings on remand may show that the motion ought not be granted.

Recommendation—The Advisory Committee recommends that proposed Rule 37 be published for public comment.

B. ACTION ITEM—Rules 5 and 58

The Committee approved proposed amendments to Rules 5 and 58 designed to address certain aspects of the international extradition process and to ensure that the treaty obligations of the United States are satisfied.

The Committee recommends two changes to Rule 5, and one parallel change to Rule 58. First, the Committee approved an amendment that clarifies where an initial appearance should take place for persons who have been surrendered to the United States in accordance with an extradition request to a foreign country. Second, it recommends that Rule 5 and Rule 58 be amended to require federal courts to inform a defendant in custody, at the initial court appearance, that if he is not a United States citizen, an attorney for the government or federal law enforcement officer will, upon request, notify a consular officer from his country of nationality of his arrest, and will make any other notification required by treaty or other international agreement.[2]

The proposed amendments are important to assist federal courts in dealing with unique aspects of the international extradition process and to ensure that foreign defendants arrested pursuant to U.S. charges receive the notifications to which they are entitled pursuant to the obligations of the United States under the multilateral Vienna Convention on Consular Relations ("the Vienna Convention"), or other bilateral agreements.

1. Rule 5(c)(4)

According to longstanding practice, persons who are charged with criminal offenses in United States federal or state jurisdictions and who are surrendered to the United States following extradition proceedings in a foreign country make their initial appearance in the jurisdiction that sought the person's extradition. Although these individuals are taken into U.S. custody outside the territory of the United States, the onward transportation of such persons to the jurisdiction that sought the extradition is appropriate and authorized by statute, *see* 18 U.S.C. § 3193.

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[2] In some cases, pursuant to a bilateral agreement between the United States and a foreign country, consular officials must be notified of the arrest or detention regardless of the national's wishes. Those "mandatory notification" countries are designated in the State Department public website at http://travel.state.gov_notify.html.

Contrary to the usual practice, recent experience indicates that, occasionally, the extradited person has his Rule 5 initial appearance hearing in the first federal district in which he arrives rather than in the district that sought his extradition. For example, in a federal district bordering Mexico, one judge ordered that the Rule 5 hearing be held in that district for a number of persons extradited and surrendered simultaneously to the United States by Mexico, despite the fact that many of the defendants were sought for prosecution in various other federal jurisdictions. Although the judge may have reacted to a brief delay in the onward transportation of those defendants to their final destinations as a result of delays in connecting flights or other logistical difficulties, requiring the Rule 5 hearing in the district of first arrival only caused additional delay and extended detentions for those defendants whose alleged crimes occurred in different jurisdictions.

The Committee concluded that the initial appearance should take place in the district where the defendant was charged even in cases in which an extradited defendant arrives first in another district. The earlier stages of the extradition process will already have fulfilled the key functions of the initial appearance. During foreign extradition proceedings, the extradited person, assisted by counsel, is afforded an opportunity to review the charging document, U.S. arrest warrant, and supporting evidence. Given the nature of the foreign extradition proceeding (which may have taken many months, or even years, to complete) there is little to gain by conducting an initial appearance in the district of first arrival in the United States. Accordingly, it is preferable not to delay an extradited person's transportation in order to hold an initial appearance in the district of arrival, even if the person will be present in that district for some time as a result of connecting flights or logistical difficulties. Interrupting an extradited defendant's transportation at that point can impair his or her ability to obtain and consult with trial counsel and to prepare his or her defense in the district where the charges are pending.

2. Rules 5(d)(1)(F) and 58(b)(2)(H)

The second proposed amendment to Rule 5 (and a parallel amendment to Rule 58 for misdemeanor cases) corresponds to certain obligations of the United States, with respect to foreign nationals arrested in the United States, which arise pursuant to the Vienna Convention multilateral treaty. The Vienna Convention sets forth basic obligations that a country owes foreign nationals who are arrested within its jurisdiction. In order to facilitate the provision of consular assistance, Article 36 of the Vienna Convention provides that detained foreign nationals must be advised of the opportunity to contact the consulate of their home country. Over the past several years, there has been a great deal of litigation over the manner by which Article 36 is to be implemented, whether the Vienna Convention creates rights that may be invoked by individuals in a judicial proceeding, and whether any possible remedy exists for defendants not appropriately notified of possible consular access at an early stage of a criminal prosecution.

In *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006), the Supreme Court rejected a claim that suppression of evidence was the appropriate remedy for failure to inform a non-citizen defendant of his ability to have the consulate from his country of nationality notified of his arrest and detention. The Court, however, did not rule on the preliminary question of whether the Vienna

Convention creates an individual right, holding that regardless of the answer to that question, suppression of evidence obtained following a violation of the Vienna Convention is not an appropriate remedy.

Notwithstanding the position of the United States in *Sanchez-Llamas v. Oregon* that the Vienna Convention does not create an enforceable, individual right, the government has created policies and taken substantial measures to ensure that the United States fulfills its international obligation to other signatory states regarding Article 36 consular provisions.[3]

The proposed amendments would require federal courts to inform a non-citizen defendant in custody that an attorney for the government or a federal law enforcement officer will, upon request, notify a consular officer from the defendant's country of nationality of his arrest, and also that the government will make any other consular notification required by its international agreements. The Department of Justice proposed these amendments as a further step in fully meeting the United States' international obligation under Article 36 of the Vienna Convention. The Department supports these amendments notwithstanding the Supreme Court's reservation of important questions surrounding the existence of any individual rights stemming from the Vienna Convention and any possible domestic remedies for a violation of the Convention. The amendments mandate a procedure that is uniformly supported without getting into unresolved questions of the extent of substantive rights or remedies. The Department noted, however, the importance of making it clear that the adoption of these amendments would not create substantive rights, modify in any respect extant Supreme Court case law construing Article 36 of the Vienna Convention, or address the various questions left open by the courts.

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[3] For example, the Department of Justice has issued regulations that establish a uniform procedure for consular notification when non-United States citizens are arrested and detained by officers of the Department of Justice. *See* 28 C.F.R. 50.5. Additionally, the Department of State has published and placed on a public website, "Instructions for Federal, State, and other Local Law Enforcement and Other Officials Regarding Foreign Nationals in the United States and the Rights of Consular Officials to Assist Them," including 24-hour contact telephone numbers law enforcement personnel can use to obtain advice and assistance. The Department of State also has published a Consular Notification and Access booklet, a Consular Notification Pocket Card for police use that has a model Vienna Convention consular notice, and a wall poster containing the consular notification in many languages that police can post in their facilities. The Department of State regularly provides training and communicates with the States and law enforcement authorities about ensuring compliance with the consular notification requirements of the Convention. Moreover, the United States is committed to ensuring that when a law enforcement authority fails to give notice to the consulate of a detained foreign national, measures will be taken to immediately inform the consulate, address the situation to the extent possible, and prevent a reoccurrence.

The Committee approved the amendments and directed the reporters to circulate an appropriate Committee Note following the meeting. The reporters circulated draft Committee Notes as well as slightly revised language for the text of Rules 5 and 58 based upon suggestions proposed by Professor Joseph Kimble, the style consultant. Before circulating this language, the reporters consulted with the Department to be certain that changes intended to simplify and clarify the proposed amendments did not introduce any difficulties.

The Committee approved the revised language in Rules 5 and 58 and the Committee Notes by an email vote.

The proposed amendments and Committee Notes are reprinted below.

Rule 5. Initial Appearance

1 * * * * *

2 **(c) Place of Initial Appearance; Transfer to Another District.**

3 * * * * *

4 (4) ***Procedure for Persons Extradited to the United States.*** If
5 the defendant is surrendered to the United States in
6 accordance with a request for the defendant's extradition, the
7 initial appearance must be in the district (or one of the
8 districts) where the offense is charged.

9 **(d) Procedure in a Felony Case.**

10 **(1)** ***Advice.*** If the defendant is charged with a felony, the judge
11 must inform the defendant of the following:

12 * * * * *

13 (D) any right to a preliminary hearing; ~~and~~

14 (E) the defendant's right not to make a statement, and that
15 any statement made may be used against the defendant~~.~~;
16 and

17 (F) if the defendant is held in custody and is not a United
18 States citizen, that an attorney for the government or a
19 federal law enforcement officer will:
20 (i) notify a consular officer from the defendant's
21 country of nationality that the defendant has been
22 arrested if the defendant so requests; or
23 (ii) make any other consular notification required by
24 treaty or other international agreement.
25 * * * * *

Committee Note

Subdivision 5(c)(4). The amendment codifies the longstanding practice that persons who are charged with criminal offenses in the United States and surrendered to the United States following extradition in a foreign country make their initial appearance in the jurisdiction that sought their extradition.

This rule is applicable even if the defendant arrives first in another district. The earlier stages of the extradition process have already fulfilled some of the functions of the initial appearance. During foreign extradition proceedings, the extradited person, assisted by counsel, is afforded an opportunity to review the charging document, U.S. arrest warrant, and supporting evidence. Accordingly, it is preferable not to delay an extradited person's transportation to hold an initial appearance in the district of arrival, even if the person will be present in that district for some time as a result of connecting flights or logistical difficulties. Interrupting an extradited defendant's transportation at this point can impair his or her ability to obtain and consult with trial counsel and to prepare his or her defense in the district where the charges are pending.

Subdivision 5(d)(1)(F). This amendment is part of the government's effort to ensure that the United States fulfills its international obligations under Article 36 of the Vienna Convention on Consular Relations, and other bilateral treaties. Bilateral agreements with numerous countries require consular notification whether or not the detained foreign national requests it. Article 36 of the Vienna Convention provides that detained foreign nationals shall be advised that they may have the consulate of their home country notified of their arrest and detention. At the time of these amendments, many questions remain unresolved concerning Article 36, including whether it creates individual rights that may be

invoked in a judicial proceeding and what, if any, remedy may exist for a violation of Article 36. *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006). These amendments do not address those questions.

Rule 58. Petty Offenses and Other Misdemeanors

1 * * * * *

2 **(b) Pretrial Procedure.**

3 * * * * *

4 **(2)** ***Initial Appearance.*** At the defendant's initial appearance on
5 a petty offense or other misdemeanor charge, the magistrate
6 judge must inform the defendant of the following:

7 * * * * *

8 (F) the right to a jury trial before either a magistrate judge
9 or a district judge – unless the charge is a petty offense;
10 ~~and~~

11 (G) any right to a preliminary hearing under Rule 5.1, and
12 the general circumstances, if any, under which the
13 defendant may secure pretrial release~~.~~ ; and

14 (H) if the defendant is held in custody and is not a United
15 States citizen, that an attorney for the government or a
16 federal law enforcement officer will:

17 (i) notify a consular officer from the defendant's
18 country of nationality that the defendant has been
19 arrested if the defendant so requests; or

20 (ii) make any other consular notification required by
21 treaty or other international agreement.

22 * * * * *

Committee Note

Subdivision (b)(2)(H). This amendment is part of the government's effort to ensure that the United States fulfills its international obligations under Article 36 of the Vienna Convention on Consular Relations, and other bilateral treaties. Bilateral agreements with numerous countries require consular notification whether or not the detained foreign national requests it. Article 36 of the Vienna Convention provides that detained foreign nationals shall be advised that they may have the consulate of their home country notified of their arrest and detention. At the time of these amendments, many questions remain unresolved concerning Article 36, including whether it creates individual rights that may be invoked in a judicial proceeding and what, if any, remedy may exist for a violation of Article 36. *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006). These amendments do not address those questions.

Recommendation—The Advisory Committee recommends that the proposed amendments to Rule 5 and 58 be published for public comment.

C. ACTION ITEM—Rule 32 (technical and conforming amendment)

On the recommendation of our style consultant, Professor Kimble, the Committee unanimously approved amendments to Rule 32(d)(2)(F) and (G) to remedy two technical problems created by our recent package of forfeiture related rules: (1) a lack of parallelism and (2) the addition of a provision before the catch-all, which must come at the end of the series. The Department of Justice confirmed that the recommended change has no substantive effect.

Rule 32. Sentencing and Judgment.

22 **(d) Presentence Report.**

23 * * * * *

24 (2) ***Additional Information.*** The presentence report must also

25 contain the following:

26 (A) the defendant's history and characteristics, including:

27 (i) any prior criminal record;

28 (ii) the defendant's financial condition; and

29 (iii) any circumstances affecting the defendant's behavior
30 that may be helpful in imposing sentence or in
31 correctional treatment;
32 (B) information that assesses any financial, social,
33 psychological, and medical impact on any victim;
34 (C) when appropriate, the nature and extent of nonprison
35 programs and resources available to the defendant;
36 (D) when the law provides for restitution, information sufficient
37 for a restitution order;
38 (E) if the court orders a study under 18 U.S.C. § 3552(b), any
39 resulting report and recommendation;
40 ~~(F) any other information that the court requires, including~~
41 ~~information~~
42 ~~relevant to the factors under 18 U.S.C. § 3553(a); and~~
43 ~~(G) specify whether the government seeks forfeiture under Rule~~
44 ~~32.2 and any other provision of law;~~
45 (F) a statement of whether the government seeks forfeiture under
46 Rule 32.2 and any other law; and
47 (G) any other information that the court requires, including
48 information relevant to the factors under 18 U.S.C. §
49 3553(a).

Committee Note

Subdivision (d)(2). This technical and conforming amendment is intended to remedy two technical problems: (1) a lack of parallelism and (2) the addition of a provision before the catch-all, which must come at the end of the series.

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 32 be approved and forwarded to the Judicial Conference as a technical and conforming amendment.

D. ACTION ITEM—Rule 41 (technical and conforming amendment)

Criminal Rule 41(e)(2)(C)(i), dealing with tracking-warrant applications, sets the time for completing installation as "no longer than 10 calendar days," and Rule 41(f)(2)(B) and (C) require the return of tracking-device warrants and service of a copy of the warrant on the person who was tracked (or whose property was tracked) within "10 calendar days after the use of the tracking device has ended." The references to "calendar" are unnecessary. During the time-computation project, which adopted a "days are days" approach, all other references to "calendar days" were deleted. It would be desirable to eliminate the references to "calendar days" in Rule 41 when an opportunity to do so arises, though it is not urgent because they do no harm.

The Committee's proposed amendments to Rule 41 (which form part of the package of technology rules) provide an excellent opportunity to clean up this problem with a technical, conforming amendment.

Although this amendment was not discussed at the Committee's April meeting, the Committee was informed by e-mail of the proposal to forward a technical and conforming amendment deleting the reference to "calendar days" with the other amendments to Rule 41. Committee members were asked to advise the chair of any reservations. No member of the Committee reported having any reservations, and nine members of the Committee notified the chair of their affirmative support for the proposed amendment.

Rule 41. Search and Seizure

22 * * * * *

23 **(e) Issuing the Warrant.**

24 * * * * *

25 **(2)** ***Contents of the Warrant.***

26 * * * * *

27 (C) *Warrant for a Tracking Device.* A tracking-device
28 warrant must identify the person or property to be
29 tracked, designate the magistrate judge to whom it must
30 be returned, and specify a reasonable length of time that
31 the device may be used. The time must not exceed 45
32 days from the date the warrant was issued. The court
33 may, for good cause, grant one or more extensions for a
34 reasonable period not to exceed 45 days each. The
35 warrant must command the officer to:
36 (i) complete any installation authorized by the warrant
37 within a specified time no longer than 10 ~~calendar~~
38 days;
39 * * * * *
40 **(f) Executing and Returning the Warrant.**
41 * * * * *
42 **(2) *Warrant for a Tracking Device.***
43 * * * * *
44 (B) *Return.* Within 10 ~~calendar~~ days after the use of the tracking
45 device has ended, the officer executing the warrant must
46 return it to the judge designated in the warrant.
47 (C) *Service.* Within 10 ~~calendar~~ days after the use of the tracking
48 device has ended, the officer executing a tracking-device
49 warrant must serve a copy of the warrant on the person who
50 was tracked or whose property was tracked. Service may be

51 accomplished by delivering a copy to the person who, or
52 whose property, was tracked; or by leaving a copy at the
53 person's residence or usual place of abode with an individual
54 of suitable age and discretion who resides at that location
55 and by mailing a copy to the person's last known address.
56 Upon request of the government, the judge may delay notice
57 as provided in Rule 41(f)(3).
58 * * * * *

Committee Note

Subdivisions (e)(2) and (f)(2). This technical and conforming amendment eliminates unnecessary references to "calendar" days. As amended effective December 1, 2009, Rule 45(a)(1)(B) provides that all periods of time stated in days include "every day, including intermediate Saturdays, Sundays, and legal holidays[.]"

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 41 be approved and forwarded to the Judicial Conference as a technical and conforming amendment.

IV. Discussion Items

A. Rule 16 and Exculpatory Evidence

The Committee is continuing its consideration of the question whether Rule 16 should be amended to incorporate the government's constitutional obligation to provide exculpatory evidence to the defense or to create a broader pretrial disclosure obligation. To inform its deliberations, the Committee is gathering information on how the system is currently functioning and seeking wide input on the question whether an amendment to the rules would be desirable.

On February 1, 2010, the Subcommittee held a consultative session on Rule 16 in Houston, Texas, that brought together representatives from all parts of the criminal justice system to engage in a full and frank exchange. Participants included judges, prosecutors, and defense lawyers who had extensive experience in a wide range of cases ranging from white collar cases to prosecutions involving organized crime and national security. Subcommittee members found the meeting extremely useful.

In collaboration with the Committee, the Federal Judicial Center is conducting a national survey of judges, prosecutors, and defense lawyers to gather information about their experiences, their opinions, and their recommendations. The Committee discussed the design and focus of the survey at its April meeting. Although the original intent had been to survey only those districts that have local rules requiring disclosure beyond the requirements of Rule 16, at the April meeting Committee members concluded that it would be desirable to survey all 94 districts. The responses from districts with pretrial disclosure requirements will help the Committee assess how useful those rules have been and what, if any, problems have arisen because of the expanded disclosure requirements. The inclusion of districts without such rules will provide a baseline against which to assess those responses. After the April meeting, Laural Hooper of the Federal Judicial Center circulated three draft survey instruments (designed for judges, prosecutors, and defense counsel, respectively) and solicited additional comments and suggestions from Committee members and the reporters. On the basis of this feedback, Ms. Hooper refined the survey instruments, and they are now being pretested.

At the April meeting the Committee also received a briefing about various initiatives undertaken by the Department of Justice. Assistant Attorney General Lanny Breuer informed the Committee of new guidelines issued by the Deputy Attorney General concerning pretrial disclosure, and he stated that 5,000 federal prosecutors have completed training courses on how to meet their disclosure obligations. The Department is also developing training curricula and creating a deskbook to provide guidance to prosecutors. General Breuer introduced Andrew Goldsmith, who was appointed to the Department's newly created position of National Criminal Discovery Coordinator. Mr. Goldsmith was a prosecutor for 27 years and is recognized as an expert on the policies and procedures governing electronically stored information. Mr. Goldsmith said that in his new capacity, he operates out of the Deputy Attorney General's Office, which gives him broad authority. His responsibilities include reviewing the discovery plans of all 94 U.S. Attorney's Offices, overseeing the creation of a "bluebook" on discovery practices written by experts, designing training for law enforcement agents and for paralegals, developing a discovery "bootcamp" for new prosecutors, and consulting with judges and members of the defense bar to absorb all points of view on the issue of criminal discovery.

General Breuer commented that the issues raised by the Committee and the discovery-related tasks facing the Department, particularly when dealing with other agencies, constituted "profound challenges." In order to meet those challenges, General Breuer favored a "friendly" as opposed to an "adversarial" approach. The Department is also attempting to improve the use of technology to better manage discovery information in its cases.

At the invitation of the chair, Judge Emmet Sullivan of the United States District Court for the District of Columbia also attended the April meeting. Judge Sullivan presided over the trial of former Senator Ted Stevens and he wrote the Committee in April 2009 requesting that it consider amending Rule 16 to require disclosure of all exculpatory and potentially impeaching evidence. Judge Sullivan explained that his interest in amending Rule 16 grew out of the Stevens case but transcended it and amounted to seeking justice. Although he applauded the Department's efforts to improve the administration of justice by training prosecutors and offering guidance on discovery, he questioned whether these efforts are sufficient. Administrations change, new leaders take over the Department, and *Brady* issues resurface every

few years and present a perennial problem. He urged the adoption of the proposed change to Rule 16 that the Standing Committee recommitted to the Advisory Committee in 2007.

The Advisory Committee continues to study proposals to amend the rule. The Rule 16 Subcommittee expects to review all of the information being collected by the Federal Judicial Center through its comprehensive survey and prepare a recommendation for the September 2010 meeting.

B. Rule 12 (Pleadings and Pretrial Motions)

The Advisory Committee on Criminal Rules is continuing work on a proposal that was presented to the Standing Committee in June 2009. The Advisory Committee's earlier proposal was designed to conform Rule 12 to the Supreme Court's ruling in *United States v. Cotton*, 535 U.S. 625 (2002). The proposed amendment required defendants to raise a claim that an indictment fails to state an offense before trial, but provided relief in certain narrow circumstances when defendants failed to do so.

The Standing Committee declined to publish the proposed amendment and remanded it to the Advisory Committee for further study. Although members of the Standing Committee generally approved of the concept of the proposed amendment to Rule 12, they urged the Advisory Committee to consider the implications of using the term "forfeiture" instead of "waiver" in the relief provision. In *Cotton*, the Supreme Court had used the term "forfeiture" and the two terms trigger different standards of review on appeal. In drafting its proposed amendment, the Advisory Committee had used "waiver" because it was part of the existing language of Rule 12.

The Rule 12 Subcommittee is now considering a more fundamental revision of the rule that would clarify which motions and claims must be raised before trial, distinguish clearly which claims are forfeited and which are waived, and clarify the relationship between Rule 52 and these waiver and forfeiture provisions.

C. Rule 11 (Immigration Consequences of Guilty Plea)

The recent Supreme Court decision in *Padilla v. Kentucky*, __U.S.__ (No. 08-651, March 31, 2010), held that defense counsel has a duty to inform a defendant whether a guilty plea carries a risk of deportation. *Padilla* highlights the importance of informing an alien defendant of the immigration consequences of a guilty plea.

A Rule 11 Subcommittee has been appointed to study the question whether these consequences should be added to the list of matters about which a judge must inform a defendant when taking a guilty plea under Rule 11. The Subcommittee will also consider whether, as an interim measure, the Committee should ask the Federal Judicial Center to amend the DISTRICT JUDGES' BENCHBOOK by adding the risk of deportation to the list of collateral consequences that a judge must address when taking a guilty plea from a defendant.

D. Implementation of the Crime Victims' Rights Act

The Committee continues to monitor the implementation of the Crime Victims' Rights Act. At the April meeting the reporters and the chair of the CVRA Subcommittee, Justice Robert Edmunds, reported their conclusion that the Administrative Office annual report on the rights of crime victims (which was included in the Committee's Agenda Book) raised no concerns that would prompt consideration of further changes to the Criminal Rules.

In the ensuing discussion, one member described a "procedural anomaly" that he had encountered while representing a crime victim in a case before the District of Columbia District Court. Because the crime victim was not a party, the court's electronic filing system did not allow the lawyer to file a motion asserting the crime victim's rights. This raised the question whether there are unintended barriers to access by crime victims inherent in the structure of a court's electronic filing system. After discussion, the Committee concluded that this was not an issue that could be addressed by the Criminal Rules, but rather would fall within the jurisdiction of the Committee on Court Administration & Case Management ("CACM"). After the meeting, Judge Tallman wrote to the Chair of CACM raising the issue for its consideration.

TAB

6B

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE*

Rule 1. Scope; Definitions

1 * * * * *

2 **(b) Definitions.** The following definitions apply to these

3 rules:

4 * * * * *

5 (11) "Telephone" means any technology for

6 transmitting live electronic voice communication.

7 ~~(11)~~(12)"Victim" means a "crime victim" as defined in

8 18 U.S.C. § 3771(e).

9 * * * * *

Committee Note

Subdivision (b)(11). The added definition clarifies that the term "telephone" includes technologies enabling live voice conversations that have developed since the traditional "land line" telephone. Calls placed by cell phone or from a computer over the internet, for example, would be included. The definition is limited to live communication in order to ensure contemporaneous communication and excludes voice recordings. Live voice

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*New material is underlined; matter to be omitted is lined through.

communication should include services for the hearing impaired, or other contemporaneous translation, where necessary.

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

The text was rephrased by the Committee to describe the telephone as a "technology for transmitting electronic voice communication" rather than a "form" of communication.

PUBLIC COMMENTS

09-CR-005, Thomas C. Mummert, III, Federal Magistrate Judges Association. The FMJA endorses the proposed amendment.

Rule 3. The Complaint

1 The complaint is a written statement of the essential
2 facts constituting the offense charged. ~~It~~ Except as provided
3 in Rule 4.1, it must be made under oath before a magistrate
4 judge or, if none is reasonably available, before a state or
5 local judicial officer.

Committee Note

Under the amended rule, the complaint and supporting material may be submitted by telephone or reliable electronic means, however, the Rule requires that the judicial officer administer the oath or affirmation in person or by telephone. The Committee concluded that the benefits of making it easier to obtain judicial oversight of the arrest decision and the increasing reliability and accessibility to electronic communication warranted amendment of the rule. The amendment makes clear that the submission of a complaint to a judicial officer need not be done in person and may instead be made by telephone or other reliable electronic means. The successful experiences with electronic applications under Rule 41, which permit electronic applications for search warrants, support a comparable process for arrests. The provisions in Rule 41 have been transferred to new Rule 4.1, which governs applications by telephone or other electronic means under Rules 3, 4, 9, and 41.

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

No changes were made in the amendment as published.

PUBLIC COMMENTS

09-CR-005, Thomas C. Mummert, III, Federal Magistrate Judges Association. The FMJA endorses the proposed amendment.

Rule 4. Arrest Warrant or Summons on a Complaint

1 * * * * *

2 **(c) Execution or Service, and Return.**

3 * * * * *

4 **(3)** ***Manner.***

5 (A) A warrant is executed by arresting the
6 defendant. Upon arrest, an officer possessing
7 the original or a duplicate original warrant
8 must show it to the defendant. If the officer
9 does not possess the warrant, the officer must
10 inform the defendant of the warrant's
11 existence and of the offense charged and, at
12 the defendant's request, must show the
13 original or a duplicate original warrant to the
14 defendant as soon as possible.

15 * * * * *

16 **(4)** ***Return.***

17 (A) After executing a warrant, the officer must
18 return it to the judge before whom the
19 defendant is brought in accordance with Rule
20 5. The officer may do so by reliable
21 electronic means. At the request of an
22 attorney for the government, an unexecuted
23 warrant must be brought back to and
24 canceled by a magistrate judge or, if none is
25 reasonably available, by a state or local
26 judicial officer.

27 * * * * *

28 **(d) Warrant by Telephone or Other Reliable Electronic**
29 **Means.** In accordance with Rule 4.1, a magistrate judge
30 may issue a warrant or summons based on information
31 communicated by telephone or other reliable electronic
32 means.

Committee Note

Rule 4 is amended in three respects to make the arrest warrant process more efficient through the use of technology.

Subdivision (c). First, Rule 4(c)(3)(A) authorizes a law enforcement officer to retain a duplicate original arrest warrant, consistent with the change to subdivision (d), which permits a court to issue an arrest warrant electronically rather than by physical delivery. The duplicate original warrant may be used in lieu of the original warrant signed by the magistrate judge to satisfy the requirement that the defendant be shown the warrant at or soon after an arrest. *Cf.* Rule 4.1 (b)(5) (providing for a duplicate original search warrant).

Second, consistent with the amendment to Rule 41(f), Rule 4(c)(4)(A) permits an officer to make a return of the arrest warrant electronically. Requiring an in-person return can be burdensome on law enforcement, particularly in large districts when the return can require a great deal of time and travel. In contrast, no interest of the accused is affected by allowing what is normally a ministerial act to be done electronically.

Subdivision (d). Rule 4(d) provides that a magistrate judge may issue an arrest warrant or summons based on information submitted electronically rather than in person. This change works in conjunction with the amendment to Rule 3, which permits a magistrate judge to consider a criminal complaint and accompanying documents that are submitted electronically. Subdivision (d) also incorporates the procedures for applying for and issuing electronic warrants set forth in Rule 4.1.

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

No changes were made in the amendment as published.

PUBLIC COMMENTS ON RULE 4

09-CR-005, Thomas C. Mummert, III, Federal Magistrate Judges Association. The FMJA endorses the proposed amendment.

Rule 4.1. Complaint, Warrant, or Summons by Telephone or Other Reliable Electronic Means

1 **(a) In General.** A magistrate judge may consider
2 information communicated by telephone or other
3 reliable electronic means when reviewing a complaint or
4 deciding whether to issue a warrant or summons.
5 **(b) Procedures.** If a magistrate judge decides to proceed
6 under this rule, the following procedures apply:
7 **(1)** ***Taking Testimony Under Oath.*** The judge must
8 place under oath — and may examine — the

9 applicant and any person on whose testimony the
10 application is based.
11 **(2)** ***Creating a Record of the Testimony and Exhibits.***
12 (A) *Testimony Limited to Attestation.* If the
13 applicant does no more than attest to the
14 contents of a written affidavit submitted by
15 reliable electronic means, the judge must
16 acknowledge the attestation in writing on the
17 affidavit.
18 (B) *Additional Testimony or Exhibits.* If the
19 judge considers additional testimony or
20 exhibits, the judge must:
21 (i) have the testimony recorded verbatim
22 by an electronic recording device, by a
23 court reporter, or in writing;

24 (ii) have any recording or reporter's notes
25 transcribed, have the transcription
26 certified as accurate, and file it;
27 (iii) sign any other written record, certify its
28 accuracy, and file it; and
29 (iv) make sure that the exhibits are filed.
30 **(3)** ***Preparing a Proposed Duplicate Original of a***
31 ***Complaint, Warrant, or Summons.*** The applicant must
32 prepare a proposed duplicate original of a complaint,
33 warrant, or summons, and must read or otherwise
34 transmit its contents verbatim to the judge.
35 **(4)** ***Preparing an Original Complaint, Warrant, or***
36 ***Summons.*** If the applicant reads the contents of the
37 proposed duplicate original, the judge must enter those
38 contents into an original complaint, warrant, or
39 summons. If the applicant transmits the contents by

40 reliable electronic means, the transmission received by
41 the judge may serve as the original.
42 **(5)** ***Modification.*** The judge may modify the complaint,
43 warrant, or summons. The judge must then:
44 (A) transmit the modified version to the applicant by
45 reliable electronic means; or
46 (B) file the modified original and direct the applicant
47 to modify the proposed duplicate original
48 accordingly.
49 **(6)** ***Issuance.*** To issue the warrant or summons, the judge
50 must:
51 (A) sign the original documents;
52 (B) enter the date and time of issuance on the warrant
53 or summons; and
54 (C) transmit the warrant or summons by reliable
55 electronic means to the applicant or direct the

56 applicant to sign the judge's name and enter the
57 date and time on the duplicate original.
58 (c) **Suppression Limited.** Absent a finding of bad faith,
59 evidence obtained from a warrant issued under this rule
60 is not subject to suppression on the ground that issuing
61 the warrant in this manner was unreasonable under the
62 circumstances.

Committee Note

New Rule 4.1 brings together in one Rule the procedures for using a telephone or other reliable electronic means for reviewing complaints and applying for and issuing warrants and summonses. In drafting Rule 4.1, the Committee recognized that modern technological developments have improved access to judicial officers, thereby reducing the necessity of government action without prior judicial approval. Rule 4.1 prescribes uniform procedures and ensures an accurate record.

The procedures that have governed search warrants "by telephonic or other means," formerly in Rule 41(d)(3) and (e)(3), have been relocated to this Rule, reordered for easier application, and extended to arrest warrants, complaints, and summonses. Successful experience using electronic applications for search warrants under Rule 41, combined with increased access to reliable electronic communication, support the extension of these procedures to arrest warrants, complaints, and summonses.

With one exception noted in the next paragraph, the new Rule preserves the procedures formerly in Rule 41 without change. By using the term "magistrate judge," the Rule continues to require, as did former Rule 41(d)(3) and (e)(3), that a federal judge (and not a state judge) handle electronic applications, approvals, and issuances. The Rule continues to require that the judge place an applicant under oath over the telephone, and permits the judge to examine the applicant, as Rule 41 had provided. Rule 4.1(b) continues to require that when electronic means are used to issue the warrant, the magistrate judge retain the original warrant. Minor changes in wording and reorganization of the language formerly in Rule 41 were made to aid in application of the rules, with no intended change in meaning.

The only substantive change to the procedures formerly in Rule 41(d)(3) and (e)(3) appears in new Rule 4.1(b)(2)(A). Former Rule 41(d)(3)(B)(ii) required the magistrate judge to make a verbatim record of the entire conversation with the applicant. New Rule 4.1(b)(2)(A) provides that when a warrant application and affidavit are sent electronically to the magistrate judge and the telephone conversation between the magistrate judge and affiant is limited to attesting to those written documents, a verbatim record of the entire conversation is no longer required. Rather, the magistrate judge should simply acknowledge in writing the attestation on the affidavit. This may be done, for example, by signing the jurat included on the Administrative Office of U.S. Courts form. Rule 4.1(b)(2)(B) carries forward the requirements formerly in Rule 41 to cases in which the magistrate judge considers testimony or exhibits in addition to the affidavit. In addition, Rule 4.1(b)(6) specifies that in order to issue a warrant or summons the magistrate judge must sign all of the original documents and enter the date and time of issuance on the warrant or summons. This procedure will create and maintain a complete record of the warrant application process.

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

Published subsection (a) referred to the action of a magistrate judge as "deciding whether to approve a complaint." To accurately describe the judge's action, it was rephrased to refer to the judge "reviewing a complaint."

Subdivisions (b)(2) and (3) were combined into subdivisions (b)(2)(A) and (B) to clarify the procedures applicable when the applicant does no more than attest to the contents of a written affidavit and those applicable when additional testimony or exhibits are presented. The clauses in subparagraph (B) were reordered and further divided into items (i) through (iv). Subsequent subdivisions were renumbered because of the merger of (b)(2) and (3).

In subdivision (b)(5), language was added requiring the judge to file the modified original if the judge has directed an applicant to modify a duplicate original. This will ensure that a complete record was preserved. Additionally, the clauses in this subdivision were broken out into subparagraphs (A) and (B).

In subdivision (b)(6), introductory language erroneously referring to judge's approval of a complaint was deleted, and the rule was revised to refer only to the steps necessary to issue a warrant or summons, which are the actions taken by the judicial officer.

In subdivision (b)(6)(A) the requirement that the judge "sign the original" was amended to require signing of "the original documents." This is broad enough to encompass signing a summons, an arrest or search warrant, and the current practice of the judge signing the jurat on complaint forms. Depending on the nature of the case, it might also include many other kinds of documents, such as

the jurat on affidavits, the certifications of written records supplementing the transmitted affidavit, or papers that correct or modify affidavits or complaints.

In subdivision (b)(6)(B), the superfluous and anachronistic reference to the "face" of a document was deleted, and rephrasing clarified that the action is the entry of the date and time of "the approval of a warrant or summons." Additionally, (b)(6)(C) was modified to require that the judge must direct the applicant not only to sign the duplicate original with the judge's name, but also to note the date and time.

PUBLIC COMMENTS ON RULE 4.1

09-CR-005, Thomas C. Mummert, III, Federal Magistrate Judges Association. The FMJA strongly endorsed the principle underlying the proposed rule and suggested clarifying language that would not suggest that the magistrate judge approves of the charges and would reflect the respective roles of the court reporter and the court.

09-CR-006, Peter Goldberger, National Association Criminal Defense Lawyers. NACDL suggested additional language in subdivisions (b)(6) and (b)(7) requiring the judge to make and keep a record of modifications that were verbally directed and direct that the date and time of approval be noted on the duplicate original. Additionally, NACDL recommended elimination of a provision which was added to Rule 41 by the USA PATRIOT Act and carried over into new Rule 4.1. Finally, NACDL recommended a clarification of the Committee Note's reference to "magistrate judges" by adding either the words "federal judges" or a cross reference to Rule 1(c).

09-CR-007, Joan Jacobs Levie, State Bar of California, Committee on Federal Courts. The California Bar Committee expressed concern about the possibility of losing a complete and accurate record of the probable cause determination as a result of the provision allowing the magistrate judge to record only a written summary or order when an affiant does no more than swear to the accuracy of a written affidavit submitted by reliable electronic means.

Rule 6. The Grand Jury

1 * * * * *

2 (f) **Indictment and Return**. A grand jury may indict only
3 if at least 12 jurors concur. The grand jury — or its
4 foreperson or deputy foreperson — must return the
5 indictment to a magistrate judge in open court. To
6 avoid unnecessary cost or delay, the magistrate judge
7 may take the return by video teleconference from the
8 court where the grand jury sits. If a complaint or
9 information is pending against the defendant and 12
10 jurors do not concur in the indictment, the foreperson

11 must promptly and in writing report the lack of

12 concurrence to the magistrate judge.

13 * * * * *

Committee Note

Subdivision (f). The amendment expressly allows a judge to take a grand jury return by video teleconference. Having the judge in the same courtroom remains the preferred practice because it promotes the public's confidence in the integrity and solemnity of a federal criminal proceeding. But there are situations when no judge is present in the courthouse where the grand jury sits, and a judge would be required to travel long distances to take the return. Avoiding delay is also a factor, since the Speedy Trial Act, 18 U.S.C. § 3161(b), requires that an indictment be returned within thirty days of the arrest of an individual to avoid dismissal of the case. The amendment is particularly helpful when there is no judge present at a courthouse where the grand jury sits and the nearest judge is hundreds of miles away.

Under the amendment, the grand jury (or the foreperson) would appear in a courtroom in the United States courthouse where the grand jury sits. Utilizing video teleconference, the judge could participate by video from a remote location, convene court, and take the return. Indictments could be transmitted in advance to the judge for review by reliable electronic means. This process accommodates the Speedy Trial Act, 18 U.S.C. § 3161(b), and preserves the judge's time and safety.

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

No changes were made in the amendment as published.

PUBLIC COMMENTS

09-CR-005, Thomas C. Mummert, III, Federal Magistrate Judges Association. The FMJA endorses the proposed amendment.

09-CR-003, Magistrate Judge Janet Stewart. Although noting that allowing grand jury returns by video conference would be an improvement, Judge Stewart recommended that the rule be amended to follow Oregon state practice, which allows the grand jury to file indictments with the clerk's office.

09-CR-004, Magistrate Judge Donald Ashmanskas. Judge Ashmanskas recommended that the federal rules allow the return of indictments to the clerk's office, and also recommended substituting the phrase "presiding juror" for "foreperson."

Rule 9. Arrest Warrant or Summons on an Indictment or Information

1 * * * * *

2 **(d) Warrant by Telephone or Other Means.** In
3 accordance with Rule 4.1, a magistrate judge may issue
4 an arrest warrant or summons based on information
5 communicated by telephone or other reliable electronic
6 means.

Committee Note

Subdivision (d). Rule 9(d) authorizes a court to issue an arrest warrant or summons electronically on the return of an indictment or the filing of an information. In large judicial districts the need to travel to the courthouse to obtain an arrest warrant in person can be burdensome, and advances in technology make the secure transmission of a reliable version of the warrant or summons possible. This change works in conjunction with the amendment to Rule 6 that permits the electronic return of an indictment, which similarly eliminates the need to travel to the courthouse.

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

No changes were made in the amendment as published.

PUBLIC COMMENTS

09-CR-005, Thomas C. Mummert, III, Federal Magistrate Judges Association. The FMJA endorses the proposed amendment.

Rule 40. Arrest for Failing to Appear in Another District or for Violating Conditions of Release Set in Another District

1 * * * * *

2 (d) **Video Teleconferencing.** Video teleconferencing may

3 be used to conduct an appearance under this rule if the

4 defendant consents.

Committee Note

Subdivision (d). The amendment provides for video teleconferencing, in order to bring the Rule into conformity with Rule 5(f).

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

The amendment was rephrased to track precisely the language of Rule 5(f), on which it was modeled.

PUBLIC COMMENTS

09-CR-005, Thomas C. Mummert, III, Federal Magistrate Judges Association. The FMJA endorses the proposed amendment.

Rule 41. Search and Seizure

1 * * * * *

2 **(d) Obtaining a Warrant.**

3 * * * * *

4 **(3)** ***Requesting a Warrant by Telephonic or Other***

5 ***Reliable Electronic Means.*** In accordance with

6 Rule 4.1, a magistrate judge may issue a warrant

7 based on information communicated by telephone

8 or other reliable electronic means.

9 ~~(A) *In General.* A magistrate judge may issue a~~

10 ~~warrant based on information communicated~~

11 ~~by telephone or other reliable electronic~~

12 ~~means.~~

13 ~~(B) *Recording Testimony*. Upon learning that an~~
14 ~~applicant is requesting a warrant under Rule~~
15 ~~41(d)(3)(A), a magistrate judge must:~~
16 ~~(i) place under oath the applicant and any~~
17 ~~person on whose testimony the~~
18 ~~application is based; and~~
19 ~~(ii) make a verbatim record of the~~
20 ~~conversation with a suitable recording~~
21 ~~device, if available, or by a court~~
22 ~~reporter, or in writing.~~
23 ~~(C) *Certifying Testimony*. The magistrate judge~~
24 ~~must have any recording or court reporter's~~
25 ~~notes transcribed, certify the transcription's~~
26 ~~accuracy, and file a copy of the record and~~
27 ~~the transcription with the clerk. Any written~~
28 ~~verbatim record must be signed by the~~
29 ~~magistrate judge and filed with the clerk.~~

30 ~~(D) *Suppression Limited.* Absent a finding of bad~~
31 ~~faith, evidence obtained from a warrant~~
32 ~~issued under Rule 41(d)(3)(A) is not subject~~
33 ~~to suppression on the ground that issuing the~~
34 ~~warrant in that manner was unreasonable~~
35 ~~under the circumstances.~~
36 **(e) Issuing the Warrant.**
37 * * * * *
38 ~~(3) ***Warrant by Telephonic or Other Means.*** If a~~
39 ~~magistrate judge decides to proceed under Rule~~
40 ~~41(d)(3)(A), the following additional procedures~~
41 ~~apply:~~
42 ~~(A) *Preparing a Proposed Duplicate Original*~~
43 ~~*Warrant.* The applicant must prepare a~~
44 ~~"proposed duplicate original warrant" and~~
45 ~~must read or otherwise transmit the contents~~

46 ~~of that document verbatim to the magistrate~~
47 ~~judge.~~
48 ~~(B) *Preparing an Original Warrant.* If the~~
49 ~~applicant reads the contents of the proposed~~
50 ~~duplicate original warrant, the magistrate~~
51 ~~judge must enter those contents into an~~
52 ~~original warrant. If the applicant transmits~~
53 ~~the contents by reliable electronic means, that~~
54 ~~transmission may serve as the original~~
55 ~~warrant.~~
56 ~~(C) *Modification.* The magistrate judge may~~
57 ~~modify the original warrant. The judge must~~
58 ~~transmit any modified warrant to the~~
59 ~~applicant by reliable electronic means under~~
60 ~~Rule 41(e)(3)(D) or direct the applicant to~~
61 ~~modify the proposed duplicate original~~
62 ~~warrant accordingly.~~

63 ~~(D) *Signing the Warrant.* Upon determining to~~
64 ~~issue the warrant, the magistrate judge must~~
65 ~~immediately sign the original warrant, enter~~
66 ~~on its face the exact date and time it is issued,~~
67 ~~and transmit it by reliable electronic means to~~
68 ~~the applicant or direct the applicant to sign~~
69 ~~the judge's name on the duplicate original~~
70 ~~warrant.~~
71 **(f) Executing and Returning the Warrant.**
72 **(1) *Warrant to Search for and Seize a Person or***
73 ***Property.***
74 * * * * *
75 (D) *Return.* The officer executing the warrant
76 must promptly return it — together with a
77 copy of the inventory — to the magistrate
78 judge designated on the warrant. The officer
79 may do so by reliable electronic means. The

80 judge must, on request, give a copy of the
81 inventory to the person from whom, or from
82 whose premises, the property was taken and
83 to the applicant for the warrant.

84 **(2)** ***Warrant for a Tracking Device.***

85 (A) *Noting the Time.* The officer executing a
86 tracking-device warrant must enter on it the
87 exact date and time the device was installed
88 and the period during which it was used.

89 (B) *Return.* Within 10 calendar days after the use
90 of the tracking device has ended, the officer
91 executing the warrant must return it to the
92 judge designated in the warrant. <u>The officer</u>
93 <u>may do so by reliable electronic means.</u>

94 * * * * *

Committee Note

Subdivisions (d)(3) and (e)(3). The amendment deletes the provisions that govern the application for and issuance of warrants by

telephone or other reliable electronic means. These provisions have been transferred to new Rule 4.1, which governs complaints and warrants under Rules 3, 4, 9, and 41.

Subdivision (f)(2). The amendment permits any warrant return to be made by reliable electronic means. Requiring an in-person return can be burdensome on law enforcement, particularly in large districts when the return can require a great deal of time and travel. In contrast, no interest of the accused is affected by allowing what is normally a ministerial act to be done electronically.

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

No changes were made to the amendment as published.

PUBLIC COMMENTS

09-CR-005, Thomas C. Mummert, III, Federal Magistrate Judges Association. The FMJA endorses the proposed amendment.

Rule 43. Defendant's Presence

1 * * * * *

2 **(b) When Not Required.** A defendant need not be present
3 under any of the following circumstances:
4 **(1)** ***Organizational Defendant.*** The defendant is an
5 organization represented by counsel who is
6 present.
7 **(2)** ***Misdemeanor Offense.*** The offense is punishable
8 by fine or by imprisonment for not more than one
9 year, or both, and with the defendant's written
10 consent, the court permits arraignment, plea, trial,
11 and sentencing to occur by video teleconferencing
12 or in the defendant's absence.
13 * * * * *

Committee Note

Subdivision (b). This rule currently allows proceedings in a misdemeanor case to be conducted in the defendant's absence with the defendant's written consent and the court's permission. The amendment allows participation through video teleconference as an

alternative to appearing in person or not appearing. Participation by video teleconference is permitted only when the defendant has consented in writing and received the court's permission.

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

Because the Advisory Committee withdrew its proposal to amend Rule 32.1 to allow for video teleconferencing, the cross reference to Rule 32.1 in Rule 43(a) was deleted.

PUBLIC COMMENTS

09-CR-005, Thomas C. Mummert, III, Federal Magistrate Judges Association. The FMJA endorses the proposed amendment.

09-CR-006, Peter Goldberger, National Association Criminal Defense Lawyers. NACDL opposed the amendment to Rule 43(a), which has been withdrawn.

09-CR-008, Shamila Shohni, Jenner and Block. Ms. Shohni opposed the amendment to Rule 43(a), which has been withdrawn.

Rule 49. Serving and Filing Papers

1 **(a) When Required.** A party must serve on every other
2 party any written motion (other than one to be heard ex
3 parte), written notice, designation of the record on
4 appeal, or similar paper.
5 * * * * *
6 **(e) Electronic Service and Filing.** A court may, by local
7 rule, allow papers to be filed, signed, or verified by
8 electronic means that are consistent with any technical
9 standards established by the Judicial Conference of the
10 United States. A local rule may require electronic filing
11 only if reasonable exceptions are allowed. A paper filed
12 electronically in compliance with a local rule is written
13 or in writing under these rules.

Committee Note

Subdivision (e). Filing papers by electronic means is added as new subdivision (e), which is drawn from Civil Rule 5(d)(3). It makes it clear that a paper filed electronically in compliance with the Court's local rule is a written paper.

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

No changes were made in the rule as published.

PUBLIC COMMENTS

09-CR-005, Thomas C. Mummert, III, Federal Magistrate Judges Association. The FMJA endorses the proposed amendment.

09-CR-006, Peter Goldberger, National Association Criminal Defense Lawyers. NACDL suggests that the wording of the proposed amendment could be clarified to make it clear that the rule applies to statutory filing requirements and that compliance with the local rule for electronic filing is "a requirement, not merely an option."

TAB

6C

ADVISORY COMMITTEE ON CRIMINAL RULES

DRAFT MINUTES

April 15-16, 2010
Chicago, Illinois

I. ATTENDANCE AND PRELIMINARY MATTERS

The Judicial Conference Advisory Committee on Criminal Rules (the "Committee") met in Chicago, Illinois, on April 15-16, 2010. The following members participated:

Judge Richard C. Tallman, Chair
Judge Morrison C. England, Jr.
Judge John F. Keenan
Judge David M. Lawson
Judge Donald W. Molloy
Judge James B. Zagel
Judge Timothy R. Rice
Justice Robert H. Edmunds, Jr.
Professor Andrew D. Leipold
Rachel Brill, Esquire
Leo P. Cunningham, Esquire
Hon. Lanny A. Breuer, Assistant Attorney General,
Criminal Division, Department of Justice (ex officio)
Professor Sara Sun Beale, Reporter
Professor Nancy King, Assistant Reporter

Thomas P. McNamara, Federal Public Defender of the Eastern District of North Carolina, was unable to attend due to illness.

Representing the Standing Committee were its chair, Judge Lee H. Rosenthal, and liaison member, Judge Reena Raggi. Supporting the Committee were:

Peter G. McCabe, Rules Committee Secretary and Administrative Office
Assistant Director for Judges Programs
John K. Rabiej, Chief of the Rules Committee Support Office at the
Administrative Office
James N. Ishida, Senior Attorney at the Administrative Office
Henry Wigglesworth, Attorney Advisor at the Administrative Office
Laural L. Hooper, Senior Research Associate, Federal Judicial Center

Also attending were two officials from the Department of Justice's Criminal Division - Jonathan J. Wroblewski, Director of the Office of Policy and Legislation, and Kathleen Felton,

Deputy Chief of the Appellate Section. Bruce Rifkin, Clerk of the United States District Court for the Western District of Washington, attended as a representative of the Clerks of Court.

A. Chair's Remarks, Introductions, and Administrative Announcements

Judge Tallman welcomed everyone to Northwestern University School of Law and particularly welcomed newly appointed Committee member Timothy R. Rice, U.S. Magistrate Judge for the Eastern District of Pennsylvania. Judge Tallman greeted several law students in attendance and briefly explained the role of the Committee.

B. Review and Approval of the Minutes

Following two revisions offered by Judge Tallman, a motion was made to approve the draft minutes of the October 2009 meeting as revised.

The Committee unanimously approved the revised minutes.

C. Status of Criminal Rules: Report of the Rules Committee Support Office

Mr. Rabiej reported that the Supreme Court had yet to act on the package of proposed rules amendments that had been approved by the Judicial Conference in September 2009 (listed below in Section II.A). Noting that the Supreme Court has until May 1, 2010, to act, Mr. Rabiej observed that we would soon find out the fate of these proposed amendments. (The Supreme Court subsequently approved the proposed amendments with the exception of the proposed amendments to Rule 15, which was recommitted to the Committee for further consideration.)

II. CRIMINAL RULES UNDER CONSIDERATION

A. Proposed Amendments Approved by the Judicial Conference for transmittal to the Supreme Court

Mr. Rabiej reported that the following proposed amendments had been approved by the Judicial Conference at its September 2009 session and were pending before the Supreme Court:

1. Rule 12.3. Notice of Public Authority Defense. Proposed amendment implementing the Crime Victims' Rights Act.

2. Rule 15. Depositions. Proposed amendment authorizing a deposition outside the United States and outside the presence of the defendant in limited circumstances after the court makes case-specific findings.

3. Rule 21. Transfer for Trial. Proposed amendment implementing the Crime Victims' Rights Act.

4. Rule 32.1. Revoking or Modifying Probation or Supervised Release. Proposed amendment clarifying the standard and burden of proof regarding the release or detention of a person on probation or supervised release.

B. Proposed Technology Amendments Published for Public Comment

The following proposed amendments were published for public comment in August 2009:

1. Rule 1. Scope: Definitions. Proposed amendment broadens the definition of telephone.

2. Rule 3. The Complaint. Proposed amendment allows complaint to be made by telephone or other reliable electronic means as provided by Rule 4.1.

3. Rule 4. Arrest Warrant or Summons on a Complaint. Proposed amendment adopting concept of "duplicate original," allowing submission of return by reliable electronic means, and authorizing issuance of arrest warrants by telephone or other reliable electronic means as provided by Rule 4.1.

4. Rule 4.1. Complaint, Warrant, or Summons by Telephone or Other Reliable Electronic Means. Proposed amendment provides a comprehensive procedure for issuance of complaints, warrants, or summons by telephone or other reliable electronic means.

5. Rule 9. Arrest Warrant or Summons. Proposed amendment authorizing issuance of a warrant or summons by telephone or other reliable electronic means as provided by Rule 4.1.

6. Rule 32.1. Revoking or Modifying Probation or Supervised Release. Proposed amendment permitting a defendant to participate by video teleconferencing.

7. Rule 40. Arrest for Failing to Appear in Another District or for Violating Conditions of Release Set in Another District. Proposed amendment authorizing use of video teleconferencing.

8. Rule 41. Search and Seizure. Proposed amendment authorizing requests for warrants to be made by telephone or other reliable electronic means as provided by Rule 4.1, and return of warrants and inventories by reliable electronic means.

9. Rule 43. Defendant's Presence. Proposed amendment cross-referencing Rule 32.1 provision for participation in revocation proceedings by video teleconference and permitting a defendant to participate in misdemeanor proceedings by video teleconference.

10. Rule 49. Serving and Filing Papers. Proposed amendment authorizing papers to be filed, signed, and verified by electronic means.

Many comments had been submitted on the proposed amendments. The Committee reviewed the comments and made changes to the proposed amendments based upon the comments. The most extensive changes were made to new Rule 4.1, the central part of the Committee's effort to engraft new technology to the procedures previously set forth in current Rule 41. The Committee approved the following changes to Rule 4.1:

(1) Subdivision (a). The published rule referred to the action of a magistrate judge as "deciding whether to approve a complaint." In response to the Federal Magistrate Judges Association's comment that a judge does not "approve" a complaint, the Committee amended the rule to refer to the judge as "reviewing a complaint or deciding whether to issue a warrant or summons."

(2) Subdivision (b)(2)(A) and (B). The Federal Magistrate Judges Association recommended revision of subdivisions (b)(2) and (3), and the Committee's style consultant recommended additional clarifying changes. The Committee combined these two subdivisions into subdivision (b)(2)(A) and (B). The change was to clarify the procedures applicable when the applicant does no more than attest to the contents of a written affidavit and those applicable when additional testimony or exhibits are presented. (Subsequent subdivisions were renumbered because of the merger of (b)(2) and (3).)

(3) Subdivision (b)(5). This subdivision (previously published as (b)(6)) deals with modification of a complaint, warrant, or summons. In response to a comment from the National Association of Criminal Defense Lawyers, the Committee added language requiring a judge who directs an applicant to modify a duplicate original to file the modified original. This change was intended to ensure that a complete record was preserved.

(4) Subdivision (b)(6). The Committee eliminated the introductory language "If the judge decides to approve the complaint, or . . . ." As noted by the Federal Magistrate Judges Association, a judge does not "approve" a complaint. Accordingly, the Committee revised the rule to refer only to the steps necessary to issue a warrant or summons, which is the action taken by the judicial officer. In subdivision (b)(6)(A) the Committee amended the requirement that the judge "sign the original" to "sign the original documents." This phrase is broad enough to encompass the current practice of the judge signing the complaint forms. In subdivision (b)(6)(B), the reference to the "face" of a document was deleted as superfluous and anachronistic,

and the action was clarified to be the entry of the date and time of "the approval of a warrant or summons." Finally, as recommended by the National Association of Criminal Defense Lawyers, subdivision (b)(6)(C) was revised to require that the judge direct the applicant not only to sign the duplicate original with the judge's name, but also to note the date and time.

The Committee determined that these changes were not substantive in nature and did not require republication. Nevertheless, due to the extensive redrafting, the Committee thought it advisable to recirculate Rule 4.1 to the commentators. Following the meeting, the Committee emailed the revised version of Rule 4.1 to the commentators and requested that they provide any feedback by May 14, 2010.

In addition, the Committee made minor modifications to the following technology-related rules:

Rule 1. Noting that defining a telephone as a "form of communication" was awkward, the Committee revised the definition to "any technology for transmitting communication."

Rules 32.1 and 43(a). The Committee voted to withdraw the proposed rule allowing a defendant to request that he or she be permitted to participate by video teleconference in a proceeding to revoke or modify probation or supervised release. The proposed cross reference in Rule 43(a) was also withdrawn.

Rule 40. The Committee voted to revise the proposed amendment to track the language of Rule 5.

Rules 3, 4, 6, 9, 41, 43(b)(2), and 49 were approved by the Committee as published.

III. CONTINUING AGENDA ITEMS

A. Rule 16 (Discovery and Inspection)

Before beginning the discussion of Rule 16, Judge Tallman welcomed the Honorable Emmet Sullivan, United States District Judge for the District of Columbia. Judge Sullivan presided over the trial of former Senator Ted Stevens and had written the Committee a letter in April 2009 requesting that the Committee consider amending Rule 16 to require disclosure of all exculpatory and potentially impeaching evidence. Judge Tallman invited Judge Sullivan to attend the meeting in Chicago and Judge Sullivan accepted.

Judge Tallman reported on the Rule 16 Subcommittee's recent actions. On February 1, 2010, the Subcommittee held a consultative session on Rule 16 in Houston, Texas. Judge Tallman noted that the session brought together representatives from all parts of the criminal justice system to engage in a full and frank exchange.

The Rule 16 Subcommittee also met by telephone conference call on March 8, 2010. During the call, the Subcommittee commented on and revised questions contained in a draft survey designed by the Federal Judicial Center and also discussed ongoing efforts at the Department of Justice to better address the discovery obligations of prosecutors.

Assistant Attorney General Lanny Breuer offered an update on the Department's efforts. He said that the Deputy Attorney General had issued new guidelines and 5,000 federal prosecutors had completed training courses on how to meet their disclosure obligations. General Breuer further noted that the Department was in the process of developing training curricula and creating a deskbook to provide guidance to prosecutors. General Breuer said that he has traveled around the country and spoken to many dedicated federal prosecutors who expressed a sincere desire to "do the right thing" in meeting their disclosure obligations.

General Breuer introduced Andrew Goldsmith, who was appointed to the Department's newly created position of National Criminal Discovery Coordinator. Mr. Goldsmith was a prosecutor for 27 years and is recognized as an expert on the policies and procedures governing electronically stored information. Mr. Goldsmith said that in his new capacity, he operates out of the Deputy Attorney General's Office, which gives him broad authority. His responsibilities include reviewing the discovery plans of all 94 U.S. Attorney Offices, overseeing the creation of a "bluebook" on discovery practices written by experts, designing training for law enforcement agents and for paralegals, developing a discovery "bootcamp" for new prosecutors, and consulting with judges and members of the defense bar to absorb all points of view on the issue of criminal discovery.

Members asked Mr. Goldsmith questions. One asked whether any of the Department's training initiatives would be available to law enforcement agents outside the Department. Mr. Goldsmith replied that such training is currently available only as time permits but would eventually be part of a "second wave" of efforts. Professor Beale asked whether any efforts were being made to encourage discovery-related dialogue between agents and managers, a "feedback loop," with the goal of eventually making discovery obligations "part of the culture." Mr. Goldsmith replied that such a practice had not been explicitly encouraged but that agents and prosecutors are now sensitized to this issue.

General Breuer commented that the issues raised by the Committee and the discovery-related tasks facing the Department, particularly when dealing with other agencies, constituted "profound challenges." In order to meet those challenges, General Breuer favored a "friendly" as opposed to an "adversarial" approach. The Department is also attempting to improve the use of technology to better manage discovery information in its cases.

Judge Tallman thanked General Breuer and Mr. Goldsmith for their presentations and for the careful, thoughtful, and deliberative process that the Department had undertaken to

accomplish change. Judge Tallman said it was reassuring that this issue was getting the attention of the highest levels of the Department.

Judge Tallman introduced United States District Judge Emmet Sullivan, who had previously written in support of amending Rule 16. Judge Sullivan thanked Judge Tallman for his leadership on the Rule 16 issue. He said that his own interest in amending Rule 16 grew out of the Stevens case but that his concern, and the concern of prosecutors too, transcended any one case and amounted to seeking justice. Judge Sullivan applauded the Department's efforts to improve the administration of justice by training prosecutors and offering guidance on discovery. But he wondered whether these efforts are sufficient. He observed that Administrations change and questioned how much weight *Brady* issues will be given in the future when new leaders take over the Department. He noted that the *Brady* issue resurfaces every few years and seems a perennial problem.

Judge Sullivan submitted that a permanent solution is warranted. He suggested that the Committee reconsider amending Rule 16 as proposed in 2007 to require full disclosure of all evidence favorable to the defendant. He said that the concerns raised by the Department could be addressed by a prudent judge. He asserted that the government should not make unilateral judgments as to what it should turn over to the defendant. He quoted from the dissenting opinion in *United States v. Bagley*, 473 U.S. 667 (1985), in which Justice Marshall argued that the right announced in *Brady*, to be effective, must be integrated into "the harsh, daily reality"of the criminal justice system. *Id.* at 696. To integrate such a right, Justice Marshall concluded, a prosecutor must be required to "divulge all evidence that reasonably appears favorable to the defendant, erring on the side of disclosure." *Id.* at 699. Noting that Justice Marshall's words were written twenty-five years ago, Judge Sullivan said it was high time that the Committee offer an amendment to Rule 16 that fully incorporates the principles announced in *Brady*.

Judge Tallman thanked Judge Sullivan for his eloquent words advocating an amendment to Rule 16.

Turning to the survey designed by the Federal Judicial Center (FJC) to collect better information about disclosure practices, Judge Tallman said that several analytical issues needed to be resolved. First, the survey had originally targeted only those districts where a broad discovery policy was already in effect. However, Judge Tallman observed that in order to assess whether an amendment is necessary, the Committee first needs to define the scope of the problem of non-disclosure. He said that he therefore favored enlarging the scope of the survey from the initial small group of districts to all 94 federal districts. Second, Judge Tallman expressed concern about the length of the survey and noted that if the survey was too long, the response rate would drop.

Judge Tallman introduced Laural Hooper of the FJC, who addressed these two questions. Regarding how many districts should be surveyed, Ms. Hooper said that she favored a broad

sampling to capture a wider, more representative spectrum of responses. Regarding the second issue, she noted that generally if a survey takes more than 15 minutes to complete, the response rate drops. The FJC typically tries to get a response rate of 65-70% on this type of survey. Ms. Hooper also observed that the American Bar Association would be sending out a similar survey that would be competing for attention, in a sense, against the Committee's survey. Judge Rosenthal added that the Committee needed to be respectful of the respondents' time and keep the survey as brief as possible.

In response to a member's question as to who would be receiving the survey, Ms. Hooper replied that the respondents would include three groups: district judges, prosecutors, and defense counsel who practice in federal court. After a brief discussion, Judge Tallman said that the sense of the Committee appeared to be in favor of a broader survey encompassing all 94 districts. Ms. Hooper stated that she would transmit to Judge Tallman and Professor Beale a revised, shorter version of the survey within a few weeks. Following their review, the survey would be vetted by the full Committee before being disseminated.

B. Rule 12 (Pleadings and Pretrial Motions)

Judge England, Chair of the Rule 12 Subcommittee, gave an overview of the Committee's consideration of whether to amend Rule 12. In April 2009, the Committee voted to send to the Standing Committee an amendment to Rule 12 that attempted to conform the rule to the Supreme Court's ruling in *United States v. Cotton*, 535 U.S. 625 (2002). The proposed amendment would have required defendants to raise a claim that an indictment fails to state an offense before trial, but would have provided relief in certain narrow circumstances when defendants fail to do so. In particular, the amendment provided for relief if the failure to raise the claim was for good cause or prejudiced a substantial right of the defendant. However, the Standing Committee declined to publish the proposed amendment and remanded it to the Committee to consider the implications of using the term "forfeiture" instead of "waiver" in the relief provision.

Judge England reported that the Rule 12 Subcommittee had voted in January 2010 to move forward with drafting a revised amendment. However, as the Subcommittee worked on redrafting the amendment, new concerns arose and the scope of the project continued to grow. Judge England expressed concern that the project now appears to require a complete rewrite of Rule 12.

Officials from the Department agreed that the scope of the project had grown from the initial concept of merely harmonizing Rule 12 with *Cotton*. Ms. Felton observed that part of the difficulty of amending the rule is that there is considerable confusion in the case law interpreting the meaning of "forfeiture" and "waiver" in Rule 12. The Subcommittee's attempt to surgically fix the rule invariably implicated other parts of the rule and created more concerns.

Discussion ensued about whether it is appropriate for the Committee to resolve conflicts among the circuits over interpretation of the rules, or leave such resolution to the Supreme Court. Judge Rosenthal said that if the circuit conflicts are due to inherent ambiguity in the rule, then it would be appropriate for the Committee to attempt to resolve the confusion by clarifying the rule.

Judge Tallman concluded the discussion by recommitting the matter to the Rule 12 Subcommittee for further consideration.

C. Rule 37 (Indicative rulings)

Professor Catherine Struve, Reporter to the Advisory Committee on Appellate Rules, joined the discussion on indicative rulings via telephone.

At the October meeting, the Committee approved a new Criminal Rule 37 permitting "indicative rulings" that would parallel Appellate Rule 12.1 and Civil Rule 62.1, both of which went into effect on December 1, 2009. These rules are designed to facilitate remands to the district court to enable the court to consider motions after appeals have been docketed and the district court no longer has jurisdiction. The only issue before the Committee now is whether to amend the Committee Note following the proposed new Rule. (The Note is found on pages 306-08 of the agenda book.)

Judge Tallman initiated the discussion by noting that he had asked a Ninth Circuit Staff Attorney, Susan Gelmis, to address the merits of a new rule permitting indicative rulings. Ms. Gelmis concluded in a written memo (page 309 of agenda book) that a new criminal rule would be beneficial. Her reasoning supported his view that the Committee should go forward with proposing a new rule that facilitated the issuance of indicative rulings.

Professor Beale agreed with Judge Tallman that the new rule was needed, and she turned the discussion towards the language of the proposed Committee Note, particularly the sentence that states that the rule "does not apply to motions under 28 U.S.C. § 2255." The rationale behind this sentence was to deter prisoners from filing § 2255 motions while their appeal was pending. Professor Beale also noted that the Committee Note on page 307 of the agenda book inadvertently omitted language that had been approved by the Committee at the October meeting. The omitted language can be found on page 11 of the agenda book, and describes three situations where the new rule was likely to be invoked.

A member pointed out that the language excluding § 2255 motions from the rule's operation was unlikely to be noticed by a prisoner, as it is buried in the Note. Professor Struve agreed and added that the sentence is also inconsistent with the law of at least one circuit.

Judge Tallman moved to amend the Committee Note by deleting the sentence in bold on page 307 that excludes § 2255 motions and inserting in its place the following:

The procedure formalized by Appellate Rule 12.1 is helpful when relief is sought from an order that the court cannot reconsider because the order is the subject of a pending appeal. In the criminal context, the Committee anticipates that Criminal Rule 37 will be used primarily if not exclusively for newly discovered evidence motions under Criminal Rule 33(b)(1) (*see United States v. Cronic*, 466 U.S. 648, 667 n.42 (1984)), reduced sentence motions under Criminal Rule 35(b), and motions under 18 U.S.C. § 3582(c).

The motion was approved unanimously by voice vote.

D. Procedures Concerning Crime Victims

Professor Beale reported that the Administrative Office had issued its fifth annual report on the rights of crime victims as required by the Justice for All Act of 2004, 18 U.S.C. § 3771. The report did not raise any concerns that would prompt consideration of changes to the rules. However, the Committee continued to monitor the status of crime victims' rights given the importance of the matter. Justice Edmunds, Chair of the Subcommittee on the Crime Victims' Rights Act, concurred.

Judge Molloy recounted an episode from *United States v. W.R. Grace*, a criminal environmental case that he presided over, that illustrated a possible need for a future rules amendment. In *Grace*, the prosecutor filed a mandamus action on behalf of 37 crime victims with whom the prosecutor had not actually spoken. Judge Molloy suspected that this was done strategically to delay the proceedings and suggested that perhaps in the future the Committee might consider an amendment requiring prosecutors to certify that they had spoken to any crime victims they claim to represent.

A member described a "procedural anomaly" that he encountered while representing a crime victim in a case before the District of Columbia District Court. Because the crime victim was not a party, the court's electronic filing system did not allow the member to file a motion asserting the crime victim's rights. The member questioned whether there are unintended barriers to crime victims inherent in the structure of a court's electronic filing system.

Judge Tallman said that the Committee has an obligation to improve any procedures that hinder crime victims from asserting their rights, but asked whether this particular issue would more properly be considered by the Committee on Court Administration and Case Management ("CACM"). Mr. Rifkin noted that in the Western District of Washington, a non-party may be granted permission to file on an ad hoc basis. Judge Sullivan said that he sits on the D.C. District Court's electronic filing committee and he would follow up on the issue of granting non-parties the ability to file.

Judge Rosenthal said that she would work with Judge Tallman to draft a letter to the Chair of CACM raising this issue. She further noted that this would serve as a good example of how the Committee is committed to carrying out the mandate of the Crime Victims' Rights Act. She remarked that this requires constant diligence on our part.

IV. NEW PROPOSALS

A. Rules 5 and 58 (Initial Appearance)

General Breuer addressed the Department's proposal to amend Rules 5 and 58. As set forth in his memo on page 322 of the agenda book, the proposed amendments are designed to better equip federal courts to handle aspects of the international extradition process and to ensure that the treaty obligations of the United States are fulfilled.

1. Amendment to Rule 5(c) – Initial Appearance of Extradited Defendant

The first proposal is to amend Rule 5(c) by adding a new paragraph (4) clarifying where an extradited defendant must first appear. (The proposed amendment is on page 324 of the agenda book.) General Breuer said that confusion currently exists over whether the first appearance should be in the judicial district where the defendant first arrives or in the district where charges are pending. General Breuer suggested that since the defendant has already been informed of the charges that are pending before being extradited, requiring a first appearance immediately in the district of arrival is unnecessary and merely causes delay.

A member asked whether the defendant would be without counsel during the period between the defendant's arrival in the United States and the defendant's first appearance in the district where charges are pending. If so, could there be any adverse consequences, *i.e.*, improper interrogation?

General Breuer responded that typically there would be no incentive to interrogate a defendant in that situation because an investigation had already been completed prior to the defendant's extradition. Further, Judge Tallman pointed out that the defendant would be in the custody of the U.S. Marshals Service during the entire period in which he is being transported back to the jurisdiction requesting his extradition.

A judge member suggested that if there were a concern about the defendant languishing in the district of arrival while awaiting transport to the district where charges are pending, such a concern could be addressed by simply adding a time limit to the proposed amendment. A member pointed out that a time limit on first appearances is already contained in Rule 5(a)(1)(A), which requires that after arrest, a defendant must be brought "without unnecessary delay" before a judicial officer.

Judge Tallman reminded the members that at this juncture, the Committee was merely considering whether to recommend to the Standing Committee that the proposed amendment to Rule 5 be published for comment. Issues such as whether there should be a time limit in the amendment or whether it implicated the defendant's right to counsel would presumably be addressed, if warranted, by commentators. Viewed in that light, Judge Tallman moved that the proposed amendment be forwarded to the Standing Committee with the recommendation that it be published for comment.

The motion was approved unanimously by voice vote.

Judge Tallman directed Professor Beale to draft a proposed Committee Note to accompany the proposed amendment to Rule 5(c) and to circulate the Note by email to members after the meeting.

2. Amendment to Rule 5(d)(1) and Rule 58(b)(2)(H) – Consular Notification

General Breuer turned to the second proposed amendment, which would ensure that the United States fulfills its obligations under the Vienna Convention on Consular Relations. Article 36 of the Convention provides that detained foreign nationals must be advised of the opportunity to contact the consulate of their home country. The proposed amendments to Rules 5 and 58 (set forth on pages 326 and 327 of the agenda book) are designed to meet that obligation. The amendment to Rule 5 requires notification in felony cases and for petty offenses under Rule 58.

General Breuer explained that under the government's view, the Vienna Convention does not create an enforceable right in favor of an individual, and that the amendments therefore do not use the word "must" in describing the duty to notify. Rather, the amendments provide that upon a defendant's request, the government "will" notify the appropriate consular officer. Noting this intentional difference, Judge Tallman directed that when the amendment is transmitted to the style consultant, the word "will" should not be changed because it reflects a substantive choice.

Ms. Felton offered an identical modification to each amendment. She asked that the phrase "or other international agreement" be inserted before the period at the end of Rule 5(d)(1)(F) and the end of Rule 58(b)(2)(H). Judge Tallman moved that the proposed amendments, with Ms. Felton's modification, be forwarded to the Standing Committee with the recommendation that they be published for comment.

The motion was approved unanimously by voice vote.

3. Advisory Committee Note

The Committee turned to the Committee Note following the proposed amendments on pages 327-28 of the agenda book. Discussion centered on the last sentence of the Note, which states: "Nothing in these amendments shall be construed as creating any individual justiciable right, authorizing any delay in the investigation or prosecution because of a request for consular assistance, or any basis for the suppression of evidence, dismissal of charges, reversal of judgment, or any other remedy."

A member expressed concern that the sentence amounted to a substantive comment that no remedy existed for the failure to adhere to the notification requirements contained in the rules and that the proper place for such a disclaimer would be in the rules themselves. Discussion ensued over whether, notwithstanding this disclaimer, the proposed amendments in fact created some sort of enforceable right. A judge member predicted that judges will rarely fail to advise defendants of their right to consular notification because the notification will simply be added to the judges' checklist of things that they must cover when addressing a defendant.

A member proposed deleting the last sentence of the Committee Note and substituting the following: "This Rule does not address what remedy, if any, a defendant may have for failure to comply with Rule 5(d)(F) and Rule 58(b)(2)(H)." The proposed modification was withdrawn after Judge Tallman offered the following substitute amendment: "These amendments do not address those questions." A member moved that the substitute amendment be adopted.

The motion was approved unanimously by voice vote.

Ms. Felton moved that after the second sentence of the Committee Note, the following sentence be inserted: "Bilateral agreements with numerous countries require consular notification whether or not the detained foreign national requests it."

The motion was approved unanimously by voice vote.

Judge Tallman said he would present the amendments, as modified, to the Standing Committee in June with the recommendation that they be published for comment.

B. Rule 32 (Technical and Conforming Amendment)

Professor Beale explained that the style consultant, Professor Joseph Kimble, had suggested a technical amendment to Rule 32(d)(2). The amendment, set forth on page 334 of the agenda book, switched the order of two provisions and corrected a lack of parallelism in one of the two provisions.

The Committee voted unanimously to approve the amendment and forward it to the Standing Committee.

Mr. Rabiej noted that because the amendment does not affect the substance of Rule 32, it does not need to be published for comment. However, the amendment does require a brief Committee Note explaining that it is merely a technical amendment. Professor Beale agreed to draft a Note to accompany the amendment.

C. Proposal to Amend Multiple Provisions of 18 U.S.C. § 3060(b)

Professor Beale explained that a disparity had been identified between the statute and the rule that address the time period for a preliminary hearing when a defendant is released from custody. The statute, 18 U.S.C. § 3060(b)(2), requires that the hearing be held within 20 days. Federal Rule of Criminal Procedure 5(c), however, prescribes 21 days. Professor Beale suggested that the Committee recommend that the statute be changed to 21 days to remedy this inconsistency and to conform to the general principle underlying the time-computation project that time periods be stated in multiples of seven. It was so moved.

The Committee voted unanimously to recommend the statutory change and forward it to the Standing Committee.

Judge Tallman reported that the Chief Justice had publicly acknowledged and expressed his appreciation for the extensive and highly productive efforts of Judge Rosenthal and the rules committees to complete the time-computation project, including both rules and corresponding statutory changes.

D. Proposal to Amend Multiple Provisions of the Rules Governing Section 2254 Cases

Professor Beale summarized correspondence from Ms. Sharon Bush Ellison, suggesting numerous changes to the Rules Governing Section 2254 Cases. After discussion of the changes, a member moved that the Committee decline to adopt the suggestions.

The Committee voted unanimously to decline to adopt the suggested changes to the Rules Governing Section 2254 Cases.

E. Rule 11 – Immigration Consequences of Guilty Plea

Judge Tallman raised a matter that was not on the agenda. The recent Supreme Court decision in *Padilla v. Kentucky*, __U.S.__ (No. 08-651; March 31, 2010), held that defense counsel has a duty to inform a defendant whether a guilty plea carries a risk of deportation.

Padilla thus highlights the importance of informing a defendant of the immigration consequences of a guilty plea.

To study the question of whether these consequences should be added to the list of matters about which a judge must inform a defendant when taking a guilty plea under Rule 11, Judge Tallman appointed Judge Rice to chair a Rule 11 Subcommittee. Judge Tallman also appointed the following members to the subcommittee: Judge Lawson, Judge Molloy, Professor Leipold, Leo Cunningham, and a representative of the Department of Justice. Judge Tallman further asked the newly formed subcommittee to consider whether, as an interim measure, the Committee should ask the Federal Judicial Center to amend the Judges' Benchbook by adding the risk of deportation to the list of collateral consequences that a judge must address when taking a guilty plea from a defendant.

Judge Rice said he would convene a meeting of the Rule 11 Subcommittee via conference call to discuss these issues and would report to the full Committee at its fall meeting.

V. RULES AND PROJECTS PENDING BEFORE CONGRESS, JUDICIAL CONFERENCE, STANDING COMMITTEE, OR OTHER ADVISORY COMMITTEES

A. Status Report on Legislation Affecting Federal Rules of Criminal Procedure

Judge Tallman noted that Mr. Rabiej had earlier reported on this topic.

B. Update on Work of the Sealing Subcommittee

Judge Zagel reported that the Standing Committee's Sealing Subcommittee had concluded its deliberations, which included reviewing an extensive study by the FJC examining all civil cases filed in federal court–district and appellate–in 2006. He reported that the subcommittee had found very few cases that had been improperly sealed.

Judge Zagel further reported that the biggest problem appears to be cases that remain sealed after the need for sealing has been obviated. The subcommittee is likely to recommend a change in the courts' electronic filing system to prompt a periodic review of sealed cases, in the hopes of remedying the problem. Professor Richard Marcus is drafting the final report which should be ready for the subcommittee's review in the near future.

C. Update on Work of the Privacy Subcommittee

Judge Raggi reported on the activities of the Standing Committee's Privacy Subcommittee. She noted that both the FJC and the Administrative Office had examined the issue of social security numbers occasionally appearing in court documents that are publicly

available over the internet. The results of those studies showed that the problem is not widespread but needed to be addressed.

In addition to these statistical studies, the subcommittee held a mini-conference in early April 2010 at Fordham University Law School, organized by Professor Dan Capra, to examine privacy-related issues from all perspectives. Judge Raggi said the conference was a tremendous success because of the great variety of viewpoints presented.

Judge Raggi said that the subcommittee's next step would be the drafting of its report, which she expected to be ready in time for the Standing Committee's meeting in January 2011. She added that two main issues to be addressed would be plea agreements and juror privacy. However, Judge Raggi cautioned that due to the multiplicity of different approaches to resolving these problem areas, the subcommittee's report would not offer any magical "one-size-fits-all" solution. Instead, she expects that the report will describe many of the approaches that seem to be working.

Judge Rosenthal applauded the work of the subcommittee and noted that the Fordham mini-conference featured many informed speakers from across the privacy spectrum.

D. Rule 45(c)

Professor Beale explained that Criminal Rule 45(c) currently mirrors Civil Rule 5(b) in adding three days to the time period in which a party must act after service of process is effected in certain ways. Judge Rosenthal reported that at its meeting in October 2009, the Advisory Committee on Civil Rules considered amending Rule 5(b) to delete the three-day provision and eliminate the disparity between different types of service. However, the Civil Rules Committee decided against amending the rule at this time. The Civil Rules Committee further decided to solicit the views of the other advisory committees on parallel rules, such as Rule 45(c).

A member stated that he saw no pressing need to amend Rule 45 at this point but that the issue should be monitored. Accordingly, he moved to table the issue until the next meeting of the Committee.

The motion was approved unanimously by voice vote.

VI. DESIGNATION OF TIMES AND PLACES FOR FUTURE MEETINGS

Judge Tallman noted that Mr. Rifkin would retire in September 2010 from his position as District Executive/Clerk of Court for the Western District of Washington and that this would therefore be his last meeting. Observing that he had known Mr. Rifkin for over thirty years, Judge Tallman thanked him for his exemplary service to the judiciary and wished him well in his retirement.

Judge Tallman proposed several dates for the next meeting of the Committee. After a brief discussion, the Committee decided that the fall meeting would take place on Monday and Tuesday, September 27-28, 2010, in Boston, Massachusetts. By subsequent email notification, the date of the spring meeting was set for Monday and Tuesday, April 11-12, 2011.

Judge Tallman thanked all the members and guests for attending and adjourned the meeting.

Respectfully submitted,

Henry Wigglesworth
Attorney Advisor

TAB

7A

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

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CHAIR

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MARK R. KRAVITZ
CIVIL RULES

RICHARD C. TALLMAN
CRIMINAL RULES

ROBERT L. HINKLE
EVIDENCE RULES

MEMORANDUM

DATE: **May 10, 2010**

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

FROM: **Robert L. Hinkle, Chair**
Advisory Committee on Evidence Rules

RE: **Report of the Advisory Committee on Evidence Rules**

Introduction

The Advisory Committee on Evidence Rules met on April 22-23 at Fordham Law School in New York. The meeting produced one action item for the Standing Committee to consider at the June 2010 meeting.

As the Standing Committee knows, the Advisory Committee has been restyling the Evidence Rules. At the June 2009 meeting, the Standing Committee approved publishing the entire set of restyled rules for public comment. The Advisory Committee and the Standing Committee's Style Subcommittee have considered the public comments in detail. Most were favorable, and some resulted in changes that have improved the product. The Advisory Committee now asks the Standing Committee to approve the entire set of restyled rules for submission to the Judicial Conference. The Style Subcommittee has approved the rules.

Appendix A sets out the restyled rules as proposed for submission to the Judicial Conference, side by side with the existing rules. Appendix B consists of the draft minutes of the Advisory Committee's April 2010 meeting. Appendix C summarizes the public comments.

Action Item — Restyled Evidence Rules 101–1103

***Background*: *the History of Restyling the Rules*.** Beginning in the early 1990s, Judge Robert Keeton, who was chair of the Standing Committee, and a committee member, University of Texas Professor Charles Alan Wright, led an effort to adopt clear and consistent style conventions for all of the rules. Without consistent style conventions, there were differences from one set of rules to another, and even from one rule to another within the same set. Style varied because a committee seeking to amend a rule did not always consider how another rule expressed the same concept. Style varied based on the membership of a particular advisory committee. Style varied as the membership of a particular advisory committee changed over time. And style varied as the membership of the Standing Committee changed over time. Different rules expressed the same thought in different ways, leading to a risk that they would be interpreted differently. Different rules sometimes used the same word or phrase to mean different things, again leading to a risk of misinterpretation. And in other respects, too, rules drafters who were experts in the relevant substantive and procedural areas sometimes did not express themselves as clearly as they might have.

Judge Keeton appointed Professor Wright to chair a newly formed Style Subcommittee of the Standing Committee. At Professor Wright's suggestion, the Standing Committee retained a legal-writing authority, Bryan Garner, as its style consultant. Mr. Garner is the author of such books as *The Elements of Legal Style* and *A Dictionary of Modern Legal Usage*. These are generally regarded as the leading authorities on these subjects. Mr. Garner also is the current editor of *Black's Law Dictionary* and the co-author, with Justice Scalia, of *Making Your Case: The Art of Persuading Judges*.

In conjunction with his work for the Standing Committee, Mr. Garner wrote *Guidelines for Drafting and Editing Court Rules*. First published in 1996, the *Guidelines* manual is now in its fifth printing. It has guided all rules amendments since it was written—whether or not they related to a restyling project. And the *Guidelines* manual has guided successful restylings of the Federal Rules of Appellate, Criminal, and Civil Rules, which took effect in 1998, 2002, and 2007. For matters not addressed in the *Guidelines*, the restylings have followed Garner's *A Dictionary of Modern Legal Usage*. Professor Daniel R. Coquillette has been the Standing Committee's reporter through all of these projects.

Mr. Garner was himself the style consultant for the restyled Appellate and Criminal Rules. Professor Joseph Kimble took over near the end of the Criminal Rules restyling project and was the style consultant as the Civil Rules project went forward. Professor Kimble is the editor in chief of *The Scribes Journal of Legal Writing* and the author of *Lifting the Fog of Legalese*, a book that compiles some of his many essays. He and Mr. Garner are co-authors of a forthcoming book, *The Elements of Legal Drafting*, which West Publishing Company will publish. Professor Kimble has taught legal writing at Thomas Cooley Law School for 26 years.

Despite some initial opposition, each of the restyling projects has proved enormously successful. Indeed, in recognition of their work in restyling the Civil Rules, Professor Kimble, the Standing Committee, and the Civil Rules Advisory Committee each received a Burton Award for Reform in Law. The Burton is probably the nation's most prestigious legal-writing award. Judge Rosenthal, Judge Thrash (of the Style Subcommittee), and Professor Kimble accepted the awards at a black-tie dinner at the Library of Congress on June 4, 2007.

The Division of Responsibility: Substance or Style. The division of responsibility on the restyling projects has conformed generally to the protocol the Standing Committee has adopted for addressing style issues for a proposed amendment to a rule outside the restyling process. For an amendment outside a restyling project, the relevant Advisory Committee must submit its proposed language to the Style Subcommittee. On style issues, the Style Subcommittee, not the Advisory Committee, has the last word. Thus when an Advisory Committee submits a proposed amendment to any rule to the full Standing Committee, the amendment already has gone through a style review, and style issues have been determined by the Style Subcommittee. The Standing Committee chairs have kept the Style Subcommittee small in order to promote consistency. Although the Standing Committee retains the ultimate authority, through the years it has followed the style decisions of the Style Subcommittee, thus ensuring a high level of consistency across all sets of rules.

Preparing the Restyled Evidence Rules as Issued for Public Comment. With this background, the Advisory Committee on Evidence Rules undertook its restyling project beginning in the Fall of 2007. The Committee established a step-by-step process for restyling that was substantially the same as that employed in the earlier restyling projects. Those steps were: 1) draft by Professor Kimble; 2) comments by the Reporter, Professor Daniel J. Capra; 3) response by Professor Kimble and changes to the draft where necessary; 4) expedited review by Advisory Committee members and redraft by Professor Kimble if necessary; 5) review by the Style Subcommittee of the Standing Committee; 6) review by the Advisory Committee; and 7) review by the Standing Committee to determine whether to release the restyled rules for public comment.

The Advisory Committee divided the Evidence Rules into three parts. The process described above thus was conducted in three stages. The Committee also agreed that the entire package of restyled rules should be submitted for public comment at one time.

The Advisory Committee established a working principle for whether a proposed change is one of "style" (in which event the decision is made by the Style Subcommittee) or one of "substance" (in which event the decision is for the Advisory Committee). A proposed change is "substantive" if:

1. Under the existing practice in any circuit, it could lead to a different result on a

question of admissibility; or

2. Under the existing practice in any circuit, it could lead to a change in the procedure by which an admissibility decision is made; or

3. It changes the structure of a rule or method of analysis in a manner that fundamentally changes how courts and litigants have thought about, or argued about, the rule; or

4. It changes what Professor Kimble has referred to as a "sacred phrase"—"phrases that have become so familiar as to be fixed in cement."

At its Spring 2008 meeting the Advisory Committee approved the restyling of the first third of the rules (Rules 101–415). The Standing Committee, at its June 2008 meeting, approved these rules for release for public comment, with the understanding that there could be further changes and that publication would occur after the Standing Committee approved all of the rules.

At its Fall 2008 meeting, the Advisory Committee approved the restyling of the second third of the rules (Rules 501–706). The Standing Committee, at its January 2009 meeting, approved these rules for release for public comment, again with the understanding that there could be further changes and that publication would occur after the Standing Committee approved all of the rules.

At its Spring 2009 meeting, the Advisory Committee approved the restyling of the final third of the rules (Rules 801–1103). The Standing Committee, at its June 2009 meeting, approved these rules and the entire set for release for public comment.

The Public Comments. We received 19 public comments, some brief, some running to many pages. In general, they were strongly favorable, with a number of helpful specific suggestions. The Committee on the Federal Rules of Evidence of the American College of Trial Lawyers said:

> Our Committee members commented, time and again, on the excellent work of the restyling sub-committee.

Comment 09-EV-002, second page.

The American Bar Association Section of Litigation said:

> We commend the Advisory Committee on their excellent and careful work. The overwhelming majority of the proposed changes will lead to clearer rules that will be of great benefit to the practicing bar and the public.

Comment 09-EV-014, at 1.

A law professor said:

> I'd like to start by congratulating the Committee on its work. The restyling will make it easier for students to learn the Federal Rules of Evidence. I wish the rules had been written that way in the first place.

Letter from Roger C. Park, Comment 09-EV-012, at 1. Several other professors made similar comments.

There was a single dissent: the Federal Magistrate Judges Association said it "doubts the value of restyling the Federal Rules of Evidence." Comment 09-EV-011 at 7. The earlier restyling projects drew much more extensive opposition, but even some of the opponents later came to recognize that the restyled rules were better. That restyling the evidence rules drew only a single negative comment is perhaps a testament to the success of the earlier restyling projects.

Considering the Public Comments. The Evidence Reporter (Professor Capra) and the Style Consultant (Professor Kimble) considered the public comments in detail. They also reviewed all of the rules yet again. They provided their input to the Style Subcommittee (consisting of three Standing Committee members: Judge James A. Teilborg, Judge Marilyn L. Huff, and William J. Maledon). The Style Subcommittee considered the public comments and the input during conference calls that consumed many hours spread over many days. They did this in time for their decisions to be reported to the Advisory Committee in advance of the April 2010 meeting. The Style Subcommittee's prompt work was of enormous assistance to the Advisory Committee.

The Reporter prepared a memorandum to the Advisory Committee that analyzed in detail the public comments, the Style Subcommittee's decisions, and every issue that had been raised by anyone. At the April 2010 meeting, the Advisory Committee considered the public comments and addressed every issue. The draft minutes—which summarize but are by no means a transcript of the two-day meeting—run to 127 pages and are attached to this report. I have not attempted to summarize in this report the extensive discussions and many decisions recounted in the minutes.

The Advisory Committee approved the entire set of restyled rules, thus indicating its belief that the restyled rules are substantively identical to the existing rules. The conclusion is underscored by the committee note to each restyled rule. The note to Rule 101 explains the restyling project. The note for each other rule reiterates that the changes have been made as part of the restyling project, that the changes are stylistic only, and that there is no intent to change any ruling on evidence admissibility. In a few instances, a note includes a further explanation of a specific drafting decision. The notes follow the pattern of earlier restyling projects.

The Advisory Committee also made several recommendations to the Style Subcommittee for changes on matters of style. On those matters, the final decision of course rests with the Style Subcommittee, not with the Advisory Committee. The Style Subcommittee took up the recommendations at an additional conference call. The Style Subcommittee acted on the suggestions and gave its final approval to the entire set of restyled rules. For ease of reference, the Style Subcommittee's decisions have been noted in the minutes of the Advisory Committee meeting, even though they of course came after that meeting.

In sum, the rules and the committee notes come to the Standing Committee with the approval of the Advisory Committee (on matters of substance) and the Style Subcommittee (on matters of style). The degree of cooperation among the Reporter, the Style Consultant, the Advisory Committee, and the Style Subcommittee has been extraordinary.

Recommendation: The Advisory Committee on Evidence Rules recommends that the Standing Committee approve the proposed restyled Evidence Rules 101–1103 and the proposed Committee Notes for submission to the Judicial Conference.

ARTICLE I. GENERAL PROVISIONS[1] Rule 101. Scope	ARTICLE I. GENERAL PROVISIONS Rule 101. Scope; Definitions
These rules govern proceedings in the courts of the United States and before the United States bankruptcy judges and United States magistrate judges, to the extent and with the exceptions stated in rule 1101.	**(a) Scope.** These rules apply to proceedings in United States courts. The specific courts and proceedings to which the rules apply, along with exceptions, are set out in Rule 1101. **(b) Definitions.** In these rules: **(1)** "civil case" means a civil action or proceeding; **(2)** "criminal case" includes a criminal proceeding; **(3)** "public office" includes a public agency; **(4)** "record" includes a memorandum, report, or data compilation; **(5)** a "rule prescribed by the Supreme Court" means a rule adopted by the Supreme Court under statutory authority; and **(6)** a reference to any kind of written material or any other medium includes electronically stored information.

Committee Note

The language of Rule 101 has been amended, and definitions have been added, as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

The Style Project

The Evidence Rules are the fourth set of national procedural rules to be restyled. The restyled Rules of Appellate Procedure took effect in 1998. The restyled Rules of Criminal Procedure took effect in 2002. The restyled Rules of Civil Procedure took effect in 2007. The restyled Rules of Evidence apply the same general drafting guidelines and principles used in restyling the Appellate, Criminal, and Civil Rules.

1. General Guidelines

Guidance in drafting, usage, and style was provided by Bryan Garner, *Guidelines for Drafting and Editing Court Rules,* Administrative Office of the United States Courts (1969) and Bryan Garner,

[1] Rules in effect on December 1, 2009.

A Dictionary of Modern Legal Usage (2d ed. 1995). *See also* Joseph Kimble, *Guiding Principles for Restyling the Civil Rules,* in *Preliminary Draft of Proposed Style Revision of the Federal Rules of Civil Procedure,* at page x (Feb. 2005) (available at http://www.uscourts.gov/rules/Prelim_draft_proposed_pt1.pdf); Joseph Kimble, *Lessons in Drafting from the New Federal Rules of Civil Procedure*, 12 Scribes J. Legal Writing 25 (2008-2009). For specific commentary on the Evidence restyling project, see Joseph Kimble, *Drafting Examples from the Proposed New Federal Rules of Evidence*, 88 Mich. B.J. 52 (Aug. 2009); 88 Mich. B.J. 46 (Sept. 2009); 88 Mich. B.J. 54 (Oct. 2009); 88 Mich. B.J. 50 (Nov. 2009).

2. Formatting Changes

Many of the changes in the restyled Evidence Rules result from using format to achieve clearer presentations. The rules are broken down into constituent parts, using progressively indented subparagraphs with headings and substituting vertical for horizontal lists. "Hanging indents" are used throughout. These formatting changes make the structure of the rules graphic and make the restyled rules easier to read and understand even when the words are not changed. Rules 103, 404(b), 606(b), and 612 illustrate the benefits of formatting changes.

3. Changes to Reduce Inconsistent, Ambiguous, Redundant, Repetitive, or Archaic Words

The restyled rules reduce the use of inconsistent terms that say the same thing in different ways. Because different words are presumed to have different meanings, such inconsistencies can result in confusion. The restyled rules reduce inconsistencies by using the same words to express the same meaning. For example, consistent expression is achieved by not switching between "accused" and "defendant" or between "party opponent" and "opposing party" or between the various formulations of civil and criminal action/case/proceeding.

The restyled rules minimize the use of inherently ambiguous words. For example, the word "shall" can mean "must," "may," or something else, depending on context. The potential for confusion is exacerbated by the fact the word "shall" is no longer generally used in spoken or clearly written English. The restyled rules replace "shall" with "must," "may," or "should," depending on which one the context and established interpretation make correct in each rule.

The restyled rules minimize the use of redundant "intensifiers." These are expressions that attempt to add emphasis, but instead state the obvious and create negative implications for other rules. The absence of intensifiers in the restyled rules does not change their substantive meaning. *See, e.g.,* Rule 104(c) (omitting "in all cases"); Rule 602 (omitting "but need not"); Rule 611(b) (omitting "in the exercise of discretion").

The restyled rules also remove words and concepts that are outdated or redundant.

4. Rule Numbers

The restyled rules keep the same numbers to minimize the effect on research. Subdivisions have been rearranged within some rules to achieve greater clarity and simplicity.

5. No Substantive Change

The Committee made special efforts to reject any purported style improvement that might result in a substantive change in the application of a rule. The Committee considered a change to be "substantive" if any of the following conditions were met:

a. Under the existing practice in any circuit, the change could lead to a different result on a question of admissibility (e.g., a change that requires a court to provide either a less or more stringent standard in evaluating the admissibility of particular evidence);

b. Under the existing practice in any circuit, it could lead to a change in the procedure by which an admissibility decision is made (e.g., a change in the time in which an objection must be made, or a change in whether a court must hold a hearing on an admissibility question);

c. The change would restructure a rule in a way that would alter the approach that courts and litigants have used to think about, and argue about, questions of admissibility (e.g., merging Rules 104(a) and 104(b) into a single subdivision); or

d. The amendment would change a "sacred phrase" — one that has become so familiar in practice that to alter it would be unduly disruptive to practice and expectations. Examples in the Evidence Rules include "unfair prejudice" and "truth of the matter asserted."

The reference to electronically stored information is intended to track the language of Fed.R.Civ.P. 34.

Rule 102. Purpose and Construction	Rule 102. Purpose
These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.	These rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination.

Committee Note

The language of Rule 102 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 103. Rulings on Evidence	Rule 103. Rulings on Evidence
(a) Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and **(1) Objection.** In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or **(2) Offer of proof.** In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked. Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.	(a) **Preserving a Claim of Error.** A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party and: (1) if the ruling admits evidence, a party, on the record: (A) timely objects or moves to strike; and (B) states the specific ground, unless it was apparent from the context; or (2) if the ruling excludes evidence, a party informs the court of its substance by an offer of proof, unless the substance was apparent from the context. (b) **Not Needing to Renew an Objection or Offer of Proof.** Once the court rules definitively on the record — either before or at trial — a party need not renew an objection or offer of proof to preserve a claim of error for appeal.
(b) Record of offer and ruling. The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.	(c) **Court's Statement About the Ruling; Directing an Offer of Proof.** The court may make any statement about the character or form of the evidence, the objection made, and the ruling. The court may direct that an offer of proof be made in question-and-answer form.
(c) Hearing of jury. In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.	(d) **Preventing the Jury from Hearing Inadmissible Evidence.** To the extent practicable, the court must conduct a jury trial so that inadmissible evidence is not suggested to the jury by any means.
(d) Plain error. Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.	(e) **Taking Notice of Plain Error.** A court may take notice of a plain error affecting a substantial right, even if the claim of error was not properly preserved.

Committee Note

The language of Rule 103 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 104. Preliminary Questions	Rule 104. Preliminary Questions
(a) Questions of admissibility generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.	(a) **In General.** The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege.
(b) Relevancy conditioned on fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.	(b) **Relevance That Depends on a Fact.** When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist. The court may admit the proposed evidence on the condition that the proof be introduced later.
(c) Hearing of jury. Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require, or when an accused is a witness and so requests.	(c) **Conducting a Hearing So That the Jury Cannot Hear It.** The court must conduct a hearing on a preliminary question so that the jury cannot hear it if: (1) the hearing involves the admissibility of a confession; (2) a defendant in a criminal case is a witness and so requests; or (3) justice so requires.
(d) Testimony by accused. The accused does not, by testifying upon a preliminary matter, become subject to cross-examination as to other issues in the case.	(d) **Cross-Examining a Defendant in a Criminal Case.** By testifying on a preliminary question, a defendant in a criminal case does not become subject to cross-examination on other issues in the case.
(e) Weight and credibility. This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.	(e) **Evidence Relevant to Weight and Credibility.** This rule does not limit a party's right to introduce before the jury evidence that is relevant to the weight or credibility of other evidence.

Committee Note

The language of Rule 104 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 105. Limited Admissibility	Rule 105. Limiting Evidence That Is Not Admissible Against Other Parties or for Other Purposes
When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.	If the court admits evidence that is admissible against a party or for a purpose — but not against another party or for another purpose — the court, on request, must restrict the evidence to its proper scope and instruct the jury accordingly.

Committee Note

The language of Rule 105 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 106. Remainder of or Related Writings or Recorded Statements	Rule 106. Remainder of or Related Writings or Recorded Statements
When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.	If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part — or any other writing or recorded statement — that in fairness ought to be considered at the same time.

Committee Note

The language of Rule 106 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

ARTICLE II. JUDICIAL NOTICE Rule 201. Judicial Notice of Adjudicative Facts	ARTICLE II. JUDICIAL NOTICE Rule 201. Judicial Notice of Adjudicative Facts
(a) Scope of rule. This rule governs only judicial notice of adjudicative facts.	**(a) Scope.** This rule governs judicial notice of an adjudicative fact only, not a legislative fact.
(b) Kinds of facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.	**(b) Kinds of Facts That May Be Judicially Noticed.** The court may judicially notice a fact that is not subject to reasonable dispute because it: **(1)** is generally known within the court's territorial jurisdiction; or **(2)** can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.
(c) When discretionary. A court may take judicial notice, whether requested or not. **(d) When mandatory.** A court shall take judicial notice if requested by a party and supplied with the necessary information.	**(c) Taking Notice.** At any stage of the proceeding, the court: **(1)** may take judicial notice on its own; or **(2)** must take judicial notice if a party requests it and the court is supplied with the necessary information.
(e) Opportunity to be heard. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.	**(d) Opportunity to Be Heard.** On timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed. If the court takes judicial notice before notifying a party, the party, on request, is still entitled to be heard.
(f) Time of taking notice. Judicial notice may be taken at any stage of the proceeding.	
(g) Instructing jury. In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.	**(e) Instructing the Jury.** In a civil case, the court must instruct the jury to accept the noticed fact as conclusive. In a criminal case, the court must instruct the jury that it may or may not accept the noticed fact as conclusive.

Committee Note

The language of Rule 201 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules.

These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

ARTICLE III. PRESUMPTIONS IN CIVIL ACTIONS AND PROCEEDINGS **Rule 301. Presumptions in General in Civil Actions and Proceedings**	ARTICLE III. PRESUMPTIONS IN CIVIL CASES **Rule 301. Presumptions in a Civil Case Generally**
In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.	In a civil case, unless a federal statute or these rules provide otherwise, the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption. But this rule does not shift the burden of persuasion, which remains on the party who had it originally.

Committee Note

The language of Rule 301 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 302. Applicability of State Law in Civil Actions and Proceedings	Rule 302. Effect of State Law on Presumptions in a Civil Case
In civil actions and proceedings, the effect of a presumption respecting a fact which is an element of a claim or defense as to which State law supplies the rule of decision is determined in accordance with State law.	In a civil case, state law governs the effect of a presumption regarding a claim or defense for which state law supplies the rule of decision.

Committee Note

The language of Rule 302 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

ARTICLE IV. RELEVANCY AND ITS LIMITS **Rule 401. Definition of "Relevant Evidence"**	ARTICLE IV. RELEVANCE AND ITS LIMITS **Rule 401. Test for Relevant Evidence**
"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.	Evidence is relevant if: **(a)** it has any tendency to make a fact more or less probable than it would be without the evidence; and **(b)** the fact is of consequence in determining the action.

Committee Note

The language of Rule 401 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible	Rule 402. General Admissibility of Relevant Evidence
All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.	Relevant evidence is admissible unless any of the following provides otherwise: • the United States Constitution; • a federal statute; • these rules; or • other rules prescribed by the Supreme Court. Irrelevant evidence is not admissible.

Committee Note

The language of Rule 402 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time	Rule 403. Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons
Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.	The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

Committee Note

The language of Rule 403 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 404. Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes	Rule 404. Character Evidence; Crimes or Other Acts
(a) Character evidence generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except: **(1) Character of accused.** In a criminal case, evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution; **(2) Character of alleged victim.** In a criminal case, and subject to the limitations imposed by Rule 412, evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor; **(3) Character of witness.** Evidence of the character of a witness, as provided in Rules 607, 608, and 609.	**(a) Character Evidence.** **(1)** ***Prohibited Uses.*** Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait. **(2)** ***Exceptions for a Defendant or Victim in a Criminal Case.*** The following exceptions apply in a criminal case: **(A)** a defendant may offer evidence of the defendant's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it; **(B)** subject to the limitations in Rule 412, a defendant may offer evidence of an alleged victim's pertinent trait, and if the evidence is admitted, the prosecutor may: **(i)** offer evidence to rebut it; and **(ii)** offer evidence of the defendant's same trait; and **(C)** in a homicide case, the prosecutor may offer evidence of the alleged victim's trait of peacefulness to rebut evidence that the victim was the first aggressor. **(3)** ***Exceptions for a Witness.*** Evidence of a witness's character may be admitted under Rules 607, 608, and 609.

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.	(b) **Crimes or Other Acts.** (1) ***Prohibited Uses.*** Evidence of a crime or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character. (2) ***Permitted Uses; Notice in a Criminal Case.*** This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. On request by a defendant in a criminal case, the prosecutor must: **(A)** provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial; and **(B)** do so before trial — or during trial if the court, for good cause, excuses lack of pretrial notice.

Committee Note

The language of Rule 404 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 405. Methods of Proving Character	Rule 405. Methods of Proving Character
(a) Reputation or opinion. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.	**(a) By Reputation or Opinion.** When evidence of a person's character or character trait is admissible, it may be proved by testimony about the person's reputation or by testimony in the form of an opinion. On cross-examination of the character witness, the court may allow an inquiry into relevant specific instances of the person's conduct.
(b) Specific instances of conduct. In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct.	**(b) By Specific Instances of Conduct.** When a person's character or character trait is an essential element of a charge, claim, or defense, the character or trait may also be proved by relevant specific instances of the person's conduct.

Committee Note

The language of Rule 405 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 406. Habit; Routine Practice	Rule 406. Habit; Routine Practice
Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.	Evidence of a person's habit or an organization's routine practice may be admitted to prove that on a particular occasion the person or organization acted in accordance with the habit or routine practice. The court may admit this evidence regardless of whether it is corroborated or whether there was an eyewitness.

Committee Note

The language of Rule 406 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 407. Subsequent Remedial Measures	Rule 407. Subsequent Remedial Measures
When, after an injury or harm allegedly caused by an event, measures are taken that, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.	When measures are taken that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove: • negligence; • culpable conduct; • a defect in a product or its design; or • a need for a warning or instruction. But the court may admit this evidence for another purpose, such as impeachment or — if disputed — proving ownership, control, or the feasibility of precautionary measures.

Committee Note

The language of Rule 407 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 407 previously provided that evidence was not excluded if offered for a purpose not explicitly prohibited by the Rule. To improve the language of the Rule, it now provides that the court may admit evidence if offered for a permissible purpose. There is no intent to change the process for admitting evidence covered by the Rule. It remains the case that if offered for an impermissible purpose, it must be excluded, and if offered for a purpose not barred by the Rule, its admissibility remains governed by the general principles of Rules 402, 403, 801, etc.

Rule 408. Compromise and Offers to Compromise	Rule 408. Compromise Offers and Negotiations
(a) Prohibited uses. Evidence of the following is not admissible on behalf of any party, when offered to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement or contradiction: **(1)** furnishing or offering or promising to furnish—or accepting or offering or promising to accept—a valuable consideration in compromising or attempting to compromise the claim; and **(2)** conduct or statements made in compromise negotiations regarding the claim, except when offered in a criminal case and the negotiations related to a claim by a public office or agency in the exercise of regulatory, investigative, or enforcement authority.	**(a) Prohibited Uses.** Evidence of the following is not admissible — on behalf of any party — either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction: **(1)** furnishing, promising, or offering — or accepting, promising to accept, or offering to accept — a valuable consideration in order to compromise the claim; and **(2)** conduct or a statement made during compromise negotiations about the claim — except when offered in a criminal case and when the negotiations related to a claim by a public office in the exercise of its regulatory, investigative, or enforcement authority.
(b) Permitted uses. This rule does not require exclusion if the evidence is offered for purposes not prohibited by subdivision (a). Examples of permissible purposes include proving a witness's bias or prejudice; negating a contention of undue delay; and proving an effort to obstruct a criminal investigation or prosecution.	**(b) Exceptions.** The court may admit this evidence for another purpose, such as proving a witness's bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

Committee Note

The language of Rule 408 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 408 previously provided that evidence was not excluded if offered for a purpose not explicitly prohibited by the Rule. To improve the language of the Rule, it now provides that the court may admit evidence if offered for a permissible purpose. There is no intent to change the process for admitting evidence covered by the Rule. It remains the case that if offered for an impermissible purpose, it must be excluded, and if offered for a purpose not barred by the Rule, its admissibility remains governed by the general principles of Rules 402, 403, 801, etc.

Rule 409. Payment of Medical and Similar Expenses	Rule 409. Offers to Pay Medical and Similar Expenses
Evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury.	Evidence of furnishing, promising to pay, or offering to pay medical, hospital, or similar expenses resulting from an injury is not admissible to prove liability for the injury.

Committee Note

The language of Rule 409 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 410. Inadmissibility of Pleas, Plea Discussions, and Related Statements	Rule 410. Pleas, Plea Discussions, and Related Statements
Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions: (1) a plea of guilty which was later withdrawn; (2) a plea of nolo contendere; (3) any statement made in the course of any proceedings under Rule 11 of the Federal Rules of Criminal Procedure or comparable state procedure regarding either of the foregoing pleas; or (4) any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn. However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record and in the presence of counsel.	(a) **Prohibited Uses.** In a civil or criminal case, evidence of the following is not admissible against the defendant who made the plea or participated in the plea discussions: (1) a guilty plea that was later withdrawn; (2) a nolo contendere plea; (3) a statement made during a proceeding on either of those pleas under Federal Rule of Criminal Procedure 11 or a comparable state procedure; or (4) a statement made during plea discussions with an attorney for the prosecuting authority if the discussions did not result in a guilty plea or they resulted in a later-withdrawn guilty plea. (b) **Exceptions.** The court may admit a statement described in Rule 410(a)(3) or (4): (1) in any proceeding in which another statement made during the same plea or plea discussions has been introduced, if in fairness the statements ought to be considered together; or (2) in a criminal proceeding for perjury or false statement, if the defendant made the statement under oath, on the record, and with counsel present.

Committee Note

The language of Rule 410 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 411. Liability Insurance	Rule 411. Liability Insurance
Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.	Evidence that a person was or was not insured against liability is not admissible to prove whether the person acted negligently or otherwise wrongfully. But the court may admit this evidence for another purpose, such as proving a witness's bias or prejudice or proving agency, ownership, or control.

Committee Note

The language of Rule 411 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 411 previously provided that evidence was not excluded if offered for a purpose not explicitly prohibited by the Rule. To improve the language of the Rule, it now provides that the court may admit evidence if offered for a permissible purpose. There is no intent to change the process for admitting evidence covered by the Rule. It remains the case that if offered for an impermissible purpose, it must be excluded, and if offered for a purpose not barred by the Rule, its admissibility remains governed by the general principles of Rules 402, 403, 801, etc.

Rule 412. Sex Offense Cases; Relevance of Alleged Victim's Past Sexual Behavior or Alleged Sexual Predisposition	Rule 412. Sex-Offense Cases: The Victim's Sexual Behavior or Predisposition
(a) Evidence Generally Inadmissible. The following evidence is not admissible in any civil or criminal proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c): **(1)** Evidence offered to prove that any alleged victim engaged in other sexual behavior. **(2)** Evidence offered to prove any alleged victim's sexual predisposition.	**(a) Prohibited Uses.** The following evidence is not admissible in a civil or criminal proceeding involving alleged sexual misconduct: **(1)** evidence offered to prove that a victim engaged in other sexual behavior; or **(2)** evidence offered to prove a victim's sexual predisposition.
(b) Exceptions. **(1)** In a criminal case, the following evidence is admissible, if otherwise admissible under these rules: **(A)** evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury or other physical evidence; **(B)** evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and **(C)** evidence the exclusion of which would violate the constitutional rights of the defendant. **(2)** In a civil case, evidence offered to prove the sexual behavior or sexual predisposition of any alleged victim is admissible if it is otherwise admissible under these rules and its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. Evidence of an alleged victim's reputation is admissible only if it has been placed in controversy by the alleged victim.	**(b) Exceptions.** **(1)** ***Criminal Cases.*** The court may admit the following evidence in a criminal case: **(A)** evidence of specific instances of a victim's sexual behavior, if offered to prove that someone other than the defendant was the source of semen, injury, or other physical evidence; **(B)** evidence of specific instances of a victim's sexual behavior with respect to the person accused of the sexual misconduct, if offered by the prosecutor or if offered by the defendant to prove consent; and **(C)** evidence whose exclusion would violate the defendant's constitutional rights. **(2)** ***Civil Cases.*** In a civil case, the court may admit evidence offered to prove a victim's sexual behavior or sexual predisposition if its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. The court may admit evidence of a victim's reputation only if the victim has placed it in controversy.

(c) Procedure To Determine Admissibility. **(1)** A party intending to offer evidence under subdivision (b) must— **(A)** file a written motion at least 14 days before trial specifically describing the evidence and stating the purpose for which it is offered unless the court, for good cause requires a different time for filing or permits filing during trial; and **(B)** serve the motion on all parties and notify the alleged victim or, when appropriate, the alleged victim's guardian or representative. **(2)** Before admitting evidence under this rule the court must conduct a hearing in camera and afford the victim and parties a right to attend and be heard. The motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.	**(c) Procedure to Determine Admissibility.** **(1)** ***Motion.*** If a party intends to offer evidence under Rule 412(b), the party must: **(A)** file a motion that specifically describes the evidence and states the purpose for which it is to be offered; **(B)** do so at least 14 days before trial unless the court, for good cause, sets a different time; **(C)** serve the motion on all parties; and **(D)** notify the victim or, when appropriate, the victim's guardian or representative. **(2)** ***Hearing.*** Before admitting evidence under this rule, the court must conduct an in camera hearing and give the victim and parties a right to attend and be heard. Unless the court orders otherwise, the motion, related materials, and the record of the hearing must be and remain sealed.
	(d) Definition of "Victim." In this rule, "victim" includes an alleged victim.

Committee Note

The language of Rule 412 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 413. Evidence of Similar Crimes in Sexual Assault Cases	Rule 413. Similar Crimes in Sexual-Assault Cases
(a) In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant.	(a) **Permitted Uses.** In a criminal case in which a defendant is accused of a sexual assault, the court may admit evidence that the defendant committed any other sexual assault. The evidence may be considered on any matter to which it is relevant.
(b) In a case in which the Government intends to offer evidence under this rule, the attorney for the Government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.	(b) **Disclosure to the Defendant.** If the prosecutor intends to offer this evidence, the prosecutor must disclose it to the defendant, including witnesses' statements or a summary of the expected testimony. The prosecutor must do so at least 15 days before trial or at a later time that the court allows for good cause.
(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.	(c) **Effect on Other Rules.** This rule does not limit the admission or consideration of evidence under any other rule.
(d) For purposes of this rule and Rule 415, ''offense of sexual assault'' means a crime under Federal law or the law of a State (as defined in section 513 of title 18, United States Code) that involved— (1) any conduct proscribed by chapter 109A of title 18, United States Code; (2) contact, without consent, between any part of the defendant's body or an object and the genitals or anus of another person; (3) contact, without consent, between the genitals or anus of the defendant and any part of another person's body; (4) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person; or (5) an attempt or conspiracy to engage in conduct described in paragraphs (1)–(4).	(d) **Definition of "Sexual Assault."** In this rule and Rule 415, "sexual assault" means a crime under federal law or under state law (as "state" is defined in 18 U.S.C. § 513) involving: (1) any conduct prohibited by 18 U.S.C. chapter 109A; (2) contact, without consent, between any part of the defendant's body — or an object — and another person's genitals or anus; (3) contact, without consent, between the defendant's genitals or anus and any part of another person's body; (4) deriving sexual pleasure or gratification from inflicting death, bodily injury, or physical pain on another person; or (5) an attempt or conspiracy to engage in conduct described in paragraphs (1)–(4).

Committee Note

The language of Rule 413 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 414. Evidence of Similar Crimes in Child Molestation Cases	Rule 414. Similar Crimes in Child-Molestation Cases
(a) In a criminal case in which the defendant is accused of an offense of child molestation, evidence of the defendant's commission of another offense or offenses of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant.	(a) **Permitted Uses.** In a criminal case in which a defendant is accused of child molestation, the court may admit evidence that the defendant committed any other act of child molestation. The evidence may be considered on any matter to which it is relevant.
(b) In a case in which the Government intends to offer evidence under this rule, the attorney for the Government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.	(b) **Disclosure to the Defendant.** If the prosecutor intends to offer this evidence, the prosecutor must disclose it to the defendant, including witnesses' statements or a summary of the expected testimony. The prosecutor must do so at least 15 days before trial or at a later time that the court allows for good cause.
(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.	(c) **Effect on Other Rules.** This rule does not limit the admission or consideration of evidence under any other rule.

(d) For purposes of this rule and Rule 415, "child" means a person below the age of fourteen, and "offense of child molestation" means a crime under Federal law or the law of a State (as defined in section 513 of title 18, United States Code) that involved— (1) any conduct proscribed by chapter 109A of title 18, United States Code, that was committed in relation to a child; (2) any conduct proscribed by chapter 110 of title 18, United States Code; (3) contact between any part of the defendant's body or an object and the genitals or anus of a child; (4) contact between the genitals or anus of the defendant and any part of the body of a child; (5) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on a child; or (6) an attempt or conspiracy to engage in conduct described in paragraphs (1)–(5).	(d) **Definition of "Child" and "Child Molestation."** In this rule and Rule 415: (1) "child" means a person below the age of 14; and (2) "child molestation" means a crime under federal law or under state law (as "state" is defined in 18 U.S.C. § 513) involving: (A) any conduct prohibited by 18 U.S.C. chapter 109A and committed with a child; (B) any conduct prohibited by 18 U.S.C. chapter 110; (C) contact between any part of the defendant's body — or an object — and a child's genitals or anus; (D) contact between the defendant's genitals or anus and any part of a child's body; (E) deriving sexual pleasure or gratification from inflicting death, bodily injury, or physical pain on a child; or (F) an attempt or conspiracy to engage in conduct described in paragraphs (A)–(E).

Committee Note

The language of Rule 414 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 415. Evidence of Similar Acts in Civil Cases Concerning Sexual Assault or Child Molestation	Rule 415. Similar Acts in Civil Cases Involving Sexual Assault or Child Molestation
(a) In a civil case in which a claim for damages or other relief is predicated on a party's alleged commission of conduct constituting an offense of sexual assault or child molestation, evidence of that party's commission of another offense or offenses of sexual assault or child molestation is admissible and may be considered as provided in Rule 413 and Rule 414 of these rules.	(a) **Permitted Uses.** In a civil case involving a claim for relief based on a party's alleged sexual assault or child molestation, the court may admit evidence that the party committed any other sexual assault or act of child molestation. The evidence may be considered as provided in Rules 413 and 414.
(b) A party who intends to offer evidence under this Rule shall disclose the evidence to the party against whom it will be offered, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.	(b) **Disclosure to the Opponent.** If a party intends to offer this evidence, the party must disclose it to the party against whom it will be offered, including witnesses' statements or a summary of the expected testimony. The party must do so at least 15 days before trial or at a later time that the court allows for good cause.
(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.	(c) **Effect on Other Rules.** This rule does not limit the admission or consideration of evidence under any other rule.

Committee Note

The language of Rule 415 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

ARTICLE V. PRIVILEGES **Rule 501. General Rule**	ARTICLE V. PRIVILEGES **Rule 501. Privilege in General**
Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.	The common law — as interpreted by United States courts in the light of reason and experience — governs a claim of privilege unless any of the following provides otherwise: • the United States Constitution; • a federal statute; or • rules prescribed by the Supreme Court. But in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision.

Committee Note

The language of Rule 501 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 502. Attorney-Client Privilege and Work Product; Limitations on Waiver	Rule 502. Attorney-Client Privilege and Work Product; Limitations on Waiver
The following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work-product protection.	The following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work-product protection.
(a) Disclosure made in a Federal proceeding or to a Federal office or agency; scope of a waiver. When the disclosure is made in a Federal proceeding or to a Federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a Federal or State proceeding only if: (1) the waiver is intentional; (2) the disclosed and undisclosed communications or information concern the same subject matter; and (3) they ought in fairness to be considered together.	(a) **Disclosure Made in a Federal Proceeding or to a Federal Office or Agency; Scope of a Waiver.** When the disclosure is made in a federal proceeding or to a federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a federal or state proceeding only if: (1) the waiver is intentional; (2) the disclosed and undisclosed communications or information concern the same subject matter; and (3) they ought in fairness to be considered together.
(b) Inadvertent disclosure. When made in a Federal proceeding or to a Federal office or agency, the disclosure does not operate as a waiver in a Federal or State proceeding if: (1) the disclosure is inadvertent; (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and (3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B).	(b) **Inadvertent Disclosure.** When made in a federal proceeding or to a federal office or agency, the disclosure does not operate as a waiver in a federal or state proceeding if: (1) the disclosure is inadvertent; (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and (3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B).

(c) Disclosure made in a State proceeding. When the disclosure is made in a State proceeding and is not the subject of a State-court order concerning waiver, the disclosure does not operate as a waiver in a Federal proceeding if the disclosure: **(1)** would not be a waiver under this rule if it had been made in a Federal proceeding; or **(2)** is not a waiver under the law of the State where the disclosure occured.	**(c) Disclosure Made in a State Proceeding.** When the disclosure is made in a state proceeding and is not the subject of a state-court order concerning waiver, the disclosure does not operate as a waiver in a federal proceeding if the disclosure: **(1)** would not be a waiver under this rule if it had been made in a federal proceeding; or **(2)** is not a waiver under the law of the state where the disclosure occurred.
(d) Controlling effect of a court order. A Federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court—in which event the disclosure is also not a waiver in any other Federal or State proceeding.	**(d) Controlling Effect of a Court Order.** A federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court — in which event the disclosure is also not a waiver in any other federal or state proceeding.
(e) Controlling effect of a party agreement. An agreement on the effect of disclosure in a Federal proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.	**(e) Controlling Effect of a Party Agreement.** An agreement on the effect of disclosure in a federal proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.
(f) Controlling effect of this rule. Notwithstanding Rules 101 and 1101, this rule applies to State proceedings and to Federal court-annexed and Federal court-mandated arbitration proceedings, in the circumstances set out in the rule. And notwithstanding Rule 501, this rule applies even if State law provides the rule of decision.	**(f) Controlling Effect of this Rule.** Notwithstanding Rules 101 and 1101, this rule applies to state proceedings and to federal court-annexed and federal court-mandated arbitration proceedings, in the circumstances set out in the rule. And notwithstanding Rule 501, this rule applies even if state law provides the rule of decision.
(g) Definitions. In this rule: **(1)** "attorney-client privilege" means the protection that applicable law provides for confidential attorney-client communications; and **(2)** "work-product protection" means the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial.	**(g) Definitions.** In this rule: **(1)** "attorney-client privilege" means the protection that applicable law provides for confidential attorney-client communications; and **(2)** "work-product protection" means the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial.

Committee Note

Rule 502 has been amended by changing the initial letter of a few words from uppercase to lowercase as part of the restyling of the Evidence Rules to make style and terminology consistent throughout the rules. There is no intent to change any result in any ruling on evidence admissibility.

ARTICLE VI. WITNESSES **Rule 601. General Rule of Competency**	ARTICLE VI. WITNESSES **Rule 601. Competency to Testify in General**
Every person is competent to be a witness except as otherwise provided in these rules. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the competency of a witness shall be determined in accordance with State law.	Every person is competent to be a witness unless these rules provide otherwise. But in a civil case, state law governs the witness's competency regarding a claim or defense for which state law supplies the rule of decision.

Committee Note

The language of Rule 601 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 602. Lack of Personal Knowledge	Rule 602. Need for Personal Knowledge
A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony. This rule is subject to the provisions of rule 703, relating to opinion testimony by expert witnesses.	A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness's own testimony. This rule does not apply to an expert's testimony under Rule 703.

Committee Note

The language of Rule 602 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 603. Oath or Affirmation	Rule 603. Oath or Affirmation to Testify Truthfully
Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so.	Before testifying, a witness must give an oath or affirmation to testify truthfully. It must be in a form designed to impress that duty on the witness's conscience.

Committee Note

The language of Rule 603 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 604. Interpreters	Rule 604. Interpreter
An interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation to make a true translation.	An interpreter must be qualified and must give an oath or affirmation to make a true translation.

Committee Note

The language of Rule 604 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 605. Competency of Judge as Witness	Rule 605. Judge's Competency as a Witness
The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point.	The presiding judge may not testify as a witness at the trial. A party need not object to preserve the issue.

Committee Note

The language of Rule 605 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 606. Competency of Juror as Witness	Rule 606. Juror's Competency as a Witness
(a) At the trial. A member of the jury may not testify as a witness before that jury in the trial of the case in which the juror is sitting. If the juror is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.	(a) **At the Trial.** A juror may not testify as a witness before the other jurors at the trial. If a juror is called to testify, the court must give an adverse party an opportunity to object outside the jury's presence.
(b) Inquiry into validity of verdict or indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith. But a juror may testify about (1) whether extraneous prejudicial information was improperly brought to the jury's attention, (2) whether any outside influence was improperly brought to bear upon any juror, or (3) whether there was a mistake in entering the verdict onto the verdict form. A juror's affidavit or evidence of any statement by the juror may not be received on a matter about which the juror would be precluded from testifying.	(b) **During an Inquiry into the Validity of a Verdict or Indictment.** (1) ***Prohibited Testimony or Other Evidence.*** During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters. (2) ***Exceptions.*** A juror may testify about whether: **(A)** extraneous prejudicial information was improperly brought to the jury's attention; **(B)** an outside influence was improperly brought to bear on any juror; or **(C)** a mistake was made in entering the verdict on the verdict form.

Committee Note

The language of Rule 606 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 607. Who May Impeach	Rule 607. Who May Impeach a Witness
The credibility of a witness may be attacked by any party, including the party calling the witness.	Any party, including the party that called the witness, may attack the witness's credibility.

Committee Note

The language of Rule 607 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 608. Evidence of Character and Conduct of Witness	Rule 608. A Witness's Character for Truthfulness or Untruthfulness
(a) Opinion and reputation evidence of character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.	(a) **Reputation or Opinion Evidence.** A witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character. But evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked.
(b) Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' character for truthfulness, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified. The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or the witness' privilege against self-incrimination when examined with respect to matters that relate only to character for truthfulness.	(b) **Specific Instances of Conduct.** Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of: (1) the witness; or (2) another witness whose character the witness being cross-examined has testified about. By testifying on another matter, a witness does not waive any privilege against self-incrimination for testimony that relates only to the witness's character for truthfulness.

Committee Note

The language of Rule 608 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

The Committee is aware that the Rule's limitation of bad-act impeachment to "cross-examination" is trumped by Rule 607, which allows a party to impeach witnesses on direct examination. Courts have not relied on the term "on cross-examination" to limit impeachment that would otherwise be permissible under Rules 607 and 608. The Committee therefore concluded that no change to the language of the Rule was necessary in the context of a restyling project.

Rule 609. Impeachment by Evidence of Conviction of Crime	Rule 609. Impeachment by Evidence of a Criminal Conviction
(a) General rule. For the purpose of attacking the character for truthfulness of a witness, **(1)** evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and **(2)** evidence that any witness has been convicted of a crime shall be admitted regardless of the punishment, if it readily can be determined that establishing the elements of the crime required proof or admission of an act of dishonesty or false statement by the witness.	**(a) In General.** The following rules apply to attacking a witness's character for truthfulness by evidence of a criminal conviction: **(1)** for a crime that, in the convicting jurisdiction, was punishable by death or by imprisonment for more than one year, the evidence: **(A)** must be admitted, subject to Rule 403, in a civil case or in a criminal case in which the witness is not a defendant; and **(B)** must be admitted in a criminal case in which the witness is a defendant, if the probative value of the evidence outweighs its prejudicial effect to that defendant; and **(2)** for any crime regardless of the punishment, the evidence must be admitted if the court can readily determine that establishing the elements of the crime required proving — or the witness's admitting — a dishonest act or false statement.
(b) Time limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.	**(b) Limit on Using the Evidence After 10 Years.** This subdivision (b) applies if more than 10 years have passed since the witness's conviction or release from confinement for it, whichever is later. Evidence of the conviction is admissible only if: **(1)** its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect; and **(2)** the proponent gives an adverse party reasonable written notice of the intent to use it so that the party has a fair opportunity to contest its use.

(c) Effect of pardon, annulment, or certificate of rehabilitation. Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime that was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.	(c) **Effect of a Pardon, Annulment, or Certificate of Rehabilitation.** Evidence of a conviction is not admissible if: (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding that the person has been rehabilitated, and the person has not been convicted of a later crime punishable by death or by imprisonment for more than one year; or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.
(d) Juvenile adjudications. Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.	(d) **Juvenile Adjudications.** Evidence of a juvenile adjudication is admissible under this rule only if: (1) it is offered in a criminal case; (2) the adjudication was of a witness other than the defendant; (3) an adult's conviction for that offense would be admissible to attack the adult's credibility; and (4) admitting the evidence is necessary to fairly determine guilt or innocence.
(e) Pendency of appeal. The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.	(e) **Pendency of an Appeal.** A conviction that satisfies this rule is admissible even if an appeal is pending. Evidence of the pendency is also admissible.

Committee Note

The language of Rule 609 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 610. Religious Beliefs or Opinions	Rule 610. Religious Beliefs or Opinions
Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness' credibility is impaired or enhanced.	Evidence of a witness's religious beliefs or opinions is not admissible to attack or support the witness's credibility.

Committee Note

The language of Rule 610 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 611. Mode and Order of Interrogation and Presentation	Rule 611. Mode and Order of Examining Witnesses and Presenting Evidence
(a) Control by court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.	**(a) Control by the Court; Purposes.** The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to: **(1)** make those procedures effective for determining the truth; **(2)** avoid wasting time; and **(3)** protect witnesses from harassment or undue embarrassment.
(b) Scope of cross-examination. Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.	**(b) Scope of Cross-Examination.** Cross-examination should not go beyond the subject matter of the direct examination and matters affecting the witness's credibility. The court may allow inquiry into additional matters as if on direct examination.
(c) Leading questions. Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.	**(c) Leading Questions.** Leading questions should not be used on direct examination except as necessary to develop the witness's testimony. Ordinarily, the court should allow leading questions: **(1)** on cross-examination; and **(2)** when a party calls a hostile witness, an adverse party, or a witness identified with an adverse party.

Committee Note

The language of Rule 611 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 612. Writing Used To Refresh Memory	Rule 612. Writing Used to Refresh a Witness's Memory
Except as otherwise provided in criminal proceedings by section 3500 of title 18, United States Code, if a witness uses a writing to refresh memory for the purpose of testifying, either— (1) while testifying, or (2) before testifying, if the court in its discretion determines it is necessary in the interests of justice, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony the court shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to order under this rule, the court shall make any order justice requires, except that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial.	(a) **Scope.** This rule gives an adverse party certain options when a witness uses a writing to refresh memory: (1) while testifying; or (2) before testifying, if the court decides that justice requires the party to have those options. (b) **Adverse Party's Options; Deleting Unrelated Matter.** Unless 18 U.S.C. § 3500 provides otherwise in a criminal case, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness about it, and to introduce in evidence any portion that relates to the witness's testimony. If the producing party claims that the writing includes unrelated matter, the court must examine the writing in camera, delete any unrelated portion, and order that the rest be delivered to the adverse party. Any portion deleted over objection must be preserved for the record. (c) **Failure to Produce or Deliver the Writing.** If a writing is not produced or is not delivered as ordered, the court may issue any appropriate order. But if the prosecution does not comply in a criminal case, the court must strike the witness's testimony or — if justice so requires — declare a mistrial.

Committee Note

The language of Rule 612 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 613. Prior Statements of Witnesses	Rule 613. Witness's Prior Statement
(a) Examining witness concerning prior statement. In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time, but on request the same shall be shown or disclosed to opposing counsel.	(a) **Showing or Disclosing the Statement During Examination.** When examining a witness about the witness's prior statement, a party need not show it or disclose its contents to the witness. But the party must, on request, show it or disclose its contents to an adverse party's attorney.
(b) Extrinsic evidence of prior inconsistent statement of witness. Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in rule 801(d)(2).	(b) **Extrinsic Evidence of a Prior Inconsistent Statement.** Extrinsic evidence of a witness's prior inconsistent statement is admissible only if the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to examine the witness about it, or if justice so requires. This subdivision (b) does not apply to an opposing party's statement under Rule 801(d)(2).

Committee Note

The language of Rule 613 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 614. Calling and Interrogation of Witnesses by Court	Rule 614. Court's Calling or Examining a Witness
(a) Calling by court. The court may, on its own motion or at the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called.	**(a) Calling.** The court may call a witness on its own or at a party's request. Each party is entitled to cross-examine the witness.
(b) Interrogation by court. The court may interrogate witnesses, whether called by itself or by a party.	**(b) Examining.** The court may examine a witness regardless of who calls the witness.
(c) Objections. Objections to the calling of witnesses by the court or to interrogation by it may be made at the time or at the next available opportunity when the jury is not present.	**(c) Objections.** A party may object to the court's calling or examining a witness either at that time or at the next opportunity when the jury is not present.

Committee Note

The language of Rule 614 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 615. Exclusion of Witnesses	Rule 615. Excluding Witnesses
At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause, or (4) a person authorized by statute to be present.	At a party's request, the court must order witnesses excluded so that they cannot hear other witnesses' testimony. Or the court may do so on its own. But this rule does not authorize excluding: **(a)** a party who is a natural person; **(b)** an officer or employee of a party that is not a natural person, after being designated as the party's representative by its attorney; **(c)** a person whose presence a party shows to be essential to presenting the party's claim or defense; or **(d)** a person authorized by statute to be present.

Committee Note

The language of Rule 615 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

ARTICLE VII. OPINIONS AND EXPERT TESTIMONY **Rule 701. Opinion Testimony by Lay Witnesses**	ARTICLE VII. OPINIONS AND EXPERT TESTIMONY **Rule 701. Opinion Testimony by Lay Witnesses**
If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.	If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is: **(a)** rationally based on the witness's perception; **(b)** helpful to clearly understanding the witness's testimony or to determining a fact in issue; and **(c)** not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Committee Note

The language of Rule 701 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

The Committee deleted all reference to an "inference" on the grounds that the deletion made the Rule flow better and easier to read, and because any "inference" is covered by the broader term "opinion." Courts have not made substantive decisions on the basis of any distinction between an opinion and an inference. No change in current practice is intended.

Rule 702. Testimony by Experts	Rule 702. Testimony by Expert Witnesses
If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.	A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: **(a)** the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; **(b)** the testimony is based on sufficient facts or data; **(c)** the testimony is the product of reliable principles and methods; and **(d)** the expert has reliably applied the principles and methods to the facts of the case.

Committee Note

The language of Rule 702 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 703. Bases of Opinion Testimony by Experts	Rule 703. Bases of an Expert's Opinion Testimony
The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.	An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

Committee Note

The language of Rule 703 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

The Committee deleted all reference to an "inference" on the grounds that the deletion made the Rule flow better and easier to read, and because any "inference" is covered by the broader term "opinion." Courts have not made substantive decisions on the basis of any distinction between an opinion and an inference. No change in current practice is intended.

Rule 704. Opinion on Ultimate Issue	Rule 704. Opinion on an Ultimate Issue
(a) Except as provided in subdivision (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.	**(a)** **In General — Not Automatically Objectionable.** An opinion is not objectionable just because it embraces an ultimate issue.
(b) No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.	**(b)** **Exception.** In a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense.

Committee Note

The language of Rule 704 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

The Committee deleted all reference to an "inference" on the grounds that the deletion made the Rule flow better and easier to read, and because any "inference" is covered by the broader term "opinion." Courts have not made substantive decisions on the basis of any distinction between an opinion and an inference. No change in current practice is intended.

Rule 705. Disclosure of Facts or Data Underlying Expert Opinion	Rule 705. Disclosing the Facts or Data Underlying an Expert's Opinion
The expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.	Unless the court orders otherwise, an expert may state an opinion — and give the reasons for it — without first testifying to the underlying facts or data. But the expert may be required to disclose those facts or data on cross-examination.

Committee Note

The language of Rule 705 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

The Committee deleted all reference to an "inference" on the grounds that the deletion made the Rule flow better and easier to read, and because any "inference" is covered by the broader term "opinion." Courts have not made substantive decisions on the basis of any distinction between an opinion and an inference. No change in current practice is intended.

Rule 706. Court Appointed Experts	Rule 706. Court-Appointed Expert Witnesses
(a) Appointment. The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection. An expert witness shall not be appointed by the court unless the witness consents to act. A witness so appointed shall be informed of the witness' duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of the witness' findings, if any; the witness' deposition may be taken by any party; and the witness may be called to testify by the court or any party. The witness shall be subject to cross-examination by each party, including a party calling the witness.	**(a) Appointment Process.** On a party's motion or on its own, the court may order the parties to show cause why expert witnesses should not be appointed and may ask the parties to submit nominations. The court may appoint any expert that the parties agree on and any of its own choosing. But the court may only appoint someone who consents to act. **(b) Expert's Role.** The court must inform the expert in writing of the expert's duties and have a copy filed with the clerk. Or the court may so inform the expert at a conference in which the parties have an opportunity to participate. The expert: **(1)** must advise the parties of any findings the expert makes; **(2)** may be deposed by any party; **(3)** may be called to testify by the court or any party; and **(4)** may be cross-examined by any party, including the party that called the expert.
(b) Compensation. Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the court may allow. The compensation thus fixed is payable from funds which may be provided by law in criminal cases and civil actions and proceedings involving just compensation under the fifth amendment. In other civil actions and proceedings the compensation shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs.	**(c) Compensation.** The expert is entitled to a reasonable compensation, as set by the court. The compensation is payable as follows: **(1)** in a criminal case or in a civil case involving just compensation under the Fifth Amendment, from any funds that are provided by law; and **(2)** in any other civil case, by the parties in the proportion and at the time that the court directs — and the compensation is then charged like other costs.
(c) Disclosure of appointment. In the exercise of its discretion, the court may authorize disclosure to the jury of the fact that the court appointed the expert witness.	**(d) Disclosing the Appointment to the Jury.** The court may authorize disclosure to the jury that the court appointed the expert.
(d) Parties' experts of own selection. Nothing in this rule limits the parties in calling expert witnesses of their own selection.	**(e) Parties' Choice of Their Own Experts.** This rule does not limit a party in calling its own experts.

Committee Note

The language of Rule 706 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

ARTICLE VIII. HEARSAY Rule 801. Definitions	ARTICLE VIII. HEARSAY Rule 801. Definitions That Apply to This Article; Exclusions from Hearsay
The following definitions apply under this article: **(a) Statement.** A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.	**(a) Statement.** "Statement" means a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.
(b) Declarant. A "declarant" is a person who makes a statement.	**(b) Declarant.** "Declarant" means the person who made the statement.
(c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.	**(c) Hearsay.** "Hearsay" means a statement that: **(1)** the declarant does not make while testifying at the current trial or hearing; and **(2)** a party offers in evidence to prove the truth of the matter asserted in the statement.
(d) Statements which are not hearsay. A statement is not hearsay if— **(1) Prior statement by witness.** The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving the person; or	**(d) Statements That Are Not Hearsay.** A statement that meets the following conditions is not hearsay: **(1)** ***A Declarant-Witness's Prior Statement.*** The declarant testifies and is subject to cross-examination about a prior statement, and the statement: **(A)** is inconsistent with the declarant's testimony and was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition; **(B)** is consistent with the declarant's testimony and is offered to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or **(C)** identifies a person as someone the declarant perceived earlier.

(2) Admission by party-opponent. The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy. The contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D), or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E).	(2) *An Opposing Party's Statement.* The statement is offered against an opposing party and: **(A)** was made by the party in an individual or representative capacity; **(B)** is one the party manifested that it adopted or believed to be true; **(C)** was made by a person whom the party authorized to make a statement on the subject; **(D)** was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or **(E)** was made by the party's coconspirator during and in furtherance of the conspiracy. The statement must be considered but does not by itself establish the declarant's authority under (C); the existence or scope of the relationship under (D); or the existence of the conspiracy or participation in it under (E).

Committee Note

The language of Rule 801 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Statements falling under the hearsay exclusion provided by Rule 801(d)(2) are no longer referred to as "admissions" in the title to the subdivision. The term "admissions" is confusing because not all statements covered by the exclusion are admissions in the colloquial sense — a statement can be within the exclusion even if it "admitted" nothing and was not against the party's interest when made. The term "admissions" also raises confusion in comparison with the Rule 804(b)(3) exception for declarations against interest. No change in application of the exclusion is intended.

Rule 802. Hearsay Rule	Rule 802. The Rule Against Hearsay
Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.	Hearsay is not admissible unless any of the following provides otherwise: • a federal statute; • these rules; or • other rules prescribed by the Supreme Court.

Committee Note

The language of Rule 802 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial	Rule 803. Exceptions to the Rule Against Hearsay — Regardless of Whether the Declarant Is Available as a Witness
The following are not excluded by the hearsay rule, even though the declarant is available as a witness: **(1) Present sense impression.** A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.	The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness: (1) *Present Sense Impression.* A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it.
(2) Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.	(2) *Excited Utterance.* A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused.
(3) Then existing mental, emotional, or physical condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.	(3) *Then-Existing Mental, Emotional, or Physical Condition.* A statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will.
(4) Statements for purposes of medical diagnosis or treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.	(4) *Statement Made for Medical Diagnosis or Treatment.* A statement that: (A) is made for — and is reasonably pertinent to — medical diagnosis or treatment; and (B) describes medical history; past or present symptoms or sensations; their inception; or their general cause.

(5) Recorded recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.	(5) ***Recorded Recollection.*** A record that: **(A)** is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately; **(B)** was made or adopted by the witness when the matter was fresh in the witness's memory; and **(C)** accurately reflects the witness's knowledge. If admitted, the record may be read into evidence but may be received as an exhibit only if offered by an adverse party.
(6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.	(6) ***Records of a Regularly Conducted Activity.*** A record of an act, event, condition, opinion, or diagnosis if: **(A)** the record was made at or near the time by — or from information transmitted by — someone with knowledge; **(B)** the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit; **(C)** making the record was a regular practice of that activity; **(D)** all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and **(E)** neither the source of information nor the method or circumstances of preparation indicate a lack of trustworthiness.

(7) Absence of entry in records kept in accordance with the provisions of paragraph (6). Evidence that a matter is not included in the memoranda reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.	(7) ***Absence of a Record of a Regularly Conducted Activity.*** Evidence that a matter is not included in a record described in paragraph (6) if: **(A)** the evidence is admitted to prove that the matter did not occur or exist; **(B)** a record was regularly kept for a matter of that kind; and **(C)** neither the possible source of the information nor other circumstances indicate a lack of trustworthiness.
(8) Public records and reports. Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.	**(8)** ***Public Records.*** A record or statement of a public office if: **(A)** it sets out: **(i)** the office's activities; **(ii)** a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or **(iii)** in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation; and **(B)** neither the source of information nor other circumstances indicate a lack of trustworthiness.
(9) Records of vital statistics. Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.	**(9)** ***Public Records of Vital Statistics.*** A record of a birth, death, or marriage, if reported to a public office in accordance with a legal duty.

(10) Absence of public record or entry. To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.	**(10)** ***Absence of a Public Record.*** Testimony — or a certification under Rule 902 — that a diligent search failed to disclose a public record or statement if the testimony or certification is admitted to prove that: **(A)** the record or statement does not exist; or **(B)** a matter did not occur or exist, if a public office regularly kept a record or statement for a matter of that kind.
(11) Records of religious organizations. Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.	**(11)** ***Records of Religious Organizations Concerning Personal or Family History.*** A statement of birth, legitimacy, ancestry, marriage, divorce, death, relationship by blood or marriage, or similar facts of personal or family history, contained in a regularly kept record of a religious organization.
(12) Marriage, baptismal, and similar certificates. Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.	**(12)** ***Certificates of Marriage, Baptism, and Similar Ceremonies.*** A statement of fact contained in a certificate: **(A)** made by a person who is authorized by a religious organization or by law to perform the act certified; **(B)** attesting that the person performed a marriage or similar ceremony or administered a sacrament; and **(C)** purporting to have been issued at the time of the act or within a reasonable time after it.
(13) Family records. Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.	**(13)** ***Family Records.*** A statement of fact about personal or family history contained in a family record, such as a Bible, genealogy, chart, engraving on a ring, inscription on a portrait, or engraving on an urn or burial marker.

(14) Records of documents affecting an interest in property. The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.	(14) ***Records of Documents That Affect an Interest in Property.*** The record of a document that purports to establish or affect an interest in property if: **(A)** the record is admitted to prove the content of the original recorded document, along with its signing and its delivery by each person who purports to have signed it; **(B)** the record is kept in a public office; and **(C)** a statute authorizes recording documents of that kind in that office.
(15) Statements in documents affecting an interest in property. A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.	(15) ***Statements in Documents That Affect an Interest in Property.*** A statement contained in a document that purports to establish or affect an interest in property if the matter stated was relevant to the document's purpose — unless later dealings with the property are inconsistent with the truth of the statement or the purport of the document.
(16) Statements in ancient documents. Statements in a document in existence twenty years or more the authenticity of which is established.	(16) ***Statements in Ancient Documents.*** A statement in a document that is at least 20 years old and whose authenticity is established.
(17) Market reports, commercial publications. Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.	(17) ***Market Reports and Similar Commercial Publications.*** Market quotations, lists, directories, or other compilations that are generally relied on by the public or by persons in particular occupations.

(18) Learned treatises. To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.	**(18)** ***Statements in Learned Treatises, Periodicals, or Pamphlets.*** A statement contained in a treatise, periodical, or pamphlet if: **(A)** the statement is called to the attention of an expert witness on cross-examination or relied on by the expert on direct examination; and **(B)** the publication is established as a reliable authority by the expert's admission or testimony, by another expert's testimony, or by judicial notice. If admitted, the statement may be read into evidence but not received as an exhibit.
(19) Reputation concerning personal or family history. Reputation among members of a person's family by blood, adoption, or marriage, or among a person's associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history.	**(19)** ***Reputation Concerning Personal or Family History.*** A reputation among a person's family by blood, adoption, or marriage — or among a person's associates or in the community — concerning the person's birth, adoption, legitimacy, ancestry, marriage, divorce, death, relationship by blood, adoption, or marriage, or similar facts of personal or family history.
(20) Reputation concerning boundaries or general history. Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or State or nation in which located.	**(20)** ***Reputation Concerning Boundaries or General History.*** A reputation in a community — arising before the controversy — concerning boundaries of land in the community or customs that affect the land, or concerning general historical events important to that community, state, or nation.
(21) Reputation as to character. Reputation of a person's character among associates or in the community.	**(21)** ***Reputation Concerning Character.*** A reputation among a person's associates or in the community concerning the person's character.

(22) Judgment of previous conviction. Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the Government in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.	**(22)** ***Judgment of a Previous Conviction.*** Evidence of a final judgment of conviction if: **(A)** the judgment was entered after a trial or guilty plea, but not a nolo contendere plea; **(B)** the conviction was for a crime punishable by death or by imprisonment for more than a year; **(C)** the evidence is admitted to prove any fact essential to the judgment; and **(D)** when offered by the prosecutor in a criminal case for a purpose other than impeachment, the judgment was against the defendant. The pendency of an appeal may be shown but does not affect admissibility.
(23) Judgment as to personal, family, or general history, or boundaries. Judgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.	**(23)** ***Judgments Involving Personal, Family, or General History or a Boundary.*** A judgment that is admitted to prove a matter of personal, family, or general history, or boundaries, if the matter: **(A)** was essential to the judgment; and **(B)** could be proved by evidence of reputation.
(24) [Other exceptions.] [Transferred to Rule 807]	**(24)** **[Other exceptions.]** [Transferred to Rule 807.]

Committee Note

The language of Rule 803 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 804. Hearsay Exceptions; Declarant Unavailable[1]	Rule 804. Exceptions to the Rule Against Hearsay — When the Declarant Is Unavailable as a Witness
(a) Definition of unavailability. "Unavailability as a witness" includes situations in which the declarant— **(1)** is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or **(2)** persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or **(3)** testifies to a lack of memory of the subject matter of the declarant's statement; or **(4)** is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or **(5)** is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means. A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.	**(a) Criteria for Being Unavailable.** A declarant is considered to be unavailable as a witness if the declarant: **(1)** is exempted from testifying about the subject matter of the declarant's statement because the court rules that a privilege applies; **(2)** refuses to testify about the subject matter despite a court order to do so; **(3)** testifies to not remembering the subject matter; **(4)** cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness; or **(5)** is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure: **(A)** the declarant's attendance, in the case of a hearsay exception under Rule 804(b)(1) or (5); or **(B)** the declarant's attendance or testimony, in the case of a hearsay exception under Rule 804(b)(2), (3), or (4). But this subdivision (a) does not apply if the statement's proponent procured or wrongfully caused the declarant's unavailability as a witness in order to prevent the declarant from attending or testifying.

[1] Rule in effect on December 1, 2010.

(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness: **(1) Former testimony.** Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.	**(b) The Exceptions.** The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness: **(1)** ***Former Testimony.*** Testimony that: **(A)** was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one; and **(B)** is now offered against a party who had — or, in a civil case, whose predecessor in interest had — an opportunity and similar motive to develop it by direct, cross-, or redirect examination.
(2) Statement under belief of impending death. In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.	**(2)** ***Statement Under the Belief of Imminent Death.*** In a prosecution for homicide or in a civil case, a statement that the declarant, while believing the declarant's death to be imminent, made about its cause or circumstances.
(3) Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.	**(3)** ***Statement Against Interest.*** A statement that: **(A)** a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and **(B)** is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.

(4) Statement of personal or family history. (A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.	**(4)** ***Statement of Personal or Family History.*** A statement about: **(A)** the declarant's own birth, adoption, legitimacy, ancestry, marriage, divorce, relationship by blood or marriage, or similar facts of personal or family history, even though the declarant had no way of acquiring personal knowledge about that fact; or **(B)** another person concerning any of these facts, as well as death, if the declarant was related to the person by blood, adoption, or marriage or was so intimately associated with the person's family that the declarant's information is likely to be accurate.
(5) [Other exceptions.] [Transferred to Rule 807]	**(5)** **[Other exceptions.]** [Transferred to Rule 807.]
(6) Forfeiture by wrongdoing. A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.	**(6)** ***Statement Offered Against a Party That Wrongfully Caused the Declarant's Unavailability.*** A statement offered against a party that wrongfully caused — or acquiesced in wrongfully causing — the declarant's unavailability as a witness, and did so intending that result.

Committee Note

The language of Rule 804 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

The amendment to Rule 804(b)(3) provides that the corroborating circumstances requirement applies not only to declarations against penal interest offered by the defendant in a criminal case, but also to such statements offered by the government. The language in the original rule does not so provide, but a proposed amendment to Rule 804(b)(3) — released for public comment in 2008 and scheduled to be enacted before the restyled rules — explicitly extends the corroborating circumstances requirement to statements offered by the government.

Rule 805. Hearsay Within Hearsay	Rule 805. Hearsay Within Hearsay
Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules.	Hearsay within hearsay is not excluded by the rule against hearsay if each part of the combined statements conforms with an exception to the rule.

Committee Note

The language of Rule 805 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 806. Attacking and Supporting Credibility of Declarant	Rule 806. Attacking and Supporting the Declarant's Credibility
When a hearsay statement, or a statement defined in Rule 801(d)(2)(C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.	When a hearsay statement — or a statement described in Rule 801(d)(2)(C), (D), or (E) — has been admitted in evidence, the declarant's credibility may be attacked, and then supported, by any evidence that would be admissible for those purposes if the declarant had testified as a witness. The court may admit evidence of the declarant's inconsistent statement or conduct, regardless of when it occurred or whether the declarant had an opportunity to explain or deny it. If the party against whom the statement was admitted calls the declarant as a witness, the party may examine the declarant on the statement as if on cross-examination.

Committee Note

The language of Rule 806 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 807. Residual Exception	Rule 807. Residual Exception
A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.	**(a)** **In General.** Under the following circumstances, a hearsay statement is not excluded by the rule against hearsay even if the statement is not specifically covered by a hearsay exception in Rule 803 or 804: **(1)** the statement has equivalent circumstantial guarantees of trustworthiness; **(2)** it is offered as evidence of a material fact; **(3)** it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and **(4)** admitting it will best serve the purposes of these rules and the interests of justice. **(b)** **Notice.** The statement is admissible only if, before the trial or hearing, the proponent gives an adverse party reasonable notice of the intent to offer the statement and its particulars, including the declarant's name and address, so that the party has a fair opportunity to meet it.

Committee Note

The language of Rule 807 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

ARTICLE IX. AUTHENTICATION AND IDENTIFICATION **Rule 901. Requirement of Authentication or Identification**	ARTICLE IX. AUTHENTICATION AND IDENTIFICATION **Rule 901. Authenticating or Identifying Evidence**
(a) General provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.	**(a) In General.** To authenticate or identify an item of evidence in order to have it admitted, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.
(b) Illustrations. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:	**(b) Examples.** The following are examples only — not a complete list — of evidence that satisfies the requirement:
(1) Testimony of witness with knowledge. Testimony that a matter is what it is claimed to be.	**(1)** ***Testimony of a Witness with Knowledge.*** Testimony that an item is what it is claimed to be.
(2) Nonexpert opinion on handwriting. Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.	**(2)** ***Nonexpert Opinion About Handwriting.*** A nonexpert's opinion that handwriting is genuine, based on a familiarity with it that was not acquired for the current litigation.
(3) Comparison by trier or expert witness. Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.	**(3)** ***Comparison by an Expert Witness or the Trier of Fact.*** A comparison with an authenticated specimen by an expert witness or the trier of fact.
(4) Distinctive characteristics and the like. Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.	**(4)** ***Distinctive Characteristics and the Like.*** The appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances.
(5) Voice identification. Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.	**(5)** ***Opinion About a Voice.*** An opinion identifying a person's voice — whether heard firsthand or through mechanical or electronic transmission or recording — based on hearing the voice at any time under circumstances that connect it with the alleged speaker.

(6) Telephone conversations. Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (A) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (B) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.	**(6)** ***Evidence About a Telephone Conversation.*** For a telephone conversation, evidence that a call was made to the number assigned at the time to: **(A)** a particular person, if circumstances, including self-identification, show that the person answering was the one called; or **(B)** a particular business, if the call was made to a business and the call related to business reasonably transacted over the telephone.
(7) Public records or reports. Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.	**(7)** ***Evidence About Public Records.*** Evidence that: **(A)** a document was recorded or filed in a public office as authorized by law; or **(B)** a purported public record or statement is from the office where items of this kind are kept.
(8) Ancient documents or data compilation. Evidence that a document or data compilation, in any form, (A) is in such condition as to create no suspicion concerning its authenticity, (B) was in a place where it, if authentic, would likely be, and (C) has been in existence 20 years or more at the time it is offered.	**(8)** ***Evidence About Ancient Documents or Data Compilations.*** For a document or data compilation, evidence that it: **(A)** is in a condition that creates no suspicion about its authenticity; **(B)** was in a place where, if authentic, it would likely be; and **(C)** is at least 20 years old when offered.
(9) Process or system. Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.	**(9)** ***Evidence About a Process or System.*** Evidence describing a process or system and showing that it produces an accurate result.
(10) Methods provided by statute or rule. Any method of authentication or identification provided by Act of Congress or by other rules prescribed by the Supreme Court pursuant to statutory authority.	**(10)** ***Methods Provided by a Statute or Rule.*** Any method of authentication or identification allowed by a federal statute or a rule prescribed by the Supreme Court.

Committee Note

The language of Rule 901 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 902. Self-authentication	Rule 902. Evidence That Is Self-Authenticating
Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following: **(1) Domestic public documents under seal.** A document bearing a seal purporting to be that of the United States, or of any State, district, Commonwealth, territory, or insular possession thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.	The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted: **(1)** ***Domestic Public Documents That Are Signed and Sealed.*** A document that bears: **(A)** a signature purporting to be an execution or attestation; and **(B)** a seal purporting to be that of the United States; any state, district, commonwealth, territory, or insular possession of the United States; the former Panama Canal Zone; the Trust Territory of the Pacific Islands; a political subdivision of any of these entities; or a department, agency, or officer of any entity named above.
(2) Domestic public documents not under seal. A document purporting to bear the signature in the official capacity of an officer or employee of any entity included in paragraph (1) hereof, having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.	**(2)** ***Domestic Public Documents That Are Signed But Not Sealed.*** A document that bears no seal if: **(A)** it bears the signature of an officer or employee of an entity named in Rule 902(1)(B); and **(B)** another public officer who has a seal and official duties within that same entity certifies under seal — or its equivalent — that the signer has the official capacity and that the signature is genuine.

(3) Foreign public documents. A document purporting to be executed or attested in an official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position (A) of the executing or attesting person, or (B) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation. A final certification may be made by a secretary of an embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for good cause shown, order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification.	**(3)** ***Foreign Public Documents.*** A document that purports to be signed or attested by a person who is authorized by a foreign country's law to do so. The document must be accompanied by a final certification that certifies the genuineness of the signature and official position of the signer or attester — or of any foreign official whose certificate of genuineness relates to the signature or attestation or is in a chain of certificates of genuineness relating to the signature or attestation. The certification may be made by a secretary of a United States embassy or legation; by a consul general, vice consul, or consular agent of the United States; or by a diplomatic or consular official of the foreign country assigned or accredited to the United States. If all parties have been given a reasonable opportunity to investigate the document's authenticity and accuracy, the court may, for good cause, either: **(A)** order that it be treated as presumptively authentic without final certification; or **(B)** allow it to be evidenced by an attested summary with or without final certification.
(4) Certified copies of public records. A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3) of this rule or complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority.	**(4)** ***Certified Copies of Public Records.*** A copy of an official record — or a copy of a document that was recorded or filed in a public office as authorized by law — if the copy is certified as correct by: **(A)** the custodian or another person authorized to make the certification; or **(B)** a certificate that complies with Rule 902(1), (2), or (3), a federal statute, or a rule prescribed by the Supreme Court.
(5) Official publications. Books, pamphlets, or other publications purporting to be issued by public authority.	**(5)** ***Official Publications.*** A book, pamphlet, or other publication purporting to be issued by a public authority.
(6) Newspapers and periodicals. Printed materials purporting to be newspapers or periodicals.	**(6)** ***Newspapers and Periodicals.*** Printed material purporting to be a newspaper or periodical.

(7) Trade inscriptions and the like. Inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin.	(7) ***Trade Inscriptions and the Like.*** An inscription, sign, tag, or label purporting to have been affixed in the course of business and indicating origin, ownership, or control.
(8) Acknowledged documents. Documents accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments.	(8) ***Acknowledged Documents.*** A document accompanied by a certificate of acknowledgment that is lawfully signed by a notary public or another officer who is authorized to take acknowledgments.
(9) Commercial paper and related documents. Commercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law.	(9) ***Commercial Paper and Related Documents.*** Commercial paper, a signature on it, and related documents, to the extent allowed by general commercial law.
(10) Presumptions under Acts of Congress. Any signature, document, or other matter declared by Act of Congress to be presumptively or prima facie genuine or authentic.	(10) ***Presumptions Under a Federal Statute.*** A signature, document, or anything else that a federal statute declares to be presumptively or prima facie genuine or authentic.
(11) Certified domestic records of regularly conducted activity. The original or a duplicate of a domestic record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by a written declaration of its custodian or other qualified person, in a manner complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority, certifying that the record— **(A)** was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters; **(B)** was kept in the course of the regularly conducted activity; and **(C)** was made by the regularly conducted activity as a regular practice. A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.	(11) ***Certified Domestic Records of a Regularly Conducted Activity.*** The original or a copy of a domestic record that meets the requirements of Rule 803(6)(A)-(C), as shown by a certification of the custodian or another qualified person that complies with a federal statute or a rule prescribed by the Supreme Court. Before the trial or hearing, the proponent must give an adverse party reasonable written notice of the intent to offer the record — and must make the record and certification available for inspection — so that the party has a fair opportunity to challenge them.

(12) Certified foreign records of regularly conducted activity. In a civil case, the original or a duplicate of a foreign record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by a written declaration by its custodian or other qualified person certifying that the record— **(A)** was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters; **(B)** was kept in the course of the regularly conducted activity; and **(C)** was made by the regularly conducted activity as a regular practice. The declaration must be signed in a manner that, if falsely made, would subject the maker to criminal penalty under the laws of the country where the declaration is signed. A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.	(12) ***Certified Foreign Records of a Regularly Conducted Activity.*** In a civil case, the original or a copy of a foreign record that meets the requirements of Rule 902(11), modified as follows: the certification, rather than complying with a federal statute or Supreme Court rule, must be signed in a manner that, if falsely made, would subject the maker to a criminal penalty in the country where the certification is signed. The proponent must also meet the notice requirements of Rule 902(11).

Committee Note

The language of Rule 902 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 903. Subscribing Witness' Testimony Unnecessary	Rule 903. Subscribing Witness's Testimony
The testimony of a subscribing witness is not necessary to authenticate a writing unless required by the laws of the jurisdiction whose laws govern the validity of the writing.	A subscribing witness's testimony is necessary to authenticate a writing only if required by the law of the jurisdiction that governs its validity.

Committee Note

The language of Rule 903 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

ARTICLE X. CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS **Rule 1001. Definitions**	ARTICLE X. CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS **Rule 1001. Definitions That Apply to This Article**
For purposes of this article the following definitions are applicable: **(1) Writings and recordings.** "Writings" and "recordings" consist of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation. **(2) Photographs.** "Photographs" include still photographs, X-ray films, video tapes, and motion pictures. **(3) Original.** An "original" of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An "original" of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an "original". **(4) Duplicate.** A "duplicate" is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent techniques which accurately reproduces the original.	In this article: **(a)** A "writing" consists of letters, words, numbers, or their equivalent set down in any form. **(b)** A "recording" consists of letters, words, numbers, or their equivalent recorded in any manner. **(c)** A "photograph" means a photographic image or its equivalent stored in any form. **(d)** An "original" of a writing or recording means the writing or recording itself or any counterpart intended to have the same effect by the person who executed or issued it. For electronically stored information, "original" means any printout — or other output readable by sight — if it accurately reflects the information. An "original" of a photograph includes the negative or a print from it. **(e)** A "duplicate" means a counterpart produced by a mechanical, photographic, chemical, electronic, or other equivalent process or technique that accurately reproduces the original.

Committee Note

The language of Rule 1001 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 1002. Requirement of Original	Rule 1002. Requirement of the Original
To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by Act of Congress.	An original writing, recording, or photograph is required in order to prove its content unless these rules or a federal statute provides otherwise.

Committee Note

The language of Rule 1002 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 1003. Admissibility of Duplicates	Rule 1003. Admissibility of Duplicates
A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.	A duplicate is admissible to the same extent as the original unless a genuine question is raised about the original's authenticity or the circumstances make it unfair to admit the duplicate.

Committee Note

The language of Rule 1003 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 1004. Admissibility of Other Evidence of Contents	Rule 1004. Admissibility of Other Evidence of Content
The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if— **(1) Originals lost or destroyed.** All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or **(2) Original not obtainable.** No original can be obtained by any available judicial process or procedure; or **(3) Original in possession of opponent.** At a time when an original was under the control of the party against whom offered, that party was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and that party does not produce the original at the hearing; or **(4) Collateral matters.** The writing, recording, or photograph is not closely related to a controlling issue.	An original is not required and other evidence of the content of a writing, recording, or photograph is admissible if: **(a)** all the originals are lost or destroyed, and not by the proponent acting in bad faith; **(b)** an original cannot be obtained by any available judicial process; **(c)** the party against whom the original would be offered had control of the original; was at that time put on notice, by pleadings or otherwise, that the original would be a subject of proof at the trial or hearing; and fails to produce it at the trial or hearing; or **(d)** the writing, recording, or photograph is not closely related to a controlling issue.

Committee Note

The language of Rule 1004 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 1005. Public Records	Rule 1005. Copies of Public Records to Prove Content
The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with rule 902 or testified to be correct by a witness who has compared it with the original. If a copy which complies with the foregoing cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given.	The proponent may use a copy to prove the content of an official record — or of a document that was recorded or filed in a public office as authorized by law — if these conditions are met: the record or document is otherwise admissible; and the copy is certified as correct in accordance with Rule 902(4) or is testified to be correct by a witness who has compared it with the original. If no such copy can be obtained by reasonable diligence, then the proponent may use other evidence to prove the content.

Committee Note

The language of Rule 1005 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 1006. Summaries	Rule 1006. Summaries to Prove Content
The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court.	The proponent may use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court. The proponent must make the originals or duplicates available for examination or copying, or both, by other parties at a reasonable time or place. And the court may order the proponent to produce them in court.

Committee Note

The language of Rule 1006 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 1007. Testimony or Written Admission of Party	Rule 1007. Testimony or Statement of a Party to Prove Content
Contents of writings, recordings, or photographs may be proved by the testimony or deposition of the party against whom offered or by that party's written admission, without accounting for the nonproduction of the original.	The proponent may prove the content of a writing, recording, or photograph by the testimony, deposition, or written statement of the party against whom the evidence is offered. The proponent need not account for the original.

Committee Note

The language of Rule 1007 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 1008. Functions of Court and Jury	Rule 1008. Functions of the Court and Jury
When the admissibility of other evidence of contents of writings, recordings, or photographs under these rules depends upon the fulfillment of a condition of fact, the question whether the condition has been fulfilled is ordinarily for the court to determine in accordance with the provisions of rule 104. However, when an issue is raised (a) whether the asserted writing ever existed, or (b) whether another writing, recording, or photograph produced at the trial is the original, or (c) whether other evidence of contents correctly reflects the contents, the issue is for the trier of fact to determine as in the case of other issues of fact.	Ordinarily, the court determines whether the proponent has fulfilled the factual conditions for admitting other evidence of the content of a writing, recording, or photograph under Rule 1004 or 1005. But in a jury trial, the jury determines — in accordance with Rule 104(b) — any issue about whether: **(a)** an asserted writing, recording, or photograph ever existed; **(b)** another one produced at the trial or hearing is the original; or **(c)** other evidence of content accurately reflects the content.

Committee Note

The language of Rule 1008 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

ARTICLE XI. MISCELLANEOUS RULES **Rule 1101. Applicability of Rules**	ARTICLE XI. MISCELLANEOUS RULES **Rule 1101. Applicability of the Rules**
(a) Courts and judges. These rules apply to the United States district courts, the District Court of Guam, the District Court of the Virgin Islands, the District Court for the Northern Mariana Islands, the United States courts of appeals, the United States Claims Court, and to United States bankruptcy judges and United States magistrate judges, in the actions, cases, and proceedings and to the extent hereinafter set forth. The terms "judge" and "court" in these rules include United States bankruptcy judges and United States magistrate judges.	**(a) To Courts and Judges.** These rules apply to proceedings before: • United States district courts; • United States bankruptcy and magistrate judges; • United States courts of appeals; • the United States Court of Federal Claims; and • the district courts of Guam, the Virgin Islands, and the Northern Mariana Islands.
(b) Proceedings generally. These rules apply generally to civil actions and proceedings, including admiralty and maritime cases, to criminal cases and proceedings, to contempt proceedings except those in which the court may act summarily, and to proceedings and cases under title 11, United States Code.	**(b) To Cases and Proceedings.** These rules apply in: • civil cases and proceedings, including bankruptcy, admiralty, and maritime cases; • criminal cases and proceedings; and • contempt proceedings, except those in which the court may act summarily.
(c) Rule of privilege. The rule with respect to privileges applies at all stages of all actions, cases, and proceedings.	**(c) Rules on Privilege.** The rules on privilege apply to all stages of a case or proceeding.
(d) Rules inapplicable. The rules (other than with respect to privileges) do not apply in the following situations: **(1) Preliminary questions of fact.** The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under rule 104. **(2) Grand jury.** Proceedings before grand juries. **(3) Miscellaneous proceedings.** Proceedings for extradition or rendition; preliminary examinations in criminal cases; sentencing, or granting or revoking probation; issuance of warrants for arrest, criminal summonses, and search warrants; and proceedings with respect to release on bail or otherwise.	**(d) Exceptions.** These rules — except for those on privilege — do not apply to the following: **(1)** the court's determination, under Rule 104(a), on a preliminary question of fact governing admissibility; **(2)** grand-jury proceedings; and **(3)** miscellaneous proceedings such as: • extradition or rendition; • issuing an arrest warrant, criminal summons, or search warrant; • a preliminary examination in a criminal case; • sentencing; • granting or revoking probation or supervised release; and • considering whether to release on bail or otherwise.

(e) Rules applicable in part. In the following proceedings these rules apply to the extent that matters of evidence are not provided for in the statutes which govern procedure therein or in other rules prescribed by the Supreme Court pursuant to statutory authority: the trial of misdemeanors and other petty offenses before United States magistrate judges; review of agency actions when the facts are subject to trial de novo under section 706(2)(F) of title 5, United States Code; review of orders of the Secretary of Agriculture under section 2 of the Act entitled "An Act to authorize association of producers of agricultural products" approved February 18, 1922 (7 U.S.C. 292), and under sections 6 and 7(c) of the Perishable Agricultural Commodities Act, 1930 (7 U.S.C. 499f, 499g(c)); naturalization and revocation of naturalization under sections 310–318 of the Immigration and Nationality Act (8 U.S.C. 1421–1429); prize proceedings in admiralty under sections 7651–7681 of title 10, United States Code; review of orders of the Secretary of the Interior under section 2 of the Act entitled "An Act authorizing associations of producers of aquatic products" approved June 25, 1934 (15 U.S.C. 522); review of orders of petroleum control boards under section 5 of the Act entitled "An Act to regulate interstate and foreign commerce in petroleum and its products by prohibiting the shipment in such commerce of petroleum and its products produced in violation of State law, and for other purposes", approved February 22, 1935 (15 U.S.C. 715d); actions for fines, penalties, or forfeitures under part V of title IV of the Tariff Act of 1930 (19 U.S.C. 1581–1624), or under the Anti-Smuggling Act (19 U.S.C. 1701–1711); criminal libel for condemnation, exclusion of imports, or other proceedings under the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301–392); disputes between seamen under sections 4079, 4080, and 4081 of the Revised Statutes (22 U.S.C. 256–258); habeas corpus under sections 2241–2254 of title 28, United States Code; motions to vacate, set aside or correct sentence under section 2255 of title 28, United States Code; actions for penalties for refusal to transport destitute seamen under section 4578 of the Revised Statutes (46 U.S.C. 679); actions against the United States under the Act entitled "An Act authorizing suits against the United States in admiralty for damage caused by and salvage service rendered to public vessels belonging to the United States, and for other purposes", approved March 3, 1925 (46 U.S.C. 781–790), as implemented by section 7730 of title 10, United States Code.	**(e) Other Statutes and Rules.** A federal statute or a rule prescribed by the Supreme Court may provide for admitting or excluding evidence independently from these rules.

Committee Note

The language of Rule 1101 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 1102. Amendments	Rule 1102. Amendments
Amendments to the Federal Rules of Evidence may be made as provided in section 2072 of title 28 of the United States Code.	These rules may be amended as provided in 28 U.S.C. § 2072.

Committee Note

The language of Rule 1102 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 1103. Title	Rule 1103. Title
These rules may be known and cited as the Federal Rules of Evidence.	These rules may be cited as the Federal Rules of Evidence.

Committee Note

The language of Rule 1103 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.