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