COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of January 14-15, 2008
Pasadena, California

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ATTENDANCE

The mid-year meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Pasadena, California, on Monday and Tuesday, January 14 and 15, 2008. The following members were present:

Judge Lee H. Rosenthal, Chair
David J. Beck, Esquire
Douglas R. Cox, Esquire
Judge Harris L Hartz
Judge Marilyn L. Huff
John G. Kester, Esquire
William J. Maledon, Esquire
Ronald J. Tenpas, Associate Deputy Attorney General
Professor Daniel J. Meltzer
Judge Reena Raggi
Judge James A. Teilborg
Judge Diane P. Wood

Chief Justice Ronald N. George was unable to attend the meeting.

Also participating in the meeting were former chairs Judge Alicemarie H. Stotler and Judge Anthony J. Scirica; former member Judge Thomas W. Thrash, Jr.; committee consultants Joseph F. Spaniol, Jr. and Professor Geoffrey C. Hazard, Jr.; and panel participants Professor Stephen B. Burbank, Gregory P. Joseph, David M. Bernick, and Elizabeth J. Cabraser.

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	Administrative Office senior attorney
Jeffrey N. Barr	Administrative Office senior attorney
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 Carl E. Stewart, Chair
Professor Catherine T. Struve, Reporter
Advisory Committee on Bankruptcy Rules —
Judge Laura Taylor Swain, Chair
Professor Jeffrey W. Morris, Reporter
Professor Elizabeth Gibson, Assistant 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 Judges Wood, Raggi, and Huff as new members of the committee and Judges Tallman, Kravitz, Hinkle, and Swain as new advisory committee chairs. She also welcomed Professor Gibson as the next reporter to the Advisory Committee on Bankruptcy Rules.

Judge Rosenthal noted with regret that Judge Thrash's term on the committee had ended, and he was attending his last meeting. She extolled his extraordinary service as a member of the Style Subcommittee and his central role in the restyling of the Federal Rules of Civil Procedure. She also pointed out that Judge Thrash had exerted unique influence in shaping the content of committee notes. He reminded the committee regularly, she said, that notes have a very important, but limited, purpose. They should not reach beyond the scope of a rule's text nor be relied upon to carry more weight than they should properly bear. She presented him with a resolution signed by the Chief Justice honoring his service on the committee from 2000 to 2007.

Judge Rosenthal reported that all the rules proposals submitted by the committee had been approved by the Judicial Conference at its September 2007 session, including new FED. R. EVID. 502 (limitations on waiver of attorney-client privilege and work product protection) and amendments to the criminal rules to implement the Crime Victims' Rights Act. She reported that several additional amendments had been published for comment in August 2007, most significantly the package of time-computation rules. She also pointed out that the restyled body of civil rules and the new privacy protection rules implementing the E-Government Act had taken effect on December 1, 2007.

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 11-12, 2007.

REPORT OF THE ADMINISTRATIVE OFFICE

Mr. Rabiej reported briefly on three pieces of legislation affecting the rules process. First, he said, proposed new FED. R. EVID. 502 had been introduced in the Senate and appeared to have very strong legislative support. Second, legislation promoted by the bail bond industry for several years now stood a good chance of enactment in the current Congress. Strongly opposed by the Judicial Conference, it would limit the authority of a judge to forfeit a bail bond for violation of any condition of release other than the defendant's failure to appear. In light of the strong possibility of

enactment, compromise language was being drafted to limit the scope of the overly broad legislation. Third, a bill had been introduced that would require a judge, before issuing a protective order, to make specific findings that there is no danger to the community's public health or safety in the materials protected by the order. Although the legislation had been introduced several times in the past, he said, it had been approved by the Senate Judiciary Committee in the current Congress and was developing momentum.

REPORT OF THE FEDERAL JUDICIAL CENTER

Mr. Cecil reported on the various activities of the Federal Judicial Center (Agenda Item 4).

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Stewart and Professor Struve presented the report of the advisory committee, as set forth in Judge Stewart's memorandum and attachment of December 12, 2007 (Agenda Item 5).

Amendment for Publication

FED. R. APP. P. 29

Judge Stewart reported that the advisory committee, over the course of several meetings, had discussed amending Rule 29 (amicus curiae brief) to conform it to Supreme Court Rule 37.6. He noted that the advisory committee had submitted a proposed amendment to the Standing Committee in June 2007. But later, the Supreme Court published for comment a proposed amendment to Rule 37.6 that would require the filer of an amicus curiae brief to disclose whether a party or its counsel was a member of the amicus or had contributed money to preparing or submitting the brief.

The proposed amendment to the Supreme Court rule, he said, had generated controversy and some strongly critical comments. Therefore, not knowing whether the Court would adopt the proposed amendment as published, the advisory committee asked the Standing Committee in June 2007 to consider two alternative revisions of FED. R. APP. P. 29. One would be published if the Supreme Court were to approve the proposed amendment to Rule 37.6. The other would be published if the Court were to withdraw the proposed amendment. The Standing Committee, however, decided to defer any action on Rule 29 until after the Court made a final decision on Rule 37.6.

Ultimately, the Supreme Court revised the proposed amendment to Rule 37.6 in light of public comments. It adopted a revised rule that does not require disclosure of

mere membership in an amicus group or mere payment of membership dues. Rather, disclosure is required only if a financial contribution is intended to fund the amicus brief.

Accordingly, the advisory committee at its November 2007 meeting further revised the proposed amendment to FED. R. APP. P. 29 to track the new Supreme Court rule in substance, but with some slight differences of style. For instance, the proposed Rule 29(c) refers to persons, rather than entities, making contributions. The committee note explains that "person" includes artificial persons such as corporations. A member observed that repetition of the word "other" in proposed Rule 29(c)(7)(C) was confusing, *i.e.*, "identifies every other person – other than the amicus curiae, its members, or its counsel." Judge Stewart and Professor Struve agreed to delete the first "other."

Another member suggested that it makes sense to follow the Supreme Court rule, but the phrasing in Rule 29(c)(7)(A) as to "whether a party's counsel authored the brief in whole or in part" is ambiguous and leaves a large loophole. The ambiguity, he noted, exists in the current Supreme Court rule, and he suggested that the rule has largely been honored in the breach. Professor Struve responded that experience under the Supreme Court rule may have clarified where the proper lines are to be drawn regarding disclosure. The advisory committee, she said, had considered the matter carefully and had concluded that good faith coordination between counsel and an amicus is perfectly appropriate, as distinguished from counsel actually authoring or funding the amicus brief. The rule, she said, was designed to prevent parties from using amicus briefs to evade page limitations on the main briefs. Thus, precise line drawing may be relatively unimportant.

The Committee without objection by voice vote approved the amendments for publication, with deletion of the first "other" in the proposed Rule 29(c)(7)(C).

Informational Items

Judge Stewart reported that the advisory committee in 2003 had voted for an amendment to FED. R. APP. P. 7 (bond for costs on appeal in a civil case) that would resolve a 2-2 split among the courts of appeals and specify that attorney's fees incurred on appeal cannot be included in the "costs" to be secured. The advisory committee, though, had deferred bringing the proposal to the Standing Committee in order to bundle it with other proposed amendments.

But since that time, two additional courts of appeals have held that attorney's fees may be included in "costs." The circuit split on this question, accordingly, is now 4-2 in favor of including attorneys' fees. The proposed amendment to Rule 7, thus, now runs against the weight of circuit precedent. Therefore, Judge Stewart said, the advisory committee was reconsidering the proposal and seeking additional research on the matter.

Professor Struve explained that the proposal would have barred attorney's fees under Rule 7 because of the risk that large appeal bonds could chill meritorious appeals. She noted that there have been cases in which substantial appeal bonds have been ordered, particularly in class action cases where it was feared that certain class action objectors might bring obstructive appeals.

She said that the advisory committee would like to learn more about current law and practice, and it is seeking empirical data about the types of cases that raise attorney's fee issues, the size of appeal bonds, and whether bonds have deterred appeals from proceeding. The committee, she said, expected to receive preliminary research results at its spring 2008 meeting and might consider an amendment to the rule at its fall meeting. Among the many options for a possible amendment, she explained, would be to allow some attorney's fees, but not others, allow them only if a statute defines attorney's fees as part of "costs," or allow them only with certain specified conditions. Another option, of course, would be for the advisory committee to recommend no change in the rule. She added that the advisory committee was also considering holding a mini-conference on fees at its fall meeting.

Judge Stewart reported that the advisory committee had discussed the recent Supreme Court decision in *Bowles v. Russell* identifying as jurisdictional the time limits for filing a civil appeal. *Bowles* held that the limits set forth in FED. R. APP. P. 4(a)(6) to reopen the time to file an appeal are jurisdictional in nature because they reflect a choice made by statute. Thus, a court cannot waive the deadline based on the court-made "unique circumstances" doctrine.

Professor Struve noted that the holding in *Bowles* has implications for other deadlines set forth in FED. R. APP. P. 4 and other federal rules. Many rules, including FED. R. APP. P. 4, include some deadlines that are "statutory" and some that are not. Over the years, moreover, there have been many amendments to Rule 4 through the rule-making process that effectively changed statutorily based deadlines. The results for a litigant in a given case, if some of these time deadlines are jurisdictional, could be disastrous. The case law is developing following *Bowles*, so the advisory committee may decide to wait before taking any action. She noted, too, that the Supreme Court had granted certiorari in *John R. Sand & Gravel Co. v. United States*, 128 S.Ct. 750 (2008), a Tucker Act case that may relevant.

Judge Stewart observed that some advisory committee members believe that the problems created by *Bowles* will require a statutory response by Congress and that the rules committees lack authority to address the problem. The committee, he said, needed time to review whether the various time limits in the rules are statutorily based and whether they can be changed by rule. It might decide to take no action at this time and let the issue play out in the courts.

Judge Stewart reported that the advisory committee had considered a proposal to amend FED. R. APP. P. 4 to treat the states the same as the federal government for purposes of the extended time to take an appeal. After much discussion, there was little support in the advisory committee for the proposal. It therefore informed the Solicitor General of Virginia, who had raised the matter, that it would not take any action at this time, but the matter could be raised again in the future.

Judge Stewart noted that the advisory committee would also consider the recent decision in *Warren v. American Bankers Insurance of Florida*, 507 F.3d 1239 (10th Cir. 2007), regarding the separate document rule, and it would consider a suggestion that the prisoner mail box rule be reviewed.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Swain and Professor Morris presented the report of the advisory committee, as set out in Judge Swain's memorandum and attachments of December 11, 2007 (Agenda Item 9).

Judge Swain thanked Judge Zilly, the outgoing committee chair, for his brilliant and tireless work in shepherding the advisory committee through the enormous project of implementing the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. She also thanked Professor Morris for his outstanding service as the committee's reporter and introduced Professor Gibson as his successor. She noted that the terms of Judges Christopher Klein and Mark McFeely had expired and that Judges David Coar, Jeffrey Hopkins, and Elizabeth Perris had been appointed to the committee.

Amendments for Publication

FED. R. BANKR. P. 1007(a) and (c)

Professor Morris reported that the advisory committee was proposing two amendments to Rule 1007 (lists, schedules, statements, and other documents that a debtor must file) that would adjust deadlines for filing documents. The first would shorten from 15 days to 7 days the time for a debtor to file a list of creditors after entry of an order for relief in an involuntary case. The list is needed for the court to send notices to creditors.

The second change would extend from 45 days to 60 days the time for an individual chapter 7 debtor to file the required statement that he or she has completed a personal financial management course. He added that the bankruptcy clerk would send a notice within 45 days to remind the debtor of the 60-day deadline. The revised procedure, he said, would avoid the necessity of having to close and later reopen a case because of the debtor's failure to file the required statement.

FED. R. BANKR. P. 1019

Professor Morris explained that the proposed amendments to Rule 1019 (conversion of a case to chapter 7) would break subdivision (2) of the rule into two separate paragraphs. The existing text would become paragraph (2)(A). A new paragraph (2)(B) would be added to provide creditors and the trustee a new time period to object to a debtor's exemption claim after a case has been converted to chapter 7. Currently, creditors in chapter 11, 12, or 13 cases have no incentive to file objections because they will normally be taken care of in the debtor's plan. But if the case is later converted to chapter 7, they have lost their chance to object to exemptions. The new time period to file objections will not arise, however, if conversion to chapter 7 occurs more than one year after the first order confirming a plan, even if the plan later is modified. It also will not arise if the case had been pending previously under chapter 7 and the time to object had expired in the earlier chapter 7 case.

FED. R. BANKR. P. 4004 and 7001

Professor Morris said that the proposed amendments to Rules 4004 (grant or denial of discharge) and 7001 (scope of the Part VII rules) are related and deal with objections to discharge. Historically, objections to discharge have had to be filed as adversary proceedings. But some types of objections are essentially ministerial in nature and should not require a complaint or invoke the Part VII rules.

The advisory committee decided to allow some objections to discharge to be filed by way of motion as a contested matter, rather than by complaint as an adversary proceeding. Thus, Rule 7001(a) would be amended to provide an exception for objections to discharge based on failure of the debtor to file a statement of having completed a personal financial management course. Rule 4004(c) would be amended to include a new deadline for filing the motion objecting to a debtor's discharge. In addition, new Rule 4004(c)(4) would require the court to withhold a discharge if a chapter 13 debtor or individual chapter 11 debtor has not filed a statement of having completed a personal financial management course.

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

Informational Items

Judge Swain summarized briefly the proposed amendments published for comment in August 2007, including the package of time-computation amendments. She noted that the proposed amendment to FED. R. BANKR. P. 8001 (manner of taking appeal) would likely encounter opposition. It would extend the time to file a notice of appeal in a bankruptcy case from 10 days to 14 days. Historically, she said, the deadline for a

bankruptcy appeal has been 10 days. At one point, the rule had been changed to extend the time to 14 days, but it was soon returned back to 10 days as a result of complaints from the bankruptcy community. She noted that the committee was also seeking comment on a more radical suggestion to raise the appeal period in bankruptcy to 30 days to conform with the appeal deadline for civil cases.

Judge Swain reported that the Executive Committee of the Judicial Conference had approved Official Forms 22A, 22B, and 22C (the debtor's means test). She explained that the new forms implement a provision of the 2005 omnibus bankruptcy reform legislation requiring a debtor's general living expenses to be calculated by applying the monthly expense amounts specified in national and local standards issued by the Internal Revenue Service.

She said that the committee had been caught off guard when IRS decided to change the expense standards on October 1, 2007. The guidelines are for IRS's own use in beginning negotiations with debtors, and IRS apparently had not realized that the 2005 bankruptcy legislation had elevated them to statutory importance. She explained that, thanks to help from the Executive Office for United States Trustees and Christopher Kohn, the Justice Department's representative to the advisory committee, the committee was able to reach an agreement with IRS to postpone the effective date of the changes for bankruptcy purposes until January 1, 2008. The deferral gave the committee time to revise the forms to conform with the new IRS standards.

Judge Swain made the general observation that the advisory committee had been very active in the past few years, principally in implementing the massive new bankruptcy legislation. The members, she said, recognize that the volume of changes may be unsettling to the bench and bar. But the committee does not expect that changes in the near future will be nearly as broad or significant, absent further legislation. The respite, she said, will give the bench and bar time to absorb the changes.

She reported that the next project on the advisory committee's agenda was to modernize, rationalize, and reorder the official bankruptcy forms. She explained that the statute, rules, and forms require debtors to file a great deal of specific information about their financial condition, which is filed with the court on various schedules, statements, and lists. The forms for this purpose, she said, had been developed at different times and may contain duplication and inconsistencies. Moreover, the forms are difficult for the advisory committee to work with because the paper versions cram a great deal of information onto a page, and they often have small print and many check boxes.

She reported that the advisory committee had formed an ad hoc subcommittee to consider the content of the forms, the manner in which information is requested, how it is used, and how technology can be used to simplify and improve the flow of information. She noted that the committee would like to integrate the forms into CM/ECF, the courts'

case management and electronic files system, to take maximum advantage of present and future technological advances. She anticipated that the working phase of the project might take about 3 to 5 years and that changes in the rules and official forms might take effect in 5 to 7 years.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Kravitz and Professor Cooper presented the report of the advisory committee, as set out in Judge Kravitz's memorandum and attachments of December 17, 2007 (Agenda Item 6).

Informational Items

FED. R. CIV. P. 56

1. Explanation of the Proposed Amendments

Judge Kravitz commended Judge Michael Baylson for his outstanding accomplishments in chairing a special subcommittee to revise Rule 56 (summary judgment). He reported that the subcommittee had focused on summary judgment practice in the district courts and had reviewed the local court rules of each district court. It had conducted two very productive mini-conferences with a cross-section of lawyers from large and small firms, judges, and law professors. The subcommittee, he explained, was proposing a complete restructuring of Rule 56. The advisory committee had not yet considered a final proposal, but planned to do so at its April 2008 meeting, with an eye to submitting a proposal for publication to the Standing Committee in June 2008.

Judge Kravitz noted that Rule 56 had not been changed significantly since 1963, and current practice in the courts bears no relationship to the text of the national rule. Summary judgment procedure, essentially, is governed by a myriad of local rules that are inconsistent with each other. He pointed out, moreover, that partial summary judgment is granted regularly by the courts, but is not even mentioned in the rule. The national rule, he said, should reflect this feature of summary judgment practice.

Judge Kravitz emphasized that the advisory committee had agreed not to change the substance of the standard for summary judgment, and it has also worked hard to assure that any amendments to the rule are not tilted towards either plaintiffs or defendants. Professor Cooper explained that the intent of the proposed amendments is to accept unchanged the standard for summary judgment drawn from the Supreme Court's 1986 *Celotex* trilogy, and not to attempt to articulate it. The burdens on the moving party are closely related to the standard, so the draft does not specify them directly.

Professor Cooper pointed out that subdivision (a) of the new rule moves up to the beginning of the rule the basic proposition that a court may grant summary judgment. This improves the flow of the rule and is similar to FED. R. CIV. P. 50 (judgment as a matter of law), which also starts with a statement of the court's authority. Subdivision (a) also adds the new proposition that the court must state the reasons for granting the motion, and it should state the reasons for denying the motion.

The principal procedural innovation in the subcommittee's proposed rule, found in subdivision (c), is to require a party moving for summary judgment to file a statement of those material facts that it asserts are not genuinely in dispute and entitle it to summary judgment. The statement must be in separate numbered paragraphs and contain citations to the record. The opponent of the motion must then respond paragraph by paragraph to those assertions. Subdivision (e) addresses what the court may do if the parties do not comply with subdivision (c). The rule, he explained, is a default rule that will work well in most cases, but there are some cases, especially complex cases, in which a court will want to order a different procedure.

This statement-and-response procedure, he said, is currently in wide use in the district courts. The subcommittee, he added, was continuing to improve the language of the draft in light of suggestions and criticisms raised at the mini-conferences and elsewhere. In addition, he said, the Federal Judicial Center had conducted excellent research for the subcommittee to identify how this type of procedure affects summary judgment practice in the courts now using it. In doing so, the Center measured such matters as the number of motions filed, disposition times, and outcomes.

Judge Kravitz asked the Standing Committee to consider some important threshold policy questions: (1) whether there should be a national summary judgment rule at all; (2) what that rule should specify; and (3) whether summary judgment should continue to be left to local preferences. Lawyers, he said, complain that they have to deal with very different practices among the courts and among judges. He suggested that a national judicial system should not have radically different procedures from district to district in such an important area of civil litigation as summary judgment.

With regard to the content of a rule, he said that many courts require the parties to file statements of uncontested facts. He noted, though, that there have been criticisms of the procedure and anecdotes of bloated, lengthy statements of undisputed facts that are burdensome and expensive to respond to. The subcommittee, he said, had worked hard to craft a rule that would make the statements more concise and meaningful and sharpen the focus of the issues for the court to decide. It would also allow parties to accept facts as undisputed for purposes of the motion only, and not for trial. Requiring specific citations to admissible evidence is another way that the rule attempts to discipline the practice. The subcommittee, he said, was continuing to wrestle with several remaining issues, such as the appropriate remedies for noncompliance with the rule.

Mr. Cecil reported that the Federal Judicial Center's research had examined summary judgment practices in the district courts. He pointed out that 20 districts require a moving party to file a statement of uncontested facts and the other party to respond in kind. Another 36 districts require a statement from the movant, but not a point-by-point response. The remaining 36 districts studied do not require statements.

The Center, he said, had compared the three groups and generally found no measurable differences among them except in two areas. The numbers seemed to indicate that in those districts that have local rules akin to the subcommittee's proposed rule, it takes longer to resolve summary judgment motions. The researchers, though, doubt that the result can be attributed to local procedure, but rather to other factors such as a court's overall caseload. It also appeared from the research that more employment discrimination cases are terminated by summary judgment in the districts that use the proposed rule, as compared to those that do not. Mr. Cecil added that these two preliminary findings would be explored further.

Judge Kravitz observed that revision of Rule 56 will affect the entire legal community. It has been suggested, he said, that the greatest potential opposition to change will come from judges whose own local practice differs from the proposed national rule.

Judge Kravitz explained that a judge may change the proposed procedure in a particular case, but a court may not adopt a local rule or standing order opting out of the national rule. Nor may an individual judge do so with a standing order.

2. Comments and Suggestions from Committee Members

A member observed that some judges issue the same pretrial order in every case. While not technically a standing order, the practice is the functional equivalent of issuing a standing order. Professor Cooper explained that the rule defers to a judge's preferences in this situation. A major problem with standing orders, he said, is that they are difficult for practitioners to find, and there are real concerns as to whether practitioners actually receive adequate notice of the content of standing orders. But if a judge issues the same order in every case, notice is not a problem because the parties actually receive specific notice. Judge Kravitz added that the intent and spirit of the proposal is not to allow an individual judge to opt out of the national rule in every case. It might be appropriate, though, for a judge to have special procedures for certain categories of cases, such as patent cases.

A member objected that blanket opt-outs would clearly be contrary to the spirit of the proposal, although nothing in the rule would effectively prevent a judge from doing so. He suggested strengthening the language to specify that a judge may opt out only by an order "in an individual case." Judge Kravitz agreed to convey the suggestion back to the advisory committee. Another member disagreed, though, and argued that district judges should have the authority to issue orders opting out of the proposed default procedure in all their cases.

Judge Kravitz stated that some judges believe that the subcommittee proposal is a bad idea and will make lawyers do useless work. They are the judges who will likely opt out of the default rule in all cases. Nevertheless, he said, the rule has to give judges authority to opt out in appropriate cases, but not to opt out entirely from the national statement-and-response procedure in all cases. Some members predicted that, even under the proposed rule, there will continue to be substantial local experimentation and variations in handling summary judgment motions.

A member reported that the California state courts have used the statement-and-response requirement successfully and predicted that it will be well received in the federal courts. It will promote uniformity while allowing appropriate local flexibility. But the opt-out language should allow judges greater flexibility because there may be a need for variations in certain types of cases that the committee cannot currently anticipate. Flexibility, moreover, will make it easier for judges to accept the new rule.

Judge Kravitz added that the lawyers at the mini-conferences, drawn from all parts of the legal spectrum, were supportive of the proposed rule.

A participant recommended placing the concept of judgment as a matter of law at the beginning of the proposed rule in order to highlight the relationship of summary judgment to a directed verdict at trial or a judgment n.o.v. In essence, a court should

consider a summary judgment motion as a motion for a directed verdict. Integration of the two should be made closer. But there was an objection that this approach would encourage mini-trials.

Judge Kravitz explained that the proposed rule states as a default that summary judgment motions may be filed at any time up to 30 days after the end of discovery. A judge, though, normally fixes the time for filing summary judgment motions in each case at the initial Rule 16 pretrial conference.

A member stated that litigants are increasingly frustrated by the costs of discovery and are becoming increasingly disgruntled with requests for admissions and inadequate responses to interrogatories. One way that a party can force movement in a case is by filing a motion for summary judgment. A defendant, thus, may file a "no evidence" motion for summary judgment in order to obtain cheap discovery from the other side about the evidence supporting its claims. Therefore, the rule might specify that a party may not file a "no evidence" motion for summary judgment until there has been some discovery.

Judge Kravitz responded that judges discuss these matters at pretrial conferences and may permit summary judgment motions to be filed at a later date. The proposed rule, he emphasized, is only a default provision designed to provide guidance to bench and bar. A court may change the time deadline by local rule. This is the only place in the rule where a court may change the national rule by local rule.

Professor Cooper explained that the subcommittee was of the view that it would be better not to set a time limit *before* which a party may not file a summary judgment motion. Rather, the rule sets a presumptive time-limit *after* which a party may not file. He said that this mechanism would work well in most cases.

A participant observed that great differences exist between preemptive summary judgment motions filed at the outset of a case and those filed after discovery, and the two may merit different procedures. Judge Kravitz noted, though, that in both situations there is benefit in having the movants state the uncontested facts. In the case of an early summary judgment motion, though, the opposing party may not be able to respond without being given additional time.

Judge Kravitz pointed out that proposed Rule 56(a) carries over the language of the current, restyled rule, which specifies that a court "should" grant summary judgment if there is no genuine dispute as to material facts and the moving party is entitled to judgment as a matter of law. Before the restyling of the civil rules, FED. R. CIV P. 56 had specified that the court "shall" grant summary judgment. He noted that civil defense lawyers have argued that a court should not have discretion to deny summary judgment

when a party is entitled to it. Therefore, the word "should" should have been replaced with "must" during the restyling process.

Judge Kravitz explained that the subcommittee had simply retained the current, restyled language "should" to emphasize that it was making no substantive changes in the standard for summary judgment. Moreover, in restyling the rule, the committee chose "should" over "must" because there was some case law that had interpreted the word "shall" to give courts discretion to deny a well-founded summary judgment motion in appropriate circumstances.

A member insisted that the cases interpreting "shall" to mean "should" were wrong and inconsistent with the Supreme Court's ruling in *Celotex v. Catrett*, 477 U.S. 317 (1986). If the summary judgment standard is met, he said, the movant is "entitled" to summary judgment and "must" be granted it. The restyling decision to use "should" was wrong, he said, and the second sentence of the proposed new Rule 56(a), he added, is logically incoherent. How can a movant be "entitled" to summary judgment if the judge is permitted to deny it?

The reality, he suggested, is that some district judges prefer to go to trial rather than decide summary judgment motions. In doing so, they impose unfair expenses on defendants. He also suggested that the proposed rule is inconsistent because it states that a court "must" give reasons for granting summary judgment, but only "should" give reasons if it denies it. All in all, the message delivered by the new rule is a preference in favor of denying summary judgment. Instead, the rule should require the court to state reasons in both situations.

Judge Kravitz observed that these points have been echoed by others. The subcommittee, though, believed that the current language would save judges time because some summary judgment motions may be denied with little explanation. The sentiment on the subcommittee, he said, was to give judges some latitude in denying the motions.

Judge Kravitz added that changing "should" to "must" in Rule 56(a) would be inconsistent with circuit law. He cited situations in which it simply makes more sense to proceed to trial even though summary judgment may be justified. He also suggested that there might be some alternative formulation that would avoid the language problem altogether, such as by leaving the matter to existing circuit standards.

Professor Cooper explained that the word "may" had been used in the advisory committee's 1992 draft amendments to Rule 56. The committee concluded, however, that "may" was too weak and that "should" would carry more hortatory force. On the other hand, it rejected "must" or "shall" as too strong. The concept that the committee would like to convey is "shall, if practicable," but it is difficult to encapsulate in rule language. In addition,

he noted, it is not the same thing to use the word "must" for partial summary judgment as for complete summary judgment.

A member agreed that it makes sense to distinguish between partial and complete summary judgment. But if "must" is used, the committee would have to consider how it could be enforced. There is little that a court of appeals can do about violations of the rule, except perhaps in limited circumstances. The committee should not include language in the rule that would be unenforceable.

A member expressed a preference to retain "should," noting that there are many gray areas in litigation, and it makes sense in certain situations for a trial judge to go ahead and try a case rather than grant summary judgment. Maintaining the difference between "must" and "should" with regard to the judge giving reasons for granting or denying summary judgment makes perfect sense. A judge "must" state the reasons for granting summary judgment because the court of appeals needs to be able to review the reasons. But if the judge denies summary judgment, the ruling is not appealable in most cases, so there is no reason for specifying that the judge "must" state reasons.

Another member stated that it is very useful to the court of appeals for a district judge to write a detailed opinion when granting summary judgment, but wondered whether it should be required by the national rule. It would be better to leave it up to the respective courts of appeals to decide what supporting text is required for a trial court's decision. The rule might better specify that a judge "should" give reasons both for granting and denying summary judgment. This would avoid litigation over whether a district judge's statement of reasons is adequate.

A member cautioned that practitioners will view "should" in Rule 56(a) as a retreat from "shall." For that reason, the committee note should explain that no change in the law is intended. Another member stated a preference for "must" and suggested that part of the problem is that some practitioners move for summary judgment too often. The proper remedy, though, is to encourage courts to take action against lawyers who file needless motions.

Judge Kravitz reiterated that the language used in the subcommittee's draft rule – "should" – is the same as the current Rule 56. The committee, he said, has no intention of excusing judges from granting summary judgment when they should do so. The draft committee note is clearer on the point than the text of the rule, and it might be refined further.

A participant explained that the restyled rules had eliminated the word "shall" throughout the rules because it is a vague and ambiguous term interpreted in different ways. Instead, the restyled rules use the terms "may," "should," and "must" as a continuum from the most judicial discretion to the least. The committee, he noted, had used these terms consistently, and the draft rule conforms with current usage and committee practice. "May"

and "must" are clear terms, he said, but "should" is inherently more difficult to apply. It means that generally a judge or party must do something, but has some discretion not to do so in an unusual case.

A participant stated that trial judges must have flexibility to manage their caseload and suggested that the committee abandon both "should" and "must" and consider a formulation such as "granting the motion is appropriate," or "granting the motion is warranted." The committee note could explain that the revised rule does not change existing law on when summary judgment should be granted. Another participant agreed and suggested using language along the lines of: "Summary judgment is appropriate when . . . ." This would be similar to the formulation used in the Federal Rules of Evidence that "evidence is admissible when . . . ."

Professor Cooper reiterated that "should" is used in the current Rule 56, and the subcommittee had stuck with the existing language to emphasize that the proposal will not change the standard for summary judgment. Nonetheless, some lawyers apparently fear erosion of a moving party's entitlement to summary judgment.

A member objected that judges who decline to grant summary judgment when it should be granted do more than merely impose unnecessary costs for defendants. They also change the decision maker in the case, judge or jury. This is a matter of great importance to lawyers. Defense lawyers, for example, ask first whether a complaint will survive a motion for summary judgment. If it, in fact, survives summary judgment, they fear the unpredictability of a jury, especially if the case involves an unattractive defendant. So if a summary judgment motion is denied, the case will likely settle.

Judge Kravitz reported that in his own district, the statistics do not bear out the notion that juries favor plaintiffs. He said that he had held that view himself when he was a practitioner, but the numbers demonstrate that it is a myth in his district.

Judge Kravitz asserted that a consensus had clearly developed that there is a need to revise Rule 56. In addition, there seems to be a consensus supporting the subcommittee's proposed statement-and-response procedure. The only debate, he said, appears to be over the details of what the revised national rule should specify. Suggestions that he thought would be useful to bring back to the advisory committee include: (1) drafting a better formulation for the "should" vs. "must" language; (2) revising the committee note to explain more precisely what the committee is trying to do; and (3) examining circuit case law on the scope of a trial judge's discretion to grant or deny summary judgment.

Professor Coquillette emphasized that the Rules Enabling Act specifies that the rules committees are charged with maintaining consistency in the federal rules of procedure. But, he pointed out, Rule 56, as currently applied in the district courts, does not result in any consistent national practice. Judge Rosenthal added that the Federal Judicial Center's

research had not addressed the practices of individual judges. She noted, though, that some judges use the proposed statement-and-response procedure even in districts that do not require it by local rule.

Judge Kravitz reported that lawyers have recommended that the rule specify how an attorney should present the common argument to the court that the movant is entitled to summary judgment because the claimant lacks facts to prevail on the merits of its claim. In addition, attorneys have reported that they often file motions to strike materials on the grounds that they are not admissible in evidence. Accordingly, he reported, the subcommittee had built into the proposed rule the ability of a moving party to assert that the claimant has no facts to support its claim. And proposed Rule 56(c)(2)(B)(ii) specifies that a moving party may state that the materials cited by the claimant to support a fact are not admissible in evidence. The provision is intended to obviate a need for a party to file a motion to strike.

Professor Cooper explained that proposed Rule 56(e) gives a judge several options when a response or reply does not comply with the rule or there is no response at all. First, the judge may give the respondent another opportunity to respond properly. Second, the judge may consider a fact accepted for purposes of the summary judgment motion. Third, the judge may grant summary judgment if the motion and the supporting materials show that the movant is entitled to it. Fourth, the judge may "issue any other appropriate order." The subcommittee, he said, had rejected the unstated alternative of permitting a court to grant summary judgment by default if a party fails to respond – without regard to what the motion and supporting materials might show.

Professor Cooper reported that lawyers at the recent mini-conferences had asked for guidance on what a court should do if a summary judgment motion itself is defective. But, he said, the subcommittee had decided that it was not worth addressing the matter in the rule because judges already have a great deal of experience in dealing with deficient filings. Judge Kravitz added that the rule deals only with nonconforming responses, but noted that plaintiffs' lawyers might perceive it as tilting towards defendants. Therefore, he suggested that the committee might want to add language, though not really needed, to defuse the suspicion, such as by specifying that Rule 56(e) applies to a nonconforming "motion," as well as to a nonconforming "response or reply."

A member noted that his circuit requires a district judge to examine the facts, even when there is no response. Often, a movant is wrong on the facts and not entitled to relief. There are many cases, moreover, where even if the facts were admitted, the movant would still not be entitled to summary judgment.

Professor Cooper stated that a number of local rules specify that if there is no response, the court may accept the facts and grant relief. Under the draft rule, however, the court must still consider all the materials submitted by the movant to establish entitlement and then decide on the record that there are no genuine disputes and that relief is appropriate. On

the other hand, if a fact is deemed admitted, the judge has no independent obligation to search through the record to discover whether the fact might be controverted.

Judge Kravitz explained that the proposed rule requires a movant to cite to particular parts of materials in the record to support the facts that it argues are undisputed. By way of example, he suggested that if a motion were to state that a traffic light was green, but the cited portion of the record actually showed that the light was red, the movant's assertion that it was green cannot be "deemed admitted" by the court. On the other hand, if the cited portion of the record were to demonstrate that the light was green, the court need not search elsewhere in the record to see whether there may be anything to contradict the assertion.

A member agreed strongly and explained that it was common for judges to examine those portions of the record cited by movants in support of facts, only to find that they are nothing more than a party's own statements or opinions and not entitled to much weight. Thus, the rule must give the court discretion to deny summary judgment, even without a response, if the cited portions of the record simply do not make the case for summary judgment.

Judge Kravitz agreed that the rule must give a judge discretion to deem a fact admitted, and that is what the advisory committee had tried to accomplish in proposed Rule 56(e). He explained that many circuits require a judge or movant to send a special notice reminding pro se litigants that if they do not respond, facts may be admitted by the court. A member expressed strong approval of the provision as drafted and said that it would give the court appropriate tools and also defer to circuit law. If a party does not comply with the rule, the court must have discretion to do the right thing under the circumstances.

Some members questioned the relationship between subdivisions (a) and (g) of the proposed rule. The language of Rule 56(g) – "if summary judgment is not granted on the whole action" – appears to be inconsistent with the statement in Rule 56(a) that a party may move for summary judgment in whole or in part. It was generally agreed that the two provisions needed to be reconciled. In addition, subdivision (a) states that the court "should" grant summary judgment – presumably in whole or in part – if the movant makes the necessary showing. But subdivision (g) states that the court "may" grant partial summary judgment. It is not clear why there should be different standards for partial and total summary judgment. Perhaps Rule 56(g) should state that the court "should" grant partial summary judgment in order to track the language of Rule 56(a). But other members objected that the standard should be different for partial summary judgment.

Judge Kravitz reiterated that the committee was simply trying to carry through the existing standards for summary judgment. He agreed, though, that the committee needed to look more closely at the interrelationship between the two provisions.

A member stated that it seemed odd that proposed Rule 56(f) contemplates a judge acting in the absence of a motion for summary judgment. In an adversary system, it would be better for the court to invite a motion. Professor Cooper said that he did not recall the advisory committee having discussed this question explicitly. The focus of the provision, he said, was on the notice that a court must give when neither party moves for summary judgment, but the court believes that it may be warranted. Judge Kravitz added that Rule 56(f) only says that *sua sponte* summary judgment is permissible as long as the court provides notice and an opportunity to be heard.

Some members agreed that a judge should not have to invite a party to make a motion, but it makes little difference as a practical matter. If a judge invites a motion for summary judgment, a party will file one.

A participant asked whether the committee had contemplated requiring the court's notice that it is considering summary judgment *sua sponte* to be reflected on the record for the benefit of the court of appeals. Judge Kravitz suggested that the rule might provide for "notice on the record."

Judge Kravitz reported that the proposed rule does not address cost shifting directly, but the advisory committee would continue to examine the subject. At the last mini-conference with the bar, he said, a number of defense lawyers stated that they would like to have the court impose fees when a party's opposition to a summary judgment motion is made without any objective, reasonable basis, even though not necessarily in bad faith. But, he added, the subcommittee had decided not to incorporate fee-shifting in the rule expressly. Professor Cooper added that there was a great deal of concern by subcommittee members over the sensitivity of cost-shifting. A proposal to allow it explicitly would be viewed with considerable alarm by plaintiffs.

A participant noted that the rules already contain several cost-shifting provisions, and all pose essentially the same problems. He suggested that the committee examine all the provisions and craft a single cost-shifting provision to replace them all. Professor Cooper noted that there are also cost-shifting provisions in statutes, and it would be difficult to harmonize them all.

A member stated that FED. R. CIV. P. 11 sanctions should be sufficient to handle the cost-shifting issue. Making a plaintiff pay the costs will not have much practical impact because many plaintiffs are judgment-proof, and the existing cost-shifting provisions are not used very often.

Judge Rosenthal requested the participants to send any further thoughts on Rule 56 to Professor Cooper and Judge Kravitz. Professor Cooper added that the advisory committee would much rather hear concerns and issues now, rather than at the June 2008 Standing Committee meeting. A participant noted that the work on Rule 56 will also impact many of

the state courts, and it should be of help to them as they revise their own summary judgment rules and procedures.

FED. R. CIV. P. 26

1. Explanation of the Proposed Amendments

Judge Kravitz reported that the committee had been working for a couple of years on expert witness issues. An ad hoc subcommittee chaired by Judge David Campbell, he said, had conducted several conferences and meetings that focused largely on three issues:

(1) whether non-retained experts, such as treating physicians, in-house employees, and law-enforcement officers, should be required to provide a report under Rule 26(a)(2)(B);
(2) whether drafts of experts' reports and communications between lawyers and retained experts should be subject to discovery; and
(3) whether communications between lawyers and retained experts waived work-product protections..

Judge Kravitz noted that the American Bar Association had adopted a resolution urging that federal and state discovery rules be amended to prohibit the discovery of draft expert reports and attorney-expert communications. He said that three principal reasons support amending Rule 26 (disclosures and discovery) to restrict discovery.

> First, sophisticated lawyers regularly opt out of the current rule by mutual agreement not to inquire into lawyer-expert communications or drafts of experts' reports.
>
> Second, good lawyers have expressed unease and discomfort over the way that they have to deal with experts under the current rule. They have to be careful in what they write and say to their experts, and they warn their experts not to write things down or prepare drafts. When they can afford it, parties even resort to retaining two sets of experts, one for consultation and one for testimony – because under the rule there is no discovery of communications of the former.
>
> Third, there is general agreement among lawyers that discovery under the current rule produces a great deal of cost and effort without attaining any corresponding benefits. In short, he said, the focus should be on the substance of an expert's testimony, not on marginal issues surrounding the process of preparing the expert's reports.

Judge Kravitz said that the 1993 amendments to Rule 26 had produced unintended consequences. Virtually all lawyers that he has spoken with believe that changes in the rule are needed because there is too much games-playing and unnecessary expense under the current regime.

That being said, however, he added that drafting the proposed rule amendments was proving much more difficult than the subcommittee had expected. Appropriate line-drawing has proven tricky, and the advisory committee, he said, had not yet approved the final text of the proposed amendments. The suggested rule in the agenda book, he explained, was just for discussion purposes at this point. But, he added, Judge Campbell's subcommittee was unanimous in concluding that the drafts of expert witnesses should not be discoverable unless a party can prove a need for them under the work-product standard. As for communications with counsel, the subcommittee concluded that lawyers should be able to speak with an expert without those communications being subject to discovery.

Under the Rules Enabling Act, he noted, the rule-making process cannot create privileges. But it may provide protection for drafts of experts' reports and attorney-expert communications under the work-product rule, as was the case before the 1993 amendments to Rule 26.

The committee, moreover, cannot ignore the impact on the discovery process of the admissibility of drafts and communications at trial. It would not be productive, he suggested, for the committee's revised rule to prevent discovery of certain matters in the discovery process, only to have them inquired into at trial. The standard of protection, he suggested, should be the same for both discovery and trial. Otherwise, the artificial practices that the committee was seeking to minimize will continue. This issue, he said, would be addressed in the committee note.

2. Disclosure of the Proposed Testimony of Non-Retained Experts

Judge Kravitz asked whether the members had any concerns about the portion of the proposed amendments that would require a new, simpler form of disclosure from non-retained experts, such as treating doctors, who are now exempt from the requirement that they file a full expert report.

A member questioned the advisability of creating another category of report that lawyers will have to prepare and asked how big a problem the current rule's exemption of certain witnesses from the report requirement really has been. He explained that he simply deposes the treating doctor in every case and does not need a report.

Judge Kravitz explained that the committee envisions not a "report," but just a disclosure. At present, a treating doctor may testify on matters dealing with causation or prognosis at trial, and the lawyer for the other side objects that the doctor is offering expert

testimony without having filed an expert report. The case law, he said, is not uniform on the subject. Moreover, most treating doctors simply will not write a report. But, as a matter of fundamental fairness, some sort of disclosure should be required to notify the other party of the subject of the proposed testimony.

Members suggested that if the requirement is merely for a simple disclosure, and not a full "report," it would be far less costly. One expressed support for the concept of some sort of disclosure, but objected to the language of the proposed Rule 26(a)(2)(A)(ii) that would require the disclosure to state "the substance of the facts and opinions to which the witness is expected to testify." He said that the other side only needs to know what opinions the expert will express, not the "facts."

Members recommended including specific language in the rule to clarify the status of "mixed" or "hybrid" witnesses. They are mostly fact witnesses, but they also offer expert opinions. Lawyers argue frequently in court as to how much of the testimony is fact and how much is expert opinion. The real question, it was suggested, is how much disclosure should be made to the other party in advance, especially of witnesses who give both fact and expert opinion testimony. One member suggested that disclosure is not needed of all "facts and opinions." Another suggested that the proposed wording, "the substance of the facts and opinions," is too ambiguous, for it could mean either a brief summary or greater detail.

Judge Kravitz stated that there is a need for some sort of disclosure of the substance of a non-retained expert's proposed testimony, but not as much disclosure as in the case of a retained expert. He agreed that the committee should make the text of proposed Rule 26(a)(2)(A) clearer, and the rule and note should state more precisely what is required in the disclosure.

A participant observed that the rules already contain several different formulas for disclosure, and another is not needed. It would be better to refer to an existing standard in the rules and state, for example, that "a Rule 26(a) disclosure should be made." The Evidence Rules divide witnesses into two specific categories – fact witnesses and expert witnesses. But in fact, almost all witnesses fall into both categories. Perhaps the Evidence Rules should create a new category of witness that recognizes both aspects of their testimony.

A member suggested that one way to clarify the scope of the required disclosure would be to state that the lawyer's disclosure, plus any other materials the lawyer provides, must be sufficient to provide "notice" to the other side.

3. Protecting Drafts of Expert Reports and Attorney-Expert Communications

Judge Kravitz noted that it was important to reduce costs by providing protection for expert drafts and communications. The rule, however, should not create new litigation and

should not put out of bounds matters that lawyers should be able to discover. Professor Cooper suggested that it might be helpful to change the requirement in Rule 26(a)(2)(B) from "data or other information considered" to "facts or data considered."

Judge Kravitz said that the subcommittee had decided to treat an expert's draft reports as protected by the work-product doctrine. Thus, a party could obtain expert draft reports only if it were able to establish a need and hardship. He added that there had been initial enthusiasm in the subcommittee to specify that a party must make the work-product showing of need and hardship in order to discover attorney-expert communications bearing on the opinions to be expressed by the expert. This requirement, for example, is set forth in the New Jersey rule, which protects from disclosure the collaborative process between attorney and expert. The expert is, in effect, treated as part of the lawyer's work product.

But the subcommittee became increasingly concerned that the proposal would make it impossible to ask an expert about certain matters that legitimately should be discoverable. Therefore, it has attempted to draft a rule that makes fine distinctions and protects, as work product, all attorney-expert communications other than those that address the opinions that the expert will express. The subcommittee, he said, has struggled with the distinction and found it difficult to draft. Accordingly, it would welcome any input that Standing Committee members might have about how far the protection of attorney-expert communications should extend.

A member stated that the approach embodied in the New Jersey rule is excellent and would save time and money. Under that rule, both sides enjoy the same protections. He noted that in all the cases he litigates, he seeks an agreement with his opponent to establish this very regime, *i.e.*, agreeing that expert-witness drafts and attorney-expert communications will not be discoverable. A party may inquire into whatever an expert witness actually did or did not do. But their draft reports and communications with attorneys regarding the development of their report and opinions are not discoverable.

A member predicted that if the rule does not protect attorney-expert communications, lawyers will simply opt out of it by agreement. The rule, moreover, must make the protection against discovery airtight. Otherwise, parties with means will continue to hire two sets of experts, one for consulting and one for testifying.

A member pointed out that if the committee were to limit what may be inquired into at trial, not just in discovery, the limits would have to be different in civil cases and criminal cases. A criminal defendant is entitled to ask an expert witness in a criminal case what the prosecutor has told the expert. That testimony simply cannot be limited, other than on grounds of relevancy and privilege. Similarly, in a criminal trial, an expert's drafts and notes must be turned over to the defendants under 18 U.S.C. § 3500. Normally, civil discovery is broader than criminal discovery, but in this particular context, civil discovery would be narrower than criminal.

Judge Kravitz noted that the advisory committee had considered inserting language in the committee note to address preserving the discovery protections at trial. The assumption has been that matters protected by work product for purposes of discovery should also be protected for purposes of trial. The committee, though, does not address the matter in the text of the rule itself.

A member acknowledged that this is a difficult area to address in a rule, but argued that the contemplated changes are essential and should be pursued. He emphasized that attorney-expert communications need protection and reported that he tries to reach opt-out agreements with counsel in all cases. But, he said, counsel must be allowed to inquire into certain communications, such as: (1) what an expert witness had been told to do, or not to do; (2) what were the lawyer's instructions to the expert; and (3) what set of facts the expert was told to assume.

Judge Kravitz agreed that a party should always be able to inquire into what set of facts the expert was told by the lawyer to assume. He acknowledged that a rule that places certain matters out of bounds for discovery purposes will result in lawyers obtaining less information. Therefore, the committee must be confident that the compensating benefits of a proposed rule outweigh the limitations. The line that the draft rule draws, moreover, must be clear in order to avoid endless litigation. He added that the New Jersey lawyers had informed the subcommittee that they are perfectly capable of attacking opposing expert witnesses without having to discover their communications with lawyers.

Members agreed that a jury is entitled to know what instructions a lawyer has given an expert and what prompted the expert to use one approach rather than another. The jury should know whether a witness is a hired gun and draw whatever conclusions it can from that fact. One member argued strongly that discovery of some attorney-expert communications is essential and expressed skepticism that lawyers will favor changes in Rule 26 that limit their scope of inquiry. Judge Kravitz responded that lawyers of all kinds have told the committee that they favor a change in the rule along the lines proposed by the subcommittee. Among other things, they complain that they simply cannot afford to hire two sets of experts and are looking to the committee for relief.

A member noted that one fear about giving greater protection to attorney-expert communications is that lawyers will be prevented in the discovery process from uncovering abuses. But, he observed, lawyers do not learn about abuses now, even with all the cost and time now expended on discovery fights over communications.

A member stated that the rules in New Jersey and Massachusetts that protect attorney-expert communications apparently work very well and enjoy wide bar support. But it would be good to know whether other states follow similar models. There could be problems if the federal rules were to proceed in a direction sharply different from most of the states. An

alternative approach might be to leave the current rule in place, but to add a sentence stating that nothing in this rule precludes a stipulation by the parties to the contrary.

A member argued for a complete ban on inquiry into attorney-expert communications, with one or two narrow exceptions along the lines discussed by the committee. Others agreed and suggested that an opponent should be able to ask an expert only such limited questions as who hired the expert, who paid the expert, and whether the expert had been paid to do any earlier work for the law firm.

A member added that the committee should be careful to make it clear that the rule addresses only discovery and that the situation at trial may be different. The opposition may not inquire into certain matters during the discovery process, but is not necessarily precluded from asking about them at trial.

4. Next Steps for the Advisory Committee

Judge Kravitz asked for a sense of the Standing Committee as to whether the advisory committee should continue with its efforts to draft amendments to Rule 26. In addition, he asked for the Standing Committee's advice on whether the rule should: (1) draw a fine line delineating which attorney-expert communications are discoverable and which are not; or (2) simply impose a complete ban on the discovery of attorney-expert communications.

The committee took a straw poll and agreed unanimously to encourage the advisory committee to continue working on amendments to Rule 26. On a second straw vote, it agreed, with one dissent, that the advisory committee should continue in its current direction on the proposed amendments. Judge Rosenthal observed that the debate had illustrated the eternal trade-off between clarity and nuance. The present rule, she noted, is very simple and requires the turnover of drafts and communications. It clearly needs refinement, but without a loss of clarity.

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 attachments of December 12, 2007 (Agenda Item 7).

Amendments for Publication

FED. R. CRIM. P. 5, 12.3, and 21

Judge Tallman reported that in June 2007 the Standing Committee had approved for publication several rule amendments to implement the Crime Victims' Rights Act. Since that time, the advisory committee has continued to review the rules to determine whether additional amendments are needed. As a result of that review, it was now seeking approval to publish three more rule amendments dealing with victims' rights.

The change to FED. R. CRIM. P. 5 (initial appearance) would make it clear that a court must take the impact of the defendant's release on the safety of the victim into account in determining whether to detain or release the defendant.

The proposed amendment to FED. R. CRIM. P. 12.3 (notice of public-authority defense) would specify that a victim's address and phone number not be given automatically to a defendant who raises a public-authority defense. Rather, the defendant must make a showing of need before the court may release the information. The amendment would also give a court authority to fashion reasonable procedures to meet the defendant's need without risking danger to the victim. The amendment, Judge Tallman said, is a conforming change similar to the amendment that the committee has made to Rule 12.1 (notice of alibi defense), which will take effect on December 1, 2008.

The proposed amendment to Rule 21 (transfer for trial) would require a court to consider the convenience of victims, in addition to the convenience of parties and witnesses, in determining whether to transfer proceedings to another district.

Professor Beale explained that when the advisory committee had considered the original package of rule amendments to implement the Crime Victims' Rights Act, serious questions had been raised as to whether protections already specified in the Act should be repeated in the rules. She noted that this is a continuing and recurring policy question, *i.e.,* whether self-executing statutory provisions should be repeated in the rules. The issue, she said, is raised by all three proposed amendments.

Professor Beale noted that if a statutory protection is not picked up in the rules, advocates will argue that the courts are not doing all they can to protect victims. That perception is unacceptable, she said, because one of the purposes of the framers of the Act

was to make courts and lawyers more sensitive to the needs of victims. She noted, by way of example, that the Act specifies that a court must consider protection of victims when it sets bail for a defendant. Therefore, it can be argued that the proposed amendment to Rule 5 is superfluous. Nevertheless, repeating the statutory directive at the appropriate point in the rules underscores the Judiciary's commitment to protecting victims. The advisory committee, she said, has been attempting to tread a fine line by not repeating all the various provisions of the Crime Victims' Rights Act in the rules, but including some key, sensitive requirements.

With regard to the proposed amendment to FED. R. CRIM. P. 5, a member pointed out that the Bail Reform Act sets forth a number of factors, other than the right of a victim to be reasonably protected, that the court must consider in determining the release of the defendant. He questioned whether the proposed amendment tilts the playing field by specifying only this one factor – protection of the victim – in the rules to the exclusion of all the other statutory factors. Professor Beale responded that the amendment may arguably tilt the playing field a bit, but the committee could not repeat all the statutory factors in the rule. Again, making a single exception to protect victims is appropriate and demonstrates the concern of the courts to protect victims. Some members suggested language that might be inserted in the text to reflect that victims' rights are among several factors specified in the statute.

A member suggested leaving the rule text alone and simply mentioning a victim's rights in the committee note. But Professor Beale replied that it would be better to include the matter in the text of the rule, where it will have more impact.

A member observed that the proposed amendment to Rule 21 states that a court must consider the convenience of victims only when the defendant makes a motion to transfer. But the court should consider the convenience of victims in all cases, whether or not the defendant makes a motion. Professor Beale attributed the proposed language to the structure of the rule. The prosecutor initiates proceedings in the district in which the case will be prosecuted. Then the defendant moves to change the location. Judge Tallman suggested that the language could be changed to specify that the court consider the convenience of victims in considering a transfer.

Professor Beale raised the possibility of changing the language from "for the convenience of the parties, any victim, and the witnesses" to "after considering the convenience of the parties, any victim, and the witnesses, the court may . . . ." A member suggested expanding the rule to two sentences. Judge Rosenthal agreed that the language should be refined, and she suggested that the Standing Committee approve the amendment for publication subject to drafting changes by the chair and reporter of the advisory committee that take into account the comments of Standing Committee members.

A member asked what happens under proposed Rule 12.3 once a defendant makes the required showing of need for personal information about the victim. He asked whether the advisory committee had considered requiring that notice be provided to the victim before the court orders the government to turn over the personal information. Since the intent of the proposed amendment is to protect victims, they should be notified as to what is happening. Although prosecutors normally do notify victims of requests for information, it does not happen in every case. Others agreed that victims should be notified immediately when a request for information is first made.

Mr. Tenpas expressed concern that any amendment to the rules that would require the Department of Justice to notify victims might create liability for the Department if it failed to notify a victim in a particular case. A prosecutor's failure to follow a federal rule, as opposed to failure to follow an internal policy directive of the Department, might have implications for the government's or prosecutor's liability.

Professor Beale noted that the proposed amendments to Rule, 12.3 regarding the public-authority defense, track the amendments to Rule 12.1 (notice of alibi defense), which have already been approved and are due to take effect on December 1, 2008. Rule 12.1, as revised, does not contain a notice requirement of the kind the committee is now discussing regarding Rule 12.3. Judge Tallman observed, though, that the alibi defense is likely to arise more frequently than the public-authority defense. Even though it would be desirable to make the two rules parallel, it is too late to do anything about amending Rule 12.1 further before it takes effect.

Judge Rosenthal suggested that the committee monitor practice under the revised alibi defense rule once it takes effect. If it decides that a notice provision is appropriate, it could propose adding it to both rules at a later date. Judge Tallman agreed and emphasized that the advisory committee has viewed implementation of the Crime Victims' Rights Act as an ongoing, iterative process. It will continue to monitor experience under the Act and address any real problems as they arise.

Judge Tallman reported that victims' rights proponents have not been satisfied with the committee's pace or results to date in implementing the Act. Some apparently believe that the committee has delayed making rule changes. As a result, he said, Senator Kyl had introduced legislation to bypass the entire Rules Enabling Act process and enact by statute all the proposed rule changes drafted by victims' rights proponents. Judge Tallman emphasized that it would be far better to follow the Rules Enabling Act process.

Judge Rosenthal stated that there had been no further Congressional developments on the legislation, and there appeared to be no need for the committee to take hasty action. Nevertheless, she said, there continues to be a good deal of interest in Congress regarding victims' rights. So if the committee is seen as not moving far enough or fast enough within the rules process, Congress may decide to proceed with further legislation.

Mr. Tenpas reported that the Department of Justice regularly receives expressions of Congressional dissatisfaction with actions that the Department takes in particular cases. He stated that victims' rights is an area of active monitoring by private groups and individuals with ready access to Congress.

Mr. Cecil reported that the Federal Judicial Center had undertaken a study of victims' rights implementation in the courts. Then the Government Accountability Office began a similar study, adopting the Center's research design. As a result, the Center has suspended its efforts until after the GAO files its report.

The Committee without objection by voice vote approved the amendments for publication, with the understanding that the advisory committee may modify the language of the amendments along the lines of the Standing Committee discussion.

Committee Membership for a Victims' Rights Advocate

Judge Tallman reported that the Chief Justice had received a request to add a crime victims' advocate as a permanent member of the Advisory Committee on Criminal Rules. The Chief Justice remanded the request to the Standing Committee, which in turn remanded it to the advisory committee.

The advisory committee, he said, had rejected the idea on the merits, emphasizing that its meetings and workings are all collaborative and open. The rules process is public, and victims' rights advocates are in fact heard. It would set a terrible precedent, he said, to appoint as a committee member a partisan advocate wedded to a particular viewpoint or group. The rule-making process is a collegial process, and partisan advocacy is inappropriate.

Several participants expressed strong agreement and noted that if the precedent were set, there would be unfortunate consequences for the other rules committees. They said that the advisory committees bend over backwards to consider all sides of issues and reach out to affected parties. Committee members, of course, may bring their particular experiences to the table, but the working reality is that each member puts justice and the rule-making process first.

A member observed that a criminal case traditionally has been viewed as a three-party proceeding involving the judge, the prosecutor, and defense counsel. But the Crime Victims' Rights Act, some victims' rights advocates claim, has transformed it into a four-party process involving the judge, the prosecutor, defense counsel, and the victim's representative. Raising the victim to the status of a full party in each criminal case, he said, would represent a fundamental shift in the very structure of the criminal justice system and upset the careful balance established by the Constitution and federal statutes.

Several members agreed that a partisan seat should not be created on the advisory committee, but emphasized that the committee needs to make sure that the victims' rights community is fully informed and given full input into the process. That community might have a sense of greater responsiveness if the committee maximized the ability of victims' advocates to participate.

Judge Tallman stated that the advisory committee had agreed to do exactly that. Among other things, it had suggested that the Department of Justice meet with victims' groups on a regular basis. The committee also has placed crime victims' issues on its website, and it recently sent a letter to victims' groups seeking their input. The Federal Judicial Center, moreover, now includes victims' rights in the curriculum of its training programs for newly appointed judges, and it is working on a pocket guide for judges on the obligations imposed by the Act.

Mr. Ishida added that the former Judge Cassell, a leading victims' rights advocate, had thanked Judge Tallman for the advisory committee's outreach efforts and asked that they be continued. Mr. Rabiej elaborated that the advisory committee had sent a letter to 20 groups that had commented on, or expressed interest in, the committee's victims' rights amendments. It asked them to keep the committee informed of any specific examples of victims' rights being denied in court.

Mr. Tenpas stated that the Department of Justice has maintained regular contact with large numbers of victims' rights groups. He suggested that the Department and the advisory committee might share information in this area. The Department could give the committee a list of the victims' groups with which it has contact.

Judge Kravitz stated that the Advisory Committee on Civil Rules had asked organizations like the American Bar Association to send a liaison to its meetings. Along the same lines, he suggested, the Criminal Rules Committee might consider inviting victims' advocates to attend committee meetings.

Judge Rosenthal observed that the Standing Committee clearly appeared to be in agreement with the views of the advisory committee. She suggested that the request be treated as an action item, and the committee should inform the Chief Justice by letter that it will not ask him to appoint a victims' representative to be a member of the advisory or Standing Committee. She asked the advisory committee to draft a letter for the Chief Justice to be circulated to the Standing Committee for approval. The letter, she said, should also point out that the rules committees will continue to monitor victims' rights issues and seek input and information from victims' rights groups.

Informational Items

Judge Tallman reported that the advisory committee was considering an amendment to FED. R. CRIM. P. 32(h) (notice of a court's possible departure from the sentencing guidelines) to specify what a sentencing judge must disclose to the defendant before imposing a sentence outside the guidelines. He noted that the Supreme Court recently had granted certiorari in a case that may shed additional light on the issue. As a result, the advisory committee had decided to put the amendment on hold pending the Court's decision.

Judge Tallman stated that he had appointed a subcommittee, chaired by Thomas McNamara, to consider proposed amendments to Rule 11 of the habeas corpus rules. The subcommittee had met twice and will report to the committee at the next meeting.

He reported that Professor Struve, reporter to the Advisory Committee on Appellate Rules, had addressed his advisory committee on the subject of indicative rulings. The criminal advisory committee, he said, was considering piggybacking on the proposed amendments to the Appellate Rules and the Civil Rules on this issue.

Judge Tallman briefly summarized recommendations pending before the advisory committee to amend: (1) Rule 6 (grand jury) to permit the return of an indictment by video conference; (2) Rule 12 (pleadings and pretrial motions) to require a defendant to assert before trial any contention that the indictment fails to state a claim; (3) Rule 15 (depositions) to permit the deposition of a witness outside the presence of the defendant when it is impractical or impossible to depose the witness in the defendant's presence; and (4) Rules 32.1 (revoking or modifying probation or supervised release) and 46 (release from custody) to expressly authorize an arrest warrant or summons to revoke bail or supervised release.

A member pointed out a problem with a motion under FED. R. CRIM. P. Rule 29(c) (motion for a judgment of acquittal) being filed after trial. Judge Tallman reported that the advisory committee had abandoned its recent, controversial efforts to amend Rule 29 after discovering how seldom Rule 29 motions are made in the courts.

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 attachments of December 1, 2007 (Agenda Item 8).

Informational Items

Judge Hinkle reported that the process of restyling the Federal Rules of Evidence is now underway. He explained that restyling of the rules had been deferred until after completion of the restyling of the appellate, criminal, and civil rules. He noted that there has been general agreement that the evidence rules should be changed as little as possible. Stability is more important for these rules than for other federal rules because lawyers use the evidence rules in the courtroom every day, and often do so on the fly. By the same token, however, a good argument can be made that the evidence rules, in particular, need restyling because they must be clear for lawyers.

Judge Hinkle reported that the advisory committee had decided that the clarity of the rules could be improved by restyling, and it decided to follow essentially the same restyling process used by the Advisory Committee on Civil Rules to restyle the civil rules. To begin the process, the subcommittee asked Professor Joseph Kimble, consultant to the Style Subcommittee, to draft for its review a few restyled evidence rules. The committee concluded that the product was a marked improvement over the current rules. It then divided the body of rules into three batches and expects to have the first batch (Rules 101 to 415) ready for review by the Standing Committee at its June 2008 meeting. By that time, the restyled rules will have been well vetted by the advisory committee and the Style Subcommittee. Under the current timetable, the restyled evidence rules would take effect on December 1, 2011.

Judge Hinkle reported that the advisory committee was reviewing Rule 804(b)(3) (hearsay exceptions), dealing with a declaration against penal interest by a declarant who is unavailable. When Congress enacted the rule, he said, it specified that the defendant must provide corroborating circumstances for an exculpatory declaration. But the prosecution need not show corroborating circumstances for an incriminating declaration. The prosecution, however, must still meet constitutional confrontation-clause requirements, which are similar but different. The constitutional requirements are not set forth in the rule, so it does not state accurately what the law is.

Several years ago the Standing Committee had approved an amendment to Rule 804 on this issue and forwarded it to the Supreme Court for issuance. But the Court decided the *Crawford* case and remanded the proposed amendment for further consideration. The advisory committee has held the amendment in abeyance in order to monitor case law

developments under *Crawford*. It now plans to present the Standing Committee at its June 2008 meeting with a recommendation – either to amend Rule 804 or not.

Professor Capra reported that the case law appears to be settling on the principle that any hearsay statement that is admissible is non-testimonial under *Crawford*, and therefore constitutionally admissible. If so, there really is no *Crawford* problem with the rules, because they do not allow admission of hearsay statements under circumstances that offend the Constitution.

Professor Capra also reported that the Supreme Court had just granted certiorari in *California v. Giles,* involving the forfeiture of hearsay exceptions. The issue in that case is whether the defendant forfeited a hearsay exception by allegedly killing the declarant. If the Court affirms, there could be a conflict between the Confrontation Clause and the provision in Rule 804 dealing with forfeiture of exceptions.

REPORT OF THE SEALING SUBCOMMITTEE

Judge Hartz reported that the rules committees have been asked on several occasions to consider rules on secrecy, protective orders, and sealing. Recently the chief judge of the Seventh Circuit expressed concern to the Judicial Conference about the practice of some district courts sealing entire cases, and it asked the Conference to study the matter. The Conference referred the matter originally to the Court Administration and Case Management Committee. As a result of that committee's efforts, the Conference corrected a situation in which the CM/ECF electronic dockets in some district courts had shown that sealed cases did not exist.

But the correction did not address the policy issue of whether an entire case should ever be sealed. The Executive Committee of the Judicial Conference has now referred to the Standing Committee the issue of whether, and when, the sealing of cases is appropriate. The Standing Committee appointed a subcommittee, chaired by Judge Hartz, with representatives of each advisory committee as members, and Professors Coquillette and Marcus as its reporters. The subcommittee intends to seek input from the Department of Justice and from clerks of court.

0 The subcommittee held its first meeting two days ago. Its first order of business was to decide on the proper scope of its inquiry. It concluded that the scope should be narrow and that its inquiry should only address the sealing of entire cases, not court orders that seal particular motions or record materials.

Judge Hartz pointed out that there is a definitional question as to what constitutes an entire case. He asked, for example, whether it would cover: (1) a sealed application for a wiretap; (2) a sealed adversary proceeding within the context of a larger bankruptcy case;

or (3) a sealed motion or application that has been assigned its own miscellaneous case number. He also noted that some cases are sealed for a period of time and then re-opened.

He noted that the subcommittee had agreed to seek further data on sealed cases from the Federal Judicial Center to guide its inquiry. Tim Reagan of the Center has agreed to examine data from 2006 cases and will provide preliminary information before the next committee meeting.

REPORT OF THE TIME-COMPUTATION SUBCOMMITTEE

Professor Struve reported that Judge Kravitz had assumed chairmanship of the Advisory Committee on Civil Rules and that Judge Huff has replaced him as chair of the Time-Computation Subcommittee. She thanked Judge Kravitz for his leadership of the project, and Judge Huff for taking over the work.

Professor Struve explained that the centerpiece of the time-computation project is a change in the method of counting time. The mandate is to count all days unless the final day of an event falls on a weekend or holiday. The subcommittee, she said, had produced a template rule that each advisory committee adopted, and proposed rule amendments were published for comment in August 2007. The responses from the public to date, she said, have been sparse, but rigorous. The scheduled hearings on the amendments had been cancelled, and the comment period ends on February 15, 2008. At that time, the subcommittee will consider the comments and refer its views to the advisory committees.

Professor Struve summarized the comments received to date. She reported that Chief Judge Easterbrook had expressed strong support for the project, but suggested that the committee take the opportunity to abolish the "three-day rule," noting that electronic service is rendering it obsolete. Professor Struve observed that the advisory committees have indeed been considering the "three-day rule" for the last decade. Judge Kravitz added that the subcommittee had made a conscious decision that the time was not yet ripe to abolish the "three-day rule," but the matter will be addressed again in the future.

Professor Struve reported that the Committee on Civil Litigation of the Eastern District of New York strongly opposed the time-computation project, arguing that the costs of change will exceed the benefits. The committee said that the current time-counting system is working fine, and changing it will cause problems. In particular, it highlighted the problem of computing statutory deadlines and offered some suggestions on how to tweak the proposed rules, if the project proceeds.

She noted that the advisory committees had been asked to identify the most important statutory deadlines in their respective areas that Congress should be asked to adjust in order to conform various statutory time limits to the new time-computation rules.

She emphasized that it will be essential to coordinate the rules changes with the legislation. In addition, local courts of court will have to be adjusted to comport with new national time-computation rules.

Professor Struve explained that the advisory committees at their spring meetings will consider the public comments and review their list of statutory deadlines in order to recommend to the Standing Committee which statutory deadlines should be adjusted. They will submit their recommendations for approval by the Standing Committee at its June 2008 meeting.

Mr. Tenpas reported that the Department of Justice was studying time-computation issues. He noted that passions are strong in every direction, as officials have widely divergent opinions. The Department considers the likelihood that Congress will act on statutory deadlines to be remote. He stated that he did not know what position the Department ultimately will take on the proposed time-computation changes, but the Standing Committee should know that many in the Department believe that the proposals are a bad idea. The Department should have a new Deputy Attorney General and other top leaders shortly, and at that time it will be able to develop Department-wide positions.

REPORT ON STANDING ORDERS

Judge Rosenthal reported that Professor Capra had been asked to examine the use of standing orders in the courts. As a result, he had drafted an excellent paper on the subject and presented it at the June 2007 committee meeting. In addition, the committee has been working with Professor Capra to develop a survey asking district judges and bankruptcy judges for input in developing guidelines that would identify for the courts the matters that are best addressed in local rules and those that should be addressed in standing orders. The courts, moreover, would be encouraged to make standing orders more accessible to the bar. The proposed survey, she said, is now being reviewed by the Administrative Office before being sent to the district and bankruptcy courts.

PANEL DISCUSSION ON *BELL ATLANTIC V. TWOMBLY* AND NOTICE PLEADING

Professor Burbank moderated the discussion on the impact of the Supreme Court's decision in *Bell Atlantic v. Twombly*, 127 S.Ct. 1955 (2007), on notice pleading. The panel consisted of Judge Scirica, Ms. Cabraser, and Messrs. Joseph and Bernick.

Professor Burbank introduced the topic by addressing: (1) whether *Twombly* represents a repudiation of the philosophy underlying the original 1938 Federal Rules of Civil Procedure; (2) the scope of *Twombly*'s application and whether it truly represents a major change in practice; (3) the extent to which *Twombly* affects interpretations of FED. R. CIV. P. 8 and 12 on heightened pleading; and (4) the impact of *Twombly* on the rule-making process and on access to the courts.

Professor Burbank noted that the drafters of the Federal Rules of Civil Procedure rejected the old common law and code pleading system in large part because it had blocked access to the courts by imposing technical and artificial distinctions and by preventing parties from obtaining the facts that they needed to pursue their claims. The Founders believed that pleading is a feckless means to discover which matters are in dispute and can lead to inefficient trials. Therefore, they decided that pleadings should play a lesser role under the federal rules, and greater emphasis should be given to judicial discovery, summary judgment, and the pretrial conference.

But fact pleading died hard. As late as 1953 the Judicial Conference lobbied for restoring the pleading requirements. Then came the litigation explosion of the 1960s, and it became clear that the Founders had overestimated discovery as a means of narrowing issues and had underestimated the value of pleading. He added that some have suggested that *Twombly* applies only to Sherman Act or antitrust conspiracy cases. But he said that his reading of the thousands of cases that have cited *Twombly* demonstrates that that is simply not the case.

Mr. Joseph reported that in just six months, *Twombly* has already been cited more than 3,000 times. It is being applied in all types of cases and has had a major impact. The courts are addressing and citing *Twombly* in every case, and it has replaced the prior standard laid down in *Conley v. Gibson*. He noted that the plausibility pleading standard erected by *Twombly* – that the plaintiff must plead a factual predicate to suggest plausibility – represents a real change. The question remains, though, whether *Twombly* applies outside Sherman Act cases. One reading is that the decision may apply in complicated cases, but not in simple ones. In simple cases, it appears that the courts after *Twombly* have been sticking to notice pleading.

Thus, no one really knows for sure what FED. R. CIV. P. 8 (general rules of pleading) means any longer. The text of the rule may have meant one thing for 50 years before *Twombly*, but now it may mean something different. Civil complaints may now be

dismissed by the district courts for being too short. We do know from *Twombly* that conspiracy claims, such as civil RICO and civil rights claims, are subject to a fact-based requirement that a plaintiff plead facts sufficient to show plausibility. Importantly, the Second Circuit in *Iqbal v. Hasty.* 490 F.3d 143 (2d Cir. 2007), found in *Twombly* a flexible plausibility standard under which heightened pleading is required where necessary to establish plausibility.

Mr. Bernick agreed that *Twombly* is not confined to antitrust claims. The Supreme Court repudiated *Conley*, but it did not have to retire *Conley* in order to clarify the standard for pleading only in antitrust cases. Clearly the Court's intent was to announce a broader application to all complex, non-routine cases. Now the federal courts have to figure it out.

Professor Burbank pointed out that the first sentence of *Twombly* explicitly states that: "We granted certiorari to address the pleading standards in antitrust conspiracy cases." A member added that the Court decided *Erickson* right after *Twombly* and made it clear in that case that notice pleading still prevails in simple cases. Therefore, *Erickson* needs to be integrated into *Twombly*. In fact, it may be that *Twombly* is being over-read in the vast majority of cases where the defendant can figure out from the complaint what is being alleged by the plaintiff. *Erickson* was a quick per curiam, issued just three weeks after *Twombly,* and it might have been a vehicle for the Court to send a prompt message that *Twombly* was not intended to abolish notice pleading. Another member disagreed, though, arguing that *Erickson* means very little and suggested that the appellate decision in that case was wrong.

Professor Burbank noted that illustrative patent infringement form appended to the civil rules (former Form 16, renumbered as Form 18 in 2007) is an example of pure notice pleading. He asked whether the advisory committee, in the light of *Twombly*, should discard the forms that illustrate pleading. Mr. Joseph added that the illustrative civil rules 2form for pleading a negligence case is also arguably inadequate under *Twombly*.

Professor Coquillette observed that lawyers have been shaped both by the common law rules of pleading and equitable rules of pleading. One explanation of *Twombly,* he said, may be that it seeks to foster a system that looks at the context of a claim and gives a judge discretion, following the tradition of equity, rather than common law.

Judge Scirica discussed the factual specificity required by *Twombly* and its relation to the goal of providing sufficient notice to the defendant. He said that the problem with *Conley v. Gibson* was not with what it said, but with how it had been interpreted to require judges to speculate about unspecified and undisclosed facts. That approach was not helpful, and it was beneficial for the Supreme Court to supersede it in *Twombly*.

He pointed out that the Court in *Twombly* noted that FED. R. CIV. P. 8 requires a plaintiff to provide fair notice to the defendant. Plausibility, though, is not mentioned in

the general standards of the rule. Many courts have looked to the fair notice aspect of *Twombly* as the key element, and they are correct. Notice, though, is different from plausibility. The Second Circuit decision in *Iqbal* was clearly based on context, and it added the concept of context to that of notice. The resulting "flexible plausibility" standard means the degree of factual specificity necessary to render a claim "plausible" in context. For example, a mere allegation of conspiracy does not provide sufficient notice, but a mere allegation of negligence does.

Judge Scirica noted that there is reason to ask whether *Twombly* conflates the purposes of FED. R. CIV. P. 12(b)(6) (motion to dismiss for failure to state a claim) and FED. R. CIV. P. 12(e) (motion for a more definite statement). The plausibility standard could be viewed as a standard more relevant to determining a motion for a more definite statement, rather than a motion to dismiss for failure to state a claim.

Professor Burbank observed that the Court in *Twombly* took pains to state that it was not requiring that "specific facts" be pleaded. But, he asked, what is the difference between "specific facts," which *Twombly* said were not required, and the kinds of facts that will now be required. Judge Scirica responded that the only way to make sense of the matter is to focus on the notice requirement. Given the context of a case, what is needed for the plaintiff to give fair notice to the defendant?

Professor Burbank added that "notice" is only supposed to be notice sufficient to permit the defendant to file an answer accepting or denying the allegations. That is not much of a requirement, as the illustrative forms suggest. It appears, therefore, that *Twombly* may be changing the nature of "notice." Judge Scirica agreed and emphasized that each class of cases will have to be treated differently based on context. The plausibility requirement will lead to inconsistent opinions, because different judges will see "plausibility" differently. Professor Burbank lamented the resulting lack of uniformity under the federal rules.

Mr. Joseph noted that since *Twombly* apparently offers the possibility of a dismissal under FED. R. CIV. P. 12(b)(6), practitioners are likely not to bother with motions for a more definite statement.

A participant observed that before *Twombly*, practitioners largely had been of the view that filing a motion to dismiss under FED. R. CIV. P. 12(b)(6) is a waste of time because judges usually just refer the movant to discovery. The only recognized exceptions are for those claims, such as defamation and conspiracy, where the rule requires pleading additional facts and a plaintiff cannot rest on a broad allegation.

A member reported that practitioners indeed are now bringing more motions to dismiss after *Twombly*. But, even after *Twombly*, courts are still granting leave to amend after some discovery. Courts may also grant motions to dismiss without prejudice,

allowing plaintiffs to plead more facts and refile their complaint. Ms. Cabraser agreed that motions to dismiss have been more common since *Twombly,* and Mr. Joseph agreed that *Twombly* actually argues in favor of granting liberal leave to amend.

Mr. Cecil reported that the Federal Judicial Center was gathering additional data on motions to dismiss in order to assist the committee's future deliberations. The Center, he said, has data on cases going back to 1975 and it can produce multi-year case comparisons. The Center will await the committee's direction as to the right time to gather and analyze the information.

Judge Rosenthal observed that it is difficult to reconcile *Twombly* with the language of FED. R. CIV. P. 8. Under *Twombly*, FED. R. CIV. P. 12(b)(6) and 12(e) are really no longer separate, and the current rule structure no longer makes sense. She noted, too, that the illustrative forms include a bare-bones patent infringement complaint that is sufficient under the rules. Therefore, if everything now depends on context, it may no longer be safe to have any illustrative forms for pleading. Thus, the advisory committee may wish to eliminate some of the illustrative forms because *Twombly* requires consideration of context. But Professor Burbank warned that the bar would be strongly opposed to that action. He suggested, as a practical matter, that the committee cannot advise lawyers that it cannot provide them with any assurance that any particular form of pleading will be sufficient.

Mr. Bernick discussed whether it was appropriate for the Supreme Court to reinterpret FED. R. CIV. P. 8 the way it did, considering its admonition that rules be amended only through the Rules Enabling Act process. He stated that the *Twombly* decision was designed to have an impact on civil practice, and it is clearly not confined to antitrust claims. Rather, it announced new guidance on pleading standards generally, revolving around "plausibility." He said that he did not see any Rules Enabling Act problem with the case. By way of analogy, the Court's decision in *Daubert* was also major in its scope. The Court in that case, too, was interpreting existing rules. A new rule was not strictly necessary, but the Federal Rules of Evidence were in fact amended through the Rules Enabling Act process to make them consistent with the Court's holding.

Mr. Bernick said that plausibility does not mean just "particularity." Nor is particularity alone sufficient. A complaint may be highly particular, but still not plausible. Plausibility also does not mean a prediction of success. Nor does it require an inquiry only as to notice. The simple, but ultimate inquiry that must be made is into the plaintiff's entitlement to relief and whether there is a viable theory of the case. Plausibility involves notice of whether the material or operative facts demonstrate that there may be a possibility of relief. *Twombly* requires a plaintiff to give notice not just of what its claim is, but also notice of why it believes that it is entitled to relief.

Thus, Mr. Bernick said, *Twombly* sets up a gate-keeping function that will determine who gets access to the court. It requires a court to exercise a more thorough

gate-keeping function early in a case, especially in complex cases. And its inquiry must focus on the total context of each case. Mr. Bernick warned, though, that abolition of the illustrative forms could wreak havoc. In many cases they are appropriate, although they are never used in antitrust cases.

Professor Burbank asked about cases other than complex antitrust or patent cases, such as employment discrimination cases. The participants suggested that the impact of *Twombly* on those cases is largely left up in the air for the courts to work out.

Professor Burbank noted that Justice Souter said in *Ortiz v. Fibreboard Corp.* that the Supreme Court is bound by the understanding of a federal rule as it was understood when adopted. He pointed out that *Twombly* may be inconsistent with that admonition because the discovery rules have changed enormously since Rule 8 was first promulgated. Mr. Bernick added that the discovery process has become more burdensome over the years, and heightened pleading standards may be attractive.

A participant observed that it is useful to look at *Twombly* as a policy-based decision by the Court. In some cases the cost and burden of discovery are so great that the court must devote greater attention to the case at the outset. In simple cases, by contrast, discovery is not so great a burden, and traditional notice pleading may still work.

Ms. Cabraser stated that she represents plaintiffs in her practice. She reported that her office was roiled by *Twombly* because it has great potential implications for access to the courts. The plaintiff's antitrust group in her office is seeking additional guidance in pleading following *Twombly*. Clearly, an antitrust conspiracy claim now requires that plaintiffs plead more facts, but it is difficult to do properly in light of FED. R. CIV. P. 11 (representations to the court and sanctions). Plaintiffs' counsel are confronted with a dilemma because they may have to add facts to their complaints to meet the *Twombly* standard, but the pertinent facts may not be available or are not clear.

The opinion has created a tension not intended by the Court. Lawyers for plaintiffs used to be able to include assertions in a pleading, even though they could not prove them at that point. But *Twombly* may now require plaintiffs to do so in order to establish "plausibility." So lawyers may now face Rule 11 complications if they plead facts that they are not sure they can prove. The bottom line is that they will have to work harder and prepare longer complaints with more information.

Ms. Cabraser said that *Twombly* has done nothing to relieve the burden on the courts. To the contrary, it has imposed great additional burdens on the courts. There is an obvious desire in *Twombly* to set up a filtering mechanism to control the costs of discovery in complex cases. But the decision has imposed a burden on district courts to make subjective merits decisions about cases at their very outset. Plaintiffs must now take greater care to describe the who, what, and when of their cases, or run the risk of having

their complaint dismissed. They will have to demonstrate the merits of their claims up front in order to be entitled to discovery. The result may be that litigation will no longer be a staged process, but a one-time bang. The big event will be for a plaintiff to prove its entitlement to discovery. It will have one shot at presenting and improving its case. The essence is that *Twombly* represents not an abrogation of Rule 8, but a refocus of the rule to create a single defining event at the outset of a case when the court must decide whether to allow the case to proceed.

She said that this departure from the rules is a big mistake. She noted that FED. R. CIV. P. 8 (general rules of pleading) and 9 (pleading special matters) have been anchors in federal civil practice. But now a higher burden will be placed on plaintiffs in more complex cases. The basic concern is that the ultimate triers of fact will be replaced by judges at the pretrial stage, and the consequences of a judge being wrong are great.

Ms. Cabraser stated that she does not understand the notion that the burden of discovery in complex cases is so great that there must be a more searching review at the outset of a case. Discovery, she said, is also expensive for plaintiffs. It is simply not a good approach to focus on reducing the costs of discovery by prejudging the plausibility of each plaintiff's case. As a result, landmark cases now will be less likely to be filed and access to the courts will be denied. Only routine, sure-thing cases are likely to be brought. She noted that plaintiffs' lawyers are not always in a position to gather additional facts without conducting some discovery. They may be able to plead "where" and "when," but it can be very difficult for them to plead "why."

She noted that human behavior often is very implausible. So "plausibility" is a very unreliable standard. There are many examples of allegations that appeared to be ridiculous on their face that have turned out to be true. In essence, people's behavior is sometimes not rational. Truth, not plausibility, is what is important.

Ms. Cabraser added that one hopes that judges will remember the context of *Twombly* and allow some discovery and amendment of pleadings. If they do, *Twombly* might work without a rule change as a function of appropriate judicial development. Some facts that a court may wish to see in a complaint cannot initially be there under Rule 11 because the plaintiff is not yet sure that he or she can prove them. Certainly, she said, we are now seeing a revival of motions to dismiss. We may also see amended complaint after amended complaint in complex cases.

Professor Burbank reported having attended an Oxford conference on class actions, where the discussion focused on the fact that just as the United States is trying to move away from class actions and rely more on public enforcement of rights, many European countries are moving in precisely the opposite direction. They are trying to de-emphasize public enforcement and re-invigorate use of the courts, which has not been their tradition.

He asked what alternatives people will have if under *Twombly* it becomes difficult for them to access the courts to enforce rights that public agencies fail to enforce.

A member stated that when he first read *Twombly*, his first thought was that Rule 8 may now be misleading. He noted that lawyers may not read or debate *Twombly*, but they certainly will read the rule. *Twombly* imposed a heightened pleading standard that is not set forth in the rule. A plaintiff may believe that it has complied with Rule 8, only to have its complaint dismissed. Therefore, the committee needs to consider amending the rule.

Professor Burbank advised against amending the rule soon. He recommended that the advisory committee await case law development under *Twombly*. He minimized the concern about lawyers being misled, arguing that any competent lawyer should know about *Twombly*, which is in effect an amendment to Rule 8. By analogy, he added, the principles of res judicata are not in the rules, but any lawyer should know what they are. Practitioners will figure it all out, even though it is not set forth in the text of the rule. Mr. Bernick agreed that lawyers are aware of *Twombly*, but he cautioned that they may not be fully aware of the case law development in its wake.

Judge Scirica stated that another reason for the committee to postpone action is that the Supreme Court is likely to render another pleading decision in the near future. Mr. Joseph agreed, but reiterated that there is a problem now because the *Twombly* rule is different from the text of Rule 8. Yet, technically, all that the Supreme Court did in *Twombly* was to reinterpret the words of Rule 8. At some point, he said, the committee may wish to amend the rule, but not immediately.

Judge Kravitz stated that he agreed with the panel members that the committee should not act too soon. He noted that the committee has been keeping a watchful eye on developments and will continue to do so. The only possible area for action at this time, he suggested, might be to look at the illustrative forms because they may no longer be good models for reflecting the current state of the law.

A member stated that he was not convinced that waiting is the best course of action and suggested that the committee at least stimulate debate. He said that consideration needs to be given to the impact of *Twombly* on small cases, including prisoner cases. Accordingly, the committee should see in *Twombly* an invitation by the Supreme Court to start thinking about these matters.

Judge Kravitz said that the advisory committee had been thinking about pleading before *Twombly*, and it would continue to monitor the case law and discuss the issues at future meetings. But it would be premature to draft proposed amendments and initiate the formal rule-making process. He observed that if the committee knew exactly what *Twombly* meant, it would be easier to decide whether the current situation demands rule changes.

Several members agreed that the committee should not jump in before getting more guidance from the case law. But it was suggested that the committee might identify the rules that might be impacted by *Twombly* and start thinking about areas where there might be a need for change. The committee could then prepare alternatives in anticipation of the day when further guidance comes.

Judge Kravitz agreed that the advisory committee could examine the types of cases where *Twombly* is applicable. The committee, for example, might want to know whether the heightened pleading requirement of FED. R. CIV. P. Rule 9(b) (pleading fraud or mistake) has worked well or not, and whether conspiracy and other kinds of cases should be added to Rule 9(b). Perhaps FED. R. CIV. P. 12(e) (motion for a more definite statement) should also be examined. The committee would have to decide whether to begin that effort now, or wait until work has been completed on the proposed amendments to Rules 26 and 56.

Several participants recommended that the committee consider beginning work now on improving the forms and observed that pro se litigants rely heavily on them. Judge Kravitz responded, though, that *Erickson* makes clear that *Twombly* does not impact pleading standards in pro se cases and may not apply to pro se cases at all. Judge Rosenthal added that *Twombly* may affect qualified immunity cases, which affect pro se litigants. One of the areas where requests for amended pleadings are most common are qualified immunity and municipal cases. Accordingly, some of the most complicated pleading and proof requirements do affect pro se cases. A member added that many district courts have developed their own local forms for pro se litigants and prisoners that require considerably more detail than the national forms.

A member observed that pleading had raised difficult issues long before *Twombly* and suggested that it might be useful to conduct a forum to discuss pleading in employment discrimination cases. The member agreed that it might be good to start now on research, even if it is not the right time for the advisory committee to take up the issue.

Judge Kravitz agreed that the advisory committee should think about possible research, confer with the Federal Judicial Center, and consider which rules might be affected by *Twombly*. The Supreme Court, he said, may provide further guidance in upcoming decisions. He added that it is likely that the bar will ask the committee to provide clearer guidance in the wake of *Twombly*.

Judge Rosenthal thanked the panel for sharing their thoughts on *Twombly* and its implications for rule-making. She emphasized that the committee's decision to hold the panel discussion did not suggest that it was proposing to launch large-scale rule-making effort on this topic. She added, though, that the advisory committee might begin laying the groundwork for potential future amendments.

CLOSING REMARKS AND NEXT COMMITTEE MEETING

Judge Rosenthal thanked Judge Teilborg, Mr. Maledon, and Professor Meltzer for their superb work on the Style Subcommittee. She also thanked Messrs. McCabe, Rabiej, Ishida, and Barr of the Administrative Office for their work in supporting the committee and arranging for another seamless meeting. She added that special recognition needs to be given to the Federal Judicial Center for its highly professional research in support of the committee's mission. Finally, she thanked Mr. Spaniol for his continuing, wise advice to the committee and his work with the Style Subcommittee.

The next meeting of the committee was set for June 9-10, 2008, in Washington, D.C.

Respectfully submitted,

Peter G. McCabe,
Secretary