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

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MEMORANDUM

DATE: May 17, 2010

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

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

RE: Report of the Civil Rules Advisory Committee

Introduction

The Civil Rules Advisory Committee met at the Emory University School of Law in Atlanta, Georgia, on March 18 and 19, 2010. Draft Minutes of this meeting are attached.

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

2010 Conference: Introduction

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

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

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

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

Pleading

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

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

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

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

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

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

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

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

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

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

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

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

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

Discovery: Current Work
RULE 45

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

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

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

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

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

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

RULE 26(C) PROTECTIVE ORDERS

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

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

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

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

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

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

Other Agenda Items

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

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

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

The 2010 Conference: [Some of] The Proposals
COST AND DELAY

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

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

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

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

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

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

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

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

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

BETTER IMPLEMENTING PRESENT RULES

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

RULES PROPOSALS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

RESEARCH AND PILOT PROJECTS

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

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

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

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

The benefits of actual experience with different rules can arise from practice in state courts as well as in federal courts. The conference included detailed research on practices in Arizona and Oregon. Arizona practice goes far beyond federal practice by requiring highly detailed initial disclosures. Oregon, on the other hand, continues to have fact pleading and is convinced that it is valuable. Federal courts have much to study in state procedure, and perhaps much to learn from it. This strong beginning must not be allowed to languish.

CARRYING FORWARD

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

Attachments

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

Monday, May 10, 2010

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

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

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

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

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

C. The NELA Data: Rebecca Hamburg (NELA)

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

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

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

Moderator: Justice Kourlis (IAALS)

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

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

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

H. RAND Data: Nick Pace (RAND)

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

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

Moderator: Prof. Arthur Miller (NYU)

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

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

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

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

Moderator: Elizabeth Cabraser (Lief, California)

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

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

Moderator: Judge Patrick Higginbotham (5th Circuit)

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

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

Tuesday, May 11, 2010

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

Moderator: Greg Joseph (Joseph, New York)

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

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

Moderator: Judge Brock Hornby (D. ME)

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

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

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

Moderator: Judge Koeltl (S.D. NY)

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

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

Moderator: Justice Andrew Hurwitz (Arizona)

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

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

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

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

Moderator: Lorna Schofield

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

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

Moderator: Dean Levi (Duke)

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

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

2010
Civil Litigation Conference

**Conference Panelist Professional
Biographies**

Tom Allman

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

John M. Barkett

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

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

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

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

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

Jason R. Baron

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

James A. Batson

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

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

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

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

Judge Michael Baylson

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

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

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

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

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

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

David J. Beck

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

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

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

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

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

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

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

Sheila L. Birnbaum

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

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

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

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

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

F. Paul Bland, Jr

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

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

Robert G. Bone

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

William P. Butterfield, Esq

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

Elizabeth J. Cabraser

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

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

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

Judge David G. Campbell

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

Paul D. Carrington

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

Edward H. Cooper

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

Daniel Coquillette

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

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

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

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

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

Alex Dimitrief

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

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

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

Theodore Eisenberg

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

Judge John M. Facciola

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

Judge Paul L. Friedman

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

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

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

Marc Galanter

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

Joe Garrison

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

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

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

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

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

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

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

Daniel Girard

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

Thomas A. Gottschalk

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

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

Jeffrey J. Greenbaum, Esq.

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

Chief Magistrate Judge Paul W. Grimm

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

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

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

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

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

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

Rebecca M. Hamburg

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

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

Paula L. Hannaford-Agor

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

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

Geoffrey C. Hazard, Jr.

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

Judge Patrick E. Higginbotham

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

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

Judge D. Brock Hornby

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

Justice Andrew Hurwitz

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

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

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

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

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

Gregory P. Joseph

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

Judge Henry Kantor

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

Peter D. Keisler

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

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

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

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

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

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

Loren Kieve

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

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

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

Judge John Koeltl

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

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

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

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

Justice Rebecca Love Kourlis

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

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

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

Judge Mark Kravitz

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

Jocelyn Larkin

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

Emery G. Lee III

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

David F. Levi

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

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

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

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

William J. Maledon

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

Rick Marcus

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

Arthur R. Miller, LL.B.

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

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

Alan B. Morrison

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

Seymour (Sy) Moskowitz

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

Richard A. Nagareda

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

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

Judge Jon O. Newman

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

Nicholas M. Pace

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

Bruce R. Parker

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

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

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

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

Adam C. Pritchard

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

Judith Resnik

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

Judge Lee H. Rosenthal

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

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

Judge Barbara Jacobs Rothstein

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

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

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

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

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

Paul C. Saunders

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

Judge Shira A. Scheindlin

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

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

Lorna Schofield

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

Amy W. Schulman

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

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

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

Wendy H. Schwartz

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

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

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

Judge Anthony Scirica

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

Joseph M. Sellers

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

Jordan M. Singer

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

Catherine Struve

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

Patrick J. Stueve

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

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

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

Stephen D. Susman

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

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

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

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

Ariana J. Tadler, Esq.

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

John Vail

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

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

David J. Waxse

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

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

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

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

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

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

Tony West

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

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

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

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

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

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

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

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

Thomas E. Willging

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

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

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

Dan Willoughby

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

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

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