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

MEMORANDUM

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

Date: December 6, 2010

Re: Report of the Civil Rules Advisory Committee

Introduction

The Civil Rules Advisory Committee met at the Administrative Office of the United States Courts on November 15 and 16, 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 discussion. These projects raise many intriguing and at times difficult — even very difficult — questions. Advance discussion and guidance will help in working toward the best answers.

Discovery: Rule 45

The Discovery Subcommittee, prompted by a series of suggestions from bar groups and other lawyers, began two years ago to study the Rule 45 provisions for trial and discovery subpoenas. A list of seventeen possible revisions was prepared, and gradually winnowed down to the four that have come under the most intense scrutiny. The work has been developed through several conference calls, presentations to the full Advisory Committee, and a "miniconference" with lawyers and judges in Dallas on October 4, 2010. Earlier reports to this Committee have traced this development. The Subcommittee expects to present a draft in April looking toward a recommendation for publication. The four developing proposals address notice to all parties before a subpoena to produce documents is served; transfer of enforcement proceedings; compelling a party to appear as a trial witness; and simplification of Rule 45. A late-revived question asks whether the time allowed to object to a Rule 45 document subpoena should be extended. This question will be studied further, but it remains unclear whether any change will be recommended.

Notice to other parties: The last sentence of Rule 45(b)(1) directs that before a subpoena to produce documents is served, "notice must be served on each party." Advance notice enables the parties to object, to suggest that the subpoena be expanded, and to monitor compliance to ensure access to whatever is produced. The problem lies not in the rule but in the observance. Many lawyers, from many callings, complain that they often do not get notice.

The proposed amendment addresses this problem by moving the notice provision out of subdivision (b)(1) and into a new subdivision (a)(4). The hope is that making the requirement more prominent in the rule will enhance compliance. Those who lack the energy to read through to the end of (b)(1) may at least persist through to the end of (a).

In addition, the proposed amendment directs that a copy of the subpoena be served with the notice. That will advance the purposes of requiring notice and simplify the other parties' responses.

The Subcommittee also considered a further possible change. Notice could be required not only before the subpoena is served, but also after materials are produced in response. In the end, the Subcommittee has concluded that the potential advantages are outweighed by potential disadvantages. A second notice requirement provides one more opportunity to go astray, and to produce corresponding disputes. Nor need it be only one opportunity to go astray — responsive materials often may be produced sequentially, raising questions as to just when and how often notice is required. Disputes could multiply. Disputes lead to questions about sanctions. In the end, the Subcommittee concluded that it is better to leave the other parties with the responsibility for periodically following up to determine what has been produced.

Transferring enforcement proceedings. Rule 45 directs that a subpoena issue from the court where the witness is located. Often the subpoena issues from a court that is not the court where the action is pending. Questions about enforcement against a nonparty go to the court that issued the subpoena. But many circumstances arise in which it would be better to resolve enforcement disputes in the court where the action is pending. Although nothing in Rule 45 seems to authorize transfer, some issuing courts have managed to transfer the enforcement dispute. And there are hints that it is rather common for the issuing court to consult informally with the action court. This proposal would explicitly authorize transfer.

The transfer question relates in some part to the features that may make Rule 45 ripe for some simplification. Posit an action pending in the federal court in Seattle and a witness in Miami. A Seattle lawyer can issue a subpoena in the name of the federal court in Miami, directing a Miami nonparty witness to produce documents or testify at a deposition. If all goes well, the Miami court knows nothing of this event, or of the witness's compliance. But if the witness objects or simply fails to comply, enforcement must be sought in Miami. The Miami court may be, and often is, the better court to resolve the enforcement issues. Many issues are truly local, turning on the circumstances of the witness. Any transfer rule must account for these concerns.

Even issues that seem local, however, may be intertwined with overall management of the action pending in Seattle. The witness may object that the discovery is too burdensome. Whether the "burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case," and so on through the Rule 26(b)(2)(C)(iii) factors, requires close familiarity with the underlying action. (The Rule 45(c)(2)(B)(ii) direction to protect the nonparty against significant expense in responding to a document subpoena does not automatically resolve this question.) The Seattle court may have a case management plan that requires centralized disposition of this and many other discovery issues.

Other circumstances present still more compelling needs for disposition in the court where the action is pending. In a complex action, discovery subpoenas may be served through several different courts. The same question may be raised in two, three, or even more courts. Far better to have a single, consistent decision than to present the same question seriatim to several courts and perhaps to receive different answers.

A discovery issue, for another example, may be still more tightly tied to the merits of the underlying claim. A clear illustration is provided by a recent action brought in a federal court in California complaining of defamation by anonymous internet bloggers. The plaintiff sought to compel an internet service provider in Arizona to identify the bloggers. Similar subpoenas were served on other providers in other federal courts. The First Amendment is thought to provide a right to anonymous blogging, but the right of anonymity can be overcome by showing a prima facie claim. Disposition of the discovery question is bound up with the merits. Resolution by the court where the action is pending seems important.

A successful transfer provision must seek to express the balance between these concerns, mediated by an additional pragmatic concern. The disputes that are primarily local should be resolved by the local court. The disputes that tie to the merits of the action — and on some views, most disputes do — and those that bear on overall coherent case management, often should be transferred. And, for good measure, some observers believe that the rule should guard against the temptation some local courts will feel to use transfer to get rid of problems that do not seem their own.

The formula tentatively adopted to express the standard for transfer is "in the interest of justice." That formula is familiar — it is part of the formula for transferring venue under 28 U.S.C. § 1404(a): "for the convenience of parties and witnesses, in the interest of justice." One question is whether it is wise to adopt only part of the formula. There is always a risk that adopting verbatim a set of words used in another context will lead to a mistaken conclusion that the considerations for transferring a discovery dispute are the same as those for transferring venue. But the convenience of parties and witnesses does bear on the transfer decision. A variety of other possibilities have been suggested. The choice of words will turn in part on the choice whether to imply a preference for or against transfer. If it seems desirable to prefer local decision, "compelling reason" could be required. The familiar "good cause" would suggest a weaker preference. "[W]hen appropriate" might seem neutral.

An alternative to a general standard might be to identify specific factors in rule language. But no list could capture more than a few of the more obvious circumstances, much less express a formula for balancing competing concerns. This alternative is not likely to be pursued.

The Subcommittee also continues to consider the authority to adopt a rule giving a federal court in Seattle power to rule on questions raised by a nonparty witness in Miami. Can a court rule create this limited form of "jurisdiction"? Once the ruling is made in Seattle, how is it enforced? The Subcommittee believes that there is authority to adopt a transfer rule, and that enforcement of the Seattle court's ruling by the court in Miami is appropriate and efficient. It also believes that common sense will readily resolve any issues as to the right of the Miami lawyer for the nonparty Miami witness to address the court in Seattle, the logistics of filing and argument, and any other details that would cause difficulty only to an obstructionist.

Distant party as trial witness: This question was made prominent by the ruling in In re Vioxx Products Liability Litigation, 438 F.Supp.2d 664 (E.D.La.2006). The court found a negative implication in Rule 45(c)(3)(A)(ii) that a subpoena may compel a party or a party's officer to appear as a witness at trial without regard to the Rule 45(b)(2) limits on the place of service. Other district courts have responded to this ruling, some adopting it and others rejecting it. The issue is important, and it deserves a uniform rule. Strong arguments can be made both ways.

The Subcommittee intends to recommend a rule amendment that undoes the Vioxx ruling. Subcommittee members agree unanimously that the Vioxx court mistook the intent of the Rule 45 amendments made in 1991. That conclusion does not dictate a revision that restores the original intent. It remains to be decided whether a court should have power to compel a party to appear as a trial witness. The Subcommittee recognizes the strength of the arguments for recognizing some such power, and intends to present an alternative draft that embodies it. But its recommendation is

expected to restore the rule that a party can be required to attend trial by traveling only from any place where the party resides, is employed, or regularly transacts business in person within the state where trial is held.[1]

The intended recommendation rests on the belief that in-person testimony ordinarily is not especially important in the trial process. Video depositions, or live testimony by contemporary transmission from a different place under Rule 43(a), provide satisfactory substitutes. It also rests on a fear that a broad power to drag party witnesses around the country may be — and has been — misused for strategic purposes. The danger is that top-level persons within a public or private organization will be subpoenaed, despite being less useful witnesses than other people within the organization, in order to impose burdens that conduce to settlement.

Work is well advanced on an alternative draft that would recognize and regulate authority to compel trial testimony by a party or party agents who are not present in the state. The central feature of the draft is that it requires a court order; a party-issued subpoena is not available. The party requesting the order must show a persuasive reason for compelling the testimony, including reasons why other witnesses will not do. (The initial formula expressing these factors borrows the "substantial need" and "undue hardship" terms from Rule 26(b)(3), but there is some concern that transporting the work-product formula to this quite different setting may engender confusion.) The court also must consider the alternatives of relying on a video deposition or t estimony by transmission under Rule 43(a). Further work remains to be done to identify the persons within a party organization who, although not "officers," may be reached by the order. But in any event the order is directed to the party, not the officer or other agent, and sanctions for failure to produce the witness are imposed only on the party.

The question of authority to establish nationwide subpoena practice is similar to the questions raised by the transfer recommendation discussed above and the simplification recommendation discussed below. In all three settings, and most directly in the trial-witness setting, some comfort may be found in Criminal Rule 17(e)(1), which authorizes service "at any place within the United States" of a subpoena requiring a witness to attend a hearing or trial.

The most likely recommendation will be to publish the alternative draft for comment, but in a format and with a transmission letter that make clear the preference for restoring the state-limits reach of a trial subpoena. The ambition is to present an alternative draft so well polished that if public comment and testimony establish the superiority of the alternative approach, the draft may be so close to the mark that it can be recommended for adoption with no more changes than are consistent with adoption without a renewed round of public comment.

Simplifying Rule 45: Rule 45 is long. Some of its provisions are near-verbatim repetitions of provisions appearing in the core sequence of discovery rules, Rules 26 through 37. The failure to understand a provision so simple and so clear as the prior notice provision in Rule 45(b)(1), discussed above, illustrates a broader complaint: many lawyers, particularly those who do not often engage in federal litigation, get lost in attempting to navigate Rule 45's complexities. And a witness confronted with the task of unraveling subdivisions (c) and (d), which under Rule 45(a)(1)(A)(iv) must be included in every subpoena, generally must surrender or consult a lawyer. Even judges and lawyers who encounter Rule 45 problems with some regularity confess that they often have to reread the text carefully to recreate the hard-won understanding produced by earlier readings.

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[1] The 1991 version includes a potential limit on even this reach. Rule 45(c)(3)(A)(iv) provides that on timely motion the court must quash or modify a subpoena that "subjects a person to undue burden." The 1991 Committee Note illustrates this provision: "[I]t might be unduly burdensome to compel an adversary to attend trial as a witness if the adversary is known to have no personal knowledge of matters in dispute, especially so if the adversary would be required to incur substantial travel burdens."

Several approaches to simplification have been considered. One would operate only on Rule 45 itself, dramatically shortening it by eliminating many of the detailed provisions and by governing many questions through simple cross-reference to Rules 26 through 37. This approach, although developed with care through several revisions, was found too risky. Many of the detailed provisions in Rule 45 were added to resolve specific problems that had arisen in practice and that had eluded consistent or satisfactory resolution. Eliminating those provisions would throw litigants and courts back into the same wells of uncertainty, requiring new attempts to emerge. And unadorned cross-reference to the rest of the discovery rules may prove confoundingly opaque. A different approach sought to transfer part or all of the discovery provisions in Rule 45 back to the discovery rules. The final version of this approach transferred the document-production provisions to Rule 34, adding a new subdivision to govern requests addressed to nonparties. The Rule 34 approach is consistent with carrying forward all of the provisions, and occasional obscurities, of present Rule 45. But it also invites revisions for such issues as the time to object or respond, the place of production, enforcement procedure, and the like. It can reduce the total volume of words in Rules 34 and 45 combined by a significant measure. But this approach also was put aside. Practicing lawyers at the miniconference thought the possible advantages would be outweighed by the problems of transition and the inevitable risk of unintended consequences.

The approach to simplification that has survived focuses on what the Subcommittee has come to identify as the "three-ring circus" aspect of Rule 45. Three problems have to be addressed: what is the reach of a subpoena, and what court issues it within those limits; where is performance required; and where what court enforces it. These problems can be simplified by providing that all subpoenas issue from the court where the action is pending. The places of performance provided in present Rule 45 can be carried forward unchanged, although the current draft does add a provision defining the place for producing electronically stored information. Designation of the court responsible for enforcing the subpoena also can remain unchanged, although it is expected that any recommended draft would integrate the transfer provisions described above.

Eliminating the formality that directs that the subpoena issue from the court in the place for performance raises again the questions about nationwide reach addressed with the proposed transfer provision. The Subcommittee believes these questions are not troubling, but continues its research.

Time to object: One of the questions the Subcommittee considered and put aside addresses the provision in Rule 45(c)(2)(B) that requires an objection to a document subpoena to be served "before the earlier of the time specified for compliance or 14 days after the subpoena is served." The question has been renewed, and will be considered further. The more obvious variations would be to set a minimum time allowed for compliance, although that might create separate problems; to allow an objection within the time set for compliance if that is longer than 14 days; or, at least for discovery subpoenas, to treat nonparties in the same way as parties are treated for Rule 34 document requests — the time to object or to respond by stating that production will occur is 30 days. Additional practical advice on these questions will be welcome.

Preservation and Spoliation

The 2006 amendments adding express provisions for discovering electronically stored information were adopted in fear that they might be made obsolete by evolving technology before they could even take effect, and in recognition that inevitably they must be revisited with continuing developments in the hard- and software of computer-based information. Four years after the effective date, the 2006 rules seem to be contributing to effective discovery practices, particularly when employed in a spirit of party cooperation and effective judicial management. That positive conclusion does not belie the need for continuing study and preparation for eventual general revision. For the moment, however, attention has focused on the problems raised by the duty to preserve information for discovery and trial and the penalty of spoliation sanctions for failing to preserve. Those duties existed, and exist still, in a world of paper documents. But destruction is the natural course of life for much electronically stored information. Programs are designed to discard unused

information. Dynamic data bases are irretrievably changed simply by using them. Temporary backup systems are scheduled for regular, often short-term recycling. Merely turning on a computer can write over information that was released from protection by a "delete" command but retained in storage subject to overwriting. Manifold other means of loss abound.

Uncertainties as to the duty to preserve and fear of spoliation sanctions have generated great concern in large organizations that process huge volumes of information. Some of these concerns are now reflected in the design of computer systems not only to meet the organization's operating needs but also to address the needs of litigation. However carefully the systems may be designed, human decisions still must be made to determine when a litigation-oriented duty to preserve arises and to respond by tailor-made preservation responses. Many voices have proclaimed that uncertainty leads to vastly expensive over-preservation. And occasionally a voice is heard observing that the same duties and uncertainties apply to individuals; the difference is that an ordinary personal injury victim, employment discrimination plaintiff, home mortgage foreclosure target, and others, have not the slightest idea of their potential obligations.

Of the many excellent panel presentations at the Duke Conference last May, the panel on preservation and spoliation was the only one to present a consensus recommendation. Although many details went beyond possible consensus, the panel presented a chart of the elements that might be incorporated in a preservation rule. They urged that adoption of a directing and protecting preservation and spoliation sanctions rule is the most important task the rules committees can undertake. Recognizing that the duty to preserve often arises before litigation is actually filed, and understanding the doubts whether a general rule of practice and procedure for the federal courts can properly address conduct before an action is filed in a federal court, they urged that the urgency of the need commands bold action. Their suggestion of elements for a rule is attached.

Additional information is needed. Andrea Kuperman, Judge Rosenthal's rules clerk, has researched the case law on preservation obligations in all the federal circuits. The law is consistent on some issues, particularly the abstract definition of the circumstances that raise a duty to preserve. It is inconsistent on other issues, particularly the degrees of culpability and prejudice appropriate to calibrating spoliation sanctions. Katherine David, rules clerk locum tenens, has worked on an outline of other laws that impose preservation requirements. Emery Lee has begun a project to determine the actual incidence of spoliation litigation and sanctions. The results are still preliminary, but strongly suggest that spoliation issues are actually litigated in only a tiny fraction of all federal actions, while sanctions are still rarer. The slides prepared for his presentation to the Advisory Committee in November are attached. Earlier FJC work done to support the Duke Conference suggests that spoliation issues arise rather more frequently, perhaps in 2% to 3% of all federal actions, but without often leading to motions and dispositions. Many other organizations are pursuing empirical work that should shed further light, not only on experience in litigation but on the all-important questions of pre-litigation behavior. It will be very difficult to separate out overall information preservation costs incurred by large organizations from the marginal costs incurred in redesigning information systems to anticipate the general needs of litigation and in implementing preservation programs when circumstances trigger a specific duty to preserve. But sophisticated efforts are under way, and there is reason to hope for valuable insights.

The Subcommittee has begun work on preservation and spoliation issues. It is not clear whether it will be possible to develop rules provisions that will be of any real use. Nor is it entirely clear whether there is authority to adopt a good rule if — as seems highly likely — a rule will be useful only if it addresses the duty to preserve before any action has been filed. The question of authority, however, may depend on the nature of the rules that are developed. As difficult as these questions are, the importance of the problems justifies intense effort. Reports abound that large organizations are terrified by litigation preservation obligations. The fear of case-altering sanctions is said to induce disproportionately extensive and expensive preservation efforts. Lawyers agree that fear of sanctions drives behavior, but may add that good behavior is much encouraged by reminding

clients that a good case can be destroyed by preservation missteps. Without knowing whether any rules can be crafted that will warrant a recommendation for publication, the effort will be made.

Faced with these difficulties, the most that can be done now is to sketch the most obvious issues that might be addressed. Many of the issues can be gathered in three main groups: what triggers an obligation to preserve? What is the scope of the obligation once it arises? And what sanctions are appropriate for what types of failure to preserve information that must be preserved?

The federal decisions are unanimous on one point. A duty to preserve information for litigation can arise before an action is filed. The general test is that the duty arises when there is a reasonable expectation of litigation, or probable litigation. One challenge will be to determine whether a rule could be any more specific than this general test. The best reason to address this issue may be as part of provisions on sanctions. Most particularly, it may be possible to frame expanded "safe harbor" provisions that, among other considerations, take account of an organization's overall compliance strategies. Good-faith implementation of a reasonably designed compliance program could be an important element in the sanctions calculus.

Identification of the circumstances that trigger a duty to preserve is closely tied to the scope of the ensuing preservation. The difficulties encountered by a large organization are noted below. But it is important also to remember the challenges that face individual litigants. One example suffices. A personal-injury victim may exchange e-mail messages, text messages, and social-network-site postings with a variety of friends and acquaintances about the events giving rise to the injury, the nature of the injuries, the progress of recovery, and so on. The thought of litigation may have been present during all of these exchanges. The thought of an obligation to preserve may not have occurred. One question is whether it is feasible or desirable to adopt rules that distinguish between more and less sophisticated parties, or at least between large-scale complex litigation and more routine actions.

The scope of the duty to preserve presents the most difficult questions during the period before an action is filed. After filing, ample tools exist for agreeing on preservation reasonably proportional to the needs of the action. The most direct provision appears in Rule 26(f)(2), directing the parties to "discuss any issues about preserving discoverable information." Additional provisions appear in addressing scheduling orders, Rule 16(b)(3)(B)(iii), pretrial conferences, Rule 16(c)(2), and protective orders, Rule 26(c). At this stage, the most important element may well be reasonable cooperation of the parties, encouraged by hands-on case management. Many participants in the Duke Conference repeatedly emphasized the importance of these elements, while lamenting that they are not always encountered.

Before an action is actually filed, the first uncertainty as to the scope of preservation arises from indefiniteness of the subject of whatever action — if any — is eventually filed. Suppose an automobile manufacturer receives a complaint that one of its automobiles left the road, rolled over, and caused injuries. What aspects of design, manufacture, distribution, marketing, and post-sale behavior might it reasonably expect to be involved? Whatever complaints may be made about the guidance provided by notice pleading once an action is filed, this sort of "notice" may be singularly unhelpful. And as an actual filing becomes more imminent, it may be that more precise information about the nature of the claims becomes available. Does the scope of the duty to preserve shift and perhaps expand?

A more general question would attempt to tie the scope of preservation duties to the scope of discovery. It is natural to begin by invoking the broad scope of discovery defined in Rule 26(b)(1), including the discovery relevant to the subject matter of the action that may be ordered for good cause. But the burdens of preservation may suggest that account also should be taken of the proportionality concerns reflected in Rule 26(b)(2). A narrow example would ask whether there is a duty to preserve electronically stored information that is not reasonably accessible because of

undue burden or cost, Rule 26(b)(2)(B). The more general question asks whether a party can safely rely on its own interpretation of the cost-benefit calculus mandated by rule 26(b)(2)(C)(iii).

Whatever the subject of the information that should be preserved, what sources should be investigated? Discussions often are framed in terms of identifying "key custodians," those people whose files and computer systems are most likely to contain relevant information. Pleas have been made for a rule that sets a specific number of key custodians that need be identified and directed to preserve, but the variety of circumstances weakens that hope dramatically.

Once the subject and sources are identified, how far back in time should the preservation obligation extend? The design of just one component of the automobile involved in an accident, such as the braking system, may have evolved over a long series of gradual changes. And for how long must the information be preserved — is it enough to make a guess as to the limitations periods that would govern the claims, as affected by the substantive theories and the choice of law as affected by the choice of court?

Sanctions for failing to preserve, whenever the duty arose and whatever its scope, are affected by the clarity of the duty, the intent and degree of care exercised, and the consequences for litigation by parties whose discovery and trial evidence have been thwarted. This interdependence is, perhaps paradoxically, the source of suggestions that perhaps the most promising prospect for adopting useful rules is to focus on sanctions. Defining the circumstances that warrant sanctions defines the duty to preserve by backward implication, and focuses directly on the fears that are so often expressed about preservation obligations.

The first step in thinking about sanctions is to remember the need for care in defining what is a "sanction." A failure to preserve may be met, for example, by an order extending the time for discovery. Or the order may award the costs incurred by the requesting party in attempting to reconstruct the lost information from other sources. Are these orders sanctions? Or are they simply remedies that should be available no matter how innocent the loss?

The next step is to address the central issues identified in the cases — the degree of fault in failing to preserve, and the extent of the prejudice caused to other parties. This is the area in which the cases show dramatic differences, primarily in determining what sanctions are appropriately imposed for what degrees of culpability.

The first step, identifying the degree of prejudice, is inevitably frustrating. Measuring the importance of information that is unknowable because it is unavailable is chancy. One indication may be the degree of fault — intentional destruction supports a relatively sturdy inference that the information was not only unfavorable but also important. But measuring the degree of care may be affected by obvious importance, even in the face of innocent intent. Suppose the automobile was owned by the driver, who allowed it to be compacted as junk. It cannot be known whether examination of the wreck would have provided valuable information as to the cause of the accident. But the need to preserve the opportunity to examine should be apparent. Sanctions might be measured accordingly — and distinctions drawn between the owner and a passenger.

The degree of fault may be approached almost separately, apart from the degree of prejudice. Intentional destruction may deserve severe sanctions. The most severe are "case terminating" by dismissal or default. Some form of spoliation instruction, either stating a presumption or permitting an inference of relevance and importance, seems less severe, but many lawyers view the effect as close to conclusive. There may be some uncertainty in drawing inferences of intent in some cases, but once intent is found severe sanctions seem warranted. There is little disagreement on that score.

Disagreement about sanctions arises at the next step. Suppose a party failed to exercise reasonable care in preservation? Or failed to exercise the level of care that a normally careless person would exercise — was grossly negligent? And what sort of conduct counts in these assessments — some case law finds that failure to initiate a prompt litigation hold is, without more, gross

negligence. Whether conduct is grossly negligent or only negligent, what sanctions are appropriate? Should that depend on the perhaps uncertain estimate of the degree of prejudice?

Sanctions could be addressed through Rule 37(e), and perhaps other rules. For example, a rule could provide that reasonable preservation conduct does not warrant sanctions even if discoverable information was lost, and that intentional destruction or failure to preserve does warrant sanctions. To be safe, it might also recognize the ambiguity of sanction decisions in the intermediate zones of negligence and serious negligence. A rule expressed in these terms would not directly establish rules of conduct for pre-filing preservation. It might be, however, that it would provide an important degree of comfort to those litigants who are sophisticated enough to worry about preservation obligations. Uniform federal standards might influence state-court standards, enhancing the benefits.

These questions will not soon become the subject of recommended rules. But progress toward determining whether to recommend new rule provisions, and what they might be, will be advanced by any suggestions that can be provided.

Rule 26(c)

The protective-order provisions of Rule 26(c) have been considered at periodic intervals since the conclusion of a years-long effort in the mid-1990s that included two rounds of public comment and concluded with a decision that no revisions were needed. Current research and reconsideration have led to a similar conclusion. The case law is remarkably uniform across the circuits, and seems to express proper rules on all of the subjects that have come up for consideration. It would be possible to express these rules more directly in the text of Rule 26(c). But the possible advantages are offset by the risk of unintended consequences, both in adopting new rule text and in the changes in rule text that might be made as a proposal passes through all stages of the Enabling Act process, concluding with action or inaction by Congress. Although continuing practice will be carefully monitored to ensure that practice is not veering toward excessive — or inadequate — protection, no proposals are anticipated in the near future.

Pleading

Beginning with the Twombly decision in 2007, and spurred further by the Iqbal decision in 2009, pleading standards have been moved from a continuing but inactive status on the agenda to active consideration. Active consideration does not imply a plan for imminent rules proposals. To the contrary, it is better to wait patiently while lower courts work through the ways in which pleading practice should be adjusted to meet the concerns expressed by the Supreme Court. Filtering through the fine sieve of thousands of pleading decisions may well produce better results than could be achieved by attempting to formulate and express revised standards in rule language. Absent some external shock, the Advisory Committee prefers to examine developing practice carefully for some time to come. If experience shows the value of new rules, the revisions will be better supported than any that could be achieved by immediately starting the process with specific proposals.

One sign that appellate courts will contribute to refining pleading standards at a steady pace is provided by revised Second Circuit Local Rule 31.2(b), taking effect on December 15, 2010. This rule provides an expedited appeals calendar for appeals from "threshold dismissals," including — among others — an order dismissing a complaint solely for failure to state a claim upon which relief can be granted. The appellant's brief is due 35 days from notification the case has been placed on the expedited calendar, the appellee's brief is due within 35 days after that, and a reply brief may be submitted within 14 days after that. It seems likely that expedited decision will often follow expedited briefing, expanding the lessons to be contributed to any effort to revise the rules.

The most important question is whether the preference for vigilant delay is well founded.

Two major bodies of work support the ongoing survey of developing practice. Andrea Kuperman continues to update her extensive review of evolving case law, focusing primarily on the

courts of appeals. The Federal Judicial Center is well along with a rigorous empirical evaluation of experience with Rule 12(b)(6) motions to dismiss for failure to state a claim. The project is designed to measure the frequency of motions to dismiss in periods immediately before the Twombly decision and shortly after the Iqbal decision. The rate of granting the motions is included, as well as the frequency of granting leave to amend, actual amendments, and — when the information is available — the fate of the amended pleadings. The work is painstaking, but will provide invaluable information when it is completed. It should be particularly useful in separating orders that dismiss an entire action on the pleadings from orders that dismiss only parts of an action. Dismissal of only some claims — or even some parties — leaves room to restore the parts that have been dismissed if further proceedings on the parts that remain support a sufficient complaint.

Whatever the outcome of the FJC project and other empirical projects, the critics of the Twombly and Iqbal decisions are not likely to be satisfied. Measuring the impact on actions actually filed does not reveal whether other potential and worthy actions were not filed for fear of dismissal on the pleadings. Nor, if there is any increase in the rate of dismissals, will the data speak to the value-laden questions whether the dismissed plaintiffs should have had access to discovery to garner information needed to plead what may be valid claims.

Champions of elevated pleading thresholds can frame similar challenges. If the data show that motions to dismiss are made more often and that a higher proportion of the motions are granted, that may be seen as only a beginning. It can be urged that too many actions still slip through into discovery, imposing unwarranted costs. Serious proposals have been made that at least as articulated, the Twombly and Iqbal decisions do not raise the threshold high enough.

The central question is not one of pleading etiquette alone. The intense debate focuses on how much information a plaintiff must have to be entitled to invoke a court's assistance. The only reflection on this question in the present rules appears in Rule 11(b)(3): the signature on a pleading certifies that "the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery." Is this the right standard? How far can administration of this standard, or a revised standard, account for categories of cases in which defendants typically control access to critical information — cases often characterized by "information asymmetry"? Can the appropriate standard for initiating (or defending) litigation be better expressed in the rules that focus more directly on pleading standards, Rules 8 and 9?

Deliberations of these questions are reflected in several sketches created to illustrate some of the most obvious alternatives. A memorandum describing the sketches is attached.

Looking first to Rule 8(a)(2), the sketches recognize that all choices should remain under consideration. The range of possibilities is broad. At one end, a rule could be devised to express the literal meaning that never was given to the "no set of facts" dictum in Conley v. Gibson. At the other end, rules could be devised to require greater — even far greater — fact detail than seems to be required by the Twombly and Iqbal opinions or by the legions of cases interpreting them. Choosing among these alternatives, if a choice must be made, will affect the fundamental role of private adversary litigation in protecting individual rights and in enforcing public values that public enforcers may lack the resources to enforce fully. Expressing the choice in a revised Rule 8(a)(2) will be difficult, and inevitably would be followed by a period of renewed uncertainty.

An alternative to modifying the general standard expressed in Rule 8(a)(2) might be to expand the categories of substantive claims that are subject to specific pleading requirements. Most of the focus is on adding new categories of claims to Rule 9(b), which directs that "a party must state with particularity the circumstances constituting fraud or mistake." Prominent candidates include cases involving official immunity or conspiracy, the subjects of the Iqbal and Twombly decisions. The possibility of requiring "heightened pleading" in this fashion has been considered intermittently since the Leatherman decision rejected heightened pleading in 1993. The possibility remains under

consideration, but has encountered at two least two concerns. One concern is that singling out categories of claims by substantive theories strains the limits of a process that is not to abridge, enlarge, or modify substantive rights. The other concern is that it will be difficult to determine which substantive claims might be listed, and whether a single level of particularity is appropriate to each. The list, moreover, could grow long.

A contrary approach also might be considered, identifying categories of substantive claims that are favored by pleading standards less rigorous than ordinary standards. This approach is subject to the same difficulties as attend attempts to single out specific categories for heightened pleading obligations. It may be subject to additional objections. It has not yet received serious consideration.

A still different approach to particularized pleading might be to develop a rule depending on case-specific judicial control. The particularized statement procedure of Rule 12(e) could be expanded beyond its present narrow limits to become a tool that allows a judge to direct pleading in sufficient detail to enable effective case management. This approach was studied a few years ago and put aside for fear that ill-founded motions would become a routine practice. It may deserve further consideration.

Other approaches focus more directly on one of the animating concerns underlying the Twombly and Iqbal decisions, the integration of pleading with discovery. The Court was clearly concerned that lax pleading standards may enable plaintiffs to inflict disproportionate discovery burdens in pursuing unfounded claims. This concern must be weighed against the prospect that well-founded claims may rest on facts known only to the defendant. It may be possible to devise rules that support tightly focused discovery designed to support a relatively detailed complaint without imposing severe burdens on the intended defendant. Many variations are possible. Some states provide for discovery to aid in framing a complaint before an action is filed. This possibility was considered and rejected twice before the Twombly and Iqbal decisions, but may deserve renewed consideration. Or a plaintiff might be allowed to file an initial complaint that identifies facts it is unable to plead without discovery — access to discovery as to those facts might be available as a matter of right, or only with court permission. Or "pleading discovery" might be deferred until there is a motion to dismiss; discovery could be integrated with the motion either by directing the movant to specify what facts need to be pleaded in greater detail or by leaving it to the plaintiff to respond by listing facts it wants to discover in aid of an amended complaint. Yet other possibilities might be devised.

Pleading: Legislative Proposals

Twombly-Iqbal Bills: A year has passed since the last report that bills have been introduced in Congress to supersede the pleading decisions in the Twombly and Iqbal cases. Revisions and new bills have been introduced since then. The central features of the bills are similar. In one way or another, the purpose is to restore pleading practice to what it was on May 20, 2007, the day before the Twombly decision. And the role of the Enabling Act process is expressly recognized by providing that the reestablished pleading practice will terminate upon adoption of new pleading standards through the Enabling Act. The Rules Committees' response embraces the recognition of the Enabling Act process, but also urges that legislation appears unnecessary and very risky. The lower courts are working their way toward an understanding of what the Twombly and Iqbal decisions mean; there is little sign of problems that might warrant rushing to respond by means faster than the designedly deliberate pace of the Enabling Act. And the courts' progress toward the next thoughtful step would be disrupted by the doubts and uncertainties that must inevitably follow any available legislative formulation.

Other Pleading Bills: Other bills address pleading standards or closely related procedures in specific kinds of cases. Two recent bills are attached.

The first, S. 3728, 111th Cong. 2d Sess., amends the design-protection statute, 17 U.S.C. § 1301 et seq., primarily to establish protection for fashion designs. Section 2(g) amends § 1321 by

adding a new subsection (e) requiring a claimant in an action for infringement to "plead with particularity facts establishing" design protection, infringement, and availability of the design "in such location or locations, in such a manner, and for such duration that it can be reasonably inferred from the totality of the surrounding facts and circumstances that the defendant saw or otherwise had knowledge of the protected design." The court is directed to consider the totality of the circumstances in considering whether a claim for infringement has been adequately pleaded.

The second bill, S.____, is inspired by the "anti-SLAPP" statutes adopted in several states. "Strategic Lawsuits Against Public Participation" are the target. The fear is that litigation is brought to stifle the exercise of free-speech rights. Section 4 is broad and brief enough to be quoted in full: "Any act in furtherance of the constitutional right of petition or free speech shall be entitled to the procedural protections provided in this Act." Section 5 provides a "special motion to dismiss." The movant must make "a prima facie showing that the claim at issue arises from an act in furtherance of the constitutional right of petition or free speech." If the movant carries this burden, the responding party has the burden "to demonstrate that the claim is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment." Filing the special motion stays discovery proceedings unless the court orders specified discovery. The court is directed to provide an expedited hearing, and to issue a ruling as soon as practicable. Perhaps in an effort to clarify the "prima facie showing" language, this subsection provides that "[t]he parties may submit the pleadings and affidavits stating the facts upon which the liability or defense is based." Dismissal "shall be with prejudice." The movant has a right of immediate appeal from an order denying the special motion in whole or in part. (There is also a special motion to quash discovery, request, or subpoena for "personally identifying information" sought in connection with an action arising from an act in furtherance of the constitutional right of petition or free speech. One apparent application would be to deny discovery aimed at identifying an anonymous blogger.)

The pleading procedure provided by the fashion-design statute is substance-specific, as part of the original legislation creating the new right. The anti-SLAPP bill presents somewhat different questions, but again the tie between new procedures and substance is unmistakable. The special motion to dismiss includes elements that are familiar from other legislation, such as the automatic stay of discovery. Provisions that establish docket priorities and direct prompt decision are familiar from past bills and not a few laws. But there also are manifest ambiguities that would be ironed out — if at all — only after a considerable period of uncertainty. What is a "prima facie showing"? Just what blend of pleading and summary-judgment practice is contemplated? What is the standard of decision — the court is directed to explain the reasons for granting or denying the motion, but that does not explain what reasons are appropriate. Does the provision that dismissal shall be with prejudice imply that leave to amend cannot be granted?

These issues are similar to those presented by many bills. Most of them do not become law. Some do. The Rules Committees are often asked for comment. It may be useful for the Rules Committees to develop a general response that describes and gives examples of the problems created by legislatively imposed pleading standards, both in Rules 8 and 12 and in specific categories of cases, such as anti-SLAPP suits. It may not be satisfying to say continually that Congress should not enact rules of procedure, that it should honor its longstanding deferral to the resources and wisdom of the Enabling Act process. And even if Congress defers, what are the Rules Committees to do if they are uncertain whether specific substantive rights deserve or require departures from the "general rules of practice and procedure" contemplated by § 2072(a)? For that matter, how well will this approach work, for how long, if the Committees regularly conclude that it is better to stick with the general transsubstantive rules? And at what point in the legislative process should the Committees ask for deference — so they can consider every procedure proposed in every bill, no matter how uncertain the prospects for enactment? Only after enactment? At some indeterminate point in between?

An alternative to considering each proposal in the Enabling Act process would be to attempt to provide help to Congress in drafting the best possible legislation. But how is that to be done? It

would hardly do to pursue the complete process through consideration by the Supreme Court and submission to Congress, not as adopted rule but as legislative advice. At what point would the process be cut short? Is it even feasible, or desirable, to ask a full Advisory Committee to make recommendations? If not — and "not" seems the better answer — how is the advice to be framed? What are the means of offering or pressing it? How can the Committees be protected against political efforts to gain support by proclaiming Committee approval for provisions the Committees would never approve?

Clear-cut answers to these and a host of related questions may not be possible. But it may be useful to engage in an open discussion of these problems, now and into the future. Any guidance that can be provided, however general, will be useful.

Duke Conference Subcommittee

A Subcommittee chaired by Judge John Koeltl has been formed to carry through the impetus for further work developed at the Duke Conference last May. The welter of ideas generated at the Conference suggest four major paths to follow. Many ideas fit easily within present rules, and focus on the need for fostering best practices by education of the bench and bar, development of manuals and pocket guides, and similar efforts. Other ideas may provide a foundation for pilot projects. Others may provide a focus for further empirical research. And still others may provide an impetus for revising the Civil Rules.

The Subcommittee began its deliberations by asking whether the time has come to abandon the basic framework established when the Civil Rules were first created in 1938. Participants at the conference provided general and rather strong support for carrying forward the basic elements of notice pleading, searching discovery, and summary judgment. It is always important to ask whether general acceptance rests on familiarity, on the need to believe that what we do as lawyers and judges is worth doing and is done well, and on the difficulty of suggesting worthy alternatives. But it does not seem the time has yet come for the next major revolution in civil procedure.

The Federal Judicial Center is hard at work on education programs for judges. It is revising pocket guides to reflect developing best practices. And it has had a hand, in cooperation with the Committee on Court Administration and Case Management, in developing the newly released Second Edition of the Civil Litigation Management Manual. The Manual is maintained in an on-line version, and it may prove possible to incorporate some of the good ideas generated at the Duke Conference into the Manual on an ongoing basis. Initiatives are under way to determine how best to offer ideas to CACM for its consideration.

Pilot projects can be useful in testing new procedures before adopting them for general use. It is important that a pilot project be planned in ways that facilitate careful empirical evaluation of the results, so that evaluation does not depend on the general impressions of those most immediately involved. Here too the Federal Judicial Center can provide great support in aid of rigorous design and evaluation. The quest for possible subjects is under way.

Empirical projects are being pursued by independent groups. Several are sponsored by the Institute for the Advancement of the American Legal System, whose earlier projects provided support for many ideas presented at the Duke Conference. Their work in examining state-court procedures and comparing them with federal procedures has been an important source of information and will continue to provide important information. The RAND Institute and other groups also have contributed valuable information and will continue to do so. Still other groups, some of them bar groups, also will help.

The number of rules proposals is broad. Many of them focus on pleading and discovery. Some of the discovery questions are being considered by the Discovery Subcommittee chaired by Judge David Campbell, as described above. Others will be studied in the future. Many other proposals addressed pleading standards, presenting questions that in part are independent of

discovery practice but also are in part interdependent with the role of discovery. The modes of pursuing pleading questions and the variety of discovery questions will likely involve subcommittees, most obviously the Discovery Subcommittee and the Duke Conference Subcommittee.

Many other rules are touched by suggestions made at the Conference, beginning with Rule 1. A "menu" of the more workable suggestions is attached to illustrate the range of possibilities, including many of the more specific discovery proposals. The list is not complete; worthy candidates for inclusion will be welcome.

Pattern Discovery

One of the ideas presented at the Duke Conference was that discovery practices would benefit from development of standard interrogatories and document requests that are available for routine and presumptively proper use in specific categories of litigation. A team formed by the National Employment Lawyers Association, including strong representation of both plaintiff and defense lawyers, has begun work on drafting models for individual employment claims. If models acceptable to both sides can be developed — and they have high expectations of success — they may provide an occasion for a pilot project. Other means of implementation may be found. And success may well spur similar efforts by lawyers who specialize in other areas of litigation. It is not clear whether or when this work will lead to revisions in the Civil Rules, but the Advisory Committee is paying close attention to the work.

Civil-Appellate Rules Issues

The Appellate Rules Committee and the Civil Rules Committee have formed a joint subcommittee to study questions that overlap these sets of rules. Two proposals are under consideration.

The first proposal involves Appellate Rule 4, addressing possible uncertainties as to appeal time when a court enters an order granting a post-judgment motion that has suspended appeal time but the order contemplates action that may not be completed before appeal time has run out if the order granting the motion restarts appeal time. It may be that an eventual recommendation as to Rule 4 will suggest parallel revisions of Civil Rule 58. These questions may be resolved soon.

The other proposal addresses the question of "manufactured finality." A party may wish to appeal an important ruling that does not lead to a final judgment and that does not lead to appealability under such familiar means as a partial final judgment under Civil Rule 54(b) or interlocutory appeal by permission under 28 U.S.C. § 1292(b). It seems to be generally accepted that an appealable final judgment can be "manufactured" by securing dismissal with prejudice of every claim presented by every party to the action. Most courts refuse to allow a would-be appellant to manufacture finality by dismissing other claims without prejudice. The middle ground that remains under study involves the question of "conditional prejudice." Should a party be able to establish appealability by dismissing all claims with prejudice, so that affirmance will conclusively end the action, but on terms that allow the dismissed claims to be revived on reversal of the ruling that spurred the appeal? This question is intriguing and difficult. It is being actively pursued.

TAB
5-C

Pleading-Discovery Approaches

This memorandum provides an incomplete and preliminary overview of some of the approaches that might be considered in reacting to the continuing expressions of concern about the development of pleading practices in response to the Twombly and Iqbal decisions. Incomplete both for want of imagination and for fear of unseemly proliferation. Preliminary because practice continues to evolve, and more importantly because even the first rigorous efforts to evaluate practice are still under way.

The Federal Judicial Center remains hard at work on its project. Tentative evaluations may be available in time for the November meeting, but final analysis will require more time.

Andrea Kuperman's massive survey of lower-court decisions, focusing primarily on the courts of appeals, continues to grow. Many will find it — at least in large part — reassuring. But not even scores of appellate opinions can provide clear evidence of what is happening in law offices and in the district courts. It is easily possible that in the end the cases will seem to have done as good a job of integrating the Supreme Court's pronouncements into working practice as could be done by amending any Civil Rule. But it is important to continue to focus on these questions so as to be ready to propose rule amendments if the need appears.

PLEADING: CLAIM

An obvious place to begin is with Rule 8(a)(2). Even if some need appears to propose rule amendments, Rule 8 must be approached carefully. No matter what words might be chosen, the message would be ambiguous in ways that a Committee Note could not cure. Even if it were announced that the new language was intended to enshrine exactly the meaning of the Twombly and Iqbal opinions as elaborated by the lower courts, disputes would remain as to just what that meaning might be. If instead the purpose were to redirect in some way the paths taken by the lower courts, greater uncertainty — and likely some real confusion — would follow. The manifest vulnerabilities of almost any Rule 8 proposal would support cogent protests by any group that feared adverse effects, and there might be many such groups. Still, Rule 8 must hold a high place on any agenda for addressing pleading standards.

Restore What Never Was: Some of the reactions to the Twombly decision seem to ask for restoration of the dictum in Conley v. Gibson that a complaint may be dismissed for failure to state claim only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." The plea for restoration in turn seems to ask that these words be taken literally. Most courts, at least, did not take the literal meaning. But Rule 8 might be redrafted in an attempt to restore a standard that never was: "a short and plain statement giving notice of the claim."

Restore What Was: A more realistic approach might attempt to restore pleading practice as it was on May 20, 2007, the day before the Twombly decision. This approach is more realistic only if it is accepted that there can be no precise definition of the practice in place at the time Twombly was decided. The idea would be to "go back to doing whatever it was you were doing, and continue to develop pleading practice without regard to anything in the Twombly or Iqbal decisions that might point you in a different direction." Even then it is difficult to believe that lower courts, recalling the Twombly and Iqbal opinions, could in fact recreate whatever they would have done had those cases never gone to the Supreme Court. But the attempt could be made. Two simple drafting possibilities are:

Republish present Rule 8(a)(2), with a Committee Note disavowing plausibility, context, judicial experience, and common sense. Explaining that it was messy, all those things counted, but it doesn't do to say so.

"a short and plain statement of the claim, showing that the pleader ~~is~~ may be entitled to relief."

"Notice plus": The ABA Section of Litigation paper, "Civil Procedure in the 21st Century" proposes this as a mid-ground between their perception of Twombly-Iqbal standards and the notice pleading practice that prevailed on May 20, 2007:

"A complaint shall allege facts based on knowledge or on information and belief that, along with reasonable inferences from those factual allegations, taken as true, set forth the elements necessary to sustain recovery."

Twombly-Iqbal in Rule Speak: Another approach would reflect basic agreement that the time had come to raise pleading standards to some extent — that the Court was right to make the attempt, and also right to express the new approach in capacious language leaving the way open for lower-court improvisation on the way to hammering out new standards through a common-law process. Although the opinions are written as opinions, not in an attempt to mimic rule language, some of the key words could be absorbed into Rule 8. These are among the possibilities:

"a short and plain statement showing a plausible claim for relief."

"a short and plain statement of facts and context showing the pleader is entitled to relief"

"a statement of non-conclusional facts, direct or inferential, showing the pleader is entitled to relief"

"a short and plain nonconclusory statement showing the pleader is entitled to relief"

"a short and plain statement of a transaction or occurrence showing * * *."[1]

"a short and plain statement of acts or events showing * * *"

"a short and plain nonconclusory statement of grounds sufficient to provide notice of (a) the claim and (b) the relief sought"[2]

"a short and plain statement, made with particularity, of all material facts known to the pleading party that support the claim creating a reasonable inference that the pleader is plausibly entitled to relief," defining "material fact" as "one that is necessary to the claim and without which it could not be supported."[3]

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[1] An early draft of Rule 8(a)(2) required a "statement of the acts and occurrences upon which the plaintiff bases his claim or claims for relief." Without "showing that the pleader is entitled to relief," this would be quite relaxed.

[2] This is the proposal of the New York State Bar Association Special Committee on Pleading Standards in Federal Litigation; see letter of July 13, 2010, Samuel F. Abernethy, Esq., to Judge Mark R. Kravitz. Bringing "notice" into rule text is evocative, perhaps too evocative — it may imply a more general relaxation of pleading standards than actually existed before Twombly and Iqbal.

[3] This is the proposal of Lawyers for Civil Justice, DRI, the Federation of Defense & Corporate Counsel, and the International Association of Defense Counsel.

More than Twombly-Iqbal: "The party that bears the burden of proof with respect to any claim or affirmative defense must plead with particularity all material facts that are known to that party that support that claim or affirmative defense and each remedy sought, including any known monetary damages. A material fact is one that is essential to the claim or defense and without which it could not be supported. As to facts that are pleaded on information and belief, the pleading party must set forth in detail the basis for the information and belief."[4]

Variations on Facts: Although the label is likely to prove controversial, Rule 8 could be pushed in the direction of something that could be called "fact pleading." The second of the three variations shown here approaches Code pleading; the first and third are designed to make it easier to disclaim any intent to revive indeterminate distinctions between "fact," "ultimate fact," and "evidence."

"a short and plain statement of facts showing that the pleader is entitled to relief."

"a short and plain statement of facts constituting the claim"

"a short and plain statement of the claim, including facts showing that the pleader is entitled to relief"

Elements Pleading: Occasionally it is suggested that a pleader should be required to plead the elements of the claim: "a short and plain statement of the elements of the claim."

Pre-filing pleading: Alan Morrison's Duke Conference paper proposes an approach to situations in which the defendant has control of fact information required to state a claim. Iqbal as would-be plaintiff, for example, could submit a letter or draft complaint to the defendant alleging that they ordered the challenged practices. If the defendants do not supply information in their control showing how the policies were established, they would be barred from challenging the complaint for failure to allege specifically facts connecting them to the orders. A mere blanket denial would not do, because there is likely to be a paper or e-mail trail. But if the defendants present evidence countering the claims, then the plaintiff must present "some basis * * * to avoid dismissal, rather like a mini summary judgment."

Reverse Pleading Burdens: Professor Miller suggests that if the plaintiff alleges the inaccessibility of critical information and "articulates a reasonable basis for the information's existence and the defendant's control over it," "it might be reasonable to reverse the pleading burden and require the defendant to make the needed material available to the plaintiff along with whatever explanation it thinks appropriate." The court could allow further discovery. 60 Duke L.J. 1 at 110.

Appellate Review: Professor Miller asks whether the "subjective appraisals" that inhere in "judicial experience and common sense" will lead to diluted appellate review. Need the rules be amended to ensure continued de novo review of dismissals for failure to state a claim?

RULE 9(B)

From time to time thought has been given to adopting "heightened pleading" standards for specific kinds of claims, expanding the Rule 9(b) requirement that "fraud or mistake" be stated "with particularity." (Rule 9(c) also requires that a party denying that "a condition precedent has occurred or been performed * * * must do so with particularity.") One reason to hesitate has been concern that picking out specific claims might seem to imply substantive choices. Requiring greater fact information to allow a claim past the Rule 12(b)(6) threshold into the heavenly fields of discovery

[4] This is ACTL/IAALS Pilot Project Rule 2.1.

might seem to reflect a judgment about the relative desirability of enforcing that kind of claim. Although this concern must be taken seriously, there are powerful arguments that the purpose is as much procedural as the purpose of original Rule 9(b). (The original procedural purpose of Rule 9(b) may not be entirely clear, but any obscurity may bolster the argument that some blend of real-world procedural concern with substantive concerns is proper under the Enabling Act.)

Greater difficulty might arise in deciding just which claims to embrace in heightened pleading standards. Broad informal consultation might establish a tentative list. Actual choices for development might be supported by miniconferences or a general request for public comment before any specific rule or set of rules is proposed.

Implementation by drafting would be influenced by the direction taken. If the revised rule simply expanded the categories of claims that must be stated "with particularity," the main challenge would be finding a way to identify the claims. Would it suffice to list "antitrust" claims, or should a more specific list of statutes be adopted? Some categories might be relatively easy to specify — civil RICO would be an example. But what of "environmental" claims — statutory, common-law (e.g., nuisance), or perhaps administrative? "Institutional reform"? Even the familiar example of claims likely to encounter an immunity defense could prove tricky; qualified or absolute official immunity to federal-law claims might be clear enough, but what of parallel immunities to state-law claims? Sovereign immunity, domestic or foreign? More exotic immunities?

Finally, a quite different Rule 9(b) question may be found in the Iqbal opinion. Rule 9(b) provides that "[m]alice, intent, knowledge, and other conditions of a person's mind may be alleged generally." The Court rejected the argument that this provision makes adequate a bare allegation of "intent." "'[G]enerally' is a relative term. * * * It does not give * * * license to evade the less rigid — though still operative — strictures of Rule 8." The task of pleading greater supporting detail for an allegation of intent is daunting, and is encountered frequently. Discrimination claims provide a common example. This question may deserve close attention.

REVERSE RULE 9(B): SPECIAL RELAXED PLEADING RULES

Rather than expand the categories of claims that must be pleaded with particularity, whether in Rule 9(b) or in new rules, a reverse approach might be taken. Pleading standards could be raised for most claims, retaining relaxed notice pleading for specified claims. Individual discrimination (at least in employment: what of "class-of-one" equal-protection claims?), intent to discriminate, "civil rights," claims based on facts inferred from circumstance, and others could be listed. One problem will be finding categories that can be kept within meaningful bounds — "civil rights" is a pretty loose concept. It would be difficult to draft in terms that focus directly on information asymmetry, on "favored" claims, or "real people" claims. It would be possible to adopt an express pro se rule — but that might tempt lawyers to suggest a limited advising role at the beginning, to be followed by explicit representation later on. And past discussions have generally concluded that it is better to hold pro se parties to some semblance of the general pleading rules, perhaps with help from local forms and often with help from sympathetic judges.

OFFICIAL IMMUNITY

The recurring problem of official immunity pleading is difficult to address by focusing on the complaint. Perhaps the most feasible approach would be to require pleading with particularity whenever an individual-capacity claim is brought against a "public officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on a public employer's behalf."

An alternative approach would call for a reply, in the practice made famous by the Fifth Circuit. The rule might be framed as a Rule 9(b)(2), or as a Rule 7(a)(8), or something still different. The major difficulty with the Rule 7(a)(8) approach might be that plaintiffs would often overlook it. But it would be easy to draft if the reply is optional: "(8) a reply to an official immunity defense." If the reply is mandatory, there would be a cross-reference in Rule 7(a)(7), and a new Rule 9(b)(2): "(2) *Reply to [Official] Immunity Defense*. If a defense of [official] immunity is made [to a claim], the claimant must respond by a reply that states with particularity the circumstances that defeat immunity." "Official" is placed in brackets to indicate one of the drafting dilemmas — what sorts of immunity should be covered? Should the rule be framed explicitly in terms of an individual-capacity claim against a public officer or employee, etc.? "Official" itself would lead to such questions as Eleventh Amendment "immunity," claims against foreign sovereigns, and various immunities under state law. Without "official," all sorts of questions would arise: workers' compensation immunity? Charitable immunity if it exists anywhere? Family immunities, if they exist anywhere? Even such things as immunity from attachment or the like?

RULE 12(D)

Rule 12(d) might serve better than Rule 56 as the location for a rule allowing a party opposing a claim to make what in effect is a preliminary motion for summary judgment. The motion would rely on matters outside the pleadings to challenge facts poorly pleaded, facts omitted, and perhaps facts "well pleaded." The pleader would have an opportunity for discovery similar to that provided by Rule 56 before responding to the motion. A rough draft:

> **(d) Preliminary Summary Judgment.** A party [opposing a claim] may combine a motion under Rule 12(b)(6) or 12(c) with a preliminary motion for summary judgment under Rule 56. The movant may show there is no genuine dispute as to material facts that are required to support the claim or that defeat the claim. The court must allow the nonmovant a reasonable opportunity for discovery on the facts asserted by the movant before ruling on the motion.

(It would be possible to carry forward some version of present Rule 12(d), which gives the court the choice between treating the pleadings motion as one for summary judgment by undertaking to consider the "matters outside the pleading." Or discretion to refuse to allow a premature Rule 56 motion could be expressed directly. The advantage of treating it as a Rule 56 motion is to pick up the full Rule 56 procedure from the beginning. Less elliptical drafting also may be desirable, but might encounter the reluctance to refer directly to the Rule 56 moving burdens that shaped new Rule 56.)

RULE 12(E)

We might consider reviving earlier Rule 12(e) proposals. The rule could focus on directing a more definite statement for the purpose of facilitating pretrial management, including initially limited discovery to support more precise pleading. Professor Miller describes this as a "Motion to Particularize a Claim for Relief," allowing a plaintiff to anticipate a motion to dismiss by moving for "plausibility discovery." 60 Duke L.J. 1, 112-113.

RULE 12(B): TIED TO DISCOVERY

A great part of the dismay engendered by the Twombly and Iqbal decisions arises from concerns about "information asymmetry." The concerns tend to focus on categories of claims — product liability, some forms of employment discrimination, and so on. Plaintiffs, it is argued, typically lack access to information controlled by defendants and necessary to satisfy higher pleading standards. The need to support adequate pleading by discovery to elicit information controlled by

the defendant might be built into Rule 12. The provision could focus only on 12(b)(6). Discovery may be needed to respond to other 12(b) motions, but it may be better to leave that to present practice. Discovery also may be needed to respond to a motion under Rule 12(c) or (f). The idea would be to allow — probably not require — the court to permit discovery for the purpose of improving the pleading before ruling on the motion.

Placing this approach in Rule 12 will prove awkward. The enumeration of Rule 12(b) motions as (1) through (7) is more a list than a sequence of paragraphs. The best approach might be to add a new subdivision after Rule 12(f) — subdivisions (g) and (h) do not have the same sacred identification as 12(b)(6) or even 12(c), and subdivision (i) was created in 2007 by the Style Project. So a new Rule 12(g) might look something like this: "(g) *Discovery in Aid of Pleading.* Before ruling on a motion under Rule 12(b),(c), or (f), the court may allow discovery [under Rules 26 through 37] to aid [more detailed pleading][amendment of the pleading]."

RULE 27.1 DISCOVERY IN AID OF PLEADING

Discovery in aid of pleading might be fit into Rule 26, but Rule 26 is already too long. It could be fit into present Rule 27, but perpetuation of testimony is a distinct problem and drafting would likely be more complicated. A new Rule 27.1 may be the simplest approach.

The first question will be whether to provide for discovery before filing an action. There are several state-law models. In addition, the ACTL/IAALS Pilot Project Rules include a detailed provision, set out in the Appendix, that provides a helpful illustration. The most persuasive reason to move in this direction may be the plaintiff who does not know the identity of the defendant — which officer in a large police department shot the plaintiff's decedent? Which company made the exploding dynamite cap? Discovery could be limited by requiring showings that the plaintiff has exhausted reasonable alternatives for finding the information, the plaintiff can state all elements of a claim apart from identifying the defendant, and there are good reasons to impose the burdens of discovery on the person asked for the information. This possibility has been twice suggested during earlier rounds of discovery work, and was quickly rejected each time. It may not prove any more popular now, but reconsideration may be appropriate if elevated pleading requirements create a risk that valid claims will frequently be defeated for lack of access to information controlled by the defendant. (The ABA 21st Century Proposals would allow pre-complaint discovery only to determine the identify of the defendant.)

An alternative is to provide discovery in aid of framing a claim after an action is commenced by filing a complaint. Discovery might be made available by allowing the plaintiff to file an incomplete complaint, specifically designating items on which discovery will be sought to support better-informed pleading. The defendant could respond by providing information without waiting for discovery, by agreeing to discovery, or by opposing discovery for stated reasons. Or discovery might be provided only after a motion challenging the claim (or defense). This approach comes closest to something that might be fit into Rule 26, perhaps with a cross-reference in Rule 12: the point would be to emphasize the authority to limit discovery to specific matters needed to support "better" pleading.

The ABA proposals include: "The court may permit focused post-complaint discovery in those limited cases where, because of the nature of the case, the plaintiff does not have access to sufficient i nformation to satisfy the" pleading standard." Examples are antitrust cases and discrimination cases where intent is an element of the claim.

INITIAL DISCLOSURE

Pleading and discovery may overlap in a different way. Early disclosure of facts might be accomplished immediately after the papers that are called "pleadings," by obligations of unitateral disclosure. This approach might address the concerns that underlie the Twombly and Iqbal decisions by providing a secure foundation for guiding or eliminating discovery, while reducing fears that evaluation of "plausibility" in light of "judicial experience and common sense" will devolve into poorly supported speculation about the "facts" that have been pleaded and the inferences that can be drawn from them.

PLEADING IN RESPONSE

It will be difficult to improve on the drafting of Rule 8(b) to meet the frequent complaints that defendants deny too much, too casually. Rule 8(b)(2) requires that a denial fairly respond to the substance of the allegation. (3) requires that a party that does not intend to deny all allegations "must either specifically deny designated allegations or generally deny all except those specifically admitted." (4) requires that a party admit the part of an allegation that is true and deny the rest. If a true fact is pleaded with characterizations, adverbs, or adjectives, the answer must admit the fact even while denying the characterization, adverbs, or adjectives. Rule 11 enforces this duty; indeed the safe-harbor provision, 11(c)(2), specifically includes defenses and denials. The safe harbor may make it difficult to make much use of Rule 11 in this context, but amendment of Rule 11 may not be a satisfactory approach.

Defendants defend their practices by arguing that plaintiffs cause the problem by overpleading and by violating the separate-statement requirement of Rule 10(b). In effect, they assert it is unfair to impose on defendants the work of picking through the mess made by sloppy pleading. Again, it will be difficult to draft a satisfactory rule to promote clearer pleading. Anything done to perpetuate the Twombly and Iqbal decisions may actually make this problem more difficult.

So: Is there anything reasonable to be done? One comment in the ABA survey suggested whatever Rule 8(a) requires, good fact pleading could be useful as a request for admissions, and laments that defendants do not respond as Rule 8(b) requires. That sounds good. But is it possible to get there?

PLEADING AFFIRMATIVE DEFENSES

Plaintiffs complain that defendants thoughtlessly add long lists of affirmative defenses to their answers, providing nothing more than the words that identify the theory. Something more could be required.

Two examples from present Rule 8(c) illustrate the range of pleading possibilities. A defendant may plead comparative negligence — is there any reason to require greater detail than we require of a plaintiff pleading negligence? Or a defendant may plead laches — should it not have to plead something to support the elements of unreasonable delay and actual prejudice in defending?

The range of desirable pleading practices may not be as broad as it is for complaints, but it is not much narrower. If anything is to be done, it may be better to avoid any attempt to provide specific pleading directions for specific affirmative defenses. There are far too many affirmative defenses, most of them not listed in Rule 8(c).

One illustration can invoke all of the possible variations in [re]drafting Rule 8(a)(2): "In responding to a pleading, a party must ~~affirmatively~~ state in short and plain terms any avoidance or affirmative defense * * *."

APPENDIX

ACTL/IAALS Pilot Project Rule

3.1 On motion by a proposed plaintiff with notice to the proposed defendant and opportunity to be heard, a proposed plaintiff may obtain precomplaint discovery upon the court's determination, after hearing, that: (a) the moving party cannot prepare a legally sufficient complaint in the absence of the information sought by discovery; (b) the moving party has probable cause to believe that the information sought by discovery will enable preparation of a legally sufficient complaint; (c) the moving party has probable cause to believe that the information sought is in the possession of the person or entity from which it is sought; (d) the proposed discovery is narrowly tailored to minimize expense and inconvenience; and (e) the moving party's need for the discovery outweighs the burden and expense on other persons and entities.

3.1 The court may grant a motion for precomplaint discovery directed to a nonparty pursuant to PPR ___.

3.2 Advance notice to the nonparty is not required, but the nonparty's ability to file a motion to quash shall be preserved.

3.3 If the court grants a motion for precomplaint discovery, the court may impose limitations and conditions, including provisions for the allocation of costs and attorneys' fees, on the scope and other terms of discovery.

Pleading Standard
Section 5(b) of H.R. 4364

I

111TH CONGRESS
1ST SESSION

H. R. 4364

To protect first amendment rights of petition and free speech by preventing States and the United States from allowing meritless lawsuits arising from acts in furtherance of those rights, commonly called "SLAPPs", and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

DECEMBER 16, 2009

Mr. COHEN introduced the following bill; which was referred to the Committee on the Judiciary

---

A BILL

To protect first amendment rights of petition and free speech by preventing States and the United States from allowing meritless lawsuits arising from acts in furtherance of those rights, commonly called "SLAPPs", and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Citizen Participation Act of 2009".

SEC. 2. FINDINGS.

The Congress finds and declares that—

(1) the framers of our Constitution, recognizing participation in government and freedom of speech as inalienable rights essential to the survival of democracy, secured their protection through the First Amendment to the United States Constitution;

(2) the communications, information, opinions, reports, testimony, claims and arguments that individuals, organizations and businesses provide to the government are essential to wise government decisions and public policy, the public health, safety, and welfare, effective law enforcement, the efficient operation of government programs, the credibility and trust afforded government, and the continuation of America's representative democracy;

(3) civil lawsuits and counterclaims, often claiming millions of dollars in damages, have been and are being filed against thousands of individuals, organizations, and businesses based upon their valid exercise of the rights to petition or free speech, including seeking relief, influencing action, informing, communicating, and otherwise participating with government, the electorate, or in matters of public interest;

(4) such lawsuits, called Strategic Lawsuits Against Public Participation or SLAPPs, are often

ultimately dismissed as groundless or unconstitutional, but not before the defendants are put to great expense, harassment, and interruption of their productive activities;

(5) it is in the public interest for individuals, organizations and businesses to participate in matters of public concern and provide information to public entities and other citizens on public issues that affect them without fear of reprisal through abuse of the judicial process;

(6) the threat of financial liability, litigation costs, destruction of one's business, loss of one's home, and other personal losses from groundless lawsuits seriously impacts government, interstate commerce, and individual rights by significantly chilling public participation in government, public issues, and in voluntary service;

(7) SLAPPs are an abuse of the judicial process that waste judicial resources and clog the already over-burdened court dockets;

(8) while some courts and State legislatures have recognized and discouraged SLAPPs, protection against SLAPPs has not been uniform or comprehensive; and

(9) some SLAPP victims are deprived of the relief to which they are entitled because the current bankruptcy law allows for the discharge of fees, costs and damages awarded against a party for maintaining a SLAPP.

SEC. 3. IMMUNITY FOR PETITION ACTIVITY.

(a) IMMUNITY.—Any act of petitioning the government made without knowledge of falsity or reckless disregard of falsity shall be immune from civil liability.

(b) BURDEN AND STANDARD OF PROOF.—A plaintiff must prove knowledge of falsity or reckless disregard of falsity by clear and convincing evidence.

SEC. 4. PROTECTION FOR PETITION AND SPEECH ACTIVITY.

Any act in furtherance of the constitutional right of petition or free speech shall be entitled to the procedural protections provided in this Act.

SEC. 5. SPECIAL MOTION TO DISMISS.

(a) IN GENERAL.—A party may file a special motion to dismiss any claim arising from an act or alleged act in furtherance of the constitutional right of petition or free speech within 45 days after service of the claim if the claim was filed in Federal court or, if the claim was removed to Federal court pursuant to section 6 of this Act, within 15 days after removal.

(b) BURDENS OF THE PARTIES.—A party filing a special motion to dismiss under this Act has the initial burden of making a prima facie showing that the claim at issue arises from an act in furtherance of the constitutional right of petition or free speech. If the moving party meets this burden, the burden shifts to the responding party to demonstrate that the claim is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment.

(c) STAY OF DISCOVERY.—Upon the filing of a special motion to dismiss, discovery proceedings in the action shall be stayed until notice of entry of an order disposing of the motion, except that the court, on noticed motion and for good cause shown, may order that specified discovery be conducted.

(d) EXPEDITED HEARING.—The court shall hold an expedited hearing on the special motion to dismiss, and issue a ruling as soon as practicable after the hearing. The parties may submit the pleadings and affidavits stating the facts upon which the liability or defense is based. The court shall explain the reasons for its grant or denial of the motion in a statement for the record. If the special motion to dismiss is granted, dismissal shall be with prejudice.

(e) IMMEDIATE APPEAL.—The defendant shall have a right of immediate appeal from a district court order denying a special motion to dismiss in whole or in part.

SEC. 6. FEDERAL REMOVAL JURISDICTION.

(a) IN GENERAL.—A civil action commenced in a State court against any person who asserts as a defense the immunity provided for in section 3 of this Act, or asserts that the action arises from an act in furtherance of the constitutional right of petition or free speech, may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending.

(b) REMAND OF REMAINING CLAIMS.—A court exercising jurisdiction under this section shall remand any claims against which the special motion to dismiss has been denied, as well as any remaining claims against which a special motion to dismiss was not brought, to the State court from which it was removed.

(c) TIMING.—A court exercising jurisdiction under this section shall remand an action if a special motion to dismiss is not filed within 15 days after removal.

SEC. 7. SPECIAL MOTION TO QUASH.

(a) IN GENERAL.—A person whose personally identifying information is sought in connection with an action pending in Federal court arising from an act in further-

ance of the constitutional right of petition or free speech may make a special motion to quash the discovery order, request or subpoena.

(b) BURDENS OF THE PARTIES.—The person bringing a special motion to quash under this section must make a prima facie showing that the underlying claim arises from an act in furtherance of the constitutional right of petition or free speech. If this burden is met, the burden shifts to the plaintiff in the underlying action to demonstrate that the underlying claim is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment. This standard shall apply only to a special motion to quash brought under this section.

SEC. 8. FEES AND COSTS.

(a) ATTORNEY'S FEES.—The court shall award a moving party who prevails on a special motion to dismiss or quash the costs of litigation, including a reasonable attorney's fee.

(b) FRIVOLOUS MOTIONS AND REMOVAL.—If the court finds that a special motion to dismiss, special motion to quash, or the removal of a claim under this Act is frivolous or is solely intended to cause unnecessary delay, the court may award a reasonable attorney's fees and costs to the responding party.

(c) GOVERNMENT ENTITIES.—A government entity may not recover fees pursuant to this section.

SEC. 9. BANKRUPTCY NONDISCHARGABILITY OF FEES AND COSTS.

Fees or costs awarded against a party by a court for the prosecution of any claim finally dismissed pursuant to this Act, or any subpoena or discovery order quashed pursuant to this Act, or any claim finally dismissed pursuant to a State anti-SLAPP law, shall not be dischargeable in bankruptcy under section 1328 or section 523 of title 11, United States Code.

SEC. 10. EXEMPTIONS.

(a) PUBLIC ENFORCEMENT.—Sections 4 through 8 of this Act shall not be available in any action brought solely on behalf of the public or solely to enforce an important right affecting the public interest.

(b) COMMERCIAL SPEECH.—This Act shall not apply to any claim for relief brought against a person primarily engaged in the business of selling or leasing goods or services, if the statement or conduct from which the claim arises is a representation of fact made for the purpose of promoting, securing or completing sales or leases of, or commercial transactions in, the person's goods or services, and the intended audience is an actual or potential buyer or customer.

(c) "SLAPP-BACK" SUITS.—This Act shall not be available to dismiss any action or claim arising from a claim that has been dismissed pursuant to this Act or to a State anti-SLAPP law.

SEC. 11. DEFINITIONS.

In this Act:

(1) ACT IN FURTHERANCE OF THE RIGHT OF FREE SPEECH.—The term "act in furtherance of the right of free speech" includes but is not limited to—

(A) any written or oral statement made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law;

(B) any written or oral statement made in a place open to the public or a public forum in connection with an issue of public interest; or

(C) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with an issue of public interest.

(2) ACT OF PETITIONING THE GOVERNMENT.—The term "act of petitioning the government" includes but is not limited to any written or oral statement—

(A) made or submitted before a legislative, executive, or judicial body, or any other official proceeding authorized by law; or

(B) any written or oral statement encouraging a statement before a legislative, executive, or judicial body, or any other official proceeding authorized by law.

(3) CLAIM.—The term "claim" includes any civil lawsuit, claim, complaint, cause of action, cross-claim, counterclaim, or other judicial pleading or filing requesting relief.

(4) GOVERNMENT ENTITY.—The term "government entity" includes the United States, a branch, department, agency, State, or subdivision of a State, or other public authority.

(5) ISSUE OF PUBLIC INTEREST.—The term "issue of public interest" includes an issue related to health or safety; environmental, economic or community well-being; the government; a public figure; or a good, product or service in the market place. "Issue of public interest" shall not be construed to include private interests, such as statements directed primarily toward protecting the speaker's business interests rather than toward commenting on or shar-

ing information about a matter of public significance.

(6) PERSONALLY IDENTIFYING INFORMATION.—The term "personally identifying information" means first and last name or last name only; home or other physical address including temporary shelter or housing and including a street name or ZIP Code; full date of birth; email address or other online contact information; telephone number; social security number; Internet protocol address or host name that identifies an individual, or any other information that would serve to identify an individual.

(7) STATE.—The term "State" means each of the several States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

SEC. 12. CONSTRUCTION.

This Act shall be liberally construed to effectuate its findings and purposes fully, except that the exemptions shall be construed narrowly.

SEC. 13. RELATIONSHIP TO OTHER LAWS.

Nothing in this Act shall preempt or supersede any Federal, State, constitutional, case or common law that provides the equivalent or greater protection for persons

engaging in activities in furtherance of the rights of petition or free speech.

SEC. 14. SEVERABILITY.

If any provision of this Act or the application of any provision of this Act to any person or circumstance is held invalid, the application of such provision to other persons or circumstances and the remainder of this Act shall not be affected thereby.

SEC. 15. EFFECTIVE DATE.

This Act shall become effective upon enactment.

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Pleading Standard
Section 2(g)(2) of H.R. 3728, adding 17 U.S.C. § 1321(e)

111TH CONGRESS
2D SESSION

S. 3728

To amend title 17, United States Code, to extend protection to fashion design, and for other purposes.

IN THE SENATE OF THE UNITED STATES

AUGUST 5, 2010

Mr. SCHUMER (for himself, Mr. HATCH, Mr. GRAHAM, Mr. WHITEHOUSE, Mrs. GILLIBRAND, Ms. SNOWE, Mrs. BOXER, Mrs. FEINSTEIN, Mr. CARDIN, Mr. KOHL, and Mrs. HUTCHISON) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

---

A BILL

To amend title 17, United States Code, to extend protection to fashion design, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Innovative Design Protection and Piracy Prevention Act".

SEC. 2. AMENDMENTS TO TITLE 17, UNITED STATES CODE.

(a) DESIGNS PROTECTED.—Section 1301 of title 17, United States Code, is amended—

(1) in subsection (a), by adding at the end the following:

"(4) FASHION DESIGN.—A fashion design is subject to protection under this chapter.";

(2) in subsection (b)—

(A) in paragraph (2), by inserting ", or an article of apparel," after "plug or mold"; and

(B) by adding at the end the following:

"(7) A 'fashion design'—

"(A) is the appearance as a whole of an article of apparel, including its ornamentation; and

"(B) includes original elements of the article of apparel or the original arrangement or placement of original or non-original elements as incorporated in the overall appearance of the article of apparel that—

"(i) are the result of a designer's own creative endeavor; and

"(ii) provide a unique, distinguishable, non-trivial and non-utilitarian variation over prior designs for similar types of articles.

"(8) The term 'design' includes fashion design, except to the extent expressly limited to the design of a vessel.

"(9) The term 'apparel' means—

"(A) an article of men's, women's, or children's clothing, including undergarments, outerwear, gloves, footwear, and headgear;

"(B) handbags, purses, wallets, duffel bags, suitcases, tote bags, and belts; and

"(C) eyeglass frames.

"(10) In the case of a fashion design, the term 'substantially identical' means an article of apparel which is so similar in appearance as to be likely to be mistaken for the protected design, and contains only those differences in construction or design which are merely trivial."; and

(3) by adding at the end the following:

"(c) RULE OF CONSTRUCTION.—In the case of a fashion design under this chapter, those differences or variations which are considered non-trivial for the purposes of establishing that a design is subject to protection under subsection (b)(7) shall be considered non-trivial for the purposes of establishing that a defendant's design is not substantially identical under subsection (b)(10) and section 1309(e).".

(b) DESIGNS NOT SUBJECT TO PROTECTION.—Section 1302(5) of title 17, United States Code, is amended—

(1) by striking "(5)" and inserting "(5)(A) in the case of a design of a vessel hull,";

(2) by striking the period and inserting "; or"; and

(3) by adding at the end the following:

"(B) in the case of a fashion design, embodied in a useful article that was made public by the designer or owner in the United States or a foreign country before the date of enactment of this chapter or more than 3 years before the date upon which protection of the design is asserted under this chapter.".

(c) REVISIONS, ADAPTATIONS, AND REARRANGEMENTS.—Section 1303 of title 17, United States Code, is amended by adding at the end the following: "The presence or absence of a particular color or colors or of a pictorial or graphic work imprinted on fabric shall not be considered in determining the protection of a fashion design under section 1301 or 1302 or in determining infringement under section 1309.".

(d) TERM OF PROTECTION.—Section 1305(a) of title 17, United States Code, is amended to read as follows:

"(a) IN GENERAL.—Subject to subsection (b), the protection provided under this chapter—

"(1) for a design of a vessel hull, shall continue for a term of 10 years beginning on the date of the commencement of protection under section 1304; and

"(2) for a fashion design, shall continue for a term of 3 years beginning on the date of the commencement of protection under section 1304.".

(e) INFRINGEMENT.—Section 1309 of title 17, United States Code, is amended—

(1) in subsection (c)—

(A) by inserting "offer for sale, advertise," after "sell,"; and

(B) by inserting "either actual or reasonably inferred from the totality of the circumstances," after "created without knowledge";

(2) by amending subsection (e) to read as follows:

"(e) INFRINGING ARTICLE DEFINED.—

"(1) IN GENERAL.—As used in this section, an 'infringing article' is any article the design of which has been copied from a design protected under this chapter, or from an image thereof, without the con-

sent of the owner of the protected design. An infringing article is not an illustration or picture of a protected design in an advertisement, book, periodical, newspaper, photograph, broadcast, motion picture, or similar medium.

"(2) VESSEL HULL DESIGN.—In the case of a design of a vessel hull, a design shall not be deemed to have been copied from a protected design if it is original and not substantially similar in appearance to a protected design.

"(3) FASHION DESIGN.—In the case of a fashion design, a design shall not be deemed to have been copied from a protected design if that design—

"(A) is not substantially identical in overall visual appearance to and as to the original elements of a protected design; or

"(B) is the result of independent creation."; and

(3) by adding at the end the following:

"(h) SECONDARY LIABILITY.—The doctrines of secondary infringement or secondary liability that are applied in actions under chapter 5 of this title apply to the same extent to actions under this chapter. Any person who is liable under either such doctrine under this chapter is subject to all the remedies provided under this chapter, in-

cluding those attributable to any underlying or resulting infringement.

"(i) HOME SEWING EXCEPTION.—

"(1) IN GENERAL.—It is not an infringement of the exclusive rights of a design owner for a person to produce a single copy of a protected design for personal use or for the use of an immediate family member, if that copy is not offered for sale or use in trade during the period of protection.

"(2) RULE OF CONSTRUCTION.—Nothing in this subsection shall be construed to permit the publication or distribution of instructions or patterns for the copying of a protected design.".

(f) APPLICATION FOR REGISTRATION.—Section 1310(a) of title 17, United States Code, is amended—

(1) by striking "Protection under this chapter" and inserting "In the case of a design of a vessel hull, protection under this chapter"; and

(2) by adding "Registration shall not apply to fashion designs." after "first made public.".

(g) REMEDY FOR INFRINGEMENT.—Section 1321 of title 17, United States Code, is amended—

(1) by striking subsection (a) and inserting the following:

"(a) IN GENERAL.—

"(1) VESSEL HULL.—In the case of a vessel hull, the owner of a design is entitled, after issuance of a certificate of registration of the design under this chapter, to institute an action for any infringement of the design.

"(2) FASHION DESIGN.—In the case of a fashion design, the owner of a design is entitled to institute an action for any infringement of the design after the design is made public under the terms of section 1310(b) of this chapter."; and

(2) by adding at the end the following:

"(e) PLEADING REQUIREMENT FOR FASHION DESIGNS.—

"(1) IN GENERAL.—In the case of a fashion design, a claimant in an action for infringement shall plead with particularity facts establishing that—

"(A) the design of the claimant is protected under this chapter;

"(B) the design of the defendant infringes upon the protected design as described under section 1309(e); and

"(C) the protected design or an image thereof was available in such location or locations, in such a manner, and for such duration that it can be reasonably inferred from the to-

tality of the surrounding facts and circumstances that the defendant saw or otherwise had knowledge of the protected design.

"(2) CONSIDERATIONS.—In considering whether a claim for infringement has been adequately pleaded, the court shall consider the totality of the circumstances.".

(h) PENALTY FOR FALSE REPRESENTATION.—Section 1327 of title 17, United States Code, is amended—

(1) by inserting "or for purposes of obtaining recovery based on a claim of infringement under this chapter" after "registration of a design under this chapter";

(2) by striking "$500" and inserting "5,000"; and

(3) by striking "$1,000" and inserting "$10,000".

(i) NONAPPLICABILITY OF ENFORCEMENT BY TREASURY AND POSTAL SERVICE.—Section 1328 of title 17, United States Code, is amended—

(1) in subsection (a), in the first sentence, by striking "The Secretary" and inserting "In the case of designs of vessel hulls protected under this chapter, the Secretary";

(2) in subsection (b), in the first sentence, by striking "Articles" and inserting "In the case of designs of vessel hulls protected under this chapter, articles"; and

(3) by adding at the end the following:

"(c) NONAPPLICABILITY.—This section shall not apply to fashion designs protected under this chapter.".

(j) COMMON LAW AND OTHER RIGHTS UNAFFECTED.—Section 1330 of title 17, United States Code, is amended—

(1) in paragraph (1), by striking "or" after the semicolon;

(2) in paragraph (2), by striking the period and inserting "; or"; and

(3) by adding at the end the following:

"(3) any rights that may exist under provisions of this title other than this chapter.".

SEC. 3. EFFECTIVE DATE.

This Act and the amendments made by this Act shall take effect on the date of enactment of this Act.

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TAB
5-D

ELEMENTS OF A PRESERVATION RULE

Introductory Note: The E-Discovery Panel, composed of Judges Scheindlin and Facciola, and Messrs. Allman, Barkett, Garrison, Joseph and Willoughby, holds the consensus view that a rule addressing preservation (spoliation) would be a valuable addition to the Federal Rules of Civil Procedure. All members of the Panel agree that such a rule should apply once an action has been commenced. (Panel members disagree as to whether such a rule can or should apply, along the lines of Rule 27, prior to the commencement of an action.)

The Panel members also agree that the rules in general, and a preservation rule in particular, should treat differently huge cases, with enormous discovery, and all others.

While not every member of the Panel concurs in every word that follows, the Panel members are in general agreement that it would behoove the Advisory Committee on Civil Rules to draft a preservation rule that takes into account the following elements.

1. **Trigger. The rule should specify the point in time when the obligation to preserve information, including electronically stored information, accrues. Potential triggers:**

    a. **A general trigger restating the common law (pending or reasonably foreseeable litigation) standard and/or**

    b. **Specific triggers (which could appear in the text or Advisory Committee Note):**

        i. **Written request or notice to preserve delivered to that person (perhaps in a prescribed form).**

        ii. **Service on, or delivery to, that person of a**

            A. **Complaint or other pleading,**

            B. **Notice of claim,**

            C. **Subpoena, CID or similar instrument.**

        iii. **Actual notice of complaint or other pleading, or a notice of claim, asserting a claim against, or defense involving that person or an affiliate of that person.**

        iv. **Statutory, regulatory, contractual duty to preserve.**

        v. **Steps taken in anticipation of asserting or defending a potential claim (*e.g.*, preparation of incident report, hiring expert, drafting/filing claim with regulator, drafting/sending prelitigation notice, drafting complaint, hiring counsel, destructive testing).**

2. **Scope. The rule should specify with as much precision as possible the scope of the duty to preserve, including, *e.g.*:**

a. Subject matter of the information to be preserved.

b. Relevant time frame.

c. That a person whose duty has been triggered must act reasonably in the circumstances.

d. Types of data or tangible things to be preserved.

e. Sources on which data are stored or found.

f. Specify the form in which the information should be preserved (*e.g.*, native).

g. Consider whether to impose presumptive limits on the types of data or sources that must be searched.

h. Consider whether to impose presumptive limits on the number of key custodians whose information must be preserved.

i. Consider whether the duty should be different for parties (or prospective parties) and non-parties.

3. Duration. The rule should specify how long the information or tangible things must be preserved, but should explicitly provide that the rule does not supersede any statute or regulation.

4. Ongoing Duty. The rule should specify whether the duty to preserve extends to information generated after the duty has accrued.

5. Litigation Hold. The rule should provide that if an organization whose duty has been triggered prepares and disseminates a litigation hold notice, that is evidence of due care on the part of the organization. If the rule requires issuance of a litigation hold, it should include an out like that in Rule 37(c)(1) excusing (for sanctions purposes) a failure that was substantially justified or is harmless.

6. Work Product. The rule should specify whether, or to what extent, actions taken in furtherance of the preservation duty are protected by work product (or privilege).

7. Consequences/Procedures. The rule should set forth the consequences of failing to fulfill the responsibilities it mandates, and the obligations of the complainant/failing party.

a. Sanctions for noncompliance resulting in prejudice to the requesting party should be specified (*e.g.*, Fed.R.Civ.P. 37).

i. The rule should apply different sanctions depending on the state of mind of the offender. (The state of mind necessary to warrant each identified sanction should be specified.)

ii. Certain conduct that presumptively satisfies the requisite state of mind should be specified (*e.g.*, failure to issue a litigation hold = negligence or gross negligence)

b. A model jury instruction for adverse inference or other jury-specific sanctions should be drafted.

c. Compliance with the rule should insulate a responding party from sanctions for failure to preserve.

d. The complainant should be obliged to raise the failure with a judicial officer promptly after it has learned of the alleged spoliation and has assessed the prejudice it has suffered as a result.

e. Identify the elements that the complainant must specify, such as:

i. The information or tangible things lost.

ii. Its relevance (specifying the standard (*e.g.*, 401, 26(b)(1), admissibility, discoverability)).

iii. The prejudice suffered.

f. The rule should address burden of proof issues.

8. Judicial Determination. It should provide access to a judicial officer, following a meet and confer, to

a. Resolve disputes

b. Apply Rule 26(c)/proportionality

c. Consider the potential for cost allocation

d. Impose sanctions (*e.g.*, of the sort provided for by Rule 37).

Spoliation Motions
November 2010

Presentation by
FJC Research Division
Emery G. Lee III
Advisory Committee on Civil Rules
Washington, D.C.

Research Design

- Text based search of CM/ECF
- Cases filed in 2007 or 2008
- 19 study districts
- Focus on motions for sanctions
- Total of 209 “true positives”

How often is spoliation *raised*?

Comparison to civil cases 2007-2008

Sanctions cases

- N= 209
- Disposition time, 649 days (mean), or about 1.8 years
- Time to motion, 513 days (mean)
- 16.5% trial

Civil cases

- N=131,992
- Disposition time, 253 days (mean), or about 0.7 years
- 0.6% trial

$$209 / 131{,}992 = 0.0015$$

$$209 / 131{,}992 = 0.0015$$
$$0.0015 * 100 = 0.15\%$$

$$209 / 131{,}992 = 0.0015$$
$$0.0015 * 100 = 0.15\%$$
$$0.15\% * 10 = 1.5\%$$

Frequency of spoliation motions compared to other motions

Type of motion (Source)	Frequency
Rule 12(b)(6) **decided** (FJC 2009)	11.0-13.2%
Rule 12 **filed** (IAALS 2008)	23.3%
Rule 12/MTD **granted** (AO 2010)	14% (?)
Rule 56 **decided** (FJC 2009)	25.1-27.7%
Rule 56 **filed** (FJC 2008)	17%
Rule 56 **filed** (IAALS 2008)	16.6%
Discovery motions **filed** (IAALS 2008)	26.7%
Motions to compel **decided** (FJC 2009)	13.4-15.9%
Motions for sanctions **granted** (FJC 2009)	2.3-2.2%
Motions for sanctions **granted** (IAALS 2008)	0.8%

IAALS Case Processing report (at 46):

"As a discrete category, discovery sanctions were sought rarely and granted even more rarely. The study recorded only 3.19 motions seeking discovery sanctions per 100 cases, with a high of 5.08 such motions per 100 cases in Western Wisconsin and a low of 0.49 such motions per 100 cases in Idaho. Slightly less than 26% of sanction motions were granted in all or part."

FJC 2009 Closed-case report (p. 23)

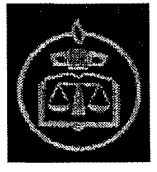
"Did any of the following occur . . . One or more claims of spoliation of [ESI]?"

7.7% of plaintiff attorneys in ESI cases

5% of defendant attorneys in ESI cases

Frequency and importance

- No "hard" estimate of frequency
- No ability to account for trends
- FJC 2010: Disputes over ESI increase costs 10%, even after controlling for other costs (including stakes)
- Fear of sanctions may drive behavior, even if sanctions motions are relatively rare



Motions Findings
Type of Evidence

Type of evidence

Type	N	%
Electronically stored information (ESI) only	83	40%
ESI plus another type	27	13%
ESI plus ESI and other	*110*	*53%*
Tangible	43	21%
Paper	38	18%
Could not determine	18	9%

Types of cases (all spoliation)

Nature of suit category	N	%
Torts	65	31%
Contracts (includes insurance)	62	30%
Civil rights	45	22%
Intellectual property	13	6%
Labor	9	4%
Other	15	7%

Types of cases (ESI cases)

Nature of suit category	N	%
Contracts (includes insurance)	40	36%
Civil rights	29	26%
Torts	15	14%
Intellectual property	12	11%
Labor	4	4%
Other	10	9%

Parties

Moving party

Moving party	N	%
Plaintiff	134	64%
Defendant	66	32%
Both sides	4	2%
Other	5	2%

Plaintiffs as moving parties

Plaintiff (by type)	N	%
Individual, including putative class representative	94	68%
Business entity	43	31%
Other (Municipality)	1	1%
All	138	100%

Plaintiffs as moving parties

Non-moving parties	N	%
Business entity	102	74%
Governmental entity	29	21%
Individual	5	4%
Other (Private school)	2	1%
All	138	100%

Defendants as moving parties

Defendant by type	N	%
Business entity	62	89%
Governmental entity	5	7%
Other	3	4%
All	70	100%

Defendants as moving parties

Non-moving party	N	%
Individual, including putative class representative	39	56%
Business entity	29	41%
Other	2	3%
All	70	100%

Orders

Rulings on Motions (all)

Court action	N	%
Granted	27	18%
Denied	68	44%
Pending	12	8%
No action	46	30%
All	153	100%

Rulings on Motions (all)
Rulings only

Court action	N	%
Granted	27	28%
Denied	68	72%
All	95	100%

Rulings on Motions (ESI)

Court action	N	%
Granted	20	23%
Denied	38	44%
Pending	5	6%
No action	24	28%
All	87	100%

Rulings on Motions (ESI)
Rulings only

Court action	N	%
Granted	20	34%
Denied	38	66%
All	58	100%

Rulings on Motions (reported cases)

Court action	N	%
Granted	31	60%
Denied	21	40%
All	52	100%

Types of 'sanctions' (all)

Type	N	%
Adverse inference/instruction	14	44%
Precluded evidence/testimony	6	19%
Costs only (includes denial with costs)	6	19%
Reopening discovery	5	16%
Monetary only	2	6%
Strike part of answer	1	3%
Dismissal/default	1	3%

Types of 'sanctions' (ESI)

Type	N	%
Adverse inference/instruction	13	57%
Precluded evidence/testimony	3	13%
Costs only (includes denial with costs)	4	17%
Reopening discovery	4	17%
Monetary only	2	9%
Strike part of answer	1	4%

Types of 'sanctions' (reported cases)

Type	N	%
Adverse inference/instruction	14	45%
Precluded evidence/testimony	15	48%
Dismissal/default (includes permanent inj.)	7	23%
Civil contempt	1	3%

Not much to go on, but . . .

- Pre- or post-litigation spoliation sanctioned?
  - Mostly post (if you add in 'both')
  - Pre-litigation conduct only, about 1 in 4 sanctions cases
- Legal basis for imposing sanctions?
  - Often hard to tell
  - Inherent authority, Rule 37 raised about equally in sanctioned cases, often raised together, but "not clear" in many sanctions cases

TAB
5-E

SUBCOMMITTEE MENU: RULES PROPOSALS

INTRODUCTION

This memorandum compiles some of the suggestions made at the Duke Conference for amending the Civil Rules. Many of the suggestions addressed discovery and pleading. Most of those suggestions are omitted here. The Discovery Subcommittee is working on preservation and spoliation issues, and may take up other discovery issues. But some discovery issues are noted here because it may become useful for this Subcommittee to address them. Any allocation between the Discovery Subcommittee and this Subcommittee will turn on the overall volume of discovery issues taken on for prompt attention and on the severability of some issues from the ongoing work of the Discovery Subcommittee. Pleading issues are being addressed separately for the time being; this Subcommittee or some new Subcommittee may be asked to address them when the time for action comes close.

The mass of Conference materials is great. A few proposals have been omitted deliberately because they do not seem likely prospects for present consideration. Others may have been overlooked. Subcommittee members should add any proposal that seems to merit consideration, drawing not only from explicit Conference proposals but also from ideas inspired by the Conference.

Descriptions of the proposals are generally brief. The purpose is to identify topics that deserve prompt development, not to provide full-blown evaluation.

The proposals are organized roughly in the order of Rule number, recognizing that some proposals affect two or more Rules and that others do not fit well within any present rule.

Some proposals present issues that might be addressed by rules amendments, but also might be addressed by other means, often working within the framework of a present rule. These proposals are described separately, choosing those that seem plausible candidates for consideration in the rulemaking process.

I RULES PROPOSALS

The Duke Conference deliberately and successfully sought out participants representing the full spectrum of experience with, and perspectives on, contemporary practice under the Civil Rules. As hoped, they generated proposals that reflect the diversity of their experiences and perspectives. Conflicting proposals may indicate that present practice has it just about right, but must be evaluated to make that diagnosis. So too, the absence of conflict does not mean that a proposal is worthy of further consideration.

General

One ABA respondent thinks the Civil Rules "include too much detailed preparation and filing."

Rule 1

Many participants drew support from the lofty goals of Rule 1 — the "just, speedy, and inexpensive determination of every action and proceeding." Some of the discussion suggested, or at least implied, that Rule 1 might be revised to provide greater direction on better realizing these related aspirations.

The need to set reasonable time limits for processing an action, and for holding litigants to the time limits, might be expressed.

The need for proportionality, reasonably tailoring the level of litigation activity to the needs of each action, might be expressed in Rule 1, not merely in the discovery rules.

Lawyers, not only the courts, might be made responsible for working toward the Rule 1 goals.

Various arguments were made that tradeoffs must be made between the Rule 1 goals. Speedy and inexpensive determinations may in some sense reduce the total quality of justice produced by the system across all cases, but they are intrinsically important. This concern is in part another argument for expressing the need for proportionality. Essentially the same conclusion can be reached from an opposite direction: justice is not sacrificed but achieved by increasing speed and reducing expense in order to maintain a system that is reasonably available to determine disputes. Alan Morrison's paper observes: "The good news is that courts and parties rarely rely on Rule 1"; "to be accurate, Rule 1 should be recast to require the courts to provide a 'just determination of every action,' and to do so with 'appropriate speed and without undue expense' under the circumstances."

ACTL/IAALS pilot project rules would add these words to Rule 1: "just, timely, efficient, and cost-effective determination * * *." In addition, whether as part of Rule 1 or perhaps as a new Rule 1.1, the rules would direct the court and the parties to "assure that the process and the costs are proportionate to the amount in controversy and the complexity and importance of the issue. The factors to be considered by the court * * * include, without limitation: needs of the case, amount in controversy, parties' resources, and complexity and importance of the issues at stake in the litigation." The Center for Constitutional Litigation responds that "[m]andating cost/benefit analysis is neither desirable nor practical." The attempt in Rule 26(b)(2) to require proportionality in discovery "is difficult to apply, leads to inconsistent results, and has precluded discovery in meritorious cases." It should not be extended.

The most ambitious Rule 1 proposal is advanced in Bone, Improving Rule 1: A Master Rule for the Federal Rules. 87 Denver U.L. Rev. 287 (2010), presented as a conference paper. A brief summary would be misleading. Essentially he argues that Rule 1 reflects the values of 1938: procedure is separate from substance, it is instrumental, it works best when judges are free from any technical rules but can exercise discretion to proceed in ways that achieve the best result in each particular case. A different view is required today. "[T]he most sensible goal for procedure is distributional. * * * [A]n optimal error risk for a given case is that which results from distributing error risk optimally across different cases and litigants. * * * Adjudication has a public purpose," to enforce substantive law. "[O]utcome error should be measured in terms of how well litigation outcomes further these public goals, not in terms of how well they satisfy the preferences of parties to a suit." Different substantive rights invoke different levels of importance — "if the substantive law protects moral rights, the procedures offered to adjudicate lawsuits involving those rights should take account of their moral weight." There is more. Rethinking the purposes of procedure does not lead to specific rules proposals, but it could be a place to begin.

Rule 2: One Form of [Transsubstantive] Action

Skepticism about the attempt to squeeze all varieties of litigation into a single "transsubstantive" set of rules was expressed frequently. Much of the attention focused on pleading and discovery, but the questions are more general. Reform could be sought by different strategies. One would carry forward the general character of the rules, making special provision only for "complex" cases or categories of cases that in practice have proved to fare poorly in the general rules. Another would be to create a "simplified" system that reduces the opportunities for extensive litigation. Pleading and discovery are likely to hold center stage in exploring these matters. But the

purpose of the inquiry may be sufficiently separate from the base-line pleading and discovery questions to justify independent consideration.

The IAALS "areas of convergence" paper, p. 8, suggests adhering to transsubstantivity in general, but with flexibility to create different sets of rules for certain types of cases. It found "some support" for experimenting with simplified procedure.

The ABA 21st Century proposals were "open to the idea that different standard timelines might be applied depending on the nature or size of the matter," pointing to a 4-track system in New Jersey. Don L. Davis pointed to the three-level Discovery Control Plans under Tex.R.Civ.P. 192.4.

Vice Chief Justice Hurwitz describes special Arizona procedures for medical malpractice actions, including three sets of uniform interrogatories — plaintiff to individual health-care provider, plaintiff to institutional provider, and defendants to plaintiff. There also is a complex case court project, governed by separate pretrial rules.

Professor Gensler writes at length on case management, exploring alternatives that include more particularized, less discretion-dependent rules for all cases; abandoning trans-substantivity, in whole or in part, by adopting substance-specific rules tailored to different categories of litigation; "track" systems more formalized than general case-management authority; and "simplified rules" for some — presumably simpler — types of cases.

One ABA respondent pointed to California Code of Civil Procedure §§ 90-100 as a model of Economic Litigation for Limited Civil Cases.

Rule 4

Professor Carrington urges that the Committee consider amending Rule 4(d) waiver-of-service provisions by extending the payment of expenses of service to defendants who are not located in the United States, see Rule 4(d)(2).

Rule 7

The ABA would require that every motion be accompanied by a certificate that counsel have conferred in good faith, or attempted to confer, to resolve or narrow the issues in dispute. Only stipulated motions and those for summary judgment would be excepted. Some ABA respondents, however, suggested that "meet and confer" is a waste of time — no one gives up anything anyway. A somewhat different criticism is that the requirement encourages unreasonable behavior: the lawyer can always back off before the court learns of it by a motion.

There was criticism of local rules read to require "permission" to file a motion. But several respondents in the NELA survey urged such a requirement for summary judgment, at least in employment cases.

Rule 8(b)

Quite apart from pleadings that state a claim, answers also came in for substantial criticism. The ABA proposals reflect a fear that "responsive pleading has become an expensive game." "[A]n answer is often an opaque, uninformative document." It would be cheaper to allow a simple general denial along with any affirmative defenses, but this alternative seems unattractive, particularly if pleading obligations are raised for claims. Plaintiffs could help themselves by making fact

allegations "in short factual sentences." This is not a proposal to revise Rule 8(b). Earlier versions may suggest the reason — Rule 8(b) is just fine as written; the problem is widespread disregard.

Many NELA respondents expressed great dissatisfaction with answers that flout Rule 8(b) requirements.

Rule 11

Professor Miller suggests it might help to partially reinstate compensation and punishment as legitimate objectives "to promote efficiency and compliance." In addition, it may be possible to "see if standards of lawyer behavior can be further articulated to produce a sophisticated and nuanced regime that will minimize litigation misconduct, whatever its form, but at the same time recognize the need to protect adversarial-system values." 60 Duke L.J. 1, 126.

One ABA respondent suggested a deadline to abandon claims or defenses. If a claim or defense is not in fact pursued after the deadline, the adversary should be awarded the fees and expenses incurred in preparing to contest it.

Rule 12

The ABA suggests adding a requirement that except in complex cases, the court rule promptly on a motion to dismiss, and must rule within 60 days after full briefing.

Rule 16

Most of the proposals aimed at pretrial conferences recommend stronger case management by more vigorous use of present Rule 16. But the New York City Bar recommendation is this: "Strong and consistent judicial management will * * * be enhanced by requiring that the Rule 16(a) initial pre-trial conference be mandatory, rather than discretionary as it is now." A defendant that intends to file a Rule 12(b) motion or a motion for summary adjudication should inform the court so that the initial pretrial conference can be scheduled before the motion is filed. ACTL/IAALS Rule 8.1 similarly requires a pretrial conference "as soon as practicable after appearance of all parties." Rule 8.2 requires the judge to set a trial date as soon as possible after the initial conference. Rule 9.4 independently requires that a trial date be set at the earliest practicable time, and forbids change "absent extraordinary circumstances."

In addressing case management, Professor Miller emphasizes the need for training, education, and other work outside the rules. But he adds: "It may be that recent thinking about management matters has been too static and that Rule 16 and the Manual are not yet sufficiently delineated and textured to meet the challenges of the more difficult aspects of contemporary litigation." 60 Duke L.J. 1, 117-118.

Rule 23

The Center for Constitutional Litigation takes issue with "common impact" rulings by some courts that are described as allowing certification of a class only if each and every class member is harmed in the same way. The proposal would amend Rule 23(b)(3) so that the predominance of common questions is determined "solely based on issues presented at trial," and so that the fact or quantity of individual injury "need not be proven at trial." A new rule 23(c)(6) would support this provision by permitting an award of aggregate class damages, to be allocated after trial by statistical or sampling methods, or some other reasonable method.

Rule 48

Judge Higginbotham's paper reflects continuing interest in restoring the 12-person civil jury, adding a casual footnote suggesting a 10-2 majority verdict rule. (An effort to restore 12-person juries was defeated in the mid-1990s.) Paul Carrington's paper also focuses on the 12-person jury.

Rule 56: Summary Judgment

Summary adjudication: The New York City Bar proposes a new procedure that blends disposition on the pleadings with summary judgment as we know it. The proposal is well fleshed out, warranting description of the details. A defendant can make a conventional motion to dismiss for failure to state a claim, and is entitled to a stay of all discovery pending resolution of the motion. Instead, the defendant may answer — including any affirmative defenses and counterclaims — and move for summary adjudication. Summary adjudication requires enhanced initial disclosures that include 14 hours of deposition "of each side," and other disclosures within a scope determined by the court. Decision is governed by the summary-judgment standard, but may not be deferred for further discovery. Any issue resolved by summary adjudication becomes the law of the case. A plaintiff may move for summary adjudication if the defendant moves for it, and also if the defendant unsuccessfully seeks a conventional Rule 12(b) dismissal or files an answer. The theory is that motions on the pleadings fail too often, in part because leave to replead is commonly given, while summary judgment is available only after costly discovery. Summary adjudication of some issues will control the scope of discovery, even if it does not resolve any claim, counterclaim, or other claim. Determination of the scope of the mandatory disclosure would be shaped by the issues that commonly prove important in the particular type of litigation, and often would be limited to easily available documents and the like.

The New York County Lawyers' Association explicitly disagrees with the City Bar. Issues that are properly decided without discovery can be resolved under Rule 12. Rule 56 can be used to focus summary judgment on specific issues, with authority to stage discovery as appropriate to those issues. The motion for summary adjudication may be used deliberately to delay discovery. And if summary adjudication is granted on some issues, the attempt to deny discovery on those issues might undesirably curtail discovery. And adhering to the summary adjudication would be unfair if subsequent discovery showed it was wrong. (Note: it is unclear how the "law of the case" phrase in the City Bar proposal is intended. Standard law-of-the-case doctrine permits a district court to depart from its own earlier rulings in a case when error appears.)

Stueve & Keenan propose to allow depositions of nonparties only by agreement or order. In part because of this limit they would allow parties to oppose summary judgment by a declaration, "based on substantial facts, of what they reasonably project that a non-party trial witness' testimony will demonstrate. This declaration should also show why receiving the witness's direct testimony through affidavit is not feasible." Sanctions may be imposed for making a representation "that proves false at trial."

Accelerated disposition: The ACTL/IAALS proposals include consideration of an "application" procedure adopted in some Provinces of Canada. The details are sketchy. But the idea is that a plaintiff may commence an action with what is in effect a motion for summary judgment, supplying supporting materials — documents and affidavits — at the outset. Depositions are limited to what is in the affidavits. The court may combine the procedure for decision on the record as it develops with a trial on some particular points.

(The 2010 version of Rule 56 allows a party to move for summary judgment at any time until 30 days after the close of all discovery. The Committee Note observes that a plaintiff can move for

summary judgment at the beginning of the action. This procedure may be useful in collection cases, bringing summary judgment back close to its origins. In addition, needs for prompt specific relief can often be addressed by injunction, see Rule 65. Declaratory relief may be suitable for expeditious handling in situations that do not call for much discovery. These opportunities, the newly emphasized availability of partial summary judgment, and the general authority to manage an action probably suffice.)

Prompt Ruling: Complaints heard during the hearings on Rule 56 amendments were repeated at the conference: some courts take too long to rule on summary-judgment motions, and at times fail to rule at all. The ABA advances an expectation that courts are expected to rule promptly, and always within 90 days after full briefing; it is not clear whether this is proposed as a rule amendment.

Permission to File: Several of the NELA respondents suggested that abuses of Rule 56 in employment cases justify imposing a requirement that a party get court permission to file the motion.

Inefficiency: During the Rule 56 review there were several suggestions that deciding a motion for summary judgment often is more work for the judge than a trial. One NELA respondent offered a similar thought: "[I]t has become less time consuming and costly to try a case to a jury than to go through the summary judgment process. So, the rules should do more to encourage trials and also more to discourage summary judgment." Others voiced the same thought.

Self-Serving Self-Contradiction: An NELA respondent suggests: "Allow clients to change and clarify answers to depositions not only in the transcript verification but later in affidavits and at trial, subject to impeachment." This addresses the common practice of refusing to consider self-serving, self-contradicting affidavits.

Disposition on an Administrative Record: Proceedings for review on an administrative record often are resolved without discovery. That is the reason why "an action for review on an administrative record" is excluded from initial disclosure by Rule 26(a)(1)(B)(i). The full routine of Rule 56 summary judgment may be more procedure than these cases need. For that matter, the standard for review is different from the summary-judgment standard. It would be possible to adopt a new and streamlined rule specifically for prompt disposition. But there is good reason to believe that courts generally manage to achieve disposition on the administrative record without undue complication or confusion of the parties. Little need appears to pursue this subject.

Rule 68: Settlement

Conference participants addressed settlement from a variety of perspectives. Professor Nagareda's paper frames the question: "how to regulate the distortive effect that our modern civil process might exert upon the pricing of claims in a world dominated by settlement, not trial." Current pretrial procedures focus on whether trial should occur, but trials rarely occur. And discovery imposes great costs in moving from motions on the pleadings to summary judgment. Perhaps procedures should be developed to help the parties price the settlement value of the claim. One possibility is a "preliminary judgment," provided by the court at an early stage; the judgment could be rejected by any party, but would provide a valuable anchor for converging on settlement value.

Rule 68 has hovered somewhere in the back cupboards of the Committee agenda for several years. Informal suggestions, and occasional formal requests, would invigorate Rule 68 by various means. Stiffer sanctions — fee shifting — are the most common element. There has been considerable resistance to taking up this thorny topic in the wake of unsatisfactory attempts in the 1980s and 1990s. But the time may come again.

Initial Disclosures

Rule 26(a)(1) initial disclosures were questioned by many participants. The subject may be sufficiently distinctive to be considered independently of other discovery topics.

The questions were almost mutually offsetting. Some suggest that the initial disclosures are nearly useless because they do not do enough — all of the same materials will be sought again by discovery demands that embrace them within requests that seek all information relevant to the same issues, not merely the information the disclosing party may use to support its own positions. Others suggest that the initial disclosures are unnecessary because they do too much, forcing the parties to work to disclose materials that the other parties would not bother to seek in discovery.

There is a plausible argument that initial disclosures should either be broadened so as to support a meaningful reduction in subsequent discovery, replaced by some other form of automatic discovery, or abandoned.

Abandonment is easy to accomplish. The ABA proposes both to broaden and to narrow initial disclosures. Disclosure of witnesses would be broadened to cover "each individual likely to have significant discoverable information about facts alleged in the pleadings, identifying the subject of the information for each individual." It would be narrowed by deleting any initial disclosure requirement as to documents. The parties would be expected to discuss and attempt to agree on exchange of documents before the initial pretrial conference.

Replacement might take a variety of forms of automatic discovery. Initial efforts to develop form interrogatories are under way. A relatively modest approach might amend Rule 33 to allow serving interrogatories, of a sort perhaps vaguely defined,
with the complaint and with the answer. The interrogatories could address the topics now covered by Rule 26(a)(1), or go further. They might include a request to produce all documents identified in the response, or perhaps some subset of the identified documents.

Expanded disclosure obligations can be easily imagined. Arizona Rule 26.1 establishes sweeping disclosure obligations that could be used as a model. (The IAALS survey of Arizona lawyers paints a rather mixed picture on experience under Rule 26.1, but supports the conclusion that this approach merits consideration.) The Center for Constitutional Litigation would require that, in a civil equivalent of *Brady* requirements for prosecutors, defendants produce materials that support the plaintiff's allegations. Judge Baylson suggests a "civil Brady" rule in broader terms: concepts of professional responsibility should oblige attorneys to disclose all materially unfavorable information (also rendered as information favorable to the other side), and parties should be likewise required to disclose; rules of professional confidentiality and privilege should not restrict this duty.

In addition to scope, timing also might be addressed. The ABA proposes that the plaintiff's disclosures be made within 30 days from filing the complaint, and the defendant's within 30 days from filing an answer.

There was one particular rule suggestion. An NELA respondent said that defendants almost always identify the address and phone number of witnesses as "c/o the attorney." The rule should be clear that the actual address and phone number are required.

Discovery: Detailed Changes

Allocation of discovery work between this Subcommittee and the Discovery Subcommittee will be an ad hoc accommodation of the agendas and interests of each. Often enough it will make

sense to assign detailed proposals to the Discovery Subcommittee. But coordination requires initial consideration — it may be useful for this Subcommittee to open up proposals that seem worthy, whether the result is to develop them fully or instead is to commend them for full development by the Discovery Subcommittee.

Scope: The ABA 21st Century proposals reflect a division among Special Committee members — some would eliminate discovery on the "subject matter" of the action. The final ACTL/IAALS proposals suggest consideration of a narrower scope — perhaps by changing the definition of relevance.

Cost Shifting: A proposal by Lawyers for Civil Justice illustrates the kinds of topics that are so important as to be readily separated from more detailed discovery work. This proposal is captured in the first sentence of the suggested rule: "A party submitting a request for discovery is required to pay the reasonable costs incurred by a party responding to a discovery request propounded under these Rules." (A similar protection for nonparties appears later.) The ACTL/IAALS final report suggests considering cost-shifting or co-pay rules.

Professor Nagareda suggests that a plaintiff should pay the defendant's discovery costs if the defendant wins on summary judgment. How about partial summary judgment? Affecting the tactical uses of Rule 56 motions?

Controlled Access: Judge Higginbotham's proposal is a good (and brief) example of a generic possibility: Require the parties to file statements of "likely controlling issues of fact and law." The court then asserts early case control over access to discovery in two steps: First, a hearing on access; then a hearing on access with a "'peek at the merits.' The latter being an effort to reinforce a determination that a claim has been stated and if there is a reasonable basis for accessing further discovery."

Judge Baylson makes a related suggestion that might be cast in rule form: mid-way during discovery, each party files a statement of contentions "in limited, numbered paragraphs with record support, with the opposing party making a substantive response." See the Manual for Complex Litigation (Fourth), § 11.473. This can help the parties adjust their discovery efforts.

Girard Proposals: Three specific proposals by Daniel Girard provide a good illustration of possible small-scale revisions that might accomplish quit a bit. They are advanced in Girard & Espinosa, "Limiting Evasive Discovery: A Proposal for Three Cost-Saving Amendments to the Federal Rules," 87 Denver U.L. Rev. ___ (2010):

(1) Evasive responses: This proposal draws from concern that discovery responses often are evasive, and the process often transforms from the intended "request-response" sequence to "an iterative, multi-step ordeal" in which the pre-motion conference requirement itself serves as an invitation to overbroad requests that anticipate over-narrow responses, negotiation, and eventual responses that may or may not be evasive. Rule 26(g) implicitly forbids evasive responses, but it should be made explicit by adding just two words to Rule 26(g)(1)(B)(i): signing a discovery request, response, or objection certifies that it is "not evasive, consistent with these rules and * * *."

(2) Rule 34: Production added to Inspection: Rule 34(a)(1) refers to a request "to produce and permit the requesting party * * * to inspect, copy * * * " documents. Rule 34(b)(1)(B) directs that the request "specify a reasonable time, place, and manner for the inspection and for performing the related acts." 34(b)(2)(B) directs that for each item or category, the response must "state that inspection and related activities will be permitted as requested," or object. "Producing" enters only in (b)(2)(D), referring to electronically stored information, and then again in (b)(2)(E), specifying

procedures for "producing documents or electronically stored information." Rule 34(c) invokes Rule 45 as the means of compelling a nonparty to "produce documents and tangible things." Girard observes that the common practice is simply to produce, rather than make documents available for inspection and copying. This leaves gaps in the language of the rules. Rule 37(a)(3)(B)(iv) should be amended to include "fails to produce documents" — a motion to compel may be made if "a party fails to produce documents or fails to respond that inspection will be permitted — or fails to permit inspection — as requested under Rule 34." In addition, a new provision should be added to Rule 34(b)(2)(B): "If the responding party elects to produce copies of documents or electronically stored information in lieu of permitting inspection, the response must state that copies will be produced and the production must be completed no later than the date for inspection stated in the request."

(3) Rule 34: General Objections: The underlying behavior is a tendency of responding parties to begin a response with a boilerplate list of general objections, and often to repeat the same objections in responding to each individual request, and at the same time to produce documents in a way that leaves the requesting party guessing whether responsive documents have been withheld under cover of the general objections. The proposed cure is to add this sentence to Rule 34(b)(2)(C): "Each objection to a request or part thereof must specify whether any responsive documents are being withheld on the basis of that objection." (Judge Baylson makes a related suggestion, observing that "[s]ome parties serve objections routinely and maintain them * * *, preferencing every response as 'subject to objections.' This tactic delays discovery and may obfuscate the search for facts." Absent party agreement otherwise, "objections not specifically sustained by the court in a certain time frame should be deemed overruled; the discovery shall be provided as if an objection had never been made.")

Start Discovery Sooner: Delaying discovery until after the Rule 26(f) conference is a bad idea, or so it is argued by a respondent to the ABA survey.

Stay Discovery Pending Motions: Various suggestions were made about staying discovery pending disposition of a motion to dismiss. The ABA proposal is that the court has discretion whether to stay discovery, but adds that the court should promptly rule on the motion — the ruling should not take more than 60 days in cases that are not "complex." The ACTL/IAALS Pilot Program Rule 6.1 similarly relies on discretion. The New York City Bar proposal would stay discovery pending disposition of a motion to dismiss or for summary adjudication, unless the court finds good cause to allow discovery. In order to deter strategic use of the motions, discovery should proceed on an expedited basis if a motion is made and denied. Lawyers for Civil Justice propose a stay unless the court finds that particularized discovery is necessary to preserve evidence or prevent undue prejudice.

Exchange Initial Discovery Requests: The New York City Bar recommends that parties be required to exchange actual discovery requests at the Rule 26(f) conference and a Rule 16(b) conference so that the reasonableness of the discovery can be discussed with the court.

Place of Depositions: More than one NELA respondent would require "corporate deponents" to travel to the district where litigation is conducted. Cf. present Rule 37(d)(1).

Word-Processing Format: A suggestion that pops up at intervals over the years is renewed: Rule 33, 34, and 36 discovery requests should be in an electronic form that allows responses directly in the form.

Number of Interrogatories: An NELA respondent suggests that the limit on the number of interrogatories should be deleted. A larger number of simpler, subject-specific interrogatories can be drafted and answered with less time and expense.

Contention Interrogatories: The ABA finds that contention interrogatories "have become a tool of oppression and undue cost"; they should be prohibited absent agreement of the parties or court order. The New York City Bar believes that contention interrogatories "to elicit contentions and narrow areas of disagreement can be effective, but typically not until later in the discovery process."

Limit Rule 34: Lawyers for Civil Justice and allies propose limits to 25 requests, to 10 custodial or information sources, and to two years prior to the complaint. Others propose comparable limits; Arizona limits requests to 10 distinct items or categories of items.

Requests to Admit: The ABA again finds oppression, and recommends a limit of 35 requests. (The FJC survey, p. 10, found requests used in 25% to 30% of the closed cases; plaintiffs and defendants reported different medians and means, but the means were always well above the medians — indicating that means, mostly hovering just above 20, are influenced by numbers at least veering toward 35 in quite a few cases.) The ACTL/IAALS invokes the general principle of proportionality, interpreting it to mean that contention interrogatories and requests to admit should be used sparingly, if at all.

Other Limits: The ACTL/IAALS final proposals include limiting the persons from whom discovery can be sought (Arizona allows depositions of parties, expert witnesses, and document custodians; court permission or stipulation is required for others); limiting the time available for discovery; limits on the amount of money a party can spend, or force its opponent to spend on discovery; discovery budgets approved by the clients and the court. Stueve & Keenan would limit depositions to parties, requiring agreement or order to depose expert witnesses and nonparties; in return, they would establish nationwide subpoenas to compel trial testimony.

Sanctions: There are many laments that sanctions are rarely imposed, generating reflex refusals to provide discovery designed to provoke a motion to compel. One NELA respondent spoke to the other side: "[T]he presumption of sanctions in Rule 37 makes it too risky for many individual parties to challenge the discovery responses of well-financed adversaries."

Definitions: An NELA respondent: "Add a definitions section to FRCP to reduce wrangling about, for example, whether questions containing 'respecting,' or 'relevant to' or 'related to' must be answered, and if so, what these words include."

Expert Witnesses

The broader proposals for restricting expert-witness practice are better suited to the Evidence Rules than to the Civil Rules. The ACTL/IAALS pilot program rule 11 would require that a Rule 702 expert's testimony be "strictly limited to the contents of the report" furnished in writing. That could be accomplished in Rule 26(a)(2)(B). In addition, the rule would allow only one expert witness per party to testify on "any given issue." (Arizona allows only one witness per side on an issue; if coparties cannot agree, the court chooses.) Their final report suggests that depositions of experts be eliminated if the testimony is limited to the contents of the report.

II NONRULES PROPOSALS

As noted above, some suggestions for reform could be implemented either by rule amendments or by other means of encouraging best practices. In addition, some proposals may fit within the Rules Enabling Act framework without looking toward actual rule amendments. Only a few of these suggestions are noted here.

Enforce Rules

There were many comments, often in different contexts, that much could be accomplished by simply enforcing present rules. One example recurred through the NELA responses — many NELA members believe courts do not honor the discovery rules in ERISA litigation. Apparently the courts treat ERISA claims as review on an "administrative" record that is not to be supplemented..

Summary Judgment

The NELA respondents produced staggering numbers of responses bewailing delay in ruling on summary judgment until the eve of trial. A related and also frequently expressed concern is the practice of holding a final pretrial conference before ruling on summary judgment. And there are requests for oral argument. A variation suggests oral argument before the nonmovant has to file a brief. None of these seems particularly amenable to rule text provisions.

Local Rules

"Local rules projects" have been pursued under the aegis of the Standing Committee. Continuing dissatisfaction with local rules was expressed in several of the surveys. There was widespread feeling that local rules are not always consistent with the national rules. In addition, implementation of the local rules themselves may not be consistent — some individual judges depart from both national and local rules.

Local rules also were praised by some of the ABA answers. One virtue is that they give notice of practices that will be followed whether or not expressed in a formal rule — better that all lawyers have access, not just the knowing insiders. Another is that they may be useful means of trying out ideas that may be proved to warrant general adoption. Yet another may be flexibility: generating sets of model local rules for specific types of litigation may be a way to respond to the shortcomings of transsubstantive procedure. Patent litigation rules are offered as an example.

The National Employment Lawyers Association found a consensus that local rules are not consistently applied within the district. It recommends that the judges of each district meet periodically to discuss their variations on local practice. (This does not seem a likely subject for Rule 83.)

Miscellaneous

Require attorneys to disclose to their own clients an expected budget of the costs of the case from beginning to end, including attorney fees; this should include aggregate data from other cases, and "how they are resolved, on average."

Go Slow

One ABA response echoed a theme that sounds periodically in rules discussions: "Please stop monkeying with the Civil Rules every year or so. Stability and predictability are important * * * . Trying to fix every new problem with a new civil rule is making our system more complex, expensive, and Canonical."

JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

JAMES C. DUFF
Secretary

September 10, 2010

MEMORANDUM

To: The Chief Justice

From: James C. Duff

RE: RULES COMMITTEES' REPORT ON THE 2010 CONFERENCE ON CIVIL LITIGATION

On behalf of the Advisory Committee on Civil Rules and the Committee on Rules of Practice and Procedure, I am transmitting the attached report on the 2010 Conference on Civil Litigation held at Duke University School of Law on May 10-11, 2010.

Attachment

cc: Honorable Lee H. Rosenthal
Honorable Mark R. Kravitz
Jeffrey Minear, Esq.

Report to the Chief Justice of the United States on the 2010 Conference on Civil Litigation

Submitted by the Judicial Conference Advisory Committee on Civil Rules and the Committee on Rules of Practice and Procedure

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INTRODUCTION[1]

The Civil Rules Advisory Committee hosted the 2010 Conference on Civil Litigation at the Duke University School of Law on May 10 and 11. The Conference was designed as a disciplined identification of litigation problems and exploration of the most promising opportunities to improve federal civil litigation. More than seventy judges, lawyers, and academics presented and discussed empirical information, analytical papers, pilot projects, and various approaches used by both federal and state judges, in considering ways to address the problems of costs and delays in the federal civil justice system. Over 200 invited participants selected to ensure diverse views, expertise, and experience filled all the space available at the Law School and engaged in two days of panel presentations followed by extensive audience discussion. The result is a large amount of empirical information and a rich array of possible approaches to improving how the federal courts serve civil litigants.

I. THE BACKGROUND AND PURPOSE OF THE CONFERENCE

For many years, the Judicial Conference Rules Committees have heard complaints about the costs, delays, and burdens of civil litigation in the federal courts. And for many years, the Rules Committees have worked to address these complaints. That work is reflected in the fact that the Civil Rules, particularly the discovery rules, have been amended more frequently than any others. The more recent changes have been preceded by efforts to obtain reliable empirical information to identify how the rules are operating and the likely effect of proposed changes. Despite these recent rule changes, complaints about costs, delays, and burdens in civil litigation have persisted. Many of the complaints are inconsistent and conflicting. The Rules Committees concluded that a more comprehensive and holistic approach was called for in its empirical work. The 2010 Conference was built on an unprecedented array of empirical studies and data, surveys of thousands of lawyers, data from corporations on the actual costs spent on discovery, and white papers issued by national organizations and groups and by prominent lawyers. In addition, the Conference relied on data gathered in earlier rules-related work.

In 1997, the Civil Rules Committee hosted a conference at the Boston College Law School to explore whether the persistent complaints should be the basis for changes to the Federal Rules of Civil Procedure governing discovery. That conference was also preceded by empirical studies conducted by the Federal Judicial Center (FJC). After that conference, changes were proposed to the discovery rules, including a narrowing of the definition of the scope of discovery in Rule 26(b)(1). That change was enacted in 2000. Since then, however, the litigation landscape has changed with astonishing rapidity, largely reflecting the revolution in information technology. The advent and wide use of electronic discovery renewed and amplified the complaints that the existing rules and practices are inadequate to achieve the promise of Rule 1: a just, speedy, and inexpensive resolution to every civil action in the federal courts.

The discovery rules were amended again in 2006 to recognize distinct features of electronic discovery and provide better tools for managing it. The 2007 style project simplified and clarified all the rules, the 2008 enactment of Federal Rule of Evidence 502 reduced the risks of inadvertent privilege waiver in discovery, and the 2009 time-computation project made the calculation of

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[1] There are many people and entities to thank and acknowledge for their support of, and work on, the Conference. A complete list is beyond this report. Particular thanks, however, must be extended to the Duke University School of Law and Dean David F. Levi; the Federal Judicial Center and Judge Barbara Rothstein and Dr. Emery Lee; the Administrative Office and Director James Duff; the Judicial Conference of the United States; and each of the Conference panel moderators.

deadlines easier. With these internal changes in place, and with external changes continuing to occur, the Advisory Committee determined that it was time again to step back, to take a hard look at how well the Civil Rules are working, and to analyze feasible and effective ways to reduce costs and delays.

Some of the same information-technology changes that gave rise to electronic discovery also provided the promise of improved access to empirical information about the costs and burdens imposed in civil lawsuits in federal courts. A great amount of empirical data was assembled in preparation for the 2010 Conference. The Rules Committees asked the FJC to study federal civil cases that terminated in the last quarter of 2008, the most recent quarter that could be studied in time for the Conference. The study included detailed surveys of the lawyers about their experience in the cases. The FJC also administered surveys for the Litigation Section of the American Bar Association (ABA) and for the National Employment Lawyers Association (NELA). The Institute for the Advancement of the American Legal System (IAALS) conducted a detailed study of the members of the American College of Trial Lawyers (American College). The Searle Institute at Northwestern Law School and a consortium of large corporations also provided empirical information designed to measure in ways not previously available the actual costs of conducting electronic and other discovery. The rich and detailed data generated by all this work provided an important anchor for the Conference discussion and will be a basis for further assessment of the federal civil justice system for years to come.

The many judges, lawyers with diverse practices, consumers of legal services, and academic critics of legal institutions and processes provided an important range of perspectives. Lawyers representing plaintiffs, defendants, or both, and from big and small firms as well as public interest practice, were recruited. Clients were represented by corporate counsel for businesses ranging from very large multinational entities to much smaller companies, as well as by government lawyers. Empirical work was presented by FJC staff, private and public interest research entities, bar associations, and academics. The academic participants also provided historical and jurisprudential grounding. Experience with state-court practices was explored to show the range of possibilities working within the framework of the American adversary system. Different litigation bar groups were represented. The mix of these participants in the organized panels and in the subsequent discussions resulted in consensus on some issues and divergence on others. The diversity of views and experience helped identify the areas in which disagreements tracked the familiar plaintiff-defendant divide and areas in which both disagreements and consensus transcended that line.

Assembling the panels and commissioning, coordinating, and reviewing the empirical studies and papers occupied the planning committee, and particularly its chair, Judge John Koeltl, for a year. The empirical information, papers, and reports from the Conference are available at the following website: http://civilconference.uscourts.gov, and the Duke Law Review will publish many of the papers. The Conference was streamed live by the FJC. Attachments to this report include the agenda, which lists the panel topics and panelists; a separate list of the panelists, sorted by panel; and a list of the titles and authors of the papers, sorted by panel. While many of the empirical studies, pilot projects, and proposals for rule changes will continue and may be expanded, the materials presented and discussed at the Conference will provide the inspiration and foundation for years of future work.

II. Preliminary Results of the Empirical and Other Studies

A full accounting of the empirical studies and findings is beyond the scope of this report. But a brief summary of some of the preliminary results demonstrates the important role they will play in determining the most promising avenues for improving federal civil litigation.

The FJC conducted a closed-case study of 3,550 cases drawn from the total of all cases that terminated in federal district courts for the last quarter of 2008. The sample was constructed to eliminate categories of cases in which discovery is seldom used and to insure the inclusion of cases likely to encounter the range of litigation issues. The study included every case that had lasted for at least four years and every case that was actually tried, a design likely to capture the cases involving significant discovery. The study showed that plaintiffs reported $15,000 as the median total costs in cases that had at least some discovery. The figure for defendants was $20,000. In the top 5% of this sample, however, the reported costs were much higher. The most expensive cases were those in which both the plaintiff and the defendant requested discovery of electronic information; the 95th percentile was $850,000 for plaintiffs and $991,900 for defendants.

The results closely parallel the findings of the 1997 closed-case survey the FJC did for the Advisory Committee in connection with the work that led to the Boston College Law School Discovery Conference. Both FJC studies showed that in many cases filed in the federal courts, the lawyers handling the cases viewed the discovery as reasonably proportional to the needs of the cases and the Civil Rules as working well. The FJC studies support the conclusion that the cases raising concerns are a relatively small percentage of those filed in the federal courts, but the numbers and the nature of these cases deserve close attention. It would be a mistake to equate the relatively small percentage of such cases with a lack of importance. The most costly cases tend to be the ones that are more complicated and difficult, in which the stakes for the parties, financial or otherwise, are large. One set of issues is whether the cases with the higher costs in the FJC studies are problematic, that is, whether the costs are disproportionate to the stakes. Higher costs may not be problematic if they are justified by the amounts or issues at stake in the litigation; lower costs may still be problematic if they are burdensome because they are the result of excessive discovery that is not justified by what is at stake in the litigation or if the costs are low only because, for example, a defendant agreed to settle a meritless case to avoid high discovery costs.

Several other surveys supplemented the FJC work. The IAALS worked with the American College on a survey that was sent to every Fellow of the American College. With some modifications, that survey was also administered by the FJC for the Litigation Section of the ABA and for NELA. The responses varied considerably among the different groups.[2] The American College respondents—who have more years of experience in the profession and are selected from a small fraction of the bar—reflected greater general dissatisfaction with current civil procedure than the other groups. The ABA Section of Litigation survey responses did not indicate the same degree of dissatisfaction with the rules' ability to meet the goals of Rule 1 as the American College responses, but still reflected a greater degree of dissatisfaction with the operation of the Civil Rules than the FJC survey results.

The survey responses by the members of the plaintiff-oriented NELA were generally that the Civil Rules are not conducive to securing a "just, speedy, and inexpensive determination of every action," but most remained hopeful that current problems could be remedied by minimal reforms. Among the concerns raised by NELA respondents were that the rules are not applied as written and are applied inconsistently; that local rules often conflict with the Federal Rules; that initial disclosures are not useful in reducing discovery or saving money; that discovery is often abused but

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[2] The 1997 and the 2009 FJC surveys asked lawyers about their actual experiences in litigating specific cases and followed up with additional questions for a sample of those cases. This study design has an important advantage over surveys asking for general impressions about how the system is working. Responses to such questions about general impressions tend to be less grounded in actual case experience. Indeed, there was sometimes a striking difference between lawyers' responses about the proportionality of discovery that they experienced in specific cases and general statements about excessive discovery.

sanctions are rarely used (although more than half of the respondents found that in the majority of cases, counsel agree on the scope and timing of discovery); that litigation is too costly; that discovery is too expensive; and that delays increase costs.

On the defense-oriented side, the Lawyers for Civil Justice, the Civil Justice Reform Group, and the U.S. Chamber Institute for Legal Reform surveyed corporate counsel of Fortune 200 companies and reported that the survey respondents viewed litigation costs as too high. The participating corporations reported that outside litigation costs account for about 1 in every 300 dollars of U.S. revenue for corporations not in insurance or health care. The respondents also reported that the average discovery costs per major case represent about 30% of the average outside legal fees. The report drafted by the groups conducting the survey concluded that litigation costs continue to rise and are consuming an increasing percentage of corporate revenue; that the U.S. litigation system imposes a much greater cost burden on companies than systems outside the United States; that inefficient and expensive discovery does not aid the fact finder; that companies spend a significant amount every year on litigation transaction costs; and that large organizations often face disproportionately burdensome discovery costs, particularly with respect to e-discovery.

The surveys showed as major perceived difficulties on the defense side that contested issues are not identified early enough to forestall needlessly extensive and expensive discovery; that discovery may impose disproportionate burdens on the parties and at times on nonparties, made worse by the difficulties of discovering electronically stored information; and that adversaries with little information to be discovered have the ability to impose enormous expense on large data producers—not only in legal fees but also in disruption of ongoing business—with no responsibility under the American Rule to reimburse the costs. The surveys showed as major perceived difficulties on the plaintiffs' side that much of the cost of discovery arises from efforts to evade and "stonewall" clear and legitimate requests, that motions are filed to impose costs rather than to advance the litigation, and that the existing rules are not as effective as they should be in controlling such tactics. One area of consensus in the various surveys, however, was that district or magistrate judges must be considerably more involved in managing each case from the outset, to tailor the motions practice and shape the discovery to the reasonable needs of that case. The challenge is to achieve this on a consistent, institutional basis without interfering with the independence and creativity of each judge and district responding to the specific mix of cases and docket conditions, and without interfering with the effective handling of many cases under existing rules and practices.

Another area of consensus was that making changes to the Federal Rules of Civil Procedure is not sufficient to make meaningful improvements. While there was disagreement over whether and to what extent specific rules should be changed, there was agreement that there is a limit to what rule changes alone can accomplish. Rule changes will be ineffective if they are not accompanied by judicial education, legal education, and support provided by the development of materials to facilitate implementing more efficient and effective procedures. What is needed can be described in two words—cooperation and proportionality—and one phrase—sustained, active, hands-on judicial case management. These goals can be advanced by several means, including improved formal ongoing education programs for lawyers and judges, the development and use of "best practices" guides and protocols, and other means of encouraging cost-effective litigation practices consistent with vigorous advocacy.

The Conference generated specific and general suggestions for changing both rules and litigation practices. The suggestions fall into the categories identified above: changes to the rules; changes to judicial and legal education; the development of protocols, guidelines, and projects to test and refine continued improvements; and the development of materials to support these efforts.

III. RULEMAKING

Two points of consensus on rulemaking emerged from the Conference. First, while rule changes alone cannot address the problems, there are opportunities for useful and important changes. Second, there is no general sense that the 1938 rules structure has failed. While there is need for improvement, the time has not come to abandon the system and start over.

One recurring question is the extent to which new or amended rules are needed as opposed to more frequent and effective use of the existing rules. Conference participants repeatedly observed that the existing rules provide many tools, clear authority, and ample flexibility for lawyers, litigants, and the courts to control cost and delay. Conference participants noted that many of the problems that exist could be substantially reduced by using the existing rules more often and more effectively. It is important to understand the reasons that existing rules are not invoked or enforced more reliably and the extent to which changes in judicial and lawyer education can respond to those reasons. It is also important to understand the extent to which the problems of costs, delays, and unfairness can be addressed by enforcing the procedural rules. Economic and other incentives that drive how lawyers and litigants conduct litigation are certainly important. One judge with many years of experience both in the district court and on the court of appeals put it succinctly: "what we're seeing is the limits of rules." And it is important to distinguish between costs, delays, and burdens created by such causes as strains placed on federal judges by competing demands on their time on the one hand, and difficulties that arise from any weakness of the existing Civil Rules on the other.

Although rule amendments are not the only answer, the Conference did identify some candidates for amendment that attracted strong support and others that deserve close analysis. Some of these suggestions are already the subject of the Advisory Committee's work. Others draw on existing best practices, case law direction, state-court experience, or the results of pilot projects. Yet other ideas are less well-developed but may prove promising.

A general question is whether a basic premise of the existing rules, that each rule applies to all the cases in the federal system, should continue to govern. Over the years, there have been specific, well-identified departures from the so-called transubstantivity principle. Examples within the rules include Rule 9(b) and the categories of cases excluded from Rule 26(a)'s initial disclosure requirements. Although no one suggested a wholesale departure from transubstantivity, several Conference papers and participants raised the possibility of increasing the rule-based exceptions to it. Two general categories of exceptions were raised: exceptions by subject matter, such as a case raising official immunity issues; and exceptions by complexity or amount at issue in a case, such as a system that would channel cases into specific tracks.

Pleading and discovery dominated Conference suggestions for rule amendments. Some longstanding topics were conspicuous for lack of attention. Although there was substantial interest in exploring the phenomena of settlement and the "vanishing trial," the Rule 68 provisions on offer of judgment received no more than a collateral glance. And the protective-order provisions of Rule 26(c) drew no comment or attention at all, other than suggestions for standardizing protective orders for categories of litigation, such as employment cases, to expedite their use.

A. Pleading

The 1938 Civil Rules diminished the role of pleadings and greatly expanded the role of discovery. Discovery has been continually on the Advisory Committee's docket since the substantial revisions accomplished by the 1970 amendments. Pleading has been considered at intervals since 1993, when the decision in *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993), suggested that adoption of "heightened" pleading is a subject for the

Enabling Act process, not judicial decision. At that time, however, the Advisory Committee found no broad support or need for amendments to pleading rules.

The decisions in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), brought pleading to the forefront of attention and debate. The academy in particular reacted in force to these decisions. A speaker at the Association of American Law Schools Civil Procedure Workshop in June 2010 counted eighty-seven law review articles on these cases, a count that continues to grow. Some members of Congress have proposed variations of bills intended to "roll back" the pleading standard, seeming to assume a fixed status quo of practice that did not exist. The lower courts have, over time, begun to provide the detail and nuance necessary to understand the specific impacts of these most recent Supreme Court interpretations of the familiar words of Rule 8. Well before the 2010 Conference, the Advisory Committee had begun a detailed study of the effects of *Twombly* and *Iqbal* on practice, to determine whether any rule amendments should be proposed and, if so, what direction they should take. That work continues, now informed by the addition of the materials and discussion presented at the Conference. As part of that work, the FJC was asked to provide data on the number and disposition of motions to dismiss in the wake of *Twombly* and *Iqbal*. That study is ongoing, but initial results are expected to be released this fall.

The Conference covered a full spectrum of pleading amendment possibilities, with disagreements that largely corresponded to the plaintiff-defendant divide over whether the current pleading standard provides timely and adequate identification of the issues to be decided and of those cases that cannot succeed and should be dismissed without further expenditure of time and resources. Some speakers presented the view that although the final answer should be adopted through the Enabling Act process, there is an emergency in pleading practice that should be cured by legislation enacted by Congress that would establish a rule that should endure until the Enabling Act process can work through its always deliberate procedures. Others expressed the view that the common-law process of case-law interpretation has smoothed out some of the statements in, and responded to the concerns raised by, *Twombly* and *Iqbal*, and will continue to do so. Yet others argued that although the Court only interpreted the language of Rule 8(a)(2), that rule should be amended to express more clearly the guidance provided by the *Twombly* and *Iqbal* opinions. Some recommended moving still further in the direction of "fact" pleading; these recommendations ranged from less factual detail than Code pleading, to "facts constituting the cause of action," to "notice plus pleading" that explicitly requires a court to consider not only factual allegations but also reasonable inferences from those allegations.

Another set of possibilities, apart from the general Rule 8(a) pleading standard, is to expand on the categories of claims flagged for "heightened pleading" by Rule 9(b). Two of the categories often mentioned for distinctively demanding pleading standards are claims of conspiracy and actions that involve official immunity.

Yet another set of possibilities is to focus on the Rule 12(b)(6) motion to dismiss rather than on the Rule 8(a) standard for sufficient pleading. Much of the debate about pleading standards focuses on cases in which plaintiffs lack access to information necessary to plead sufficiently because that information is solely in the hands of the defendants and not available through public resources or informal investigation. "Information asymmetry" has become the descriptive phrase for cases in which only formal discovery is able to provide plaintiffs with information necessary to plead adequately. The Conference participants provided substantial encouragement for rule amendments that would explicitly integrate pleading with limited initial discovery in such cases. Various forms will be considered. A plaintiff might identify in the complaint fact matters as to which discovery is needed to support an amended complaint and seek focused discovery under judicial supervision. Or one response to a motion to dismiss under Rule 12(b)(6) might be for the plaintiff to make a preliminary showing of "information asymmetry" and to seek focused, supervised

discovery before a response to the motion is required. Another approach might be to require the court asked to decide a motion to dismiss to consider the need for discovery in light of probable differences in access to information. Alternatively, there might be some opportunity for prefiling discovery in aid of framing a complaint, drawing from models adopted in several states.

Yet other approaches to pleading have been explored in the past and continue to be open for further work. One would expand the Rule 12(e) motion for a more definite statement to focus on an order to plead in a way that will facilitate case management by the court and parties. Another would expand the use of replies, drawing on approaches used in official-immunity cases as one example.

Pleading problems are of course not limited to complaints. Plaintiffs' attorneys assert that defendants frequently fail to adhere to the response requirements built into Rule 8(b). The Conference, however, did not produce suggestions for revising this rule. The difficulty here seems to lie not in the rule but in its observance, another illustration of the limited capacity of rulemaking to achieve desirable ends. By contrast, a number of Conference participants did make the specific suggestion that the standard for pleading an affirmative defense should parallel the standard for pleading a claim. That question can be addressed by new rule text, and that possibility will be considered by the Advisory Committee.

B. Discovery

Empirical studies conducted over the course of more than forty years have shown that the discovery rules work well in most cases. But examining the cases in which discovery has been problematic because, for example, it was disproportionate or abusive, requires continuing work. Discovery disputes, the burdens discovery imposes, the time discovery consumes, and the costs associated with discovery increase with the stakes in the litigation, both financial and legal; with the complexity of the issues; and with the volume of materials involved in discovery. The Conference produced some specific areas of agreement on the need for some additional rule changes and better enforcement of existing rules, along with areas of disagreement on whether a more significant overhaul of the discovery rules is needed. This was also the area in which the recognition that rule changes alone are inadequate to produce meaningful improvements in litigation behavior or significantly reduce the costs and delays of discovery had the greatest force. Rules alone cannot educate lawyers (or their clients) in the distinction between zealous advocacy and hyper-advocacy.

The Conference discussions of discovery problems extended beyond the costs, delays, and abuses imposed by overbroad discovery demands to include those imposed by discovery responses that do not comply with reasonable obligations. While the defense-side lawyers reported routine use of overbroad and excessive discovery demands, plaintiff-side lawyers reported practices such as "stonewalling" and the paper and electronic versions of "document dumps," accompanied by long delays, overly narrow interpretations of discovery requests, and motions that require expensive responses from opposing parties and that create delay while the court rules.

Privilege logs were identified as both a cause of unnecessary expense and delay and a symptom of the dysfunction that can produce these problems. Privilege logs are expensive and time-consuming to generate, more so since electronic discovery increased the volume of materials that must be reviewed. Defense-side lawyers reported that after all the work and expense, the logs are rarely important in many cases. Plaintiff-side lawyers reported that many logs are designed to hide helpful documents behind privilege claims that, if tested, are shown to be implausible. While Rule 26(g) already addresses this abuse of privilege logs, it may be that Rule 26(g) is too obscure in its location or insufficiently forceful in its expression and should be improved. Or it may be that Rule 26(g) is an example of an existing rule that judges and lawyers can be shown ways to use more

effectively. Others suggested that the Civil Rules should explicitly permit more flexible approaches to presenting privilege logs and to testing their validity, combined with judicial and legal education about useful approaches. An example of such an approach would be to have a judge supervise sampling techniques that select log documents for a determination of whether the privilege claims are valid. Federal Rule of Evidence Rule 502, enacted in 2008, provides helpful support for further work in this area.

In 2000, the basic scope of discovery defined in Rule 26(b)(1) was amended to require a court order finding good cause for discovery going beyond the parties' claims or defenses to include the subject matter involved in the action. The extent of the actual change effected by this amendment continues to be debated. But there was no demand at the Conference for a change to the rule language; there is no clear case for present reform. There is continuing concern that the proportionality provisions of Rule 26(b)(2), added in 1983, have not accomplished what was intended. Again, however, there was no suggestion that this rule language should be changed. Rather, the discussion focused on proposals to make the proportionality limit more effective and at the same time to address the need to control both over-demanding discovery requests and under-inclusive discovery responses.

There was significant support across plaintiff and defense lines for more precise guidance in the rules on the obligation to preserve information relevant to litigation and the consequences of failing to do so. Large data producers, whether public or private, for profit or otherwise, made clear a sense of bewilderment about the scope of their obligations to preserve information for litigation and the importance of clear rules that will give assurance that compliance will avert severe sanctions for what in an electronic world are inevitable losses of information. The uncertainty leads to inefficient, wasteful, expensive, and time-consuming information management and discovery, which in turn adds to costs and delays in litigation. Clear guidance should be provided if it can be.

A Conference panel produced a proposal for "Elements of a Preservation Rule" that achieved a consensus on the panel. The proposal exemplifies many of the complexities that led the Advisory and Standing Rules Committees in developing the 2006 electronic discovery rules to at least defer enacting a rule to address them. One question is whether a rule can helpfully define the event that triggers a duty to preserve. Many cases find a duty to preserve before a lawsuit is filed, triggered by events that give "reasonable notice" that litigation is likely. It is unclear that a rule drafted in such general terms would provide the guidance asked for. Careful consideration must be given to whether it is proper to frame a rule addressing preservation before any federal action is filed. Careful consideration must also be given to whether a rule can specify the topics on which information must be preserved in terms more helpful than the open-ended scope of discovery allowed by Rule 26(b)(1), or can helpfully specify the categories of persons or data sources subject to preservation duties. While all acknowledge the challenge, preservation obligations are so important that the Advisory Committee is committed to exploring the possibilities for rulemaking. The Discovery Subcommittee is already at work on these issues.

Spoliation sanctions are directly related to preservation obligations, but the sanctions questions raised at the Conference are more easily defined. Sanctions cover a wide range, from those that directly terminate a case to those that simply award the costs of providing proof by alternative means. An instruction that adverse inferences may be drawn from the destruction of evidence is somewhere in the middle as a matter of formal description, but many lawyers view it as close to the "case-terminating" pole. The circuits divide on the degrees of culpability required for various sanctions. Some allow the most severe sanctions only on finding deliberate intent to suppress evidence. Others allow an adverse inference instruction on finding simple negligence. Conference participants asked for a rule establishing uniform standards of culpability for different sanctions. These issues are also important and will be explored. Depending on the direction taken, it may prove

desirable to enlist the Evidence Rules Advisory Committee in the effort. The Discovery Subcommittee is already at work on possible solutions to the lack of uniformity in sanctions decisions.

The initial disclosure obligations imposed by Rule 26(a)(1) were also the subject of Conference attention. The 1993 version of the initial disclosure rule required identification of witnesses and documents with favorable and unfavorable information relevant to disputed facts alleged with particularity in the pleadings. It also expressly allowed districts to opt out of the initial disclosure requirement by local rule. Many courts opted out. The rule was amended in 2000 to require national uniformity, but reduced the information that had to be disclosed to what was helpful to the disclosing party. A number of Conference participants argued that the result is a rule that is unnecessary for many cases, in which the parties already know much of the information and expect to do little or no discovery, and inappropriate or unhelpful for more heavily discovered cases, in which discovery will of necessity ask for identification of all witnesses and all documents. Some responded that a more robust disclosure obligation is the proper approach, pointing to the experience in the Arizona state courts. Others argued for entirely or largely abandoning the initial disclosure requirement.

Another category of discovery rule proposals continued the strategy of setting presumptive limits on the number of discovery events. This strategy has proven successful in limiting the length of depositions and the number of interrogatories. Many suggested limiting the number of document requests and the number of requests for admission. Other suggestions were to limit the use of requests for admission to authenticating documents, and to prohibit or defer contention interrogatories. Some of these suggestions build on state-court experience and should be studied carefully.

Other discovery proposals are more ambitious. One, building on the model of the Private Securities Litigation Reform Act, would require that discovery be suspended when a motion to dismiss is filed. Another, more sweeping still, would impose the costs of responding to discovery on the requesting party. More limited versions of a requester-pays rule would result in cost sharing at least when discovery demands prove overbroad and disproportionate or the requesting party loses on the merits. Such proposals are a greater departure from the existing system and would require careful study of their likely impact beyond the discovery process itself. An assessment of the need for such departures depends in part on whether the types of rule changes sketched above, together with other changes to provide more effective enforcement of the rules, will produce the desired improvements, or whether a more thorough shift is required.

C. Case Management

The empirical findings that the current rules work well in most cases bear on the question of whether "simplified rules" should be adopted to facilitate disposition of the many actions that involve relatively small amounts of money. A draft set of "simplified rules" designed to produce a shorter time to trial, with less discovery and fewer motions, for simpler cases with smaller stakes, was prepared several years ago. It was put aside for lack of support. One reason was the response—supported by the experience in federal courts that adopted "case-tracking" by local rule, and in some state courts using "case-tracking"—that few lawyers would opt for a simplified track and that many would seek to opt out if initially assigned to it. Another reason was that the existing case-management rules, including Rule 16, allow a court to tailor the extent of discovery and motions to the stakes and needs of each case. There was widespread support at the Conference for reinvigorating the case-management tools that already exist in the rules. The question is whether there should be changes in those rules or whether what is needed are changes in how judges and lawyers are educated and trained to invoke, implement, and enforce those rules.

Pleas for universalized and invigorated case management achieved strong consensus at the Conference. Many participants agreed that each case should be managed by a single judge. Others championed the use of magistrate judges to handle pretrial work. There was consensus that the first Rule 16 conference should be a serious exchange, requiring careful planning by the lawyers and often attended by the parties. Firm deadlines should be set, at least for all events other than trial; there was some disagreement over the plausibility of setting firm trial dates at the beginning of an action. Conference participants underscored that judicial case-management must be ongoing. A judge who is available for prompt resolution of pretrial disputes saves the parties time and money. Discovery management is often critical to achieving the proportionality limits of Rule 26. A judge who offers prompt assistance in resolving disputes without exchanges of motions and responses is much better able to keep a case on track, keep the discovery demands within the proportionality limits, and avoid overly narrow responses to proper discovery demands.

Several suggestions were made for rule changes that would make ongoing and detailed judicial case-management more often sought and more consistently provided. One suggestion was to require judges to hold in-person Rule 16 conferences in cases involving represented parties, to enable a meaningful and detailed discussion about tailoring discovery and motions to the specific cases. Other suggestions sought to reduce the delays encountered in judicial rulings on discovery disputes, which add to costs and overall delays, by making it easier and more efficient for judges to understand the substance of the dispute and to resolve it. One example would be having a rule-based system for a prompt hearing on a dispute—a premotion conference—before a district or magistrate judge, before the parties begin exchanging rounds of discovery motions and briefs, to try to avoid the need for such motions or at least narrow the issues they address.

Other Conference suggestions expressed wide frustration in overall delays by judges in ruling on motions. This problem extends to the amount and distribution of judicial resources, which are well beyond the scope of rule amendments. But some of these problems may be susceptible to improvement by changes in judicial and lawyer training.

IV. The Need for Strategies in Addition to Rule Amendments

A. Judicial and Legal Education

The many possibilities for improving the administration of the present rules can be summarized in shorthand terms: cooperation; proportionality; and sustained, active, hands-on judicial case management. Many of the strategies for pursuing these possibilities lie outside the rulemaking process. The Rules Committees do not train judges or lawyers, write manuals, draft practice pointers, or develop "best practices" guides. But the Rules Committees are eager to work with those responsible for such efforts and to ensure that the rules, the training, and the supporting materials all reinforce each other.

The FJC was deeply involved in the Conference and has already begun planning for judicial education to implement some of the lessons learned about the additional work judges must do to work towards cooperation, proportionality, and effective case management. The FJC is exploring changes in how both newly appointed and experienced judges are trained in effective methods for managing electronic discovery and in how recent changes in the practice can best be met by corresponding changes in case management.

These efforts will be supported by the development of effective and readily available materials for lawyers, litigants, and judges to use in a variety of cases. Such materials can include pattern interrogatories and production requests for specific categories of litigation. Such pattern discovery requests would be presumptively unobjectionable and could save both sides time and

money, and spare the court some of the skirmishing that now occurs. Promising work developing pattern interrogatory requests for employment discrimination actions is already underway as a result of the Conference. This work involves both plaintiff and defense lawyers cooperating to ensure that the form discovery requests reflect the views of both sides. Other categories of litigation would benefit from similar efforts. Similarly, standard protective orders that have been tested in practice could be a more time- and cost-effective alternative to each firm or lawyer inventing different forms of orders that in turn can generate litigation.

Bar organizations and legal research groups have also expressed a willingness to work on educating and training lawyers and clients in methods to promote cooperation consistent with vigorous advocacy and changes in litigation practice and behavior necessary to achieve proportionality in discovery. The existing rules provide many opportunities and incentives to cooperate, including the Rule 26(f) party conference, the Rule 16 scheduling orders and pretrial conferences, and the "meet and confer" obligations for many motions. While many lawyers honor and seize these opportunities, others do not, whether because of mistaken notions of the duties of "zealous advocacy," clients who dictate "scorched earth" practices, self-serving desires to expand their own work, or lack of training and experience. Professional bar organizations have tried to address these problems by adopting standards of cooperation. It will be important to encourage widespread recognition and implementation of these standards. In addition, groups such as the Sedona Conference, which was an early leader in identifying the need to adapt basic litigation strategies to manage electronic information, and the IAALS, are committed to continuing to develop and improve standards that are specifically responsive to continuing changes in technology and business that profoundly affect litigation.

The education and training must include not only lawyers, but also clients. In this respect, one area many have noted as important is the lack of preparation by even large and sophisticated data producers for electronic discovery, which has in turn contributed to the problems lawyers and judges have encountered. Bar and other organizations specifically representing clients will have an important role in such efforts.

B. Pilot Projects and Other Empirical Research

One form of empirical research will be pilot projects to test new ideas. An example of a promising project is the Seventh Circuit Electronic Discovery Pilot Program, which has convened large numbers of lawyers and judges to educate the bench and the bar on the problems of discovering electronically stored information and to devise improved practices. That pilot program developed and tested Principles Relating to the Discovery of Electronically Stored Information.[3] The FJC will study this pilot program and the accompanying principles to identify successful strategies that can be adopted elsewhere, to develop useful materials for judges and lawyers, and to improve judicial and legal education on managing electronic discovery.

The state courts are an important source of information about experience with different rules and approaches. The Conference included detailed research on practices in Arizona and Oregon.

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[3] The committee overseeing the pilot program has released a report on phase one of the program, which explains the process and reasoning behind the development of the principles and provides preliminary results of information gathered on the application of the principles in cases during phase one of the pilot program. *See* SEVENTH CIRCUIT ELECTRONIC DISCOVERY PILOT PROGRAM COMMITTEE, SEVENTH CIRCUIT ELECTRONIC DISCOVERY PILOT PROGRAM REPORT ON PHASE ONE (2010), *available at* http://civilconference.uscourts.gov (follow "Library" hyperlink; then follow "Seventh Circuit Electronic Discovery Pilot Program" hyperlink on page 4) (last visited September 1, 2010).

For example, Arizona goes far beyond federal practice by requiring highly detailed initial disclosures. Oregon continues to have fact pleading. Continued study of state practice will be important.

V. Specific Implementation Steps

The 2010 Conference has provided more than could have been expected or even hoped for. The immediate task for the Rules Committees is to prioritize the many issues identified in the Conference for further study. The Conference highlighted two particular areas that merit the Rules Committees' prompt attention: (1) discovery in complex or highly contested cases, including preservation and spoliation of electronically stored information; and (2) review of pleading standards in light of the recent Supreme Court cases. The Advisory Committee has initiated work in these areas. The Discovery Subcommittee chaired by Judge David Campbell has begun considering rules to provide better guidance on preservation and spoliation of evidence, particularly with respect to electronically stored information. The Chair and Reporter of the Advisory Committee have begun exploring rule responses that might be developed as current pleading issues become better focused. On a broader basis, a new subcommittee chaired by Judge John Koeltl has begun to study the many different kinds of projects needed to capitalize on the insights gained from the Conference.

Some aspects of the work, such as judicial education, the development of supporting materials, and the development and implementation of pilot projects will be coordinated with the FJC. The FJC has also already begun working to implement some of the insights and lessons the Conference provided. Education programs, best practices guides, and different kinds of supporting materials for the bench and the bar will help achieve better use of present court rules. Research, empirical data, and pilot projects, such as the Seventh Circuit Electronic Discovery Pilot Program, will continue to provide the foundation for sound rule amendments and for changes in judicial education.

Bar and legal research organizations are already at work on developing their own training and supporting materials for lawyers and litigants to promote some of the lessons learned. As one example, NELA and the American College, with the IAALS, are working to develop pattern discovery requests for employment cases.

All of this will require continuing hard work by the Rules Committees to carry forward the momentum provided by the broad-based and carefully considered observations and proposals. The agenda for the Advisory Committee is demanding. But the goals are as old as the Federal Rules of Civil Procedure. They are the goals of Rule 1: to secure the just, speedy, and inexpensive determination of every civil action and proceeding in the federal courts.

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

Monday, May 10, 2010

7:30-8:30 Continental Breakfast

8:30-8:45 **Welcome and Introduction:** Judges Lee Rosenthal, Mark Kravitz , and John Koeltl

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 Barbara Rothstein

A. The FJC Data: Judge Barbara Rothstein, Dr. Emery Lee, and Tom Willging

B. The Litigation Section Data: Lorna Schofield, Dr. Emery Lee, and Tom Willging

C. The NELA Data: Rebecca Hamburg

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

10:15-10:30 BREAK

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

Moderator: Justice Rebecca Kourlis

E. Vanishing Jury Trial Data: Prof. Marc Galanter

F. The ACTL/IAALS Data: Justice Rebecca Kourlis, Paul Saunders

G. LJC Cost Data: Alexander Dimitrief

H. RAND Data: Nicholas Pace

I. Commentary on the Presented Research: Prof. Marc Galanter, Prof. Theodore Eisenberg, Jordan Singer

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

Participants: Judge Jon Newman, Prof. Adam Pritchard, Prof. Geoffrey Hazard, Daniel Girard, Sheila Birnbaum, Jocelyn Larkin

1:00-2:00 LUNCH

2:00-2:30 Speaker: Former Deputy Attorney General David 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

Participants: Judge David Campbell, Magistrate Judge J. Paul Grimm, Jason Baron, Patrick Stueve, Stephen Susman, Prof. Catherine Struve

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

Participants: Judge Michael Baylson, Magistrate Judge J. David Waxse, Jeffery Greenbaum, Prof. Judith Resnik, William Butterfield, Paul Bland

Tuesday, May 11, 2010

7:30-8:30 Continental Breakfast

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: Gregory Joseph

Participants: Judge Shira Scheindlin, Magistrate Judge J. James Bredar, John Barkett, Thomas Allman, Joseph Garrison, Daniel Willoughby, Jr.

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

Participants: Judge Paul Friedman, Prof. Richard Nagareda, Prof. Robert Bone, James Batson, Loren Kieve

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 John Koeltl

Participants: Alan Morrison, Amy Schulman, Thomas Gottschalk, Ariana Tadler, Anthony West, Joseph Sellers

11:45-1:00 **Perspectives from the States: Different Solutions for Common Problems and their Relative Effectiveness; IAALS Pilot Results**

Moderator: Justice Andrew Hurwitz

Participants: Justice Kourlis, Paula Hannaford-Agor, Prof. Seymour Moskowitz, William, Judge Henry Kantor

1:00-1:30 LUNCH

1:30-2:00 Speaker: Chief Judge James Holderman

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

Moderator: Lorna Schofield

Participants: Lorna Schofield, David Beck, Wendy Schwartz, Bruce Parker, John Vail

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

Moderator: Dean David Levi

Participants: Judge Anthony Scirica, Judge Patrick Higginbotham, Prof. Paul Carrington, Prof. Daniel Coquillette, Prof. Arthur Miller

4:30-5:00 **Summary and Conclusions:** Judge Lee Rosenthal, Judge Mark Kravitz, Prof. Edward Cooper, Prof. Rick Marcus

Conference Panelists, By Panel
2010 Litigation Review Conference
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Welcome and Introduction:

- Judge Lee Rosenthal (United States District Court Judge from S.D. Tex.; Current Chair of the Committee on Rules of Practice and Procedure; Former Chair of the Advisory Committee on Civil Rules)
- Judge Mark Kravitz (United States District Court Judge from D. Conn.; Current Chair of the Advisory Committee on Civil Rules)
- Judge John Koeltl (United States District Court Judge from S.D.N.Y. ; Current member of the Advisory Committee on Civil Rules)

Empirical Research Panel #1:

- Judge Barbara Jacobs Rothstein (Director of the Federal Judicial Center; United States District Court Judge from W.D. Wash.)
- Dr. Emery Lee III (Senior researcher in the Federal Judicial Center)
- Tom Willging (Senior researcher in the Federal Judicial Center)
- Lorna Schofield (Partner at Debevoise & Plimpton; Current Chair of the ABA Litigation Section)
- Rebecca Hamburg (Program Director of the National Employment Lawyers Association)

Empirical Research Panel #2:

- Justice Rebecca Kourlis (Executive Director of the Institute for the Advancement of the American Legal System; Former Justice on the Colorado Supreme Court)
- Professor Marc Galanter (Professor of Law at University of Wisconsin-Madison and the London School of Economics and Political Science)
- Paul Saunders (Partner at Cravath, Swain & Moore LLP)
- Alexander Dimitrief (Vice President and Senior Counsel for Litigation and Legal Policy at General Electric)
- Nicholas Pace (Staff member of RAND Institute for Civil Justice)
- Professor Theodore Eisenberg (Professor of Law at Cornell Law School)
- Jordan Singer (Director of Research at the Institute for the Advancement of the American Legal System)

Pleadings and Dispositive Motions Panel:

- Professor Arthur Miller (Professor of Law at the New York University School of Law; Former Reporter to the Advisory Committee on Civil Rules)
- Judge Jon Newman (United States Court of Appeals Judge for the Second Circuit)
- Professor Adam Pritchard (Professor of Law at University of Michigan Law School)
- Professor Geoffrey Hazard (Professor of Law at Hastings College of Law)
- Daniel Girard (Managing partner of Girard Gibbs LLP; Current member of the Advisory Committee on Civil Rules)
- Sheila Birnbaum (Co-head of Skadden Arps Complex Tort and Insurance Group; Former member of the Advisory Committee on Civil Rules)
- Jocelyn Larkin (Deputy Executive Director of the Impact Fund)

Current State of Discovery Panel:

- Elizabeth Cabraser (Founding partner at Lieff, Cabraser, Heimann & Bernstein, LLP)
- Judge David Campbell (United States District Court Judge from D. Ariz.; Current member of the Advisory Committee on Civil Rules)
- Magistrate Judge J. Paul Grimm (United States Magistrate Judge from D. Md.; Current member of the Advisory Committee on Civil Rules)
- Jason Baron (Director of Litigation for the National Archives and Records Administration)
- Patrick Stueve (Founding partner of Stueve Siegel Hanson LLP)
- Stephen Susman (Founding partner of Susman Godfrey)
- Professor Catherine Struve (Professor of Law at University of Pennsylvania School of Law)

Judicial Management Panel:

- Judge Patrick Higginbotham (United States Court of Appeals Judge for the Fifth Circuit; Former Chair of the Advisory Committee on Civil Rules)
- Judge Michael Baylson (United States District Court Judge for E.D. Pa.; Current member of the Advisory Committee on Civil Rules)
- Magistrate Judge J. David Waxse (United States Magistrate Judge for D. Kan.)
- Jeffery Greenbaum (Partner at Sills Cummis & Gross P.C.)
- Professor Judith Resnik (Professor of Law at Yale Law School)
- William Butterfield (Partner at Hausfeld LLP)
- Paul Bland (Staff attorney at Public Justice)

E-Discovery Panel:

- Gregory Joseph (Principal of Greg P. Joseph Law Offices, LLC; President Elect of the American College of Trial Lawyers; Former member of the Advisory Committee on Evidence Rules)
- Judge Shira Scheindlin (United States District Court Judge from S.D.N.Y.; Former member of the Advisory Committee on Civil Rules)
- Magistrate Judge J. James Bredar (United States Magistrate Judge from D. Md.)
- John Barkett (Partner at Shook, Hardy & Bacon L.L.P.)
- Thomas Allman (Former General Counsel of BASF Corporation)
- Joseph Garrison (Founding partner of Garrison, Levin-Epstein, Chimes, Richardson & Fitzgerald, P.C.)
- Daniel Willoughby, Jr. (Partner at King & Spalding)

Settlement Panel:

- Judge Brock Hornby (United States District Court Judge from D. Me.)
- Judge Paul Friedman (United States District Court Judge from D.D.C.; Former member of the Advisory Committee on Criminal Rules)
- Professor Richard Nagareda (Professor of Law at Vanderbilt University School of Law)
- Professor Robert Bone (Professor of Law at the University of Texas School of Law)
- James Batson (Partner at Liddle & Robinson, L.L.P.)
- Loren Kieve (Founding partner of Kieve Law Offices)

Users of the System Panel:

- Alan Morrison (Dean for Public Interest & Public Service at the George Washington University Law School)
- Amy Schulman (Senior Vice President and General Counsel of Pfizer Corporation)
- Thomas Gottschalk (Of counsel to Kirkland & Ellis; Former General Counsel at General Motors Company)
- Ariana Tadler (Partner at Milberg LLP)
- Anthony West (Assistant Attorney General, Civil Division, Department of Justice)
- Joseph Sellers (Partner at Cohen Millstein Sellers & Toll PLLC)

Perspectives from the States Panel:

- Justice Andrew Hurwitz (Justice on the Arizona Supreme Court; Current member of the Advisory Committee on Evidence Rules)
- Justice Rebecca Kourlis (Executive Director of the Institute for the Advancement of the American Legal System; Former Justice on the Colorado Supreme Court)

- Paula Hannaford-Agor (Director of the Center for Jury Studies, National Center for State Courts)
- Professor Seymour Moskowitz (Professor of Law at Valparaiso University School of Law)
- William Maledon (Partner at Osborn Maledon, P.A.; Current member of the Committee on Rules of Practice and Procedure)
- Judge Henry Kantor (Judge of the Circuit Court of the State of Oregon)

Bar Association Proposals Panel:

- Lorna Schofield (Partner at Debevoise & Plimpton; Current Chair of the ABA Litigation Section)
- David Beck (Founding partner of Beck, Redden & Secrest; Former member of the Committee on Rules of Practice and Procedure; Former President of the American College of Trial Lawyers)
- Wendy Schwartz (Partner at Reed Smith, LLP)
- Bruce Parker (Partner at Venable's Products Liability Practice Group)
- John Vail (Representative of American Association of Justice)

Rulemaking Panel:

- Dean David Levi (Dean of Duke University School of Law; Former United States District Judge from E.D. Cal.; Former Chair of the Committee on Rules of Practice and Procedure and the Advisory Committee on Civil Rules)
- Judge Anthony Scirica (United States Court of Appeals Judge for the Third Circuit; Former Chair of the Committee on Rules of Practice)
- Judge Patrick Higginbotham (United States Court of Appeals Judge for the Fifth Circuit; Former Chair of the Advisory Committee on Civil Rules)
- Professor Paul Carrington (Professor of Law at Duke University School of Law; Former Reporter to the Advisory Committee on Civil Rules)
- Professor Daniel Coquillette (Professor of Law at Harvard Law School and Boston College of Law; Reporter to the Committee on Rules of Practice and Procedure)
- Professor Arthur Miller (Professor of Law at the New York University School of Law; Former Reporter to the Advisory Committee on Civil Rules)

Summary and Conclusions:

- Judge Lee Rosenthal (United States District Court Judge from S.D. Tex.; Current Chair of the Committee on Rules of Practice and Procedure; Former Chair of the Advisory Committee on Civil Rules)
- Judge Mark Kravitz (United States District Court Judge from D. Conn.; Current Chair of the Advisory Committee on Civil Rules)

- Professor Edward Cooper (Professor of Law at University of Michigan School of Law; Reporter to the Advisory Committee on Civil Rules)
- Professor Rick Marcus (Professor of Law at Hastings College of Law; Associate Reporter to the Advisory Committee on Civil Rules)

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