

**ADVISORY COMMITTEE
ON CIVIL RULES**

**Ann Arbor, Michigan
March 22-23, 2012**

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TAB 1

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Agenda
March 22-23, 2012
Meeting of the Advisory Committee on Civil Rules

1. Welcome by the Chair
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2. **ACTION ITEM:** Minutes for November meeting
3. Legislative Activity
4. **ACTION ITEM:** Rule 45: Proposed Recommendation To Adopt
5. Discovery Subcommittee Report: Preservation and Spoliation
6. Rules Past and Future Panel
7. Pleading
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9. Duke Subcommittee
 - a. Report and agenda
 - b. Conference Call Notes
 - c. FJC Report: Rule 26(f) practice
10. Inter-Committee Forms Subcommittee
Report
11. Rule 23 Subcommittee Report
12. **ACTION ITEM:** Rule 55(c)
13. Next Meeting: November 1-2, 2012

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Liaison for the Advisory Committee on Criminal Rules	Judge Marilyn L. Huff <i>(Standing)</i>
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TAB 1A

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COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of January 5-6, 2012
Phoenix, Arizona
Draft Minutes

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ATTENDANCE

The mid-year meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Phoenix, Arizona, on Thursday and Friday, January 5 and 6, 2012. The following members were present:

- Judge Mark R. Kravitz, Chair
- Dean C. Colson, Esquire
- Roy T. Englert, Jr., Esquire
- Gregory G. Garre, Esquire
- Judge Neil M. Gorsuch
- Judge Marilyn L. Huff
- Chief Justice Wallace B. Jefferson
- Dean David F. Levi
- Judge Patrick J. Schiltz
- Judge James A. Teilborg
- Judge Richard C. Wesley
- Judge Diane P. Wood

Deputy Attorney General James M. Cole and Larry D. Thompson, Esquire were unable to attend, but Mr. Thompson participated by telephone. The Department of Justice was represented at the meeting by Elizabeth J. Shapiro, Esquire.

Also participating were the committee's former chair, Judge Lee H. Rosenthal, former lawyer members Douglas R. Cox and William J. Maledon, and the committee's style consultant, Professor R. Joseph Kimble.

Judge Rosenthal chaired a discussion on class action issues with the following panelists: Dean Robert H. Klonoff, a member of the Advisory Committee on Civil Rules; Daniel C. Girard, Esquire, a former member of the advisory committee; and John H. Beisner, Esquire.

Providing support to the committee were:

Professor Daniel R. Coquillette	The committee's reporter
Peter G. McCabe	The committee's secretary
Jonathan C. Rose	Rules Committee Officer
Andrea L. Kuperman	Rules law clerk to Judge Kravitz
Joe Cecil	Research Division, Federal Judicial Center
Bernida Evans	Rules Office Management Analyst

Representing the advisory committees were:

- Advisory Committee on Appellate Rules —
 - Judge Jeffrey S. Sutton, Chair
 - Professor Catherine T. Struve, Reporter
- Advisory Committee on Bankruptcy Rules —
 - Judge Eugene R. Wedoff, Chair
 - Professor S. Elizabeth Gibson, Reporter
 - Professor Troy A. McKenzie, Associate Reporter
- Advisory Committee on Civil Rules —
 - Judge David G. Campbell, Chair
 - Professor Edward H. Cooper, Reporter
 - Professor Richard L. Marcus, Associate Reporter
- Advisory Committee on Criminal Rules —
 - Judge Reena Raggi, Chair
 - Professor Sara Sun Beale, Reporter
 - Professor Nancy J. King, Associate Reporter
- Advisory Committee on Evidence Rules —
 - Judge Sidney A. Fitzwater, Chair
 - Professor Daniel J. Capra, Reporter

INTRODUCTORY REMARKS

Committee Membership Changes

Judge Kravitz announced with regret that the terms of Messrs. Cox and Maledon had expired on October 1, 2011, and both were attending their last Standing Committee meeting. He thanked them for their distinguished service on the committee, described their many contributions to the committee's work and the rules program, and presented each with a plaque signed by Chief Justice John Roberts, Jr. and Judge Thomas F. Hogan, Director of the Administrative Office.

Judge Kravitz introduced the new committee members, Judge Wesley and Mr. Garre, and he summarized their impressive legal backgrounds. He reported that Mr. Thompson was also a newly appointed member of the committee, but was unable to attend the meeting.

Meeting with Supreme Court Justices

Judge Rosenthal reported on a recent meeting held at the Supreme Court that she had attended with Judge Kravitz, Dean Levi, Professor Coquillette, and former committee chair Judge Anthony J. Scirica. They had an extensive and candid exchange with the Chief Justice and other justices on the rules program. The discussion, she said, touched upon such matters as the openness of the rules process, the procedures followed by the rules committees, the effective use of empirical research to support proposed rule amendments, and the rules committees' ongoing relationships with Congress, the bar, and the academy. The meeting, she said, had been very beneficial and met all the committee's objectives. She added that it would make sense to pursue similar dialogues with the Court every five years or so.

Judicial Conference Report

Judge Kravitz reported that the Judicial Conference at its September 2011 session had approved all the proposed amendments to the rules and forms presented by the committee.

Rules Taking Effect on December 1, 2011

Judge Kravitz referred to the amendments to the appellate, criminal, and evidence rules and the bankruptcy rules and forms that took effect by operation of law on December 1, 2011.

Pending Rule Amendments

Judge Kravitz reported that proposed amendments to the appellate, bankruptcy, civil, criminal, and evidence rules had been published for comment in August 2011. Although public hearings had been scheduled, few requests had been submitted by bench and bar to date to testify on the proposals.

Lawsuit Abuse Reduction Act

Ms. Kuperman reported that the proposed Lawsuit Abuse Reduction Act of 2011 (H.R. 966) would restore the mandatory-sanctions provision of FED. R. CIV. P. 11 (sanctions). Adopted in 1983, she said, the provision simply did not work and was later repealed in 1993. In addition, she said, the proposed legislation would eliminate the beneficial safe-harbor provision of Rule 11(c)(2), added in 1993. It gives a party 21 days to withdraw challenged assertions on a voluntary basis.

She pointed out that Judges Rosenthal and Kravitz had written to the chair of the House Judiciary Committee to oppose the bill. Their letter emphasized that the Federal Judicial Center's empirical research had demonstrated that the 1983 version of Rule 11 had produced wasteful satellite litigation and increased the time and costs of civil litigation. She added that the American Bar Association and other organizations had also sent letters to Congress opposing the legislation.

She noted that the House Judiciary Committee had held a hearing on H.R. 966 in March 2011 and then reported out the bill. But there was no further action in the House, although a companion bill (S. 533) was introduced in the Senate.

Sunshine in Litigation Act

Ms. Kuperman reported that Judges Rosenthal and Kravitz had written to the chair of the Senate Judiciary Committee to oppose the proposed Sunshine in Litigation Act of 2011 (S. 623). The bill would prevent a court from issuing a discovery protective order unless it first makes particularized findings of fact that the order would not restrict the disclosure of information relevant to protecting public health or safety. She noted that the bill, similar to others introduced in past Congresses, had been favorably reported out of committee in May 2011, but there had been no further action on it.

Pleading Standards

Ms. Kuperman reported that no legislation was currently pending in Congress to address civil pleading standards in light of the Supreme Court's decisions in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

Consent Decrees

Ms. Kuperman noted that legislation (H.R. 3041) had been introduced to limit the duration of consent decrees issued by federal courts that impose injunctive or other prospective relief against state or local programs or officials. The bill, she said, was being monitored closely by the Judicial Conference's Federal-State Jurisdiction Committee. It would not amend the federal rules directly, but could impact the rules in procedural ways. The legislation, she said, had been referred to Congressional committee, but no further action had taken place on it.

Costs and Burdens of Civil Discovery

Ms. Kuperman reported that the House Judiciary Committee Subcommittee on the Constitution had held a hearing in December 2011 on "the costs and burdens of civil discovery." She noted that Judges Kravitz and Campbell had sent a letter to the subcommittee chair providing an update on the advisory committee's various efforts to reduce discovery costs, burdens, and delays. The letter, she said, urged Congress to allow the Advisory Committee on Civil Rules to continue pursuing these issues under the thorough and deliberate process that Congress created in the Rules Enabling Act. She added that Congressional staff had been invited to, and had attended, the advisory committee's recent meeting in Washington. The committee, she added, will continue to keep members and staff of Congress informed of pertinent developments.

Time to File a Notice of Appeal When a Federal Officer or Employee is a Party

Ms. Kuperman reported that the Congress had enacted legislation amending 28 U.S.C. § 2107 to conform it to the December 2011 change in FED. R. APP. P. 4(a)(1) (time to file a notice of appeal in a civil case). The statute mirrors the amended rule and clarifies the time for parties to appeal in a civil case when a federal officer or employee is sued in an individual capacity for an act or omission occurring in connection with duties performed on behalf of the United States.

Bankruptcy Legislation

Ms. Kuperman reported that legislation (Pub. L. No. 112-64) had been enacted in December 2011 to extend for another four years the exemption given to qualified reservists and members of the National Guard from application of the means-test presumption of abuse in Chapter 7 bankruptcy cases. She noted that a footnote in an interim bankruptcy rule would have to be updated to incorporate the number of the new public law. In addition, she said, legislation was pending to add some bankruptcy judgeships and increase the filing fee for chapter 11 cases. If enacted, it would require conforming changes to the bankruptcy forms to reflect the higher fee.

REPORT OF THE ADMINISTRATIVE OFFICE

Mr. Rose reported that Judge Thomas F. Hogan had assumed his duties as the new Director of the Administrative Office.

REPORT OF THE FEDERAL JUDICIAL CENTER

Mr. Cecil reported that Judge Jeremy D. Fogel, the new Director of the Federal Judicial Center, had decided to undertake a comprehensive study of case-dispositive motions in civil cases. To that end, he said, the Center was seeking assistance from several law professors to participate in the study and provide law students to help in the research. The Center, he added, was conducting pilot efforts for the project and would present proposals for consideration by the Advisory Committee on Civil Rules at its March 2012 meeting. He suggested that the project would likely be ready to proceed at the start of the next academic year.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee without objection by voice vote approved the minutes of the last meeting, held on June 2-3, 2011.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Sutton and Professor Struve presented the report of the advisory committee, as set forth in Judge Sutton's memorandum and attachments of December 7, 2011 (Agenda Item 10). Judge Sutton reported that the advisory committee had no action items to present.

Informational Items

Judge Sutton thanked the members, reporters, and committee staff for working with congressional staff on the amendment of 28 U.S.C. § 2107 to make it consistent with FED. R. APP. P. 4(a)(1) (time to file a notice of appeal in a civil case). Even though it involved a relatively minor, technical change, he said, it had taken enormous effort and skill to accomplish the legislative action.

He reported that only one comment had been received to date on the advisory committee's proposed amendment to FED. R. APP. P. 28 (briefs) that would remove the requirement that a brief set forth separate statements of the case and of the facts. The comment, from a prominent appellate judge, opposed combining the two statements.

But, he said, the advisory committee believed that the current requirement of separate statements had generated confusion and redundancy. Combining them would provide lawyers with greater flexibility in making their presentations.

Judge Sutton reported that the advisory committee had not reached a consensus on whether to treat federally recognized Indian tribes the same as states for the purpose of filing amicus briefs under FED. R. APP. P. 29(a) (amicus briefs). The committee, though, did reach a consensus that municipalities should be included with Indian tribes if a Rule 29 amendment were pursued. Judge Sutton added that he had sent a letter to the chief judges of all the courts of appeals soliciting their views on the matter.

Judge Sutton reported that Professor Richard D. Freer of Emory Law School, a guest speaker at the advisory committee's recent meeting had complained about the frequency of federal rule changes. Professor Freer argued that frequent changes increase costs, add confusion for lawyers, complicate electronic searches, and may lead to unintended consequences. He suggested that if rule changes were made less often – such as once every several years – the bar would pay more attention to the rules and submit more and better comments. Judge Sutton noted that the advisory committee was taking the criticism to heart and generally supports deferring and bundling amendments where feasible.

A member endorsed the suggestion generally and added that lawyers often complain about the committees "tinkering" with the rules. Other participants pointed out that the advisory committees do in fact bundle rule amendments where possible. Nevertheless, many rule changes are required by legislation, case law developments, and other factors beyond the committees' control.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Wedoff and Professor Gibson presented the report of the advisory committee, as set forth in Judge Wedoff's memorandum and attachments of December 12, 2011 (Agenda Item 8).

Amendments for Publication

FED. R. BANKR. P. 7054(b) and 7008(b)

Judge Wedoff reported that the proposed amendments to FED. R. BANKR. P. 7054 (judgments and costs) and FED. R. BANKR. P. 7008(b) (attorney's fees) would clarify the procedure for seeking the award of attorney's fees in adversary proceedings. Bankruptcy procedures, he explained, are different from those in civil actions in the district courts.

Civil practice is governed by FED. R. CIV. P. 54(d)(2) (attorney's fees), which specifies that a claim for attorney fees be made by motion unless the substantive law requires proving the fees at trial as an element of damages. The bankruptcy rules, though, have no analog to FED. R. CIV. P. 54(d)(2). Instead, attorney's fees are governed by FED. R. BANKR. P. 7008(b), which specifies that a request for the award of attorney's fees be pleaded as a claim in a complaint or other pleading.

The difference between the civil and bankruptcy rules, he said, creates a trap for the unwary, especially for lawyers who practice regularly in the district courts. Moreover, the difference between bankruptcy practice and civil practice has led bankruptcy courts to adopt different, non-uniform approaches to handling fee applications. The largest bankruptcy court in the country, for example, has adopted the civil practice by local rule.

In a recent decision, the Ninth Circuit bankruptcy appellate panel pointed to a gap in the current bankruptcy rules. It noted that when a party follows FED. R. BANKR. P. 7008(b) and pleads its demand for attorney's fees in the complaint, the bankruptcy rules specify no procedure for awarding them. The panel's opinion expressly invited the advisory committee to close the gap by amending FED. R. BANKR. P. 7054. That rule currently incorporates FED. R. CIV. P. 54(a)-(c) and has its own provision governing recovery of costs by a prevailing party. But it has no provision like FED. R. CIV. P. 54(d)(2) governing recovery of attorney's fees.

Judge Wedoff explained that the advisory committee agreed with the bankruptcy appellate panel and decided to conform the bankruptcy rules to the civil rules – thus requiring that a claim for the award of attorney's fees in an adversary proceeding be made by motion. To do so, the proposed amendments incorporate much of FED. R. CIV. P. 54(d)(2) into a new FED. R. BANKR. P. 7054(b)(2) prescribing the procedure for seeking attorney fees. Current FED. R. BANKR. P. 7008(b), requiring that the demand be pleaded in a complaint or other pleading, would be deleted. Judge Wedoff added that FED. R. CIV. P. 54(d)(2)(D), dealing with referral of matters to a master or magistrate judge, would not be incorporated because it is not relevant to the bankruptcy courts.

Judge Wedoff reported that the advisory committee would also correct a long-standing grammatical error in the first sentence of FED. R. BANKR. P. 7054(b) by changing the verb “provides” to “provide.”

The committee without objection by voice vote approved publication of the proposed amendments to FED. R. BANKR. P. 7054(b) and the proposed deletion of FED. R. BANKR. P. 7008(b).

Information Items

PART VIII – THE BANKRUPTCY APPELLATE RULES

Judge Wedoff reported that the advisory committee had been engaged for several years in a major project to revise the Part VIII rules. The principal objectives of the project, he said, are: (1) to align Part VIII more closely with the Federal Rules of Appellate Procedure; and (2) to adjust the rules to the reality that bankruptcy court records today are filed, stored, and transmitted electronically, rather than in paper form.

He explained that the advisory committee had made substantial progress and would return to the Standing Committee in June 2012 seeking permission to publish the revised Part VIII rules for public comment. At this point, the advisory committee just wanted to give the Standing Committee a preliminary look at the first half of the rules, explain the principal changes from the current rules, and address any concerns that members might have. He invited the members to bring any suggestions to the advisory committee's attention.

Professor Gibson noted that Part VIII deals primarily with appeals from a bankruptcy court to a district court or bankruptcy appellate panel. If a case proceeds from there to the court of appeals, the Federal Rules of Appellate Procedure take over. In addition, in 2005 Congress authorized direct appeals from a bankruptcy court to a court of appeals in limited circumstances. Accordingly, the new Part VIII rules also contain provisions dealing with permissive direct appeals.

She noted that Part VIII had largely been neglected since 1983, even though the Federal Rules of Appellate Procedure have since been amended on several occasions and completely restyled in 1998. She pointed out that Part VIII was difficult to follow and needs to be reorganized and rewritten for greater ease of use. In addition, it needs to be updated and made more consistent with the current Federal Rules of Appellate Procedure. She emphasized that the proposed revisions were comprehensive in nature. Some rules would be combined, some deleted, and some moved to new locations.

Professor Gibson explained that the advisory committee had conducted two mini-conferences on the proposed rules with members of the bench and bar. The participants, she said, expressed substantial support for the proposed revisions, but several recommended that additional changes be made to take account of the widespread use of technology in the federal courts. They urged the committee to revise the rules to recognize explicitly that court records in bankruptcy cases now are filed and maintained in electronic form.

Judge Wedoff and Professor Gibson noted that the proposed new Part VIII rules largely adopt the style conventions of the other, restyled federal rules. For example, they

consistently use the word “must” to denote an affirmative obligation to act, even though the other parts of the bankruptcy rules still use the word “shall.” He pointed out that the Part VIII rules are largely distinct from the rest of the bankruptcy rules. As a result, there should be no problem with using the modern terminology only in Part VIII and not in other bankruptcy rules.

Professor Gibson noted that the advisory committee had revised and reorganized Part VIII so thoroughly that it would not be meaningful to produce a redlined or side-by-side version comparing the old and new rules. Rather, she said, the committee was using the committee notes to specify where particular provisions in the new rules are located in the current rules.

A participant suggested that it would be helpful to produce a chart showing readers where each provision in the current rules has been relocated. Professor Gibson agreed, but explained that some provisions had been broken up and relocated in several different places. Judge Wedoff agreed to work on producing a chart, but added that it might be of limited value because readers will need to examine the new rules as a whole.

FED. R. BANKR. P. 8001

Professor Gibson noted that proposed FED. R. BANKR. P. 8001 (scope and definitions) was new and had no counterpart in the existing rules. Similar to FED. R. APP. P. 1, it sets forth the scope of the Part VIII rules and contains three definitions: (1) “BAP” to mean a bankruptcy appellate panel; (2) “appellate court” to mean either the district court or the BAP to which an appeal is taken; and (3) “transmit” to mean sending documents electronically (unless a document is sent by or to a pro se litigant, or a local court rule requires a different means of delivering the document).

She explained that the advisory committee had deliberately selected the term “transmit” to highlight a specific process with a strong presumption in favor of electronic transfer of a document or record. A member suggested, though, that the proposed definition of “transmit” was not sufficiently forceful and suggested including a stronger affirmative statement that electronic transmission is to be the norm. Judge Wedoff agreed and added that electronic transmission was already universal in the bankruptcy courts except for pro se litigants. Another member cautioned that it is problematic to use a word like “transmit,” which has a much broader common meaning, and ascribe to it an intentionally narrower meaning. Perhaps a unique new term could be devised, such as “e-transmit.”

Some members questioned the proposed definition of “appellate court” because it contradicted the ordinary meaning of the term, which normally refers to the courts of appeals. Judge Wedoff and Professor Gibson agreed to have the advisory committee reconsider the definition.

FED. R. BANKR. P. 8002

Professor Gibson reported that proposed FED. R. BANKR. P. 8002 (time to file a notice of appeal) must remain in its current place because 28 U.S.C. § 158(c)(2) refers to it by number. She said that the committee had essentially restyled the existing rule and added a provision to cover inmates confined in institutions.

FED. R. BANKR. P. 8003 and 8004

Professor Gibson explained that proposed Rules 8003 (appeal as of right) and 8004 (appeal by leave) would set forth in two separate rules the provisions governing appeals as of right and appeals by leave. The two are combined in the current FED. R. BANKR. P. 8001 (manner of taking an appeal). The proposed revisions, she said, will conform Part VIII to the Federal Rules of Appellate Procedure.

She noted that under the current bankruptcy appellate rules, an appeal is not docketed in the appellate court until the record is complete and received from the bankruptcy clerk. Proposed FED. R. BANKR. P. 8003(d)(2), however, conforms to the Federal Rules of Appellate Procedure and requires the clerk of the appellate court to docket the appeal earlier, as soon as a notice of appeal is received. Proposed FED. R. BANKR. P. 8004 would continue the current bankruptcy practice of requiring an appellant to file both a notice of appeal and a motion for leave to appeal.

FED. R. BANKR. P. 8005

Professor Gibson explained that proposed FED. R. BANKR. P. 8005 (election to have an appeal heard by the district court) governs appeals in those circuits that have a BAP. Under 28 U.S.C. § 158(c)(1), an appeal in those circuits is heard by the BAP unless a party to the appeal elects to have it heard by the district court. The proposed rule provides the procedure for exercising that election, and it eliminates the current requirement that the election be made on a separate document. Instead, a new Official Form will be devised for the election. Proposed Rule 8005(c) specifies that a party seeking a determination of the validity of an election must file a motion in the court in which the appeal is then pending.

FED. R. BANKR. P. 8006

Professor Gibson noted that proposed FED. R. BANKR. P. 8006 (certification of a direct appeal to the court of appeals) overlaps substantially with the Federal Rules of Appellate Procedure. Under 28 U.S.C. § 158(d)(2), a case may be certified for direct appeal from a bankruptcy court in three ways. First, the bankruptcy court, the district court, or the BAP may make the certification itself based on one of the direct appeal criteria specified in 28 U.S.C. § 158(d)(2)(A). Second, the certification may be made by all the parties to the appeal. Third, the bankruptcy court, district court, or BAP must make the certification if a majority of the parties on both sides of the appeal ask the court to make it.

Judge Wedoff explained that the proposed rule provides the procedures for implementing each of the three options. Since the bankruptcy court is likely to have the most knowledge about a case, proposed Rule 8006(b) specifies that a case will remain pending in the bankruptcy court, for purposes of certification only, for 30 days after the effective date of the first notice of appeal. The 30-day hold gives the bankruptcy court time to make a certification. Once the certification has been made, the case is in the court of appeals, and the request for permission to take a direct appeal must be filed with the circuit clerk within 30 days. The court of appeals has discretion to take the direct appeal, and the procedure is similar to that under 28 U.S.C. § 1292(b).

Judge Sutton reported that the Advisory Committee on Appellate Rules was working closely with the bankruptcy advisory committee on revising the Part VIII rules, with Professor Struve and Professor Amy Barrett serving as liaisons to the project. He noted that the appellate advisory committee had drafted corresponding changes in FED. R. APP. P. 6 (appeal in a bankruptcy case) by adding a new subdivision 6(c) to address permissive direct appeals from a bankruptcy court.

He reported that appellate advisory committee members had questioned the choice of the verb “transmit” in FED. R. APP. P. 6 and debated several other potential terms. In addition, he said, concern had been voiced over the wisdom of introducing a new term, such as “transmit,” “provide,” or “furnish,” but only in FED. R. APP. P. 6. It would be inconsistent with the terminology used in the other appellate rules. The appellate courts, moreover, are not as far advanced with electronic filing as the bankruptcy courts and may not be ready to receive other types of appeals in the same manner as bankruptcy appeals. But, he added, it may well be acceptable as a practical matter to live with two different verbs in the rules for a while. A member suggested using the term “send,” but Judge Sutton pointed out that in the electronic environment, the clerk of the bankruptcy court may merely provide the appellate court with links to the bankruptcy court record, rather than actually send or transmit the record to the appellate court.

Judge Sutton suggested convening an ad hoc subcommittee, comprised of at least one person from each advisory committee, to consider a uniform way of describing the transmission of records throughout the federal rules. Several participants endorsed the concept and emphasized the desirability of using the same language across all the rules. Others warned, though, that the project could be very complicated because many other provisions in the rules also need to be amended to take account of technology, and they cited several examples. A member cautioned that whatever terminology is selected must accommodate the continuing need for paper records and paper copies.

Professor Gibson said that the new bankruptcy appellate rules, scheduled to be published in August 2012, will be the test case for the new terminology. Judge Sutton added that eventually all the federal rules will have to be accommodated to the electronic world. But that project, he said, will take considerable time to accomplish. He emphasized that the immediate problem facing the advisory committees was to decide before publication on the right terminology for the proposed new Part VIII bankruptcy rules and the amendments to FED. R. APP. P. 6.

Judge Kravitz appointed Judge Gorsuch to chair an ad hoc subcommittee to consider devising a standard way of describing electronic filing and transmission throughout the rules. He asked the chairs of the appellate, bankruptcy, civil, and criminal advisory committees to provide at least one representative each.

FED. R. BANKR. P. 8007

Professor Gibson noted that proposed FED. R. BANKR. P. 8007 (stay pending appeal) would continue the practice of current FED. R. BANKR. P. 8005 that requires a party ordinarily to seek relief pending an appeal in the bankruptcy court first.

A member pointed out that proposed Rule 8007(b)(2) did not provide for the situation in which a bankruptcy court fails to issue a timely ruling. He said that the Federal Rules of Appellate Procedure in that circumstance authorize a party to ask the court of appeals for relief. Professor Gibson replied that the advisory committee will consider the matter.

FED. R. BANKR. P. 8008

Professor Gibson explained that proposed FED. R. BANKR. P. 8008 (indicative rulings) had been adapted from the new indicative ruling provisions in the civil and appellate rules. Proposed FED. R. BANKR. P. 8008(a) is parallel to FED. R. CIV. P. 62.1. It specifies what action a bankruptcy court may take on a motion for relief that it lacks authority to grant because an appeal has been docketed and is pending. The moving party must notify the appellate court if the bankruptcy court states either that it would grant the motion or the motion raises a substantial issue.

She pointed out that the rule is complicated because an appeal may be pending in the district court, the BAP, or the court of appeals. Proposed FED. R. BANKR. P. 8008(c) governs the indicative ruling procedure in the district court and the BAP, while FED. R. APP. P. 12.1 takes over if the appeal is pending in the court of appeals.

FED. R. BANKR. P. 8009 and 8010

Professor Gibson reported that proposed FED. R. BANKR. P. 8009 (record and issues on appeal) and FED. R. BANKR. P. 8010 (completing and transmitting the record) would govern the record on appeal. They apply to direct appeals to the court of appeals, as well as to appeals to the district court or BAP.

Rule 8009 differs from the Federal Rule of Appellate Procedure because it continues the current bankruptcy practice of requiring the parties to designate the record on appeal. That procedure is necessary because a bankruptcy case is a large umbrella that may cover thousands of documents, of which only a few may be at issue on appeal.

Proposed FED. R. BANKR. P. 8009(f) would govern sealed documents. If a party designates a sealed document as part of the record, it must identify the document without revealing secret information and file a motion with the appellate court to accept it under seal. If the motion is granted, the bankruptcy clerk transmits the sealed document to the appellate court.

Professor Gibson noted that the advisory committee was still refining proposed FED. R. BANKR. P. 8010 to specify a court reporter's duty to provide a transcript and file it with the appellate court. The majority of bankruptcy courts, she said, record proceedings by machine. A transcript is prepared by a transcription service when ordered through the clerk. She suggested that the court reporters may not always know in which court an appeal is pending and where they must file the transcript.

FED. R. BANKR. P. 8011

Professor Gibson reported that proposed FED. R. BANKR. P. 8011 (filing, service, and signature) had been derived from current FED. R. BANKR. P. 8008 (filing and service) and FED. R. APP. P. 25 (filing and service). She noted that it followed the format, style, and some of the detail of FED. R. APP. P. 25, but placed more emphasis on electronic filing and service.

FED. R. BANKR. P. 8012

Professor Gibson reported that proposed FED. R. BANKR. P. 8012 (corporate disclosure statement) was a new provision derived from FED. R. APP. P. 26.1.

RULES AND FORMS PUBLISHED FOR COMMENT IN AUGUST 2011

Judge Wedoff reported that the advisory committee had received 11 comments and one request to testify on the proposed rules and forms published in August 2011. The only significant area of concern reflected in the comments, he said, related to the proposed amendment to Official Form 6C, dealing with exemptions. Prompted by the Supreme Court's decision in *Schwab v. Reilly*, 130 S. Ct. 2652 (2010), the revised form would give debtors the option of stating the value of their claimed exemptions as "the full fair market value of the exempted property." Some trustees, he said, are concerned that the change will encourage people to claim the entire value of the property even though they are not entitled to it.

STERN V. MARSHALL

Judge Wedoff reported that the advisory committee was continuing to monitor case law developments in the wake of the Supreme Court's decision in *Stern v. Marshall*, 131 S. Ct. 2594 (2011). He pointed out that Professor McKenzie was leading the committee's efforts and had identified three concerns.

First, he said, the scope of the decision was unclear. The holding itself was narrow. It stated that even though that the Bankruptcy Code designates a counterclaim by a bankruptcy estate against a creditor as a "core" bankruptcy proceeding that a bankruptcy judge may decide with finality, that statutory grant of authority is inconsistent with Article III of the Constitution. A non-Article III bankruptcy judge cannot exercise the authority constitutionally because the counterclaim is really a non-bankruptcy matter.

It is not clear, he said, whether the constitutional prohibition will be held to apply to other matters designated by the statute as "core," especially fraudulent conveyance claims. The Supreme Court, he explained, has previously described fraudulent conveyance actions as essentially common law claims like those usually reserved to the Article III courts.

Second, there is uncertainty over the extent to which litigant consent may cure the defect and authorize a bankruptcy judge to hear and finally determine a proceeding that would otherwise fall beyond the judge's authority. The governing statute, 28 U.S.C. § 157(b) and (c), specifies that a bankruptcy judge may decide "core" bankruptcy proceedings with finality. If a matter is not a "core" proceeding, the bankruptcy judge

may only file proposed findings and conclusions for disposition by the district court, unless the parties consent to entry of a final order or judgment by the bankruptcy judge.

The bankruptcy rules, he explained, currently contain a mechanism for obtaining litigant consent, but only in “non-core” proceedings. FED. R. BANKR. P. 7008(a) (general pleading rules) provides that parties must specify in their pleadings whether an adversary proceeding is “core” or “non-core” and, if “non-core,” whether the pleader consents to entry of final orders or judgment by the bankruptcy judge. The problem, he said, is that the term “core” now is ambiguous. As a result of *Stern v. Marshall*, he suggested, there are now statutory “core” proceedings, enumerated in 28 U.S.C. § 157(b), and constitutional “core” proceedings. The advisory committee, he said, was considering proposed rule amendments to resolve the ambiguity.

Third, there is a potential for reading *Stern v. Marshall* as having created a complete jurisdictional hole in which a bankruptcy court may not be able to do anything at all in some cases – either to enter a final order or to submit proposed findings and conclusions. He explained that 28 U.S.C. § 157(c) specifies that if a matter is not a “core” proceeding under 28 U.S.C. § 157(b), a bankruptcy judge may enter proposed findings of fact and conclusions of law for disposition by the district court. After *Stern v. Marshall*, some statutory “core” proceedings are now unconstitutional for the bankruptcy court to decide with finality. Therefore, there is a question as to whether 28 U.S.C. § 157(c), which specifically authorizes a bankruptcy judge to issue proposed findings and conclusions in “a matter that is not a core proceeding,” refers only to matters that are not core under 28 U.S.C. § 157(b) or also includes matters that are not “core” under the Constitution.

If § 157(c) refers only to matters that are not “core” under the statute, bankruptcy judges would have no authority to issue proposed findings and conclusions of law in matters that the statute explicitly defines as “core” matters. And for some of these statutory “core” matters, the Constitution prevents bankruptcy judges from entering a final judgment. The potential void, he said, could arise relatively frequently. It would apply to all counterclaims by a bankruptcy estate against creditors filing claims against the estate, and it might also be held to include fraudulent conveyance cases.

QUARTERLY REPORTING BY ASBESTOS TRUSTS

Judge Wedoff reported that the advisory committee had decided to take no action on a proposal for a new rule that would require asbestos trusts created in accordance with § 524(g) of the Bankruptcy Code to file quarterly reports with the bankruptcy courts. The committee, he said, had concerns over its authority to issue a rule to that effect under the Rules Enabling Act because the trusts are created at the conclusion of a chapter 11 case. He noted that the committee had obtained input on the proposal from various interested organizations, and the great majority stated that a rule was not appropriate.

FORMS MODERNIZATION PROJECT

Judge Wedoff reported that the advisory committee's forms modernization project was making substantial progress and was linked ultimately to the Administrative Office's development of the Next Generation electronic system to supersede CM/ECF. He said that the new forms produced by the committee had been designed in large measure to take advantage of electronic filing and reporting. They are clearer, easier to read, and have instructions integrated into the questions. As a result, though, some attorneys have complained that the new forms are appreciably longer than the current versions and will require more time to complete.

The advisory committee, he said, was very sensitive to these concerns and was trying to shorten the forms where possible, while still eliciting more accurate information. Moreover, he said, the length of the forms will be substantially reduced by not having separate instructions filed.

He added that the advisory committee would like to expedite implementation of the new forms, especially consumer forms that deal with debtor income and expenses. The committee, he said, was planning to bring some of the forms to the Standing Committee at its next meeting and seek authority to publish them for public comment.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Campbell and Professor Cooper presented the report of the advisory committee, as set forth in Judge Campbell's memorandum and attachments of December 2, 2011 (Agenda Item 6). Judge Campbell reported that the advisory committee had no action items to present.

*Information Items***POTENTIAL RULE ON PRESERVATION FOR FUTURE LITIGATION**

Judge Campbell reported that a panel at the May 2010 Duke Law School conference on civil litigation had urged the advisory committee to adopt a new national rule governing preservation of evidence in civil cases. The panel, he said, presented the outline of a proposed preservation rule, including eight specific elements that it said needed to be addressed in order to provide appropriate guidance to bench and bar. The proposal, he said, had been referred to the committee's discovery subcommittee, and Ms. Kuperman was asked to prepare a memorandum on the state of the law regarding preservation obligations and sanctions.

Judge Campbell pointed out that the committee's research revealed that federal case law is unanimous in holding that the duty to preserve discoverable information is triggered when a party reasonably anticipates being a party to litigation. But, he said, no consensus exists in the case law regarding: (1) when a party should reasonably anticipate being brought into litigation; and (2) the extent of the preservation duty. Rather, the law is fact-driven and left to resolution on a case-by-case basis.

As for the law on sanctions for failure to preserve, the courts of appeals are in disagreement. Some circuits hold that mere negligence is sufficient for a court to invoke sanctions, while others require some form of willfulness or bad faith before sanctions may be imposed. Some courts, moreover, have tried to specify what kinds of conduct may result in what kinds of sanctions.

Judge Campbell reported that the advisory committee wanted to ascertain the extent of preservation problems, and it asked the Federal Judicial Center to study the frequency of spoliation motions in the federal courts. That study, conducted by Emery Lee, reviewed over 131,000 cases filed in 19 district courts in 2007 and 2008. It found that spoliation motions had been filed in only 209 cases, or 0.15% of the total. About half those motions related to electronically stored information. The study revealed, moreover, that sanctions had been imposed against both plaintiffs and defendants.

In addition, the committee examined the existing laws that impose preservation obligations. It found that there is a substantial body of statutes that deal with preservation, covering many different subjects. But no coherent pattern emerges from them.

Judge Campbell reported that the discovery subcommittee had focused on what elements should be included in a proposed rule, and Professor Marcus produced initial discussion drafts to show three different possible approaches to a rule. The first was a very detailed rule, as proposed by the Duke panel. It included specific provisions giving examples of the types of events that constitute reasonable anticipation of litigation and trigger a duty to preserve. It addressed the scope of the duty to preserve, including the subject matter, the sources of information, the types of information, and the form of preservation. It also laid out time limits on the scope of the duty, such as how far back a custodian must retain information and how long the obligation to preserve continues. It contained a presumptive number of record custodians who must be identified and instructed to preserve information. The rule was also detailed on sanctions, specifying what kinds of conduct will lead to what kinds of sanctions.

The second proposed rule, he said, was substantially more general, addressing the trigger, scope, and duration of the duty to preserve and the selection of sanctions, but in less detail. Essentially, it directed parties to behave reasonably in all dimensions.

The third proposed rule addressed only sanctions and did not specify the trigger, scope, or duration of preservation obligations. Instead, it focused exclusively on the area of greatest concern to lawyers and their clients – the area, moreover, where there is the greatest disagreement and uncertainty in the law. The expectation was that by addressing the key problem of sanctions, the rule would give guidance to the people who make preservation decisions and relieve much of the uncertainty about the trigger and scope of the duty to preserve.

The third rule also distinguished between sanctions and curative measures. The latter consist of targeted actions designed to cure the consequences flowing from a failure to preserve information, such as allowing extra time for discovery or requiring the party who failed to preserve to pay the costs of seeking substitutes for the missing information. Under the proposed rule, remedial measures could be imposed if a preservation duty were not followed.

Imposition of more serious sanctions – such as an adverse inference instruction, claim preclusion, dismissal, or entry of judgment – would require something more than a mere failure to preserve. A showing would have to be made of some kind of knowing conduct, such as willfulness or bad faith. The rule also laid out the factors that a judge should consider in imposing sanctions, including the level of notice given the custodians, the reasonableness and proportionality of the efforts, whether there was good faith consultation, the sophistication of the parties, the actual demands made for preservation, and whether a party sought quick guidance from a judge.

Judge Campbell reported that the three rules had been discussed at a one-day mini-conference in Dallas in September with invited attorneys, judges, law professors, and technical experts. The committee, he said, heard very thoughtful, competing views from the participants. The discussions were very helpful, and several participants submitted papers elaborating on their positions.

In essence, he said, corporate representatives argued that the sheer cost of preserving information in anticipation of litigation is an urgent problem that calls for a strong, detailed rule providing clear guidance to record custodians. In particular, they complained about the uncertainty that corporations face in not knowing where and when a suit will be filed against them, what the claims will be, and what information may be relevant in each case. They are concerned about the heavy costs of over-preserving information. But, more importantly, they fear the harm to their reputation that may result from accusations of spoliation.

On the other hand, plaintiffs' lawyers argued that a detailed national rule would lead to greater destruction of information because of its negative implications. It would encourage custodians to destroy information not explicitly spelled out in the rule. They emphasized that there will always be information that simply does not fit within the details of a rule, but must nevertheless be preserved.

Department of Justice representatives argued that case law should be allowed to continue running its course, and no preservation rule should be adopted at this time. They argued, in particular, that the first of the three proposed rules would lead to over-preservation by government agencies, as they would be forced to preserve records whenever there is a dispute over a claim with the government.

Judge Campbell noted that the discovery subcommittee met at the close of the mini-conference and later by telephone. It then reported in detail on the mini-conference at the full advisory committee's November 2011 meeting. After lengthy discussion, the committee decided that the subcommittee needed to continue to receive input and explore the three potential options. Under its new chair, Judge Paul W. Grimm, the subcommittee will continue to consider all the issues as open and report back at the advisory committee's March 2012 meeting.

Several members suggested that the first of the three proposed rules, the detailed option, would not be workable because of the endless variety of possible situations that may arise. A detailed new national rule, moreover, could lead to satellite litigation, as with the 1983 amendments to FED. R. CIV. P. 11 (sanctions). A sanctions-only rule, on the other hand, such as the third proposal, would resolve the serious split among the circuits on the law of sanctions, and it might well be effective in sending strong signals regarding pre-litigation conduct.

Judge Campbell suggested that even if the committee were to adopt a new federal rule on spoliation, a myriad of different rules will still exist in the state courts. Accordingly, there will not be national uniformity in any event. The problems of uncertainty will continue because state law often governs preservation obligations. A participant added that the rules on preservation are largely rules of attorney conduct, which lie within the traditional province of the states. Because of the relevance of state law, the federal courts would be on stronger jurisdictional grounds if the rule were limited to sanctions.

A member added that in most cases no federal proceeding is pending when the duty to preserve first attaches. It was suggested that the advisory committee take a limited focus because it may lack authority under the Rules Enabling Act to adopt pre-litigation preservation standards.

A participant pointed out that the scope of the obligation to preserve before trial is related to the scope of discovery under FED. R. CIV. P. 26(b)(1). Therefore, it may not be possible to have a rule that narrows the scope of what information must be preserved before a case is filed if that provision is at odds with what information must be produced in discovery after a case is filed. Moreover, apart from the duty to preserve certain records and information, substantial additional cost is incurred in searching the

information. Thus, even if it were inexpensive just to preserve information, it would still be expensive for the parties to search through it. Therefore, it might be necessary to reconsider the scope of discovery under Rule 26(b)(1).

FED. R. CIV. P. 45

Judge Campbell reported that the proposed amendments to Rule 45 (subpoena) had been published in August 2011. They make four basic changes: (1) simplifying the rule by having a subpoena issued in the name of the presiding court, authorizing nationwide service, and having local enforcement in the district where the witness is; (2) allowing the court where discovery is taken in appropriate instances to send disputes back to the court presiding over the case; (3) overruling the *Vioxx* line of cases that authorize subpoenas for out-of-state parties and a party's corporate officers to testify at trial from a distance of over 100 miles; and (4) clarifying the obligation of a serving party to provide notice.

He said that a public hearing had been scheduled for January 27, 2012, but the committee had received only two requests to testify. As a result, the hearing may be canceled and the requesting parties asked to put their views in writing or participate in a teleconference.

DUKE CONFERENCE SUBCOMMITTEE

Judge Campbell reported that a subcommittee chaired by Judge John G. Koeltl was studying the many recommendations for improvements in civil litigation made by participants at the May 2010 Duke Law School conference. He noted that the subcommittee was focusing on five categories of proposals to implement suggestions made at the conference.

First, one of the common themes voiced by lawyers at the conference was that judges need to be more active in case management. But merely promulgating additional rules will not produce better managers. Therefore, the subcommittee was coordinating with the Federal Judicial Center to improve judicial education programs and enhance informational resources. Among other things, a new civil case-management section of the *Benchbook for U.S. District Court Judges* had been drafted.

Second, Judge Campbell noted that efforts were being made to tap into local efforts around the country to test new procedures for managing litigation. A number of case-management pilot programs were underway, and the committee was working with the Federal Judicial Center to identify and monitor them. In addition, the committee would ask chief judges around the country to keep it informed about pertinent local developments.

Judge Campbell reported that one of the initiatives that the committee was encouraging was a project to develop a standard protocol for initial discovery in employment discrimination cases. Drafted jointly by lawyers representing both plaintiffs and defendants, the protocol identifies the information that each side must exchange at the outset of an employment case, without the need for depositions or interrogatories. No objections are allowed except for attorney-client privilege. The protocol, he said, will be made available to all federal courts, and all the judges on the advisory committee will adopt it and encourage their colleagues to do the same.

Third, the advisory committee had encouraged additional empirical work, especially by the Federal Judicial Center, on how federal courts are actually handling their cases on a daily basis. One study by the Center was focusing on the early stages of a civil case, including initial scheduling orders, Rule 26(f) planning conferences, and Rule 16(b) initial pretrial conferences. The study revealed that court dockets show that the initial scheduling orders required by FED. R. CIV. P. 16(b)(1) are issued in only about half the civil cases in the district courts. But, he cautioned, docket information may not be sufficiently reliable because there are no uniform ways of recording the pertinent data, and the absence of public records may be the result of inadequate docketing practices. In addition to reviewing the docket sheets, the Center will conduct a survey of lawyers to ascertain what events occurred early in their cases.

Fourth, Judge Campbell noted that the committee had invited judges and lawyers from the Alexandria Division of the Eastern District of Virginia to discuss their experiences with that court's "rocket docket." He added that all the judges on the court share a common philosophy that cases must be handled promptly, and the bar works very well within that court culture.

Fifth, Judge Campbell said that several specific rule amendments were being considered in light of the Duke Conference, including: reducing the time to hold an initial case management conference from 120 to 60 days; eliminating the moratorium on discovery until after the Rule 26(f) conference is held; requiring parties to talk to the court about discovery problems before filing motions; amending Rule 26 to emphasize the importance of proportionality; reducing obstructive objections; limiting the presumed number of depositions in a case to five and the presumptive maximum time of a deposition from seven hours to four; reducing the presumptive number of interrogatories below the current 25; postponing contention interrogatories until later in a case; reducing service time; mandating that judges hold a scheduling conference; and emphasizing in Rule 1 that lawyers must cooperate with each other. He added that rules language was being drafted to help in considering these various ideas.

Professor Cooper added that another area for potential rulemaking was the relationship between pleading motions and discovery. Two competing proposals had been offered. One would suspend discovery until the court rules on a motion to dismiss

for failure to state a claim. The other would create a presumption in favor of ruling on a motion to dismiss only after some discovery has occurred.

Judge Campbell said that the central theme at the Duke conference had been that parties generally believe that civil litigation takes too long and costs too much. The advisory committee, he said, was contemplating conducting a “Duke II” conference, but had not yet made a decision on the matter.

PLEADING STANDARDS

Professor Cooper reported that the advisory committee had no immediate plans to propose rule amendments dealing with pleading standards. The committee was actively reviewing the developing case law, and the Federal Judicial Center was continuing to conduct empirical research on the frequency of motions to dismiss and their disposition.

The Center’s research had found a statistically significant increase in the number of motions filed, but not in the rate of granting motions. It was not possible to tell whether more cases were being dismissed out of the system because courts often grant motions to dismiss with leave to amend. A follow-up study by the Center had shown no statistically significant increase in plaintiffs excluded from the system by motions to dismiss or cases terminated by motions to dismiss, other than in financial instrument cases. On the other hand, some law professors have conducted their own research and claim that there has in fact been an increase in dismissals from the system.

Professor Cooper noted that the advisory committee had been presented with a large number of suggested changes in pleading standards and various suggestions for integrating pleading practice with discovery practice. He noted that there were many opportunities and possibilities for rule changes, but the committee was not contemplating proposing any rule for publication in the coming year.

PLEADING FORMS

Professor Cooper pointed out that FED. R. CIV. P. 84 (forms) specifies that the illustrative civil forms in the appendix “suffice” under the rules. He noted specifically that the form for pleading negligence had been approved by the Supreme Court in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 565 n.10 (2007). But lower federal courts have found a tension between Supreme Court cases and the current pleading forms, especially Form 18 (complaint for patent infringement).

The larger question, he said, was why the committee was still in the forms business. There was a clear need for illustrative forms in 1938 to show the bar how the new federal rules would work in practice. That objective, however, may no longer be important. Moreover, the committee has generally not paid a great deal of attention to

the forms over the years. Although some, such as Form 5 (notice of a lawsuit) and Form 6 (waiver of service of a summons) had been very carefully coordinated with FED. R. CIV. P. 4(d) (waiver of service), most forms do not receive much attention.

He noted that the advisory committees have adopted different approaches towards drafting forms, and the forms are used in different ways for different purposes. The civil and appellate forms, for example, are promulgated through the full Rules Enabling Act process. The official bankruptcy forms, on the other hand, follow the first several steps of that process, but are prescribed by the Judicial Conference. The criminal forms do not go through the Rules Enabling Act process at all. They are drafted by the Administrative Office with some consultation with the criminal advisory committee..

The Standing Committee, he said, had appointed an ad hoc subcommittee on forms, composed of members of the advisory committees, to consider the appropriate role of the committees in preparing forms. Among other things, the subcommittee will consider whether the current variety of approaches is appropriate or whether there is a need for more uniformity. There appears to be little support for adopting a uniform approach, as sufficient coordination may be achieved through the Standing Committee's review of the advisory committees' recommendations. The subcommittee will also consider whether it is advisable for any of the forms to continue to follow all the steps of the full Rules Enabling Act process. He added that there was no urgency in making those decisions.

CLASS ACTIONS

Judge Campbell reported that the advisory committee had recently formed a subcommittee on class actions, chaired by Judge Michael W. Mosman, and it had begun to identify issues that might possibly warrant future rulemaking.

Professor Marcus provided background on the development of Rule 23. He explained that after the important 1966 amendments to FED. R. CIV. P. 23 (class actions), the advisory committee took no action on class actions for 25 years. In 1991, the Judicial Conference, on the recommendation of its ad hoc committee on asbestos litigation, directed the committee to study whether Rule 23 should be amended to improve the disposition of mass tort cases.

In response, the committee considered a wide range of different possible changes in the rule and sought extensive input from the bench and bar. In 1996, it published a limited number of significant amendments. They would have required a court to consider whether a class claim is sufficiently mature and whether the probable relief to individual class members justifies the costs and burdens of class litigation (commonly referred to as the "just ain't worth it" test). They would also have explicitly permitted certification of settlement classes and a discretionary interlocutory appeal from certification decisions.

During the publication period, the proposed amendments to revise the certification process proved to be very controversial. Moreover, the Supreme Court issued its decision in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), dealing with settlement certification. As a result, the committee decided to proceed only with the proposed addition of Rule 23(f) authorizing a discretionary interlocutory appeal. That provision took effect in 1998 and has proved successful.

In 2000, the committee continued working on the rule. Its additional efforts resulted in several amendments that took effect in 2003, including improving the timing of the court's certification decision, strengthening the process for reviewing proposed class-action settlements, and authorizing a second opt-out opportunity for certain class members to seek exclusion from the settlement. It also added Rule 23(g) governing the appointment of class counsel, including interim class counsel, and Rule 23(h) governing the award of attorney's fees.

Judge Campbell pointed out that the amendments pursued by the advisory committee did not address the problems of overlapping classes, recurrent efforts to certify a class through judge-shopping, or recurrent efforts to approve a settlement. Professor Cooper, he noted, had devised creative ideas on addressing those issues by rule, but they attracted too much controversy.

Judge Campbell reported that the advisory committee was considering whether Rule 23 needs to be amended to take account of several recent developments, including enactment of the Class Action Fairness Act and recent class-action case law. The committee, he said, had compiled a list of potential issues that might be addressed and was considering whether the time was ripe to give further consideration to Rule 23. On the other hand, he said, any significant change in the rule would likely be controversial, and the committee has several other, more important projects on its agenda.

INTERLOCUTORY APPEAL FROM ATTORNEY-CLIENT PRIVILEGE DECISION

Professor Cooper reported that a suggestion had been referred to the advisory committee for a rule amendment that would allow appeal by permission from an order granting or denying discovery of materials claimed to be protected by attorney-client privilege. Although referred to the civil committee, he said, the matter should also be considered by the other advisory committees.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Raggi and Professor Beale presented the report of the advisory committee, as set forth in Judge Raggi's memorandum and attachments of December 12, 2011 (Agenda Item 9).

Amendments for Final Approval

FED. R. CRIM. P. 16(a)(2)

Judge Raggi reported that the advisory committee was proposing an amendment to FED. R. CRIM. P. 16(a)(2) (discovery and inspection) that would clarify an ambiguity introduced during the 2002 restyling of the criminal rules. The change would make it clear that the restyling of the rule had made no change in the protection given to government work product.

She explained that Rule 16(a) allows a defendant to inspect papers and materials held by the government. Before restyling, Rule 16(a)(1)(C) had contained enumerated exceptions to that access, including one for the government's work product. The restyled rule, however, eliminated the exceptions.

The district courts, she said, have rejected claims that the 2002 amendments had changed the substance of the rule, using the doctrine of a "scrivener's error" to deny access by the defendant to the government's work product. As a result, there appear to be no serious practical problems and no urgency to make a correction. Nevertheless, she said, the advisory committee agreed unanimously that it was inappropriate to have an ambiguous restyled rule and decided to pursue an amendment.

The committee, she pointed out, believed that the proposed change was technical and could be made without publication. Nevertheless, it recognized that the Standing Committee needed to make that policy decision.

The committee without objection by voice vote approved the proposed technical and conforming amendment for final approval by the Judicial Conference without publication.

Information Items

FED. R. CRIM. P. 6(e)

Judge Raggi reported that the advisory committee was considering the Attorney General's recommendation to amend FED. R. CRIM. P. 6(e) (recording and disclosing grand jury proceedings). The amendment would provide procedures for authorizing disclosure of historically significant grand jury materials after a suitable period of years.

The proposal, she said, was in response to a district court decision that ordered the release of grand jury materials dealing with President Nixon's testimony before the Watergate grand jury. The district court issued the release order relying on its inherent

authority, even though FED. R. CRIM. P. 6(e) contains no provision expressly authorizing release of the materials.

She noted that the Department of Justice did not agree that the court had inherent authority to order disclosure, but it did not appeal the decision. Instead, it asked the advisory committee to amend Rule 6 to allow disclosure after a specified period of years. The proposal, she said, was being studied by a subcommittee chaired by Judge John F. Keenan.

FED. R. CRIM. P. 16

Judge Raggi reported that the advisory committee – after extensive study and debate – had decided not to pursue amendments to FED. R. CRIM. P. 16 (discovery and inspection) to codify the duty of prosecutors to turn over exculpatory information to the defendant. The committee, however, agreed to address the matter in a “best practices” section of the *Benchbook for U.S. District Court Judges*. She said that she had met with Judge Paul L. Friedman, chairman of the Federal Judicial Center’s Benchbook Committee, and a draft section had been prepared.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Fitzwater and Professor Capra presented the report of the advisory committee, as set forth in Judge Fitzwater’s memorandum and attachments of November 28, 2011 (Agenda Item 11). Judge Fitzwater noted that the advisory committee had no action items to present.

Information Items

SYMPOSIUM ON THE RESTYLED FEDERAL RULES OF EVIDENCE

Judge Fitzwater reported that the restyled Federal Rules of Evidence had taken effect on December 1, 2011. The advisory committee, he said, had held its October 2011 meeting in Williamsburg, Virginia, at the William and Mary Marshall-Wythe College of Law. The meeting was preceded by a symposium on the restyled rules, hosted by William and Mary at the committee's request.

FED. R. EVID. 801(d)(1)(B)

Judge Fitzwater noted that the advisory committee was considering a proposal to amend Rule 801(d)(1)(B) (hearsay exemption for certain prior consistent statements). It would make prior consistent statements admissible under the hearsay exemption whenever they would otherwise be admissible to rehabilitate the witness's credibility. The amendment, he said, was based on the premise that there is no meaningful distinction between substantive and rehabilitative use of prior consistent statements. The needed jury instruction, moreover, is almost impossible for jurors to understand.

He noted that there was a difference of opinion in the advisory committee on whether to pursue a change in the rule, and the members would appreciate receiving any further advice from the Standing Committee on the matter. He also noted that the committee, with the help of the Federal Judicial Center, was planning to send a questionnaire to all district judges soliciting their views on the advisability of the proposed amendment.

A member supported making the proposed change in Rule 801, but cautioned against sending out questionnaires to all judges on potential rule changes, especially where a proposed rule is not particularly significant. He said that it could set a bad precedent for other committees to send out surveys on a regular basis.

PRIVILEGES PROJECT

Judge Fitzwater reported that the advisory committee undertook a project several years ago to compile the federal common law on evidentiary privileges. The initiative, he said, was not intended to result in a codification of the evidentiary privileges or in new federal rules. Rather, it was expected to lead to a Federal Judicial Center monograph providing a restatement of the federal common law. Because of the potential sensitivity of the project, however, the committee decided not to proceed further without Standing Committee guidance and approval.

Professor Capra explained that the committee had undertaken similar types of projects in the past. For example, when Congress enacted the evidence rules in 1975, it made several changes in the rules proposed by the judiciary, but it did not change the accompanying committee notes. As a result, some of the notes are inconsistent with the text of the rules. At the committee's request, he compiled the inconsistencies and produced a Federal Judicial Center monograph under his own name. Later, the advisory committee authorized him to write a monograph on the discordance between some of the rules and the prevailing case law. Both publications were very helpful to the bar.

Professor Capra said that the law of privileges is very important, but it is not codified. The advisory committee began developing a set of privilege rules to reflect the federal common law. After initial efforts, the project, under the leadership of Professor Kenneth S. Broun, was deferred because of the committee's other priorities, such as restyling the rules. He added that the project was a low priority for the committee and would be put aside if other matters need attention. After having completed the restyling project, however, the committee now has a light pending agenda.

Members asked whether the advisory committee itself was planning to approve the work and whether the project was the best use of the committee's time and the judiciary's limited resources. Several agreed that it would be a beneficial project, but it should have a relatively low priority. Judge Kravitz added that it was fine to produce the paper, but he would not recommend giving it official advisory committee approval.

A participant recommended that the project continue because there has been recurring interest by Congress over the years in enacting privileges by law. Professor Capra added that since 1996, the advisory committee had been asked to comment on six different proposals dealing with privileges.

A member said that the Standing Committee should defer to the advisory committee's best judgment on the matter. If the advisory committee finds the project useful, especially since Congress may ask for input on privileges, it should continue.

Judge Fitzwater and Professor Capra suggested allowing Professor Broun to continue on the work on the matter and report to the advisory committee as needed at its meetings. A committee consensus developed to adopt their suggestion.

COMMITTEE JURISDICTIONAL REVIEW

The committee authorized Judge Kravitz and Professor Coquilletto to complete for the committee a self-evaluation questionnaire for the Judicial Conference's Executive Committee on the need for the committee's continued existence, the scope of its jurisdiction, and its workload, composition, and operating processes.

PANEL DISCUSSION ON CLASS ACTIONS

Judge Rosenthal presided over a panel discussion on class actions with Dean Robert H. Klonoff, a member of the Advisory Committee on Civil Rules, Daniel C. Girard, Esquire, a former member of the advisory committee, and John H. Beisner, Esquire.

Judge Rosenthal noted that the discussion was in accord with the committee's tradition of spending time at its January meetings in examining long-term trends and issues that may affect the rules process in the future, but do not require immediate changes in the rules. She explained that the Class Action Fairness Act of 2005 (CAFA) had now been in place for seven years and the courts have issued several important class-action decisions in the last few years. In light of the committee's statutory obligation to monitor the continuing operation and effect of the federal rules, she said, it was an opportune time to start thinking about whether any changes in FED. R. CIV. P. 23 might be needed in the future. Class actions, she added, are a high profile area of the law and involve a great deal of money and interest.

The panel, she pointed out, consisted of an attorney who primarily represents plaintiffs and a lawyer and a law professor who normally have represented defendants. She asked them to focus on the impact of the recent cases on class-action practice and to identify any potential rule changes that might have a beneficial impact on class-action litigation.

The panel discussed a wide range of issues, but the exchange can be categorized as falling into the following four broad topics:

1. Front-loading of cases;
2. Class definition;
3. Settlement classes; and
4. Competing classes and counsel.

1. FRONT-LOADING OF CASES*In re Hydrogen Peroxide*

The panel discussed the impact of *In re Hydrogen Peroxide Antitrust Litigation*, 552 F.3d 305 (3rd Cir. 2009). In the case, the Third Circuit held that the district court was obligated at the certification phase of a class action to apply a rigorous analysis of the available evidence and make findings supported by a preponderance of the evidence (rather than a mere threshold showing) that each element of Rule 23 has been met.

The district court was required to resolve all factual and legal disputes relevant to class certification, even if they overlap with the merits. Specifically, it should have resolved the battle of the experts over whether the alleged injury could be demonstrated by proof common to the class, rather than individual to its members. The decision, moreover, expressed concern that the district court's order certifying the class would place unwarranted pressure on the defendant to settle non-meritorious claims – elevating that concern, in effect, into a policy factor to consider in the certification process.

Although not all courts follow *Hydrogen Peroxide*, it was suggested that the practical impact of the case has been that plaintiffs are now confronted with an early merits-screening test. They must present their evidence at the certification stage or risk losing the case if the court denies certification. That conclusion, moreover, was seen as bolstered by several other cases, including the Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011).

In *Wal-Mart*, the Supreme Court ruled that if the plaintiffs had evidence of company-wide employment discrimination, they had to present it by the time of the certification hearing. A key question, therefore, is whether the courts will now impose a higher standard of “commonality,” as in *Wal-Mart*, which would necessitate more expansive discovery, or whether they will read *Wal-Mart* as limited to the unique employment setting and continue the traditional concept of commonality.

Discovery at certification

A panelist argued that *Hydrogen Peroxide* has created a much more expensive class-certification process, particularly in complex cases. He said that there is considerable uncertainty for the lawyers on how discovery is to take place after the pleading stage. Discovery may have to be conducted before certification is heard and expert witnesses may be subjected to a full *Daubert* analysis.

It was noted that expert testimony now is often a central feature at the certification stage, and extensive case law is developing on the subject, including whether *Daubert* applies at the class-certification stage. In *Wal-Mart*, the treatment of expert witnesses at certification was an important factor in the majority opinion, and *Hydrogen Peroxide* was largely a battle of the experts.

It was suggested that plaintiffs' lawyers often feel disadvantaged by the front-loading of discovery. At the same time, defendants traditionally have preferred to bifurcate discovery and avoid excessive costs by limiting discovery at certification and deferring full-blown discovery on the merits until later.

In front-loading the discovery, though, the recent decisions have raised questions about how much merits discovery is actually required up front and whether the discovery

can continue to be bifurcated if plaintiffs are now required to prove the merits of the certification issues. The discovery problems are complicated, moreover, because discovery is now largely electronic and does not lend itself very well to phasing.

A panelist said that the recent decisions have caused additional work and difficulties for the parties but have not created a crisis situation. It appears, for example, that meritorious class actions are not being killed in the cradle, as plaintiffs are afforded a fair chance to explain to the court why they believe that their class can be certified.

One panelist argued that what information both sides should put forward in class certification briefing is becoming much clearer. The information necessarily will vary from case to case, but much of the discovery is simply not relevant for certification purposes. The judges, he said, are closely managing the cases and overseeing the discovery.

The focus now for the parties, he said, is on providing useful information that a court needs to make the certification decision. Judges, for example, often ask the lawyers whether particular discovery is really needed for certification or can be deferred until later in order to meet the schedule for class certification. Some judges also indicate to the parties what sort of discovery will be needed for certification and set a time for certification briefing, leaving it up to the lawyers to figure out the details of what discovery must be exchanged for certification.

A panelist noted that *Hydrogen Peroxide* cited the advisory committee note to the 2003 amendments to Rule 23, which sets forth the concept of a “trial plan that describes the issues likely to be presented at trial and tests whether they are susceptible of class-wide proof.” The recent cases, he said, have been sending a uniform message that the district court should instruct the parties to gather their available information and figure out what a class trial would look like. The court, thus, exercises the gateway function of deciding whether the jury will have the evidence it needs to make a decision that the entire class is entitled to relief. The key issue is whether the evidence varies so much among the individual plaintiffs that the jury is unable to decide that the defendant is liable to all members of the class.

Early practicable time for making the certification decision

In light of the additional information that now has to be gathered for certification, the panel discussed whether courts are being more flexible in applying Rule 23(c)(1)(A)’s requirement that certification occur at “an early practicable time.” There appears to be little uniformity among the courts, however, as courts cite the language of the rule to support every conceivable outcome. Some make the certification decision very early in the case, while others defer it until much later. A few districts specify

categorically that a class certification motion be made within 90 days, while in others, the certification process occurs at the close of discovery.

Early dispositive motions

It was reported that the trend towards front-loading of class-action litigation has led to an increasing tendency to find ways to dispose of cases at an early stage. As a matter of good practice, therefore, a defendant who believes that a national class action cannot be certified under any circumstances should force the plaintiffs to come forward at an early stage and move for class certification.

Since CAFA, many more class-action cases are being brought in the federal courts that involve state laws, and more motions are being filed that challenge jurisdiction. Some state laws, moreover, appear to grant relief for class members in circumstances that may not meet the criteria for standing in the Article III federal courts.

It was suggested that there has been some drift away from analyzing class membership questions under the criteria specified in Rule 23(a) and (b) and framing them instead as matters of standing. A defendant, thus, moves to strike class allegations at the pleading stage, challenging the definition of the class through a dispositive motion, claiming that the class includes members who do not have standing. The trend may be a reaction to the sheer complexity of the issues in a multi-state post-CAFA class action, the high costs of conducting discovery, and a lack of clear guidance. In essence, the dispositive motions assert that there is some fundamental flaw in a particular class and, therefore, no need to go through the expense of discovery and the certification process.

In addition, there is some confusion over the ability of an individual plaintiff to act in a representative capacity. Some defendants claim that unless a plaintiff's claim is a mirror image of the claim of every other person in the class, in ways that do not necessarily relate to the presentation of common proof, the plaintiff does not have standing to act on behalf of others in a representative capacity.

2. CLASS DEFINITION

Preponderance and Commonality

It was suggested that there is uncertainty over what is meant by "preponderance" in Rule 23(b)(3). Under the current language of the rule, it was argued, plaintiffs are faced with a "winner take all" proposition. The court has to decide whether common issues of law and fact predominate. If they do, the court will certify the class. If they do not, certification will be denied.

It was noted that if common issues of law and fact do not predominate under Rule 23(b)(3), a court may still certify a class action under Rule 23(c)(4) for particular common issues. There is, however, very little guidance as to when a court may certify an issues class. Although a body of case law is developing on issues classes, it varies from circuit to circuit.

Recent cases show that the courts are sharply divided on Rule 23(c)(4). One circuit has ruled that an issues class is a housekeeping remedy, and predominance still must be shown. Another has held that predominance need not be shown, and a court only has to consider whether resolution of the issue will materially advance the case.

A panelist said that issues classes are not commonly invoked by counsel because lawyers prefer a more complete outcome to their litigation. They are not normally interested in litigating on a piece-meal basis. As a practical matter, there are too many complications in issues-class litigation, and it is generally not worth it for them. Another panelist disagreed, however, and suggested that issues classes are quite important and have been used effectively in environmental tort cases and employment cases.

It was recommended that the Advisory Committee on Civil Rules monitor the developing case law and ultimately evaluate whether to consider a rule amendment that adjusts the standards of Rule 23(c)(4) to give the courts greater guidance on when a class may be certified that has both common issues and individual issues. The panelists pointed out that courts that have wrestled with the rule have said that the matter is unclear. It was also noted that the ALI had spent a great deal of time on issues classes as part of its recent restatement project. If properly defined, it was argued, an amended federal rule on issues classes could be beneficial to the mass adjudication of cases.

It was pointed out that there is a mechanism for dealing with predominance issues arising from state-law variations, especially in post-CAFA cases involving consumer claims arising under the laws of multiple states. In these cases, defendants generally argue that the claims have to be considered individually under different state consumer protection laws. Although a national class action may still be maintained, as in the *De Beers* litigation in the Third Circuit, a case may effectively be divided into sub-classes on a state-by-state basis for litigation purposes. In the settlement context, the analysis of state law variations historically was an issue of “manageability.” Defense counsel would argue that the court cannot litigate the case on a manageable basis because the jury would have to be charged on the law of 50 states.

It was pointed out that one factor that has increased the number of class-action cases in the federal courts is the strategy of plaintiffs – reinforced by a general skepticism of federal courts towards nationwide classes – to break down a class into several subclasses, such as a separate class action for each state. That tendency will continue to occur in employment cases, as classes are broken down into smaller class actions,

especially after *Wal-Mart v. Dukes*. The trend will result in more class actions, and multiple class actions on the same subject. The Judicial Panel on Multidistrict Litigation will routinely draw the federal cases together to conduct the discovery on a common basis. In the end, though, separate certification determinations will have to be made in each class action.

In the past, commonality was not an important issue and was often stipulated. The real issue, rather, was predominance. But the Supreme Court has now said that the common issue has to be central to the validity of each of the claims. It has to be a central, dispositive issue to class certification. Commonality, moreover, is used in other rules, such as Rule 20 (joinder), which contains the exact same language. So one issue for the future will be whether *Wal-Mart* will have an impact on joinder.

Rule 23(b)(2) classes

It was suggested that *Wal-Mart v. Dukes* represents a potential sea change, not only regarding “commonality” under Rule 23(a), but also for classes under Rule 23(b)(2). A panelist said that the most remarkable aspect of the *Wal-Mart* decision, and potentially the most important aspect, was the section dealing with Rule 23(b)(2). The Court’s statements that back pay could not be brought as part of a (b)(2) action because it was not “incidental” were a major departure from the decisions of the courts of appeals. Moreover, the Supreme Court suggested that there may be a due process problem with any monetary claim in a (b)(2) action, even a claim for statutory damages or incidental damages.

Accordingly, many difficult questions arise as to the scope of Rule 23(b)(2) after *Wal-Mart*, and there will be a great deal of analysis of the decision and the ensuing case law. Questions will arise, for example, on whether some problems can be dealt with by allowing opt-out classes under (b)(2) or hybrid classes under (b)(2) and (b)(3).

Arbitration Clause Cases

It was argued that *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011), may have the most important impact of any of the recent class-action cases, for it has been seen as effectively eviscerating many small claims cases. Although the Supreme Court noted in *Amchem* (which dealt with mass torts) that class actions are really about small claims cases, rather than mass torts, it later dealt a virtual death knell to many small claims cases in *Concepcion*.

It was suggested that one of the issues that plaintiffs thought was left open in *Concepcion* was whether a “no class-arbitration” clause may be invalidated if the plaintiffs can show that it is impossible to vindicate their rights other than through class

arbitration. One court of appeals ruled recently, however, that the argument could not survive after *Concepcion*.

3. SETTLEMENT CLASSES

The need for a Rule 23 amendment on settlement classes

A panelist said that many of the court decisions since *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), have wrestled with what must be shown in the context of certifying a settlement class. Although *Amchem* said that the district court does not have to worry about “manageability” in a settlement case under Rule 23(b)(3), the class must still meet the tests of preponderance, commonality, and adequacy, and the case has to be treated as if it were going to trial. In the Third Circuit’s *De Beers* litigation, for example, the court’s opinion noted that “(e)ver since the Supreme Court’s landmark decisions in *Amchem Products Inc. v. Windsor*, 521 U.S. 591 (1997), and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), one of the most vexing questions in modern class action practice has been the proper treatment of settlement classes, especially in cases national in scope that may also implicate state law.”

Judge Kravitz asked the panel whether FED. R. CIV. P. 23 should be amended to deal specifically with settlement classes.

The panelists agreed that the absence of a settlement-class provision has created problems and has tended to push settlements, especially in mass-tort cases, outside the court system. Since *Amchem*, the parties in these cases have had to construct work-around solutions to achieve settlements, often a settlement that lies outside judicial supervision under Rule 23(e).

The absence of a workable settlement-class device is seen as a major problem in mass torts because there is no supervision of the parties’ actions or the attorney’s fees. Defendants, moreover, are concerned about engaging in settlements outside the courts because they are left to their own devices. They must hope that the terms of the settlement stick because they have not been sanctioned by a court.

A panelist summarized three specific impacts of *Amchem*. First, he said, more cases are now proceeding to non-class settlements, where there are no criteria and no supervision. Second, several cases have struck down non-judicial settlements, forcing the parties to go back to the court and try cases that all the parties wanted to settle. Third, the requirements for a litigation class place defendants in an awkward position. If they claim under *Amchem* that the case is suitable for class certification and trial, and then fail to settle, they may have stipulated to something that will harm them for litigation purposes. The internal problem for the defendants is what they must do to support and

enforce a settlement after they have asserted to the court that the case is suitable for certification as a litigation class.

A panelist added that the absence of a clearly defined standard for certification of a settlement class is exploited by tactical, professional objectors. In essence, they want a financial reward in return for dropping their objections. Greater clarity in the rule, he said, would not solve the problem of non-meritorious objections entirely, but it would take an argument away from nuisance objectors.

Approval of Settlements

Judge Rosenthal reported that the rules committees retreated in the 1990s from the decision to seek approval of a separate provision for settlement classes because *Amchem* and *Ortiz* were pending in the Supreme Court. But there was also strong and negative reaction to the committee's published rule, especially from law professors who argued that it would unleash the forces of collusion and lead to rampant reverse auctions.

At the same time, defendants feared that loosening the standards for certification of settlement classes would bleed over inevitably to loosen the standards for litigation class actions. They warned that the proposal would invite more class actions because it would be easier for potential plaintiffs to obtain settlement awards. In light of these concerns, she said, there was no consensus for the committee to proceed with the proposal.

She added that the 2003 amendments to Rule 23 were designed to put rigor into the evaluation of a settlement's fairness, reasonableness and adequacy and to strengthen the oversight of attorney's fees. The amendments, though, deliberately did not address whether the standards for certifying a settlement class should be different from those for certifying a trial class. She asked whether conditions have changed since 2003 and whether the absence of a settlement class certification standard in Rule 23, coupled with other concerns raised by the panelists, are sufficiently acute to warrant pursuing rule amendments.

A panelist explained that effective brakes are currently in place to deal with abusive settlements. Most class actions, moreover, are litigated in a relatively small number of district courts. The judges are sophisticated and experienced and know how to deal with issues of fairness and compensation.

A panelist urged pursuing a distinct rule addressing settlement classes. He noted that the current requirements for certification are clear, perhaps too clear, and are inconsistent with the realities of the settlement process. The defendants, in reality, are waiving their defenses and do not have a trial plan because their objective is a settlement without a trial. Nevertheless, *Amchem* requires them to go through a certification process

that does not make a lot of sense for them. Another panelist did not see a pressing need for a settlement-class rule in anti-trust, securities, and financial services cases, but agreed that it could be helpful in mass-tort cases.

A panelist argued that the primary focus of a proposed settlement-class rule should not be on the class-certification process. He pointed out that settlements in mass-tort cases do not reach the stage of court approval under Rule 23(e)(2) because the plaintiffs cannot meet the certification requirements of Rule 23(a) and (b).

Rather, an amended rule should build on Rule 23(e)(2), which specifies that a settlement must be “fair, reasonable, and adequate.” The rule would alter *AmChem*’s statement that Rule 23(e) is not a substitute for Rule 23(a) and (b). Instead, the inquiry in a settlement-class case would proceed directly to Rule 23(e), essentially skipping over Rule 23(a) and (b).

The amendment could augment the court’s inquiry under Rule 23(e)(2) by requiring it to examine the fairness of compensation among the different members of the class and determine whether variations in individual entitlement are adequately reflected in the proposed settlement. Injuries of class members, for example, may well range from mere fear of injury to permanent disability. It was pointed out that most mass-tort settlements do in fact consider those distinctions and typically provide a grid of different compensation levels for different levels of injury. They also establish some sort of due process arrangements for making the awards.

The recent ALI principles of aggregate litigation deal with certification of a settlement class and provide that a settlement class does not have to meet the standards for a litigation class. They specify the various fairness factors that must be applied to settlements and address second opt-outs and objectors. It was recommended that the civil advisory rules committee review the ALI deliberations to see whether any of the proposals it considered would be suitable for a federal rule change.

It was reported that the ALI also had taken a hard look at *cy-près* cases. Its principles of aggregate litigation create a presumption that undistributed money is given to the class. If there is a *cy-près* issue, it is normally because it is difficult to distribute the money, and a recipient or recipients must be selected that mirrors the purpose of the class.

Although just one part of the larger ALI project to address settlement classes, the *cy-près* portion of the new principles has been cited more often than all other provisions of the principles combined. It has recently been adopted as the law of a federal circuit and cited by two other circuits. A panelist recommended that if the advisory committee decides to proceed with amendments to address settlement classes, *cy-près* should be an important component of them.

Role of the state attorneys general in class settlements

It was pointed out that the attorneys general of the states review class-action settlements carefully and play a useful and appropriate role. The attorneys general have a sharing arrangement and work well together in reviewing settlements and taking action where appropriate.

Under CAFA a defendant has to give notice of a settlement to the attorneys general of the affected states within 90 days. After the notice, the lawyers may receive calls from a group of attorneys general inquiring into the facts and details of the case and the settlement. They are also often asked to present supporting information to justify their fees. In addition, when a truly abusive settlement is announced, law professors, concerned lawyers who may have had competing cases, as well as the attorneys general, normally come forward to object.

It was agreed that the impact of the efforts of the attorneys general has been to raise the bar generally for negotiating and presenting settlements. Courts, moreover, are very conscious in overseeing how much money is distributed to the class, how soon it is distributed, and how much the lawyers receive in fees.

In light of the effectiveness of the review of settlements by the attorneys general, the panel was asked whether there is still a need for Rule 23(e)'s requirement that the presiding judge review and approve all settlements. The panelists replied that judicial supervision is still appropriate and pointed out that the attorneys general do not intervene in every case.

4. COMPETING CLASSES AND COUNSEL

Duplication of efforts

A panelist pointed to the problems arising when many different counsel file similar class actions, as often occurs under the federal anti-trust laws. Historically, the cases have been coordinated by having the Multidistrict Litigation Panel sweep them into a single proceeding for pretrial purposes. Recently, though, lawyers for both plaintiffs and defendants have been invoking the "first-filed" rule. Thus, if the defendants have no objection to the location of the first-filed case, their lawyers file motions to stay or dismiss all other class actions, and the matter never reaches the MDL panel. Likewise, plaintiffs who file the first case defend their turf by filing motions to stay or dismiss all later cases.

It was reported that law firms filing class-action cases have a significant problem in controlling the work of other, competing lawyers. When a law firm representing a class of plaintiffs reaches the point of resolving the case with the defendants, it is often

confronted with other lawyers seeking fees for having performed unnecessary or counter-productive services. The lawyers were not asked to perform the work for the class, and their intervention may in fact be an impediment to resolution of the case. Defendants should not have to pay for the unnecessary services, nor should fees be diverted from the lawyers who actually handled the important work on the case.

It was pointed out that the Southern District of New York has developed a body of case law specifying that before class counsel is appointed, services that duplicate the work rendered by other counsel are not compensable. And after the appointment of counsel, only services performed at the direction of lead counsel are compensable. That process was said to be working effectively and might be considered for inclusion in an amended rule.

Appointment of Counsel

It was reported that Rule 23(g), part of the 2003 rule amendments, has worked very well and is beneficial for practitioners. It allows the court to appoint interim class counsel after a case has been filed to represent the class up through certification. Then at certification the court decides whom to appoint as class counsel. There is some question, though, as to whether the rule applies when there is just one case.

A panelist said that Rule 23(g) should be applied early and often, for it is essential for the courts to control the appointment of counsel and the payment of attorney fees. In many CAFA cases, for example, a lawyer must negotiate with other lawyers who have filed duplicative cases in order to reach agreement on the hard policy decisions on how best to frame the case to achieve court certification. It leads to a good deal of tactical behavior among counsel that has little to do with the presentation of the case for certification. To make those hard policy decisions, he said, it is important to have only one lead lawyer, or maybe two lawyers, in charge of the case. Better outcomes are reached when a court asserts strong control at the front end of a case, and Rule 23(g) is the perfect vehicle to achieve that control.

A panelist said that when there is an MDL proceeding, which brings many class actions together, some courts forgo Rule 23(g) and rely on their inherent authority and do one of two things. On the one hand, they may instruct the counsel of all the many overlapping cases that they should get together and file a consolidated complaint that is, in effect, an amalgam of all the actions. Usually, as a part of that process, a management team emerges to take responsibility for the new complaint, which essentially initiates a new action. On the other hand, where there are many single-state actions in the MDL proceeding, the cases will not be combined because each state wants to stand on its own. Typically a liaison counsel is appointed by the court to bring all the counsel together. He added that counsel are not usually brought together for fee-sharing purposes, although they generally have made some arrangements on their own.

Federal-State coordination

Judge Rosenthal noted that CAFA has increased the number of federal class actions and affected the nature and extent of federal-state issues. She asked whether the pre-CAFA problems have abated and whether Rule 23 is adequate in dealing with current federal-state coordination issues.

It was agreed that CAFA is working much as its proponents intended. Cases with interstate implications are migrating to the federal courts, while those involving local controversies remain in the state courts.

A panelist said that the remaining coordination problems arise mostly in one state. When there is a multi-state controversy after CAFA, most class actions will be filed in the federal courts. But if a group of plaintiffs live in the same state as the defendant, their class action will be heard in the state courts. He said that it is common to have a national MDL proceeding that consolidates class actions proceedings for all the federal cases, except those in one state. In that state, there will be a parallel class action in the state courts for local residents. Despite the separate proceedings, coordination normally occurs among counsel and the courts.

The panelists noted that the federal MDL judges have become very proficient in handling MDL proceedings and in reaching out to work cooperatively with the state courts in mass-tort cases. They added that state court judges have their own difficult issues to resolve, and coordination with their federal colleagues has been very beneficial.

CONCLUSIONS

Judge Rosenthal summarized the various concerns voiced by the panelists and asked each to pick the single most promising potential rule amendment that would have a beneficial impact on class-action practice.

Front-loading of cases

One panelist cited the front-loading of cases after *Hydrogen Peroxide* as an important issue that needs to be addressed. He suggested drafting a rule to give the parties and the courts more guidance on exactly what information a plaintiff must produce for class certification. The parties, he said, are uncertain about the impact of all the recent cases. They want an early ruling on class certification, but they also want to avoid discovery costs and prefer to continue with some form of bifurcated discovery.

Class definition

Another panelist suggested a rule that revisits the issue of predominance and acknowledges that most cases appropriate for class adjudication in fact have individual issues. To pretend that such is not the case, he said, results in a waste of time and much unproductive behavior. There is, moreover, a difficult intersection among several class-definition issues, including the current ambiguity over issues classes under Rule 23(c)(4), the use of (b)(2)-(b)(3) hybrid classes, certification of settlement-only classes, and handling (b)(3) classes that have some individual issues with bifurcated liability and damages.

Rather than having an “all or nothing” approach to certification based on whether common issues predominate or not, the committee might prepare a rule that gives the courts direction and discretion in class-actions that have individual issues. As a starting point, he suggested examining the case law on issues-classes under Rule 23(c)(4). A wide variety of cases, he said, can be adjudicated very effectively on a class basis. But many of the most important – those where group adjudication will confer the most social benefit – will likely have individual issues as well as common issues. He also suggested developing a rule that is flexible enough to accommodate a lower bar for certification of classes for settlement purposes.

Settlement classes

Another panelist’s choice was for a distinct settlement-class rule. It might be similar to the advisory committee’s proposed amendments to Rule 23(b)(4) in the 1990s. Regardless of the details of the rule, though, it should contain a specific provision that creates a clear basis for a district court to approve and supervise mass-tort settlements under Rule 23.

NEXT MEETING

The committee will hold its next meeting on Monday and Tuesday, June 11 and 12, 2012, in Washington, D.C.

Respectfully submitted,

Peter G. McCabe,
Secretary

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**REPORT OF THE PROCEEDINGS
OF THE JUDICIAL CONFERENCE
OF THE UNITED STATES**

September 13, 2011

The Judicial Conference of the United States convened in Washington, D.C., on September 13, 2011, pursuant to the call of the Chief Justice of the United States issued under 28 U.S.C. § 331. The Chief Justice presided, and the following members of the Conference were present:

First Circuit:

Chief Judge Sandra L. Lynch
Chief Judge Mark L. Wolf,
District of Massachusetts

Second Circuit:

Chief Judge Dennis Jacobs
Chief Judge Carol Bagley Amon,
Eastern District of New York

Third Circuit:

Chief Judge Theodore A. McKee
Judge Harvey Bartle III,
Eastern District of Pennsylvania

Fourth Circuit:

Chief Judge William B. Traxler, Jr.
Judge James P. Jones,
Western District of Virginia

Fifth Circuit:

Chief Judge Edith Hollan Jones
Chief Judge Sarah S. Vance,
Eastern District of Louisiana

Sixth Circuit:

Chief Judge Alice M. Batchelder
Judge Thomas A. Varlan,
Eastern District of Tennessee

Seventh Circuit:

Chief Judge Frank H. Easterbrook
Chief Judge Richard L. Young,
Southern District of Indiana

Eighth Circuit:

Chief Judge William Jay Riley
Judge Rodney W. Sippel,
Eastern District of Missouri

Ninth Circuit:

Chief Judge Alex Kozinski
Judge Robert S. Lasnik,
Western District of Washington

Tenth Circuit:

Chief Judge Mary Beck Briscoe
Judge Robin J. Cauthron,
Western District of Oklahoma

Eleventh Circuit:

Chief Judge Joel F. Dubina
Judge Myron H. Thompson,
Middle District of Alabama

District of Columbia Circuit:

Chief Judge David Bryan Sentelle
Chief Judge Royce C. Lamberth,
District of Columbia

Federal Circuit:

Chief Judge Randall R. Rader

Court of International Trade:

Chief Judge Donald C. Pogue

The following Judicial Conference committee chairs attended the Conference session: Circuit Judges Julia Smith Gibbons, Michael S. Kanne, Diarmuid F. O'Scannlain, Reena Raggi (incoming chair), Jeffrey S. Sutton, and John Walker, Jr.; District Judges Robert Holmes Bell, Rosemary M. Collyer, Joy Flowers Conti, Claire V. Eagan, Sidney A. Fitzwater, Janet C. Hall, D. Brock Hornby, George H. King, Mark R. Kravitz, J. Frederick Motz, Julie A. Robinson, Lee H. Rosenthal, and George Z. Singal; and Bankruptcy Judge Eugene R. Wedoff. Bankruptcy Judge Rosemary Gambardella and Magistrate Judge Thomas C. Mummert, III, were also in attendance, and Cathy Catterson of the Ninth Circuit represented the circuit executives.

James C. Duff, Director of the Administrative Office of the United States Courts, attended the session of the Conference, as did Jill C. Sayenga, Deputy Director; William R. Burchill, Jr., Associate Director and General Counsel; Laura C. Minor, Assistant Director, and Wendy Jennis, Deputy Assistant Director, Judicial Conference Executive Secretariat; Cordia A. Strom, Assistant Director, Legislative Affairs; and David A. Sellers, Assistant Director, Public Affairs. District Judge Barbara Jacobs Rothstein, Director, and John S. Cooke, Deputy Director, as well as District Judge Jeremy D. Fogel, incoming Director, Federal Judicial Center, and District Judge Patti B. Saris, Chairman, and Judith W. Sheon, Staff Director, United States Sentencing Commission, were in attendance at the session of the Conference, as was Jeffrey P. Minear, Counselor to the Chief Justice. Scott Harris, Supreme Court Counsel, and the 2011-2012 Supreme Court Fellows also observed the Conference proceedings.

Attorney General Eric H. Holder, Jr., addressed the Conference on matters of mutual interest to the judiciary and the Department of Justice. Senators Patrick J. Leahy, Amy Klobuchar, and Jeff Sessions, and Representatives Lamar S. Smith, John S. Conyers, Jr., Howard Coble, and Steve Cohen spoke on matters pending in Congress of interest to the Conference.

REPORTS

Mr. Duff reported to the Conference on the judicial business of the courts and on matters relating to the Administrative Office (AO). Judge Rothstein spoke to the Conference about Federal Judicial Center (FJC) programs, and Judge Saris reported on Sentencing Commission activities. Judge Gibbons, Chair of the Committee on the Budget, presented a special report on the budget outlook.

EXECUTIVE COMMITTEE

RESOLUTIONS

Outgoing chairs. The Judicial Conference approved a recommendation of the Executive Committee to adopt the following resolution recognizing the substantial contributions made by the Judicial Conference committee chairs whose terms of service end in 2011:

The Judicial Conference of the United States recognizes with appreciation, respect, and admiration the following judicial officers:

HONORABLE M. MARGARET MCKEOWN
Committee on Codes of Conduct

HONORABLE JANET C. HALL
Committee on Federal-State Jurisdiction

HONORABLE BOBBY R. BALDOCK
Committee on Financial Disclosure

HONORABLE GEORGE Z. SINGAL
Committee on Judicial Resources

HONORABLE MICHAEL S. KANNE
Committee on Judicial Security

HONORABLE LEE H. ROSENTHAL
Committee on Rules of Practice and Procedure

HONORABLE MARK R. KRAVITZ

Advisory Committee on Civil Rules

HONORABLE RICHARD C. TALLMAN

Advisory Committee on Criminal Rules

Appointed as committee chairs by the Chief Justice of the United States, these outstanding jurists have played a vital role in the administration of the federal court system. These judges served with distinction as leaders of their Judicial Conference committees while, at the same time, continuing to perform their duties as judges in their own courts. They have set a standard of skilled leadership and earned our deep respect and sincere gratitude for their innumerable contributions. We acknowledge with appreciation their commitment and dedicated service to the Judicial Conference and to the entire federal judiciary.

Director of the Administrative Office. The Judicial Conference approved a recommendation of the Executive Committee to adopt the following resolution to mark the departure of James C. Duff from the position of Director of the Administrative Office of the United States Courts:

The Judicial Conference of the United States recognizes with appreciation, admiration, and respect

JAMES C. DUFF

Director of the Administrative Office
2006-2011

James C. Duff's service as the Director of the Administrative Office (AO) over the last five years is the culmination of many years of distinguished service to the federal judiciary. He began his career in the judiciary as an assistant to Chief Justice Warren E. Burger, serving from 1975-1979, while also attending law school. He returned to the judiciary in 1996 to serve for four years as the Administrative Assistant to Chief Justice William H. Rehnquist, and then again in July 2006, when he was appointed Director of the Administrative Office by Chief Justice John G. Roberts, Jr. As Director of the Administrative Office, Jim Duff has proven to be a tenacious

advocate for the judiciary and for ensuring that the American judicial system maintains its reputation for excellence.

Jim Duff devoted his tenure at the Administrative Office to his goal of making the AO the most effective service organization in government. He worked to strengthen the ties between the AO and the courts it serves by creating exchanges between AO and court staff and by ensuring that the courts have a strong voice on the AO's advisory councils and groups. He focused on teamwork and collaboration both within the AO and between the AO and the agencies with which it partners to administer the nation's judicial system. Under his leadership, the judiciary forged strong working relationships with the General Services Administration and the United States Marshals Service to ensure that the judiciary had adequate facilities to carry out its mission and to secure the safety of the judicial community.

Jim Duff has also been a powerful voice for the judiciary before Congress. By partnering strong advocacy for the judiciary's budgetary and legislative needs with equally strong emphasis on good stewardship in managing the judiciary's resources, he has made sure that the judiciary's requests to Congress are heard. He has also been a champion for maintaining the independence of the Third Branch and preserving the unique aspects of service in the federal judiciary that guarantee its ability to administer fair and impartial justice. As a key part of this effort, he has worked tirelessly to obtain fair compensation for members of the judiciary so that the courts can continue to attract the highest caliber of judges and staff. As a further part of this effort, he has worked to strengthen the judiciary's internal oversight program to ensure the public's continued confidence in the integrity of the judiciary. Under his leadership, the Committee on the Administrative Office was renamed the Committee on Audits and Administrative Office Accountability and restructured to focus on the significant areas of audit, review, and investigative assistance.

Jim Duff has led the Administrative Office during a period of great challenges – workload and security risks in the border

courts, mammoth bankruptcy cases in the wake of the 2008-2009 financial crisis, and an increasingly austere fiscal environment. His great gift as a leader is that he has faced these challenges with grace and optimism, as a consensus builder, a mediator, and a motivator. His warm personal qualities, including his humility, approachability, and sense of humor make working with Jim a true pleasure. His sharp intellect, excellent judgment, and devotion to cause make working with him an honor.

The Judicial Conference expresses its great appreciation to Jim Duff for his strong leadership and dedicated service and wishes the best to him and his family in his new undertakings.

PROFESSIONAL LIABILITY INSURANCE

The Omnibus Consolidated and Emergency Supplemental Appropriations Act for Fiscal Year 1999, Public Law No. 105-277, as amended by Public Law No. 106-58, requires the judiciary to provide reimbursement for up to one half of the cost of professional liability insurance to certain groups within the judiciary, including supervisors and managers as authorized by the Judicial Conference. In September 1999, the Conference delegated authority to court unit executives and federal public defenders to designate eligible positions in their respective units, consistent with Conference guidelines (JCUS-SEP 99, pp. 61-62, 66-67). At this session, the Conference delegated to the Director of the Administrative Office of the United States Courts, the Director of the Federal Judicial Center, and the Chair of the United States Sentencing Commission the authority to designate supervisors and managers of their respective agencies with regard to eligibility for professional liability insurance reimbursement, and provided that the authority may be re-delegated to executives or human resources officials of the respective judicial branch agencies.

JUDICIAL CONDUCT AND DISABILITY ACT

The Department of Justice has proposed legislation that would loosen the confidentiality requirements of the Judicial Conduct and Disability Act so that information developed in complaint proceedings under the Act could be disclosed to law enforcement officials if it relates to a potential criminal

offense. In July 2011, the Committee on Judicial Conduct and Disability endorsed a recommendation that the Conference support the proposal if it were modified to include protections drawn from the concept of a “reporter’s privilege.” Because the legislation was moving quickly through Congress, the Executive Committee was asked to consider the matter. On recommendation of the Committee on Judicial Conduct and Disability, the Executive Committee adopted the following position on behalf of the Conference:

The Judicial Conference supports amending the confidentiality provisions of the Judicial Conduct and Disability Act to recognize that the judiciary controls the disclosure of information developed in connection with proceedings under the Act (“Act information”) and to permit the disclosure of Act information to a law enforcement agency (a) as pertaining only to possible criminal activity and (b) subject to requirements paralleling those described in the Department of Justice’s “Policy with regard to issuance of subpoenas to members of the news media,” 28 C.F.R. § 50.10. Those requirements include that (1) there must be a compelling need for the Act information for the investigation of a crime reasonably believed to have occurred; (2) the substance of the Act information must be unavailable from other sources; (3) the requester must give reasonable and timely notice of the request and negotiate with the judiciary over the disclosure’s scope, timing, and manner; (4) the Attorney General of the United States or of the applicable state must give permission for the request; and (5) the requester must take effective precautions to prevent the disclosed Act information from being disseminated to unauthorized persons or for improper purposes.

FISCAL YEAR 2012 INTERIM FINANCIAL PLANS

Pending final congressional action on the judiciary’s appropriations for the 2012 fiscal year, the Executive Committee approved fiscal year 2012 interim financial plans for the Salaries and Expenses, Defender Services, Court Security, and Fees of Jurors and Commissioners accounts. The plans reflect many “quick hit” cost-containment items, suggested by Conference committees and others, that will significantly reduce fiscal year 2012 requirements. In approving the interim plan for the Salaries and Expenses

account, the Committee also endorsed a strategy for distributing court allotments among the court programs. In addition, the Committee affirmed that its approval of the interim plans included a determination not to allow step increases and routine promotions, and to allow other promotions only in extraordinary circumstances with approval of the Administrative Office Director, for all circuit unit, court, chambers, and defender organization staff.

MISCELLANEOUS ACTIONS

The Executive Committee —

- On recommendation of the Committee on Rules of Practice and Procedure and on behalf of the Conference, with regard to a proposed package of style amendments to the Federal Rules of Evidence approved by the Conference in September 2010 and pending before the Supreme Court, restored certain language to Rule 408(a)(1) to avoid a risk that the amendment might be interpreted as substantive, and to Rule 804(b)(4) for clarity and completeness;
- Approved final fiscal year 2011 financial plans for the Salaries and Expenses, Defender Services, Court Security, and Fees of Jurors and Commissioners accounts, as well as an allotment distribution strategy for the Salaries and Expenses account;
- Revised the policy related to the locations for Judicial Conference committee meetings to provide that meetings should be held only in hub cities and that committees that meet semi-annually must hold one of those meetings in Washington, D.C.;
- Agreed to ask every circuit to ensure that they have an up-to-date written policy in place for providing staff to senior judges and that the policy is being enforced; and
- Approved on behalf of the Conference resolutions in honor of Judge Barbara Jacobs Rothstein, who is ending her eight-year tenure as Director of the Federal Judicial Center, and William R. Burchill, Jr., who has served the judiciary for 38 years and is retiring from his position as Administrative Office Associate Director and General Counsel.

COMMITTEE ON AUDITS AND ADMINISTRATIVE OFFICE ACCOUNTABILITY

COMMITTEE ACTIVITIES

The Committee on Audits and Administrative Office Accountability reported that it received detailed briefings from three of the judiciary's independent audit firms regarding the following: cyclical financial audits of the courts and federal defender offices, audits of community defender organization grantees, audits of Chapter 7 bankruptcy trustees in bankruptcy administrator districts, and audits of debtors in Chapter 7 and Chapter 11 filings in bankruptcy administrator districts. The Committee considered ways in which the judiciary can ensure that audit issues are addressed and resolved in a timely manner, and it emphasized the importance of appropriate actions by court unit executives, chief judges and circuit judicial councils to address audit findings and recommendations. The Committee also asked the AO to focus on its follow-up efforts and to provide assistance to the courts and federal defender offices when needed. The Committee passed a resolution honoring the service of AO Director James C. Duff.

COMMITTEE ON THE ADMINISTRATION OF THE BANKRUPTCY SYSTEM

OFFICIAL DUTY STATIONS

On recommendation of the Bankruptcy Committee, and in accordance with 28 U.S.C. 152(b)(1), the Conference took the following actions with regard to official duty stations of bankruptcy judges:

- a. Approved a request from the Central District of California and the Ninth Circuit Judicial Council to designate Los Angeles as the official duty station for a vacant bankruptcy judgeship in that district; and
- b. Approved a request from the District of South Carolina and the Fourth Circuit Judicial Council to transfer the official duty station for Chief Judge John E. Waites from Columbia to Charleston.

COMMITTEE ACTIVITIES

The Committee on the Administration of the Bankruptcy System reported that it is exploring ways to more effectively use existing bankruptcy judicial resources to address severe judicial workload pressures occurring in several districts. To assist the judiciary in weathering the projected budgetary shortfall, the Committee examined multiple short- and long-term cost-containment ideas, and provided its views to the Budget Committee. In addition, the Committee informed the Committee on Court Administration and Case Management that it (a) endorses, with several qualifications, recommendations for certain inflationary fee increases; (b) recommends that the two committees work together, with assistance from the Federal Judicial Center, to study the impact and feasibility of implementing additional fees for claims transfers in bankruptcy cases and for filing publicly traded and/or mega cases; and (c) recommends approval of a proposed policy on courtroom sharing in the bankruptcy courts. The Committee also recommended that the Director approve certain reports required by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Public Law No. 111-203.

COMMITTEE ON THE BUDGET

FISCAL YEAR 2013 BUDGET REQUEST

Noting the limited funding that Congress is likely to have available in 2013 and after considering the funding levels proposed by the program committees, the Committee on the Budget recommended to the Judicial Conference a fiscal year 2013 budget request that is 3.3 percent over assumed fiscal year 2012 appropriations. This request is \$118.6 million below the funding requested by the program committees. The Conference approved the budget request subject to amendments necessary as a result of (a) new legislation, (b) actions of the Judicial Conference, or (c) any other reason the Executive Committee considers necessary and appropriate.

BUDGET DECENTRALIZATION RULES

Under existing budget decentralization rules, courts can reprogram funds among court operating funds within their own units, among court units within a judicial district, and among circuit and court of appeals units within a

judicial circuit, which allows these units to share administrative services and maximize resource utilization. However the rules do not permit reprogramming across districts or circuits or even between appellate and district units within a circuit. To achieve additional efficiencies, the Committee recommended expansion of reprogramming authority so that local funds can be reprogrammed among court units regardless of type, geographical location, or judicial district or circuit for voluntary shared services arrangements. The new reprogramming authority would be subject to the approval of the Administrative Office, with semi-annual reports provided to the Budget Committee. The Conference approved the Committee's recommendation.

COMMITTEE ACTIVITIES

The Committee on the Budget reported that it reviewed over 100 cost-containment ideas that had been generated through the Administrative Office's court advisory process as well as ideas that various Judicial Conference committees are pursuing. The Committee participated in a "summit" of committee chairs held on September 12, 2011 to discuss the significant cost-containment ideas the judiciary must consider as it faces a serious budget crisis. In addition, the Committee discussed efforts to focus its congressional outreach program on key members of the judiciary's appropriations subcommittees and to provide court-specific impacts of the fiscal year 2012 House of Representatives mark to judges and members of Congress.

COMMITTEE ON CODES OF CONDUCT

MODEL FORMS FOR WAIVER OF JUDICIAL DISQUALIFICATION

On recommendation of the Committee on Codes of Conduct, the Judicial Conference approved three versions of a Model Form for Waiver of Judicial Disqualification: one for civil pro se cases, one for other civil cases, and one for criminal cases. These forms replace a form originally adopted in September 1985, commonly known as the "remittal" form, which was used by judges to request a waiver of disqualification under Canon 3D of the Code of Conduct for United States Judges. The Conference delegated to the

Committee the authority to make technical, conforming, and non-controversial changes to the forms, as necessary.

MODEL CONFIDENTIALITY STATEMENT

The Model Confidentiality Statement (Form AO-306) is intended for use by courts and judges to promote awareness among judicial employees of their confidentiality obligations under Canon 3D of the Code of Conduct for Judicial Employees. On recommendation of the Committee, the Judicial Conference approved revisions to the Model Confidentiality Statement to reflect new developments, such as the use by judicial employees of electronic social media, and delegated to the Committee on Codes of Conduct the authority to make technical, conforming, and non-controversial changes, as necessary.

FORM FOR APPROVAL OF COMPENSATED TEACHING

Judges who wish to engage in compensated teaching are required to obtain approval from their circuit chief judge, using Form AO-304, Application for Approval of Compensated Teaching Activities. On recommendation of the Committee, the Conference approved a revised Form AO-304 to clarify that a judge may be compensated for time spent grading examinations and term papers. The Conference also delegated to the Committee on Codes of Conduct the authority to make technical, conforming, and non-controversial changes to the form, as necessary.

COMMITTEE ACTIVITIES

The Committee on Codes of Conduct reported that since its last report to the Judicial Conference in March 2011, the Committee received 19 new written inquiries and issued 19 written advisory responses. During this period, the average response time for requests was 13 days. In addition, the Committee chair responded to 135 informal inquiries, individual Committee members responded to 99 informal inquiries, and Committee counsel responded to 381 informal inquiries.

**COMMITTEE ON COURT ADMINISTRATION
AND CASE MANAGEMENT**

FEES

Miscellaneous Fees. The Judicial Conference prescribes miscellaneous fees for the courts of appeals, district courts, United States Court of Federal Claims, bankruptcy courts, and Judicial Panel on Multidistrict Litigation, pursuant to 28 U.S.C. §§ 1913, 1914, 1926, 1930, and 1932, respectively. On recommendation of the Court Administration and Case Management Committee, the Conference determined to raise many of these fees to account for inflation, as set forth below, effective November 1, 2011. These fees have not been adjusted for inflation since 2003.

Court of Appeals Miscellaneous Fee Schedule

<u>Item</u>	<u>Current Fee</u>	<u>New Fee</u>
2. Record Search	\$26	\$30
3. Certification	\$9	\$11
5. Audio Recording	\$26	\$30
6. Record Reproduction	\$71	\$83
7. Record Retrieval	\$45	\$53
8. Returned Check Fee	\$45	\$53
13. Attorney Admission Fee	\$150	\$176
Certificate of Good Standing	\$15	\$18

District Court Miscellaneous Fee Schedule

<u>Item</u>	<u>Current Fee</u>	<u>New Fee</u>
1. Document Filing/Indexing	\$39	\$46
2. Record Search	\$26	\$30
3. Certification	\$9	\$11
5. Reproduction of Proceedings	\$26	\$30
6. Microfiche	\$5	\$6

7. Record Retrieval	\$45	\$53
8. Returned Check Fee	\$45	\$53
9. Misdemeanor Appeal	\$32	\$37
10. Attorney Admission Fee	\$150	\$176
Certificate of Good Standing	\$15	\$18
13. Cuban Liberation Civil Filing Fee	\$5431	\$6355

Bankruptcy Court Miscellaneous Fee Schedule

<u>Item</u>	<u>Current Fee</u>	<u>New Fee</u>
2. Certification	\$9	\$11
Exemplification	\$18	\$21
3. Audio Recording	\$26	\$30
4. Amended Bankruptcy Schedules	\$26	\$30
5. Record Search	\$26	\$30
6. Adversary Proceeding Fee	\$250	\$293
7. Document Filing/Indexing	\$39	\$46
8. Title 11 Administrative Fee	\$39	\$46
12. Record Retrieval Fee	\$45	\$53
13. Returned Check Fee	\$45	\$53
14. Notice of Appeal Fee	\$250	\$293
19. Lift/Stay Fee	\$150	\$176

United States Court of Federal Claims Miscellaneous Fee Schedule

<u>Item</u>	<u>Current Fee</u>	<u>New Fee</u>
3. Certification	\$9	\$11
4. Attorney Admission Fee	\$150	\$176
Certificate of Good Standing	\$15	\$18

5. Sale of Monthly Listing of Court Orders and Opinions	\$19	\$22
7. Returned Check Fee	\$45	\$53
9. Audio Recording	\$26	\$30
10. Document Filing/Indexing	\$39	\$46
11. Record Retrieval Fee	\$45	\$53

Judicial Panel on Multidistrict Litigation Miscellaneous Fee Schedule

<u>Item</u>	<u>Current Fee</u>	<u>New Fee</u>
1. Record Search	\$26	\$30
2. Certification	\$9	\$11
4. Record Retrieval Fee	\$45	\$53
5. Returned Check Fee	\$45	\$53

Electronic Public Access Fees. Pursuant to statute and Judicial Conference policy, the electronic public access (EPA) fee is set to be commensurate with the costs of providing existing services and developing enhanced services. Noting that the current fee has not increased since 2005 and that for the past three fiscal years the EPA program’s obligations have exceeded its revenue, the Committee recommended that the EPA fee be increased from \$.08 to \$.10 per page. The Committee also recommended that the current waiver of fees of \$10 or less in a quarterly billing cycle be changed to \$15 or less per quarter so that 75 to 80 percent of all users would still receive fee waivers. Finally, in recognition of the current fiscal austerity for government agencies, the Committee recommended that the fee increase be suspended for local, state, and federal and government entities for a period of three years. The Conference adopted the Committee’s recommendations.

COURTROOM SHARING

Based on a comprehensive study of district courtroom usage conducted by the FJC at the Committee’s request, the Judicial Conference adopted courtroom sharing policies for senior district judges and magistrate judges in new courthouse and/or courtroom construction (JCUS-SEP 08,

pp. 10-11; JCUS-MAR 09, pp. 14-16; JCUS-SEP 09, pp. 9-11). It also asked the Committee to study the usage of bankruptcy courtrooms, and if usage levels so indicated, to develop an appropriate sharing policy for bankruptcy courtrooms (JCUS-SEP 08, pp. 10-11). At this session, following completion of the bankruptcy study, conducted for the Committee by the FJC, the Court Administration and Case Management Committee in consultation with the Bankruptcy and Space and Facilities Committees recommended a courtroom sharing policy for bankruptcy judges in new courthouse and courtroom construction, for inclusion in the *U.S. Courts Design Guide*. The Conference approved the policy as follows:

SHARING POLICY FOR BANKRUPTCY JUDGES IN NEW COURTHOUSE AND COURTROOM CONSTRUCTION

New courtrooms for bankruptcy judges will be provided as follows:

- a. In court facilities with one or two bankruptcy judges, one courtroom will be provided for each bankruptcy judge.
- b. In court facilities with three or more bankruptcy judges, one courtroom will be provided for every two bankruptcy judges. In court facilities where the application of this formula will result in a fraction (i.e., those with an odd number of bankruptcy judges), the number of courtrooms allocated will remain at the next lower whole number. In addition, one courtroom will be provided for emergency matters, such as Chapter 11 first-day hearings.

Exemption Policy

In the event this sharing arrangement would cause substantial difficulty in the secure, effective and efficient disposition of cases, a court, as a whole, with the approval of its circuit judicial council, may seek an individual exemption to this sharing policy from the Judicial Conference's Space and Facilities Committee. Such exemptions should be considered the exception and not the rule.

In order to be considered for an exemption, a court must first show that the bankruptcy judge's courtroom is in use over 75 percent of the work day for case-related purposes. Thereafter, a court should demonstrate that deviation from the basic sharing policy is necessary, based on the following:

- a. An assessment of the number and type of courtroom events anticipated to be handled by the bankruptcy judge that would indicate that sharing a courtroom would pose a significant burden on the secure, effective and efficient management of that judge's docket.
- b. An assessment of the current complement of courtrooms and their projected use in the facility and throughout the district, to reaffirm the necessity of constructing an additional courtroom.
- c. Whether a special proceedings, visiting judge, or other courtroom is available for the bankruptcy judge's use in the facility.

Many bankruptcy judges are housed in leased facilities where security concerns may arise due to the configuration of the space. Because of this unique situation, an alternative exemption to the sharing policy, notwithstanding the exemption requirements of the previous paragraph, may be considered for bankruptcy judges in leased facilities based on an assessment of the security of a bankruptcy judge's access from chambers to a shared courtroom.

RECORDS DISPOSITION SCHEDULES

Electronic records. The district court records disposition schedule for civil and criminal case files provides for the transfer of electronic records to the National Archives and Records Administration (NARA) three years after case closing. Noting that this is an inadequate amount of time to maintain the records at the court and that further study on disposition of electronic records was needed, the Committee recommended that the three-year transfer reference be removed from the schedule for civil and criminal case files. Once removed, electronic records will be considered unscheduled and can not

be disposed of until a new disposition schedule is adopted. The Conference approved the Committee's recommendation, and the schedule will be transmitted to NARA for acceptance of the change.

Criminal cases. In March 2011, the Judicial Conference approved a revised district court records disposition schedule for criminal cases that, like the schedule for civil cases, sets retention periods largely by case type (JCUS-MAR 11, p. 10). NARA published this proposed schedule for public comment. On recommendation of the Committee, which considered the public comments, the Judicial Conference approved amending the disposition schedule for criminal case files to designate additional non-trial case types – those pertaining to embezzlement, fraud, or bribery by a public official – as permanent. The schedule will be transmitted to NARA for acceptance of the change.

Bankruptcy cases. Similarly, amendments to the bankruptcy court records disposition schedule approved by the Conference in March 2011 were published by NARA for public comment. After consideration of those comments, the Committee recommended that the Judicial Conference approve amending the schedule to classify as permanent a sample of 2.5 percent of non-trial bankruptcy cases¹ and 2.5 percent of temporary adversary proceedings cases retired by each district each year. The amendments would also reduce the retention period for temporary non-trial adversary proceedings cases from 20 to 15 years after case closing. The Conference approved the Committee's recommendation, and the schedule will be transmitted to NARA for acceptance of the change.

PACER ACCESS TO CERTAIN BANKRUPTCY FILINGS

In September 2010, the Judicial Conference adopted a policy limiting public electronic access to bankruptcy records filed before December 1, 2003 that had been closed for more than one year. The policy was intended to prevent the dissemination of personal information that might be contained in documents that were filed before the judiciary's privacy policy for bankruptcy cases was fully implemented. Under the September 2010 policy, the public could access docket sheets through PACER for these older cases, but full

¹This would replace a provision in the existing schedule that designates as permanent 25 percent of non-trial bankruptcy cases retired by nine judicial districts, selected each year on a rotational basis.

documents would be available only at clerks' offices (JCUS-SEP 10, pp. 12-13). At this session, on recommendation of the Committee, the Conference adopted an exception to that policy for counsel or parties who are developing potential class actions, as follows:

Access may be granted pursuant to a judicial finding that such access is necessary for determining class member certification, subject to the following limitations to be set forth in the judge's order:

- a. Access is limited to a particular identified list of cases or a specified universe of cases (e.g., lift stay motions filed by a specified lender in a limited period of time);
- b. Time limitations on the period of access (corresponding to the scope and number of potential cases involved);
- c. Inclusion of a verified statement of counsel that access would be solely for the purpose of determining class member status and that counsel is aware that unauthorized use is prohibited and may result in sanctions; and
- d. Any other conditions, limitations, or direction that the judge deems necessary under the specific circumstances of the request.

SEALING AN ENTIRE CIVIL CASE FILE

On recommendation of the Committee on Court Administration and Case Management, in consultation with the Committee on Rules of Practice and Procedure, the Judicial Conference adopted the following standards for sealing an entire civil case:

An entire civil case file should only be sealed consistent with the following criteria:

- a. Sealing the entire civil case file is required by statute or rule or justified by a showing of extraordinary circumstances and the absence of narrower feasible and

effective alternatives (such as sealing discrete documents or redacting information), so that sealing an entire case file is a last resort;

- b. A judge makes or promptly reviews the decision to seal a civil case;
- c. Any order sealing a civil case contains findings justifying the sealing of the entire case, unless the case is required to be sealed by statute or rule; and
- d. The seal is lifted when the reason for sealing has ended.

COMMITTEE ACTIVITIES

The Committee on Court Administration and Case Management reported that it devoted a significant amount of its June 2011 meeting to cost-containment initiatives for fiscal year 2012 and beyond, and considered more than 40 different ideas and proposals. The Committee also discussed several policy issues related to the development of the Next Generation CM/ECF system to ensure that the system's requirements are synchronized across various court units and court types. The Committee endorsed 14 courts to participate in the pilot project on cameras in the courtroom, which began on July 18, 2011 and selected 14 courts to participate in a 10-year, statutorily required pilot project regarding the assignment of patent cases in U.S. district courts, to begin on September 19, 2011.

COMMITTEE ON CRIMINAL LAW

STANDARD CONDITIONS OF PROBATION AND SUPERVISED RELEASE

A judgment in a criminal case as well as other national forms contains a set of standard conditions that are automatically imposed in probation and supervised release sentences, including one condition that requires offenders to submit a written report to the probation officer within the first five days of each month. However, such reports may not be necessary in all cases because the information is available from other means, and in those cases in which reports are needed, spreading out the submission dates would provide officers with

greater flexibility to manage their caseloads. Noting this, the Committee recommended that the condition be amended in national forms (AO forms 7A, 7A-S, 245, 245B-D, 245I and 246) to state that the defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer. The Conference adopted the Committee's recommendation.

RESEARCH AND DATA SHARING

The Administrative Office collects statistical and other information concerning the work of probation officers pursuant to statute and Judicial Conference policy. Criminal justice researchers frequently request this information, as do executive branch agencies such as the Bureau of Prisons. On recommendation of the Committee, the Conference authorized the Director of the AO to adopt proposed regulations governing the disclosure of federal probation system data to outside entities that establish procedures for handling requests for such data, including factors to consider in evaluating the merits of a request and conditions to be imposed to ensure the continued confidentiality of information released.

SUPERVISION OF CONDITIONALLY RELEASED SEXUALLY DANGEROUS PERSONS

The Committee recommended that the Judicial Conference seek legislation that would amend 18 U.S.C. § 3154 (Functions and powers relating to pretrial services) and § 3603 (Duties of probation officers) to specifically authorize probation and pretrial services officers to supervise sexually dangerous persons who have been conditionally released following a period of civil commitment pursuant to 18 U.S.C. § 4248. While §§ 3154 and 3603 both contain a general provision authorizing officers to perform other duties as assigned by the courts, providing explicit authorization will remove any ambiguity about an officer's role and allow for the development of standardized policies and procedures specifically designed for this population. The Conference adopted the Committee's recommendation.

COMMITTEE ACTIVITIES

The Committee on Criminal Law reported that it reviewed and endorsed a new sex offender management procedures manual for probation and pretrial services officers. The manual provides detailed instructions on how officers should investigate and supervise persons charged with or convicted of a sex offense. The Committee also considered the U.S. Sentencing Commission's proposed amendments to the sentencing guidelines manual and submitted testimony supporting the Commission's proposal to apply retroactively the amendments to the drug quantity table that implement the Fair Sentencing Act of 2010. In addition, the Committee discussed and submitted recommendations on various cost-containment proposals under consideration for fiscal years 2012 and 2013.

COMMITTEE ON DEFENDER SERVICES

CRIMINAL JUSTICE ACT GUIDELINES

The Committee on Defender Services recommended revisions to chapters 2 and 3 of the Criminal Justice Act Guidelines (*Guide to Judiciary Policy*, Vol. 7A) to provide principles and procedures on the proration of claims by attorneys and other service providers and on the billing of interpreting services. The Judicial Conference approved the recommendation.

COMMITTEE ACTIVITIES

The Committee on Defender Services reviewed the status of its long-range cost-containment initiatives (including the recently completed circuit case-budgeting pilot project and the ongoing federal defender organization staffing study) and received a report on the shorter-term cost-reduction efforts undertaken over the past six months by strategic planning groups and by program administrators. The Committee reviewed additional short- and longer-term cost-containment ideas that were suggested for its consideration and identified possible new areas to explore. It approved a reduced training plan for FY 2012, which is limited to the FY 2010 Committee-authorized level.

COMMITTEE ON FEDERAL-STATE JURISDICTION

COMMITTEE ACTIVITIES

The Committee on Federal-State Jurisdiction reported that it was updated on the progress of patent reform legislation and discussed jurisdictional provisions in the proposed legislation. The Committee also considered a proposal to amend 28 U.S.C. § 1447(d) to provide for a right of appeal from any order remanding an action to state court and determined not to support a change to existing law. The Committee received a report on discussions involving the Judicial Panel on Multidistrict Litigation, the Federal Judicial Center, the Conference of Chief Justices, and the National Center for State Courts concerning means of promoting cooperation between federal and state judges presiding over related cases filed in multiple jurisdictions.

COMMITTEE ON FINANCIAL DISCLOSURE

COMMITTEE ACTIVITIES

The Committee on Financial Disclosure reported that on March 29, 2011, it launched the Financial Disclosure Online Reporting System (FiDO). This transition from paper to an exclusively electronic format should significantly reduce judiciary expenses related to the printing, mailing, processing, and records management of financial disclosure reports. As of July 8, 2011, the Committee had received 3,990 financial disclosure reports and certifications for calendar year 2010, including 1,246 reports and certifications from Supreme Court justices, Article III judges, and judicial officers of special courts; 327 reports from bankruptcy judges; 534 reports from magistrate judges; and 1,883 reports from judicial employees.

COMMITTEE ON INFORMATION TECHNOLOGY

LONG RANGE PLAN FOR INFORMATION TECHNOLOGY

Pursuant to 28 U.S.C. § 612 and on recommendation of the Committee on Information Technology, the Judicial Conference approved the fiscal year 2012 update to the *Long Range Plan for Information Technology in the*

Federal Judiciary. Funds for the judiciary's information technology program will be spent in accordance with this plan.

COMMITTEE ACTIVITIES

The Committee on Information Technology reported that it endorsed the Judiciary Information Security Framework, which provides a high-level approach to information security risk management, and strongly encourages its use by all courts. The Committee concurred in the recommendation of the Committee on Court Administration and Case Management to raise the judiciary's electronic public access user fee (*see* "Miscellaneous Fees," p. 16). The Committee also discussed a number of initiatives that both strengthen the judiciary's information technology program and promote cost containment, such as the national telephone service on the judiciary's new communications network.

COMMITTEE ON INTERCIRCUIT ASSIGNMENTS

COMMITTEE ACTIVITIES

The Committee on Intercircuit Assignments reported that 117 intercircuit assignments were undertaken by 90 Article III judges from January 1, 2011, to June 30, 2011. During this time, the Committee continued to disseminate information about intercircuit assignments and aided courts requesting assistance by identifying and obtaining the assistance of judges willing to take assignments.

COMMITTEE ON INTERNATIONAL JUDICIAL RELATIONS

COMMITTEE ACTIVITIES

The Committee on International Judicial Relations reported on its involvement in rule of law and judicial reform programs throughout the world. The Committee also reported on its continued participation in the rule of law component of the legislative branch's Open World Program for jurists from Russia, Ukraine, Georgia, Kazakhstan, and Moldova. The Committee received briefings about international rule of law activities involving federal public

defenders, U.S. court administrators, the Federal Judicial Center, the U.S. Department of State, officials from several embassies, the U.S. Department of Justice, the U.S. Agency for International Development, the U.S. Patent and Trademark Office, the World Bank, and the International Association of Judges. In addition, the Committee reported on foreign delegations of jurists and judicial personnel briefed at the Administrative Office.

COMMITTEE ON THE JUDICIAL BRANCH

JUDGES' TRAVEL REGULATIONS

Senior Judges on National Courts. The Committee on the Judicial Branch recommended that the Judicial Conference amend section 220.30.10(g)(3)(B) of the Travel Regulations for United States Justices and Judges, *Guide to Judiciary Policy (Guide)*, Vol. 19, to provide that if a senior judge is commissioned to a court of national jurisdiction and the judge intends to travel a distance of more than 75 miles from his or her residence to hold court or to transact official business for that court and to claim reimbursement for any expenses associated with that travel, such travel must be authorized by the chief judge of the court. The Conference adopted the Committee's recommendation.

Senior Judges' Commuting-Type Expenses. To make consistent certain travel authorization procedures for senior judges, the Committee recommended, and the Conference approved, an amendment to section 220.30.10(g)(3)(A) of the judges' travel regulations, *Guide*, Vol. 19, to require the authorization of the circuit judicial council rather than the chief circuit judge when a senior judge relocates his or her residence outside the district or circuit of the judge's original commission and intends to seek reimbursement for travel back to the court for official business.

Actual Expense Reimbursement for Meals. On recommendation of the Committee and after discussion, the Judicial Conference approved amendments to sections 250.20.20, 250.20.30, 250.20.50, 250.20.60, and 250.40.20 of the judges' travel regulations, *Guide*, Vol. 19, to limit judges' actual expense reimbursement for meals in connection with official travel, and provided that the limits will be subject to annual and automatic adjustment for inflation in the same manner as the judges' alternative maximum subsistence allowance.

COMMITTEE ACTIVITIES

The Committee on the Judicial Branch reported that it discussed in detail the problem of the recruitment and retention of federal judges. Salary stagnation and salary inversion continue to threaten the federal judiciary's ability to recruit and retain judges. The Committee also reported that it is organizing a program with the Freedom Forum and its First Amendment Center that will bring together a small group of judges and journalism educators to support continued and enhanced education on the coverage of the courts in journalism schools.

COMMITTEE ON JUDICIAL CONDUCT AND DISABILITY

COMMITTEE ACTIVITIES

The Committee on Judicial Conduct and Disability reported that it asked the Executive Committee to act on behalf of the Conference with regard to pending legislation proposed by the Department of Justice that would loosen the confidentiality requirements of the Judicial Conduct and Disability Act so that information developed in proceedings under the Act could be disclosed to law enforcement officers if it related to a potential criminal offense (*see supra*, "Judicial Conduct and Disability Act," pp. 7-8).

COMMITTEE ON JUDICIAL RESOURCES

EXECUTIVE GRADING PROCESS

Court-sizing formulas are used to determine the appropriate grades and salaries of district and bankruptcy clerks of court and chief probation and pretrial services officers. On recommendation of the Committee on Judicial Resources, the Conference agreed to approve a new grading process for determining the target grades for these executives. The new executive grading process consists of two steps: a) applying a formula that includes a constant factor for core competencies that accounts for 70 percent of the formula and

weighted factors that account for 30 percent of the formula;² and b) assigning target grades for these executive positions in Judiciary Salary Plan (JSP) grades 16, 17, and 18, using the 2011 distribution of JSP target grades.

SAVED PAY

The saved pay policy provides salary protection to court employees downgraded through no fault of their own, e.g., when a chambers staff member takes a lower graded position within the judiciary as result of the death of a federal judge. The employee receives the same rate of basic pay that was payable immediately before the reduction to the lower grade or classification level, 50 percent of each employment cost index (ECI) adjustment, and 100 percent of any applicable locality pay increase until the employee's saved rate of pay can be matched in the lower grade or classification level. Noting that the policy can have a negative effect on morale when two employees performing the same job earn different rates of pay and that elimination of the policy would help to contain costs, the Committee recommended that the Judicial Conference eliminate the saved pay policy for the courts, but grandfather for two years any employees currently in a saved pay status under the policy. After two years, the Administrative Office would place those employees who remained in a saved pay status at the top step of their respective grade or classification level. The Conference adopted the Committee's recommendation. The saved pay policy for federal public defender organization personnel is not affected by this change.

TEMPORARY PAY ADJUSTMENTS

An appointing authority may grant a temporary pay adjustment to a non-supervisory Court Personnel System (CPS) employee temporarily assigned leadership responsibilities. Currently, that pay adjustment is set at the lowest step in the employee's current classification level that exceeds the employee's existing rate of pay by three percent. At the time this pay rate was established,

²For district and bankruptcy court clerks' offices, the weighted factors include the number of authorized judgeships (15 percent), the number of authorized staff at 100 percent of formula (10 percent), and total allotments (5 percent). For probation and pretrial services offices, the weighted factors include the number of authorized staff at 100 percent of formula (15 percent) and total allotments (15 percent).

the CPS promotion rate was a flat rate of six percent. Since that time, the CPS promotion rate has been changed to be a range from not less than one percent to not more than six percent, to be applied on a uniform, unit-wide basis. On recommendation of the Committee, the Conference agreed to amend the pay rate for CPS temporary pay adjustments from a flat rate of three percent to a range from one to three percent, to be determined by the appointing authority on a case-by-case basis as set forth below:

An appointing officer may provide a temporary pay adjustment in the full performance range to a Court Personnel System employee who is temporarily in charge of a work project with other employees. A temporary pay adjustment provides for a temporary pay increase within the employee's existing classification level at the lowest step which equals or exceeds the employee's existing rate of pay by anywhere from one to three percent, at the appointing officer's discretion. A temporary pay adjustment may not exceed 52 weeks without re-authorization.

TIME-OFF AWARDS

Time-off awards allow excused absences with pay (*Guide*, Vol. 12, Ch. 8, § 830.35(c)). Considering that the judiciary bases an intermittent employee's pay on hours actually worked with no provision for paid time off, the Committee recommended that the Judicial Conference approve a clarification to the policy for granting awards to court employees to prohibit time-off awards for intermittent employees. The Conference adopted the Committee's recommendation.

TELEWORK

In March 1999, the Judicial Conference adopted a telework policy for the courts that provided for voluntary employee participation in telework (JCUS-MAR 99, p. 28). In 2004, that policy was extended to federal public defender organizations (JCUS-SEP 04, p. 8). In order for courts and federal public defender organizations to have employees available to telework during a continuity of operations (COOP) event or similar emergency situation, on recommendation of the Committee, the Judicial Conference approved a revision to the telework policy to state that a court or federal public defender

organization, at its discretion, may require eligible employees to telework as needed during a continuity of operations event, inclement weather, or similar situation (*Guide*, Vol. 12, Ch. 10, § 1020.20(a)).

TYPE II CHIEF DEPUTY CLERK

In September 2004, the Judicial Conference authorized any unit in a district or bankruptcy court with ten or more authorized judgeships to establish a second JSP-16 Type II deputy position upon notification to the Administrative Office, to be funded with the court's decentralized funds (JCUS-SEP 04, p. 23). The District of Idaho has requested a JSP-16 Type II chief deputy clerk for its consolidated bankruptcy and district court clerk's office even though it does not qualify for one under the policy, citing special circumstances, including the broad span of operational knowledge required in a consolidated court and geographic challenges. The court requested funding, noting that as a small court it does not have the salary flexibility to pay for an additional executive salary. On recommendation of the Committee, the Judicial Conference authorized a second fully funded JSP-16 Type II chief deputy clerk position for the District of Idaho, subject to any budget-balancing reductions.

COURT INTERPRETER POSITION

Using established criteria, the Committee recommended, and the Conference approved, one additional Spanish staff court interpreter position beginning in fiscal year 2013 for the District of Arizona based on the Spanish language interpreting workload in this court. The Conference also approved accelerated funding in fiscal year 2012 for that position.

REALTIME TRANSCRIPT FEES

In March 1999, the Judicial Conference amended the maximum realtime transcript rate policy to include a requirement that a litigant who orders realtime services in the courtroom must also purchase, at the regular rates, a certified transcript (original or copy) of the same pages that were received as realtime unedited transcript (JCUS-MAR 99, p. 25). The policy was adopted to address concerns about the unprofitability of providing realtime services and about the circulation of unedited transcripts that are not backed up

by certified transcripts. At this session, the Committee noted that the requirement has resulted in an increased administrative burden to litigants and court staff, and serves as a disincentive for litigants to use realtime services. Moreover the concerns which led to development of the policy can be addressed through other means. On recommendation of the Committee, the Judicial Conference agreed to eliminate the requirement effective January 1, 2012.

COMMITTEE ACTIVITIES

The Committee on Judicial Resources reported that it submitted to the Committee on the Budget a fiscal year 2013 budget request derived from existing work measurement data using alternative staffing formulas calculated at the 70 percent level, which would result in a 3.9 percent increase over the assumed 2012 funding levels. The Committee considered short-term and longer-term cost-containment ideas and provided its recommendations to the Budget Committee. The Committee supported requests from the Administrative Office's Bankruptcy and District Clerks Advisory Groups to accelerate by one year the delivery dates of the staffing formula updates for bankruptcy and district clerks' offices. Those updates will now be due to the Committee in June 2012 and June 2013, respectively.

COMMITTEE ON JUDICIAL SECURITY

COMMITTEE ACTIVITIES

The Committee on Judicial Security reported that it decided to convene a cost-containment task force comprised of members of the Committee and the U.S. Marshals Service (USMS) staff to gather data and identify cost-containment initiatives in the short, medium, and long term based on the projected budgetary shortfalls in FY 2012 and beyond. The Committee was also briefed on the status of the perimeter security pilot program at seven courthouses where the USMS has assumed responsibility for perimeter security guarding and equipment. The Committee was informed that a follow-up report on the program would be sent to Congress, and was advised that further congressional direction is required to define the future of the program.

**COMMITTEE ON THE ADMINISTRATION
OF THE MAGISTRATE JUDGES SYSTEM**

CHANGES IN MAGISTRATE JUDGE POSITIONS

After consideration of the report of the Committee on the Administration of the Magistrate Judges System and the recommendations of the Director of the Administrative Office, the district courts, and the judicial councils of the circuits, and after discussion on the Conference floor on whether to authorize three new full-time magistrate judge positions, the Judicial Conference approved the following recommendations that involved courts that had requested new magistrate judge positions. Changes with a budgetary impact are to be effective when appropriated funds are available.

THIRD CIRCUIT

District of Delaware

1. Authorized an additional full-time magistrate judge position at Wilmington; and
2. Made no other change in the number, location, or arrangements of the magistrate judge positions in the district.

FOURTH CIRCUIT

Middle District of North Carolina

1. Authorized an additional full-time magistrate judge position for the district, to be located at Durham; and
2. Made no other change in the number, locations, or arrangements of the magistrate judge positions in the district.

ELEVENTH CIRCUIT

Middle District of Florida

1. Authorized an additional full-time magistrate judge position at Orlando or Tampa; and

2. Made no other change in the number, locations, or arrangements of the magistrate judge positions in the district.

Southern District of Georgia

Made no change in the number, locations, or arrangements of the magistrate judge positions in the district.

The Conference also agreed to make no change in the number, locations, salaries, or arrangements of the magistrate judge positions in the Western District of North Carolina; Middle District of Louisiana; Eastern District of Michigan; District of Alaska; District of Idaho; and Northern District of Alabama.

ACCELERATED FUNDING

On recommendation of the Committee and after discussion on the Conference floor, the Judicial Conference agreed to designate for accelerated funding, effective April 1, 2012, the new full-time magistrate judge positions at Wilmington in the District of Delaware, Durham in the Middle District of North Carolina, and Orlando or Tampa in the Middle District of Florida.

MAGISTRATE JUDGE POSITION VACANCY

The Middle District of Louisiana requested permission to fill an upcoming magistrate judge position vacancy at Baton Rouge. Noting the decline in the court's per judgeship caseload since a third magistrate judge was appointed, the Committee recommended that the Conference not authorize the district to fill the position when it becomes vacant in May 2012. The Conference adopted the Committee's recommendation and declined to approve filling the vacancy.

COMMITTEE ACTIVITIES

The Committee on the Administration of the Magistrate Judges System reported that it considered short-term and longer-term cost-containment ideas. In response to one short-term idea identified for its consideration, involving reducing or discontinuing staff travel to conduct magistrate judge surveys, the

Committee confirmed the value of staff visits to the courts and agreed that the benefits from visits to the courts exceed the relatively small cost. For the longer term, the Committee agreed to explore cost-containment ideas for the magistrate judge recall program and to work with other committees on various other initiatives.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

FEDERAL RULES OF BANKRUPTCY PROCEDURE

The Committee on Rules of Practice and Procedure submitted to the Judicial Conference proposed amendments to Bankruptcy Rules 1007 (Lists, Schedules, Statements, and Other Documents; Time Limits), 2015 (Duty to Keep Records, Make Reports, and Give Notice of Case or Change of Status), 3001 (Proof of Claim), 7054 (Judgments; Costs), and 7056 (Summary Judgment), together with committee notes explaining their purpose and intent. The Judicial Conference approved the proposed rules amendments and authorized their transmission to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

The Committee also submitted to the Judicial Conference proposed revisions to Official Forms 1 (Voluntary Petition), 9A–9I (Notices of Commencement of Case Under the Bankruptcy Code, Meeting of Creditors, and Deadlines), 10 (Proof of Claim), and 25A (Plan of Reorganization in Small Business Case Under Chapter 11) and new Official Forms 10, Attachment A (Mortgage Proof of Claim), 10, Supplement 1 (Notice of Mortgage Payment Change), and 10, Supplement 2 (Notice of Postpetition Mortgage Fees, Expenses, and Charges). The Judicial Conference approved the revised forms to take effect on December 1, 2011.

FEDERAL RULES OF CRIMINAL PROCEDURE

The Committee on Rules of Practice and Procedure submitted to the Judicial Conference proposed amendments to Criminal Rules 5 (Initial Appearance), 15 (Depositions), and 58 (Petty Offenses and Other Misdemeanors), and proposed new Rule 37 (Indicative Ruling on a Motion for Relief That is Barred by a Pending Appeal), together with committee notes explaining their purpose and intent. The Judicial Conference approved the

proposed rules amendments and new rule and authorized their transmission to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

PROCEDURES GOVERNING THE WORK OF THE RULES COMMITTEE

On recommendation of the Committee, the Judicial Conference approved revised *Procedures for the Judicial Conference's Committee on Rules of Practice and Procedure and Its Advisory Rules Committees*. The revised procedures take into account the impact of the internet on committee functions, propose ways to make the rules process more efficient, and follow the style protocols used in drafting the rules.

COMMITTEE ACTIVITIES

The Committee on Rules of Practice and Procedure reported that it approved publishing for public comment proposed amendments to Appellate Rules 13, 14, 24, 28, and 28.1, and Form 4; Bankruptcy Rules 1007, 3007, 5009, and 9006, and Forms 6C, 7, 22A, and 22C; Civil Rules 37 and 45; Criminal Rules 11, 12, and 34; and Evidence Rule 803. Among the proposals is an amendment to Civil Rule 45, governing both trial and discovery subpoenas, to make the rule clearer and easier to apply; and a proposed amendment to Criminal Rule 12 to address motions that must be raised before trial and the consequences of untimely motions. The proposals were published in August 2011; the comment period closes on February 15, 2012.

COMMITTEE ON SPACE AND FACILITIES

FIVE-YEAR COURTHOUSE PROJECT PLAN

The Committee on Space and Facilities recommended that the Judicial Conference approve the *Five-Year Courthouse Project Plan for Fiscal Years 2013-2017* and grant the Committee authority to remove the Los Angeles project from the *Plan* when appropriate. The Committee indicated that the Los Angeles project requires no additional funding and therefore should be removed from the *Plan* once a contract for design and construction has been awarded. The Conference approved the Committee's recommendation.

FEASIBILITY STUDY

A new courthouse project has been authorized and is underway in Salt Lake City, Utah. The Committee recommended, and the Conference approved, requesting a General Services Administration (GSA) feasibility study for the backfill of the existing Moss Courthouse in Salt Lake City, contingent upon final court approval of the District of Utah long-range facilities plan.

U.S. COURTS DESIGN GUIDE

Over the last several years, the Judicial Conference has adopted a number of policies that affect the planning and design of new courthouses and courtrooms, including asset management planning (a new long-range facilities planning methodology), the circuit rent budget (CRB) program, and courtroom sharing policies for senior and magistrate judges. These policies, as well as the new planning approach discussed immediately below, supersede a number of factors and planning assumptions in the *U. S. Courts Design Guide*. On recommendation of the Committee, the Judicial Conference agreed to update the *Design Guide* to reflect the changes made by these policies.

PLANNING THE SIZE OF NEW COURTHOUSES

On recommendation of the Committee, the Judicial Conference agreed to adopt a new approach to planning the size of new courthouses that reassesses the manner in which space is planned for projected judgeships. The approach includes the following assumptions:

New courthouse construction projects will be designed to provide space for the existing circuit, district, bankruptcy and magistrate judges (including vacant judgeship positions), and senior judges, as well as space to account for judges who will be eligible for senior status within the 10-year planning period for the project consistent with Judicial Conference policy and congressional direction.

Space for Judicial Conference-approved judgeships not yet created by Congress will be taken into consideration at the design concept phase in that the architects will show how space for these judgeships could fit into the design. Architects will not, however, complete a detailed design that includes space for these judgeships because they have not yet been created by Congress. Should the positions be created by Congress during the design phase, the design documents would be amended to include the new positions and space would be constructed for them.

Space for judgeships that the judiciary projects will be needed, but that have not yet been recommended to the Judicial Conference for approval, will be considered by GSA as part of future expansion plans for the building. Space will not be designed for these projected positions.

COMMITTEE ACTIVITIES

The Committee on Space and Facilities reported that with regard to the circuit rent budget program, it approved 17 Component B requests, and that due to the delay in the approval of a fiscal year 2011 budget, circuits will be allowed to extend the availability of fiscal year 2011 Component C funding through FY 2013 on a one-time basis. The Committee discussed potential short- and long-term cost-containment initiatives involving the space and facilities program, and determined to gather the data necessary to quantify the cost savings and determine the operational impact of the proposed initiatives. In addition, the Committee was updated on the efforts underway to develop an implementation strategy for the Capital Security Program, should that program be funded by Congress in FY 2012 or in subsequent years. The program is intended to assist courts at locations that have security deficiencies, but that may not qualify for a new building.

FUNDING

All of the foregoing recommendations that require the expenditure of funds for implementation were approved by the Judicial Conference subject to the availability of funds and to whatever priorities the Conference might establish for the use of available resources.

Chief Justice of the United States
Presiding

TAB 2

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DRAFT MINUTES

CIVIL RULES ADVISORY COMMITTEE

NOVEMBER 7-8, 2011

1 The Civil Rules Advisory Committee met at the Administrative
2 Office of the United States Courts on November 7 and 8, 2011. The
3 meeting was attended by Judge David G. Campbell, Chair; Elizabeth
4 Cabraser, Esq.; Judge Steven M. Colloton; Professor Steven S.
5 Gensler; Judge Paul W. Grimm; Peter D. Keisler, Esq.; Dean Robert
6 H. Klonoff; Judge John G. Koeltl; Judge Michael W. Mosman; Judge
7 Solomon Oliver, Jr.; Judge Gene E.K. Pratter; Anton R. Valukas,
8 Esq.; and Hon. Tony West. Professor Edward H. Cooper was present
9 as Reporter, and Professor Richard L. Marcus was present as
10 Associate Reporter. Judge Mark R. Kravitz, Chair, Judge Lee H.
11 Rosenthal, outgoing Chair, Judge Diane P. Wood, and Professor
12 Daniel R. Coquillette, Reporter, represented the Standing
13 Committee. Judge Arthur I. Harris attended as liaison from the
14 Bankruptcy Rules Committee. Laura A. Briggs, Esq., was the court-
15 clerk representative. Peter G. McCabe, Jonathan C. Rose, Benjamin
16 Robinson, and Andrea Kuperman, Chief Counsel to the Rules
17 Committees, represented the Administrative Office. Judge Jeremy
18 Fogel, Joe Cecil, and Emery Lee represented the Federal Judicial
19 Center. Ted Hirt, Esq., and Allison Stanton, Esq., Department of
20 Justice, were present. Observers included Alfred W. Cortese, Jr.,
21 Esq.; Joseph Garrison, Esq. (National Employment Lawyers
22 Association liaison); John Barkett, Esq. (ABA Litigation Section
23 liaison); Chris Kitchel, Esq. (American College of Trial Lawyers
24 liaison); Kenneth Lazarus, Esq.; John Vail, Esq. (American
25 Association for Justice); Thomas Y. Allman, Esq.; Robert Levy,
26 Esq.; Ariana J. Tadler, Esq.; William P. Butterfield, Esq.;
27 Jonathan Redgrave, Esq.; John K. Rabiej, Esq. (Sedona Conference);
28 Jerry Scanlon (EEOC liaison); Professor Lonny Hoffman; and Andrew
29 Bradt, Esq.

30 Judge Campbell opened the meeting by greeting Committee
31 members, committee support staff, and observers. The Committee
32 appreciates the interest shown by the observers in the Committee's
33 work, and welcomes the presence of several staff lawyers for the
34 House Judiciary Committee.

35 Two new Committee members were also greeted. Dean Klonoff is
36 a graduate of the University of California at Berkeley, and the
37 Yale Law School. He clerked for the Chief Judge of the Fifth
38 Circuit, practiced with Jones Day for many years, took a chair on
39 the law faculty at the University of Missouri, was a Reporter for
40 the ALI Principles of Complex Litigation, and is Dean of the Lewis
41 and Clark Law School. Judge Oliver is a graduate of Worcester
42 College and NYU Law School; he also has a masters degree. He
43 clerked for Judge Hastie in the Third Circuit. As Assistant United
44 States Attorney he served as chief of both civil and appellate

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45 divisions. He also was in private practice, and has taught at the
46 Cleveland-Marshall College of the Law. He has been a judge since
47 1994, and now is Chief Judge of the Northern District of Ohio.

48 Jonathan Rose was welcomed as the new Rules Committee Officer;
49 most recently he has been a partner at Jones Day, and has served in
50 a variety of federal government positions. Benjamin Robinson is
51 the Deputy Rules Officer and Counsel; he too comes to the
52 Administrative Office from Jones Day.

53 This is the final meeting for Professor Gensler, who has
54 completed serving his two terms. He has provided much wise counsel
55 during his time as member, and can be expected to continue to help
56 the Committee in other roles. Judge Kravitz will return to the
57 Standing Committee, this time as Chair. The Civil Rules Committee
58 gained immediate benefit from his earlier years on the Standing
59 Committee, and will benefit from his wise guidance as Chair. Judge
60 Rosenthal has been CEO, presiding judge, chief architect, and
61 mother superior of the rules process. As difficult as it will be
62 to succeed her, Judge Kravitz will carry forward the outstanding
63 tradition of her work. Andrea Kuperman, who began as Rules law
64 clerk for Judge Rosenthal, will continue to serve as Chief Counsel
65 to the Rules Committees, working with Judge Kravitz.

66 Judge Fogel, of the Northern District of California, is the
67 new head of the Federal Judicial Center. The Committee has
68 depended on support by the FJC research staff for many important
69 projects. Several ongoing research projects attest to the role the
70 FJC has played; the Committee will continue to draw as heavily on
71 the FJC as can be fit into the many competing demands for its work.

72 **STANDING COMMITTEE REPORT**

73 Judge Kravitz reported on the June Standing Committee meeting
74 and the September Judicial Conference meeting. There were no rules
75 items on the Judicial Conference calendar. The Standing Committee
76 considered the current Rule 45 proposal, liked it, and approved
77 publication for comment. The Standing Committee also discussed the
78 activities of the Duke Conference Subcommittee and other Civil
79 Rules projects.

80 Judge Kravitz added that while chair of this Committee he had
81 achieved outstanding results by delegating the most important work.
82 Judge Campbell did a great job in leading the Discovery
83 Subcommittee through, among other things, the Rule 45 proposal and
84 the initial stages of the work on preservation, spoliation, and
85 sanctions. Judge Koeltl did a masterful job in orchestrating the
86 Duke Conference, and has followed through with the Duke Conference
87 Subcommittee. Other Subcommittee chairs have done as well, albeit
88 with less onerous tasks. It is good to turn the reins of the

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89 Committee over to Judge Campbell.

90 **APRIL 2011 MINUTES**

91 The draft minutes of the April 2011 Committee meeting were
92 approved without dissent, subject to correction of typographical
93 and similar errors.

94 **LEGISLATIVE ACTIVITY**

95 Andrea Kuperman reported on legislative activity that bears on
96 the Civil Rules.

97 The Law Abuse Reduction Act, introduced in both the House and
98 the Senate, is the latest in a long string of bills that would
99 restore the 1983 version of Civil Rule 11, superseding the changes
100 made in 1993. Professor Hoffman testified against the bill at a
101 House hearing in March. The FJC did extensive research on the 1983
102 version, finding it caused many problems. There is no indication
103 that the 1993 version has caused any problems. The American Bar
104 Association Litigation Section and the American College of Trial
105 Lawyers oppose the bills. The bill has been reported by the House
106 Judiciary Committee. There has been no activity in the Senate.

107 The Sunshine in Litigation Act is similar to prior bills
108 dating back through several Congresses. The common feature is to
109 require specified findings of fact before entering a protective
110 order, or approving a settlement, to ensure that the order does not
111 prevent dissemination of information relevant to the public health
112 and safety. The new version is different from earlier bills
113 because it is limited to actions in which the pleadings show issues
114 relevant to the public health and safety. The rules committees
115 have opposed these bills over the years. The Senate Judiciary
116 Committee has favorably reported a bill, but it has not yet been
117 taken up in the Senate. The House bill has not been taken up.

118 There is no legislation currently pending to address the
119 *Twombly* and *Iqbal* decisions.

120 HR 3401, the Consent Decree Fairness Act, would establish term
121 limits on injunctive relief against state and local officials. It
122 would require scheduling order timing and content different from
123 Civil Rule 16(b). It would apply in only a narrow set of cases.

124 **DUKE CONFERENCE SUBCOMMITTEE**

125 Judge Koeltl delivered the report of the Duke Conference
126 Subcommittee. The Subcommittee was formed to deal with many of the
127 questions addressed at the May, 2010 Conference at Duke Law School.
128 Pleading issues have been left on a separate track, and issues

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129 relating to preservation and spoliation of discoverable information
130 have been left with the Discovery Subcommittee. This Subcommittee
131 deals with the "great other."

132 A wide variety of proposals have been advanced to serve the
133 cause of greater speed, efficiency, and justice. These are the
134 goals of Rule 1.

135 Many paths are open to pursue better results under present
136 rules without need for any rules amendments. The Federal Judicial
137 Center is developing several means of improving judicial education
138 programs and resources by emphasizing the flexible and powerful
139 management tools available today. Committee members, particularly
140 Judges Kravitz and Rosenthal and Professor Gensler, drafted
141 important portions of the new benchbook for judges, focusing
142 particularly on Rule 16 conferences and the relationships between
143 Rules 16 and 26. The Sedona Conference has added the advice that
144 it is really important to encourage chief district judges to urge
145 effective use of these rules.

146 Pilot programs also can be encouraged. They will work best
147 when they are framed from the beginning in ways that will enable
148 the Federal Judicial Center to provide rigorous evaluation of the
149 results. The Seventh Circuit e-discovery pilot program was already
150 under way, and was described at the Conference. Since then the
151 Northern District of California has adopted an expedited Trial
152 Procedure.

153 Another project has just been launched in the Southern
154 District of New York, the Pilot Project Regarding Case Management
155 Techniques for Complex Civil Cases. The Project had its genesis in
156 the Duke Conference. Judge Scheindlin chaired the Judicial
157 Improvements Committee that drafted the program, with the help of
158 a very distinguished advisory committee that was widely
159 representative of the bar and clients. The lawyers were really
160 enthusiastic about the project. The full Board of Judges,
161 including all active and all senior judges, adopted the program.
162 Not every judge was enthusiastic – the program includes things that
163 some had not been doing. But the board decided to adopt the
164 project as a court project; all judges are participating. The
165 procedures reflect the court's trust of the bar. The court
166 respects the recommendations, and will attempt to do what the
167 lawyers asked. The program will run for 18 months. The FJC is
168 surveying lawyers in closed cases to provide a baseline for
169 studying the project's impact. They are asking questions on such
170 matters as whether there was a Rule 16 conference? A Rule 26(f)
171 conference? Were they useful? The FJC will conduct another survey
172 at the end of the project. The second survey will be facilitated
173 by adopting a set of docket flags to be used by court clerks for
174 cases handled under the project.

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175 The Southern District procedures include shortening the time
176 set by Rule 16(b) for the scheduling order from 120 days after
177 service to 45 days after service. The court is to do more than
178 "consult" with the lawyers; there must be an actual conference,
179 although it can be accomplished by phone or other means short of a
180 physical meeting. There is a long list of subjects to discuss at
181 the Rule 26(f) conference, and then at the Rule 16 conference.
182 Discovery disputes are resolved by letter submissions, not motion;
183 "we don't have discovery motions." A Rule 12(b)(6) motion stops
184 all discovery other than Rule 34 discovery of documents and
185 electronically stored information. The number of Rule 36 requests
186 to admit is limited to 50. A lawyer who wishes to file a motion
187 must have a pre-motion conference with the court. Attorneys were
188 unhappy with the Local Rule 56.1 statement, thinking it too long
189 and too expensive; if the parties request and the court approves,
190 the statement need not be filed. If the court requires a
191 statement, it must not exceed 20 pages per party.

192 A pretrial report by the lawyers is required after fact
193 discovery, and before expert discovery.

194 It will be important to attempt to measure how effective these
195 innovations are. The court has some reservations about the ability
196 to achieve rigorous measurement.

197 The Committee has encouraged another endeavor, development of
198 a discovery protocol for employment cases. The project was
199 fostered by the bar. The drafting group included plaintiffs
200 lawyers, headed by Joe Garrison, and defendant lawyers, headed by
201 Chris Kitchel. They inspired wonderful work, despite initial
202 obstacles: "with litigators, you know"? Many of the participants
203 began by opposing elements favored by the other side: "never." But
204 ultimately, after a series of meetings and conference calls, and
205 with the help of the IAALS and Judge Kourlis, they finished the job
206 "in the best spirit of the bar." The resulting protocol is
207 endorsed by the plaintiff lawyers and the defendant lawyers. It is
208 an intelligent, thoughtful way to begin the litigation. It
209 recognizes the information that reasonably will be produced, and
210 aims to get it produced more directly than the usual discovery
211 process, and early in the litigation. This will enable the parties
212 to evaluate the case, and to move it ahead to the second wave of
213 discovery if it is fit to move ahead. The second wave itself will
214 be better focused.

215 Chris Kitchel noted that the protocol was developed through
216 vigorous debate. Judge Koeltl and Judge Kourlis were a great help.
217 And it was a great committee. The work began with discussion by
218 Judge Rosenthal with Kitchel and Garrison at the Duke Conference.
219 The protocol itself identifies the information lawyers should
220 really want at the beginning of the action, the information that

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221 will enable the case to go forward before formal discovery. The
222 protocol will replace initial disclosures. The group worked hard
223 to make sure the obligations are mutual.

224 Joe Garrison repeated the observation that Judge Kourlis was
225 a very good facilitator in resolving what seemed to be intractable
226 disputes.

227 Further discussion described some aspects of the protocol.
228 The information is to be exchanged 30 days after the first response
229 to the complaint. The protocol will work better if there are no
230 extensions. No objections are allowed, other than to preserve
231 privilege. The ban on objections is the most important part; the
232 protocol will not work if objections are allowed. The materials
233 also include a proposed protective order, but it is a "check-the-
234 box" form because the participants could not agree on a single
235 uniform order. There is a difference of opinion on whether
236 discovery can be stayed on filing a Rule 12(b)(6) motion, but it is
237 accepted that a stay may be appropriate if the action seems
238 frivolous on the face of the pleadings. The protocol applies to
239 pro se parties as well as to represented parties.

240 Although the protocol does not address the Rule 26(f)
241 conference, the conference will be important. It can help, for
242 example, in forging agreement on a proposed protective order.

243 Joe Garrison stated that the effort now should be to implement
244 the protocol. The work can begin by persuading the FJC and IAALS
245 to post the protocol on their web sites. It also would be
246 desirable to post a list of the judges who are using the protocol
247 around the country. This information will make it much easier to
248 adopt the protocol in other courts. Adoption can be accomplished
249 by a standing order, entered by an individual judge. The order
250 should be entered before the Rule 16 conference. It also will be
251 good to encourage judges to comment on what is working, and on what
252 can be improved. A volunteer committee of three judges was later
253 formed to help Joe Garrison and Chris Kitchel with monitoring and
254 implementing the protocol. They are Judges Koeltl, Mosman, and
255 Rosenthal. Judge Fogel has agreed to send out a message from the
256 FJC notifying chief district judges of the protocol, and urging
257 adoption. The letter will note that all the district judges on the
258 Civil Rules Committee are adopting the protocol. Those judges also
259 will urge adoption by other judges in their districts.

260 New pilot projects in other courts will be encouraged. Emery
261 Lee has agreed to be the clearing house for other projects. Judge
262 Kravitz noted that Judge Fogel had sent a message to all chief
263 district judges asking that they identify all pilot projects, and
264 thanked Judge Fogel for doing that. All projects that are
265 identified will be listed on the FJC web site.

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266 Beyond judicial education, ongoing empirical work, and pilot
267 projects, the Duke Subcommittee also has an agenda of possible
268 rules amendments. The list has been whittled down over time, but
269 additions also have been made and observers are invited to make
270 suggestions. One of the relatively recent additions is a proposal
271 to add new limits on the numbers of discovery events, adding
272 numerical limits to Rule 34 and Rule 36, and perhaps reducing the
273 limits in at least Rules 30 and 31. The limits could be set to
274 reflect the median experience revealed in the FJC survey for the
275 Duke Conference, perhaps with a slight margin. For example, the
276 limit to 10 depositions per side might be reduced to 5, better
277 reflecting the fact that in a majority of cases the parties take
278 only 2 or 3 per side.

279 The focus of rules proposals has been on the beginning of
280 litigation. The time for the Rule 16(b) scheduling order could be
281 accelerated, and an actual conference could be required. The need
282 to actually hold a Rule 26(f) conference could be underscored. The
283 Rule 26(d) discovery moratorium could be changed by providing that
284 discovery requests can be made before the Rule 26(f) conference,
285 although responses are not required until a time after the
286 conference. The conference would then be better focused on at
287 least the initial discovery requests actually made in the case.
288 (It was noted that even good lawyers seem to forget the moratorium,
289 as shown by requests to stay discovery before the 26(f) conference.
290 And they may forget that in many cases the moratorium obviates any
291 occasion to seek a stay of discovery pending disposition of a Rule
292 12(b)(6) motion because there has not yet been a Rule 26(f)
293 conference.)

294 Emery Lee described ongoing and pending FJC research projects
295 to support these efforts. A docket study aims at measuring the
296 frequency of scheduling orders, the time entered, the typical
297 length of discovery cut-offs, and the holding of Rule 26(f)
298 conferences. They are surveying lawyers in the Southern District
299 of New York as the foundation for measuring the effects of the
300 complex case management pilot project. Next February a
301 questionnaire will go out to lawyers seeking information about the
302 second phase of the Northern District of Illinois e-discovery pilot
303 project.

304 So far there have not been many responses to the FJC message
305 asking about local experiments. It is not yet clear what should be
306 done with the information as it accumulates.

307 The work on scheduling orders and Rule 26(f) conferences has
308 progressed to the point of an initial report on scheduling orders
309 and discovery cut-offs. It has proved difficult to identify
310 scheduling orders in the CM/ECF system. Courts use different codes
311 for scheduling orders. Some of the codes bury this information

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312 "deep in the docket leaves." Many can be found by searching for a
313 discovery cut-off. But not all. The search has turned up more
314 than 11,000 scheduling orders. The median date of entry is 106
315 days from filing the action; the mean is 120 days. The median
316 discovery cut-off is 6.2 months, or approximately 10 months from
317 filing to the first discovery cut-off. This initial search will be
318 followed by a nationwide closed-case survey. A closed-case survey,
319 however, encounters difficulties. Lawyers' memories often fade as
320 to closed cases. Even identifying the attorneys who were involved
321 in a case at the time for a scheduling order or Rule 26(f)
322 conference may prove elusive because the lawyers who were on the
323 case when it concluded may not be the same as those who filed it,
324 particularly in complex cases.

325 Judge Koeltl noted that the Duke Subcommittee agenda also
326 includes three proposals by former Committee member Dan Girard to
327 reduce evasion and stonewalling. One frequent problem is that a
328 party objects to document requests in broad blanket terms at the
329 outset, then produces documents "subject to the objections," but
330 does not say whether some documents have been withheld from
331 production because of the objections. The Lawyers for Civil
332 Justice group opposes the Girard proposals; he has responded to
333 their objections. The proposals continue to command a place on the
334 agenda.

335 Other rules topics include adding express provisions requiring
336 cooperation among lawyers. Rule 1 could be amended to require the
337 parties as well as the court to act to achieve the just, speedy,
338 and inexpensive determination of every action or proceeding.
339 Cooperation also could be built into Rule 16 or the discovery rules
340 in various ways; all that exists now is a reference in the title of
341 Rule 37, a remnant of an abandoned proposal to insert a duty to
342 cooperate into rule text.

343 Proportionality continues to be an object of concern,
344 particularly with respect to discovery. Proportionality is made an
345 explicit requirement in Rule 26(b)(2), and Rule 26(b)(1) – as well
346 as other rules – expressly invokes (b)(2). Proportionality also
347 can be implemented through Rule 26(c) protective orders. And the
348 FJC survey for the Duke Conference suggests that for a great many
349 cases, discovery is held within appropriate limits proportional to
350 the needs of the case. But it also seems clear that discovery can
351 run beyond what is reasonable. When courts of appeals discuss the
352 scope of discovery, they seldom mention proportionality. New rule
353 provisions might yet provide some help, perhaps as part of Rule
354 26(b)(1) defining the scope of discovery.

355 Much of the Subcommittee's focus will be on the beginning of
356 litigation. As already noted, Rule 16(b) might be revised to
357 require an actual conference among the attorneys and a judicial

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358 officer, whether or not in person. The time for the scheduling
359 order could be advanced. The scheduling order provisions might be
360 expanded to include a date for explicitly abandoning claims or
361 defenses that a party has decided not to press further. A
362 provision might be added to address stays of discovery pending a
363 motion to dismiss. And as also already noted the Rule 26(d)
364 moratorium might be reconsidered, perhaps to allow discovery
365 requests to be made – but not answered – before the Rule 26(f)
366 conference.

367 Discovery cost-shifting also may be considered. And the time
368 for serving contention interrogatories might be considered,
369 creating a presumption that they are appropriate only after fact
370 discovery has closed.

371 Discussion began with an observation that the case law on cost
372 taxation for discovery is growing. The amendment of 28 U.S.C. §
373 1920 to allow costs for "exemplification" has led some courts to
374 expansive awards of costs for responding to discovery of
375 electronically stored information. The conduct of e-discovery
376 could be dramatically affected by a string of cost awards in the
377 hundreds of thousands of dollars.

378 Judge Campbell noted that Arizona sets a presumptive 4-hour
379 limit to depositions. About half the lawyers who appear before him
380 stipulate to adopting this limit. The result is better-focused
381 depositions. And his Rule 16 order limits the parties to 25
382 requests to produce under Rule 34 and 25 requests to admit under
383 Rule 36. Requests to expand these limits are made in about 5% of
384 his cases. They work.

385 Another observed that the Sedona Conference is discussing the
386 interplay between Rule 16 and Rule 26, and will have some
387 suggestions.

388 It also was noted that the panel discussion of the "rocket
389 docket" practices in the Eastern District of Virginia to be held at
390 this meeting is part of the Duke Conference Subcommittee program.

391 The possibility of holding a second "Duke" Conference in the
392 spring of 2013 is being considered. At least one purpose would be
393 to present concrete proposals for rule amendments for discussion
394 and evaluation. To do that, concrete proposals must be developed.
395 The goal would be to present a package of changes that work well
396 together, and that will be acceptable to lawyers "on both sides of
397 the v." There also should be room to hear "bigger picture"
398 proposals. No final decision has been made whether, or when, to
399 hold a second conference of this magnitude.

400 The final part of the Duke Conference Subcommittee report

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401 addressed a "mailbox" suggestion by Daniel J. DeWit proposing
402 adoption of a new Rule 33(e). This rule would authorize a party
403 who serves a request to admit under Rule 36 to serve with the
404 request an interrogatory asking whether the response was an
405 unqualified admission. If not an unqualified admission, the
406 responding party should state all facts on which the response is
407 based, identify each person who has knowledge of those facts, and
408 identify all documents and tangible things that support the
409 response. The Subcommittee recommends that this suggestion be
410 dropped from the Committee agenda. The proposed provision would
411 "add clutter" to the rules; it would generate disputes; and the
412 described information can better be got by other means. The
413 Committee unanimously approved a motion to drop this item from the
414 agenda.

415 **DISCOVERY: PRESERVATION AND SANCTIONS**

416 Judge Campbell began the discussion of preservation and
417 sanctions by observing that these questions were raised by a very
418 distinguished panel at the Duke Conference. The panel presented a
419 unanimous recommendation that the Committee do something to address
420 these problems. The recommendation included a list of issues that
421 might be addressed by rules provisions. The Discovery Subcommittee
422 began work in the fall of 2010. It has had several meetings and
423 conference calls. It held a miniconference in Dallas on September
424 9, 2011, hearing a wide range of views from many lawyers,
425 technology experts, and others. Suggestions continue to arrive
426 from many groups, down to a November 6 letter from Ariana J. Tadler
427 and William P. Butterfield. The flow of additional information
428 will continue, and is encouraged.

429 Judge Grimm introduced the Subcommittee report by praising the
430 September 9 miniconference as tremendously educational for everyone
431 involved. There were many submissions before the conference began.
432 Some presented empirical work. Others were based on experience.
433 There were formal papers and other submissions. This wealth of
434 material is included in the agenda book for this meeting; along
435 with a few pages of notes on Subcommittee discussions, the material
436 runs from page 87 through page 516. The round-table discussion
437 involved many people. The Subcommittee has held two conference
438 calls after that.

439 One submission, by Robert Owen, a private practice attorney,
440 presents 26 pages of specific recommendations for radical reform.
441 The views expressed reflect the concerns of many. Current law is
442 inconsistent and imprecise. There seems to be an assumption that
443 there is a lot of destruction. Current rules on proportionality in
444 discovery are not adequate to the need to protect against requiring
445 preservation of disproportionately large volumes of information
446 before litigation is even filed. The operating regime has changed

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447 from "do not destroy" to "preserve everything." The suggestions
448 include these: (1) Carry forward the prohibition against
449 intentional destruction. (2) The trigger for a duty to preserve
450 should be actual notice of the filing of an action or a petition to
451 a government agency. (3) Rule 27 should be amended to permit
452 courts to enter a prefiling order to preserve information, on a
453 showing of good cause. (4) The scope of preservation should be
454 limited to the claims pleaded in the complaint. The duty should be
455 confined to materials in the possession, custody, or control of a
456 party and used in its regular affairs. (5) Punitive sanctions
457 should be available only on a showing of bad faith.

458 The Lawyers for Civil Justice proposals made after the Dallas
459 miniconference discuss the economic benefits that would be achieved
460 by clear rules on preservation and sanctions. There should be a
461 clear trigger for the duty to preserve: a reasonable expectation of
462 the certainty of litigation. The duty should be defined by concise
463 scope and boundaries. It should be limited to information in a
464 party's possession, custody, or control and used in the ordinary
465 conduct of business or personal affairs. Non-active information
466 need be preserved only on a showing of good cause. No more than 10
467 key custodians need be required to preserve, and preservation is
468 required only for a period of two years preceding the preservation
469 trigger. The information should be that relevant and material to
470 a claim or defense. Sanctions should be awarded only for willful
471 and prejudicial conduct intended to prevent use in litigation.

472 The Sedona Working Group 1 has devoted much time and energy to
473 discussing the issues explored in Dallas. The Subcommittee is
474 grateful for their work.

475 The materials for the Dallas miniconference sketched three
476 different approaches to drafting a preservation rule. The first,
477 taking many of its cues from the Duke panel suggestions, provided
478 comprehensive and specific rules for triggering the duty to
479 preserve, defining its scope and duration, and establishing
480 sanctions. The miniconference discussion suggested several
481 difficulties with the specifics, and the Subcommittee concluded
482 that this approach would require a great deal of work to generate
483 specific provisions that might soon be superseded by advancing
484 technology. The second approach also addressed trigger, scope,
485 duration, and sanctions, but only in general terms: reasonable
486 scope, and so on. This approach offered so little guidance as to
487 be of little apparent use. The third approach focused on sanctions,
488 in part because the fear of sanctions is said to drive many
489 companies to preserve far more information than reasonably should
490 be preserved, and in part because of the wide differences among the
491 circuits in setting the levels of culpability required for
492 different sanctions. This approach would not directly define a
493 duty to preserve, but limiting the definition of conduct that

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494 supports sanctions would provide implied directions about what
495 preservation is required. It won the Subcommittee's tentative
496 support as the most promising path to be pursued. But the Sedona
497 group thinks it premature to attempt even this approach. They
498 think it better to attempt to strengthen Rules 16 and 26(f), and to
499 pursue further education of bench and bar.

500 Opponents of adopting any preservation rule argue that
501 Enabling Act authority does not extend to a rule that would require
502 preservation before an action is filed in a federal court. The
503 Subcommittee decided to carry this question forward in a general
504 way. It seems best to attempt to draft the best rule that can be
505 crafted, and then to focus the Enabling Act inquiry on this
506 specific model.

507 Professor Hubbard, at the University of Chicago, provided a
508 thought-provoking article. He begins with the reflection that
509 judges and lawyers evaluate preservation decisions in hindsight,
510 while actual preservation decisions must be made ex ante.
511 Judgments should be based on what was reasonable in prospect, not
512 on what seems reasonable with the benefit of hindsight.
513 Proportionality cannot be measured by the judge, who often will not
514 have the information needed to measure preservation in reasonable
515 proportion to the needs of the case. It is better to place
516 responsibility on the parties. And the responsibilities must be
517 distinguished: not to spoliolate; to preserve; to retain in light of
518 the obligations imposed by law independent of preservation for
519 litigation; to produce. A duty to preserve is not the same thing
520 as a duty to not spoliolate. When there is a duty to preserve, it
521 should be defined by setting a presumptive limit on the number of
522 custodians who must be directed to preserve. With even a generous
523 limit such as 15 custodians, having a limit will provide a focal
524 point for bargaining between the parties. Without giving at least
525 this much presumptive protection to the party that has a
526 disproportionate share of the information, the party who has little
527 information has no incentive to bargain to a reasonable
528 preservation regime. Sanctions should be imposed for loss of
529 information only on showing a guilty state of mind. The rules
530 should be amended.

531 The Tadler-Butterfield letter urges it is too early to adopt
532 comprehensive rules changes. The 2006 amendments addressing
533 discovery of electronically stored information are only 5 years
534 old. Important questions have been raised, but there is no need
535 for the level of change recommended in any of the models.

536 The Subcommittee now seeks direction from the Committee. What
537 direction should be followed? Do nothing? Is it time to draft a
538 proposed rule, or should more information be gathered? What should
539 a proposed preservation rule look like? If not a preservation

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540 rule, would it be better to draft a sanctions rule that backs into
541 preservation and indirectly reduces the fears of those who are
542 over-preserving?

543 Professor Marcus carried the discussion on, stating that the
544 basic message is one of caution "in dealing with things we do not
545 fully appreciate or understand." The Committee first began
546 thinking about these sorts of problems more than 15 years ago.
547 From 1997 to 2003 it was uncertain what approach to take.
548 Preservation was a concern then, as now. After a temporary
549 impasse, the Committee moved ahead toward adoption of what now is
550 Rule 37(e). "Facebook did not exist then." And new technologies
551 continually appear that require consideration. One recent example
552 is news of a program that sends and receives e-mail messages
553 without leaving any record. But it may be that for the time and
554 the problems that were addressed, "we got it about right." The
555 letter from RAND in the materials argues that the law may be
556 relatively stable vis-a-vis technology with respect to the part of
557 the discovery cycle that involves actual production of information.

558 Preservation law and practice is not stable. The agenda book
559 summarizes the many divergent thoughts that have been expressed to
560 the Subcommittee. Fifteen years ago the Committee proceeded
561 cautiously, with deliberation. How fast should we move now?
562 Proliferating social media, smart phones, all sorts of hard- and
563 software developments raise all sorts of questions. But there is
564 a "very much enhanced concern" with preservation that may justify
565 attempts to move toward rules changes.

566 Judge Campbell recounted the Dallas conference descriptions of
567 the problems corporations face. A big corporation with 200,000
568 employees may lose or transfer 10,000 of them every year. We heard
569 of a corporation that had 10,000 employees under a litigation hold.
570 One company told of spending \$5,000,000, increasing at a rate of
571 \$100,000 a month, preserving information against the prospect of
572 litigation that had not yet even been filed. There is a great
573 concern about differences in the standard of fault that supports
574 sanctions. The consequence is that people over-preserve.

575 As serious as the problems are, there are many ongoing efforts
576 to develop more information to support better-informed rules
577 proposals. The problem is real. The risks in addressing it
578 prematurely are real. Should the Subcommittee at least work toward
579 developing a draft or drafts that might be considered for a
580 recommendation for publication at the March meeting?

581 Discussion began with agreement that these are really tough
582 questions. But does the prospect that technology will change
583 continually justify a failure to do anything, ever? People are
584 very concerned about the ex ante duty to preserve. "The trigger is

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585 very important." It is all very difficult. "But perhaps we should
586 do something now."

587 A committee member expressed similar troubles about the
588 trigger, but suggested that "sanctions is the area where we can do
589 something now." Attempting to define a trigger would be hard. No
590 reputable corporation will chance sanctions. The result is to
591 preserve under the most severe view. "I would not defer a uniform
592 rule on sanctions."

593 The Committee was reminded that these questions overlap the
594 rules of conduct for lawyers. Professional obligations also will
595 engender very conservative behavior. The Committee should proceed
596 with great caution. This theme recurred. "Everything comes down
597 to attorney conduct." Years ago, the Standing Committee worked on
598 developing federal rules of attorney conduct. It held three major
599 conferences, and then gave up. Although the Committee was
600 concerned about Enabling Act limits, interested members of Congress
601 thought the subject is within the Act. The result today is that
602 most districts adopt a dynamic conformity to local state rules.
603 Local rules usually are the ABA Model Rules, with some local
604 adaptations. The rules forbid unlawfully obstructing another
605 party's access to evidence, and speak in other ways to issues that
606 bear on preservation. Sanctions can be imposed under the state
607 systems of attorney regulation. "This is very difficult. But that
608 is not to argue we should do nothing." Responding to an
609 observation that the attorney discipline rules do not command
610 federal courts to impose Rule 37 sanctions, it was noted that
611 lawyers do have to worry about state sanctions. But it was
612 suggested that state sanctions may be a source of "angst that we
613 cannot do anything about." The Code of Conduct for judges, indeed,
614 obligates judges to notify disciplinary authorities of lawyers'
615 violations of professional responsibility requirements.

616 Another member suggested that the attempt to focus on
617 spoliation as the easier target cannot really succeed because
618 preservation is so tightly tied to spoliation. And a rule on
619 sanctions will lead to emergence of new specialists in how to
620 litigate spoliation issues. Who will decide those issues? "We
621 cannot escape" defining triggers for the duty to preserve.

622 A Subcommittee member noted that at the end of the September
623 miniconference he had suggested the Committee should think hard
624 about the advantages of doing nothing. But that probably is not
625 the best answer. "At least a sanctions rule is necessary." And it
626 may prove that a workable sanctions rule cannot be completely
627 divorced from trigger and preservation issues. A rule must attempt
628 to hit a rapidly moving target. The proposal that the obligation
629 to preserve should be triggered by a "reasonable expectation of the
630 certainty of litigation," for example, does not provide real

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631 certainty in the current landscape.

632 Another Committee member observed that although it is possible
633 to think about a sanctions rule rather than an express preservation
634 rule, the separation is difficult. If different courts have
635 different concepts of trigger, scope, and duration, the outcomes
636 will be different. "How do you plan to avoid sanctionable
637 behavior"?

638 Yet another Committee member thought the submissions to the
639 Subcommittee are impressive. Some urge that we do nothing,
640 implementing the principle that the first thing is to do no harm.
641 Others urge that attempting specific or general rules on trigger,
642 scope, and duration is too risky, but that a sanctions rule may be
643 feasible. There are variations on the level of detail that might
644 wisely be incorporated in a sanctions-only approach. It is
645 possible to craft a sanctions rule that incorporates an idea of
646 reasonable conduct that should not be sanctioned. "The number of
647 cases where this actually comes up is limited. People self-
648 regulate for fear of extreme cases." At the end, it seems likely
649 that an explicit preservation rule, whether one that expresses
650 detailed obligations or one that simply directs reasonable
651 behavior, will not repay the effort of creating it. But a creative
652 sanctions rule may be useful to protect against extreme behavior.
653 "People will talk more and that will reduce problems."

654 Committee discussion continued with the view that a sanctions
655 rule will provide only limited help with the preservation
656 obligation. The guidance "will be hard to build on." "But a
657 uniform rule on sanctions is important even if it does not address
658 preservation." The rule is likely to come up short of the most
659 demanding present standards, and in this way will provide some
660 comfort. Preservation is important. The Committee should continue
661 to work on it as a highly significant problem.

662 An observer suggested that there is a "big Erie problem." The
663 source of the duty to preserve bears on the cure; is it state law?
664 federal procedure? substantive law? There also is a nomenclature
665 issue – what *is* a "sanction"? A curative order is not a sanction,
666 and any rule must draw the distinction. An order directing
667 additional discovery, or shifting costs, to compensate for the loss
668 of information is not punitive. "Negligence is better fit for
669 curative orders than for sanctions."

670 The diversity of present law was explained in part by looking
671 to the charts breaking the questions down by circuit. Most of the
672 decisions are district-court decisions. Courts of appeals do not
673 often get these cases. That may provide added reason for adopting
674 a rule, achieving greater national uniformity.

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675 The value of working toward a sanctions rule was further
676 underscored by urging that success would produce national harmony,
677 "replacing present cacophony." It is not good to have many
678 different standards in different courts. Negligence, for example,
679 might support cost-shifting, but not adverse inferences. It may
680 not ever be possible to create a satisfactory preservation rule,
681 but it makes sense to move ahead on sanctions. In any event, the
682 Standing Committee may incline toward a conservative approach,
683 welcoming a uniform sanctions rule, recognizing a preservation rule
684 as presenting an ongoing challenge that deserves continued
685 attention but may not yield to early answers.

686 The Committee was reminded that the 2006 amendment of Rule 37
687 was narrow. It was conceived as a first step. "It was an essential
688 first step because of the degree of anxiety that had already
689 developed." It was an attempt to catch up with the fact that with
690 automated information systems, "doing nothing can cause the
691 destruction of information." It was understood that the Committee
692 would continue to study the problem. Electronically stored
693 information is different from paper information in these
694 dimensions. Are more changes needed? Reducing the fear of
695 sanctions may reduce the extent of over-preservation. "It can be
696 good to do something, rather than risk never doing anything."

697 Turning to scope, it was suggested that the preservation
698 obligation leads to discovery. Should the scope of the duty to
699 preserve be tied to the scope of discovery? Or should it be
700 something less than everything that can be anticipated to fall
701 within the scope of discovery after litigation is filed? It might
702 prove awkward to define a scope of preservation different than the
703 scope of discovery. And it may be that the Duke Subcommittee will
704 recommend that the scope of discovery be narrowed; that would bear
705 on the scope of preservation, reducing the burdens.

706 All of this discussion, initially focused on whether to
707 attempt anything, clearly moved in the direction of counsel about
708 what to do. A transitional summary was offered. Defining the
709 trigger for a preservation duty is the subject most likely to raise
710 concerns about making changes to the common law. The notion of
711 spoliation goes back a long way; it is anchored in an 1817 Supreme
712 Court decision, which in turn has roots in the common law. But
713 would it help to have a rule that identifies conduct that is
714 sheltered? Is it possible to address proportionality in
715 preservation, compare the present discovery rules? As Professor
716 Hubbard's article points out, the parties have to make preservation
717 decisions, and courts enforce proportionality. A sanctions rule
718 can address reasonable care, proportionality, attempts at
719 discussion among parties or intending parties to solve the problem
720 (as compared to an over-reaching preservation demand letter). Is
721 it indeed legitimate to build into a sanctions rule factors that

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722 will protect reasonable behavior?

723 The Committee was reminded of the recommendation that it will
724 work best to devise the most attractive rule that can be drafted,
725 and then to determine whether it can be squared with the Enabling
726 Act. A sanctions rule could be more detailed than any of the
727 drafts yet devised. And "Rule 37 sanctions in a case actually
728 before the court seem to fall in the heartland of § 2072."

729 The Subcommittee began with the view that it should restate
730 the generally accepted definition of the events that trigger a duty
731 to preserve: a reasonable expectation of litigation. But recent
732 discussion has suggested that the common and general rule should be
733 changed, that it creates problems that should be addressed. The
734 Department of Justice, on the other hand, disagrees.

735 Defining the scope of the duty to preserve also is a problem.
736 Actual rulings on actual questions are not easy to predict. That
737 makes it difficult to decide on what to preserve, particularly
738 before litigation is filed. Specifics could be built into a
739 sanctions rule, such as a presumptive upper limit on the number of
740 custodians to be directed to preserve, but this approach might
741 encounter difficulties. Or the limit could be built into "Rule
742 26." The number of custodians could be set, for example, at 15,
743 requiring good cause to raise the number. The attorneys would be
744 required to confer before making or opposing a motion to raise the
745 number. And the presumptive limits would tie back to measuring
746 what it is reasonable to preserve. Still, it is not clear whether
747 such a rule would make a difference. The proposal that became Rule
748 26(b)(2)(B) caused consternation when it was published; it is not
749 clear whether it has made any difference in practice.

750 The concept that Rule 37 limits on sanctions may be
751 appropriate was said to rest on the belief that inherent authority
752 is what authorizes sanctions under present practice. If a
753 sanctions rule gets it right on the level of culpability for
754 different sanctions, the *Chambers v. NASCO, Inc.* [501 U.S. 32
755 (1991)] concept of inherent authority would likely not be a serious
756 threat.

757 Concern was expressed that this discussion reinforces the fear
758 that it is premature to begin drafting. The position of the
759 Department of Justice has been described as "do nothing," but that
760 is not accurate. Instead the Department believes it is important
761 to work toward a careful approach. With pleading, the Committee
762 has declined to rush into rule drafting. It is wise to wait to
763 sense the scope of any problems, so as to draft a workable
764 solution. What we have now is a snapshot. We need a better sense
765 of the direction of the law, about effects on pro se litigants,
766 about access to information, and about access to justice. "There

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767 is a lot to do. Drafting language is premature."

768 Another Committee member suggested that "there is a real
769 problem." A sanctions rule would not get directly to preservation.
770 Thought should be given to developing a preservation rule. "We
771 should not give up on that, even if we do sanctions first."

772 The virtues of going slowly about the task were suggested from
773 a different perspective. There are choices intermediate between
774 creating a rule now and doing nothing. Education of bench and bar
775 might accomplish something. "If huge numbers of litigants do not
776 experience preservation as a big problem," immediate drafting
777 efforts may not be justified. A similar thought was that there is
778 room to go forward with drafting a rule, but it is unclear whether
779 it is reasonable to aim to achieve a proposal for publication at
780 the March meeting.

781 An observer said that "there is a vacuum. It is filled by
782 judges deciding cases. A sanctions rule would be some help, but it
783 would not help businesses to understand what they have to do. We
784 need guidance."

785 Identifying the trigger for a duty to preserve came back for
786 discussion. The first comment was that the RAND study discussed at
787 the Dallas miniconference found that in-house people find the law
788 clear. The Sedona Conference agrees. So does the chart of
789 decisions prepared by Judge Grimm. A reasonable expectation of
790 litigation triggers the duty to preserve. The differences arise in
791 evaluating the established trigger. Some think it works. Others
792 think it too broad, urging scaling it back to a reasonable
793 anticipation of the certainty of litigation. And yet others would
794 narrow it further, to arise only on the filing of an action or
795 service of a subpoena. There have been strong reservations about
796 proceeding with a rule in the shape of the specific model that
797 lists a number of specific triggers, such as receipt of a letter
798 demanding preservation.

799 The next observation was that the common law "is causing the
800 preservation of information far out of proportion to its value in
801 litigation." If we have authority to do so, it would be good to
802 limit the trigger. An observer challenged this view, opposing any
803 change. Seizing on the "reasonable expectation of the certainty of
804 litigation," this comment asked how this standard would work when
805 a statute of limitations may extend for years into the future?

806 Examples given at the Dallas miniconference were recalled. A
807 duty to preserve may properly arise "before there is a lawyer even
808 in sight." "A patient dies in the operating room; an engine falls
809 off an airplane." "We have to continue to work on preservation,
810 even though we may never succeed in crafting a workable rule."

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811 Judge Scheindlin, who has dealt with these issues extensively,
812 believes it would be sensible to adopt a rule.

813 A district judge offered several thoughts. Some companies now
814 have specialists in e-discovery on staff. One case illustrates a
815 special problem – it is a patent infringement action pending in
816 Delaware and California; the different courts have different
817 preservation standards. The resulting costs run in the tens of
818 millions of dollars. Technology is changing rapidly; "you can
819 store almost anything easily in the cloud." And the Supreme Court
820 decision in the MedImmune case changes the trigger – it is not the
821 certainty of litigation, but something much looser.

822 It was asked what policies should be followed in defining the
823 trigger. Is it to save money? Protect access to information? A
824 firm has many reasons to preserve information, including state and
825 federal regulation and business reasons. What problems are we
826 trying to solve in adopting an independent duty to preserve for
827 litigation? In patent cases, for example, there will be a huge
828 preservation endeavor independent of any rule-based duty to
829 preserve. "We need a better sense of the reasons to move toward
830 adopting a rule."

831 A Committee member responded that there *is* a class of
832 corporations spending a lot of money on what they think is
833 unnecessary preservation. "The value of uniform standards for
834 sanctions is real. This is a significant problem. Can we address
835 it"? Identifying the trigger is a problem. Most firms assume the
836 common-law trigger. The disparate standards for sanctions also
837 present problems.

838 Preservation duties and sanctions affect plaintiffs as well as
839 defendants. The problem is important. Whether or not a
840 publishable proposal can be drafted by March, it is important that
841 work on a sanctions rule should go forward.

842 A broader conceptual approach was suggested. "Over-
843 preservation is an error. So is under-preservation. We cannot
844 build an error-free system. So how do we define success"? Is it
845 an acceptable error rate for parties acting in good faith? Should
846 we weight differently the costs of over- and under-preservation?
847 The best we can achieve will be clarity. Certainty is not within
848 reach.

849 The first response to this question was that it would be a
850 success to reduce the consequences of under-preservation, to reduce
851 the tendency to over-preserve. A rule change will not give
852 certainty. But there is a chorus of people who request information
853 – mostly plaintiffs – who fear that needed information will not be
854 there. And those who are called upon to produce information fear

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855 sanctions, and the reputational effect of sanctions. Neither side
856 can be fully protected by a rule.

857 So a Committee member agreed that it is good to conserve
858 resources, to avoid wasting time and resources on litigation. But
859 "it's not just about the parties, or the court system." There is
860 also a public interest in deciding controversies on the merits.
861 "We cannot easily monetize that." Preservation entails cost, but
862 the cost is constantly diminishing. "The cost of error on the
863 merits will not diminish." The goal of certain guidance to
864 litigants should not be reached by creating a loophole for non-
865 preservation. And the trigger for preserving information in
866 anticipation of federal-court litigation should not be different
867 from the rules and practices that guide real-world preservation of
868 information in other ways.

869 The suggestion that the cost of preserving electronically
870 stored information is small was met by observing that although the
871 cost seems to fall continually per unit of information, there is an
872 unending supply in the number of units. "We cannot say that the
873 cost of preservation is de minimis." On the other hand, there is
874 an independent reason to be wary of adopting a trigger based on the
875 actual filing of an action - "we will have more cases filed."

876 Discussion of preservation obligations concluded by agreeing
877 that this is a very important task. There is much yet to learn.
878 The Committee and Subcommittee can expect to receive continuing
879 submissions of new information and views; the submissions will be
880 much appreciated. The Subcommittee will look for near-term
881 solutions, such as sanctions. But "it should work as if all issues
882 are still in play." The Subcommittee will report to the Committee
883 at the March meeting.

884 **RULE 45**

885 Professor Marcus said that work on the proposed Rule 45
886 amendments that were published for comment in August could command
887 an important part of the agenda for the March meeting. No one
888 asked to testify at the hearing that was scheduled for this
889 morning; it was cancelled. It remains to be seen how many people
890 will appear for the two hearings scheduled in January.

891 The published proposal sought to simplify Rule 45; to revise
892 the notice provisions and make them more prominent; to reject the
893 Vioxx approach to commanding a party or its officer to appear at
894 trial; and to establish authority to transfer a nonparty subpoena
895 dispute to the court where the action is pending. The Vioxx
896 proposal was accompanied by a request for comment on an alternative
897 that was not endorsed by the Committee, granting the court
898 authority to command a party to appear as a witness at trial.

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899 Modification of the notice provision expanded it to include
900 trial subpoenas as well as discovery subpoenas. But it did not
901 include any requirement of subsequent notice as information is
902 produced in response to the subpoena. The American Bar Association
903 Litigation Section feels strongly that notice of production should
904 be required. There are likely to be extensive comments on that
905 subject.

906 The standard to transfer a discovery dispute was set at
907 consent of all, or "exceptional circumstances." There have been
908 two written comments so far, pointing in different directions.

909 Another comment has suggested that a provision akin to Rule
910 30(b)(6) be adopted for trial subpoenas, so that a party could
911 subpoena a corporation or other entity with a direction that it
912 provide witnesses to testify on designated subjects. The
913 Subcommittee considered this possibility early on, and rejected it
914 for a variety of reasons. But it has been brought back and will be
915 considered further.

916 The relative paucity of early comments was not seen as a sign
917 that there will be few comments overall. The rate of submitting
918 comments commonly accelerates toward the deadline. Early hearings
919 often are cancelled; they tend to be held, and to be useful, when
920 a proposal stirs deep controversy. These issues are presented in
921 some pending MDL proceedings, providing an added incentive to
922 comment.

923 **CASE MANAGEMENT PRACTICES, EASTERN DISTRICT OF VIRGINIA**

924 Peter Keisler chaired a panel presentation on the "rocket
925 docket" practices in the Eastern District of Virginia. Panel
926 members included Judge Leonie M. Brinkema; Judge Thomas Rawles
927 Jones, Jr.; Dennis C. Barghaan, Jr., Assistant United States
928 Attorney; William D. Dolan, III, Esq.; and Craig C. Reilly, Esq.

929 Judge Brinkema opened the presentation by summarizing: "The
930 heart of the matter is not to waste time." The court has local
931 rules and practices. But it also has "a shared judicial
932 philosophy." The court takes pride in being one of the fastest
933 courts in the country. That helps the court. There are no
934 "renegade judges," an essential part of making it work. It also
935 helps the bar. The bar have become accustomed to the practice.

936 The practice begins with an early scheduling order. The order
937 is one page long. It provides the structural framework. There is
938 an early date for a Rule 16 conference with a Magistrate Judge.
939 There is an early discovery cut-off, set for the second Friday of
940 the month – usually about 16 weeks. Most lawyers know that when
941 you file a case, "you need to be ready to try it soon." Final

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942 pretrial conferences are set for the third Thursday of the month.
943 Lawyers file plans for these conferences, and know that trial will
944 be held approximately eight weeks after the conference.

945 The scheduling order sets the time for objecting to exhibits.
946 This cuts out a lot of work. The order limits the number of
947 nonparty, nonexpert depositions to five. It also limits the number
948 of interrogatories. "We are extremely strict about enforcing the
949 order. But there is some flexibility."

950 "We do not let lawyers dictate the schedule." They cannot
951 agree to extend the discovery cut-off or the like. They can agree
952 to submit a joint motion, but the court may deny it.

953 "Another technique is to rule from the bench as much as
954 possible." With adequate briefs and bench memos, the court should
955 be able to rule on most motions after brief argument. "I do it on
956 about 85% of motions." This saves a lot of time as compared to
957 writing opinions.

958 The court uses its magistrate judges very efficiently. It
959 avoids referring matters that call for a report and
960 recommendations; that procedure uses the time of two judges.

961 Friday is motions day. Criminal motions are scheduled for
962 9:00, civil motions for 10:00. Lawyers know to notice motions for
963 a Friday.

964 Judge Jones began his presentation by noting that from the
965 perspective of a magistrate judge, the district judges "have not
966 given up their independence." They agree with the docket
967 practices. Empirical evidence shows that these practices achieve
968 efficiencies and economies in managing their own dockets.

969 The standard management of pretrial matters is left to the
970 magistrate judges up to the close of discovery. "The
971 predictability for the bar enables us to move at the pace we do."

972 At the end of the pretrial schedule, each district judge sets
973 up his or her own calendar for dispositive motions, motions in
974 limine, other matters, and trial dates.

975 Several aspects of magistrate-judge management were described.

976 All nondispositive motions automatically go to the magistrate
977 judge, with few exceptions. This enables lawyers to keep things
978 moving. "An attorney cannot slow things down."

979 The magistrate judges work closely with the district judges on
980 what they expect, and know when to consult with the district judge.

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981 A consent motion to enlarge time, for example, comes to the
982 magistrate judge – and often is not granted.

983 There is a quick Rule 16(b) conference in every case. It may
984 be held by telephone conference when the attorneys are experienced.
985 The conference leads to a more detailed Rule 16 order. An effort
986 is made to resolve problems in advance of the Rule 16 conference,
987 addressing such matters as the number of depositions, known
988 privilege issues, and production of documents and electronically
989 stored information. This drastically cuts down on motions
990 practice.

991 The court does not allow general objections. This works so
992 well that it would be good to amend Rules 33 and 34 to disallow
993 them. Lawyers, if allowed, often file general objections at the
994 beginning of their responses, and then, addressing specific
995 requests, provide answers "without waiving objections." That
996 leaves no idea whether anything is being withheld. The court
997 allows only specific objections.

998 The court encourages streamlined privilege logs.

999 A judge is available by telephone to rule on problems at
1000 depositions.

1001 Final expert witness depositions are frequently allowed after
1002 the final pretrial conference. This works, and does not interfere
1003 with the trial date. "The goal is to get the case packaged for
1004 trial."

1005 Peter Keisler introduced the lawyer members of the panel.
1006 Judge Brinkema and Judge Jones had extensive experience practicing
1007 in the Eastern District before going on the bench. "The current
1008 practitioners are essential to make the docket work." A lawyer
1009 from outside the district immediately associates an experienced
1010 Eastern District practitioner. "It *is* a different culture."
1011 "Justice Delayed Is Justice Denied" is carved over the courthouse
1012 door. Etchings inside the courthouse illustrate the fable of the
1013 tortoise and the hare – the court does not think of itself as the
1014 erratically speedy hare, but instead sees itself as moving at the
1015 steady, inexorable march of the tortoise.

1016 At the beginning, there was some question whether to divide
1017 the presentation into two panels, lest practitioners be inhibited
1018 in speaking frankly to their experiences. But that proved
1019 unnecessary. The court has a tradition of open and robust candor
1020 between bench and bar. The practitioners do not hesitate to speak
1021 freely.

1022 Craig Reilly began by saying that the court has a spare set of

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1023 local rules. Its practice is rooted in judicial philosophy.
1024 Routine cases are governed by standard practices. Exceptions are
1025 made on a case-by-case basis, not by relying on complicated rules
1026 that attempt to provide guidance.

1027 The benefit of these practices is immediate and sustained
1028 attention to the case. "30 days to answer Rule 33 interrogatories
1029 means 30 days." Less time is less expense, although you may need
1030 more lawyers and cost to bring them up to speed.

1031 More discovery does not lead to more truth at trial. Often
1032 less.

1033 Patent cases are brought to the Eastern District to avoid the
1034 costly wheel-spinning of preliminary-injunction practice in other
1035 districts. There is little reason to spend months arguing over a
1036 preliminary injunction when you can get to trial on the merits in
1037 six months. The joint discovery plan, prepared under Rule 26(f),
1038 works well; it is followed by the Rule 16(b) conference with the
1039 magistrate judge, leading to specific tasks with a time table that
1040 suits that case. Disclosure practices are like those in the
1041 Northern District of California – there is an early disclosure of
1042 detailed infringement and invalidity contentions; noninfringement
1043 contentions are put off until discovery is completed. A protective
1044 order is presented early; it can be complex; and information is
1045 exchanged on a "counsel-eyes-only" basis until the order is
1046 entered. The role of in-house counsel in the protective order is
1047 often disputed, particularly in litigation that involves source-
1048 code discovery, and implementation of the order may be difficult.

1049 Discovery of electronically stored information often is
1050 addressed. The issues typically involve form of production;
1051 timing; volume and rolling production; and whether e-mail messages
1052 should be discovered at all – often discovery is sought, but there
1053 have been cases where discovery is bypassed.

1054 Deposition disputes may extend to who counts as a party – how
1055 to count different witnesses designated under Rule 30(b)(6). The
1056 resolution may be to measure deposition limits in the number of
1057 hours per side, perhaps 100 hours or 150 hours, and not to consider
1058 the number of depositions at all.

1059 Expert discovery is often postponed. Parties reserve the
1060 right to supplement earlier responses to meet new expert opinions.

1061 Motion practice is frequent and contentious.

1062 Extensions of discovery cut-offs can be had on a case-specific
1063 basis.

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1064 Claim construction is done late, so the case is mature. It
1065 can be a few-week process.

1066 Summary-judgment practice is done in one round, with one
1067 brief. There used to be a series of motions. The court is not
1068 shy; many defenses are stricken on summary judgment.

1069 The court offers excellent mediation opportunities, including
1070 with magistrate judges, third parties, or sometimes a second
1071 district judge. The court does not engage in "head banging"; it
1072 does not seek to force bad settlements.

1073 Securities fraud class actions are a second distinctive group.
1074 They do not arise that often. The PSLRA gets these cases off the
1075 ordinary track because of the discovery stay. But the delay is not
1076 great, because judges rule quickly on the motion to dismiss. These
1077 cases are subject to the discovery cutoff; usually discovery is all
1078 one way. The case might be stayed for mediation.

1079 Securities fraud, patent cases, and class actions involve
1080 highly skilled and motivated counsel. That makes it easier to get
1081 things resolved despite the complex nature of the litigation.

1082 Dennis Barghaan said that as a civil litigator on the United
1083 States Attorney's office he finds two big advantages in the rocket
1084 docket. Often he is the only attorney for the government in the
1085 case, as compared to the four or five lawyers Craig Reilly
1086 described. The docket practices allow him to move his cases
1087 forward: "I can say 'no' to my client." Beyond that, the
1088 government is a large repository of documents, giving adversaries
1089 an incentive to demand everything. The docket practices force them
1090 to cut back.

1091 The docket practices also pose challenges for cases that
1092 typically involve the government. Administrative Procedure Act
1093 cases often are esoteric, and can be very complicated. They span
1094 the full range of subject matters confided to federal agencies.
1095 The government lawyer often comes into the case knowing nothing
1096 about the subject matter, confronting lawyers who specialize and
1097 know this particular subject inside-out. "There is an incentive to
1098 file here to take advantage." But the judges are good at providing
1099 leeway. It works, but only if the judge is an active participant.

1100 *Bivens* cases also present problems. There is no discovery
1101 until immunity questions are resolved. So the defendant's motion
1102 to dismiss is met by a Rule 16(b) order that discovery is to begin
1103 now - "We need a ruling from the bench on Friday morning," although
1104 judges often do a pre-screening Rule 16(b) order for *Bivens* and
1105 sovereign-immunity cases that stays discovery pending a ruling on
1106 the motion to dismiss.

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1107 William Dolan observed that in litigating in other districts
1108 around the country, some judges have a notion that speed means a
1109 lack of substantive attention to nuances of law and fact. Not so.
1110 The judges in the Eastern District of Virginia work hard. Not all
1111 judges do. In a case now pending in another district a 12(b)(6)
1112 motion to dismiss has been pending for 8 months. The cost is high;
1113 in retrospect, it would have been better not to file the motion.

1114 The money spent on discovery "is scandalous." Speed in moving
1115 the case reduces the costs. On Friday morning the judge ruling on
1116 a motion knows what the case is about. The first question from the
1117 bench shows that the judge has read the motion and briefs; the
1118 arguments go quickly. The lawyer has the obligation to point out
1119 what is unusual to justify departure from the regular docket
1120 practices. "It is a paper court. They read first." They rule
1121 promptly, so the case can move on.

1122 There are local rules. But there is also a culture. Lawyers
1123 look to the culture as what the judges really look to. This makes
1124 the lawyer's task easier; "you can explain to your client what's
1125 going to happen."

1126 "Unless you've been there, you can't believe how it's going to
1127 happen." As local counsel, a lawyer has to be true co-counsel.
1128 "We have to argue the motion, or conduct the trial, if you're not
1129 there."

1130 If you lose in this court, "you've got bad facts or a bad
1131 lawyer."

1132 People are always calling for preliminary injunctions. Given
1133 the speed of the docket, preliminary injunctions are seldom
1134 necessary. It is better to get on to the merits. "I had an
1135 injunction motion in another court with a 4-day hearing; the court
1136 never ruled on it."

1137 Lawyers want to persuade and please the judge. It is good to
1138 go to court on a Friday when you do not have a motion and listen.
1139 The judges will explain what they are doing: "The framework is A,
1140 B, C; B is missing. Motion denied. The judges distill it to the
1141 essence." A good lawyer, like Craig Reilly, "goes straight for
1142 it."

1143 "In-house lawyers are playing a more aggressive game. They
1144 insist I find the smoking gun. 'Argue this.' 'Approach it that
1145 way.' Younger lawyers are subject to this pressure. I can tell
1146 them to bug off" because the docket practices force more sensible
1147 behavior.

1148 There is a risk that we will have a generation of lawyers and

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1149 judges who do not know how to try cases. But courts are there for
1150 trials. "Trial is not a failure of administration."

1151 Discussion began with a judge's observation that a lot of solo
1152 practitioners in his court cannot meet a 16-week schedule for
1153 discovery; they want to have other cases. Do solo practitioners in
1154 the Eastern District file in state courts to avoid the rocket
1155 docket? Judge Jones responded that this *is* a cultural phenomenon.
1156 Tell them they have to do it, they do it. "In private practice as
1157 a solo, I did it. And nothing says it has to be 16 weeks; it could
1158 work with equal effect in a longer period." Craig Reilly added
1159 that except for employment cases, there are few cases in federal
1160 court that can be handled by a solo lawyer. One federal case could
1161 take as much time as 20 in state courts. But the state courts are
1162 moving toward the federal practices. "Still, it does not prove
1163 easy for a solo." William Dolan added that a plaintiff waits to
1164 file the action until ready to go. Then the rocket docket can be
1165 an advantage.

1166 The same question was asked about excessive force cases, where
1167 "discovery is all in the police department." Judge Jones said that
1168 "we do them, with solo practitioners for the plaintiffs." Dennis
1169 Barghaan added that "it does force you to think more carefully
1170 about how to narrow discovery, about what really is at issue in the
1171 case."

1172 In response to a question about briefing practices on summary-
1173 judgment motions and about how many cases go to trial, Judge
1174 Brinkema said that most civil cases settle. The court has a great
1175 mediation program. For summary-judgment motions, the court limits
1176 the opening brief to 30 pages, including the statement of facts.
1177 The answering brief is also limited. The court strongly believes
1178 in these limits because they force lawyers to make the best
1179 arguments. But the court does get some really complex cases. The
1180 court has a 3- to 4-week lead time on Rule 56 motions. They are
1181 discussed in chambers. The briefs are read before the hearing, and
1182 so is the bench memo. "When I go to argument, 95% of the time I
1183 know how I'm going to rule and I rule from the bench."

1184 Dennis Barghaan added that litigants have to think about
1185 summary judgment ahead of time, during discovery. This helps the
1186 plaintiff to realize what information it needs, and helps the
1187 defendant to know what facts are troubling.

1188 Craig Reilly pointed out that the number of trials per judge
1189 in the Eastern District is 32, compared to a national average of
1190 20. The national average time from filing to trial is 24.7 months;
1191 in the Eastern District it is 11.5 months. "We're way faster."
1192 The national average case filings per judge is 428, in the Eastern
1193 District it is 312. But the national weighted average is 505,

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1194 while it is 497 in the Eastern District.

1195 A judge asked whether the benefits of the Eastern District
1196 practices can be transferred to other courts if the only common
1197 element is strong management? How far does it depend on the
1198 division of responsibilities between magistrate judges and district
1199 judges, on early and continued strong judicial control, on prompt
1200 rulings, on a collegial bar, on a bench that works to the same
1201 judicial philosophy? Judge Brinkema responded that there are
1202 interesting anecdotes about experiences when Eastern District
1203 judges sit in other districts – they impose Eastern District
1204 practices, the local lawyers yell and scream, and then they find
1205 out that it really works.

1206 Another question asked whether lawyers will work together when
1207 the court imposes discipline. William Dolan said "absolutely. But
1208 if there is one judge who will give you relief, on a court where
1209 the other 15 judges will not, the lawyers will somehow wind up on
1210 the forgiving judge's doorstep."

1211 A judge asked whether scheduling works better if the first
1212 conference has a real exchange with the lawyers – "can you do this
1213 on paper"? Judge Jones answered that the default is an in-person
1214 conference. "I do it in chambers." But if a participant is from
1215 out of town, it can be done by conference call. "Paper cases are
1216 normally those with agreement among lawyers I know. Everything
1217 that can be dealt with early has been. I'm not looking for excuses
1218 to do it on paper."

1219 The question of "drive-by" Rule 26(f) conferences was raised
1220 by asking what is the culture in the Eastern District. Craig
1221 Reilly answered that knowing what judges are likely to do if a
1222 dispute arises means the conferences usually are not contentious.
1223 They are never a "drive-by." "Many of my cases have counsel eager
1224 to be involved in scheduling, not that we always agree." When
1225 agreement fails, competing proposals are submitted for resolution
1226 at the Rule 16(b) conference. Judge Jones added that the initial
1227 order requires a real Rule 26(f) conference, and a real plan at
1228 least 7 days before the 16(b) conference.

1229 A judge observed that the discussion suggested that the real
1230 time saving comes between the close of discovery and trial. How is
1231 this accomplished? By setting trials a lot more quickly? By
1232 ruling on dispositive motions? Judge Brinkema observed that
1233 motions are noticed for the next Friday, and that the reply brief
1234 comes in on Wednesday or Thursday. Judge Jones added that the time
1235 for filing a summary-judgment motion varies from judge to judge on
1236 the court, "but it's quick."

1237 The question then turned to scheduling trials: if the time

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1238 from the close of discovery to trial is compressed, does the court
1239 stack up trials for the same day? Judge Brinkema said that that
1240 does not often happen, but there is always a judge available. "I
1241 do set two trials for the same day. We set strict time limits for
1242 trial – no cumulative witnesses, or the like – so there is no
1243 problem that one trial lasts long enough to run into the time set
1244 for the next trial." Dennis Barghaan added that the time for the
1245 final pretrial conference means it is necessary to ask for some
1246 delay in the trial setting; "I don't have the deposition
1247 transcripts yet. Collegiality of the bench with the bar is
1248 necessary."

1249 Another judge asked whether the Rule 56 timing means the
1250 parties have to prepare for trial before the ruling on summary
1251 judgment? The panel's common response was "yes." But if you can
1252 file the summary-judgment motion, you should be able to prepare an
1253 exhibit list for trial. "There is a window – the case should be
1254 ready for trial. It will not be a 6-week trial." There is no
1255 reason to think that the court gets fewer summary-judgment motions
1256 because of its speed. Craig Reilly said "I've never given up the
1257 chance to move for this reason."

1258 The Committee thanked the panel warmly for a thoroughly
1259 prepared and fascinating presentation.

1260 **PLEADING**

1261 Judge Campbell noted that the continuing study of pleading
1262 practice has stemmed from the decisions in the *Twombly* and *Iqbal*
1263 cases. The subject continues to command close attention, including
1264 ongoing empirical work by the Federal Judicial Center.

1265 Joe Cecil summarized the ongoing FJC study. The first phase
1266 found an increase in the rate of making motions to dismiss for
1267 failure to state a claim. The only measurable change in the rate
1268 of granting the motions occurred in financial instrument cases.
1269 And orders granting the motion more often grant leave to amend.

1270 The second phase is looking into experience when a motion to
1271 dismiss is granted with leave to amend. An amended complaint is
1272 filed in two-thirds of these cases. The amended complaint often is
1273 followed by a renewed motion to dismiss. There is no significant
1274 increase in the rates of granting dismissal. Pro se cases and
1275 prisoner cases have been added to the study.

1276 This second phase reveals that some data are missing. An
1277 effort is under way to find the missing data.

1278 The first-phase report "was received less than warmly by
1279 some." Focused criticisms have been made in articles by Professor

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1281 Lonny Hoffman and by Professor Hatamayr-Moore. A response to those
1282 criticisms is being prepared, and will be posted on the FJC site.

1283 In other research, Professor Hubbard could not find a change
1284 in the rate at which motions are granted. Others find a shift in
1285 the way judges assess complaints – there is an increased focus on
1286 a demand for detailed fact pleading. Professor Dodson finds a
1287 small but significant shift in grant rates, based on much more
1288 reliance on the sufficiency of pleading facts.

1289 The rate of granting dismissal for amended complaints was
1290 about the same as for original complaints. A supplemental report
1291 will be prepared to elaborate on these findings.

1292 Professor Hoffman addressed the committee. He began by noting
1293 that he testified in a congressional hearing that the prospect of
1294 amending Rule 8(a) by legislation is a bad idea. But he has been
1295 concerned that readers of the FJC first-phase study would be
1296 confused into thinking there is no change in dismissal practices,
1297 or would be confused about the cause of changes. The findings as
1298 to filing rates are significant and interesting. A plaintiff is
1299 50% more likely to face a motion to dismiss. There is a whole new
1300 class of cases in which defendants who would not have moved to
1301 dismiss before the *Twombly* and *Iqbal* decisions are now moving to
1302 dismiss. And the FJC data show that a motion to dismiss is more
1303 likely to be granted. But that does not show whether the Supreme
1304 Court decisions cause the increase. Except for financial
1305 instrument cases, the FJC reports that the increase is not
1306 statistically significant. "But the 'null hypothesis' is difficult
1307 to understand." To say that a fact pattern is not significant at
1308 the 0.05 level is to say there is a greater than 5% chance the
1309 changes were random. It is better to ask whether we should demand
1310 so high a level of confidence. It is a two-edged sword. "We're
1311 not likely to be wrong in concluding that *Twombly* and *Iqbal* had an
1312 effect; we can be wrong in thinking they had no effect." It would
1313 be unwise to move too quickly. But we should remain concerned that
1314 they are having an effect. One study shows a 20% reduced chance a
1315 case will survive to discovery. Others are finding statistically
1316 significant increases in dismissal rates. "Results very much
1317 depend on the inputs." The two biggest case categories in the
1318 study are "other" and "civil rights." There is not a 95% level of
1319 confidence of changes in those categories, but the level is greater
1320 than 90%. "That's pretty good odds." But that does not say what
1321 should be done.

1322 A judge noted that the circuit courts have taken a much harder
1323 look at pleading than the Supreme Court did. The message is
1324 getting to the district courts – they cannot throw out claims
1325 willy-nilly. The Supreme Court "kind of made the same point" in
1326 this year's *Skinner* decision. It has been observed that the Court

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1327 is cyclical in its approaches to pleading; there may be a pull-
1328 back. An exhaustive source of information about emerging
1329 approaches is provided by Andrea Kuperman's study.

1330 Joe Cecil said that he and Professor Hoffman agree on more and
1331 more points. There are more motions to dismiss being filed. As to
1332 the grant rate, page 7 of the report shows the overall numbers, but
1333 that does not tell the whole story. Using multivariate analysis to
1334 account for other factors that affect the outcome, such as the type
1335 of case, the numbers of cases in different courts in the study,
1336 whether there has been an amended complaint, reduces any change in
1337 grant rate below a statistically significant level, apart from
1338 financial instrument cases. As to statistical significance, "we
1339 cannot prove no effect. We could never prove that. But the
1340 patterns of findings we see could easily have happened by chance."
1341 There is other research going on. Some of it assumes that there
1342 will be no amendment if dismissal is granted without leave to
1343 amend. "That is not always so."

1344 So there are differences in patterns among the districts
1345 studied. The Southern District of New York has a low rate of
1346 filing motions to dismiss, but a high grant rate. But the patterns
1347 do not show identifiable differences among the circuits; there are
1348 differences between districts in the same circuit.

1349 It was noted that the Second Circuit has established a program
1350 to decide quickly on appeals from pleadings dismissals. The
1351 records are compact, enabling prompt decision.

1352 It was asked whether at a 90% level of confidence we can find
1353 an effect in civil rights cases? Joe Cecil said yes. But it is
1354 important to set the significance level before doing the research.
1355 The rate chosen will depend on whether you're exploring or whether
1356 you want to test a theory. To test a theory, there should be a
1357 higher level of significance. But the choice of the level of
1358 significance is for the Committee.

1359 A judge noted that from a district judge's perspective, it is
1360 important to know the extent to which *Twombly* and *Iqbal* lead to
1361 ending cases without an opportunity to get the information needed
1362 to frame the complaint. Dismissal of only part of a complaint
1363 leaves open the opportunity for discovery, and the discovery may
1364 reveal information that enables the plaintiff to reinstate the
1365 parts that were initially dismissed. The bite is in the cases
1366 where the plaintiff cannot get the necessary information. There is
1367 important work left to be done, and it must be based on a wide
1368 foundation of information.

1369 It was asked whether the high dismissal rates in financial
1370 instrument cases are linked to the mortgage foreclosure crisis.

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1371 Joe Cecil responded that the pattern is in cases in areas where the
1372 crisis appeared to be particularly acute. The common pattern is
1373 that a case is filed in state court, removed to federal court,
1374 dismissed as to the federal claims, and survives to be remanded to
1375 state court on the state claims. That is especially common in the
1376 Northern and Eastern Districts of California.

1377 Discussion then turned to the question whether the time has
1378 come to begin actively developing specific proposals to revise
1379 pleading practice or, perhaps, discovery practices integrated with
1380 pleading practice. A wide variety of illustrative proposals have
1381 been sketched during the years since the *Twombly* and *Iqbal*
1382 decisions turned the Committee's attention from the question
1383 whether heightened pleading standards should somehow be
1384 incorporated in the rules to the question whether pleading
1385 standards have been heightened in a desirable way – whether too
1386 high, about right, or not high enough. All of them have been
1387 carried forward as worthy possibilities. But none has yet
1388 generated confidence that the time has come for active advancement.

1389 Familiar themes were recalled. The Supreme Court's opinions
1390 can easily be seen as a call for help from the lower courts. The
1391 Court is concerned that three decades of effort have not succeeded
1392 in sufficiently reducing the burdens that discovery imposes in an
1393 improperly high portion of federal cases. But it is not sure
1394 whether pleading standards can be developed to provide a
1395 sophisticated screen that dismisses unfounded claims before
1396 discovery, while letting worthy claims through to discovery. The
1397 opinions are multi-faceted, offering many different cues that can
1398 be selected to support substantial changes or relatively modest
1399 changes.

1400
1401 The common-law process opened by the Court is working
1402 thoroughly. Pleading questions can be raised across the entire
1403 spectrum of federal litigation, yielding many opportunities to
1404 confront and develop pleading standards. The great outpouring of
1405 decisions in the appellate courts may be working toward some degree
1406 of uniformity, but consensus has not yet been reached. Among the
1407 welter of opinions, two recent decisions singled out by Andrea
1408 Kuperman's work provide nice illustrations. One is a First Circuit
1409 decision reversing dismissal for failure to state a claim. What is
1410 remarkable about the opinion is the intense fact detail set out in
1411 the complaint; in many ways it is more extensive than the facts
1412 that likely would be singled out on a motion for summary judgment.
1413 The opinion, moreover, deals with claims of discharge from public
1414 service for political reasons; it may reflect the "judicial
1415 experience" component of the "judicial experience and common sense"
1416 formula in the *Iqbal* opinion, since the First Circuit has had
1417 frequent experience with cases of this sort. The other decision is
1418 a Sixth Circuit decision in a case urging an "indirect purchaser"

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1419 claim of price discrimination under the Robinson-Patman Act. The
1420 court affirmed dismissal for failure to plead sufficient facts to
1421 show the manufacturer-supplier's control of the prices charged by
1422 the plaintiff's competitor, a distributor who both sold in direct
1423 competition with the plaintiff and acted as the plaintiff's
1424 exclusive source of supply. The most notable part of the opinion
1425 responded to the plaintiff's argument that because the defendants
1426 controlled access to information about their pricing practices,
1427 discovery should be allowed before dismissing for failure to plead
1428 facts inaccessible to the plaintiff. The court invoked part IV C
1429 3 of the *Iqbal* opinion, which discussed at length the need to
1430 protect public officials claiming official immunity against the
1431 burdens of discovery. The Supreme Court concluded: "Because [the]
1432 complaint is deficient under Rule 8, [the plaintiff] is not
1433 entitled to discovery, cabined or otherwise." Generalizing this
1434 observation, extending it from the special concerns that treat
1435 immunity as conferring a right not to be tried or even pretried, is
1436 a ground for real concern. It may be that the Sixth Circuit was
1437 responding to a different kind of "judicial experience" – the
1438 common view of economists and many lawyers that the Robinson-Patman
1439 Act is an obsolete artifact of the 1930s that should be interpreted
1440 narrowly to prevent becoming a tool to suppress efficient
1441 competition. However that may be, the seemingly flat rule barring
1442 discovery to support an amended and sufficient complaint is cause
1443 for concern.

1444 These observations led to the suggestion that matters remain
1445 in the stage of waiting to see what is happening and how practice
1446 will develop. Discussion agreed that pleading proposals should
1447 remain on the agenda, with continuing active study, but should not
1448 yet be brought to the point of developing proposals for publication
1449 and comment. A Committee member "did not disagree," but asked
1450 whether very modest changes could be made in the rules that would
1451 discourage "the inevitable tendency to cite *Twombly* and *Iqbal* in
1452 every case, whether or not on point." One useful practice might be
1453 to adopt a limit on the length of motions to dismiss.

1454 A judge observed that motions to dismiss come in infinite
1455 variety. His own practice is to ask the plaintiff whether the
1456 plaintiff would like to amend. If the plaintiff accepts the
1457 invitation, the motion to dismiss is denied without prejudice.
1458 "Most times the amended complaint works – there is no renewed
1459 motion to dismiss."

1460 The Committee agreed to keep pleading topics on the agenda for
1461 continuing active study and attention, but to continue to stay
1462 active development of specific proposals.

1463 **CIVIL-APPELLATE SUBCOMMITTEE**

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1464 Judge Colloton delivered the report of the Civil-Appellate
1465 Subcommittee. The Subcommittee has carried two items on its
1466 agenda.

1467 The first subject involved a question that could lead to
1468 amending Civil Rule 58 to complement an amendment of Appellate Rule
1469 4(a). The question was stirred by considering hypothetical
1470 circumstances in which it could be argued that appeal time might
1471 expire before the period allowed by an order for remittitur, or to
1472 draft an injunction. The remittitur example, for instance, was an
1473 order granting a new trial unless the plaintiff would accept
1474 remittitur within 40 days. The Appellate Rules Committee has
1475 concluded that amending Rule 4(a) is not warranted. That means
1476 there is no need to consider Rule 58 amendments. These questions
1477 have been dropped from the Subcommittee agenda.

1478 The other subject involves "manufactured finality." This
1479 tactic may prove attractive to a plaintiff who suffers dismissal of
1480 the principal claim while peripheral claims remain alive. A
1481 variety of means have been attempted to achieve a final judgment so
1482 as to win immediate appeal from dismissal of the principal claim.
1483 Dismissal of the remaining claims with prejudice works to establish
1484 finality. Most courts agree that dismissal of the remaining claims
1485 without prejudice does not establish finality, although a couple of
1486 circuits have accepted this strategy. The more interesting
1487 question is presented by dismissal with "conditional prejudice" –
1488 the remaining claims are dismissed with prejudice, but on the
1489 condition that they may be resurrected if dismissal of the
1490 principal claim is reversed. The Second Circuit has accepted this
1491 practice; it has been disallowed in two others. The Subcommittee
1492 could not reach any consensus as to the need to act on this
1493 subject. Barring renewed enthusiasm from an advisory committee,
1494 the Subcommittee is not likely to recommend action. A judge agreed
1495 that it is "good to do nothing."

1496 The Subcommittee continues in existence as a vehicle should
1497 new questions arise – as has happened with some regularity –
1498 involving integration of the Civil Rules with the Appellate Rules.

1499 **RULE 23: CLASS ACTIONS**

1500 The Standing Committee has planned a panel on class-actions
1501 for the January meeting. The broad question is whether sufficient
1502 problems have emerged in practice to warrant beginning work toward
1503 amending Rule 23.

1504 The Committee was reminded that Rule 23 was deliberately put
1505 off limits between the 1966 amendments and 1991. The 1991 report
1506 of the ad hoc Judicial Conference Committee on asbestos litigation
1507 suggested that perhaps Rule 23 might be amended to improve the

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1508 disposition of asbestos claims. The Committee set to work. After
1509 considering a top-to-bottom restructuring of Rule 23, more modest
1510 proposals were published in 1996. The only one that survived to
1511 adoption was Rule 23(f), a provision for appeal from orders
1512 granting or denying class certification that has proved successful.
1513 Work continued, resulting in a variety of amendments that took
1514 effect in 2003. That experience suggests that any class-action
1515 project will endure for many years. The only prospect for a
1516 relatively short-term project would be identification of one, or
1517 perhaps a few, small changes that command general consensus
1518 support. Any significant change is likely to stir deep
1519 controversy, and any package of significant changes surely will
1520 stir broad controversy. This prospect makes it important to weigh
1521 whatever needs for reform may be identified against the need to
1522 allocate Committee resources to the projects that most need
1523 attention. Discovery work continues apace. Pleading may come on
1524 for development of specific proposals. The Duke Conference
1525 Subcommittee is preparing a package of amendments. There is enough
1526 on the agenda to keep the Committee well occupied for some time.

1527 The agenda materials presented a summary of recent Supreme
1528 Court decisions bearing on class actions, a reminder of past
1529 proposals that failed of adoption, and a general request for advice
1530 based on the continuing experience of Committee members. Have
1531 problems emerged with administration of Rule 23, perhaps influenced
1532 by experience with the kinds of cases being brought to the federal
1533 courts by the Class Action Fairness Act, that justify launching a
1534 class-action project?

1535 The first response suggested four topics that deserve study.

1536 One topic is the extent of considering evidence on the merits
1537 of class claims to inform the determination whether to certify a
1538 class. The Seventh Circuit decision in the *Szabo* case has been
1539 picked up in most circuits. The problem is that some courts are
1540 moving toward basing the certification decision on a determination
1541 whether there is enough evidence to go to the jury on the merits.
1542 There is a thread of a view that the district court has to choose
1543 which competing expert witness is correct in making a certification
1544 decision whether common questions predominate in the case as it
1545 will be tried. There are real variations among the circuits on
1546 these questions.

1547 A second question relates to issues classes. Should
1548 predominance in the Rule 26(b)(3) inquiry be measured by the case
1549 as a whole? Or should it be measured by looking only to the issues
1550 that will be tried on a class basis? The Third Circuit has looked
1551 to a balancing test, considering a variety of factors.

1552 The criteria for reviewing a proposed class settlement also

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1553 vary. Courts establish different lists of factors, some longer,
1554 some shorter. (The Committee was reminded that the process that
1555 amended Rule 23(e) began with enumerating a dozen factors, some of
1556 them innovations over case law, in rule text. The Committee became
1557 concerned that the factors would become a mere check-list, a
1558 laundry list that would encourage rote recitals without actual
1559 thought. The list was moved to the Committee Note, and then
1560 discarded entirely.) It also should be established whether there
1561 is a presumption in favor of a settlement supported by all parties.

1562 Finally, there has been a lot of reconsideration of the value
1563 of cy pres settlements. This topic seems ripe for consideration.

1564 Another Committee member agreed that these four issues are
1565 worthy of consideration. That does not mean that it will be easy
1566 to agree on the solutions. Consideration of the merits as part of
1567 the certification decision is addressed by many cases, but there is
1568 no clear path. There is a real tension with summary judgment and
1569 the right to jury trial, a risk that the court will decide jury
1570 issues in the guise of a certification decision.

1571 A separate possibility is to study the American Law Institute
1572 Principles of Aggregate Litigation to see whether some of the
1573 principles should be incorporated in Rule 23.

1574 An observer agreed that these topics deserve study, and added
1575 that consideration of the merits in the certification process
1576 intersects discovery. "We need to have discovery" to the extent
1577 that predictions about the merits influence certification.

1578 These suggestions led to the question whether Rule 23 is
1579 working well enough as a whole. Class actions are so
1580 consequential, and so hard fought, that there will always be
1581 disagreements among the circuits. Amendments will produce new
1582 litigation. Has the time come to take on these consequences?

1583 A Committee member suggested that it may be better not to
1584 tinker with Rule 23 at this point, although cy pres settlements
1585 have become a more prevalent issue. (It was later noted that
1586 legislation addressing cy pres settlements has been introduced;
1587 there is no sense whether it will be adopted.)

1588 The Standing Committee panel in January will look at the
1589 proper time for the Committees to address Rule 23. It has not been
1590 considered since 2003. The Class Action Fairness Act may have had
1591 an impact on administration of Rule 23. And the change in overall
1592 litigation contexts affects class actions. "There is no
1593 predetermined answer."

1594 It was asked whether the ALI Principles "have a gravitational

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1595 pull"? An answer was that they do. And the "Hydrogen Peroxide"
1596 issue [In re Hydrogen Peroxide Antitrust Litigation, 552 F.3d 305
1597 (3d Cir.2008)] has been percolating for years.

1598 A more specific note was that the agenda materials include two
1599 alternative approaches that might be taken to overruling the ruling
1600 that federal courts can certify a class action to enforce a state-
1601 law claim even though state law specifically denies class-action
1602 enforcement of the claim. This is a valid subject of consideration
1603 if a Rule 23 project moves forward.

1604 There is a prospect that the Standing Committee will ask the
1605 Civil Rules Committee to consider some aspects of Rule 23. But the
1606 Civil Rules Committee will have to decide independently whether it
1607 has the capacity to tackle this work immediately.

1608 It was decided that some clear issues have been identified,
1609 and there may be others that deserve study. A subcommittee will be
1610 formed to explore the issues.

1611 **RULE 84 FORMS**

1612 Judge Pratter reported on launching the Forms Subcommittee.
1613 The Subcommittee is composed of representatives from the advisory
1614 committees for the Appellate, Bankruptcy, Civil, and Criminal
1615 Rules, and the Standing Committee. The focus is on the way in
1616 which "official" forms are used in the contexts of the different
1617 sets of rules, and on the ways in which they are generated.

1618 For the Civil Rules, a source of growing concern has been the
1619 pleading forms. Rule 84 says they suffice under the rules. But
1620 they were generated long ago. Many judges think they are
1621 inconsistent with the pleading standards directed by the *Twombly*
1622 and *Iqbal* decisions. Judge Hamilton's recent dissent in a Seventh
1623 Circuit case lists Forms 11, 15, and 21 as inadequate under present
1624 pleading doctrine.

1625 The Subcommittee has met by phone conference. The Notes
1626 provide a good summary of the discussion.

1627 The Subcommittee is collecting the history of the several
1628 advisory committees, looking to the ways in which forms have been
1629 developed and how they are used. It will move on to consider
1630 recommendations for possible revisions of Rule 84, to be shaped in
1631 part by exploring the desirability of revising and amending the
1632 forms through the full Enabling Act process. If the advisory
1633 committee cannot find time enough to ensure that the forms remain
1634 relevant and useful, it may prove wise to find new ways to develop
1635 suggested forms. And if resort is not had to the full Enabling Act
1636 process, it may be wise to back away from endorsing them by the

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1637 Rule 84 statement that the forms suffice under the rules.

1638 A further subject may be working toward features in the forms
1639 that will make it easier to track issues through FJC docket
1640 research.

1641 **OTHER AGENDA ITEMS**

1642 The agenda book includes brief descriptions of several
1643 proposals submitted by members of the public. As happens
1644 periodically, it seems useful to determine whether any of them
1645 should be moved ahead for active consideration.

1646 09-CV-D: This question arises from changes made by the Time
1647 Computation Project amendments that took effect in 2009. Rule
1648 62(a) provided a 10-day automatic stay of execution on a judgment.
1649 Rule 62(b) provided that a court could stay execution "pending
1650 disposition of" motions under Rules 50, 52, 59, or 60. Those
1651 motions also must be made within 10 days after entry of judgment.
1652 Then the Time Computation Project changed the automatic stay under
1653 Rule 62(a) to 14 days, but extended the time to move under Rules
1654 50, 52, or 59 to 28 days. The question is whether the court can
1655 stay execution more than 14 days after judgment is entered if there
1656 is no pending motion under Rule 50, 52, 59, or 60 but time remains
1657 to make such a motion.

1658 Discussion began with the suggestion that the rule recognizes
1659 authority to grant a stay if a party seeks a stay before filing a
1660 motion under Rules 50, 52, 59, or 60, but represents that a timely
1661 motion will be filed. The time for Rule 50, 52, and 59 motions was
1662 extended to recognize that the former 10-day period was often
1663 inadequate to frame a motion, even as computed under the former
1664 rules that made a 10-day period equal to at least 14 calendar days.
1665 This opportunity should be preserved, without forcing an
1666 accelerated motion in order to avoid a gap after the automatic stay
1667 expires. This conclusion is easily supported by finding that a
1668 stay ordered before a promised motion is filed is one "pending
1669 disposition of" the motion. If there is concern about procedural
1670 maneuvering, the stay can readily be ordered to expire
1671 automatically if a timely motion is not filed under Rule 50, 52,
1672 59, or 60.

1673 Incidental discussion reflected the belief that it makes sense
1674 to have an automatic stay. The alternative of forcing an immediate
1675 motion could not always protect against immediate execution before
1676 the judgment debtor learns of the judgment and takes steps to seek
1677 a stay. There may be many good reasons for a stay, including both
1678 the prospect of post-judgment motions in the trial court and
1679 appeal. (Other provisions deal with stays once an appeal has been
1680 taken.) And forcing an immediate motion would generate hasty

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1681 drafting and argument. On the other hand, there may be good
1682 reasons to deny a stay even when a post-judgment motion has been
1683 filed.

1684 Committee members agreed that a court has authority to stay
1685 execution of its own judgment, and that judges will realize this
1686 power as an essential safeguard. Unless misunderstanding becomes
1687 common enough to show a real problem, there is no need to amend
1688 Rule 62. This proposal will be removed from the agenda.

1689 09-CV-B: This proposal suggests adoption of detailed rule
1690 provisions for agreements governing e-service among counsel. They
1691 would govern such matters as specific e-mail addresses, subject-
1692 line identifications, types of attachment formats, and so on.

1693 Discussion began with recognition that details at this level
1694 are not commonly included in the national rules. But it was asked
1695 whether the proposal should be tracked in some way so that it will
1696 remain as a prompt when the general subjects of e-filing and e-
1697 notification come up for renewed study. The conclusion was that
1698 when those questions are taken up, the process will stimulate
1699 suggestions like this one, and likely many variations. This
1700 proposal will be removed from the agenda.

1701 09-CV-A: This proposal provides alternative suggestions. One is
1702 that Rule 4(d)(2) sanctions for refusal to waive service should be
1703 made available as to foreign defendants, as they are now available
1704 as to domestic defendants. The suggestion rests on the perception
1705 that the opposition to sanctions emanated not so much from a
1706 genuine sense of affront to foreign sovereignty as from the desire
1707 of defendants to make it difficult and costly to drag a foreign
1708 defendant into a United States court. As an alternative, it was
1709 suggested that improvements might be made in the Rule 4(f)
1710 provisions for serving an individual in a foreign country.

1711 Discussion began with the observation that foreign countries
1712 really do hold a serious view that service is a sovereign act.
1713 They take offense, much as they would take offense if a United
1714 States police officer attempted to make an arrest in a foreign
1715 country. And there are international conventions for service.
1716 These questions are very sensitive. At a minimum, these subjects
1717 would require careful study.

1718 A Committee member noted that there is a particular cost
1719 problem that arises in complex litigation. The Hague convention
1720 requires translation of the documents. Translating a *Twombly-Iqbal*
1721 complaint can cost \$50,000 to \$100,000. In some cases counsel do
1722 waive service in an effort to be cooperative, but in other cases
1723 service is not waived. The court does not have authority to coerce
1724 waiver. A refusal to waive can be one tactic of attrition.

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1725 A similar observation was made: sending a letter is not likely
1726 to induce waiver.

1727 Another member noted that the Department of State views these
1728 matters as sensitive. Foreign sovereigns would view service by
1729 mail as inconsistent with their sovereignty. Sanctions for
1730 refusing to waive service would come close to that.

1731 The Committee determined to remove this proposal from the
1732 agenda.

1733 10-CV-G: This proposal echoes the common lament that the Form 18
1734 model of a complaint for patent infringement is woefully
1735 inadequate. It proposes a more detailed substitute, tuned to the
1736 real needs of litigation. It will be held on the docket for
1737 consideration by the Rule 84 Subcommittee, and will be considered
1738 carefully if the Subcommittee concludes both that form complaints
1739 should be carried forward and that one of them should be a
1740 complaint for patent infringement.

1741 10-CV-F, 10-CV-E: These suggestions, provided by the same person,
1742 address a question triggered by recent amendments of the Rule
1743 15(a)(1) right to amend a pleading once as a matter of course.
1744 Before the amendments, the right was cut off immediately on service
1745 of a responsive pleading, but was unaffected by a motion to
1746 dismiss. The amendments establish a uniform approach to the
1747 effects of a responsive pleading or a motion under Rule 12(b), (e),
1748 or (f). The right to amend once survives for 21 days after service
1749 of either the responsive pleading or the motion, but no longer.
1750 The new question is what happens if the time to respond to a motion
1751 to dismiss is extended beyond 21 days. The Committee concluded
1752 that any problem can be addressed by requesting an extension of the
1753 time to amend once as a matter of course, and it is better to give
1754 the court control of the timing question.

1755 A related proposal would amend Rule 12(f) so that a motion to
1756 strike can be used to challenge a motion as well as to challenge a
1757 pleading. The Committee concluded that there is no need to expand
1758 the motion to strike. These motions are overused as it is.

1759 These proposals will be removed from the agenda.

1760 10-CV-D: This proposal offers several changes in the offer-of-
1761 judgment provisions in Rule 68. One of them addresses an issue
1762 that has not been considered in earlier Committee deliberations on
1763 Rule 68. The suggestion is that a complaint may seek only nominal
1764 damages, perhaps \$1. The offer of judgment is then for \$1.01, or
1765 perhaps a more generous \$10. The problem is that the purpose of
1766 the litigation is not to win a dollar, but to win the implicit
1767 declaratory value of a judgment on the merits. These problems are

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1768 similar to those that arise when comparing an offer of judgment to
1769 the terms of injunctive or declaratory relief.

1770 The Committee has undertaken two major efforts to reconsider
1771 Rule 68. The first generated a storm of critical comment on
1772 published proposals and was abandoned. The second led to ever-
1773 more-elaborate draft rules, and was abandoned before seeking public
1774 comment. Proposals for amendments continue to be made, most
1775 commonly to add "teeth" to the rule so that it will become a more
1776 powerful vehicle for promoting settlement. The Committee has not
1777 yet been willing to enter the fray once more.

1778 This proposal will be removed from the agenda.

1779 10-CV-C: This proposal would amend Rule 41(a)(1)(A) to expand the
1780 category of motions that would cut off a plaintiff's right to
1781 dismiss an action without prejudice. The expressed concern is that
1782 a motion to dismiss may become a de facto motion for summary
1783 judgment when the court considers materials outside the pleadings.
1784 Concern also is expressed about fairness to a defendant who has
1785 paid a filing fee to remove, and then is confronted by a dismissal
1786 without prejudice that leaves the plaintiff free to begin anew.

1787 The proposal raises a broader question. Rule 15(a)(1) was
1788 amended to establish that a motion to dismiss cuts off the right to
1789 amend once as a matter of course. Would it be useful to adapt the
1790 same change to Rule 41(a)(1)(A), so that the plaintiff can dismiss
1791 without prejudice "before the opposing party files either an
1792 answer, a motion under Rule 12(b), (e), or (f), or a motion for
1793 summary judgment"? There is an abstract symmetry, but does it make
1794 sense?

1795 Discussion suggested that it would be a bad idea to expand the
1796 category of events that terminate the right to dismiss without
1797 prejudice. There is an opportunity for gamesmanship that should
1798 not be expanded.

1799 This proposal will be removed from the agenda.

1800 10-CV-B: This proposal would amend Rule 23 to incorporate
1801 provisions similar to the parens patriae provisions that recognize
1802 the authority of state attorneys general to bring suit for
1803 pricefixing. The statute allows calculation of damages by
1804 statistical or sampling means or other reasonable systems. The
1805 discretion to calculate aggregate damages includes authority to
1806 dispense with proving the individual claims of persons on whose
1807 behalf the action is brought. The proposal is designed to counter
1808 decisions ruling that class certification is appropriate only if
1809 each and every member of a plaintiff class is harmed in the same
1810 way.

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1811 This proposal was advanced at the Duke Conference and was on
1812 the initial menu of proposals considered by the Duke Conference
1813 Subcommittee. It was not advanced for further discussion. It
1814 raises obvious questions of Enabling Act Authority.

1815 Discussion asked whether the proposal is consistent with the
1816 decision in the Wal-Mart case dealing with the Rule 23(a)(2)
1817 prerequisite of common questions. This question would be debated
1818 vigorously, even though it remains possible to amend Rule 23 to
1819 supersede a Supreme Court interpretation. And it was noted that
1820 there is a big difference between authorizing an action in the
1821 public interest by a state attorney general and authorizing a
1822 similar action in a private form of group litigation. And it would
1823 be improper to adopt a rule provision limited to antitrust actions;
1824 that would become too far entangled with a specific set of
1825 substantive rights.

1826 The Committee concluded that this proposal should be
1827 considered by the Rule 23 Subcommittee.

1828 10-CV-A: This proposal would create a rule allowing interlocutory
1829 appeal by permission from an order granting or denying discovery of
1830 materials claimed to be protected by attorney-client privilege. In
1831 refusing to allow collateral-order appeal from an order directing
1832 discovery on finding that the privilege had been waived, the
1833 Supreme Court suggested that the Enabling Act process is the
1834 appropriate forum for considering these questions.

1835 It was noted that the courts of appeals would resist any
1836 effort to create a right to appeal whenever a district court grants
1837 permission. But the model contemplated by the proposal seems to be
1838 Rule 23(f), which requires permission only from the court of
1839 appeals.

1840 The possible attraction of the proposal lies in the same
1841 pressures that led to several decisions allowing collateral-order
1842 appeal before the Supreme Court spoke. Once privileged information
1843 is disclosed, "the bell cannot be unrung." And the discovery order
1844 can become a pressure point that encourages a reluctant party to
1845 settle rather than disclose or chance the uncertain path of
1846 disobeying the order and hoping for a contempt sanction in a form
1847 that supports appeal. (A nonparty can appeal either civil or
1848 criminal contempt; a party can appeal only a criminal contempt
1849 order.)

1850 This question clearly involves topics that involve the
1851 Appellate and Evidence Rules as well as the Civil Rules, even if
1852 the outcome might be adoption of a Civil Rule modeled more or less
1853 closely on Rule 23(f). The Committee voted to refer the question
1854 to the Appellate and Evidence Rules Committees without

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1855 recommendation.

1856 11-CV-C: This proposal would allow pro se litigants an extra 7 days
1857 to submit a Rule 26(f) report to the court. It may be that the
1858 Committee should go back to earlier efforts to devise alternative
1859 and simplified rules for some kinds of cases. Pro se cases might
1860 be included in those rules, either generally or as the subject of
1861 specific provisions. But until then, the Committee believes it
1862 inappropriate to depart from the long tradition that refuses to
1863 make specific exceptions for pro se litigants.

1864 This proposal will be removed from the agenda.

1865 11-CV-A: This proposal would amend Rule 55 to provide guidance for
1866 circumstances in which a default judgment is entered as to part of
1867 a case. It might be a judgment that leaves some claims pending
1868 among all parties, or it might be a judgment that disposes of all
1869 claims against one party while leaving claims pending against
1870 others. Questions arise as to coordination between judge and court
1871 clerk when the clerk is authorized to enter default judgment as to
1872 one part, while action by the court is required as to another.
1873 Questions also arise as to execution on a money judgment, and as to
1874 default judgments on claims for declaratory or injunctive relief.

1875 Discussion began by noting that Rule 54(b) provides that a
1876 judgment as to fewer than all claims among all parties becomes
1877 final only on express direction for entry of judgment. Absent
1878 entry of a partial final judgment, the order may be revised at any
1879 time before entry of a complete final judgment. Rule 55(c), which
1880 provides that a default judgment may be set aside under Rule 60(b),
1881 should be read in light of Rule 54(b). Rule 60(b) itself applies
1882 only to relief "from a final judgment, order, or proceeding."
1883 Until a default judgment becomes final under Rule 54(b), Rule 60(b)
1884 is inapposite.

1885 The first reaction was that Rule 55 is administered by the
1886 court clerk as well as by the judge. Adding complexity would make
1887 it more difficult.

1888 A judge added that he always tells the parties that a default
1889 judgment in a multiparty or multiclaim case is not a final
1890 judgment, unless made so under Rule 54(b). It cannot be enforced.
1891 The court retains authority to set it aside. One good reason for
1892 relief is illustrated by a claim against two defendants; one is
1893 subject to a default judgment, while the other wins on merits
1894 grounds that show the defaulted defendant also is not liable.
1895 Another judge agreed with these views.

1896 There was a suggestion that there may be special problems in
1897 bankruptcy cases, perhaps tied to the special and expansive view of

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1898 "finality" that applies on appeals to the court of appeals. There
1899 might be reasons of bankruptcy administration to establish forever-
1900 finality that do not apply in ordinary civil proceedings.

1901 The Committee concluded that this proposal will be removed
1902 from the agenda unless further investigation shows special problems
1903 in bankruptcy proceedings that need to be addressed.

1904 Failed Notice of Judgment: This question arises from the Judicial
1905 Conference work designing the next generation of the CM/ECF system.
1906 Rule 77(d)(1) directs the clerk to serve notice of entry of an
1907 order or judgment "as provided in Rule 5(b)." Most courts make
1908 service by electronic means under Rule 5(b)(2)(E). The problem
1909 arises when the notice bounces back to the court as undeliverable.
1910 Rule 5 provides that e-service "is not effective if the serving
1911 party learns that it did not reach the person to be served." The
1912 question is what features should be built into the CM/ECF system to
1913 address this problem.

1914 A proposal under study would require a party agreeing to e-
1915 service to provide a secondary address. When notice to the primary
1916 address bounces back, the system would automatically send an
1917 "alert" to the secondary address. The alert would not include the
1918 text of the judgment or order, nor would it include a link. The
1919 attorney would be responsible to go to the docket to find out what
1920 had happened.

1921 Laura Briggs expressed skepticism about the value of the
1922 "alert." In her court, at least, the original notice goes to both
1923 the primary address and the secondary address. Why send a second
1924 notice to the secondary address? And why only to that address, if
1925 there is to be duplication? Although some lawyers' systems
1926 automatically reject messages with big attachments, the Rule
1927 77(d)(1) notice does not include an attachment. The first thing
1928 her office does when notice bounces back is to call the attorney.
1929 That works most of the time.

1930 It was noted that the CM/ECF project has found that lawyers
1931 often have full e-mail boxes, causing messages to be rejected.
1932 Most courts follow up by postal mail.

1933 In response to the question whether any member thought it
1934 would be useful to provide advice on these questions, a member
1935 thought not, but added a question about pro se cases. How many
1936 attempts at notice are required in pro se actions? Apparently some
1937 courts use e-notice in pro se actions, while others do not. And it
1938 may happen that repeated efforts fail. A conscientious judge may
1939 devote considerable time to writing an explanation to the litigant
1940 of how many attempts have been made. There should be a reasonable
1941 limit.

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1942 This discussion led to the question whether there should be
1943 some formalized system to ensure that rules proposals are
1944 considered from the perspective of pro se litigants. Emery Lee
1945 noted that the Committee on Court Administration and Case
1946 Management is thinking about pro se litigation. And the rules
1947 committees are working with that Committee to make sure that the
1948 new generation CM/ECF system is consistent with the Rules. And
1949 perhaps this could be tied to the simplified rules effort. It was
1950 also noted that docket item 11-CV-C provided a refreshing
1951 perspective on the ability of a pro se litigant to wade through the
1952 rules, a task made easier by the Style Project.

1953 **NEXT MEETING**

1954 The next meeting is scheduled for March 22-23, 2012, in Ann
1955 Arbor, Michigan, at the University of Michigan Law School.

1956 Respectfully submitted,

1957 Edward H. Cooper
1958 Reporter

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TAB 3

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LEGISLATIVE REPORT
(Oral Report from the Rules Committee Support Office)

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RULE 45 ISSUES

In August, 2011, a preliminary draft of proposed amendments to Rule 45 was published for public comment. The invitation for public comment particularly solicited comments on four subjects: (1) whether additional notices should be required besides the notice of intended service of a subpoena that was moved from current Rule 45(b)(1) to a new Rule 45(a)(4); (2) whether the standard in proposed Rule 45(f) for transfer of subpoena-related motions was appropriate; (3) whether the amendments appropriately clarified that Rule 45 does not permit subpoenas of parties or party officers to testify at trial outside the geographical limitations that apply to other witnesses, including the question whether authority for a court to order such witnesses to attend trial and testify should be added to the rule; and (4) whether the overall simplification effort was successful. Comments on any other topic were, of course, also welcome.

Although three public hearings were tentatively scheduled to receive comments on the Rule 45 proposals, all were eventually cancelled due to lack of interest in testifying. The Committee did, however, receive 25 written comments. These comments can all be accessed in full through the A.O. website, www.uscourts.gov, by following links for proposed amendments published for public comment. These agenda materials should contain a summary of those comments.

After the public comment period closed, the Discovery Subcommittee held a conference call to discuss the issues raised in the invitation to comment and some issues raised by comments received. A copy of the notes of that conference call should be included in the agenda materials, and the memorandum about pending issues that was discussed during the conference call should also be included in the agenda materials.

The purpose of this memorandum is to identify and introduce the issues discussed by the Subcommittee in light of the public comments. For the most part, the Subcommittee does not recommend change in the published preliminary draft.

At the end of the memorandum is the published preliminary draft with a few changes indicated on it. Several of those changes were suggested by the Standing Committee's Style Consultant; the Subcommittee did not accept all the Style Consultant's proposed revisions, and the Subcommittee may seek direction on some of those remaining changes if that seems useful. The preliminary draft at the end of this memorandum also includes a few additions to the Committee Note that respond to comments raised during the public comment period.

The goal of the discussion at the March meeting will be to determine exactly what Rule 45 action to recommend to the Standing Committee. All issues raised by the published

preliminary draft remain open for action by the Committee. But it is worth noting that the eventual proposed amendments emerged from a fairly lengthy and intensive examination of a wide variety of issues initially considered. Most issues so identified were deemed not to be of sufficient importance to justify rule amendments.

(1) Relocated provision requiring
service of notice to other parties
before service of the subpoena

One of the major concerns that emerged from discussion of subpoenas was that one directive in Rule 45(b)(1) was often overlooked. Since 1991, that provision has directed that when a party serves a "documents only" subpoena it give notice to the other parties that it has done so. Rule 30 requires notice of depositions, but the 1991 amendments introduced for the first time the possibility that a subpoena could seek production of documents without a deposition. Because there was no other provision for notice of the service of such a subpoena, Rule 45(b)(1) supplied that requirement. The problem was that people were not doing what it said they should be doing.

The Committee's solution was to move the requirement from the somewhat obscure position it had occupied at the end of Rule 45(b)(1) and insert it instead in a new Rule 45(a)(4). In addition, the proposed amendment adds a requirement that the notice include a copy of the subpoena, intended to facilitate the determination by the other parties whether they wish to seek additional material or, perhaps, to object to the demand for certain materials. The proposed amendment also removed the words "before trial" from the current provision on the notion that trial subpoenas are important also, and that notice of them is also significant.

During the consideration of revisions to the notice provision, there was extensive discussion of the possibility of requiring further notices in addition to the one Rule 45(b)(1) already requires. In particular, the Committee was urged to add a requirement that the party serving the subpoena give notice of receipt of produced materials (and make them available to the other parties), and to give notice of modifications in the subpoena. The Subcommittee spent considerable time discussing these ideas and ultimately concluded that additional notice requirements were more likely to produce additional disputes about whether the rule's requirements had been satisfied than to produce benefits.

Several comments have also urged that additional notices, and/or a requirement of making the produced materials available, be added to the rule. The Subcommittee revisited these issues after the public comment period ended and concluded that the

points made in the public comments did not call for revising the proposed amendment. The conclusion was that, once a lawyer gets the required notice, the lawyer should be able to protect the client's interest without additional notice requirements, and that adding notice requirements could invite considerably more litigation about whether they had been satisfied.

The public comments also raised something that had not been raised or discussed before publication -- changing the timing of subpoena service, either to require that the notice be a minimum number of days before service, or to provide that notice could be deferred until after service of the subpoena.

The rule currently requires notice "before" the subpoena but prescribes no minimum period before. Some states have minimum periods such as 15 or 20 days, and in some instances those waiting periods may enable parties to seek relief from the court if the subpoena seems designed for harassment of some sort. On the other hand, other comments suggested that any prior notice would raise risks that a party could tip off the subpoena target and make service more difficult, although it is not clear how significant that potential problem might be.

The Subcommittee carefully considered these issues, but concluded that there is not sufficient reason to require a minimum notice period or to delete the 1991 adoption of pre-service notice.

Accordingly, the Subcommittee is not proposing any changes to the notice provision.

(2) Transfer standard

The amendments add a new Rule 45(f), which permits the court where compliance is required under the rule to transfer a subpoena-related motion to the court where the action is pending ("the issuing court" under the amended rule). The invitation for comment asked for reactions on the proposed transfer standard, which permits transfer when all parties and the person served with the subpoena consent, or in exceptional circumstances.

The invitation to comment asked about both features of the transfer standard -- whether party consent should be required, and whether "exceptional circumstances" was an appropriate standard in the absence of consent. On that score, one question was whether the circumstances warranting transfer mentioned in the Committee Note were "exceptional." The Committee Note says:

A precise definition of "exceptional circumstances" authorizing transfer is not feasible. Generally, if the dispute about the subpoena is focused on issues involved in the underlying action -- for example, if these issues have

already been presented to the issuing court or bear significantly on its management of the underlying action, or if there is a risk of inconsistent rulings on subpoenas served in multiple districts, or if the issues presented by the subpoena-related motion overlap with the merits of the underlying action – transfer may be warranted. If, on the other hand, the dispute is focused on the burden or expense on the local nonparty, transfer should not occur. The rule contemplates that transfers will be truly rare events.

A number of comments urged that party consent should not be required, and that the consent of the person subject to the subpoena should suffice. The main concern with regard to transfer should be the interests of the person subject to the subpoena, it is urged, and adding a requirement of party consent enables the parties to veto that person's preference that the matter be submitted to the court presiding over the action. The Subcommittee concluded that permitting transfer on consent of the person subject to the subpoena should suffice, and that party consent should not be required. Accordingly, the party consent feature has been overstricken in the published preliminary draft as presented at the end of this memorandum.

The Subcommittee found the question of a transfer standard when the person subject to the subpoena does not consent more difficult to resolve. The comments offered various possible substitute standards, "good cause" being most frequent, and "in the interests of justice" being another. Some Subcommittee members favored substituting one of those standards for "exceptional circumstances." It was noted that the "exceptional circumstances" standard in Rule 26(b)(4)(D) -- dealing with discovery of a specially retained nontestifying expert's work on the case -- is almost impossible to satisfy. The Committee Note's examples, it was urged, do not meet that standard, and are not nearly so exceptional. A standard that is easier to satisfy is important. At least one submission (from the Federal Magistrate Judges Association) said that transfer should be favored.

This set of arguments was met with the counterargument that it is crucial to place primary emphasis on the interest of the person subjected to the subpoena. Almost by definition, it will be relatively convenient for the parties to the underlying case to litigate the motion in the forum court. They are already litigating in that court. For them, indeed, litigating in the compliance court may often be something of an inconvenience. For the judge in the compliance court, it will almost always be more convenient to shift responsibility to the judge presiding over the underlying action. Even if the main objections focus on the particular circumstances of the local nonparty witness, some familiarity with the action pending elsewhere is likely to matter, and getting up to speed on those matters is an additional

chore for a busy judge in the compliance district. Too often, the only thing standing in the way of the convenience of all these other people will be the preference for local resolution by the nonparty subject to the subpoena.

Eventually, the Subcommittee did not come to a firm resolution of this question, and it expects to involve the full Committee in resolving the issue. As a goal, a majority of the Subcommittee ended up inclined to favor a less exacting standard than "exceptional circumstances," but one that nevertheless placed substantial weight on the interests of the nonparty served with the subpoena. The Subcommittee did not try to draft such a standard during its conference call, but the following new formulation may offer a useful starting point:

When the court where compliance is required did not issue the subpoena, it may transfer a motion under this rule to the issuing court if the parties and the person subject to the subpoena consents or if the court finds that the interests favoring transfer outweigh the interests of the person subject to the subpoena [or any party opposing transfer] exceptional circumstances.¹

If it is of interest, the following is the formulation the Subcommittee brought to the April, 2011, meeting of the full Committee, which was replaced (at the urging, among others, of the ABA Section of Litigation) with the published standard:

When the court where compliance is required did not issue the subpoena, it may, considering the convenience of the person subject to the subpoena, the interests of the parties, and the interests of effective case management, transfer a motion under this rule to the issuing court.

The idea behind the new formulation quoted above is that it focuses attention on the person subject to the subpoena in a way that might not be equally true if "good cause" or "in the interest of justice" were used instead. Accompanying Committee

¹ The above alternative standard contains a phrase -- "or any party opposing transfer" -- in brackets because the Subcommittee was unable to reach consensus on whether to include this phrase. One member favors including the phrase, one member favors retaining "exceptional circumstances" as the standard in the absence of consent by the person subject to the subpoena, but favors including this phrase if the standard in text is substituted, and two members would not include the phrase. The inclusion of the phrase would militate somewhat against transfer compared to adopting the standard in text without this phrase.

Note language would explain that the court should ordinarily rate the interests of the nonparty higher than those of the parties, or even the convenience of the court.

At least in instances in which the principal issue raised by the subpoena-related motion focuses on the circumstances of the witness (such as a health or burden consideration), the conclusion would ordinarily be that those interests outweigh the interests that might favor transfer. At the same time, there is merit to the point (made by some comments) that even burden arguments sometimes must be evaluated with a keen appreciation of the importance of evidence to the underlying litigation. That, after all, lies close to the heart of several concerns underlying Rule 26(b)(2)(C)(iii). To the extent those considerations involve comparative judgments, it may be that a judge in the enforcement court will conclude that transfer is justified even though there appear to be serious interests in favor of local resolution. It is likely that retaining "exceptional circumstances" as the standard when the witness does not consent would deter transfers in some situations in which the above new formulation would justify transfer.

The question thus posed might be viewed as whether the person subject to the subpoena should control the question of transfer in all but exceptional cases, or the court should have more latitude in granting a transfer even though that person has not consented. In addressing that question, improved telecommunications could play a role because it may be that there will be limited additional burden on the local witness even if a transfer is granted. Proposed Rule 45(f) ensures that the subpoena target's attorney can file papers and appear (perhaps by remote transmission) in the court in which the underlying action is pending. At the same time, it might be argued that telecommunications permit the compliance court to receive input from the judge presiding over the underlying action without transfer, particularly when the question for decision involves a comparison between the burden on the witness and the importance of the evidence being sought to the resolution of the case.

In approaching this question, it may be helpful to take account of some of the arguments made in comments we have received. The Federal Magistrate Judges Association (11-CV-018) says it believes "strongly" that "exceptional circumstances" is too narrow a standard. "In fact, the FMJA believes that transfer of such disputes should be the preferred practice." Although the new formulation above does not take that view, it is worth noting. The EEOC (11-CV-020) urges that "exceptional circumstances" be replaced by a standard more like the one that the Subcommittee brought to the Committee in April 2011, quoted above. The N.Y. State Bar Ass'n (11-CV-010) urges that the sorts of situations portrayed in the Committee Note (quoted above) are not exceptional, and favors "good cause" as a standard.

Others, including some who favored removing the requirement that the parties consent to transfer absent exceptional circumstances, favored retaining the "exceptional circumstances" standard if the witness does not consent. See, e.g., Dep't of Justice (11-CV-021), Lawyers for Civil Justice (11-CV-009). The State Bar of California (11-CV-019) did not urge a shift from the "exceptional circumstances" test, but did focus attention on the possibility that there is a close relationship between the witness and one of the parties, suggesting that in some instances that fact should favor transfer. Whether that should be regarded as "exceptional" is uncertain.

Finally, it is worth noting that during the Standing Committee discussion of Rule 45 in June, 2011, there was evidently some uneasiness about the "exceptional circumstances" standard, and some interest in using "good cause" instead.

During the March meeting, the members of the Subcommittee may voice somewhat divergent views on which standard is most desirable.

(3) The Vioxx rule and the Appendix
possibility of granting authority
to mandate party testimony at trial

Although a few comments (Matthew Walko (11-CV-003); Robert Byman (11-CV-013)) urged that parties should routinely be required to appear to testify at trial, there was little dissent from the basic decision of the Committee to amend the rule to make clear that the parties do not have routine authority by subpoena to compel such attendance at trial. The Subcommittee continues to regard the Vioxx line of cases as misinterpreting the 1991 version of the rule, and to favor clarification that rejects that interpretation, as the published amendments accomplish.

For purposes of soliciting public comment, the published preliminary draft included an Appendix with a possible addition of a Rule 45(c)(3) authorizing the court to order a party to appear at trial to testify or to produce a party officer to testify. The Subcommittee does not favor including that provision in the rule, although there was a dissenting view in favor of adding (c)(3) to the amendment package that will be presented at the March meeting.

It may be helpful to recall the resolution of this issue at last April's meeting. That resolution is reflected in the invitation for public comment:

After consulting with practitioners and reviewing the relevant case law, the Committee concluded that the power to compel parties and party officers to testify at trial should

not be expanded. Nonetheless, because some dissenting voices the Committee encountered during its consideration of these issues felt that in unusual cases there may be reason to empower the judge to order a distant party or party officer to attend and testify at trial, the Committee decided to seek public comment about adding such a power to the rules and to suggest rule language that could be used for that purpose.

* * * This is not a formal proposal for amendment, but instead an invitation to comment. If the public comment shows that this approach is strongly favored, the Committee will have the option of recommending it for adoption in substantially the form illustrated below without the need to republish for a further round of comment unless the testimony and comments suggest revisions that make republication desirable.

The view of the Subcommittee was that the comments do not show that the Rule 45(c)(3) approach is "strongly favored" even though a majority of those comments do seem to favor inclusion of Rule 45(c)(3). The summary of comments sets out the various arguments. Some question the utility of substitute means for presenting the testimony of distant witnesses, such as videotaped depositions or testimony from a remote location under Rule 43(a). Some emphasize that courts have authority to order parties to appear locally for depositions and produce their officers, directors and managing agents locally for such purposes. The argument is that it is peculiar that courts cannot similarly require attendance at trial to testify before the jury. Some urge that the rule broaden the considerations required to be considered before entering such an order to include not only video depositions and remote live testimony, but also consideration whether the trial will be to a jury or to the court, and whether there will be credibility issues with the witness in question.

The Subcommittee favors going forward with the clarification to reject the *Vioxx* interpretation of the 1991 version of the rule, and does not favor adding Rule 45(c)(3) from the Appendix.

(4) Simplification

Another goal of the proposed amendments was to simplify the operation of Rule 45 to eliminate the "three-ring circus" that resulted from having to identify the right "issuing court," obtain service in the right place, and dissect the rule to determine where it authorized a subpoena to command compliance. These features are removed by making the court presiding over the underlying action the "issuing court," making the place of service irrelevant to place of compliance, and creating a new subdivision (proposed Rule 45(c)) that collects in one place all

the provisions about place of compliance and removes a feature in the current rule that requires reference to state law to apply those provisions.

This revision was very well received. Indeed, one comment (Amer. Coll. of Tr. Lawyers (11-CV-014)) characterized the current rule as "impenetrable" and worried that the transparency of the new rule might lead to a misinterpretation that depositions can only be held at places within the limits of subpoenas. That specific concern is addressed below.

The Subcommittee favors going forward with simplification. It notes that one comment (L.A. County Bar Ass'n Lit. Section (11-CV-016)) expressed concern that making the "issuing court" the court where the underlying action is pending could create jurisdictional concerns if the local witness argued that the distant forum court did not have jurisdiction over him. This argument had not been made before, but the Subcommittee had heard of similar concerns about jurisdiction of the issuing court after transfer. To address those concerns, it added provisions permitting the issuing court to transfer its order to the compliance court for enforcement purposes, and providing that refusal to comply with the order could be treated as contempt of either court.

The "jurisdictional" concerns re-raised in a slightly different way in the comments seem unpersuasive to the Subcommittee. A rule surely can authorize a federal court to subpoena a witness to testify. Criminal Rule 17(e) already does that; it authorizes district courts to issue subpoenas commanding anyone served in the United States to attend and testify at trial. There is no constitutional objection to having a federal court exercise such jurisdiction. But the proposed amendments do not do any such thing. Instead, they recognize that the current rule's "issuing court" approach, while burdening lawyers with the problem of choosing the right court's name to put at the top of the subpoena, really does not involve that court's "jurisdiction" in any significant way. The "issuing court" has no role in issuing the subpoena until and unless there is a subpoena-related motion. Under the amended rule, any such motion must be filed in the local court where compliance is required, and none should question the jurisdiction of that court to command compliance. Further points along this line are included in an Appendix to the materials prepared for the Subcommittee's conference call (included in the agenda book).

Another concern was raised by the Department of Justice (11-CV-021) -- that providing the witness's refusal to comply with the order can, after transfer, be treated as contempt by the issuing court or the compliance court might invite contempt proceedings in two places.

The Subcommittee discussed this concern but concluded it did not raise significant issues. The amendments provide the issuing court with authority to transfer its order to the compliance court for purposes of enforcement; if that happens, the contempt issue would be in the compliance court. That may be the best approach in the event court enforcement is required. But the Subcommittee could not see any significant possibility of simultaneous contempt proceedings in both courts. Presumably an issuing court that had transferred its order for purposes of enforcement would not entertain such contempt proceedings, and a compliance court that had transferred the subpoena-related motion to the issuing court would not either unless the order had been transferred for purposes of enforcement. And even if there were proceedings in both courts, it is likely that the judges would be in touch with each other and that the ruling of one would support issue preclusion before the other. The Subcommittee therefore does not recommend any change to address this concern.

(5) Responding to a possible
misinterpretation regarding party depositions

The American College of Trial Lawyers (11-CV-014) worried proposed Rule 45(c)(1)'s provision that a subpoena may compel a party witness to appear only within the geographical limits it applies to everyone else might be misread to limit the location for party depositions. The Subcommittee has been aware for some time that the treatment of deposition and trial testimony differs. Prior discussions have noted that existing practice often requires travel to the forum for a deposition even though a subpoena could not compel travel to the forum to testify at trial. Although that may at first seem odd, one reason might be that deposition testimony is much more manageable for the witness than trial testimony, which may involve waiting around the courthouse for a long time until the witness is called to the stand. That is not a problem for depositions, and they operate under a one day of seven hours rule.

The Rule 45 amendments were never meant to change the existing Rule 30 practice. But a misreading of the revision would be unfortunate, and the Subcommittee therefore endorsed adding a paragraph to the Committee Note as follows:

Depositions of parties, and officers, directors, and managing agents of parties need not involve use of a subpoena. Rule 30 permits the party noticing a deposition to set the place of deposition without regard to the limitations on compliance with a subpoena; existing case law recognizes that courts may regulate the location for depositions to guard against undue prejudice. See 8A *Federal Practice & Procedure* § 2112 (3d ed. 2010). Under Rule 37(d)(1)(A)(i), failure of such a witness whose deposition was properly noticed to appear for the deposition

can lead to Rule 37(b) sanctions (including dismissal or default but not contempt) without regard to service of a subpoena and without regard to the geographical limitations on compliance with a subpoena. These amendments do not change that existing law; the courts retain their authority to control the place of party depositions and impose sanctions for failure to appear under Rule 37(b).

This addition should suffice to show that parties may continue to rely on Rule 30 despite the change to Rule 45.

(6) Remote testimony authorized
under Rule 43(a)

One comment (Paul Alston (11-CV-012)) described a frustration he had in a case in using a subpoena to compel a witness to testify as authorized under Rule 43(a) from a remote location. Mr. Alston practices in Hawaii; it may be that such remote testimony is important more frequently there. In the case he described, he was unable to obtain court enforcement of the subpoena in the court where the witness resided. He thinks the rule should authorize him to do what he was unable to do in that case.

It seems that the rule does so authorize. Rule 45(a)(1)(A)(iii) already says that a subpoena can "command each person to whom it is directed to * * * attend and testify." Testimony authorized under Rule 43(a) should be included. No rule change seems to be needed. Nonetheless, making this point completely clear can be done by adding a sentence to the Committee Note:

Rule 45(c)(1) addresses a subpoena to testify at a trial, hearing, or deposition. Rule 45(c)(1)(A) provides that compliance may be required within 100 miles of where the person subject to the subpoena resides, is employed, or regularly conducts business in person. This compliance includes testimony from a remote location when authorized by an order under Rule 43(a). For parties and party officers, Rule 45(c)(1)(B)(i) provides that compliance may be required anywhere in the state where the person resides, is employed, or regularly conducts business in person. Under Rule 45(c)(1)(B)(ii), nonparty witnesses can be required to travel more than 100 miles within the state where they reside, are employed, or regularly conduct business in person only if they would not, as a result, incur "substantial expense." When travel over 100 miles could impose substantial expense on the witness, the party that served the subpoena may pay that expense and the court could condition enforcement of the subpoena on such payment.

The Subcommittee recommends adding this sentence.

(7) Other matters

Various comments raised other matters. A number of them had been discussed by the Subcommittee before, and it did not see any reason for revising the published preliminary draft in response. Other comments raised issues not previously discussed, but after reviewing those issues the Subcommittee did not conclude that changes to the published amendment proposals were in order.

APPENDIX

[Below is the published preliminary draft of Rule 45 amendments, with a few changes indicated either by double underlining or strikeover on underlined material in the rule, and by underlining or strikeover in the Note. The changes to the rule respond to recommendations by the Standing Committee Style Consultant. The changes to the Note implement responses to comments as discussed in the above memorandum. Further changes to the Note may be needed once the appropriate transfer standard is selected.]

1

2 **Rule 45. Subpoena**3 **(a) In General.**4 **(1) Form and Contents.**5 **(A) Requirements – In General.** Every subpoena must:6 **(i)** state the court from which it issued;7 **(ii)** state the title of the action, ~~the court in~~
8 ~~which it is pending,~~ and its civil-action
9 number;10 **(iii)** command each person to whom it is directed
11 to do the following at a specified time and
12 place: attend and testify; produce designated
13 documents, electronically stored information,
14 or tangible things in that person's
15 possession, custody, or control; or permit
16 the inspection of premises; and17 **(iv)** set out the text of Rule 45(de) and (ed).18 **(B) Command to Attend a Deposition – Notice of the**
19 **Recording Method.** A subpoena commanding

20 attendance at a deposition must state the method
21 for recording the testimony.

22 (C) *Combining or Separating a Command to Produce or to*
23 *Permit Inspection; Specifying the Form for*
24 *Electronically Stored Information.* A command to
25 produce documents, electronically stored
26 information, or tangible things or to permit the
27 inspection of premises may be included in a
28 subpoena commanding attendance at a deposition,
29 hearing, or trial, or may be set out in a separate
30 subpoena. A subpoena may specify the form or
31 forms in which electronically stored information
32 is to be produced.

33 (D) *Command to Produce; Included Obligations.* A
34 command in a subpoena to produce documents,
35 electronically stored information, or tangible
36 things requires the responding person party to
37 permit inspection, copying, testing, or sampling
38 of the materials.

39 (2) ~~***Issuing Issued from Which Court.***~~ A subpoena must issue
40 ~~from the court where the action is pending. as follows:~~

41 ~~(A) for attendance at a hearing or trial, from the~~
42 ~~court for the district where the hearing or trial~~
43 ~~is to be held;~~

44 ~~(B) for attendance at a deposition, from the court for~~
45 ~~the district where the deposition is to be taken,~~
46 ~~and~~

47 ~~(C) for production or inspection, if separate from a~~
48 ~~subpoena commanding a person's attendance, from~~
49 ~~the court for the district where the production or~~
50 ~~inspection is to be made.~~

51 (3) **Issued by Whom.** The clerk must issue a subpoena,
52 signed but otherwise in blank, to a party who requests
53 it. That party must complete it before service. An
54 attorney also may issue and sign a subpoena if the
55 attorney is authorized to practice in the issuing
56 court. ~~as an officer of:~~

57 ~~(A) a court in which the attorney is authorized to~~
58 ~~practice, or~~

59 ~~(B) a court for a district where a deposition is to be~~
60 ~~taken or production is to be made, if the attorney~~
61 ~~is authorized to practice in the court where the~~
62 ~~action is pending.~~

63 (4) Notice to Other Parties Before Service. If the
64 subpoena commands the production of documents,
65 electronically stored information, or tangible things
66 or the inspection of premises, then before it is served
67 on the person to whom it is directed, a notice and a
68 copy of the subpoena must be served on each party

69 ~~before the subpoena is served on the person to whom it~~
70 ~~is directed.~~

71 **(b) Service.**

72 **(1) By Whom and How; Tendering Fees; Serving a Copy of**
73 **Certain Subpoenas.** Any person who is at least 18 years
74 old and not a party may serve a subpoena. Serving a
75 subpoena requires delivering a copy to the named person
76 and, if the subpoena requires that person's attendance,
77 tendering the fees for 1 day's attendance and the
78 mileage allowed by law. Fees and mileage need not be
79 tendered when the subpoena issues on behalf of the
80 United States or any of its officers or agencies. ~~If~~
81 ~~the subpoena commands the production of documents,~~
82 ~~electronically stored information, or tangible things~~
83 ~~or the inspection of premises before trial, then before~~
84 ~~it is served, a notice must be served on each party.~~

85 **(2) Service in the United States.** A subpoena may be served
86 at any place within the United States. Subject to Rule
87 45(c)(3)(A)(ii), ~~a subpoena may be served at any place:~~
88 ~~(A) within the district of the issuing court;~~
89 ~~(B) outside that district but within 100 miles of the~~
90 ~~place specified for the deposition, hearing,~~
91 ~~trial, production, or inspection;~~
92 ~~(C) within the state of the issuing court if a state~~
93 ~~statute or court rule allows service at that place~~
94 ~~of a subpoena issued by a state court of general~~

95 ~~jurisdiction sitting in the place specified for~~
96 ~~the deposition, hearing, trial, production, or~~
97 ~~inspection; or~~

98 ~~(D) that the court authorizes on motion and for good~~
99 ~~cause, if a federal statute so provides.~~

100 (3) ***Service in a Foreign Country.*** 28 U.S.C. § 1783 governs
101 issuing and serving a subpoena directed to a United
102 States national or resident who is in a foreign
103 country.

104 (4) ***Proof of Service.*** Proving service, when necessary,
105 requires filing with the issuing court a statement
106 showing the date and manner of service and the names of
107 the persons served. The statement must be certified by
108 the server.

109 **(c) Place of compliance.**

110 **(1) For a Trial, Hearing, or Deposition.** A subpoena may
111 command a person to attend a trial, hearing, or
112 deposition only as follows:

113 **(A) within 100 miles of where the person resides, is**
114 **employed, or regularly transacts business in**
115 **person; or**

116 **(B) within the state where the person resides, is**
117 **employed, or regularly transacts business in**
118 **person, if the person**

119 **(i) the person is a party or a party's officer;**
120 **or**

121 (ii) the person is commanded to attend a trial and
122 would not incur substantial expense.

123 (2) For Other Discovery. A subpoena may command:

124 (A) production of documents, tangible things, or
125 electronically stored information at a place
126 reasonably convenient for the person who is
127 commanded to produce; and

128 (B) inspection of premises, at the premises to be
129 inspected.

130 (d)(c) Protecting a Person Subject to a Subpoena; Enforcement.

131 (1) ***Avoiding Undue Burden or Expense; Sanctions.*** A party
132 or attorney responsible for issuing and serving a
133 subpoena must take reasonable steps to avoid imposing
134 undue burden or expense on a person subject to the
135 subpoena. The issuing court for the district where
136 compliance is required under Rule 45(c) must enforce
137 this duty and impose an appropriate sanction – which
138 may include lost earnings and reasonable attorney’s
139 fees – on a party or attorney who fails to comply.

140 (2) ***Command to Produce Materials or Permit Inspection.***

141 (A) ***Appearance Not Required.*** A person commanded to
142 produce documents, electronically stored
143 information, or tangible things, or to permit the
144 inspection of premises, need not appear in person
145 at the place of production or inspection unless

146 also commanded to appear for a deposition,
147 hearing, or trial.

148 **(B) Objections.** A person commanded to produce
149 documents or tangible things or to permit
150 inspection may serve on the party or attorney
151 designated in the subpoena a written objection to
152 inspecting, copying, testing, or sampling any or
153 all of the materials or to inspecting the premises
154 – or to producing electronically stored
155 information in the form or forms requested. The
156 objection must be served before the earlier of the
157 time specified for compliance or 14 days after the
158 subpoena is served. If an objection is made, the
159 following rules apply:

160 **(i)** At any time, on notice to the commanded
161 person, the serving party may move the
162 issuing court for the district where
163 compliance is required under Rule 45(c) for
164 an order compelling production or inspection.

165 **(ii)** These acts may be required only as directed
166 in the order, and the order must protect a
167 person who is neither a party nor a party's
168 officer from significant expense resulting
169 from compliance.

170 **(3) Quashing or Modifying a Subpoena.**

- 171 **(A)** *When Required.* On timely motion, the issuing
172 court for the district where compliance is
173 required under Rule 45(c) must quash or modify a
174 subpoena that:
- 175 **(i)** fails to allow a reasonable time to comply;
 - 176 **(ii)** requires a person to comply beyond the
177 geographical limits specified in Rule 45(c);
178 ~~who is neither a party nor a party's officer~~
179 ~~to travel more than 100 miles from where that~~
180 ~~person resides, is employed, or regularly~~
181 ~~transacts business in person – except that,~~
182 ~~subject to Rule 45(c)(3)(B)(iii), the person~~
183 ~~may be commanded to attend a trial by~~
184 ~~traveling from any such place within the~~
185 ~~state where the trial is held;~~
 - 186 **(iii)** requires disclosure of privileged or other
187 protected matter, if no exception or waiver
188 applies; or
 - 189 **(iv)** subjects a person to undue burden.
- 190 **(B)** *When Permitted.* To protect a person subject to or
191 affected by a subpoena, the issuing court for the
192 district where compliance is required under Rule
193 45(c) may, on motion, quash or modify the subpoena
194 if it requires:

- 195 (i) disclosing a trade secret or other
196 confidential research, development, or
197 commercial information; or
198 (ii) disclosing an unretained expert's opinion or
199 information that does not describe specific
200 occurrences in dispute and results from the
201 expert's study that was not requested by a
202 party; ~~or~~
203 ~~(iii) a person who is neither a party nor a~~
204 ~~party's officer to incur substantial expense~~
205 ~~to travel more than 100 miles to attend~~
206 ~~trial.~~

207 (C) *Specifying Conditions as an Alternative.* In the
208 circumstances described in Rule 45(~~d~~) (3) (B), the
209 court may, instead of quashing or modifying a
210 subpoena, order appearance or production under
211 specified conditions if the serving party:

- 212 (i) shows a substantial need for the testimony or
213 material that cannot be otherwise met without
214 undue hardship; and
215 (ii) ensures that the subpoenaed person will be
216 reasonably compensated.

217 **(~~e~~) Duties in Responding to a Subpoena.**

218 (1) ***Producing Documents or Electronically Stored***
219 ***Information.*** These procedures apply to producing
220 documents or electronically stored information:

- 221 **(A)** *Documents.* A person responding to a subpoena to
222 produce documents must produce them as they are
223 kept in the ordinary course of business or must
224 organize and label them to correspond to the
225 categories in the demand.
- 226 **(B)** *Form for Producing Electronically Stored*
227 *Information Not Specified.* If a subpoena does not
228 specify a form for producing electronically stored
229 information, the person responding must produce it
230 in a form or forms in which it is ordinarily
231 maintained or in a reasonably usable form or
232 forms.
- 233 **(C)** *Electronically Stored Information Produced in Only*
234 *One Form.* The person responding need not produce
235 the same electronically stored information in more
236 than one form.
- 237 **(D)** *Inaccessible Electronically Stored Information.*
238 The person responding need not provide discovery
239 of electronically stored information from sources
240 that the person identifies as not reasonably
241 accessible because of undue burden or cost. On
242 motion to compel discovery or for a protective
243 order, the person responding must show that the
244 information is not reasonably accessible because
245 of undue burden or cost. If that showing is made,
246 the court may nonetheless order discovery from

247 such sources if the requesting party shows good
248 cause, considering the limitations of Rule
249 26(b)(2)(C). The court may specify conditions for
250 the discovery.

251 **(2) Claiming Privilege or Protection.**

252 **(A) Information Withheld.** A person withholding
253 subpoenaed information under a claim that it is
254 privileged or subject to protection as trial-
255 preparation material must:
256 **(i)** expressly make the claim; and
257 **(ii)** describe the nature of the withheld
258 documents, communications, or tangible things
259 in a manner that, without revealing
260 information itself privileged or protected,
261 will enable the parties to assess the claim.

262 **(B) Information Produced.** If information produced in
263 response to a subpoena is subject to a claim of
264 privilege or of protection as trial-preparation
265 material, the person making the claim may notify
266 any party that received the information of the
267 claim and the basis for it. After being notified,
268 a party must promptly return, sequester, or
269 destroy the specified information and any copies
270 it has; must not use or disclose the information
271 until the claim is resolved; must take reasonable
272 steps to retrieve the information if the party

273 disclosed it before being notified; and may
274 promptly present the information under seal to the
275 court for the district where compliance is
276 required under Rule 45(c) ~~under seal~~ for a
277 determination of the claim. The person who
278 produced the information must preserve the
279 information until the claim is resolved.

280 **(f) Transferring a Subpoena-Related Motion.** When the court
281 where compliance is required did not issue the subpoena, it
282 may transfer a motion under this rule to the issuing court
283 if the parties and the person subject to the subpoena
284 consents or if the court finds exceptional circumstances.
285 Then, if the attorney for a person subject to a subpoena is
286 authorized to practice in the court where the motion was
287 made, the attorney may file papers and appear on the motion
288 as an officer of the issuing court. To enforce its order,
289 the issuing court may transfer the order to the court where
290 the motion was made.²

291 **(ge) Contempt.** The court for the district where compliance is
292 required under Rule 45(c) – and also, after a motion is
293 transferred, the issuing court – may hold in contempt a
294 person who, having been served, fails without adequate
295 excuse to obey the subpoena or an order related to it. A

² Depending on the standard ultimately selected for transfer in the absence of consent by the person subject to the subpoena, this paragraph may need further revision.

296 ~~nonparty's failure to obey must be excused if the subpoena~~
297 ~~purports to require the nonparty to attend or produce at a~~
298 ~~place outside the limits of Rule 45(c)(3)(A)(ii).~~

Committee Note

1
2 Rule 45 was extensively amended in 1991. The goal of the
3 present amendments is to clarify and simplify the rule. The
4 amendments recognize the court where the action is pending as the
5 issuing court, permit nationwide service of a subpoena, and
6 collect in a new subdivision (c) the previously scattered
7 provisions regarding place of compliance. These changes resolve
8 a conflict that arose after the 1991 amendment about a court's
9 authority to compel a party or party officer to travel long
10 distances to testify at trial; such testimony may now be required
11 only as specified in new Rule 45(c). In addition, the amendments
12 introduce authority in new Rule 45(f) for the court where
13 compliance is required to transfer a subpoena-related motion to
14 the court where the action is pending in exceptional
15 circumstances or on consent by ~~agreement of the parties and the~~
16 person subject to the subpoena.³

17
18 **Subdivision (a).** This subdivision is amended to provide
19 that a subpoena issues from the court in which the action is
20 pending. Subdivision (a)(3) specifies that an attorney
21 authorized to practice in that court may issue a subpoena, which
22 is consistent with current practice.

23
24 In Rule 45(a)(1)(D), "person" is substituted for "party"
25 because the subpoena may be directed to a nonparty.

26
27 Rule 45(a)(4) is added to highlight and slightly modify a
28 notice requirement first included in the rule in 1991. Under the
29 1991 amendments, Rule 45(b)(1) required prior notice of the
30 service of a "documents only" subpoena to the other parties.
31 Rule 45(b)(1) was clarified in 2007 to specify that this notice
32 must be served before the subpoena is served on the witness.

33
34 The Committee has been informed that parties serving
35 subpoenas frequently fail to give the required notice to the
36 other parties. The amendment moves the notice requirement to a
37 new provision in Rule 45(a) and requires that the notice include

³ Depending on the standard ultimately selected for transfer in the non-consent situation, this sentence may need further revision.

38 a copy of the subpoena. The amendments are intended to achieve
39 the original purpose of enabling the other parties to object or
40 to serve a subpoena for additional materials. The amendment also
41 deletes the words "before trial" that appear in the current rule;
42 notice of trial subpoenas for documents is as important as notice
43 of discovery subpoenas.

44
45 Parties desiring access to information produced in response
46 to the subpoena will need to follow up with the party serving it
47 or the person served to obtain such access. The party serving
48 the subpoena should make reasonable provision for prompt access.

49
50 **Subdivision (b).** The former notice requirement in Rule
51 45(b)(1) has been moved to new Rule 45(a)(4).

52
53 Rule 45(b)(2) is amended to provide that a subpoena may be
54 served at any place within the United States, removing the
55 complexities prescribed in prior versions.

56
57 **Subdivision (c).** Subdivision (c) is new. It collects the
58 various provisions on where compliance can be required and
59 simplifies them. Unlike the prior rule, place of service is not
60 critical to place of compliance. Although Rule 45(a)(1)(A)(iii)
61 permits the subpoena to direct a place of compliance, that place
62 must be selected under Rule 45(c).

63
64 Rule 45(c)(1) addresses a subpoena to testify at a trial,
65 hearing, or deposition. Rule 45(c)(1)(A) provides that
66 compliance may be required within 100 miles of where the person
67 subject to the subpoena resides, is employed, or regularly
68 conducts business in person. This compliance includes testimony
69 from a remote location when authorized by an order under Rule
70 43(a).⁴ For parties and party officers, Rule 45(c)(1)(B)(i)
71 provides that compliance may be required anywhere in the state
72 where the person resides, is employed, or regularly conducts
73 business in person. Under Rule 45(c)(1)(B)(ii), nonparty
74 witnesses can be required to travel more than 100 miles within
75 the state where they reside, are employed, or regularly transact⁵
76 ~~conduct~~ business in person only if they would not, as a result,
77 incur "substantial expense." When travel over 100 miles could
78 impose substantial expense on the witness, the party that served
79 the subpoena may pay that expense and the court could condition
80 enforcement of the subpoena on such payment.

⁴ This sentence was added in response to a comment from Paul Alston (11-CV-012).

⁵ This wording change responds to the comment of the Standing Committee's Style Consultant, noting that "transact" is the word used in the rule.

81 Because Rule 45(c) directs that compliance may be commanded
82 only as it provides, these amendments resolve a split in
83 interpreting Rule 45's provisions for subpoenaing parties and
84 party officers. Compare *In re Vioxx Products Liability*
85 *Litigation*, 438 F. Supp. 2d 664 (E.D. La. 2006) (finding
86 authority to compel a party officer from New Jersey to testify at
87 trial in New Orleans), with *Johnson v. Big Lots Stores, Inc.*, 251
88 F.R.D. 213 (E.D. La. 2008) (holding that Rule 45 did not require
89 attendance of plaintiffs at trial in New Orleans when they would
90 have to travel more than 100 miles from outside the state). Rule
91 45(c)(1)(A) does not authorize a subpoena for trial to require a
92 party or party officer to travel more than 100 miles unless the
93 party or party officer resides, is employed, or regularly
94 transacts ~~conducts~~ business in person in the state.

95
96 Depositions of parties, and officers, directors, and
97 managing agents of parties need not involve use of a subpoena.
98 Rule 30 permits the party noticing a deposition to set the place
99 of deposition without regard to the limitations on compliance
100 with a subpoena; existing case law recognizes that courts may
101 regulate the location for depositions to guard against undue
102 prejudice. See 8A Federal Practice & Procedure § 2112 (3d ed.
103 2010). Under Rule 37(d)(1)(A)(i), failure of such a witness
104 whose deposition was properly noticed to appear for the
105 deposition can lead to Rule 37(b) sanctions (including dismissal
106 or default but not contempt) without regard to service of a
107 subpoena and without regard to the geographical limitations on
108 compliance with a subpoena. These amendments do not change that
109 existing law; the courts retain their authority to control the
110 place of party depositions and impose sanctions for failure to
111 appear under Rule 37(b).⁶

112
113
114 For other discovery, Rule 45(c)(2) directs that inspection
115 of premises occur at those premises, and that production of
116 documents, tangible things, and electronically stored information
117 occur at a place reasonably convenient for the person commanded
118 to produce. Under the current rule, the place of production has
119 not presented difficulties. The provisions on the reasonable
120 place for production are intended to be applied with flexibility,
121 keeping in mind the assurance of Rule 45(d)(1) that undue expense
122 or burden must not be imposed on the person subject to the
123 subpoena.

124
125 Rule 45(d)(3)(A)(ii) directs the court to quash any subpoena
126 that purports to compel compliance beyond the geographical limits
127 specified in Rule 45(c).

128
⁶ This paragraph was added in response to comments from the American College of Trial Lawyers (11-CV-014).

129 **Subdivision (d).** Subdivision (d) contains the provisions
130 formerly in subdivision (c). It is revised to recognize the
131 court where the action is pending as the issuing court, and to
132 take account of the addition of Rule 45(c) to specify where
133 compliance with a subpoena is required.
134

135 **Subdivision (f).** Subdivision (f) is new. Under Rules
136 45(d)(2)(B), 45(d)(3), and 45(e)(2)(B), subpoena-related motions
137 and applications are to be made to the court where compliance is
138 required under Rule 45(c). Rule 45(f) provides authority for
139 that court to transfer the motion to the court where the action
140 is pending. It applies to all motions under this rule, including
141 an application under Rule 45(e)(2)(B) for a privilege
142 determination.
143

144 Subpoenas are essential to obtain discovery from nonparties.
145 To protect local nonparties, local resolution of disputes about
146 subpoenas is assured by the limitations of Rule 45(c) and the
147 requirements in Rules 45(d) and (e) that motions be made in the
148 court in which compliance is required under Rule 45(c). But
149 transfer to the court where the action is pending is sometimes
150 warranted. If ~~the parties~~ and the person subject to the subpoena
151 consents to transfer, Rule 45(f) provides that the court where
152 compliance is required may do so. In the absence of consent, the
153 court may transfer in exceptional circumstances. Such
154 circumstances will be rare, and the proponent of transfer bears
155 the burden of showing that they are presented.⁷
156

157 A precise definition of "exceptional circumstances"
158 authorizing transfer is not feasible. Generally, if the dispute
159 about the subpoena is focused on issues involved in the
160 underlying action – for example, if these issues have already
161 been presented to the issuing court or bear significantly on its
162 management of the underlying action, or if there is a risk of
163 inconsistent rulings on subpoenas served in multiple districts,
164 or if the issues presented by the subpoena-related motion overlap
165 with the merits of the underlying action – transfer may be
166 warranted. If, on the other hand, the dispute is focused on the
167 burden or expense on the local nonparty, transfer should not
168 occur. The rule contemplates that transfers will be truly rare
169 events.⁸

⁷ This paragraph is revised to reflect the Subcommittee's decision that consent of the parties should not be necessary to transfer. Depending on how the question whether to retain "exceptional circumstances" in a non-consent situation is resolved, further changes in the Note may be needed.

⁸ Once the non-consent transfer standard is selected, this paragraph will need to be reviewed, and may need revision.

170 If the motion is transferred, telecommunications methods can
171 minimize the burden a transfer imposes on nonparties, if it is
172 necessary for attorneys admitted in the court where the motion is
173 made to appear in the court in which the action is pending. The
174 rule provides that if these attorneys are authorized to practice
175 in the court where the motion is made, they may file papers and
176 appear in the court in which the action is pending in relation to
177 the motion as officers of that court.
178

179 After transfer, the court where the action is pending will
180 decide the motion. If the court rules that discovery is not
181 justified, that should end the matter. If the court orders
182 further discovery, it is possible that retransfer may be
183 important to enforce the order. One consequence of failure to
184 obey such an order is contempt, addressed in Rule 45(g). Rule
185 45(g) and Rule 37(b)(1) are both amended to provide that
186 disobedience of an order enforcing a subpoena after transfer is
187 contempt of the issuing court and the court where compliance is
188 required under Rule 45(c). In some instances, however, there may
189 be a question about whether the issuing court can impose contempt
190 sanctions on a distant nonparty. If such circumstances arise, or
191 if it is better to supervise compliance in the court where it is
192 required, the rule provides authority for retransfer for
193 enforcement. Although changed circumstances may prompt a
194 modification of such an order, it is not expected that the
195 compliance court will reexamine the resolution of the underlying
196 motion.
197

198 **Subdivision (g).** Subdivision (g) carries forward the
199 authority of former subdivision (e) to punish disobedience of
200 subpoenas as contempt. It is amended to make clear that, in the
201 event of transfer of a subpoena-related motion, such disobedience
202 constitutes contempt of both the court where compliance is
203 required under Rule 45(c) and the court where the action is
204 pending. If necessary for effective enforcement, Rule 45(f)
205 authorizes the issuing court to transfer its order after the
206 motion is resolved.
207

208 The rule is also amended to clarify that contempt sanctions
209 may be applied to a person who disobeys a subpoena-related order,
210 as well as one who fails entirely to obey a subpoena. In civil
211 litigation, it would be rare for a court to use contempt
212 sanctions without first ordering compliance with a subpoena, and
213 the order might not require all the compliance sought by the
214 subpoena. Often contempt proceedings will be initiated by an
215 order to show cause, and an order to comply or be held in
216 contempt may modify the subpoena's command. Disobedience of such
217 an order may be treated as contempt.
218

219 The second sentence of former subdivision (e) is deleted as
unnecessary.

**Rule 37. Failure to Make Disclosures or to Cooperate in
Discovery; Sanctions**

* * * * *

1 **(b) Failure to Comply with a Court Order.**

2 **(1) Sanctions Sought in the District Where the Deposition**
3 **Is Taken.** If the court where the discovery is taken
4 orders a deponent to be sworn or to answer a question
5 and the deponent fails to obey, the failure may be
6 treated as contempt of court. If a deposition-related
7 motion is transferred to the court where the action is
8 pending, and that court orders a deponent to be sworn
9 or to answer a question and the deponent fails to obey,
10 the failure may be treated as contempt of either the
11 court where the discovery is taken or the court where
12 the action is pending.

13 **(2) Sanctions Sought in the District Where the Action Is**
14 **Pending.**

* * * * *

Committee Note

1
2 Rule 37(b) is amended to conform to amendments made to Rule
3 45, particularly the addition of Rule 45(f) providing for
4 transfer of a subpoena-related motion to the court where the
5 action is pending. A second sentence is added to Rule 37(b) (1)
6 to deal with contempt of orders entered after such a transfer.
7 The Rule 45(f) transfer provision is explained in the Committee
Note to Rule 45.

APPENDIX

New Rule 45(c) limits the geographic scope of the duty to comply with a subpoena in ways that eliminate the authority some judges found in the 1991 version of the rule to compel parties and party officers to testify at trial in distant fora. After consulting with practitioners and reviewing the relevant case law, the Committee concluded that the power to compel parties and party officers to testify at trial should not be expanded. Nonetheless, because some dissenting voices the Committee encountered during its consideration of these issues felt that in unusual cases there may be reason to empower the judge to order a distant party or party officer to attend and testify at trial, the Committee decided to seek public comment about adding such a power to the rules and to suggest rule language that could be used for that purpose.

This Appendix provides that language in the form of a new Rule 45(c)(3), which could be added to new Rule 45(c) proposed above by the Committee. The Committee invites comment on (a) whether the rules should be amended to include such power to order testimony, and (b) whether the following draft provision would be a desirable formulation of such power were it added to the rules. This is not a formal proposal for amendment, but instead an invitation to comment. If the public comment shows that this approach is strongly favored, the Committee will have the option of recommending it for adoption in substantially the form illustrated below without the need to republish for a further round of comment unless the testimony and comments suggest revisions that make republication desirable.

Rule 45. Subpoena

* * * * *

(c) Place of compliance.

(1) For a Trial, Hearing, or Deposition. A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

(A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or

9 (B) within the state where the person resides, is
10 employed, or regularly transacts business in
11 person, if the person

12 (i) the person is a party or a party's officer;
13 or

14 (ii) the person is commanded to attend a trial,
15 and would not incur substantial expense.

16 **(2) For Other Discovery.** A subpoena may command:

17 (A) production of documents, tangible things, or
18 electronically stored information at a place
19 reasonably convenient for the producing person;
20 and

21 (B) inspection of premises, at the premises to be
22 inspected.

23 **(3) Order to a Party to Testify at Trial or to Produce an**
24 **Officer to Testify at Trial.** Despite Rule 45(c)(1)(A),
25 for good cause the court may, for good cause, order a
26 party to appear and testify at trial, or to produce an
27 officer to appear and testify at trial. In deciding
28 whether to enter such an order, the court must consider
29 the alternative of an audiovisual deposition under Rule
30 30 or testimony by contemporaneous transmission under
31 Rule 43(a), and may order that the party or officer be
32 reasonably compensated for expenses incurred in
33 attending the trial. The court may impose the

34 sanctions authorized by Rule 37(b) on the party subject
to the order if the order is not obeyed.

Committee Note

[This Note language could be integrated into the Note above were this provision added to the amendment package]

Subdivision (c)

* * * * *

1 Rule 45(c)(1) places geographic limits on where subpoenas
2 can require parties and party officers to appear and testify.
3 These amendments disapprove decisions under the 1991 version of
4 the rule that found it to authorize courts to require parties and
5 party officers to testify at trial without regard to where they
6 were served or where they resided, were employed, or transacted
7 business in person. The amended provisions in part reflect
8 concern that unrestricted power to subpoena party witnesses could
9 be abused to exert pressure, particularly on large organizational
10 parties whose officers might be subpoenaed to testify at many
11 trials even though they had no personal involvement in the
12 underlying events.
13

14 On occasion, however, it may be important for a party or
15 party officer to testify at trial. New Rule 45(c)(3) therefore
16 authorizes the court on motion to order such trial testimony
17 where a suitable showing of need is made. There is no parallel
18 authority to order testimony by party witnesses at a "hearing"
19 that is not the trial on the merits.
20

21 The authority conferred by Rule 45(c)(3) requires the moving
22 party to show good cause— that there is a real need for
23 testimony from the individual in question. The court must
24 consider the alternative of an audiovisual deposition or
25 testimony by contemporaneous transmission. In some cases, the
26 court may ask whether a different witness could be used to
27 address the issues on which this witness would testify. The
28 court should be alert to the possibility that a party may be
29 attempting to apply settlement or other pressure by seeking to
30 impose on another party the time and cost burdens of traveling to
31 testify at trial.
32

33 Whether the witness is a party or the party's officer, the
34 court's order is directed to the party. If the witness does not
35 obey the order, the court may impose the sanctions authorized by
36 Rule 37(b) on the party; the rule does not create authority to
37 impose sanctions directly on a nonparty witness. In determining

38 whether to impose a sanction for failure of a nonparty witness to
39 appear and testify – or which sanction to impose – the court may
40 consider the efforts the party made to obtain attendance of the
41 nonparty witness at trial.

42
43

* * * * *

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**Summary of comments on Rule 45
amendments, 2011-12**

Overall simplification

[Note that the Invitation for Public Comment specifically requested comments "on whether the efforts at simplification are successful, and whether further simplification of the rule might properly be considered."]

Jody Smith, Tyler Laughinghouse, Jon Burtard, Sabina Thaler (11-CV-001) (these commenters prepared their comments as part of a Federal Civil Litigation course at Washington & Lee Law School, seemingly before the actual publication of the preliminary draft of proposed amendments): The decision not to rely on cross-references to provisions in Rules 26-37 is wise, as is the decision not to remove details from Rule 45 and rely instead on judicial discretion. Removing the "three-ring circus" elements of the current rule is desirable to take out a source of complexity and confusion. But it may be that no change is really needed at all. Attorneys with experience using Rule 45 do not seem to have encountered difficulty employing it. Because nonlawyers served with a subpoena are likely to enlist the services of an attorney, making the rule understandable to the lay reader is a low priority. In particular, the removal of the mandatory quash directive in current Rule 45(c)(3)(ii) would not be desirable.

Michael A. Roddy (11-CV-006) (Executive Officer of the Superior Court of California, County of San Diego): The amendment to Rule 45 changing the "issuing court" from the court located where the nonparty witness is found to the court where the action is pending could impose substantial costs on the California judicial branch. The Superior Court receives hundreds of subpoenas every year. It cannot afford the attorney fees to hire lawyers around the country to address these subpoenas. This court therefore requests that the rule be modified to exempt state courts expressly, based on principles of sovereign immunity, comity, and a court's inherent power to control its own records. [Note: This amendment was meant not to alter the place where any litigation about the enforcement of a subpoena should occur. See proposed Rule 45(c).]

N.Y. State Bar Ass'n Commercial & Fed. Litigation Section (11-CV-010): We applaud the simplification of the rule. Consolidating all aspects of the duty to comply in one place -- new Rule 45(c) -- is a welcome change. We also support the change to make the court where the underlying action is pending the "issuing court." "Many lawyers do not believe it makes intuitive sense for the Federal Rules to require a subpoena to be issued by the court in the jurisdiction in which compliance will occur." The amendment eliminates this confusion.

Robert L. Byman (11-CV-013) (submitting copy of article from National Law Journal): "The proposed amendments are excellent. They greatly eliminate confusion and simplify issues on the issuance, service and compliance with subpoenas."

American College of Trial Lawyers, Federal Civil Procedure Committee (11-CV-014): "The proposed amendment's great attribute is its simplicity. The drafters have done a wonderful job of simplifying Rule 45's confusing language and converting its impenetrable structure into something that can now be readily understood."

Litigation Section, L.A. County Bar Ass'n (11-CV-016): Although we applaud the effort to simplify the rule, we think that making the "issuing court" the court in which the action is pending is a mistake for jurisdictional reasons. A subpoena is an exercise of the jurisdiction of the issuing court. Particularly in diversity cases, there may be a question about whether that court can exercise jurisdiction over a witness who does not have minimum contacts with the state in which the court sits. As a consequence, the enforcing court might have to quash the subpoena on the ground the issuing court did not have jurisdiction to summon this witness to testify, even though the testimony will be near the witness's home. The benefits of having all subpoenas issue from the court presiding over the underlying action are minimal, and the potential jurisdictional issues make that change unwarranted.

Federal Magistrate Judges Association (11-CV-018): The Association generally endorses the simplification. But it is concerned that the amended rule uses similar but not identical terms in a number of places, and that these terms should either be replaced by a single term if they are meant to be identical or defined with clarity if they are not meant to be identical. Thus, proposed Rule 45(c)(1)(B)(ii) speaks of "substantial expense," but proposed 45(d)(3)(A)(iv) refers to "undue burden." Rule 45(d)(1), meanwhile, speaks of "undue burden or expense," and 45(d)(2)(B)(ii) protects a nonparty from "significant expense." We are uncertain what the difference is supposed to be between "substantial" and "significant" expense. More generally, the use of different terms in different places may invite disputes about whether they are really different standards. If they are different, the Note should explain how they are to be differentiated. If they are not different, the same term should be used throughout. [Note: Most of these terms are holdovers from the current rule. Thus, current 45(c)(1) refers to "undue burden or expense," 45(c)(2)(B)(ii) refers to "significant expense," 45(c)(3)(A)(iv) refers to "undue burden," and 45(c)(3)(B)(iii) refers to "substantial expense." No submissions have indicated that this divergence in terminology has caused problems in the past.]

More important, the rule does not say who bears the burden of establishing whether "substantial expense" has been established. The rule suggests that the issuing party must make the showing, but the subpoena target would be better positioned to do so. [Note: Current 45(c)(3)(B)(iii) permits the court to quash the subpoena if it requires "a person who is neither a party nor a party's officer to incur substantial expense to travel more than 100 miles to attend trial." Proposed 45(c)(1)(B)(ii) permits a subpoenas to require a person to attend trial within the state where he resides, is employed, or regularly transacts business in person if "the person * * * would not incur substantial expense." Proposed 45(d)(3) then requires that the subpoena be quashed if it requires a person "to comply beyond the geographical limits specified in Rule 45(c)."]

U.S. Equal Opportunity Commission (11-CV-020): EEOC believes the amended rule is better organized and easier to understand than the current rule.

U.S. Department of Justice (11-CV-021): We support amending the rule to make the forum court the "issuing court" for subpoenas and providing nationwide service of subpoenas from that court. We believe that the amendment provides sufficient protections for nonparty witnesses.

Managing Attorneys' and Clerks' Association (11-CV-022): Proposed Rule 45(c)(2)'s "reasonably convenient" standard for where a subpoena can compel production of documents would afford undue discretion to the party serving the subpoena. It could lead to forum shopping because it would determine which court would hear disputes about the subpoena. In a significant number of cases, issuing parties and subpoenaed persons would differ as to where it is reasonably convenient to produce documents or data. We have not found that the current rule produces problems, and we therefore urge that proposed (c)(2) be dropped and (c)(1) be used for place of production. In addition, Rule 45 should allow litigants the same flexibility in selecting where a motion to quash or modify is heard like the flexibility permitted by Rule 30(d)(3)(A), which permits a motion in the court where the underlying action is pending or in the court where the deposition is being taken.

Defense Research Institute (11-CV-023): DRI supports the clarification that the court issuing subpoenas is the court where the action is pending regardless of the location of compliance with the subpoena. We also agree that disputes relating to subpoenas should be resolved by the court where the compliance is sought.

Ronald Marmer (and 35 other "individual members of leadership" of the ABA Section of Litigation) (11-CV-025): "We applaud the changes reflected in the proposed amendments." The

group does, however, have some uneasiness about a number of specifics.

Notice of service of subpoena

[Note that the Invitation for Public Comment specifically requested comments on "whether additional notices should be required beyond the one specified in Rule 45(a)(4)."]

Jody Smith, Tyler Laughinghouse, Jon Burtard, Sabina Thaler (11-CV-001) (these commenters prepared their comments as part of a Federal Civil Litigation course at Washington & Lee Law School, seemingly before the actual publication of the preliminary draft of proposed amendments): We agree that notice is important because it provides for greater transparency in the justice system, but are concerned that moving the existing provision will do little to cure notice problems. It is not clear that failures to give required notice in the past resulted from ignorance of the notice requirement; moving the provision will only solve the problem if it was a problem of awareness. The revised provision also lacks sanctions for failure to give the required notice; without sanctions the change may not be effective. The actual reason for noncompliance with the current rule's notice requirement should be determined before a solution is adopted.

Kenneth A. Lazarus (11-CV-005) (on behalf of American Medical Ass'n and several related physician associations): We recognize that the proposed notice provision -- limited to "documents only" subpoenas -- reflects current law, but feel that it should not. When a subpoena is served on a doctor, the physician-patient privilege and patient privacy rights belong to the patient. Those rights apply with equal force to document productions and deposition testimony. Normally, the patient or the attending physician or hospital is a party to the litigation, and their interests are fairly met only if they are put on notice of a possible threat to their rights due to the subpoena. [Note that Rule 30 appears to require notice to all parties for a deposition, whether or not attendance of the witness is obtained by subpoena, and whether or not the witness is directed to bring along documents. Nonparty document discovery -- first authorized in the absence of a deposition subpoena by the 1991 amendments to Rule 45 -- did not have a parallel notice requirement.]

Wayne E. Uhl (11-CV-007): The requirement that notice be given to other parties "before" the subpoena is served is vague. It could be read to mean one day before, or less. As service is complete upon mailing, the rule can be complied with by mailing a copy to the other parties, and then serving the nonparty witness the same day, or the following day. If the purpose of the notice is to give the other parties a meaningful opportunity to object, then a specific period of time should be built in, plus the opportunity for the other parties to waive that period. I have not read the cases that triggered the 2007 amendment from "prior" to "before," but I can tell you that this vagueness is already

causing problems in practice. In Indiana, the state-court rules have long required a 15-day notice period before service of a nonparty subpoena. This time period is waivable, and in most cases is waived. The Indiana rule also requires the requesting party to produce copies of all the documents to the other parties. Although this provision has its benefits, it may not be appropriate for the federal rule.

Hon. Michael M. Baylson (11-CV-008) (This comment is in the form of a skit that was presented at the Univ. of Penn. Inn of Court): Under Pennsylvania state-court practice, before serving a nonparty subpoena a party must give 20 days' notice to the other parties, who have an opportunity to object. The proposed amendment is silent on how much advance notice must be given. Under the Pennsylvania rule, a party is required to give notice to the other parties that it has received documents, and offer to make them copies at their expense. Under the amended rule, could a party that serves a subpoena request that the nonparty recipient refuse to provide the same documents to the other parties unless they also serve subpoenas?

Lawyers for Civil Justice (11-CV-009): LCJ agrees with the addition of new Rule 45(a)(4). This relocation will achieve the Committee's goal of providing other parties with the opportunity to object to a subpoena. No further notices should be required beyond the one specified in proposed Rule 45(a)(4).

N.Y. State Bar Ass'n Commercial & Fed. Litigation Section (11-CV-010): We support the inclusion in the notice provision of a requirement to provide a copy of the subpoena. That is not burdensome, and would keep the parties apprised of what is being sought. The current rule and proposed amendment call for notice "before" a subpoena is served. We think this should be changed to require notice "simultaneous" with service. The parties would then have the same opportunity to challenge the subpoena, but this change would limit the ability of a party to facilitate evasion of service by the person subpoenaed. The rule should also be enhanced to require that the party issuing the subpoena notify the other parties if it negotiates a modification of the subpoena.

American College of Trial Lawyers, Federal Civil Procedure Committee (11-CV-014): The ABA Section of Litigation proposed that the amendment require additionally that the party serving the subpoena give notice of any modification of the subpoena and make available the documents or other material produced in response to the subpoena. We agree that these additional requirements should be included. At least the requirement of making the produced materials available should be included in the rule; presently that concept is only in the Committee Note. The burden of providing that notice of the production should be placed on the party that obtained the documents. Of the 35

states that authorize document subpoenas, 17 have a requirement along the lines suggested, and 18 do not require a notice beyond what is in current Rule 45(b)(1) and in the new 45(a)(4).

Steven M. Puiszis (11-CV-015): The clarification about the notice requirement is a welcome improvement of the existing rule. It will enhance a party's ability to object to a subpoena or to seek additional information from the subpoenaed person. But the amendment would allow a party to issue a subpoena immediately after issuing the required notice. The Committee should consider a minimum time requirement between issuance of the notice to all parties and when the subpoena may be served on the person directed to comply. This timing requirement would enable the parties to determine whether to challenge the subpoena before it is served. The Committee should also consider requiring additional notices in two circumstances -- when an objection is made and when an agreement is made to modify the subpoena. Although good practice should lead lawyers to do this anyway, experience shows that it does not always work that way. Requiring such notice is not burdensome. Giving the notice will enable the other parties to join in the objection or in efforts to resolve the objection prior to the need to apply to the court for relief. Similarly, giving notice of modifications of the subpoena would provide other interested parties the opportunity to determine if they will accept the revised scope of the subpoena or seek additional documents without the need for issuing an additional subpoena.

Litigation Section, L.A. County Bar Ass'n (11-CV-016): Additional notices should be required. The failure to inform other parties that production has occurred is a common source of disagreement, and the failure of the issuing party to share the fruits of the subpoena often gives rise to unnecessary discovery disputes. The rules should clearly specify that the party who issues a subpoena should be required to notify the other parties when a production has been made and to make available copies of the material produced. The issuing party should also be required to notify the other parties of any agreement to narrow the subpoena or otherwise alter its scope.

U.S. Equal Opportunity Commission (11-CV-020): EEOC believes the revised notice provision in 45(a)(4) should also require notice of modifications to the subpoena and notice of initial receipt of any materials produced. Contrary to the concerns reflected in the minutes of the Advisory Committee's April, 2011, meeting, we view these as very slight burdens on the party serving the subpoena, particularly when compared to the burdens on the other parties of making repeated requests for such information. Requiring notice of only the initial production eliminates any concern over how to apply the requirement to "rolling production," while alerting other parties to the fact that production is occurring. The statement in the Committee

Note about giving access to produced materials will do little, in our view, to alleviate what we believe will be the major problem faced by the nonserving parties -- the failure of the serving party to respond to inquiries regarding whether production has occurred. There is no apparent remedy for such nonresponsiveness, but a requirement in the rule that notice of initial production be provided could easily be enforced. We suggest that the requirement could be that notice be given "___ calendar days from first receipt of production [modification of the subpoena]."

U.S. Department of Justice (11-CV-021): We generally support the amendment to make the notice requirement more prominent. We are troubled, however, by the removal of the words "before trial" that appear in the current rule. The removal of those words seems to be designed to make the notice provision apply to trial subpoenas. But we are concerned that the removal of "before trial" could interfere with using a subpoena for post-judgment discovery under Rule 69(a)(2). We don't doubt that there is a value to giving notice of trial subpoenas. But in the post-judgment context any such concerns would be outweighed by the potential for dissipation of assets by the judgment debtor who receives notice of the discovery. Accordingly, we suggest that the words "before judgment" should be inserted into the revised rule, and a brief explanation should be provided in the Committee Note to confirm that prior notice need not be given for post-judgment subpoenas. The Department has considered whether there should be a further notice requirement -- for modification of the subpoena's terms or other matters. The Department is not convinced that a need has been shown for any such requirements.

Managing Attorneys' and Clerks' Association (11-CV-022): The timing of the notice should be changed so notice need not be given until after service of the subpoena. We suggest that it be within three days after service, or at least one day prior to the date of production. In addition, the issuing party should be required to give a second notice within five days after records are produced. Notice before service of the subpoena is not necessary, and can be a problem when time is of the essence for service of the subpoena. There is, also, the risk that a friendly party will give the person to be subpoenaed a tip and cause service to become difficult. That problem should be avoided. Another problem is that the other parties have difficulties gaining access to documents after production. Several years ago New York Civil Practice & Rules § 3120(3) was adopted, requiring that the subpoenaing party to notify the other parties within five days of compliance that the subpoenaed records are available for inspection and copying. This has produced cost savings and dispelled much confusion.

Defense Research Institute (11-CV-023): DRI supports that amendment to the rule to provide for notice to other parties, which will allow an opportunity to object to the subpoena.

Ronald Marmer (and 35 other "individual members of leadership" of the ABA Section of Litigation) (11-CV-025): Before publication, the ABA Section of Litigation leadership urged that additional notices and a rule provision requiring access to produced materials be included. We continue to believe that such provisions would improve the rule. This is our main concern about the proposed amendments. We have four basic concerns:

Notice before service: We think that there should be a minimum period of seven days' notice before service, because saying only that the notice must be "before" service does not allow a meaningful amount of time to seek protection. And there are litigants who use subpoenas to harass customers or suppliers of adverse parties. Because there could be circumstances in which there is a "demonstrable" risk that the subpoena recipient will evade service or destroy documents, we also propose that in "exceptional circumstances" a party be allowed to serve a subpoena before giving notice. The initiating party would not have to seek a court ruling in advance of such expedited service, but it would have to be prepared to prove later that truly "exceptional circumstances" existed to justify lack of notice.

Notice of objections and modifications: In practice, parties notified that another party has served a subpoena do not burden the nonparties with identical or similar subpoenas. But that behavior can be frustrated when the party that issued the subpoena, perhaps in response to objections by the nonparty, changes the scope, return date or other terms of the subpoena without telling the other parties. We proposed that the issuing party be required to send an email notification of all such changes.

Notice of receipt and opportunity to inspect: The Committee Note properly says that best practice is to allow inspection, but our experience is that a significant portion of the bar does not always adhere to this best practice. One of us recently confronted an opponent who challenged our member to show where in Rule 45 there was a requirement to provide access to the produced materials. Many states (such as Pennsylvania and New Jersey) require explicitly that such access be granted. The federal rule should also. We note that the S.D.N.Y. has recently adopted a provision for complex cases saying that "the party responsible for issuing and serving the subpoena shall promptly produce [materials so obtained] to, or make them available for inspection and copying by, all parties to the action." We do not see how

spelling out these requirements in the rule will cause more problems.

Use of e-filing: Because e-filing is now the rule rather than the exception, we suggest that it can be used to achieve several of the goals mentioned above. All notices could be delivered by e-filing, and the parties would thereby be put on an even playing field.

Overall: If our proposals were accepted, they would result in a revised rule provision somewhat as follows:

If the subpoena commands the production of documents, electronically stored information, or tangible things or the inspection of premises:

- (A) a copy of the subpoena must be served on each party seven days before the subpoena is served on the person to whom it is directed, except in exceptional circumstances;
- (B) reasonable notice must be given to each party of any modifications of the subpoena, including any new date and time of inspection or production; and
- (C) reasonable notice must be given to each party of the receipt of documents, electronically stored information, or tangible things, and such material must be made available to each party for inspection and copying in a timely manner.

Transfer

[Note that the Invitation for Public Comment specifically requested comments on whether the proposed standard for transfer ("exceptional circumstances") is too confining, and also whether party consent should be required, or only the consent of the person subject to the subpoena.]

Jody Smith, Tyler Laughinghouse, Jon Burtard, Sabina Thaler (11-CV-001) (these commenters prepared their comments as part of a Federal Civil Litigation course at Washington & Lee Law School, seemingly before the actual publication of the preliminary draft of proposed amendments): Although the Committee should research further the question of pro hac vice admission and potential jurisdictional issues, the transfer proposal strikes an appropriate balance between safeguarding burdensome discovery requests and ensuring efficient and just resolution of the merits of the underlying suit. Protection of the interests of nonparties served with subpoenas is important, but courts should be able to guard against overburdening them.

Hon. Bernard Zimmerman (N.D. Cal.) (11-CV-004): Judge Zimmerman has transferred subpoena-enforcement motions to the court presiding over the underlying action on a number of occasions. From his experience, transfer is a valuable tool. The requirement of "exceptional circumstances" to justify such a transfer may not provide the enforcement judge with sufficient flexibility. Objections to subpoenas usually fall into one of two broad categories. One category is objections that come principally from the witness. These issues are best handled in the compliance district because it would generally be inconvenient and expensive for the witness to address these issues in the litigation district. Another category is objections which come from one of the parties, not from the witness. One common objection is lack of relevance. Another is that the subpoena is inconsistent with, or even violates, an order issued by the litigation court. "In my judgment, such objections should be, for the most part, transferred to the litigation court. While it is true that the compliance court can make its own determination of what is relevant or whether the subpoena violates the litigation court's rulings, those determinations can more expeditiously be made by the litigation court. And the possibility of inconsistent rulings would be eliminated. * * * Since in my experience appropriate enforcement motions should be regularly transferred to the litigation district, I believe that a good cause standard would work better than an 'exceptional circumstances' standard."

Kenneth A. Lazarus (11-CV-005) (on behalf of American Medical Ass'n and several related physician associations): We see no need to alter Rule 45's current provisions regarding the

"issuing court." We urge the Committee to give even greater deference to the needs of nonparty witnesses. In the majority of cases, physicians in receipt of a subpoena would much prefer to protect their interests and the interests of others whom they are duty-bound to protect in the district in which they reside and practice. Therefore, the preference of the nonparty subject to the subpoena should be respected; transfer should only occur when that person consents. If transfer is permitted without the consent of the nonparty recipient, the rule should provide that it may occur only in exceptional circumstances and where transfer will not result in any substantial inconvenience to the nonparty recipient.

Hon. Michael M. Baylson (11-CV-008): Judge Baylson is concerned that proposed Rule 45(f) allows "transfer" of an "order," and is concerned that this is a very novel concept that may need more discussion.

Lawyers for Civil Justice (11-CV-009): LCJ supports the "exceptional circumstances" standard for transfer. It agrees that in certain extraordinary situations Rule 45 should allow a subpoena dispute to be transferred, such as when the decision of to enforce the subpoena would go to the merits of the case or would be case dispositive. But such transfers should be rare.

N.Y. State Bar Ass'n Commercial & Fed. Litigation Section (11-CV-010): We support the addition of authority to transfer, but would change the standard because the "exceptional circumstances" standard is too strict. The examples mentioned in the Committee Note ("if these issues have already been presented to the issuing court or bear significantly on its management of the underlying action, or if there is a risk of inconsistent rulings on subpoenas served in multiple districts, or if the issues presented by the subpoena-related motion overlap with the merits of the underlying action") are not exceptional. A better standard would be "good cause," and we recommend modifying the standard to "good cause." In addition, and in keeping with concern for the interests of the person subject to the subpoena, we recommend that transfer be permitted on request of that person, provided that notice is given to all parties prior to transfer.

George A. Davidson, Esq. (11-CV-011): It would be a serious mistake to limit transfer to "exceptional circumstances" (as the proposed rule provision says) or to ensure that transfers are "truly rare" (as the Committee Note says). Transfer should be frequent. The court in which the action is pending is in much the better position to determine the merits of a compliance motion. Even if the focus of the subpoena-related motion is on the burdens the proposed discovery would impose on the nonparty, that judgment would best be made by the judge presiding over the underlying action. Burden is always relative; the judge

presiding over the underlying case is best situated to determine whether the information sought has value to the case sufficient to justify that burden. The burden on the nonparty witness of resolution of the subpoena-related motion in the issuing court should not be great due to the ease of electronic communications. Accordingly, the standard should be that transfer should be allowed if it would promote efficiency and not unduly prejudice the witness, not only in exceptional circumstances.

American College of Trial Lawyers, Federal Civil Procedure Committee (11-CV-014): We believe that consent of the nonparty subject to the subpoena should suffice to support transfer and that, absent such consent, transfer should occur only in "exceptional circumstances," as provided in proposed Rule 45(f). The nonparty is the one most affected by enforcement of the subpoena. If that nonparty consents to transfer, the compliance district court should have broad discretion to make the transfer. The "exceptional circumstances" language should remain for situations in which the nonparty does not consent to the transfer; in those circumstances, the nonparty's interests should be respected unless there are exceptional circumstances that nevertheless support a transfer.

Steven M. Puiszis (11-CV-015): The proposed standard sets the appropriate threshold in light of the goal of reducing the burdens of Rule 45 on nonparties. It should be a rare case in which a subpoena-related motion is transferred over the objection of the party subject to the subpoena. The exceptional circumstances standard is not overly restrictive and the examples provided by the Committee in the Note are illustrative of how the standard should be applied in practice.

Litigation Section, L.A. County Bar Ass'n (11-CV-016): The transfer standard should be changed to make transfer easier. Specifically, the consent of the parties should not be required; so long as the person subject to the subpoena consents to transfer, that should suffice. In addition, the "exceptional circumstances" standard in the absence of such consent to transfer is too limiting; we believe "good cause" should be used. There are many common circumstances in which the court handling the underlying case will be in the best position to rule on a subpoena-related motion, and the judge in the enforcement forum will often prefer to have the judge familiar with the case make the ruling. This may even be true if there is objection that the subpoena is unduly burdensome, for that requires that court to weigh the burden against the likely importance of the information sought to the case. The "exceptional circumstances" standard would prevent transfer in these common circumstances, and that is too narrow.

Federal Magistrate Judges Association (11-CV-018): The Association believes strongly that the decision whether to

transfer should not be hobbled by the "exceptional circumstances" standard. "In fact, the FMJA believes that transfer of such disputes should be the preferred practice." The requirement of party consent to permit a transfer is not appropriate. Neither party should have a veto power on this subject. Having that power will lead to forum shopping by a party unhappy with the previous rulings of the issuing court. Indeed, the Association would not even give the person subject to the subpoena a veto power, although that person's concerns clearly deserve substantial respect. In most cases, a transfer will significantly advance the just and efficient resolution of the dispute. Accordingly, the transfer standard should invoke the court's discretion and direct attention to the interests of the person subpoenaed and the interests of justice. The Note can then elaborate on the importance of guarding against imposition on the person subject to the subpoena, but also recognize that electronic communications are likely to minimize the burdens resulting from a transfer.

State Bar of California Committee on Federal Courts (11-CV-019): We agree with the Committee Note's conclusion that "exceptional circumstances" cannot be defined precisely. But we believe that it would benefit from further elucidation in the Note. In particular, we believe a nonparty's close relationship with a party should be identified in the Note as a factor supporting transfer. For example, if a nonparty is a consultant or employee of a party, this relationship should favor transfer. In contrast, the absence of a relationship between the nonparty and any party should weigh against transfer.

We are also concerned that although proposed Rule 45(f) says that an attorney authorized to practice in the compliance court may file papers and appear in the issuing court after transfer, nothing says that the attorney who served the subpoena can appear in the compliance court for purpose of a subpoena-related motion. Our committee takes no position on this issue, but believes that it may warrant further study. [Note: Although current Rule 45(a)(3) says an attorney may issue and sign a subpoena as an officer of the court for the district where the discovery is to be done, it does not speak directly to the question whether that attorney is authorized to appear and argue subpoena-related motions in that court. Proposed 45(a)(3) says that an attorney may issue and sign a subpoena if authorized to practice in the issuing court. It does not say that the attorney does so "as an officer of" that court or another court.]

U.S. Equal Opportunity Commission (11-CV-020): We believe that the consent of the person subpoenaed should be sufficient to permit transfer without any additional showing. Although there may be situations in which a party has close connections with the district in which compliance is required, generally local interests will relate only to the person subpoenaed. And a

party's connection with the area where compliance is required is a fortuitous circumstance that shouldn't be a factor in the determination of which court should decide a matter that would be decided by the court presiding over the action but for the fortuity of where the person subpoenaed is located. We believe that the "exceptional circumstances" standard should be replaced by considerations like the prior draft -- "the convenience of the person subject to the subpoena, the interest of the parties, and the interests of effective case management." The case-management factor should be the primary consideration. The parties by definition have a connection to the issuing court, and the party seeking the transfer can be required to compensate the person subpoenaed for any additional expense incurred. The EEOC often finds, for example, that the same issues arise in various districts due to subpoenas. The "exceptional circumstances" standard is too limiting if the phrase is used in the same way it is used where it appears in other rules. For example, Rule 256(b)(4)(D) says that "exceptional circumstances" must be shown to justify production of work done by a nontestifying expert, and in our experience that is almost never granted. We fear that the same will be likely to result if that phrase is used in this rule -- transfer will almost never be granted except upon consent.

U.S. Department of Justice (11-CV-021): We support the addition of new Rule 45(f) to provide greater protections to those persons or entities who might be subject to burdensome subpoenas. We believe that the transfer standard should look to consent of the nonparty subject to the subpoena or "exceptional circumstances." But the consent of the parties should not be required to permit transfer if the nonparty consents. Permitting any one of the parties to "veto" what would otherwise be a consensual transfer could cause delay and frustrate the purpose of the amendment. The Department also endorses the provision authorizing the attorney for the person subject to the subpoena to appear in the issuing court after transfer. We suggest that either the rule or the Committee Note specifically explain that this provision supersedes any contrary local rules of a district court.

Managing Attorneys' and Clerks' Association (11-CV-022): The proposed amendments do not address the existing problem of forcing subpoenaed persons who are commanded to respond in a jurisdiction other than where they live or work to retain unfamiliar counsel to represent them. A person subpoenaed to respond out of state, which can happen within the 100-mile rule fairly frequently, must retain a lawyer in an unfamiliar legal market within a tight time frame. This is an unfair burden on uninvolved nonparties served with subpoenas. Although Rule 45(f) touches in this issue, and the rule therefore defaults to the ordinary rule that one be admitted in the district where the motion is to be filed. That may mean that even the lawyer who served the subpoena cannot file a motion to compel in that court.

This weakness in federal subpoena practice could be eliminated with the simple provision that the issuing lawyer may litigate subpoena-related disputes in any federal district court without formally being admitted in that court. A similar provision already exists in Rule 2.1(c) of the Rules of Procedure of the Judicial Panel on Multidistrict Litigation.

Defense Research Institute (11-CV-023): DRI agrees that the parties and the person responding to the subpoenas should be required to consent before transfer, and that the subpoena-related motion otherwise cannot be transferred absent extraordinary circumstances. We do not believe that is too demanding a standard for transfer in the absence of consent.

Ronald Marmer (and 35 other "individual members of leadership" of the ABA Section of Litigation) (11-CV-025): We applaud the selection of the "exceptional circumstances" standard for transfer when the person served with the subpoena does not consent to transfer. It is not necessary to require consent also of the parties; consent of the person subject to the subpoena should suffice. But when that person does not consent, a lesser standard for transfer -- such as "good cause" or the "interests of justice" would not give sufficient weight to protecting nonparties from undue burden or expense. Such a lower standard could quickly make transfer the rule, as judges might be inclined to assume that the issuing court supervising the litigation would usually be best suited to resolve all issues raised by compliance with its subpoena.

Authority to Compel Attendance at Trial
of Parties and Party Officers

[Note that the Invitation for Public Comment specifically requested comments on whether allowing courts authority would be desirable, and if so whether language included in an Appendix to the preliminary draft would be appropriate.]

Jody Smith, Tyler Laughinghouse, Jon Burtard, Sabina Thaler (11-CV-001) (these commenters prepared their comments as part of a Federal Civil Litigation course at Washington & Lee Law School, seemingly before the actual publication of the preliminary draft of proposed amendments): The Vioxx court's reading of existing Rule 45 is not correct, but its criticism of the 100-mile limit has force in the 21st century. The best solution would be to increase the mileage limitation from 100 to 500 miles, but also to require a court order when the witness is required to travel more than 100 miles and assure that the witness will be reimbursed for travel costs in this situation.

Matthew J. Walko (11-CV-003): The Rule 45 proposals "further undermine the fundamental purpose of the Seventh Amendment's guarantee of trial by jury, in favor of trial by deposition." If the court has personal jurisdiction over the parties, then either side should be able to require his opponent to stand before the jury at trial and be judged. Under Rule 16(a), the court can require "unrepresented parties" to appear before it for a pretrial conference, and Rule 16(c)(1) permits the court to command even represented parties to appear before the court to discuss settlement. The handling of nonparties, such as party officers, should be treated as a separate concern. But as to corporate parties, they should be required (as under Rule 30(b)(6)) to designate a live person to testify at trial, just as they have to designate a person to testify by deposition. [Note: Several years ago the Committee looked carefully at possible amendments to Rule 30(b)(6) and concluded that its balancing of various considerations did not call for adjustment.]

Kenneth A. Lazarus (11-CV-005) (on behalf of American Medical Ass'n and several related physician associations): We take no position on whether corporate party officers should be made to travel more than 100 miles to testify, but strongly support the Committee's retention of the 100-mile rule for nonparty witnesses. Nonparty physicians have no stake whatsoever in the litigation and should not be required to travel long distances for purposes of either deposition or trial.

Lawyers for Civil Justice (11-CV-009): LCJ supports the decision not to compel nationwide subpoena power for parties and party officers. The traditional justifications for the 100 mile rule -- protecting witnesses from harassment and minimizing

litigation costs -- remain viable today. Alternatives to live testimony, such as videotaped depositions, provide the necessary tools for finding the truth. Accordingly, LCJ opposes the alternative included in the Appendix.

N.Y. State Bar Ass'n Commercial & Fed. Litigation Section (11-CV-010): The revised rule has the beneficial effect of describing the jurisdictional boundaries of a subpoena in a single provision, new Rule 45(c). It also resolves the divergence in case law on whether the court can compel an out-of-state party or party's officer to travel more than 100 miles to testify. We have some concern that this change still leaves such witnesses subject to extensive and costly intra-state travel, but believe proposed Rule 45(d)(1) should adequately protect against such problems. We support the addition of Rule 45(c)(3) as set forth in the Appendix. It would be helpful for the court to have the power to order an out-of-state party or party officer to testify at trial. We think that Rule 45(c)(3) should also caution the courts to consider not only whether an audio deposition or testimony by contemporaneous transmission could suffice, but also to weigh those considerations against other factors, such as whether the trial is a jury or court trial, the expected length of the testimony, and the extent to which the testimony will be contested. We think the standard for ordering such testimony should be "good cause." Any attempt at drafting more precise language is likely to cause problems.

Robert L. Byman (11-CV-013) (submitting copy of article from National Law Journal): The rule should say that the issuing court can compel attendance by parties -- at least by plaintiffs -- in the forum for deposition or trial. "All we need is a provision in Rule 45 (or in Rule 30 or anywhere else) that says, 'A Party's attendance at deposition or trial may be compelled by notice without any requirement for a subpoena.'"

American College of Trial Lawyers, Federal Civil Procedure Committee (11-CV-014): A majority of our Committee opposes authorizing national subpoena power as provided in the Appendix, but there was a wide difference of opinion among our members and substantial support for the proposal in the Appendix. The proposed amendment clearly shows that the rule does not, without the addition of the provision in the Appendix, authorize trial subpoenas for parties or party officers beyond the "100 mile rule." The possibility of using trial subpoenas for strategic advantage is substantial. Although there are strong arguments on the other side of the issue, on balance a majority of our Committee prefers the proposal recommended by the Advisory Committee without the addition of the provision in the Appendix.

Steven M. Puiszis (11-CV-015): The amendment confirming that parties and party officers are protected by the 100-mile limit is a welcome clarification of the existing rule. Even

though modern modes of transportation have reduced travel time, they have not eliminated the inconvenience of travel; the time that senior officers spend travelling to testify at trial imposes an opportunity cost on the company that is one of the hidden costs of litigation. The amendment protects against that drain, and guards against the potential for harassment unfettered subpoena power would otherwise create. Due to the availability of videotaped depositions, the amendment will not negatively impact a jury's truth-seeking function.

Litigation Section, L.A. County Bar Ass'n (11-CV-016): We agree that the existing rule and should be clarified, but we favor including the power to order a party or party officer to attend and testify at trial. We therefore favor including the provision in the Appendix, although we would remove one feature of that proposal. It is not appropriate to apply the geographic limits of Rule 45 to parties, for parties have a great interest in the outcome of a case. In addition, other parties and the court have a strong interest in live testimony at trial to make an accurate decision. To deny the court the power to order a party to testify at trial undermines the jurisdiction of the courts. By the time this issue arises, the court has already obtained jurisdiction over the parties, and for this reason no subpoena should even be needed to compel attendance at trial. The court can order a party to appear for a settlement conference or a deposition without any new process; why should a subpoena be necessary to obtain live testimony at trial? Although the court does not automatically obtain jurisdiction over corporate officers just because it has jurisdiction over the company, corporations subject to the jurisdiction of a court are often required to produce officers or managing agents for depositions in the forum. A court's power to order a party to produce officers at trial should be at least as great as its power to order such a person to appear in the forum for a deposition. The risk of harassment cited as a reason for declining such authority is not distinctive; such a risk exists with every procedural tool. That risk does not justify a blanket refusal to authorize orders to testify at trial. The provision in the Appendix should therefore be included. But it should not require the court to consider the alternatives of a videotaped deposition or remote transmission of live testimony. Those are simply two of a multitude of considerations that court should consider, including as well the importance of the witness's testimony, the burden on the witness to travel to the forum, the witness's contacts with the forum, the extent of the witness's involvement in the litigation, and the length and complexity of the witness's testimony. The references to videotaped testimony and remote transmission should be removed; highlighting those factors would not be appropriate.

State Bar of Michigan U.S. Courts Committee (11-CV-017): The Committee considered a variety of topics, but concluded that

it wanted to submit a comment on only one -- whether to grant the court authority to order that a party or party officer appear at trial to testify without regard to the geographical limits that apply generally at subpoenas. The Committee favors including such authority, because otherwise the rules would unduly restrict the ability of trial judges to exercise discretion. Our members envision a variety of situations in which testimony from such witnesses would be sufficiently important to the fair disposition of a matter so that compelling live testimony would be justified. Examples include circumstances in which the credibility of the testimony of a party or party's officer is critical and thus is more fully and fairly judged live, and document-intensive examinations where necessary shuffling back and forth between multiple complex documents and exhibits can lead to confusion and misidentification. The Committee therefore unanimously concluded that the language of proposed (c) (3) in the Appendix should be included in the amended rule.

U.S. Equal Opportunity Commission (11-CV-020): We believe the Appendix Rule 45(c) (3) provision should be included in the rule. The "good cause" standard in proposed 45(c) (3) should obviate any concern that such authority will be abused. The Committee Note seems to assume that there is a significant risk that parties will subpoena a party's officers for improper reasons, but we do not see a reason to make that assumption. We note that the proposed rule directs the court to consider the alternative of remote testimony pursuant to Rule 43(a). We think that requiring that in the rule may be unwise; it is important to give appropriate weight to the reasons stated in the Committee Note to the 1996 amendments to Rule 43 (particularly in the third paragraph of that Note) regarding the importance of in-person testimony at trial. Our experience is that plaintiffs often want to call adverse parties or their officers as witnesses a trial, sometimes as the very first witnesses. This is an appropriate decision for the party with the burden of proof, but it cannot be used unless those witnesses are in the courtroom.

U.S. Department of Justice (11-CV-021): The Department has evaluated the proposed 45(c) (3) in the Appendix, and has ultimately decided to remain neutral on this issue.

Defense Research Institute (11-CV-023): DRI wholeheartedly agrees with the amendment to clarify that the issuing court cannot issue nationwide trial subpoenas. We also agree with providing that a party or party's officer may be subpoenaed within 100 miles of his residence or within the state where he personally transacts business. This amendment, as well as the amendment which requires that disputes relating to subpoenas be resolved in the compliance court, combine to focus on the inconvenience that they can cause to party officers and to nonparties.

Steven Susser (11-CV-024): I would not require parties or party officers to travel more than 100 miles to appear for trial. These individuals can be deposed by video or de bene esse deposition can be arranged.

Ronald Marmer (and 35 other "individual members of leadership" of the ABA Section of Litigation) (11-CV-025): We strongly support the decision to reverse the so-called Vioxx rule. We believe that permitting subpoenas to compel testimony at trial from distant parties or party officers would invite abuse. Courts already have sufficient tools available to obtain the testimony of such persons, by video deposition or otherwise, when their testimony is truly relevant.

Other matters

Lawyers for Civil Justice (11-CV-002): (This comment is entitled "A Prescription for Stronger Discovery Medicine: The Danger of Tinkering Change and the Need for Meaningful Action." It seems mainly concerned with more general matters and not Rule 45.) The explosion of discovery of electronically stored information has markedly increased the cost, waste, and delay that attend the discovery process. Modest amendments to the discovery rules have done little to solve these problems. A number of measures should now be taken: (1) Rule 26 should be amended to narrow the scope of discovery; (2) Rule 26(b)(2)(B) should be amended to identify categories of electronically stored information that are presumptively excluded from discovery; (3) Rule 26(b)(2)(C) should be amended to explicitly include its requirements to limit the scope of discovery; (4) Rule 34 should be amended to limit the number of requests absent stipulation of the parties or court order. Instead, Daniel Girard, a former member of the Advisory Committee, has proposed changes that will further fuel the development of a "sanctions tort" premised on "gotcha" behavior during discovery. These proposals do not promise to solve problems, but to create additional problems.

Lawyers for Civil Justice (11-CV-009): (The submission included a Nov. 5, 2010, letter to the Judge Campbell that included the following point, not repeated in the submission in response to the invitation for public comment.) Rule 45 should be amended to allow 30 days to object to subpoenas. As currently written, the rule could lead a party to waive its objections accidentally by relying on the 30-day return date. The deadline to object and the return date should be the same to avoid confusion.

George A. Davidson, Esq. (11-CV-011): This rule change will make things somewhat better regarding use of subpoenas for arbitration, but will not solve other problems. I have served as an arbitrator in both domestic and international arbitrations. Section 7 of the Federal Arbitration Act authorizes arbitrators to "summon" any person to attend before them as a witness. It says that such summons "shall be served in the same manner as subpoenas to testify before the court," and authorizes the court to enforce the order and compel the attendance of the person involved. The problem of witnesses located more than 100 miles from the seat of the arbitration has arisen under current Rule 45. The problem arises when the witness is located too far from the location where the arbitration is proceeding. Unlike a civil case, there is no option in an arbitration to take the deposition of the witness and use that as evidence. Both the Second and Third Circuits have held that arbitrators may not subpoena witnesses for depositions. Some arbitration panels have responded to the problem by travelling to the witness to obtain the desired testimony; the threat to do that sometimes prompts

the witness to be willing to travel to the place of arbitration. It is unclear whether the arbitral panel could count on a local court to enforce such a subpoena; arguably the drafters of the Arbitration Act were not contemplating a peripatetic tribunal, and had in mind only the court in the tribunal's usual seat. But that court is still without power to summon the distant witness to attend in this district. There is accordingly a gap -- there may be no court capable of enforcing a validly issued subpoena. Unless (a) the court where the arbitrators "are sitting" under Section 7 is construed to be the court in which they are seeking to sit for purposes of hearing the subpoenaed witness, or (b) Rule 45 is drafted to make the court in the arbitration tribunal's seat the enforcement court of a compliance motion, this gap will persist even after the amendments.

In addition, I note that Rule 43(a) could be utilized much more often. Presently it provides only "grudgingly" for live testimony transmitted from a remote location. At least it should be clear that a subpoena could be used to summon a witness to appear for such live testimony within 100 miles of his residence. It would be helpful for the Committee Note to say so. Sometime soon, Rule 43(a) could be liberalized to permit much broader use of telecommunications for testimony. Until then, at least this method should be endorsed.

Paul Alston (11-CV-012): I urge that Rule 45 be amended to allow subpoenas to be issued for the taking of testimony by video conference from a witness outside the jurisdiction of the trial court. I practice in Hawaii, and the problem of absent witnesses is particularly acute here because many cases involve people who have only a transient presence here. With improved video conference capabilities now available throughout the country, it is possible to have distant witnesses appear at little cost and with high-quality video and audio fidelity that was unimaginable when the current rules were drafted. Taking testimony in this manner eliminates both the prejudice suffered by the party who would otherwise have to read a deposition excerpt into the record or show choppy fragments of a discovery deposition. It would also eliminate the gamesmanship that can occur when one party keeps witnesses "offshore." The trial court is in the best position to decide when or whether video testimony should be taken, and any such arrangements would have to be made with the trial court's approval. But when the court determines that is desirable, use of a subpoena to accomplish it should be available. I had an experience in which that proved impossible under current Rule 45. In a multi-million dollar securities fraud case in Hawaii, I sought (with the blessing of the trial court here) to subpoena a witness in the SDNY for video testimony, but the SDNY quashed the subpoena on the ground this is not allowed. It should be allowed under Rule 45.

Robert L. Byman (11-CV-013) (submitting copy of article from National Law Journal): Although the amendments are excellent as far as they go, they do not clear up something that should be cleared up, and could even become worse under the amended rule. It should be clear that no subpoena is necessary to compel a party to attend a deposition or trial in the forum, now the "issuing court." Presently, a plaintiff's deposition can be set in the district in which the case he filed is pending, and no subpoena is necessary to compel that attendance. But a subpoena seemingly could not, under the amended rule (or the current rule) compel such attendance if plaintiff were located out of state and had to travel more than 100 miles for the deposition. And Rule 45 at present clearly does contemplate subpoenas on party witnesses, so there is at least an argument that the power to compel attendance by party witnesses is limited to the scope of the subpoena power. At least one judge found the pre-1991 rule unclear on these issues. See *Howell v. Morven Area Medical Center, Inc.*, 138 F.R.D. 70, 71 (W.D.N.C. 1991).

American College of Trial Lawyers, Federal Civil Procedure Committee (11-CV-014): Although comment was not invited on this subject, we are concerned that the revision of Rule 45 may produce an unintended change in practice on the location of party depositions. Currently, it is widely recognized that Rule 30 requires a party to appear for deposition at the location selected by the opposing party, and does not require a subpoena to require the party's attendance. Thus, Rule 30(g) provides that the noticing party may be sanctioned for failure to subpoena a non-party deponent, and case law recognizes that ordinarily the plaintiff's deposition may be noticed in the forum, and that the plaintiff must appear there, since plaintiff chose the forum, unless that would produce unreasonable hardship. Similarly, Rule 37(d)(1)(A)(i) permits imposition of Rule 37(b) sanctions on a party who fails to appear at a deposition after proper notice; no motion to compel is required, much less a subpoena. Proposed Rule 45(c)(1), however, includes commanding a person to attend a deposition. And it clearly includes subpoenas on parties, since proposed Rule 45(c)(1)(B)(i) refers to a person who is "a party or a party's officer." This provision might be read to supersede the existing rule provisions regarding the place of taking a party's deposition. Actually, Rule 45 has long provided for deposition subpoenas on party witnesses, but it seems few have realized that, perhaps due to "the impenetrable structure of current Rule 45 as a whole." The simplicity of the revised rule could cause problems because proposed Rule 45(c)(1) is easy to understand. There is a risk that Rule 45 might be read to repeal the provisions of Rule 30 by implication, but the court might ask itself "Why would the * * * new rule so clearly provide for subpoenas on party deponents if the drafters intended to retain existing Rule 30 jurisprudence?" The solution, we believe, is to revise Rule 45 to remove parties entirely from proposed Rule 45(c)(1), and add a new provision as follows:

(3) ***Subpoena of a Party.*** The place of compliance for the deposition of a party is governed by Rule 30. A party may be commanded to appear at trial only if the party is served with a subpoena that complies with the provisions of subparagraph (1).

Federal Magistrate Judges Association (11-CV-018): The Association offers an unsolicited suggestion to establish a presumptive time for the target of a subpoena to comply with a subpoena. Proposed 45(d)(3)(A)(i) authorizes quashing a subpoena if it "fails to allow a reasonable time to comply." It would be better for the rule to specify a time for compliance, rather than leaving the decision to a judicial officer's assessment of a "reasonable time." Many district have invoked presumptive time periods to lend some consistency to the handling of this question. We suggest setting one time to govern nationwide, such as fourteen days.

Also, while we endorse the purpose behind the amendment of Rule 37(b)(1), we suggest that it should be worded differently so it conforms to the terminology of Rule 45. The following language could be used:

If a motion is transferred pursuant to Rule 45(f), and the deponent fails to obey an order by the issuing court to be sworn or to answer a question, the failure may be treated as contempt of either the issuing court or the court where the motion was brought.

U.S. Department of Justice (11-CV-021): The Department is concerned that the proposed amendment to Rule 45(g) and 37(b) may be interpreted to permit simultaneous contempt jurisdiction in both the forum court and the compliance court. Proposed 45(g) says that "the court for the district where compliance is required under Rule 45(c) -- and also, after a motion is transferred, the issuing court" may hold a person in contempt. The words "and also" create that ambiguity, which we assume the Committee did not intend, possibly because it contemplates the re-transfer of the dispute. To alleviate due process concerns, the Committee should state more explicitly in the Note that it understands that the forum court and the compliance court will exercise their enforcement and contempt powers consistently with due process considerations and with due regard for the interests of nonparty witnesses.

Ronald Marmer (and 35 other "individual members of leadership" of the ABA Section of Litigation) (11-CV-025): We believe that the time to object to a subpoena should be extended to 30 days, the time allowed for a party to respond to a Rule 34 request for documents. The corporate world has become more complex in the 20 years since Rule 45 was last reviewed.

Corporate counsel tell us that a subpoena might not even arrive in the correct corporate office for almost 14 days, and making a determination whether to object on grounds of privilege or burden is difficult to do in this time frame. If the time to object is not extended, at least failure to object within that time should not work a forfeiture of rights.

We are also concerned that the "reasonably convenient" place for production will be subject to abuse. The current rule links compliance to a rule-dictated place of service and subjects it to a geographic limit. The nonparty served with the subpoena can seek the aid of the local court there. Although focusing on a convenient place for production seems sensible in an age when so much document discovery is conducted electronically, we think that this is subject to abuse. Under the proposed rule, a Seattle lawyer may think that production in his office in Seattle is "reasonably convenient" when a subpoena is directed to a witness in Miami, and it seems that the Miami witness will then have to apply for relief in Seattle, since that is the court where compliance is required under proposed Rule 45(c). That is an undue burden for the Miami nonparty. We propose instead that production occur "at a place *within the district where the subpoena was served* and reasonably convenient for the person commanded to produce." If this were thought unduly restrictive, the rule could provide that a protective order motion or enforcement motion must be made in the district where service was made.

Finally, think that switching the "issuing court" to the court where the action is pending calls for an added explanation in the standard form of subpoena. We note that businesses often generate documents that look a lot like "official" documents, and there is a risk that nonparties will so regard subpoenas. A subpoena from a distant court is likely to cause people to conclude it is a fake. We propose that Rule 45(a)(1)(A)(iv) (which already requires that the subpoena include the text of Rules 45(d) and (e)) also require the addition of something like the following:

NOTE: Rule 45 authorizes nationwide service of subpoenas. If this subpoena was issued by a court in a federal district other than the one in which you reside or were served, you must still must comply with the subpoena, as described above. Your compliance with the subpoena must be at a location reasonably convenient for you. If you have objections to this subpoena, they should be filed in the United States District Court for the district [where you were served] {where compliance is called for}.

TAB 4C

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Notes on Conference Call
Discovery Subcommittee
Advisory Committee on Civil Rules
Feb. 16, 2012

On Feb. 16, 2012, the Discovery Subcommittee held a conference call. Participating were Judge Paul Grimm (Chair, Discovery Subcommittee), Judge Mark Kravitz (Chair, Standing Committee), Judge David Campbell (Chair, Advisory Committee), Anton Valukas, Elizabeth Cabraser, Prof. Edward Cooper (Reporter, Advisory Committee), Prof. Richard Marcus (Associate Reporter, Advisory Committee), Andrea Kuperman (Chief Counsel, Rules Committees), and Benjamin Robinson and Julie Wilson (representing the A.O.).

The meeting was introduced as involving several issues that had either been raised by the invitation for comment or raised by comments. The goal is to determine whether the Subcommittee has a position on these issues, and whether to present some of them to the full Committee for its resolution.

Transfer

The transfer issues were introduced with a reminder that the Subcommittee had come to the April, 2011, full Committee meeting with a transfer standard looking to "the convenience of the person subject to the subpoena, the interests of the parties, and the interests of effective case management." At the meeting the standard was changed to one urged by the ABA Section of Litigation, which looks to consent of all the parties and the person subject to the subpoena, and permits transfer in the absence of such consent only in "exceptional circumstances."

The commentary divided fairly strongly in support of the proposition that the transfer standard was too strict. The Magistrate Judges' Association, for example, strongly urged a less exacting standard. Two strands of objection could be distinguished. First, many objected to requiring party consent on the consent prong. If the nonparty witness consents to transfer, it was urged, the parties should not be allowed to veto that decision. Second, several objected that the "exceptional circumstances" standard was too restrictive. The invitation for comment asked whether the examples in the Committee Note were actually exceptional. Some comments said they were not particularly unusual.

An initial reaction was from the June, 2011, Standing Committee meeting. Some members of that Committee seemed to have initial reactions that the "exceptional circumstances" standard was too difficult to satisfy. At least one urged that the examples in the Note are far from exceptional. In addition, some Standing Committee members seemed to support using a "good cause" standard in its place.

Starting with the consent prong, one reaction was that the main focus was on the nonparty witness. "If that person consents, transfer should be possible. If that person does not consent, it should be ordered only in exceptional circumstances." A transfer can be extremely burdensome to the nonparty who has no other involvement in the case. But the parties themselves will not be significantly burdened by having the motion presented to the court presiding over the underlying action.

A reaction was that the "exceptional circumstances" standard elsewhere in the rules is very difficult to satisfy. The most prominent example is in Rule 26(b)(4)(D), regarding discovery of the work done by a nontestifying expert consultant specially retained to work on the case. That is almost never granted. Another participant noted that the Magistrate Judges Association had a diametrically different view -- that transfer should be preferred because it was in essence an issue of case management.

Another participant agreed with the position of the Magistrate Judges Association, and favored use of "good cause" as the standard. Although the nonparty's interests are important, the interest of the court in efficiently and consistently managing the litigation before it was of great importance as well.

This drew disagreement. Litigation can involve the convenience of all the players; comparing the interests of the nonparty witness to everyone else -- the court handling the underlying litigation, the otherwise uninvolved compliance court obliged to master somebody else's case, and the parties who are already litigating in the forum court -- almost guarantees that the nonparty's interests will get lost in the crowd. The exceptional circumstances standard is strict to offset this tendency to favor transfer as convenient to most of the people.

A reaction was that it might be that a less exacting standard could nevertheless focus on the interests of the nonparty as paramount. Another reaction was that "good cause" or "interests of justice" should suffice.

This discussion prompted the reaction that if the standard for transfer without consent is dropped to good cause, it will be too easy. Often the nonparty witness will consent, but if not those concerns deserve deference.

Another possibility was that the nonparty is actually affiliated with a party in a way that could lead to gamesmanship depending on the known or suspected views of the forum court. That drew the response that very few cases were of this sort; nonparty witnesses usually have no connection to the parties or the litigation. Gamesmanship of this sort is not frequent.

Another suggestion was that, in the absence of consent by the nonparty, the court could be authorized to transfer when the interests in favor of transfer outweigh those of the local nonparty. This suggestion drew support on the ground that such a rule provision could be combined with explanation in the Note that should weigh heavily against relying on the convenience of the parties and the court. Transfer should be authorized only in cases in which other interests substantially outweigh the interests of the nonparty.

The discussion was summed up. There was consensus that the party consent requirement should be dropped; the only consent that is necessary is consent of the nonparty witness. But "good cause" seemed too low a bar to justify transfer in the absence of consent. Instead, the Subcommittee should supply the Committee with a standard that is less exacting than "exceptional circumstances" but puts a thumb on the scale in favor of deferring to the nonparty witness. Prof. Marcus is to attempt to draft such a standard.

Appendix proposal

The Appendix included a draft Rule 45(c)(3) authorizing the court to direct a party or party officer to testify at trial under limited circumstances. The Committee did not endorse it. To the contrary, it included this idea in the Appendix only to obtain public comment on whether there was strong support for including it in the rule. Among those who commented, supporters seemed to outnumber opponents about 6-4, but that hardly seemed to be overwhelming support. And some of those favoring adding the authority seemed to think that the authority already existed.

An initial report came in about the Standing Committee meeting, where a couple of members said something like "I can't understand why you would give up the power," also seemingly feeling that the current rules do authorize such orders.

One participant reported agreeing with this view, and favored including the provision in the amendment package.

This drew the response that neither the Subcommittee nor the full Committee had come out that way in the past. It is important to be clear on that. The immediate goal was to overrule the Vioxx line of cases, which really did not interpret the existing rule correctly. The main rule proposal does that. The Appendix raises the possibility of including some authority for judges to do in specific cases what the Vioxx line suggested could be done by lawyers in every case. The arguments in favor of including that authority could be submitted to the full Committee.

The consensus was that, although the Subcommittee was not unanimous, it did not recommend adopting Rule 45(c)(3) as set forth in the Appendix. The style proposals for that provision could be addressed separately. The member who favored adoption of the authority could present the issues to the full Committee in March.

Notice -- Rule 45(a)(4)

The Rule 45(a)(4) questions were introduced as involving two sorts of questions, one of which had already been discussed at some length, and the other not previously addressed. The issue that had been discussed before was the possibility of directing further notices in addition to the notice of upcoming service of a subpoena. The issue that had not been discussed was whether to require a minimum number of days' notice, as is done in a number of states.

Additional notices

An initial reaction was that our starting point on the notice question was that we were told that many lawyers did not comply at all with the current requirements in Rule 45(b)(1). The provision was moved to Rule 45(a) in part to make it more prominent. Perhaps we should be cautious about expecting to accomplish too much more than getting people to start doing what they have not been doing for over 20 years even though the rule so requires. Building in additional notices and requirements could boomerang because it might not produce the sort of lawyer conduct we hope will occur but will introduce a lot of new opportunities for litigation about compliance with rule requirements.

Another reaction was agreement; once a lawyer gets one notice, the lawyer should be able to protect the client's interests without more rule provisions to fight about.

These comments prompted agreement; the Subcommittee would not propose requiring additional notices.

Timing

The timing issue was introduced with a reminder that during restyling the current notice provision in Rule 45(b)(1) was clarified to direct that notice be given "before" the subpoena is served. During the Subcommittee's extensive consideration of Rule 45 issues, including the mini-conference, there was no mention of considering changing that timing provision.

But the comments have raised the possibility of altering the timing, in somewhat inconsistent ways. Some point to state provisions calling for 15 or 20 days' notice before service of

the subpoena. This approach was endorsed on the ground that subpoenas may be used to pester customers of a party, for example, and it's important to give an opportunity to seek relief in court before service of the subpoena. On the other hand, other comments urge that giving notice before service can lead to efforts to elude service, so that the notice requirement should not be required "before" service.

A reaction was to ask whether these are real problems. True, some states require lead time, but is there reason to think that the failure to give lead time produces problems under our current rule? And is there reason to think that giving advance notice produces evasive behavior by nonparties sought to be served with subpoenas?

The response was that there is no indication that such problems exist. The consensus was that these general problems do not call for changing the timing in the current rule.

A related concern was raised by the Department of Justice comments, pointing out that post-judgment discovery of assets could be prejudiced. Noting that the amendments removed the phrase "before trial" to make sure that trial subpoenas are also subject to the notice requirement, the Department suggested that "before judgment" should be substituted.

An initial reaction was the question why the risk of dissipation of assets -- seemingly the concern -- would be made worse by advance notice. A subpoena is not an attachment, and service first does not seem to protect against dissipation of assets. A reaction was that there may be added penalties for loss of assets after service of the subpoena, or other consequences that would not apply before service.

Another possibility raised was related to the trigger discussion the Subcommittee has had regarding preservation and sanctions -- perhaps a nonparty is free to discard or destroy information until service of the subpoena but not thereafter; forewarned, therefore, it could destroy the information sought.

Another reaction was that this sounds like a law enforcement type of concern.

These various speculations produced the suggestion that the thing to do would be to seek clarification about the specific nature of the concern and the way in which the notice requirement could produce harmful results. That inquiry should include the possibility that service of the subpoena increases penalties or otherwise has a substantive effect on collection efforts.

A related point was that shifting to "before judgment" would not seem entirely to solve the problem. Often the way to enforce

a judgment is to file a new action on the judgment. Is discovery in that enforcement action "before judgment"? If so, wouldn't the same sorts of problems exist?

Simplification

The next topic was simplification of the rule. That has received nearly universal support, and the consensus was that it should go forward.

One question was the concern of the Litigation Section of the L.A. Bar Association that there might be jurisdictional problems with making the court where the action is pending the "issuing court" for a subpoena. That issue was introduced as resembling a concern raised during the Dallas mini-conference on Rule 45, where lawyers were concerned that there might be jurisdictional problems with enforcement of orders made after subpoena-related motions were transferred. But those concerns should not arise, for there is no constitutional requirement that federal courts have jurisdiction limited to the states in which they sit; the current organization of U.S. districts limiting each to a state's perimeters is not constitutionally required. Nonetheless, the Subcommittee obtained a research report from Kate David on the general question, and that memorandum accompanied the materials for the conference call. The "jurisdictional" question did not seem serious, but the question was asked whether the jurisdictional details should be carried forward in case others were concerned.

The response was that the issue should be carried forward and flagged for the Committee, but that there was no need to present the detailed research to the full committee. The power of a rule to direct national service is sufficiently demonstrated by Criminal Rule 17(e), which empowers federal courts to issue subpoenas requiring attendance in their courts to testify in criminal trials. All the simplification of Rule 45 does is recognize the reality that the enforcement court has no involvement (whether it is the "issuing court" or only a resource for enforcement) until there is a dispute and a motion to enforce. Then enforcement is sought locally with a court that clearly has jurisdiction to order the local nonparty to testify. That should not give rise to any actual problems.

Supplanting Rule 30 geographical limits on party depositions

The American College of Trial Lawyers (11-CV-014) commented that there was a risk the simplification of Rule 45 could prompt the reaction that party depositions can only be obtained by subpoena, and in accord with the geographical limitations on subpoenas. But that was never the purpose, and should not be the effect of these changes. The College suggested adding a

provision to the rule saying that "[t]he place of compliance for the deposition of a party is governed by Rule 30." But that might not be so; a subpoena could be used for a deposition of a party, or a party officer, director, or managing agent. One might want to rely on a subpoena with some of these individuals, particularly given the possible disputes about what is a "managing agent."

The ongoing reality is that Rule 30 has been interpreted to authorize deposition notices to set the location for a deposition of a party witness, and Rule 37(d)(1)(A) says that if a party or a party's officer, director, or managing agent fails to appear for a properly-noticed deposition the sanctions provided in Rule 37(b) may be used. Although those rules do not say that no subpoena is necessary, that is the effect, and has been the holding in many cases. Indeed, foreign parties are fairly frequently required to deliver their employees for depositions in the U.S. A Committee Note can make that clear and provide an antidote for a misreading or overreading of amended Rule 45. A draft Note was included in the materials for the conference call.

The discussion noted that -- on the face of Rule 45 -- it is possible that one could make the argument about party witnesses. Maybe it would be good to try to draft a rule provision as an alternative to the draft Note if that seems necessary. For the present, a Note provision like the one in the materials seems sufficient. We should flag the issue for the full Committee and see if there are concerns. It was noted that if this is disputed, the lawyers should check the Note, and the proposed addition should answer the question.

Subpoena to attend and provide
remote testimony under Rule 43(a)

A comment from Paul Alston (11-CV-012), an attorney in Hawaii, described an instance in which the district court in Hawaii authorized testimony under Rule 43(a) from a witness in New York but the district court in New York would not enforce the subpoena for that purpose. The suggestion was that the rule be revised to say that this is a proper use of a subpoena.

The reaction was that the rule already says that a subpoena can "command each person to whom it is directed to * * * attend and testify," and says nothing about whether that attendance is in a courtroom or somewhere else. Indeed, deposition subpoenas generally call for attending and testifying in a law office. But perhaps that is not clear to all; and the solution in the materials for the call was to add a sentence to the Committee Note saying that one of the permitted purposes for use of a subpoena is to command testimony from a remote location authorized under Rule 43(a).

The consensus was that adding the sentence to the Note would be a satisfactory reaction to the concern.

Other concerns

A number of other concerns were raised by comments. Some of them were discussed.

The Department of Justice raised a concern about whether the amendments of Rule 45(g) and 37(b) could be interpreted to permit simultaneous contempt proceedings in the issuing court and the compliance court. That might even raise due process issues.

The reaction was that this should not be a problem. "Would double contempt ever really happen?" The goal of the amended provisions is to respond to "jurisdictional" issues about enforcing the issuing court's order after transfer to the issuing court. But the setup is designed to enable the compliance court to make the initial decision on how to enforce if the order of the issuing court is transferred for that purpose.

A different scenario was suggested: What if contempt was sought in one court and denied? Could it then be sought in the other one? An immediate reaction was that this was extremely unlikely. Another reaction was that if this were attempted, issue preclusion should apply in the second proceeding. This does not seem to be a significant issue.

No other points were raised based on comments received to date.

TAB 4D

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MEMORANDUM

To: Discovery Subcommittee
CC: Dave Campbell, Ed Cooper
From: Rick Marcus
Date: Feb. 10, 2012
Re: Discussion issues for March meeting agenda materials

We have a conference call scheduled for Feb. 16, 2012. The agenda materials for the March, 2012, meeting are due before the end of February. The public comment period ends on Feb. 15. There is limited time for the Subcommittee to consider issues that might justify modification of the published proposals. As far as possible, the summary of comments received has captured the comments we have received, and the up-to-date summary should accompany this memorandum. The goal of this memo is to identify and discuss issues that might call for revision of the published amendment proposals, and therefore to raise at least some of the matters for discussion on Feb. 16. Inclusion of a topic in this memo does not signify any belief that a change in the published draft amendments is in order, but only that the topic may be one which members would like to discuss.

This memo should be accompanied by several other items:

(1) The published proposal: It may be that you don't all have the published proposal. In any event, it should accompany this memo. The copy sent with this memo has been revised slightly to take account of style suggestions we received from the Standing Committee's Style Consultant. Those changes are indicated by double underlining or strikeover of previously underlined material. Under the Standing Committee's direction, the Style Consultant is authorized to make changes in rule wording that conform to the style used in the rules. Advisory Committees can resist those changes if they conclude that the change affects the substance of the rule, but not if it is merely a matter of style. Changes have not been made to the Committee Note to reflect any changes to the rule that the Subcommittee may decide to endorse.

At the end of this memorandum, we note one proposal made by the Style Consultant that may be worth discussing as a Subcommittee. Paul Grimm, Ed Cooper, and I have reviewed the other suggestions that are implemented below, and concluded that they are purely matters of style that do not affect substance. The Style Consultant made additional proposals that we did not adopt; there may be a need to seek guidance/support from the Committee on whether to stand on our positions on these items. They are not included in the published amendment proposal sent with this memo. We intend to send our reactions to the style proposals to the Style Consultant before the March full Committee meeting.

(2) A summary of the comments received to date: Only 17 comments have been received so far. More may come in by the time of our conference call. The comments themselves are, of course, the best source for the concerns raised. But a summary may be useful to identify themes. The comments are all accessible on the www.uscourts.gov website.

(3) The David jurisdiction memo: One of the comments raised an issue we considered in a slightly different guise some time ago. The issue was whether there were important jurisdictional issues presented by revisions to Rule 45. Those concerns came up during the October 4, 2010, mini-conference in Dallas about Rule 34. Kate David (who was standing in for Andrea Kuperman) did a thorough research memo on this subject. An Appendix to this memo sets out some further thoughts. Although the issues raised by the recent comment do not seem weighty, these materials are provided in case they are of use.

The purpose of the upcoming call is to determine whether the Subcommittee wants to modify the published proposal, and whether it feels questions should be resolved by the full Committee rather than the Subcommittee. Any and all issues are, of course, open for reconsideration at this time. This memo will selectively focus on those issues that seem to warrant note either because they were identified as topics on which we invited comment, or because the comments received seem to call for discussion of them.

(1) Overall Simplification

One goal of the amendment package was to simplify the rule. We specifically invited public comment on whether this effort was successful. Several comments commended the simplification. Although there was some uneasiness about recognizing the court in which the action is pending as the "issuing court," that uneasiness seemed largely to flow from an incomplete understanding of the overall operation of the revised rule.

(2) Notice of Service of the Subpoena

Our amendments moved the notice provision from Rule 45(b)(1), where it is now found, to a new Rule 45(a)(4). We also added a directive that the notice include a copy of the subpoena. Two issues have arisen, one of them an issue we have discussed before.

(a) Timing of notice

The requirement of the current rule that the notice be given "before" service of the subpoena has been carried over. One comment urges that it would be better if it were "simultaneous"

with service of the subpoena. (N.Y. St. Bar Ass'n (no. 11-CV-010)). Otherwise, we are told, there is a risk that a party could facilitate evasion of service. (We have invited further details on this concern.) On the other hand, two comments (Wayne Uhl (11-CV-007) and Hon. Michael Baylson (11-CV-009)) urge that a minimum time limit be built in to enable the other parties to seek relief from the court before service. The concern there is that a subpoena may be a way to pester a party's customers or others. The comments say that some state courts require such extended advance notice (15 days in Indiana and 20 days in Pennsylvania). Whether that would work with some subpoenas -- such as a subpoena to produce documents at trial -- is uncertain. A specific number of days could be built in.

Our prior discussion of the notice requirement has focused on whether notice is actually given at all, not on some minimum time to react to the notice. We were told that many lawyers do not give the required notice even though the rule has said since 1991 that it should be given. One goal of moving the notice provision was to make it more prominent and foster at least minimal compliance. Although some who advised the Subcommittee urged that additional notices be required (see below) none urged that the notice not only be "before" service, but also a minimum period before. If there is a meaningful risk that the notice would increase risks of avoidance of service, a longer period might cause more problems.

(b) Additional notices
and related matters

During the drafting process, some urged that there be a requirement that the party who serves the subpoena give additional notices. One thing that might call for an additional notice is receipt of documents, perhaps along with a requirement that the party provide copies to the other parties. Another development that might be the subject of a further notice requirement would be a revision of the subpoena in terms of scope or timing or in another way. It might be said that such notice is more important because we have added a requirement that a copy of the subpoena be served on the other parties. At least the Indiana and Pennsylvania rules require something of the sort. (See Uhl (11-CV-007) and Baylson (11-CV-008) comments.) The N.Y. St. Bar Ass'n (11-CV-010), Steven Puiszis (11-CV-015) and the L.A. County Bar Litigation Section (11-CV-015) urge that notice of any modification in the subpoena should be given. In prior discussions, the Subcommittee has concluded that added notice requirements would be more likely to cause mischief than to produce benefits.

Relatedly, the Subcommittee has discussed whether to require in the rule that the party serving the subpoena must provide copies of the materials obtained to the other parties. The

American College of Trial Lawyers (11-CV-014) urges that there be a requirement in the rule and not (as presently) only an admonition in the Committee Note. It notes that of 35 states with similar subpoena rules, 17 have such a requirement and 18 do not.

(3) Transfer standard

The Subcommittee, and later the full Committee, spent considerable time discussing the standard for transfer. Eventually it adopted a restrictive standard -- the court may transfer a subpoena-related motion only "if the parties and the person subject to the subpoena consent or the court finds exceptional circumstances." The Committee Note identified circumstances warranting transfer (see published Committee Note at lines 115-25) that may not be exceptional. We invited comments on the standard.

We have not received many comments, and they have been divided. Some commenters (Hon. Bernard Zimmerman (11-CV-004), N.Y. St. Bar (11-CV-010), George Davidson (11-CV-011), the American College of Trial Lawyers (11-CV-014), and the L.A. Bar Section of Litigation (11-CV-016)) feel the standard is too strict. Others (Kenneth Lazarus (11-CV-005), LCJ (11-CV-009), and Steven Puiszis (11-CV-015)) urge retention of the "exceptional circumstances" standard and seem to worry more about transfer becoming too easy to obtain.

It seems that the commentary separates two somewhat distinctive issues. One is whether consent of anyone other than the person served with the subpoena should be required. Presumably there will be cases in which one party will not consent, for whatever reason; perhaps some of those are the ones in which transfer might be most useful (as when the judge presiding over the underlying case has already addressed the issues involved.) The other is the standard to guide the court when the consents necessary are not forthcoming -- should be it be exceptional circumstances or something less demanding?

To provide a focus for thought about possible changes, here is the current language and some alternatives:

When the court where compliance is required did not issue the subpoena, it may transfer a motion under this rule to the issuing court if the parties and the person subject to the subpoena consent or if the court finds exceptional circumstances. [published proposal]

When the court where compliance is required did not issue the subpoena, it may transfer a motion under this rule to the issuing court if ~~the parties and~~ the person subject to

the subpoena consents or for good cause if the court finds exceptional circumstances. [Alternative 1]

When the court where compliance is required did not issue the subpoena, it may transfer a motion under this rule to the issuing court if the parties and the person subject to the subpoena consents or if the court finds exceptional circumstances. [Alternative 2]

When the court where compliance is required did not issue the subpoena, it may transfer a motion under this rule to the issuing court if the parties and the person subject to the subpoena consent or if the court finds exceptional circumstances. [Alternative 3]

When the court where compliance is required did not issue the subpoena, it may transfer a motion under this rule to the issuing court if the parties and the person subject to the subpoena consents or if the court finds exceptional circumstances. [Alternative 4]

The above alternatives alter the set of criteria included in the published proposal. As you may recall, those were adopted at the urging of the ABA Section of Litigation at the April, 2011, Committee meeting. In case it would be of interest, the agenda book for that meeting contained the following standard, which was replaced by the formulation included in the published proposal:

When the court where compliance is required did not issue the subpoena, it may, considering the convenience of the person subject to the subpoena, the interests of the parties, and the interests of effective case management, transfer a motion under this rule to the issuing court.

Yet other alternatives were vetted during our Rule 45 study before last April. The question for now is whether to propose to the full Committee that the published standard be revised. As written, that standard is quite restrictive; transfer will indeed be rare. At least some comments urge that it should be easier to accomplish, and that modern telecommunications should overcome any difficulties that might formerly have attended transfers. Indeed, it seems that the adoption of the published transfer provision might restrict the actual latitude judges have in the past felt they had to transfer subpoena-related motions.

(4) The Appendix proposal

After much discussion, the Subcommittee and the full Committee decided not to recommend that the rules provide even discretionary authority for a trial judge to compel attendance at trial of party or party officer witnesses who live beyond the distance allowed under the "100 mile rule." But there was

sufficient support for that sort of provision that the Appendix to the published preliminary draft be include a new Rule 45(c) (3) that would provide such authority.

(a) Does the Subcommittee favor adopting 45(c) (3)?

The basic question is whether to adopt this rule change. Some commenters (Matthew Walko (11-CV-005), Robert Bynum (11-CV-013), L.A. Bar Litigation Section (11-CV-016), St. Bar of Mich. (11-CV-017)) strongly support authority to order attendance at trial. But they don't so much favor the Vioxx rule as favor a rule that parties (particularly corporate parties) must always produce live witnesses for trial. Others favor a nuanced authority along the lines proposed in proposed 45(a) (3) (N.Y. St. Bar Ass'n (11-CV-010)). The N.Y. State Bar also urges adding consideration of whether the trial will be to a jury or the court, the expected length of the testimony, and the extent the testimony will be contested. The American College of Trial Lawyers committee (11-CV-014) is divided on the issue, although a majority oppose adoption of the authority. It is not certain whether the proposal is that these factors be added to the rule. If this proposal moves forward, it would probably be best to address any such issues in the Committee Note rather than the rule.

Other commenters (LCJ (11-CV-009) and Steven Puiszis (11-CV-015)) oppose adding authority to compel attendance by party and party officer witnesses.

The basic question is whether the Subcommittee favors this proposal. It was published with the following explanation:

After consulting with practitioners and reviewing the relevant case law, the Committee concluded that the power to compel parties and party officers to testify at trial should not be expanded. Nonetheless, because some dissenting voices the Committee encountered during its consideration of these issues felt that in unusual cases there may be reason to empower the judge to order a distant party or party officer to attend and testify at trial, the Committee decided to seek public comment about adding such a power to the rules and to suggest rule language that could be used for that purpose.

* * * This is not a formal proposal for amendment, but instead an invitation to comment. If the public comment shows that this approach is strongly favored, the Committee will have the option of recommending it for adoption in substantially the form illustrated below without the need to republish for a further round of comment unless the testimony and comments suggest revisions that make republication desirable.

The question now is whether the Subcommittee recommends that the full Committee go forward with published Rule 45(c)(3) or some variant.

(b) Should the Subcommittee accept restyling?

Somewhat separate from the question in (a) above is the question of restyling 45(c)(3) for consideration by the full Committee. The Style Consultant has proposed a reorganization of the rule proposal that may seem to make it easier than we intended to grant such a motion. If it does, that could be a reason to resist restyling. If it does not, this is presumably a matter of style. Below are the published version and the restyled version. The relocation of "for good cause" has been done as directed on the ground that it is purely a matter of style.

(3) **Order to a Party to Testify at Trial or to Produce an Officer to Testify at Trial.** Despite Rule 45(c)(1)(A), for good cause the court may, for good cause, order a party to appear and testify at trial, or to produce an officer to appear and testify at trial. In deciding whether to enter such an order, the court must consider the alternative of an audiovisual deposition under Rule 30 or testimony by contemporaneous transmission under Rule 43(a), and may order that the party or officer be reasonably compensated for expenses incurred in attending the trial. The court may impose the sanctions authorized by Rule 37(b) on the party subject to the order if the order is not obeyed. [as published]

(3) **Order to a Party to Testify at Trial or to Produce an Officer to Testify at Trial.** Despite Rule 45(c)(1)(A), for good cause the court may, for good cause, order a party to appear and testify at trial, or to produce an officer to appear and testify at trial; may order that the party or officer be reasonably compensated for expenses incurred in attending the trial; and may impose the sanctions authorized by Rule 37(b) on the party subject to the order if the order is not obeyed. In deciding whether to enter such an order, the court must consider the alternative of an audiovisual deposition under Rule 30 or testimony by contemporaneous transmission under Rule 43(a), and may order that the party or officer be reasonably compensated for expenses incurred in attending the trial. The court may impose the sanctions authorized

~~by Rule 37(b) on the party subject to the order if the order is not obeyed. [as restyled]~~¹

Even if the Subcommittee does not recommend proceeding with 45(c)(3), it is probably worthwhile to present the full Committee with the version that could be adopted if the full Committee decides to recommend its adoption. It may be that the restyled version makes it seem too easy to get the order, and that the published version is preferred on that ground. If so, that may be a "substantive" rather than a "style" concern.

(5) Possible unintended effect on party depositions

The American College of Trial Lawyers (11-CV-014) raises an issue not previously considered. It points out that longstanding practice and case law recognize that a deposition notice for a party witness may command attendance in the forum without regard to the geographical limits on the subpoena power. Indeed, there are cases in which American courts have required witnesses to come from other countries to attend depositions in the U.S. Rule 30 does not set limits on a deposition's location, and implies (at least) that no subpoena is required to compel the attendance of such a witness. Rule 37(d) confirms that assumption by permitting a court to impose Rule 37(b) sanctions on a party who does not appear for a properly-noticed deposition, or in instances when the party's officer or managing agent does not appear for such a deposition.

The problem the College identifies is that Rule 45(c)(1) says that a subpoena may compel a party witness to appear only within the geographical limits it applies to everyone else. This is, of course, our solution to the *Vioxx* problem; it says that a party or a party officer may be compelled by subpoena to attend a trial or deposition only in accord with the geographical limitations that apply to everyone else. The risk, the College worries, is that a judge may conclude that this provision overrides the existing interpretation of Rule 30. The solution, in the College's view, is to add a new Rule 45(c)(3) as follows:

(3) ***Subpoena of a Party.*** The place of compliance for the deposition of a party is governed by Rule 30. A party may be commanded to appear at trial only if the party is served

¹ Ed Cooper points out that this revision may introduce ambiguity by its use of the word "order," creating uncertainty about the antecedent to some directives. That concern is somewhat separate from the basic question whether the reorganization alters the import of the rule, although it may bear on whether to assent to this revision as a matter of "style."

with a subpoena that complies with the provisions of subparagraph (1).

The Subcommittee has been aware for some time that the treatment of deposition and trial testimony differs. Prior discussions have noted that existing practice often requires travel to the forum for a deposition even though a subpoena could not compel travel to the forum to testify at trial. Although that may at first seem odd, one reason might be that deposition testimony is much more manageable for the witness than trial testimony, which may involved waiting around the courthouse for a long time until the witness is called to the stand. That is not a problem for depositions, and they operate under a one day of seven hours rule.

The Rule 45 amendments were never meant to change the existing Rule 30 practice. The College's solution seems to forbid serving a subpoena for a deposition on a party witness (or a officer, director, or managing agent of a party) at a place within Rule 45's limits. That place might or might not be a place that would be upheld under existing Rule 30 practice. So the College's proposal could change existing practice also, for those who have been able to thread their way through "impenetrable" current Rule 45 to figure out that it authorizes subpoenas on a party to testify at a deposition. (Note also that there might be disputes about who is a "managing agent" of a party that might cause a lawyer to be reluctant to rely only on the notice to ensure attendance at the deposition, particularly since Rule 30(f) seems to authorize sanctions against the party if it failed to serve a subpoena when needed.) The College's solution also does not take note of the problem of party officers, directors, or managing agents.

Because the clarification of the rule really does not address (and should not affect) the existing practice as the College worries it might, a simpler solution might be to make clear in the Committee Note that no effect on existing practice is intended. One place where that could be done is after the Committee Note paragraph ending at line 78 of the published version; a clarification could be added as follows:

Depositions of parties, and officers, directors, and managing agents of parties ordinarily do not involve use of a subpoena. Rule 30 permits the party noticing a deposition to set the place of deposition without regard to the limitations on compliance with a subpoena; existing case law recognizes that courts may regulate the location for depositions to guard against undue prejudice. See 8A *Federal Practice & Procedure* § 2112 (3d ed. 2010). Under Rule 37(d)(1)(A), failure of such a witness whose deposition was properly noticed to appear for the deposition is subject to sanctions without regard to service of a subpoena and

without regard to the geographical limitations on compliance with a subpoena. These amendments do not change that existing law; the courts retain their authority to control the place of party depositions and impose sanctions for failure to appear under Rule 37(b).

(6) Subpoena to provide remote testimony
under Rule 43(a)

Paul Alston (11-CV-012) urges that the rule be amended to provide that a subpoena may be used to compel attendance at a place other than the trial court for purposes of remote testimony the court has ordered under Rule 43(a) ("the court may permit testimony in open court by contemporaneous transmission from a remote location"). He practices in Hawaii, where such problems may arise more often than in other places. He says he served a subpoena for such testimony but was unsuccessful in getting it enforced in the S.D.N.Y.

Rule 45(a)(1)(A)(iii) already says that a subpoena can "command each person to whom it is directed to * * * attend and testify." No rule change seems to be needed. But perhaps the issue could be productively addressed by adding a sentence to the Committee Note:

Rule 45(c)(1) addresses a subpoena to testify at a trial, hearing, or deposition. Rule 45(c)(1)(A) provides that compliance may be required within 100 miles of where the person subject to the subpoena resides, is employed, or regularly conducts business in person. This compliance includes testimony from a remote location authorized by an order under Rule 43(a). For parties and party officers, Rule 45(c)(1)(B)(i) provides that compliance may be required anywhere in the state where the person resides, is employed, or regularly conducts business in person. Under Rule 45(c)(1)(B)(ii), nonparty witnesses can be required to travel more than 100 miles within the state where they reside, are employed, or regularly conduct business in person only if they would not, as a result, incur "substantial expense." When travel over 100 miles could impose substantial expense on the witness, the party that served the subpoena may pay that expense and the court could condition enforcement of the subpoena on such payment.

(7) Jurisdictional concerns in changing
"the issuing court"

A major goal of the amendments was to simplify the "three-ring circus" that resulted from the need under the current rule to pick the right "issuing court," arrange for service in the right place, and direct compliance in the right place. A number of comments commend our efforts in this regard.

The L.A. Bar Association Litigation Section (11-CV-016) is concerned, however, that changing the rule so the "issuing court" is the court presiding over the underlying action may produce jurisdictional objections. The cases it cites, oddly, involve questions somewhat different from any we have focused upon, having to do with subpoenas served abroad or subpoenas served here that call for production of documents held abroad.

At the Oct. 4, 2010, mini-conference in Dallas, lawyers raised jurisdictional concerns about the transfer provision. That led the Subcommittee to ask Kate David to do research on these objections, and she provided the research memo that should accompany this memo. After we got that, I prepared a further discussion included as an Appendix to our conference call discussion on Dec. 29, 2010, and attached as an Appendix to this memo.

These materials show that there really should be no problem with "jurisdiction." Although the "issuing court" is the court presiding over the underlying action, Rule 45(c) provides that compliance is required locally, and the rule directs that initial efforts to enforce take place locally. It does not seem likely that one can effectively resist enforcement locally on the ground that the subpoena was issued by the court presiding over the underlying action. Fed. R. Crim. P. 17(b) permits courts presiding over criminal cases to compel witnesses from around the country to come and testify in their courtrooms. Rule 45 as amended does not do that. The possibility of transfer led to the earlier discussion of jurisdiction. Nobody has raised similar concerns about the transfer provision since the proposed amendments were published.

Although there really seems to be no "jurisdiction" problem, it may be that adding something to the Committee Note to say so would be worthwhile. Early drafts of Note material contained such a statement, but it was later dropped as unnecessary.

(8) Other matters

The proposed amendments do not do other things that have been urged in the past, and other additional things that were proposed by commenters. Ideas that were raised during the review of Rule 45 include extending the time to object to a subpoena to the return date (LCJ (11-CV-009)). We did not act on those urgings. In addition, Davidson (11-CV-011) invites efforts to address the complications posed by subpoena practices in arbitration proceedings. Those problems were noted early in the consideration of Rule 45, and the Subcommittee determined that it would not try to devise solutions for them. The summary should adequately identify the additional issues, and the question is whether the Subcommittee feels that any of them should be submitted to the full Committee.

APPENDIX

Comments on "Jurisdictional" Issues

[These comments accompanied the memo for a conference call on Dec. 29, 2010, about pending Rule 45 matters, and might be of use now.]

The memorandum on jurisdictional concerns from Kate David explores and addresses a variety of possible arguments. In particular, it overcomes the sort of "structural" arguments that were made by some participants in the Dallas mini-conference about difficulties that could result from the adoption of either the transfer or the three-ring circus approach. That sort of objection might be summed up by the recurrent comment during the mini-conference that a nonparty served with a subpoena in Miami in relation to an action pending in Seattle would say "I've never been to Seattle, and a judge in Seattle can't tell me what to do."

On reflection, it seems that the basic attitude behind that objection is unsupported. At the same time, the discussion does point up at least one actual change that seemingly would result from the adoption of the three-ring circus approach.

The fundamental problem with the jurisdictional objection is that it assumes that the jurisdiction of a federal court is limited by the Constitution in the same way that the jurisdiction of a state court is limited. But there is no such limitation. Within a year of deciding *Pennoyer v. Neff*, the Supreme Court so affirmed in *United States v. Union Pacific R.R.*, 98 U.S. 569 (1878), which said that Congress could have established a single federal trial court with nationwide jurisdiction. Indeed, the Court of Federal Claims was such a court. The limitation on state court jurisdiction depends on the more circumscribed sovereignty of individual states, and is grounded ultimately on the 14th Amendment due process clause, which does not apply to the federal government.

For many reasons, however, the scope of personal jurisdiction exercised by U.S. district courts is usually the same as that exercised by state courts. Otherwise, one might encourage parties to go to federal court to obtain nationwide jurisdiction. Thus, Rule 4(k)(1)(A) provides that usually a summons is effective to require a response from a defendant "who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located." That way, forum shopping to get into federal court is not rewarded with broader jurisdictional reach.

At the same time, the Constitution imposes no "structural" limitations on the exercise of broader jurisdiction. That

explains the existence of a variety of statutes authorizing nationwide service of process. It also explains provisions of Rule 4. Rule 4(k)(2) provides that, with respect to any claim arising under federal law, a defendant "not subject to jurisdiction in any state's courts of general jurisdiction" is nonetheless subject to the jurisdiction of a U.S. district court so long as "exercising jurisdiction is consistent with the United States Constitution and laws." Rule 4(k)(1)(B) also provides that a party joined under Rule 14 or Rule 19 is subject to the district court's jurisdiction so long as served within 100 miles of the district courthouse. That means that -- even though the Constitution might forbid a state court in Connecticut from exercising jurisdiction over such a party served and resident in New York -- the District of Connecticut could exercise jurisdiction in the circumstances identified in Rule 4(k)(1)(B).

What might be called a "structural" attitude toward personal jurisdiction limitations on state courts has an uneasy history. On occasion, the Supreme Court has suggested that state courts' jurisdictional limitations under the Constitution flow from federalism principles, but on other occasions it has affirmed that they are personal rights of defendants (not rights of states) that defendants are free to waive and can lose by failing to assert them. The point for present purposes is that the entire United States is a single sovereignty, and the Constitution has never placed a limitation on the exercise of federal judicial power over a person who has sufficient contacts with the United States to make permissible the exercise of jurisdiction. Hence the provision in Rule 4(k)(2)(B) that jurisdiction must be consistent with the Constitution. "National contacts" are sufficient.

A different question sometimes exists about whether the power has been employed. In *Robertson v. Railroad Labor Board*, 268 U.S. 619 (1925), the Court said that the territorial limits of the federal courts are not limited by the Constitution, but held that the statute in question -- authorizing a subpoena served anywhere in the country to compel attendance anywhere in the country -- was implicitly intended to be limited to federal courts of "competent jurisdiction," which the Court said was limited to those in which the person was served within the district. (Of course, the old *Pennoyer v. Neff* requirement of service within the district was jettisoned by *International Show Co. v. Washington* in 1945.) The fact that the power exists does not mean that it has been used.

When it is employed, the full power of the federal court system is not subject to the limitations that apply to state courts. Thus, 28 U.S.C. § 1404(a) permits a federal court to transfer a case across the country. True, the statute limits that transfer to a district in which personal jurisdiction and venue could have been satisfied had the suit been filed there,

but that limitation is not required by the Constitution. Moreover, that limitation does not require any showing that "jurisdiction" is available "over" the plaintiff, much as the plaintiff may resist transfer. 28 U.S.C. § 1407 authorizes transfer to any district, without such a jurisdictional or venue limitation, and it has been upheld as constitutionally valid. See David memorandum at p. 8.

Fed. R. Crim. P. 17(e) applies the full power of the federal court system to obtain the attendance at trial of witnesses needed in criminal cases. One reason for employing this power is the Confrontation Clause; alternative methods to present testimony may not suffice in criminal trials (a question perhaps under study by other rules committees looking at how testimony in criminal cases should be handled).

The transfer proposals the Subcommittee is considering does not go as far as Criminal Rule 17(e). The proposed transfer provision only authorizes a district judge in the district in which performance is to occur to consign the resolution of a subpoena dispute to the judge in another district who is presiding over the underlying action. The subpoena still issues, as a matter of form, from the district where the discovery is to occur. The three-ring circus revision discards the fiction that the "issuing court" really has any connection to the subpoena issued by the distant lawyer in its name and, in that sense, seems as a matter of form to resemble Criminal Rule 17(e). But proposed Rule 45(c) on where compliance may be required makes clear that the actuality is quite different; the required action is only in the locality not where the distant "issuing court" is located. And the goal is that first resort in the event of a dispute also be to the district court where the person subject to the subpoena is located, subject to a transfer provision analogous to the transfer provision already developed independent of the three-ring circus idea.

Relatedly, the alternative amendment to Rule 45(a) to authorize courts to order a party to testify at trial or to produce its officer or employee to testify at trial does not depend on exercise of the court's "power" over anyone but the parties already before the court. Accordingly, it should raise no such concerns. And those proposals appear only as disfavored alternative ideas that may be published for public comment without an endorsement from the Committee.

The transfer proposals seem unlikely to result in circumstances that might raise a different type of due process argument. As Part III of the David memorandum explains, there is a division among courts on whether it can ever be true that nationwide exercise of jurisdiction violates 5th Amendment due process (which does apply to the national government). That would not be on the "structural" ground that a state line

intervened; there is no objection to a federal court in Connecticut requiring a third-party defendant or a witness from New York City to defend or appear and testify. But it may be that in some circumstances the actual burden on a person subjected to the federal court's generally unquestionable authority would be so great as to violate that person's due process rights. That possibility explains the difference of opinion between the courts that say individual circumstances may never create a due process objection to a federal court's exercise of jurisdiction conferred by statute or rule (see David memo at pp. 16-18) and those that regard fairness considerations as creating at least the possibility of such an objection (*id.* at 18-21). But even the latter courts note that such circumstances are "highly unusual."

It is difficult to imagine that the modest changes to Rule 45 that are under consideration would ever create such circumstances, and if they did they would need to be addressed on a case-by-case ground. Cf. *First American Corp. v. Price Waterhouse LLP*, 154 F.3d 16, 20 (2d Cir. 1998) ("a person who is subjected to liability by service of process far from home may have better cause to complain of an outrage to fair play than one similarly situated who is merely called upon to supply documents and testimony"); see also *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985) (contrasting the burdens on an unnamed class member subjected to a state court's jurisdiction with those on a named defendant). In any event, these possible case-specific fairness concerns do not create a general limitation on the power of a rule to make fuller use of the federal court system's powers in this regard.

The discussion of these issues does identify one way in which the three-ring circus revisions may sometimes produce a change, however. The current rule stresses the place of service of the subpoena as crucial to its enforceability and the place where performance is required, at least as to parties and party officers. See Rule 45(b). The three-ring circus revisions permit nationwide service but, in proposed Rule 45(c), place limitations on where performance is required. What's missing from the three-ring circus approach is authority to compel discovery from one who can be served locally with the subpoena but who is not required to comply locally under proposed new Rule 45(c). For nonparty witnesses, that power is probably nullified by current Rule 45(c)(3)(A)(ii), which requires that a court quash a subpoena that calls for a nonparty witness to travel more than 100 miles.

It is not certain how proposed Rule 45(c) would handle these issues. For a trial, hearing, or deposition, it seems that proposed 45(c)(1) would not provide a basis for requiring a French citizen served locally with a subpoena (perhaps while on vacation) to testify here. For production under 45(c)(2)(A), it

seems there is no ground for insisting on production locally of documents or tangible things located in France even though the French citizen who has custody or control of those items can be served locally with a subpoena. The handling of electronically stored information is uncertain.

In contrast, local service seems to suffice to support personal jurisdiction over our French citizen if sued and served here. In *Burnham v. Superior Court*, 495 U.S. 604 (1990), the Court held that service of a California summons on a husband from New Jersey while he was visiting California sufficed to support California jurisdiction in an action against him by his estranged wife. Under current Rule 45(b), service on one temporarily in the jurisdiction would also suffice to require local compliance with a subpoena. But it seems that under the revised rule that would not be true.

First American Corp. v. Price Waterhouse LLP, 154 F.3d 16 (2d Cir. 1998), provides an illustration. That litigation arose out of the collapse of the Bank of Commerce and Credit International (BCCI). Price Waterhouse United Kingdom (PW-UK) was BCCI's worldwide auditor. In connection with BCCI litigation in the D.D.C., First American obtained subpoenas from the S.D.N.Y. directed to PW-UK seeking production of documents located outside the U.S. Among other efforts, First American served subpoenas on an English citizen who was a partner of PW-UK working at the Manhattan office of PW-US, the American affiliate. This Englishman was served with one copy of this subpoena at the PW-US offices in Manhattan, and another at his temporary home in Connecticut. The district court held the service in Connecticut ineffective because the subpoena was issued by the S.D.N.Y., but found the subpoena generally enforceable because Price Waterhouse "does business" in New York through PW-US. Price Waterhouse appealed.

The Second Circuit declined to resolve the "complex, possibly unique, and sharply disputed issue of how the Price Waterhouse accounting firms around the world relate to each other." *Id.* at 19. Instead, it held the subpoena enforceable against PW-UK due to service in New York on one of its partners. Citing *Burnham v. Superior Court*, the court reasoned the "PW-UK knew, or should have known, that by seconding one of its partners to the New York office of an affiliate, PW-UK was risking exposure to personal jurisdiction in New York." *Id.* at 20-21. Under the three-ring circus approach, this sort of ground would not seem to suffice to support production in the U.S. by a non-American entity or person.

The problems of subpoenas on entities and place of compliance with subpoenas for documents seem not to be addressed with precision in the current rule. For example, where does General Motors conduct business "in person"? Where can General

Motors be required by subpoena to produce documents that are in its offices in Asia? For present purposes, the point is that the transfer provision does not appear to complicate the handling of those issues.

On one matter, however, the transfer provision may benefit from some emendation. It may be desirable to address retransfer in some instances where enforcement would be assisted by such retransfer. One issue raised by lawyers in Dallas was whether a judge in Seattle could order compliance by a nonparty witness in Miami. To the extent the contempt power is central to such enforcement of the Seattle judge's order on the transferred motion, it is worth noting that Rule 4.1(b) says that an "order in a civil-contempt proceedings may be served only in the state where the issuing court is located or elsewhere in the United States within 100 miles from where the order was issued." It may be that a provision for retransfer is worthwhile to address situations calling for enforcement by contempt against nonparties served with subpoenas. Note that, before transfer, the "issuing" court or the court where compliance is required must have opened a file of some sort to address the subpoena-related motion that it later transferred to the court presiding over the underlying action. So there would already be an open file to which retransfer could be made.

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SANCTIONS/PRESERVATION ISSUES

During its November, 2011, meeting, the Committee discussed the emerging issues as regarding possible rulemaking to deal with preservation and/or sanctions.

By way of background, the Discovery Subcommittee held a very informative mini-conference in September, 2011, that revealed many concerns about possible draft approaches to providing preservation specifics by rule. Some participants strongly favored adoption of rules including specifics to provide guidance to those who have to make decisions about what to preserve. Others who have to make such preservation decisions strongly opposed adding specifics, concerned in part that doing so would actually expand the preservation burden, particularly specific rules on triggers for the duty to preserve. The mini-conference also produced a wealth of submissions that were included in the agenda book for the November meeting.

During the November meeting, there was a considerable discussion of these issues, along with other related matters such as questions about the outer limits of rulemaking authority if it sought in form to regulate out-of-court behavior by persons who may never become parties to a federal-court case. The conclusion of November's meeting was that the Subcommittee should continue to discuss the wisest way forward.

Meanwhile, a number of other groups were addressing such issues. For one thing, the Subcommittee on the Constitution of the House Judiciary Committee held a hearing on Dec. 13, 2011, on "The Costs and Burdens of Civil Discovery." The papers submitted and the testimony provided should be available at the following site:

http://judiciary.house.gov/hearings/hear_12132011_2.html

In addition, at least some bar groups or public interest groups (e.g., the Sedona Conference) indicated an interest in attempting to draft possible proposals, and others (e.g., Prof. Hubbard) indicated that they were moving toward completion of studies of issues pertinent to the general topic of preservation and sanctions.

Against this background, the Subcommittee returned to analysis of the various methods of addressing these concerns. That included the three types of rule approaches included in the mini-conference discussion and a fourth that explored including specifics about preservation in a sanctions rule. That additional method was considered of interest because it might provide the specifics desired by some, but only in the context of a sanctions issue arising in a case already filed in federal court. Such an approach could effectively blunt any rulemaking

authority questions, but would include all the difficulties that have surfaced about the utility of including specifics in a rule.

Presented with these alternatives, the Subcommittee held a conference call on Nov. 23, 2011, that carefully examined the various options. Ultimately, it concluded that a detailed preservation rule seemed to present more difficulties than promise, while a sanctions rule designed to provide succor to those subjected to preservation headaches held more promise. Accordingly, after extensive discussion the Subcommittee resolved to focus on what was called the Category 3 sanctions rule approach that had been presented at the mini-conference and during the Committee's November meeting.

At the same time, the Subcommittee began tentative discussion of a different issue partly prompted by the earlier discussion of providing specific directives about scope in a preservation rule. An abiding concern in that discussion has been whether it is possible to define scope for purposes of preservation more narrowly than it is defined for purposes of discovery. Perhaps we should recognize an emerging reality -- the volume of electronically stored information is so large that the version of "everything relevant" that has guided discovery for more than half a century should be reconsidered as it applies to electronically stored information. Perhaps the scope of electronically stored information discovery could be tailored to these realities, and cast a useful shadow on the preservation issues on which we have been focusing.

The Subcommittee met again by conference call on Jan. 26, 2012, to reflect on how best to proceed. It had before it the ongoing draft sanctions rule that the full Committee has seen before. It also had a Rule 37(e) variation, designed to integrate the new provisions into that subdivision of the existing rule. And it also had before it a very tentative attempt at considering how one might begin to design a scope provision suitable for discovery of electronically stored information, prompted in part by a model order recently embraced by the Court of Appeals for the Federal Circuit to govern email discovery in patent infringement litigation.

During its second conference call, the Subcommittee considered whether it should focus its attention regarding preservation solely on electronically stored information, or instead focus on a rule more generally addressed to preservation of any potential evidence. It found that it was roughly evenly divided about this basic point, and concluded that it would benefit from guidance from the full Committee on making this choice.

This memorandum therefore introduces the question whether to address preservation and sanctions only with regard to

electronically stored information or more generally as to all potential evidence. It then presents the two draft methods of dealing with these issues in Rule 37 amendment approaches, which raise a variety of questions not yet resolved. Finally, it also includes an initial "concept" presentation of an example of attempting to refine the scope provision with regard to electronically stored information. The Subcommittee has had little time to discuss this idea, and has done so only in the most general terms. It has certainly made no decision about proceeding down a path like this one. But input from the full Committee on the general question is invited.

In addition to this memorandum, the agenda book should include:

Notes from Jan. 26, 2012, Conference Call

Notes from Nov. 23, 2011, Conference Call

Model E-Discovery Model Order from Court of Appeals for Federal Circuit

*FOCUSING ON ALL DISCOVERABLE INFORMATION
OR LIMITING ATTENTION TO ELECTRONICALLY
STORED INFORMATION*

Spoliation has been around for a long time, and so have judicial responses to it. The general duty to avoid destruction of prospective evidence has also been recognized for a long time.

The federal rules have not addressed spoliation for a long time. True, preservation orders could lead to sanctions imposed in part under Rule 37, but the rules themselves did not impose preservation requirements.

The possibility of rules about preservation arose with E-Discovery's emergence. More than a decade ago, the Committee began considering whether, or how, to address E-Discovery issues, including the problems of preserving electronically stored information. From the beginning, the task of dealing with preservation in the rules was challenging.

The 2006 amendments began this process. For one thing, Rule 26(b)(5)(B) directs that when a party gives notice that privileged material has been inadvertently produced and insists on its return, it must retain the material pending a ruling on whether it is privileged and whether the privilege has been waived. For the first time, the rules themselves imposed a preservation obligation, but in a very specialized context.

More significantly, as adopted in 2006 Rule 37(e) insulates against some sanctions when electronically stored information is

lost due to the good faith operation of an electronic information system. The Committee Note recognizes that "good faith" under the rule can call for interrupting the routine operation by imposing a litigation hold. Thus, although the rule itself does not speak to litigation holds, the "good faith" requirement in the rule is tied to them.

Obviously preservation was already a matter of concern at the time the 2006 amendments were developed. But since then it has emerged as a much more pressing concern in many quarters. It is regularly a lead topic on CLE programs on E-Discovery, and regularly the subject of articles in the legal press. In part, the growing concern since 2006 results from technological change. Social media, for example, were relatively insignificant when the E-Discovery amendments were drafted. Now they are a very big deal, and in some cases social media may be important objects of discovery.

The variety and power of PDAs has grown a great deal. Large organizations may have to contend with tens of thousands of such devices that may all contain some significant amount of discoverable information. Similarly, discoverable information may reside on home computers of employees who use them to perform job-related tasks, and social media may be used by employees to interact about work matters. Consider the report in the San Francisco Daily Journal's Dec. 19, 2011, issue in an article entitled "Your Co-Worker has a Status Update": "Despite efforts to keep client lists secret, Silicon Valley companies find that their nonsolicitation agreements can be circumvented by posting on social media websites like Facebook, Twitter, and LinkedIn."

Moreover, some reports suggest that employers are increasingly permitting their employees to use their own devices for work purposes, including access to the employer's networks. That development displeases IT departments, but is supposedly a way of keeping up worker morale. Some companies even subsidize their employees' purchase of the devices the employees favor. Consider how that complicates the problem of determining what is in the employer's possession, custody, or control.

Altogether, there is a lot more to be secured now than there was in the past, even the relatively recent past. Much as the photocopier greatly enlarged the amount of potentially discoverable material, there is a good argument that digital media vastly overshadow the amount of material available 15 years ago. An article entitled "When Data Disappears" in the Aug. 7, 2011, issue of the New York Times asserted that "[w]e generate over 1.8 zettabytes of digital information a year. By some estimates, that's nearly 30 million times the amount of information contained in all the books ever written."

The digital revolution means that there is a lot more information, and a lot more accurate information, to decide disputed questions of fact. Many may be familiar with the "CSI effect," a problem with jurors who expect to have something more certain than old fashioned witness testimony to decide the case, but there surely are many cases in which much more accurate evidence is available than could have been found fifteen years ago. So there is a up side to the digital revolution.

The question at present is whether the current effort to address preservation issues should be limited to digital data or should encompass all evidence. That is the question that has divided the Discovery Subcommittee. The draft rule provision that has been the focus of discussion thus far could apply to any evidence. That would go beyond Rule 37(e), in the sense that it is only about electronically stored information, and focused on the routine operation of electronic information systems. Thus, it could apply to automatic deletion of email after the passage of a set period of time, but would probably not apply to a person's individual decision to delete email from her inbox. The question whether to limit attention to electronically stored information emerged in part due to the presentation of an alternative draft of a sanctions provision that would be added onto existing Rule 37(e). That might fit much better if the only goal were to address preservation of electronically stored information, leaving the problem of spoliation of other evidence unaffected.

Members of the Subcommittee will surely explore these issues more thoroughly than this introduction. But one starting point is to recognize that the source of the current concern is preservation of electronically stored information, not other kinds of discoverable material. We have heard descriptions of the enormous efforts that preserving electronically stored information can require. Submissions received in connection with the Dallas mini-conference provided specific evidence of the extent of those burdens. Those burdens (and the accompanying fear that failure to preserve "everything" would lead to severe sanctions) are the reason this project was started.

One argument is therefore that we should restrict our rulemaking focus to the problem that has prompted rulemaking. Nobody suggested that rules for preservation or sanctions were needed before the Digital Age began to make its presence felt. And it may be that intruding into the non-digital preservation area could produce harmful results that are not apparent. To date, nobody has said that preserving hard-copy materials or other potential evidence has presented problems that call for rulemaking. And to the extent that companies and people actually go paperless, there may actually be less such material.

A competing argument is that there is really no dividing line between electronically stored information and other potential evidence that differentiates it. It may seem that "real" evidence is more likely to be important than email and the like. But consider medical records. National policy calls for electronic medical records; in such a setting, won't they be just as crucial in many cases as other potential evidence? If the rules are to be amended to say that reasonable efforts to preserve electronically stored information should be respected by courts asked to impose sanctions, why not also protect those who make reasonable efforts to preserve other types of evidence?

Another argument is that it's not really true that the sanctions problem is entirely about electronically stored information. To the contrary, the FJC research done for the Committee showed that only about half of the sanctions motions identified related to loss of electronically stored information. Certainly many relate to loss of "real" evidence. For example, *Silvestri v. General Motors Co.*, 271 F.3d 583 (4th Cir. 2001), involved dismissal of plaintiff's case because he did not preserve a wrecked car and, in particular, the allegedly malfunctioning airbag. Many of the cases found by the FJC were of that sort. Should they not be subject to the same rules?

But the problems with storage and preservation of "real" evidence may be quite different from those presented by electronically stored information. One possible reason is the emerging importance of computing or backing up "in the cloud." That activity involves reliance on a third-party vendor who may or may not be reliable or responsive to the party's directives about what to keep and how. Although other sorts of potential evidence may be stored with others (e.g., in a warehouse), the problems may soon be quite different for electronically stored information. We already have one rule (37(e)) prompted by the distinctive features of electronically stored information. Focusing on that information now would be consistent with that first step in recognizing that electronically stored information presents distinctive preservation challenges.

The preservation duty, it may be countered, is not about one kind of potential evidence any more than another; it applies to all potential evidence. Is there a risk that by singling out electronically stored information the rules may seem to dilute the preservation duties that apply to other forms of evidence? A counter to that concern is that the rulemaking under consideration seems more oriented toward circumscribing sanctions than encouraging them; that hardly suggests that material not covered by the rule may be discarded with impunity.

In sum, there are strong points to be made in favor of limiting the rulemaking focus to electronically stored information or including all discoverable information. Right

now, Rule 26(f) calls for discussion of preservation of all discoverable information, not just electronically stored information, but it also directs special attention to issues related to discovery of electronically stored information. The Subcommittee would benefit from the receiving the views of the full Committee on how broad-gauged its focus should be.

Once the Subcommittee resolves the question of focus, it will need to turn to many questions that remain about the content of a sanctions rule. The memo therefore turns to the drafts the Subcommittee has been discussing, including footnotes raising many questions. It then introduces an idea that the Subcommittee has begun to discuss -- containing the burdens of E-Discovery by refining the scope of that discovery.

OUR ONGOING DRAFT

Since before the Dallas mini-conference, we have had an ongoing draft of a possible sanctions rule. It has been denominated Rule 37(g), and has become festooned with questions that would need attention if we were to proceed down this route. Most of those questions would also need to be addressed in a rule limited to electronically stored information.

Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

* * * * *

(g) FAILURE TO PRESERVE DISCOVERABLE [ELECTRONICALLY STORED] INFORMATION; REMEDIES

- (1) If a party fails to preserve discoverable [electronically stored]¹ information that reasonably should be preserved² in the anticipation or conduct of litigation, the court may:
- (A) permit additional discovery;
 - (B) order the party to undertake curative [other remedial]³ measures; or

¹ This could be added if we wanted to limit this rule to electronically stored information. As discussed below, however, that might be a reason to proceed with amendments to Rule 37(e) rather than a new Rule 37(g).

² Note that the phrase "discoverable information that reasonably should be preserved" has an inherent premise about trigger and scope that provide a basis for Committee Note discussion of those topics.

³ Does "curative" have a commonly understood meaning? Would "other remedial" give greater flexibility? The goal here is to emphasize that orders that otherwise would not be made are justified due to the loss of data. Again, this is not a "sanction," but an effort by the court to minimize the possible harm to a litigant's case resulting from another party's loss of data.

- (C) require the party to pay the reasonable expenses, including attorney's fees,⁴ caused by the failure.
- (2) Absent exceptional circumstances [irreparable prejudice],⁵ the court may not impose any of the sanctions listed in Rule 37(b)(2) or give an adverse-

⁴ Would this possibility tend to encourage claims of spoliation? It might be that one could, by succeeding on a spoliation argument, get a "free ride" for discovery one would otherwise be doing at one's own expense. Hopefully, it should be clear that discovery is made necessary by the loss of data ("caused by the failure"), and not something that would happen in the ordinary course. But will there be many instances in which that is not clear? The notion is that it should justify imposing on the spoliator the costs of discovery and other litigation activity made necessary by the spoliation. For a recent example, see *E.I. du Pont de Nemours and Co. v. Kolon Indus., Inc.*, 803 F.Supp.2d 469 (E.D. Va. 2011), in which the court imposed on defendant the costs of plaintiff's discovery efforts that led to some five days of evidentiary hearings about spoliation. The judge explained (*id.* at 509-10):

DuPont was thus forced by the spoliation to incur attorneys' fees, investigative expense, and the expense of a hearing and briefing. That was made necessary by Kolon's violation of its obligation not to spoliolate evidence. It is proper to afford DuPont recompense for the consequences of that violation in the form of an award of expenses, costs and attorney's fees.

⁵ This proviso is designed to authorize sanctions in the absence of fault in cases like *Silvestri v. General Motors Corp.*, 271 F.3d 583 (4th Cir. 2001), where the loss of the data essentially precluded effective litigation by the innocent party. One question is whether such instances are truly exceptional. If they happen with some frequency, this may be the wrong phrase.

The term irreparable prejudice may be preferable to focus on the real concern here. It would be important, however, to ensure that this be limited to extremely severe prejudice. Most or all sanctions depend on some showing of prejudice. Often that will be irreparable unless the "curative" measures identified in (g)(1) above clearly solve the whole problem. The focus should be on whether the lost evidence is so central to the case that no cure can be found.

inference jury instruction⁶ unless [the court finds] {the party seeking sanctions proves}⁷ that the other party's failure to preserve discoverable information was willful or in bad faith and caused [substantial] prejudice in the litigation. [A court that imposes a sanction must [should]⁸ {ordinarily} use the least

⁶ Is this too broad? Adverse inference instructions can vary greatly. General jury instructions, for example, might tell the jury that it could infer that evidence not produced by a party even though it should have had access to the evidence supports an inference that the evidence would have weakened the party's case. Is that sort of general instruction, not focusing on any specific topic, forbidden? How about the judge's "comment on the evidence" concerning lost evidence but not in the form of a jury instruction? Perhaps that's different from an "instruction" on what the jury should do, but many might think that the judge's comment is pretty close to an instruction. (In some states, judges have on occasion been forbidden to comment on the evidence because such comments were thought to intrude into the jury's function.) Would this rule forbid attorney argument to the jury inviting to make an adverse inference if there were no instruction at all on the subject?

⁷ Presently the rule does not seem to allocate burdens of proof. The draft Committee Note presumes that the party seeking sanctions has the burden of showing both bad faith (or willfulness) and prejudice. If that is correct, should it be in the rule? The bracketed language is one way to do that. Perhaps this should be revised to take account of the possibility that the court is acting on its own; does it bear a burden of proof?

⁸ Using "should" here may make "ordinarily" unnecessary, and also avoid the question whether certain sanctions are less severe than others as a matter of law. That question is likely in some cases to be a close call. But the softer the directive, the greater the possibility that the court will decide to go beyond what is needed to cure the demonstrated prejudice. Remember that in *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976), the Court held that "general deterrence" was a valid ground for dismissing plaintiff's case for being three days late in serving some supplemental interrogatory answers. The Third Circuit had reversed the dismissal on the ground the penalty did not fit the crime, and the Court said it overstepped its appellate authority in doing so.

The draft Committee Note attempts to introduce the notion that courts should calibrate the sanction to the harm, but that may not suffice. On the other hand, is this a desirable limitation? Perhaps in some instances the general deterrence

severe sanction necessary to cure the demonstrated prejudice.]

- (3) In determining whether a party failed to preserve discoverable information that reasonably should have been preserved, and whether the failure was willful or in bad faith,⁹ the court may [must] {should}¹⁰ consider all relevant factors, including:
- (A) the extent to which the party was on notice that litigation was likely and that the information would be discoverable;¹¹
 - (B) the reasonableness of the party's efforts to preserve the information, including the use of a litigation hold and the scope of the preservation efforts;¹²
 - (C) whether the party received a request that information be preserved, the clarity and

attitude of the Supreme Court in 1976 is appropriate. Consider the party that acts in extreme bad faith (using Evidence Eliminator at 3:00 a.m. the day before inspection of his system) but bungles the effort.

⁹ Combining an evaluation of reasonableness and willfulness or bad faith in one set of factors is attractive. Often the circumstances that bear on reasonableness also will bear on intent. Would it help to add other factors that bear directly on intent, but also may bear on reasonableness? Examples might include departure from independent legal requirements to preserve, departure from the party's own regular preservation practices, or deliberate destruction.

¹⁰ It may be that "must" or "should" is more appropriate than "may" here. Since the rule only talks about "considering" factors, the difference may not matter, but the idea seems to be to press the judge to consider at least the listed factors.

¹¹ Is this treatment sufficient to substitute for provisions about trigger? The draft Committee Note attempts to add detail.

¹² The use of "scope" is designed to permit consideration of a variety of factors. The draft Committee Note attempts to elaborate.

reasonableness¹³ of the request, and – if a request was made – whether the person who made the request or the party offered to engage in good-faith consultation regarding the scope of preservation;

- (D) the party's resources and sophistication in matters of litigation;¹⁴
- (E) the proportionality¹⁵ of the preservation efforts to any¹⁶ anticipated or ongoing litigation; and

¹³ Does this mean that an unreasonable request imposes a narrower duty than a reasonable request? Should clarity be the test here, since reasonableness of preservation efforts is already addressed in (B)? On the other hand, the overall thrust is toward encouraging reasonable behavior, so stressing that objective here may be desirable.

¹⁴ This consideration seems important to address the potential problem of spoliation by potential plaintiffs who may realize that they could have a claim, but not that they should keep their notes, etc., for the potential litigation. Are resources a useful consideration here? A wealthy individual might be quite unfamiliar with litigation. Is this somewhat at war with considering whether the party obeyed its own preservation standards? Making those relevant to the question of whether preservation should have occurred may be seen to deter organizations from having preservation standards. It is unclear how many organizational litigants -- corporate or governmental -- actually have such standards. Does the fact they exist prove that this litigant is "sophisticated"?

¹⁵ This unadorned invocation of "proportionality" might be a source of mischief. Is the directive to consider and apply Rule 26(b)(2)(C)? Is that rule really about the same things that proportionality addresses here? The question there is the cost of responding to discovery. The question here is the cost and burden of preserving. Although all seem to agree that proportionality concepts should loom over the judgment about the adequacy of preservation, there are abiding questions about how to say that and how to do it.

¹⁶ This is broad, but probably the right choice. If the party reasonably anticipates multiple actions, proportionality is measured in contemplating all of them. A party to any individual action should be able to invoke the duty of preservation that is owed to the entire set of reasonably anticipated parties.

- (F) whether the party sought timely guidance from the court¹⁷ regarding any unresolved disputes concerning the preservation of discoverable information.

DRAFT COMMITTEE NOTE

In 2006, Rule 37(e) was added to address issues peculiar to the operation of electronic information systems, which may appropriately be configured to alter or delete information as a feature of their routine operation. That rule forbids imposition of sanctions when such routine operation prevents discovery of such lost information, provided the system was operated in good faith. One issue bearing on good faith operation is whether the party took action to alter its routine operation upon learning of possible litigation, commonly called a "litigation hold."

Since 2006, there has been much concern about the scope and burden of litigation holds, and the possibility that sanctions would be imposed for failure to impose them, or failure to impose a sufficiently broad hold. The Committee has been informed that some potential litigants have adopted extremely expensive practices that overpreserve electronically stored information without providing significant improvements in access to needed evidence. In part, this activity has resulted from the remarkable growth of digital data, and the increasing use of a variety of handheld and other devices that did not exist at the time Rule 37(e) was drafted. In addition, social media -- which were not used by a significant number of people when Rule 37(e) was drafted -- have attracted an enormous following and are now used to create a very large volume of electronically stored information. Taken together, these developments have presented preservation challenges that can produce excessive expense.

¹⁷ This implicitly applies only when there is an ongoing action. Do we need anything more than a Committee Note to recognize that it is difficult to seek guidance from a court before there is a pending action? What if there is a pending action, and the party reasonably should anticipate further actions -- is it fair to consult with one court (perhaps chosen from among many), and then invoke that court's guidance when addressing other courts? Is this a reasonable concern? Shouldn't following a court's directions count for something? Can others later accuse the party that followed the court's direction of failing to acquaint the judge with all the needed facts, such as the pendency of 99 other similar cases?

Rule 37(g) addresses these concerns. It is designed to ensure that potential litigants who make reasonable efforts to satisfy their litigation hold responsibilities may do so with confidence that they will not be subjected to serious sanctions should information be lost despite those efforts. It does not provide "bright line" preservation directives because such bright lines seem unsuited to a set of problems that is intensely context-specific. It does seek to assure that the court retains authority to manage litigation appropriately in light of loss of information that should have been retained, and to guard potential litigants against serious sanctions unless it is established that they acted willfully or in bad faith. Rather than prescribe a set of "bright line" preservation directives, the rule focuses on a variety of considerations that the court may [must] {should} consider in determining its response once it is established that information that should have been retained was not.

Subdivision (g) (1). Rule 37(g) applies to discoverable information "that reasonably should be preserved in the anticipation or conduct of litigation." This preservation obligation arises from the common law, and may in some cases be implemented by a court order in the case. [It is ultimately a duty owed to the court.¹⁸] Such a duty may be triggered by a variety of occurrences that indicate that the party is likely to become a party to litigation.¹⁹ Examples of such triggering events include service of a pleading or other document asserting a claim; receipt of a notice of claim indicating an intention to assert a claim; service of a subpoena or similar demand for information; retention of counsel or of an expert witness or taking similar action in anticipation of litigation; or receipt of a notice or demand to preserve discoverable information in

¹⁸ Do we want to say this? Embracing the duty as one owed to the court may be at odds with encouraging parties to reach agreement on preservation specifics, but perhaps the pertinent difference is between the general duty to the court and the precise specifics by which it is applied in a given case. Particularly in light of the possibility that a given defendant may foresee multiple claims, that defendant's duty to the court is not entirely excused because the first plaintiff's lawyer does not appreciate the importance of preservation. Moreover, if we consider the presuit situation, it may seem that the duty then runs to all courts. Is that right?

¹⁹ This paragraph is an effort in the Note to provide guidance on what triggers the duty to preserve. It could be made more precise or more general.

anticipation of litigation.²⁰ This rule provision is not intended to alter the longstanding and evolving common law regarding the duty to preserve in anticipation of litigation.²¹

The rule applies to situations in which, after such a triggering event, information that should be preserved is not. The question what information should be preserved depends on the circumstances of each case; the goal of the rule is that the litigation hold²² be reasonable in the circumstances. The determination whether a party failed to preserve information as it should must be made under Rule 37(g)(3).

When the court concludes that a party failed to preserve information it should have preserved, it has available a number of remedies that are not sanctions. One is to permit additional discovery that would not have been allowed had the party preserved information as it should have. A party's failure to preserve information that should have been preserved may affect the judgment whether certain discovery should be allowed. For example, discovery might be ordered from sources of electronically stored information that might otherwise not be

²⁰ This listing is derived from the listing in our Category 1 for the Dallas mini-conference. It does not include one example that was included there -- the occurrence of an event that results in a duty to preserve information under a statute, regulation, contract, or the person's own retention program. The reason for omitting this trigger is that it seems too broad and that it might deter adoption of appropriately broad preservation policies. Regulatory preservation requirements may exist for a great variety of reasons having nothing to do with prospective litigation; making all of them sufficient to trigger a preservation duty as meant here is debatable. Regarding party-designed preservation policies, it may be that including them would seem a "tax" on those who have broad policies. On the other hand, either such example might be urged even though not listed because the listed examples are just that.

²¹ This sentence seems useful to show that it is not our goal to make substantial changes in existing precedent. Assuming that's desirable, does it undermine the effort of the paragraph to provide at least examples of what might often trigger the duty to preserve? To the extent that the description reflects what can be found in the cases, it seems consistent with the cases, and not to supersede them.

²² Does this use of the term "litigation hold" go beyond what is usually meant by the term?

reasonably accessible under Rule 26(b)(2)(B). More generally, the fact that a party has failed to preserve information may affect the determination of the appropriate scope of discovery under Rule 26(b)(2)(C).

Of course, the court always has authority to permit additional discovery within the scope of Rule 26(b)(1). The fact that a party has properly preserved evidence does not constitute an argument for a narrowed scope of discovery. This rule does not confine the court's latitude to order discovery from a party that has properly preserved evidence, providing that such discovery comports with Rule 26(b)(2)(C).

Another remedy may be to order the party that failed to preserve information to take curative [other remedial] measures to restore or obtain the lost information, or to develop substitute information that the court would not have ordered the party to create but for the failure to preserve.

The court may also require the party that failed to preserve information to pay another party's reasonable expenses, including attorney's fees, caused by the failure to preserve. Such expenses might include, for example, discovery efforts made necessary by the failure to preserve information. In making such orders, the court may consider whether the discovery sought would have been done without regard to the failure to preserve; if so, the expense may not have been caused by the failure to preserve. This rule is not intended to provide broad cost-shifting sanctions against parties that have failed to preserve; the costs addressed are those caused by the failure to preserve.

Subdivision (g)(2). This provision provides protection for a party that has behaved reasonably in relation to preserving information that may be relevant to pending or impending litigation. Despite reasonable efforts to preserve, it may happen that some information that should have been preserved was not, and some parties may not have taken sufficient measures to preserve information. In those circumstances, the court may address the failure to preserve under Rule 37(g)(1). But the court may impose an adverse-inference jury instruction or a sanction listed in Rule 37(b)(2) only in cases that satisfy Rule 37(g)(2).

A threshold matter is that [the court must find] {a party seeking to justify a sanction under Rule 37(b)(2) or an adverse-

inference instruction for failure to preserve information must show} that the information should have been preserved.²³ In addition, this party must make two further showings required by Rule 37(g)(2):

First, it must be established that party that failed to preserve did so willfully or in bad faith. This determination should be made with reference to the factors identified in Rule 37(g)(3), which emphasize both reasonableness and proportionality. Under Rule 37(e), a party is protected against sanctions under these rules for loss of information due to the good faith routine operation of its information system. But good faith may call for efforts to avoid loss of electronically stored information, and similar efforts should be made for other discoverable information. Reasonable efforts ordinarily would not require that a party "keep everything forever." And under some circumstances -- perhaps often with potential litigants not familiar with the demands of litigation -- failure to make immediate efforts to preserve potentially discoverable information would not show bad faith or willfulness. Each case must be judged on its own facts under the factors in Rule 37(g)(3).

Second, [the court must also find] {the party seeking sanctions must also show} that the loss of information caused [substantial] prejudice in the litigation. One of the consequences of the growth of digital data is that there is now a much greater volume of information than was available in the past. Much of that data duplicates other data, and substitute evidence is often available. Although it is impossible to demonstrate with certainty what lost information would prove, the party seeking sanctions must show that it has been prejudiced by the loss. Among other things, the court may consider the measures identified in Rule 37(g)(1) in making this determination; if curative measures can cure the problem, sanctions would ordinarily be inappropriate.²⁴

²³ This is an effort to introduce a burden of proof concept. Is it appropriate? Should there be an effort to incorporate that into the rule itself?

²⁴ The word "ordinarily" recognizes that in some cases of outrageously bad-faith actions, sanctions may be justified even if the bad-faith actor was unsuccessful in deleting the information. Should we explain this qualification in the Note? One reaction is that this disinters the notion that the duty is owed to the court, and perhaps all courts (in the presuit stage). Another is to recall that the Supreme Court said in the National

The rule does provide, however, that the showing of willfulness or bad faith need not be made in "exceptional circumstances" [when "irreparable prejudice" results from the loss of the information]. This exception builds on the concept of prejudice in the litigation; in some circumstances the loss of the information may cripple another party's ability to present its case. Although such a result may occur due to loss of electronically stored information in some exceptional instances, it is more likely in situations in which tangible or "real" evidence -- such as an injury-producing agent -- is lost before some parties are able to examine it.²⁵ It is expected that such cases will be very rare. But when such crippling prejudice is shown, a court may impose sanctions on a party that did not act willfully or in bad faith.

In any given case in which imposition of a sanction has been properly supported under this rule, the expectation is that the court will limit itself to the least severe sanction needed to repair the prejudice resulting from loss of the information. The various sanctions listed in Rule 37(b)(2) -- and adverse inferences -- can often be arranged in a hierarchy from least to most severe. The thrust of this rule is that the court should incline toward the least severe sanction that will substantially cure the proven prejudice resulting from the failure to preserve. Because a categorical listing of sanctions by "severity" cannot reliably determine which would actually be more or less so in a given case, the rule does not attempt to do that. Courts can make commonsense determinations in the cases before them.

Hockey League case in 1976 that "general deterrence" is a sufficient justification for case-ending sanctions. Flagrant disregard of duty may be just the situation that is suitable for general deterrence.

²⁵ Is this assertion really true, and will it remain true even if it is now? If one is talking about "real" evidence, like the airbag in the Silvestri case, it seems that electronically stored information is less likely to be as important. But consider medical records or design records for a car. Those are likely to be electronic, and the complete loss of them could be crippling to a case. Perhaps one idea would be that there is greater chance by forensic means to find substitute electronically stored information than a substitute airbag. But that really seems to talk more to curative measures than the question of whether sanctions should be imposed if those measures don't cure the problem.

Subdivision (g) (3). These factors guide the court when asked to adopt measures under Rule 37(g) (1) due to loss of information or to impose sanctions consistent with Rule 37(g) (2). These factors may inform the decision whether a party failed to preserve information that reasonably should have been preserved, and also whether that failure was willful or in bad faith. The listing of factors is not meant to be exhaustive; other considerations may bear on these decisions.

The first factor is the extent to which the party was on notice that litigation was likely and that the information lost would be discoverable in that litigation. As noted above, a variety of events may alert a party to the prospect of litigation. But often these events provide only limited information about the nature or contours of claims or defenses in that prospective litigation. As a consequence, it may be that the scope of discoverable information will not be apparent for some time after the prospect of litigation itself has become reasonably clear. Depending on the circumstances, the scope of preservation will need to be expanded as the scope of the litigation becomes clearer; on some occasions, it may become apparent that the scope of preservation can be reduced.

The second factor focuses on what the party did to preserve information after the prospect of litigation arose. One factor that is often important is whether the party used a litigation hold, although it cannot be said that any particular litigation hold, or method of implementing one, is invariably required.²⁶ More generally, the scope of the overall preservation efforts made by the party should be scrutinized. One consideration may be what it knew, or should have known, about the likelihood of loss of information if it did not take measures to preserve the information. Another may be the extent to which it could appreciate that certain types of information might be discoverable in the litigation. With regard to all these matters, the court's focus should be on reasonableness. The fact that some information was lost does not itself prove that the efforts to preserve were not reasonable.

The third factor looks to whether the party received a request to preserve information. Such a request should often bring home to a prospective litigant the need to preserve

²⁶ This sentence in part addresses the notion that a written litigation hold is always required. Beyond doubt, a written litigation hold will often be a good idea to ensure that there is no dispute about what the hold said.

information, and it may provide useful guidance on what types of information would be relevant to that litigation. But this factor is not meant to compel compliance with all such demands. To the contrary, the focus is on reasonable behavior in light of known circumstances. Thus, an unreasonably broad preservation demand may be self-defeating, for the party presented with it can make its own determination what is appropriate preservation in relation to the likely claims.

One important matter may be whether the person making the preservation demand was willing to engage in good faith consultation about the scope of the desired preservation. After litigation commences, such discussion is required under Rule 26(f). As noted above, the dimensions of unfiled litigation may be difficult to discern in advance. Even after litigation commences, there may be considerable uncertainty. Particularly given the importance of the fifth factor -- proportionality -- parties must be flexible about their preservation demands and efforts. At the same time, it may happen that a party demanding preservation omits from the list of things to be preserved some items that the recipient of the demand does or should recognize as important; in those circumstances, the absence of those items from the request to preserve does not excuse preservation if otherwise reasonably required.

The fourth factor looks to the party's resources and sophistication in relation to litigation. Prospective litigants may have very different levels of sophistication regarding what litigation entails, and about their electronic information systems and what electronically stored information they have created. Ignorance alone does not excuse a party that fails to preserve important information, but this sophistication may bear on whether failure to do so was either willful or in bad faith.²⁷

²⁷ This language is particularly concerned with preservation claims regarding plaintiffs. It does seem that defendants are waking up to the reality that preservation arguments can be directed to plaintiffs. For example, in "Plaintiffs Have Their Own Duty to Preserve," Nat. L.J., Dec. 19, 2011, Paul Weiner of the management firm Littler Mendelson emphasizes that "e-discovery is a two-way street, and obligations apply just as forcefully to plaintiffs -- who often anticipate litigation well in advance of any defendant." Weiner urges that plaintiffs should be required not only to retain email, but also social media activity, cellphone records, text messages, and tweets. He recommends that defense counsel inquire into a wide variety of sources of information during Rule 26(f) conferences: home or other email accounts; any device used for sending or

A possibly related consideration may be whether the party has a realistic ability to control or preserve some electronically stored information.²⁸

The fifth factor emphasizes a central concern -- proportionality. Because there is so much electronically stored information, and because the amount is growing rapidly, the effort involved in trying to preserve all of it can be very great. The volume of such information also means that there may often be limited need to attempt to preserve "all" information on a subject. Instead, the focus should be on the information needs of the litigation at hand. That may be only a single case, or multiple cases. Rule 26(b)(2)(C) provides guidance particularly applicable to calibrating a reasonable preservation regime. Rule 37(g)(3)(E) explains that this calculation should be made with regard to "any anticipated or ongoing litigation." Prospective litigants who call for preservation efforts by others (the third factor) should keep those proportionality principles in mind. Parties complying with their obligation under Rule 26(f) to discuss preservation of discoverable information should similarly keep proportionality in mind.

Making a proportionality determination often depends in part on specifics about various types of information involved, and the costs of various forms of preservation. A party may act reasonably by choosing the least costly form of information preservation, providing that it is substantially similar to more costly forms. It is important that counsel become familiar with their clients' information systems and digital data -- including social media -- to address these issues. A party urging that preservation requests are disproportionate may need to provide specifics about these matters in order to enable meaningful discussion of the appropriate preservation regime.

receiving text messages; blogs or other online discussion forums; accounts with Google+, MySpace, Facebook, Twitter and equivalent services; LinkedIn, Monster.com, Career-Builder.com or similar accounts; and cloud-based services to store documents or data. He concludes: "It is no longer acceptable to give short shrift to plaintiffs' e-discovery obligations -- they are well established."

²⁸ The idea here is to suggest that -- particularly as to information in the cloud or on Facebook or other sources -- the party may not be able to exercise complete control over the preservation of the information.

Finally, the sixth factor looks to whether the party alleged to have failed to preserve as required sought guidance from the court if agreement could not be reached with the other parties. Until litigation commences, reference to the court is not possible. In any event, this is not meant to encourage premature resort to the court; Rule 26(f) directs the parties to discuss and to attempt to resolve issues concerning preservation before presenting them to the court. Ordinarily the parties' arrangements are to be preferred to those imposed by the court.²⁹ But if the parties cannot reach agreement, they should not forgo available opportunities to obtain prompt resolution of the differences from the court. Although judicial resolution of differences is obviously important to the party attempting to design an appropriate preservation regime for itself, it must be remembered that the other parties can also seek guidance from the court. An unresolved disagreement about preservation could lead to loss of information that judicial resolution could have avoided; if it becomes apparent that agreement cannot be reached, a party desiring broader preservation ought not unduly delay applying to the court for guidance.

In sum, the goal of Rule 37(g) is to provide a framework for realistic preservation arrangements to be made in given cases. Because one size does not fit all, it cannot prescribe a precise regime for most or all cases. But it does attempt to guide the parties and the court as they address these important matters.³⁰

²⁹ This point speaks to the notion that the duty to preserve is owed to the court.

³⁰ This concluding paragraph probably does not add significantly to the guidance already provided in the Note, but it may be useful to stress the overall theme.

ADAPTING RULE 37(e)

This approach seeks to combine our ongoing approach with existing Rule 37(e). It would be limited to electronically stored information, as is Rule 37(e). It would tie in with what we have already done, and would answer the question how this provision relates to what we did in 2006 by adding Rule 37(e).

Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

* * * * *

(e) FAILURE TO PRESERVE OR PROVIDE ELECTRONICALLY STORED INFORMATION

(1) Limitation on sanctions for loss of information through routine operation of electronic information system.

Absent exceptional circumstances, a court may not impose sanctions under these rules³¹ on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.

(2) Remedies for failure to preserve electronically stored information in anticipation of litigation. If a party fails to preserve electronically stored information that reasonably should be preserved in the anticipation or conduct of litigation, the court may:

(A) permit additional discovery;

(B) order the party to undertake curative [other remedial] measures; or

³¹ Should the phrase "under these rules" be retained? It avoids interfering with use of "inherent authority" to impose sanctions, but in general that is permitted only upon a showing of bad faith or willful destruction of information and therefore does not seem to create a problem.

(C) require the party to pay the reasonable expenses, including attorney's fees, caused by the failure.

(3) Limitation on sanctions for failure to preserve electronically stored information. Absent exceptional circumstances [irreparable prejudice], the court may not impose any of the sanctions listed in Rule 37(b)(2) or give an adverse-inference jury instruction unless {the court finds} [the party seeking sanctions proves] that the other party's failure to preserve discoverable information was willful or in bad faith and caused [substantial] prejudice in the litigation. [A court that imposes a sanction must use the least severe sanction necessary to cure the demonstrated prejudice.]

(4) Factors bearing on preservation and sanctions. In determining whether a party failed to preserve electronically stored information that reasonably should have been preserved, and whether the failure was willful or in bad faith, the court may [must] consider all relevant factors, including:

(A) the extent to which the party was on notice that litigation was likely and that the information would be discoverable;

(B) the reasonableness of the party's efforts to preserve the information, including the use of a litigation hold and the scope of the party's preservation efforts;

(C) whether the party received a request that information be preserved, the clarity and reasonableness of the request, and -- if a request was made -- whether the person who made the request or the party offered to engage in good-faith consultation regarding the scope of preservation;

(D) the party's resources and sophistication in matters of litigation;

- (E) the proportionality of the preservation efforts to any anticipated or ongoing litigation; and
- (F) whether the party sought timely guidance from the court regarding any unresolved disputes concerning the preservation of discoverable information.

Reporter's Notes

The assumption behind this presentation is not to change the basic thrust of the amendments. Instead, it seeks to integrate them with existing rule language with which they belong. Thus, the draft Committee Note to proposed 37(g) begins with a discussion of 37(e). Probably that draft Note could easily be adapted to fit were this placement found more suitable.

A major factor in making that decision is whether the amendments are to address all preservation or only preservation of electronically stored information. Inserting the new provisions here seems much more appropriate if they are to be applied only to electronically stored information.

Limiting the new provisions to electronically stored information need not suggest that it's open season on preservation of other discoverable information. Instead, it can be explained as focusing on the topic we have been told is the source of difficulties, and adapting an existing set of practices from non-digital information to that particular setting. Certainly the considerations listed for electronically stored information (e.g., proportionality) are pertinent to preservation of other things. But if we are talking about the car involved in the crash, or something like that, proportionality seems a limited issue.

One issue that this placement emphasizes is that proposed 37(e)(3) is not limited to sanctions "under these rules." But it does focus on "the sanctions listed in Rule 37(b)(2)" (along with an adverse-inference instruction).

Another is whether this placement makes "irreparable prejudice" more desirable in proposed 37(e)(3). Current Rule 37(e) uses "exceptional circumstances." Is proposed 37(e)(3) talking about the same thing? It may be that it is.

ADAPTING RULE 26(b)(1) FOR ELECTRONICALLY STORED INFORMATION

In recent conference calls, there has been some discussion of whether default limitations on discovery of electronically stored information might serve a valuable purpose. For one thing, they might be very useful as starting points for formal discovery. For present purposes, they might also be useful referents for preservation decisions, which we are inclined to limit to "discoverable" information.

Past experience shows that any proposal to modify Rule 26(b)(1) is likely to attract a great deal of attention. Including discussion of that possibility here in no sense advocates proceeding in a serious way toward developing such a proposal. This is included solely for purposes of informal discussion by the Committee. The Subcommittee has made no decisions about whether to give serious attention to this possibility, and there are many obstacles (some noted below) to overcome before any actual rule proposal would emerge.

At the same time, it may be that we are approaching a watershed when most parties to litigation have sufficient digital data to have a stake in confining discovery about that information. A footnote above calls attention to a recent National Law Journal article by a defense lawyer listing the wide variety of sources of digital data that most Americans now have available. Ensuring preservation of all these sources of information could be quite difficult and burdensome, as well as surprising, for many litigants. If defendants begin to press such points, it may seem that the shoe really is on both feet. The era of "one-way discovery" may be passing, even though organizational litigants likely have much more data than ordinary Americans. Organizational litigants are probably much better equipped to manage its data than most individuals.

So the following is a rough first-cut mock-up of what such a rule change might look like. It is presented solely to facilitate discussion of whether any such general idea has sufficient promise to justify further attention.

Rule 26. Duty to Disclose; General Provisions Governing Discovery

* * * * *

(b) Discovery Scope and Limits**(1) ~~Scope in General~~**

(A) In General. Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense -- including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).

(B) Electronically stored information. Subject to Rule 26(b)(1)(A), a party may obtain discovery of electronically stored information only as follows unless the parties agree or the court orders otherwise:

(i) [Alternative 1] Discovery need be provided only from sources of electronically stored information routinely used by the responding party in its everyday activities or business;

(i) [Alternative 2] Sources of information: Discovery need not be provided from the following:

Deleted, slack, fragmented or unallocated data on hard drives;

Random access memory (RAM) or other ephemeral data;

On-line access data such as temporary internet files;

Data in metadata fields that are frequently updated, such as last opened dates;

Information whose retrieval cannot be accomplished without substantial additional programming, or without transferring it into another form before search and retrieval can be achieved;

Backup data that substantially duplicate more accessible data available elsewhere;

Physically damaged media;

Legacy data remaining from obsolete systems that is unintelligible on successor systems [and otherwise inaccessible to the person];
or

Other forms of electronically stored information that require extraordinary affirmative measures not utilized in the ordinary course of business.

(ii) Custodians: Electronically stored information need be provided only from the _____ key custodians of the party most likely to possess the information sought;

(iii) Search terms: Every discovery request for electronically stored information must specify search terms, and no request may specify more than _____ search terms;

(iv) Time frame: Every discovery request for electronically stored information must identify the time frame for the request;

(v) Metadata: Metadata need not be provided, but fields showing the date and time email was sent and received, as well as the complete distribution list, must be included.

Reporter's Notes

This is obviously a very rough first cut of types of provisions that might be inserted into the rules. Some of them are drawn from our Category 1 draft for the Dallas mini-conference. Others are based on the model order for patent infringement cases announced in November by Chief Judge Rader of the Court of Appeals for the Federal Circuit. A copy of this model order should be included in the agenda materials. It bears note that this order is limited to one specialized type of litigation, and only to discovery of email, not also other sorts of electronically stored information. It makes no effort to address the difficulties of discovery regarding social media, material stored in the cloud, etc.

It should be obvious that there are many very serious questions about even the specifics included above. For example, "search terms" may be dated and departing technology. Predictive coding or some other technique may soon displace that method of identifying responsive materials. The metadata directives above are borrowed from the model order adopted by the Federal Circuit, but they clearly are limited to email, and almost certainly directed toward technology that will change as time goes by. So one way of evaluating this sort of idea is to think about how difficult it might be to devise limiting criteria that are also likely to stand the test of time. Unless they are "technology neutral," they may cause more problems than they solve.

Another way of looking at this rough draft is to think about other criteria that might be considered for addition. Are there no others? If there are others, would they be easier to formulate than the ones included above?

As emphasized, this is offered solely to provide focus for a discussion on whether even the attempt to devise something along

these lines holds promise sufficient to justify the effort involved. Providing this draft is not meant to endorse proceeding down this path.

TAB 5B

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Notes on Conference Call
Discovery Subcommittee
Advisory Committee on Civil Rules
Jan. 26, 2012

On Jan. 26, 2012, the Discovery Subcommittee of the Advisory Committee on Civil Rules held a conference call. Participating were Hon. Paul Grimm (Chair, Discovery Subcommittee), Hon. David Campbell (Chair, Advisory Committee), Hon. Michael Mosman, Anton Valukas, Esq., Elizabeth Cabraser, Esq., Prof. Edward Cooper (Reporter, Advisory Committee), Prof. Richard Marcus (Assoc. Reporter, Advisory Committee), and Andrea Kuperman (Chief Counsel, Rules Committees).

Judge Grimm introduced the topics for discussion by focusing on a threshold consideration of where new sanctions provisions would best appear. The Subcommittee has until now considered a new Rule 37(g) concerning sanctions with regard to any lost potential evidence. But the predominant source of concern that has been voiced has related to electronically stored information, not other sorts of evidence. An abiding question has been whether the new rule should be limited to electronically stored information. If it is, it may be that the new rule provisions would fit well into current Rule 37(e), which is only about electronically stored information. The pending drafts present the rule provisions either as a new Rule 37(g) or as additional provisions to existing 37(e). The draft Committee Note included with the 37(g) draft could readily be adapted to be a Committee Note to an amended Rule 37(e). But including the rule provisions in Rule 37(e) might be difficult if they go beyond electronically stored information. More generally, the threshold question is whether to focus only on electronically stored information or more generally on all discoverable information in framing sanctions amendments. Is there a consensus on which approach to take?

The first reaction was that we should not treat physical evidence differently from electronically stored information. The basic questions about retention and impact, as well as culpability if evidence is lost, are the same. We should keep this in one place and have it refer to all problems of this sort no matter whether they involve electronically stored information or other evidence.

A second reaction was agreement -- the problem is a general one, not one confined to electronically stored information.

A third view was that one-stop shopping is indeed a good idea, but that there may be a definite difference between tangible evidence and electronically stored information. Consider the Silvestri case. The loss of the car and airbag there prevented the defendant from being to make its case. That is the kind of thing that can happen with "real" evidence, and there must be a way to deal with it and protect the other side

even in the absence of serious culpability. The loss of emails (the ordinary problem in most ESI preservation cases that have been litigated) is simply not of a similar consequence. If we were to limit our new provisions to electronically stored information we might avoid the difficult challenge of permitting case-ending sanctions on a non-culpable party. With real evidence included under the rule, we will have to confront the problem of the Silvestri situation. In addition, the reason for considering this set of amendments is that we have been told about serious preservation problems with electronically stored information. Nobody has said that preservation of hard-copy or "real" evidence has presented such difficulties. Indeed, to the extent we are moving to a paperless world the problems of retaining that sort of material should diminish.

Another participant reported having begun with the view that a rule applying to all evidence would be desirable, but gradually had moved away from that view. One question is how taking the broader view would affect Rule 37(e), which is limited to electronically stored information. Should we consider abrogating or changing that rule? Would this issue delay getting a new rule on the books? In addition, the need to deal with the Silvestri problem of nonculpable loss of crucial evidence could itself invite discovery regarding how irreparable the loss of the evidence really would be. "We will end up with a shoot-out about this."

A response emphasized that a new 37(g) would not be incompatible with current 37(e). Moreover, the FJC research on actual sanctions motions showed that a significant proportion of the motions (perhaps a majority) did not involve electronically stored information but rather more traditional evidence. Finally, it is not at all clear that loss of electronically stored information would rarely be fatal to a party's case. Consider patient care in a hospital. Wouldn't it be fatal to plaintiff's case if all the records were lost? Would it matter if they were stored electronically instead of being kept in hard copy? How about all the research and development materials on the new steering system of a car if that seems defective. That development work would almost certainly now be done and saved on computers, and loss of it could be critical to cases about the new steering system. Finally, there might be negative implications to providing limitations on sanctions only with regard to electronically stored information.

A reaction was that the FJC study really was not directed at the subject that has been brought to the Committee's attention. Indeed, some who are most concerned about preservation worry that focus on actual sanctions motions would distract from the most important problem. The important problem is that preservation of electronically stored information has proven to be a very different burden from preservation of other sorts of potential

evidence. Those difficulties are due to particular features of electronically stored information that don't apply to other forms of evidence, and they are not reflected in the frequency of motions for sanctions but rather in the frequency of overlarge costs of preservation.

Another participant observed that the Committee would be wise to focus on solving only the problem that it has heard about, and not to broaden its focus to other "similar" problems. True, there is some risk of confusion if we give up on one stop shopping on handling sanctions for lost potential evidence of any sort. And it's true that electronically stored information can be critical evidence in some cases. Nonetheless, there is a limit to prudent ambition, and it should be limited to solving the problems that have been demonstrated. Nobody has said that sanctions for loss of traditional forms of evidence present the same kinds of preservation difficulties and burdens that preservation of electronically stored information often presents.

Another participant reported having the same struggle in addressing this question. One concern is making things worse. It is true that we have heard little about anything but electronically stored information. And it may often be true that there are work-arounds that can ameliorate the problems resulting from loss of that information. But there is a risk that we could encourage a more casual attitude toward one sort of evidence than another sort. There are instances where loss of electronically stored information is devastating to a party's case. Addressing electronically stored information only may raise risks of suggesting that there is reduced concern with tangible evidence or with electronically stored information, and either message is wrong.

A reaction was that it's important to keep in mind that if any amendment is limited to electronically stored information it would limit sanctions for loss of that evidence, but not for loss of any other kind of evidence. Accordingly, loss of tangible evidence would make a party subject to sanctions without being able to shelter behind the protections of the new rule.

It was agreed that the loss of electronically stored information could be devastating to a party and result from nonculpable conduct of the party that lost the information. If that's beyond sanctions, where does that leave us? Maybe we have to deal with the "exceptional circumstances" problem anyway even if the rule is limited to electronically stored information. Indeed, current 37(e) has an "exceptional circumstances" exclusion from its protection against sanctions for loss of electronically stored information due to the routine operation of an electronic information system.

Cloud computing was offered as an example of a situation in which this might occur. It has opened up an entire realm of data that could be lost without any serious culpability of a party. Suppose the cloud computing vendor goes bankrupt and ceases business, or turns out to be deficient and loses the data. Perhaps one could say the party that chose this company was negligent in doing so, but it's difficult to find that mistake willful or otherwise seriously culpable. A negligent choice of technology may become a bigger issue in the future.

A reaction was that this is a real concern, but that Rule 37(g) itself does not really meet it. Neither does current 37(e). Maybe we should consider curtailing sanctions for everything.

Another participant offered that this could be a good goal. Look to the future to appreciate the problems if one party's loss of electronically stored information cripples another party's case, perhaps the whole case. "I understand that the focus we have heard about is on electronically stored information discovery, but I don't see a reason to make a distinction."

A summary was offered: It seems as though there is a pretty even division on the Subcommittee about whether rulemaking should be confined to electronically stored information or apply to all sanctions, and therefore that the Subcommittee is not about to reach a consensus about this question. That leads to the further question what the Subcommittee should bring back to the full Committee during the March meeting.

One reaction was that it is probably wise not to try to go to the full Committee with a definite proposal for a rule amendment at this time. For one thing, the Subcommittee is uncertain about which approach would be wisest, something on which the full Committee might offer guidance. For another, we may shortly have more input from outside groups that could bear on the best course to pursue. The New York Bar Association may be submitting materials in the near future. The RAND Corporation report may be finished soon. Prof. Hubbard has said his work will be completed soon. Unless there is a reason to push this right now, it may be more prudent not to do so.

In addition, it was reported that the Sedona Conference is hard at work on developing possible rule-amendment ideas. Indeed, a representative of Sedona's drafting group had been in touch with the Subcommittee, and several Subcommittee members indicated a willingness to interact with the Sedona drafters about their progress.

Another participant favored a deliberate approach. Receiving insights from other groups could be very helpful; it is

challenging at present to make a confident judgment about the subject we have been discussing today.

Another consideration was offered: Even assuming the Subcommittee were unanimous about how to handle the issue discussed today, there are many subsidiary issues that have not been discussed. These questions have been presented both as language alternatives in the text of possible amendments and in footnotes, and there are 30 such footnotes in the memorandum for today's discussion. Resolving all those issues will take considerable time, and rushing that resolution could compromise the quality of the resulting work product.

It was also suggested that the evolving work of this Subcommittee dovetailed with the work being done by the Duke Subcommittee.

Another participant favored deferring final action to permit more consideration of these issues and to coordinate with the Duke Subcommittee.

Discussion turned to the enduring role of Rule 37(e) were something like the current rule ideas to go forward. It might be that the existing rule does not fully fit with the changes under discussion. But another view was offered: Actually, the current rule is mainly about the automatic operation of computer systems, and proceeds on the assumption that good faith requires a party to interrupt or alter that routine operation once litigation appeared sufficiently likely to trigger a duty to preserve. Hence the current rule ideas could be seen as "taking the next step" by addressing the handling of efforts to implement a litigation hold, something mentioned in the Committee Note to Rule 37(e). Indeed, the way 37(e) emerged is that the Committee was invited to address preservation directly and concluded that would not be prudent at the time; the more limited reach of 37(e) could be integrated with changes like the ones now under discussion.

There was also brief discussion of the possibility of addressing the scope of electronic discovery somehow along the lines of the model rule for patent litigation developed under the auspices of the Federal Circuit, but it was also noted that at least some of the provisions of that model rule might lead to difficulties in application. In particular, the proposed focus on "keyword" searching may address a method that is rapidly passing from the scene. For the present, the most to be done on this front would be to collaborate with the Duke Subcommittee as it works through the various proposals it has identified.

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TAB 5C

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Notes of Conference Call
Discovery Subcommittee
Advisory Committee on Civil Rules

Nov. 23, 2011

On Nov. 23, 2011, the Discovery Subcommittee of the Advisory Committee on Civil Rules had a conference call. Participants included Judge Paul Grimm (Chair, Discovery Subcommittee), Judge David Campbell (Chair, Advisory Committee), Anton Valukas, Esq., Elizabeth Cabraser, Esq., Andrea Kuperman (Chief Counsel, Rules Committees), Prof. Edward Cooper (Reporter, Advisory Committee), and Prof. Richard Marcus (Assoc. Reporter, Advisory Committee). Judge Michael Mosman was unable to participate.

Judge Grimm introduced the issues before the group. Prof. Marcus's Nov. 16 memo set out five variations of a "back end" approach to preservation issues, focusing on possible amendments in Rule 37. Four of them were in the agenda materials for the November full Committee meeting. The fifth was added after that meeting, and is something of a hybrid. It is a Rule 37 amendment, and focused on providing guidance (and perhaps limitations) with regard to sanctions decisions by a judge in a pending case. It therefore seems well within the Committee's rulemaking authority. But it offers a lot of specifics about what preservation must be undertaken to avoid sanctions. Those specifics could be absolute limitations on the judge's sanction power (forbidding sanctions on any party that complies with the specifics) or more general constraints on the judge's sanctions decision. The goal is to infuse the ex post decision of the judge with specifics that can inform the ex ante decisions to be made by the potential parties.

Overall, there are a number of recurrent issues that might be addressed in addition to the question which specific approach seems most promising. These include: (1) whether Rule 37(e) continues to serve a purpose if one of these methods is selected; (2) whether a rule should be designed to preclude reliance on inherent power or only to guide the court, which would have the final say on whether to impose sanctions; (3) the best way to differentiate "sanctions" from measures that do not depend on finding that a party has failed to preserve; (4) whether to try to link specific sanctions to specific culpability thresholds (as the N.Y. State Bar Ass'n has proposed); (5) whether sanctions limitations should prevent imposing sanctions on those who egregiously try to spoliage but fail; (6) whether severe sanctions should in some instances be permitted even though a party was not particularly culpable (the *Silvestri* issue); (7) whether a Rule 37 amendment should try to address sanctions against nonparties; (8) whether the Subcommittee should focus as well on possible revisions to Rules 26(f) and 16 to improve or expedite the meet-and-confer process; (9) whether rule provisions should be limited to electronically stored information or apply also to documents and tangible things.

Throughout, the focus should be on what we should be recommending to the full Committee at its meeting in March, 2012. One possibility would be to have a consensus rule proposal favored by the whole Subcommittee. Another would be to present options -- perhaps two approaches -- so the full Committee could choose between them.

The first participant to react was skeptical about any rule provisions dealing with trigger or scope. "The more detailed we get, the more it will get out of date." Everyone understands trigger now, so defining it is not useful. Trying to provide specifics on scope seems almost endless; the actual decisions are so fact-specific that a rule really can't be specific and accommodate all the variations. "I would take a lot off the table."

A second participant shared these general views. For example, thinking about a fair and flexible trigger leads to the conclusion that lawyers are able to handle actual issues under the standards the courts have developed. It seems clear from what we have heard that some clients would very much like more certainty. But providing specifics probably can't do that, and surely can't do that without also creating a significant risk that some will seek to exploit the specifics to defeat the basic preservation goal. The focus should be on sanctions, and the byword should be reasonableness. That may not be as specific in guiding front-end decisionmaking as some would prefer, but is preferable to trying to conjure up specifics that will stand the test of time.

A third participant was "probably in the same place" as the first two. Take trigger, to begin with. It seems pretty clear that this is a concept that is uniformly stated by the courts and well understood by the bar. The Sedona survey shows that, and the RAND report confirms it. The chart prepared by Judge Grimm about federal-court interpretations of pertinent issues across the country confirms the point.

There are essentially two reasons for considering a rule on trigger. First, some urge that we adopt a rule to change the trigger approach that is widely employed now. Focusing on the "certainty of litigation" or deferring all preservation obligations (for defendants) until after service of a complaint filed in court would surely move the trigger later in time for a significant number of cases. But the case has not been made for this committee to undertake to change this widely-accepted rule.

Second, one could try to provide precision without fundamentally altering the rule. The alternative with a list of examples might be a way of illustrating such an effort. That effort would produce all the kinds of difficulties that including specifics usually involves. And by its specificity it might

create significant problems for many entities that don't have heartburn under the current rules. On this point, the DOJ submission before the Dallas conference is very informative; for the Government, the specifics provided in the draft discussed in Dallas would produce significant headaches.

Regarding scope, it seems almost impossible to write a rule that would suitably fit all cases. For example, consider time limits. A hard time limit (e.g., two years) would seem to invite destruction in a number of instances where that would be inappropriate. The concept of "custodian" might be adopted as a presumptive but not an absolute limit on preservation. But that does not seem likely to be particularly beneficial to companies enduring preservation headaches. In good faith, companies acting with zeal to avoid the risk of being accused of failure to preserve would likely not find such presumptive limitations of great value in designing preservation regimes.

In terms of the scope of preservation as compared with the scope of discovery, it is troubling to consider announcing a scope provision that is significantly narrower. At the same time, and more generally, it seems desirable to think about trying to devise presumptive limits on the scope of production that would curtail the frequency of overdiscovery, not just overpreservation.

Another participant noted that the custodian issue raises the troubling question of what "custody" means in the digital age. It seems best to focus on identifying the individuals who are most likely to have knowledge about the matters that are important to the litigation, and then rely on them for guidance about where items subject to Rule 34 discovery could be found. That may be different from the notion of "custodian" that some who favor specifics on this subject in a rule have in mind. "I have long doubted the ability of this Committee to do more than address sanctions."

Another participant reacted on the subject of custodians that the whole notion may become obsolete. The original idea was that the person with physical possession of tangible things (including documents) is the source of the information sought in discovery. But that seems not to be as pertinent now, and likely will become less pertinent in the future.

Another participant agreed, and noted that shared workspaces and platforms in many organizations mean that one could say that nobody is the "custodian" of the shared work product. Using terms that will become antique can produce great difficulties. A pertinent example is the difficulty created by the terminology used in the Stored Communications Act, which no longer accurately describes the actual phenomena that matter in application of the Act.

Another participant offered the view that in some ways the hybrid rule collapses of its own weight. Trigger, for example, does not seem to be a problem, and we likely cannot improve on what the courts have announced, but might create problems and uncertainty if we acted. On scope, we might court great difficulties if we tried to narrow the scope of preservation compared to the scope of discovery.

On sources of information, it might be desirable to try to give some solace to those who have made reasonable efforts to preserve. Perhaps experimenting with provisions focused on what the party accesses in the "routine course of its business or activities" would be useful. But there are examples of efforts to game such systems. For example, this participant has heard of a lawyer advising employees of an organization to use text messaging rather than email to communicate about certain matters because texts are retained for a briefer period and often overlooked in discovery.

Regarding time frame, number of custodians, etc. -- these are arbitrary.

Focusing on burden of proof, and the distinction between sanctions (subject to limitations) and "curative measures" (not subject to limitations) seems more fruitful. But trying to tie specific descriptors of culpability to specific sanctions seems too difficult to attempt. The dividing lines between varieties of culpability are hard to articulate, and the dividing lines between sanctions may also be somewhat amorphous.

A reaction from another participant was that a presumptive limitation on custodians seems worth mentioning because it addresses a consideration that submissions to the Committee have pointed up: In the pre-litigation setting, we want the parties to make reasonable arrangements for preservation. But we do not provide parties who demand preservation with significant incentives to be reasonable. A presumptive limitation on the number of custodians would be a way to prompt reasonable behavior because the limitation would provide a starting point. Even though it might be that a court would later conclude that a longer list of custodians is suitable, having the starting point might be a way to ensure that the other side has an incentive to demand something less than the world. This need not be a full-blown alternative in drafting, but it would be good to keep this in mind.

Another participant asked whether we can sever that approach (the incentive to be reasonable) from the idea that this duty is defined by the scope of discovery. The goal is to ensure that what will be needed will be there.

Another participant observed that "the number of custodians won't work" as a rule provision. Two current cases illustrate the problem. In both, the other side is represented by excellent lawyers. "I could sit down with them and try to work these issues out, but my client won't authorize me to share the sort of information that the other side will demand." The idea may sound attractive but "it doesn't work that way in most cases." So a presumptive number would not work before litigation begins. After the case is filed, if the judge gets involved in discovery progress can be made. "As soon as there is somebody in the room who can decide things, people get reasonable." The place for us to work on the rules is at the back end, regarding sanctions.

Another participant echoed these views. On the plaintiff's side, it is an intriguing idea to incentivize reasonable behavior. But prior to litigation it may often be true that there is nobody who really represents the plaintiff side even if it is clear who represents the defense, and the defendant seems receptive to a reasonable approach. Even after litigation is filed, in important situations there may be uncertainty. For example, until a court appoints lead or liaison counsel there may be much ambiguity about who represents the plaintiff side in securities litigation, antitrust litigation, mass tort litigation, or other sorts of litigation. And more plaintiffs may arrive later.

A question was raised: How about individual employment discrimination litigation? That's the largest category of litigation (except prisoner petitions) in the federal courts and would seem to have a very different profile for these purposes from mass tort litigation.

A reaction was that such cases do seem familiar, but they may not solve these problems. There may be more awareness about who are the people at the employer who should preserve, but if it's a class action or other group litigation that could be less clear. And "those clients often fire their lawyers," so the other side may be dealing with different lawyers at different times.

This discussion prompted a different inquiry. Focusing on encouraging cooperation by emphasizing incentives might suggest that some changes in Rule 26 or Rule 34 might be useful. For example, what if one of those rules said that discovery beyond the presumptive limits as to ESI could be obtained only by court order, and a moving party seeking such a court order had to certify in the motion that it had tried to discuss reasonable access and numbers of custodians before seeking the court's assistance. Similarly, the rule could provide that the responding party could not oppose the motion without certifying that it had tried to confer about these matters. That would provide both sides with an incentive to confer about these

topics. Then there could be presumptive limitations on numbers of custodians and the like that provide a starting point, with the incentive to discuss in good faith key to getting to the court.

A reaction was that it is important to return to basic principles. Most cases boil down to a few facts and witnesses -- maybe ten key documents and a handful of key witnesses. The goal is to get to the point where those can be identified sooner rather than later. The way to do that is sensibly focused discovery. But that happens only when the judge gets involved and forces the parties to focus on what's really needed. Absent that, we probably can't get there.

Another participant agreed. The most valuable tool would be something that gets lawyers to be reasonable at the earliest juncture. At the same time, we need to be careful not to create perverse incentives. For example, some scope ideas might be read to provide affirmatively that certain things never need be preserved. It's quite different to stress that both sides must be reasonable and proportional in their attitudes.

As the time for the call was running out, the conclusion was that the focus for the present would be on the Category 3 approach from the Dallas conference. The "hybrid" alternative seemed to present too many difficulties, and did not seem to be suitable for similar pursuit at this time. These topics will have to be covered with Judge Mosman. The goal will be to have another conference call before the end of the year to keep moving forward.

TAB 5D

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AN E-DISCOVERY MODEL ORDER

INTRODUCTION

Since becoming a staple of American civil litigation, e-discovery has been the subject of extensive review, study, and commentary. *See The Sedona Principles: Best Practices, Recommendations & Principles for Addressing Electronic Document Production* (2d ed. June 2007). In view of the growing concern about e-discovery, the Federal Rules of Civil Procedure were amended in 2006 to more fully address e-discovery. Likewise, several district courts have adopted local e-discovery rules.¹

Despite these amendments, e-discovery continues to present a broad spectrum of challenges, such as preservation obligations, production format, and the disproportionate cost of e-discovery.² Patent cases, in particular, tend to suffer from disproportionately high discovery expenses. *See* Emery G. Lee III & Thomas E. Willging, *Litigation Costs in Civil Cases: Multivariate Analysis* 8 (Fed. Judicial Ctr. 2010) (“Intellectual Property cases had costs almost 62% higher, all else equal, than the baseline ‘Other’ category.”); *see also* Thomas E. Willging et al., *Discovery and Disclosure Practice, Problems, and Proposals for Change: A Case-*

¹ District Courts in Delaware, Kansas and Maryland have adopted e-discovery local rules. The Seventh Circuit has adopted an e-discovery pilot program.

² The following are the main cost areas for e-discovery:

Collection: Forensically sound (*e.g.*, preserving the document date) collection can require a trained specialist. Costs will include vendor fees and/or licensing fees, and media related charges. Inactive data requires restoration and software licensing fees.

Processing: Requires use of licensed assessment or review tools (more than 1 tool are often used for this process). Expenses will include data and text extraction, de-duplication, imaging fees, project management time and potential hosting fees. Frequently includes narrowing or broadening the scope of collection based on results.

Review: Requires continued hosting and licensing fees. Project management time is necessary for database setup and management, additional keyword filtering/assessment and searching. If human review is involved, this is the largest area of cost.

Production: Requires any additional data and image conversion, text extraction and/or appropriate language OCR generation. Tech time will include dealing with problematic files (*e.g.*, Excel). Also requires endorsement and control numbering. Costs will also be incurred for project management/tech time and media related charges.

Post Production: Project management and load time for importing productions into production review tool or index. Additional costs for associating native files to records.

Based National Survey of Counsel in Closed Federal Civil Cases 38-39 (Fed. Judicial Ctr. 1997) (finding that patent cases “stood out for their high discovery expenses”). Such expenses are compounded when attorneys use discovery tools as tactical weapons, which hinders the “just, speedy, and inexpensive determination of every action and proceeding.” Fed. R. Civ. P. 1.

In recent years, the exponential growth of and reliance on electronic documents and communications has exacerbated such discovery abuses. Excessive e-discovery, including disproportionate, overbroad email production requests, carry staggering time and production costs that have a debilitating effect on litigation. Routine requests seeking all categories of Electronically Stored Information often result in mass productions of marginally relevant and cumulative documents. Generally, the production burden of these expansive requests outweighs the minimal benefits of such broad disclosure.

Most discovery in patent litigation centers on what the patent states, how the accused products work, what the prior art discloses, and the proper calculation of damages. These topics are normally the most consequential in patent cases. Thus, far reaching e-discovery, such as mass email searches, is often tangential to adjudicating these issues.

As technology and knowledge play an increasingly important role in our economy, the courts must not become an intolerably expensive way to resolve patent disputes. Specifically, litigation costs should not be permitted to unduly interfere with the availability of the court to those who seek to vindicate their patent rights—the enforcement of such rights is both an obligation of the legal system and important to innovation. Likewise, disproportionate expense should not be permitted to force those accused of infringement to acquiesce to non-meritorious claims. This only serves as an unhealthy tax on legitimate commerce.

Fortunately, district courts have inherent power to control their dockets to further “economy of time and effort for itself, for counsel and for litigants.” *Landis v. North Am. Co.*, 299 U.S. 248, 254 (1936). Our objective is thus narrow, but important. The accompanying Model Order Limiting E-Discovery in Patent Cases is intended to be a helpful starting point for district courts to use in requiring the responsible, targeted use of e-discovery in patent cases. The goal of this Model Order is to promote economic and judicial efficiency by streamlining e-discovery, particularly email production, and requiring litigants to focus on the proper purpose of discovery—the gathering of material information—rather than permitting unlimited fishing expeditions. It is further intended to encourage

discussion and public commentary by judges, litigants, and other interested parties regarding e-discovery problems and potential solutions.

DISCUSSION OF THE MODEL ORDER

Hard-worn experience in patent cases and recent commentary teach that efforts to identify comprehensively the discovery issues or to produce all “relevant” documents at once at the outset of the case can result in the vastly overbroad production of e-discovery. Indeed, the practice of gathering huge amounts of information at the front of a case and running broad key searches as the issues emerge has come under increasing question. The recently published *Judges’ Guide to Cost-Effective E-Discovery* critiqued this practice sharply:

Some argue that e-discovery is best accomplished by taking large amounts of data from clients and then applying keyword or other searches or filters. While, in some rare cases, this method might be the only option, it is also apt to be the most expensive. In fact, keyword searching against large volumes of data to find relevant information is a challenging, costly, and imperfect process.

Anne Kershaw & Joe Howie, *Judges’ Guide to Cost-Effective E-Discovery* 4 (Fed. Judicial Ctr. 2010).

Hence, this Model Order requires a discovery process whereby the parties exchange core documentation concerning the patent, the accused product, the prior art, and the finances before making email production requests. Moreover, email production requests should be focused on a particular issue for which that type of discovery is warranted. Much as Federal Rule of Civil Procedure 30 presumptively limits cases to ten depositions and seven hours per deposition,³ this Model Order presumptively limits the number of custodians and search terms for all email production requests. However, the parties may jointly agree to modify these limits or request court modification for good cause.

This is not to say a discovering party should be precluded from obtaining more e-discovery than agreed upon by the parties or allowed by the court. Rather, the discovering party shall bear all reasonable costs of discovery that exceeds these

³ Such limits have reformed deposition practice, making it more efficient. *See* Fed. R. Civ. P. 30(a), 1993 Advisory Committee Notes (explaining that Rule 30 limits the number of depositions a party may take in order to “to emphasize that counsel have a professional obligation to develop a mutual cost-effective plan for discovery in the case”).

limits. This will help ensure that discovery requests are being made with a true eye on the balance between the value of the discovery and its cost.

A large source of e-discovery cost is the pre-production review of documents by attorneys or other human reviewers. Even with clawback provisions, this pre-production review is often undertaken to avoid the disclosure of privileged or other sensitive documents to adversaries. Accordingly, this Model Order addresses concerns regarding waiver of attorney-client privilege and work product protection in order to minimize human pre-production review.

E-Discovery Committee

Chief Judge James Ware (ND Cal)
Judge Virginia Kendall (ND Ill)
Magistrate Judge Chad Everingham (ED Tex)
Chief Judge Randall Rader (Fed. Cir.)
Tina Chappell
Richard “Chip” Lutton
Joe Re
Edward Reines
Steve Susman
John Whealan

Addendum: Discovery Model Order

	Plaintiff,	
v.		
	Defendant.	Case No.

[MODEL] ORDER REGARDING E-DISCOVERY IN PATENT CASES

The Court ORDERS as follows:

1. This Order supplements all other discovery rules and orders. It streamlines Electronically Stored Information (“ESI”) production to promote a “just, speedy, and inexpensive determination” of this action, as required by Federal Rule of Civil Procedure 1.

2. This Order may be modified for good cause. The parties shall jointly submit any proposed modifications within 30 days after the Federal Rule of Civil Procedure 16 conference. If the parties cannot resolve their disagreements regarding these modifications, the parties shall submit their competing proposals and a summary of their dispute.

3. Costs will be shifted for disproportionate ESI production requests pursuant to Federal Rule of Civil Procedure 26. Likewise, a party’s nonresponsive or dilatory discovery tactics will be cost-shifting considerations.

4. A party’s meaningful compliance with this Order and efforts to promote efficiency and reduce costs will be considered in cost-shifting determinations.

5. General ESI production requests under Federal Rules of Civil Procedure 34 and 45 shall not include metadata absent a showing of good cause. However, fields showing the date and time that the document was sent and received, as well as the complete distribution list, shall generally be included in the production.

6. General ESI production requests under Federal Rules of Civil Procedure 34 and 45 shall not include email or other forms of electronic correspondence (collectively “email”). To obtain email parties must propound specific email production requests.

7. Email production requests shall only be propounded for specific issues, rather than general discovery of a product or business.

8. Email production requests shall be phased to occur after the parties have

9. Email production requests shall identify the custodian, search terms, and time frame. The parties shall cooperate to identify the proper custodians, proper search terms and proper timeframe.

10. Each requesting party shall limit its email production requests to a total of five custodians per producing party for all such requests. The parties may jointly agree to modify this limit without the Court's leave. The Court shall consider contested requests for up to five additional custodians per producing party, upon showing a distinct need based on the size, complexity, and issues of this specific case. Should a party serve email production requests for additional custodians beyond the limits agreed to by the parties or granted by the Court pursuant to this paragraph, the requesting party shall bear all reasonable costs caused by such additional discovery.

11. Each requesting party shall limit its email production requests to a total of five search terms per custodian per party. The parties may jointly agree to modify this limit without the Court's leave. The Court shall consider contested requests for up to five additional search terms per custodian, upon showing a distinct need based on the size, complexity, and issues of this specific case. The search terms shall be narrowly tailored to particular issues. Indiscriminate terms, such as the producing company's name or its product name, are inappropriate unless combined with narrowing search criteria that sufficiently reduce the risk of overproduction. A conjunctive combination of multiple words or phrases (*e.g.*, "computer" and

12. The receiving party shall not use ESI that the producing party asserts is attorney-client privileged or work product protected to challenge the privilege or protection.

13. Pursuant to Federal Rule of Evidence 502(d), the inadvertent production of a privileged or work product protected ESI is not a waiver in the pending case or in any other federal or state proceeding.

14. The mere production of ESI in a litigation as part of a mass production shall not itself constitute a waiver for any purpose.

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PANEL DISCUSSION: RULES PAST AND FUTURE

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PLEADING

Work continues to appraise the evolving course of federal pleading standards in reaction to the *Twombly* and *Iqbal* decisions. The next item in the agenda is a report comparing the FJC study of the impact on motions to dismiss for failure to state a claim with other empirical studies. The important lesson is that little reason appears to begin any attempt to devise rules amendments to solidify, or redirect, the work undertaken by the lower courts. The questions are too important, and the answers too uncertain, to justify immediate movement toward proposals for publication. For that matter, it remains unclear whether any rulemaking response should focus on pleading, or on the integration of discovery with pleading, or with motions to dismiss.

The FJC is undertaking a comprehensive study of motions to dismiss that will reach well beyond Rule 12(b)(6) motions for failure to state a claim upon which relief can be granted. This work may provide some further information about pleading practices. The integration of pleading and discovery practices also may be affected by consideration of other pretrial practices, work being pursued by the Duke Conference Subcommittee.

The important question for the moment is whether these views about the need for immediate action by the rules committees are too complacent. The collective experience of the Committee should be brought to bear on the question. If it seems desirable to bring specific rules proposals to the current agenda, work can begin now.

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Joe Cecil
Research Division

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February 27, 2012

Memorandum

To: Hon. David Campbell

From: Joe Cecil

**Subject: RESPONSE TO COMMENTATORS ON FJC STUDY OF RULE 12(b)(6)
MOTIONS**

At the Advisory Committee's last meeting Professor Lonny Hoffman raised a number of questions about the Federal Judicial Center's studies showing little if any change in the overall rate at which judges are granting motions to dismiss for failure to state a claim. More recently several other papers have appeared that question the Center's findings, some of which present competing empirical studies. More studies are underway, and the debate about the effects of *Twombly* and *Iqbal* is likely to continue for some time.

The Research Division has undertaken two initiatives in response to these events. Attached is an initial draft of a response to four commentators on the Center's studies, clarifying areas of misunderstanding and refuting those claims that are without merit. The draft, which will be revised and posted on the Social Science Research Network and the FJC web site, does the following:

- acknowledges a recently discovered problem of missing records in our studies and our current efforts to identify and analyze those missing records;
- responds to criticisms by Professor Hoffman that the study fails to meet proper standards of empirical research;
- responds to criticisms of Professor Moore regarding exclusion of pro se and other types of cases, and critiques her most recent study;
- responds to Professor Brescia recent study of employment and housing discrimination cases; and,
- cautions against incorporation of the Center's findings in Professor Gelbach's economic model of pretrial litigation.

In addition, the Research Division is preparing a proposal for a new collaborative study of dispositive motions, intended to encourage a consensus view of pretrial civil litigation. This proposed study, which was discussed briefly at the recent meeting of the Standing Committee, will examine the full range of dispositive motions, including summary judgment motions. It will explore the relationship between motions to dismiss for failure to state a claim and summary judgment motions, and allow linkage with earlier studies to examine changes in dispositive motion practice over longer periods of time. We will invite legal scholars to review and comment on our initial draft proposal and to collaborate in the collection of the data. Upon completion of the study we will make the dataset available to legal scholars for reanalysis and extension of findings, constrained only by the limits of policies established by the Judicial Conference.

Please let me know if you wish to discuss any of these issues.

cc: Hon. Mark Kravitz
Hon. Lee Rosenthal
Edward Cooper
Richard Marcus
Andrea Kuperman

Of Waves and Water:

A Response to Comments on the FJC Study

Motions to Dismiss for Failure to State a Claim after Iqbal

Joe S. Cecil

Senior Research Associate
Federal Judicial Center
Washington, D.C

Draft -- February 27, 2012

[Updated drafts will be posted at www.ssrn.com]

[INSERT ACKNOWLEDGEMENTS]

This Federal Judicial Center publication was undertaken in furtherance of the Center's statutory mission to conduct and stimulate research and development for the improvement of judicial administration. While the Center regards the content as responsible and valuable, it does not reflect policy or recommendations of the Board of the Federal Judicial Center.

Abstract

This paper responds to comments regarding the Federal Judicial Center's recent studies of the resolution of motions to dismiss for failure to state a claim. Those studies, undertaken at the request of the Judicial Conference Advisory Committee on Civil Rules, found a statistically significant increase in the rate at which defendants file motions to dismiss following the Supreme Court decisions in *Bell Atlantic v. Twombly* and *Ashcroft v. Iqbal*. The studies also found no statistically significant increase in the rate of grants of motions to dismiss without leave to amend, except in cases involving challenges to financial instruments such as mortgages, and no statistically significant increase in cases terminated by such motions. Several scholars have expressed reservations regarding these findings and raised a number of specific issues regarding the research. This paper responds to the following issues:

- Professor Hoffman's concerns about our use of statistical analysis in general, and the use of multinomial statistical models in particular;
- Professor Moore's concerns about the exclusion from our study of pro se cases and cases asserting affirmative defenses, and offers a critique of her most recent study of the outcome of motions to dismiss;
- Professor Brescia's recent study of the outcome of motions to dismiss in employment and housing discrimination cases; and
- Professor Gelbach's incorporation of our findings into an economic model of pretrial litigation that attempts to estimate the overall effect on settlement and access to discovery.

I continue to believe that our findings represent the most accurate statement of the federal district courts' response to these Supreme Court decisions, but acknowledge that this response has continued to evolve since we conducted our study. I propose a collaborative study of all dispositive motions that will, among other things, examine the interaction between motions to dismiss for failure to state a claim and motions for summary judgment.

An ocean traveler has even more vividly the impression that the ocean is made of waves than that it is made of water.

*Arthur S. Eddington (1882-1944) English astronomer and physicist. In: **The Nature of the Physical World**, Cambridge (1929).*

A number of legal scholars have published critiques of our initial report on motions to dismiss for failure to state a claim,¹ raising questions about the structure and interpretation of the analyses we presented to the Advisory Committee on Civil Rules. I agree with some of their concerns, many of which we acknowledged in the March report.² We have benefited from their comments and have clarified our follow-up report to make the statistical analysis more accessible and added several new analyses to respond to issues they raise.³ However, there are other issues about which we disagree. After presenting a brief summary of the findings of our study I set forth those areas of disagreement and respond to their primary concerns.

Our report presents the findings of a Federal Judicial Center study on the filing and resolution of motions to dismiss for failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure. The study was requested by the Judicial Conference Advisory Committee on Civil Rules, in anticipation of its consideration of proposed amendments to the civil rules regarding

¹ JOE CECIL ET AL., FED. JUDICIAL CTR., MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM AFTER IQBAL: REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES (2011), *available at* http://www.fjc.gov/library/fjc_catalog.nsf, and at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1881139.

² We noted in our initial report that our study, like all empirical studies, has a number of limitations, many of which Professor Hoffman and others also mentioned. For example, we acknowledged that empirical research is only one factor that will inform the deliberations of the Advisory Committee; that we are not able to determine if valid claims have been deterred or whether cases of merit have been dismissed; that we are not able to focus on the specific subset of cases that are particularly vulnerable to issues of factual insufficiency; and that some motions may have been overlooked in our search strategy. We specifically acknowledge that our strategy of examining changes in motion practice across broad sets of cases may miss any effects that are limited to narrower subcategories of cases. CECIL ET AL., *supra* note 1, at 22-23.

³ In our follow-up analysis examining the outcome of motions granted with leave to amend the complaint, we include specific estimates of statistical significance for those comparisons that do not achieve conventional levels of significance, and include information on cases that we excluded in our initial analyses, such as pro se cases, and cases with counterclaims and cross claims. JOE CECIL ET AL., FED. JUDICIAL CTR., UPDATE ON RESOLUTION OF RULE 12(B)(6) MOTIONS GRANTED WITH LEAVE TO AMEND: REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES (2011), *available at* http://www.fjc.gov/library/fjc_catalog.nsf.

pleading practice. The study compared motion activity in 23 federal district courts in 2006, before the Supreme Court's decision in *Bell Atlantic v. Twombly*,⁴ and in 2010, after the Court's decision in *Ashcroft v. Iqbal*.⁵ Unlike other studies in this area, our study included an assessment of the outcome of motions in orders that do not appear in computerized legal reference systems such as Westlaw. Statistical models were used to control for unrelated factors, such as type of case and the overall levels of motion activity in individual federal district courts.

After excluding cases filed by prisoners and pro se parties, and after controlling for differences in motion activity across federal district courts, across types of cases, and for the presence of an amended complaint, we found a general increase from 2006 to 2010 in the filing rate of motions to dismiss for failure to state a claim. With one exception, we found no statistically significant increase in the rate of motions to dismiss granted without leave to amend. In particular, there was no statistically significant increase in the rate of grants of motions to dismiss without leave to amend in civil rights and employment discrimination cases. Moreover, we found no statistically significant increase from 2006 to 2010 in the rate at which a grant of a motion to dismiss terminated the case.

The exception to this pattern of results involved cases challenging mortgage and other consumer loans on both federal and state law grounds. This category of cases tripled in number during the relevant period in response to the 2008 economic downturn associated with the collapsing housing market. Such cases did indicate a statistically significant increase in the rate of grants of motions to dismiss without leave to amend. We believe these cases represent a response to a distinctive economic condition and do not believe that the rate of dismissals without leave to amend would have been significantly lower in 2006 had such cases existed then.

We also found that in 2010, Rule 12(b)(6) motions were granted more frequently with leave to amend the complaint. We conducted a follow-up study of motions granted with leave to amend to determine the extent to which the respondents submitted amended complaints and the outcome of any subsequent motions to dismiss.⁶ This follow-up study confirmed the overall pattern of results presented in our initial report. In brief, we found that an opportunity to amend a complaint reduced the extent to which movants prevailed by approximately ten percentage points. Our conclusions remain the same. We found a statistically significant increase in motions granted in whole or part only in cases involving financial instruments, and we found no statistically significant increase in plaintiffs excluded by such motions or in cases terminated when such motions were granted. This follow-up study was not available at the time the critiques addressed in this report were prepared.

⁴ Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).

⁵ Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009).

⁶ CECIL ET. AL., *supra* note 1; CECIL ET. AL., *supra* note 3.

The Hoffman Critique

Professor Lonny Hoffman has made available to the Advisory Committee a draft of his article entitled, *Twombly and Iqbal's Measure: An Assessment of the Federal Judicial Center's Study of Motions to Dismiss*.⁷ In brief, Professor Hoffman argues that our study: misleads the Advisory Committee by failing to clarify the meaning of a finding of no statistical significance; sets an inappropriately demanding threshold for determining statistical significance and ignores the substantive significance of findings that do not meet that threshold; fails to take into account the extent to which pleading standards under *Twombly* and *Iqbal* have disposed of meritorious claims that would have been supported if the plaintiff had been allowed to proceed to discovery, and fails to consider the extent to which these pleading standards have deterred the filing of federal cases with meritorious claims. I will address each of these issues in turn.

Need for Additional Data

While conducting the follow-up study of motions granted with leave to amend the complaint we learned that we overlooked some motions and orders concerning motions to dismiss for failure to state a claim. We are presently retrieving these missing documents and will including them in a final comprehensive analysis. As part of this study we relied on a new methodology that employed the Court Management/Electronic Case Filing (CM/ECF) codes entered by court clerks at the time that motions and orders are docketed.⁸ We believed that retrieving motions and orders using such codes provided a more complete collection of relevant motions and orders than relying on orders appearing in Westlaw and Lexis. In fact, we believed that such a technique would allow us to identify all relevant motions and orders resolving motions to dismiss for failure to state a claim.

Almost at the end of his critique, Professor Hoffman mentions the possibility that our data may understate the rate at which motions to dismiss are filed because of coding errors by the clerks who enter the CM/ECF data on which our study relies.⁹ It turns out that Professor Hoffman was correct. As part of a routine verification of our findings and pilot work for other studies, we recently found that some districts included in our study employ idiosyncratic coding practices when entering the CM/ECF data. The curse that accompanies reliance on administrative records for research purposes asserts itself yet again.¹⁰

⁷Lonny Hoffman, *Twombly and Iqbal's Measure: An Assessment of the Federal Judicial Center's Study of Motions to Dismiss*, 6 FED. CTS. L. REV. 1 (2012).

Professor Hoffman provided valuable advice in the initial stages of the design of this project and I greatly appreciate his assistance, though it appears from his critique that we have strayed far from the path he set forth. Any problems with our research design, analysis and interpretation, of course, rest with us and with no one else.

⁸CECIL ET AL. *supra* note 1, at 36.

⁹Hoffman, *supra* note 7, at 34 ("Only motions coded by the clerk under the event subcategory code 'motion to dismiss' made it into the filing rate cohort that was collected. If a court clerk did not code a motion correctly, it would not have been included in the dataset.").

¹⁰Sir Josiah Stamp, *Some Economic Factors in Modern Life*, 258-9 (1929) ("The government are very keen on amassing statistics -- they collect them to the nth power, take the cube root and prepare wonderful diagrams. But

We expect that including the missing motions will increase the estimates of filing rates for motions in both 2006 and 2010 by an unknown amount. It seems unlikely that the missing orders will change the results of the study of outcome of the motions, because the nonconforming coding practices are likely unrelated to the outcome of the motions and because our statistical models control for distinctive effects of individual courts. We are presently locating these missing motions and orders using docket sheet entries and other sources of information, and will reanalyze the data to determine what effect this has on our original findings.

Of course, it is worth noting that the studies relying on other data sources, such as Westlaw databases, are also missing relevant orders responding to motions to dismiss. I show below that the missing orders in the Westlaw database are more likely to deny motions to dismiss, thereby building a bias into studies that rely on such sources.¹¹

Failure to Consider the Multinomial Models.

Before turning to Professor Hoffman's specific concerns about our study, it is important to note that Professor Hoffman assesses our study without addressing the findings of the multinomial models on which we base our estimates of effects. In fact, many of his concerns stem from this failure to take into account the findings of these multinomial models. Because we regard these models as essential to a proper understanding of the effects of *Twombly* and *Iqbal*, it is worth taking a moment to restate the purpose of the models and how they inform our understanding of the lower courts' response to these Supreme Court cases.

The multinomial models presented in our report allow us to sort out changes in the filing and disposition of Rule 12(b)(6) motions that are due to factors unrelated to the pleading standards established by *Twombly* and *Iqbal*, and to better isolate the effects due to those decisions. The most obvious example of such an unrelated factor that must be taken into account is the increase in the absolute number of motions filed and resolved that accompanies an overall increase in case filings. With more cases filed in recent years, we would expect to see more motions to dismiss even if there are no changes due to *Twombly* and *Iqbal*, just as we would expect an increase in the absolute number of motions to dismiss in the years of increasing case filings prior to *Twombly*. As noted in our report, the number of federal cases filed increased by 7% from 2006 to 2010. The necessary and simple correction is to look not at the absolute number of motions filed, but rather at the likelihood that one or more motions were filed on a per case basis.

Professor Hoffman initially appears to reject the need to take into account increased case filings over time, repeatedly pointing to the increase in absolute numbers of motions filed and

you must never forget that every one of these figures comes in the first instance from the village watchman, who just puts down what he damn well pleases.”)

¹¹See *infra* notes 99-105 and related text.

granted after *Iqbal* as evidence of the courts' reaction to those cases.¹² Of course, with more cases being filed in 2010, a higher absolute number of motions and dismissal orders indicates little about the courts' response to *Twombly* and *Iqbal*.

In a different section of his critique, Professor Hoffman appears to accept the correction to account for increased filings over the years,¹³ but resists acknowledging the need for other corrections included in the multinomial models.¹⁴ Yet the reason that these other corrections are necessary is the same – factors other than the courts' response to the Supreme Court cases are plausible explanations for the changes over time. The multinomial models allow us to rule out plausible alternative explanations and to better isolate the changes attributable to the courts' response to the cases. For example, the multinomial model examining the outcome of motions allows us to control for motions filed in response to an amended complaint. As indicated in our report and as noted by Professor Hoffman,¹⁵ motions that respond to an amended complaint are more likely to be granted both before *Twombly* and after *Iqbal* than motions that respond to an initial complaint. We also found that motions responding to amended complaints were more likely following *Iqbal*. Unless we control for the presence of an amended complaint, we will be unable to determine if the increases following *Iqbal* are due to changes in pleading practice or instead due to the increase in motions that respond to amended complaints.¹⁶

Similarly, the multinomial models control for overall differences in motion activity across federal district courts and across different types of cases. We know from earlier studies that summary judgment activity varies greatly across types of cases and individual district courts.¹⁷ Again, a proper assessment of the effects of *Twombly* and *Iqbal* requires that we control for differences in motion activity in the individual courts and in different types of cases. Controlling for effects due to individual courts takes into account the different overall levels of motion

¹²Hoffman, *supra* note 7, at 17 (“As noted above, the FJC found both a higher absolute number of orders granting dismissal in the post-*Iqbal* period and a higher likelihood that motions would be granted in every case category examined. We have also seen, however, that the researchers focused little attention on the absolute increase in orders and that, as far as the grant rate findings are concerned, the researchers emphasized that the post-*Iqbal* increases were not statistically significant in any case category except for Financial Instruments cases.”).

¹³*Id.* at 12 (“There was an increase in case filings in the later period, but it was not nearly as large as the increase in dismissal orders granted. Civil case filings increased only 7% in the 23 federal district courts from which the FJC’s data was drawn.”).

¹⁴But see *infra* notes 19-23 and related text.

¹⁵CECILE ET AL., *supra* note 1, at 15; and Hoffman, *supra* note 7, at 15.

¹⁶ Interpreting the effects of an amended complaint is a bit more complicated than we initially believed. In our previous analysis, we included the presence of a motion responding to an amended complaint as a simple covariate in the multinomial model. Upon further reflection, we became concerned that there also may be an indirect effect of *Twombly* and *Iqbal* on grant rate through amended complaints, in addition to the direct effect that we included in our model. In the most recent analysis we also included an interaction term to assess any such independent effect, and found that the interaction term failed to reach a 0.05 level of statistical significance.

¹⁷CECILE ET AL., *supra* note 1, at 15 (“Marked differences in grant rates and the opportunity to amend the complaint were found across the individual courts. Such motions were more likely to be granted with leave to amend in the Eastern and Northern Districts of California, and granted without leave to amend in the Eastern and Southern Districts of New York.”).

activity in individual courts and avoids giving undue influence to those courts that have higher than normal rates of overall case and motion filings. Similarly, controlling for effects due to case type ensures that an increase in filings and motions in certain types of cases will not be misinterpreted as an effect that extends beyond those specific case types.

Of course, we could look within individual courts to determine if there are changes from 2006 to 2010. Accordingly, we would have to look within individual types of cases at individual courts to determine if a pattern of change takes place. More specifically, we would have to look at motions responding to initial and amended complaints within individual types of cases, at each individual district court to determine if the rates at which motions were granted have increased from 2006 and 2010. If we found a consistent pattern of increases from 2006 to 2010, within motions filed in response to initial and amended complaints, within differing types of cases, within individual courts, then we could be reasonably confident that the increases are related to changes in pleading standards due to *Twombly* and *Iqbal*. However, such an analysis would entail over 250 individual comparisons, some of which may show a difference, while others may not. The multinomial models offer a more convenient statistical computational method and a more powerful test that allows us to isolate such effects and avoid the ambiguity that accompanies individual comparisons.

Professor Hoffman discounts the findings of the multinomial models as follows:

A still further and even more potentially problematic assumption is that the variables selected [for the multinomial models] truly were independent of *Twombly* and *Iqbal's* effects. The regressions the FJC researchers ran controlled for three variables: court, case type and whether the order responded to an amended complaint. The results of their models only reveal valuable information, however, only if these variables really are independent of *Twombly* and *Iqbal's* effects; yet, it is not clear that they all are truly independent. For instance, why should we assume the district court is entirely independent of *Twombly* and *Iqbal's* effects? It is even less clear why it is appropriate to isolate out whether the court's order was in response to a complaint that had been amended. As noted earlier, an increase in the grant rate may be alarming even when leave to amend has been given, especially when the FJC's own data shows that the movant's success rate goes up significantly after the plaintiff has had an opportunity to amend.¹⁸

¹⁸Hoffman, *supra* note 7, at 23. Professor Hoffman also questions whether the models were correctly constructed, observing, "As Table A-2 in the appendices to the FJC study shows, controlling for different dismissal rates in different courts, the grant rates in every other case category were lower in 2006 than the constructed baseline [involving torts cases], raising concern that the model's comparison of the dismissal rate understated the increase in the later period." However, the table also indicates no statistically significant differences for these other case categories. Professor Hoffman also suggests that "it might have been more appropriate to take only a single variable—say, case type—and stratify within each case type other variables, such as the different courts." *Id.* Such stratification may be appropriate in a clinical study in which the researcher controls exposure to the primary

Professor Hoffman’s concerns about the models also indicate the reason they must be employed. Professor Hoffman asks, “[W]hy should we assume the district court is entirely independent of the effects of *Twombly* and *Iqbal*?” What we assume, and what is demonstrated by the findings of the multinomial models, is that district courts have differing baseline levels of motion activity without regard to *Twombly* and *Iqbal*— some typically have higher levels of motion activity, while others have lower levels of activity. The same is true for the overall rates at which courts grant such motions. An accurate assessment of the overall effect of *Twombly* and *Iqbal* must take into account these differing levels of overall motion activity by measuring the effect of any change from a common baseline level of activity across all courts. Otherwise a disproportionate increase in filings in districts with high but unchanging levels of motion activity can be misinterpreted as an effect of *Twombly* and *Iqbal*. The same is true for increases in certain types of cases with high levels of motion activity, such as civil rights cases, and motions filed in response to an amended complaint. By taking into account these unrelated factors using multinomial models, we avoid being misled by unrelated shifts in filings and are able to obtain a more precise estimate of the effects of *Twombly* and *Iqbal*.¹⁹

In her initial study of the effects of *Twombly* and *Iqbal*, Professor Patricia Hatamyar Moore offers a concise expression of the proper interpretation of frequency tabulations in the presence of estimates of effects from multinomial regression models. This is a practice that we, in fact, follow. After presenting the frequency tables from her study, Professor Moore cautions:

It is important to note that inferences—if any—to be drawn from the statistics should be confined to the regressions. I believe that the raw frequencies in Part III(A) may be of interest to the reader. However, multiple factors may affect the ruling on the 12(b)(6) motions, and two-way tables cannot account for any confounding effects of other variables. As presented in two-way tables, any apparent relationships between the independent variables and outcomes can be misleading.²⁰

Professor Hoffman often cites the studies by Professor Moore with favor, but proceeds to do the exact opposite of what she advises; he confines his inferences to the potentially misleading frequency tabulations and relies on the multinomial models only when they confirm his interpretations arising from the frequencies.²¹ In doing so Professor Hoffman erroneously

variable of interest, but offers no advantage in this case where we have no such control over assignment to case types.

¹⁹ At this point I defend only the use of the multinomial models in general to isolate the effects of changes in legal standards. Later I defend the selection of variables included in the model.

²⁰ Patricia W. Hatamyar, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?*, 59 AM. U. L. REV. 553, 597 (2010). Professor Moore repeated this advice in her updated analysis. Patricia Hatamyar Moore, *An Updated Quantitative Study of Iqbal’s Impact on 12(b)(6) Motions*, 46 U. RICH. L. REV. 603, 619 n.48 (2012).

²¹ Hoffman, *supra* note 7, at 15 (“Regression analysis to control for differences across federal districts and across types of cases confirmed the straightforward findings: after *Iqbal*, a plaintiff was twice as likely to face a motion to dismiss.”).

attributes the confounding effects of other variables to *Twombly* and *Iqbal* and calls for changes in the Federal Rules of Civil Procedure based on factors that may be unrelated to the Supreme Court's guidance on pleading standards. Our disagreement over the role of these multinomial models is at the core of our differences, and this disagreement echoes throughout much of Professor Hoffman's critique and our response.

Perhaps Professor Hoffman overstates his distrust of multinomial models. When the multinomial models show a greater effect than the crosstabs, Professor Hoffman adopts the results of the multinomial model as his preferred estimate of effect size. For example, our crosstabs show an increase in the rate at which motions are filed from 4% to 6.2%, an increase of 55%.²² Our multinomial model confirms that this is a statistically significant increase, and controlling for federal district court and type of case, estimates the adjusted size of the increase in filing rate to be from 2.9% to 5.8%, an increase of 100%, or twice as likely that a motion to dismiss will be filed in an individual case after *Iqbal*.²³ Professor Hoffman first cites the 55% increase based on the crosstab²⁴ and notes the higher estimate of effect size resulting from the multinomial models.²⁵ He then repeatedly describes the effect size as showing that the likelihood that a motion is filed is *twice* as high after *Iqbal*, without mentioning that this estimate is derived from the multinomial models that he distrusts.²⁶ Professor Hoffman also does not explain why the effects estimates of the multinomial models are valid for estimating changes in the motion filing rate (which suggest an effect of *Twombly* and *Iqbal*), but not valid for estimating changes in the motion grant rate (which do not suggest an effect of *Twombly* and *Iqbal* beyond financial instrument cases).

I agree that Professor Hoffman should rely on the effects estimates of the multinomial models for estimating the increase in filing rate of motions, and believe he should also rely on the estimates of the multinomial models throughout his assessment of our study.

Low Estimate of Filing Rate

Professor Hoffman questions whether our research methodology provided an accurate assessment of the filing rate for motions to dismiss, and points out that while we found a

²²CECIL ET AL., *supra* note 1, at 9, tbl.1.

²³CECIL ET AL., *supra* note 1, tbl.2 ("These adjusted estimates indicate that the probability of a motion to dismiss being filed in an individual case increased from a baseline of 2.9% of the cases in 2006 to 5.8% of the cases in 2010.").

²⁴Hoffman, *supra* note 7, at 10 ("In the earlier period, the FJC found that defendants filed motions to dismiss for failure to state a claim in 4% of all civil cases. After *Iqbal*, the rate increased to 6.2%."); *id.* at 15 ("The researchers found a 50% increase from before *Twombly* to after *Iqbal* in the rate at which motions to dismiss for failure to state a claim were filed.").

²⁵*Id.* ("Regression analysis to control for differences across federal districts and across types of cases confirmed the straightforward findings: after *Iqbal*, a plaintiff was twice as likely to face a motion to dismiss.").

²⁶*Id.* at 11 ("In the post-*Iqbal* period it was twice as likely that a plaintiff would face a motion to dismiss."); *id.* at 36 ("[R]ulemakers could reasonably want to take into consideration that in the post-*Iqbal* period plaintiffs were twice as likely to face a dismissal motion. . ."); *id.* at 7 ("After *Iqbal*, a plaintiff is twice as likely to face a motion to dismiss.").

statistically significant increase in the likelihood that a motion to dismiss would be filed after *Iqbal*, we also found a lower filing rate than some earlier studies.²⁷ As noted previously, we may have missed some motions in some districts, and are presently retrieving those missing motions. But, even after we add the missing cases our findings will be comparable to the filing rates of those previous studies. Our research design, based on cases filed after *Iqbal*, is not intended to estimate the percentage of cases with motions to dismiss filed throughout the life of the case. As we noted in our report,²⁸ and as referenced by Professor Hoffman,²⁹ we sought to determine if there was a change in filing rates only during the first 90 days after the case was filed. This limitation is a consequence of trying to obtain current data on cases filed following *Iqbal*. We examined motion activity in cases filed from October 2009 through June 2010 and followed those cases through September 30, 2010, when we suspended data collection to begin coding and analyzing the data.³⁰ This study, which is based on a group of cases *filed* in 2005-2006 and 2009-2010, is not comparable to the earlier Center study cited by Professor Hoffman that found motions to dismiss for failure to state a claim filed in 13 percent of the cases. That earlier study was based on cases *terminated*, not filed, in 1988. This earlier study included cases with motions filed long after the first 90 days of the case, including motions filed after some cases had been terminated and then reopened, and motions filed after some cases had been remanded from the courts of appeals. Such cases are excluded from our analysis to avoid confusing the effects of *Twombly* and *Iqbal* in cases filed before those Supreme Court decisions and cases filed afterwards.³¹ We acknowledge that the filing rates for motions to dismiss throughout the life of the case will be higher than the rates we found after 90 days, and noted this in our report.³²

²⁷ Professor Hoffman cites a recent FJC survey as support for his concern that we are underestimating the filing rate. *Id.* at 32 (“In this same connection, it is perhaps notable that the 6.2% post-*Iqbal* filing rate the FJC found seems at odds with survey results of lawyers with the National Employment Lawyers Association (NELA), in which nearly three quarters reported that they had responded to motions to dismiss they believe would not have been brought before *Twombly*.”) (citing EMERY G. LEE III & THOMAS E. WILLGING, FED. JUDICIAL CTR., ATTORNEY SATISFACTION WITH THE FEDERAL RULES OF CIVIL PROCEDURE: REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 12 (2011), available at http://www.fjc.gov/library/fjc_catalog.nsf. But there is more to the story. Professor Hoffman does not mention the results presented on the same page of the survey report that are consistent with our finding of only a modest increase in the likelihood of an employment discrimination case being dismissed under the *Twombly* and *Iqbal* standards. *Id.* (“Finally, respondents were asked whether “any of your employment discrimination cases have been dismissed for failure to state a claim under the standard announced in *Twombly/Iqbal*.” This question was asked of respondents who had filed an employment discrimination case post-*Twombly*. Only 7.2% of those respondents answered in the affirmative (14 total respondents).”). In other words, only one of the 14 responding attorneys who had filed such cases after *Twombly* had *any* case dismissed for failure to state a claim.

²⁸ CECIL ET AL., *supra* note 1, at 23. (“We examined motions only if they were filed within the first 90 days of a case, and we cannot determine if the increase in motions filed during this period would be sustained throughout the duration of the cases.”).

²⁹ Hoffman, *supra* note 7, at 33.

³⁰ CECIL ET AL., *supra* note 1, at 5 & 25.

³¹ For an example of a study that examines the effect of *Twombly* on cases filed before that decision, see William Hubbard, *The Problem of Measuring Legal Change, With Application to Bell Atlantic v. Twombly* (U. Chi. L. & Econ., Olin Working Paper No. 575), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1883831.

³² CECIL ET AL., *supra* note 1, at 8 n.13 (“The figures resulting from our analysis understate the overall likelihood of motions to dismiss, since multiple motions may have been filed during this period and motions may be filed after the 90-day cutoff used in this study, often in response to amended complaints.”).

Inappropriate Reliance on Statistical Testing

Having discounted the multinomial models, Professor Hoffman then examined the raw frequencies and percentages in the tables of cross-tabulations without regard to confounding factors. Even here, Professor Hoffman departs from conventional practice by ignoring the results of statistical tests designed to determine which of the differences may be due to chance alone. Professor Hoffman justifies this bold departure as follows:

Whatever the benefits of a well-constructed study, empirical research can also confound thinking if the chosen methodology is unsound or if even adequately collected findings are not communicated clearly. By emphasizing that none of the dismissals increases in the [case categories other than financial instruments] were statistically significant, the FJC's study leads readers to assume that the study proved *Twombly* and *Iqbal* were not responsible for the higher number and rate of dismissals, as well as to overlook the effects that were observed. The researchers should have more clearly communicated the study's results. More precisely, I argue that the researchers could have aided transparency and understanding by (1) clarifying what a finding of no significance means; (2) discussing the cost of setting an inappropriately high threshold for statistical significance; and (3) raising plausible reasons why the observed differences might not have reached the level of statistical significance they selected.³³ (footnotes omitted)

I believe that we communicated the findings clearly and do not understand the claim that our presentation is misleading in any way.³⁴ We never claimed to have “proved *Twombly* and *Iqbal* were not responsible for the higher number and rate of dismissals.” A fundamental principle of empirical research is that statistical testing relates to interpretation of the data and cannot be interpreted to confirm the truth or falsity of the hypothesis.³⁵ I can find no statement in our

³³Hoffman, *supra* note 7, at 17-18.

³⁴Professor Hoffman also faults us for failing to report the actual probability levels resulting from statistical testing, claiming, “[t]he common practices in scientific journals is to report actual p-values rather than merely reporting results as significant or not.” Hoffman, *supra* note 7, at 26-27. In our updated report we address this concern by reporting actual p-values, but it is worth noting that reporting practice varies greatly across the scientific disciplines. To the extent that there is a common practice, reporting whether the findings exceed specified standards is a broadly accepted practice, as indicated by articles published in the Proceedings of the National Academy of Sciences. See, e.g., Shai Danziger, Jonathan Levav, and Liora Avnaim-Pesso, *Extraneous Factors in Judicial Decisions*, 108 PROC. NAT'L ACAD. SCI., 6889, 6891, tbl.1 (2011), available at <http://www.pnas.org/content/108/17/6889> (last visited November 15, 2011) (indicating those variables in the model that exceed specified significance levels without indicating actual significance levels).

³⁵David H. Kaye & David A. Freedman, *Reference Guide on Statistics*, in REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 250 (Fed. Judicial Ctr. ed., 3d ed. 2011) (“The p-value is the probability of getting data as extreme as, or more extreme than, the actual data—given that the null hypothesis is true. . . . Large p-values indicate that a disparity can easily be explained by the play of chance: The data fall within the range likely to be produced by chance variation. On the other hand, if p is very small, something other than chance must be involved: The data are far away from the values expected under the null hypothesis. . . . Because p is calculated by assuming that the null hypothesis is

report that would justify such an interpretation. Nor does Professor Hoffman cite any such a statement.

Instead of citing statements to support this charge, Professor Hoffman accuses us of failing to caution naïve readers against drawing this improper inference, as follows:

By failing to clarify the meaning of a finding of no statistical significance, the FJC study confused readers into thinking that it proved the Court's cases had no impact on dismissal practice.³⁶

But the final four paragraphs of our report set forth the limitations of the study and acknowledge that there may be effects of the Supreme Court cases that we did not detect. Moreover, this section explicitly acknowledges that increases in filing rates of motions to dismiss due to *Twombly* and *Iqbal* may result in an increase in the number of motions granted even if the grant rate remains unchanged.³⁷ I do not understand how anyone could read these paragraphs and conclude that our study “proved the Court's cases had no impact on dismissal practice.”

Professor Hoffman urges readers to focus on “substantive significance” of the findings of the study without regard to statistical significance, as follows:

By emphasizing only whether the differences they observed were statistically significant, the FJC researchers fell into a common trap that may have led at least some of its readers into confusing statistical for substantive significance. Whether statistically significant or not, with recognition of the limited meaning of a no significance finding, readers—and policymakers, in particular—could reasonably be concerned by the higher number and rate of orders granting dismissal post-*Iqbal* both overall and in every case category examined.³⁸

correct, p does not give the chance that the null is true. The p-value merely gives the chance of getting evidence against the null hypothesis as strong as or stronger than the evidence at hand. Chance affects the data, not the hypothesis. According to the frequency theory of statistics, there is no meaningful way to assign a numerical probability to the null hypothesis.”).

³⁶Hoffman, *supra* note 7, at 19.

³⁷CECIL ET AL., *supra* note 1, at 22 (“Even if the rate at which motions are granted remains unchanged over time, the total number of cases with motions granted may still increase. The 7% increase in case filings combined with the increase in the rate at which motions are filed in 2010 may result in more cases in recent years with motions granted, even though the rate at which motions are granted has remained the same.”). The conclusion to our follow-up study, which Professor Hoffman had not seen at the time he prepared his critique, also makes clear that the Supreme Court cases may lead to an increase in dismissals. CECIL ET AL., *supra* note 3, at 5 (“While we found no statistically significant increase in the likelihood that a motion would be granted in cases other than those involving financial instruments, we found in the previous study that motions to dismiss are more likely to be filed after *Iqbal*, and this increased filing rate may combine with the overall stable rate at which motions are granted to result in an overall increase in the percentage of cases in which motions are granted.”).

³⁸Hoffman, *supra* note 7, at 20-21.

But Professor Hoffman presents a false choice. I agree that policy makers should take substantive significance into account, but contrary to Professor Hoffman's suggestion, they need not ignore the meaning of statistical significance. Both substantive and statistical significance provide valuable information in the assessment of empirical research, and our analysis takes both statistical significance and substantive significance into account.³⁹ To us, it seems quite useful to use statistical tests to rule out a chance pattern of results as a plausible explanation for an effect that would otherwise be attributed to *Twombly* and *Iqbal*. Otherwise, large differences that arise by coincidence will be interpreted as meaningful when, in fact, they may wash out when more data are collected. Certainly determining which differences meet conventional standards of statistical significance should not be the end of the inquiry. Professor Richard Lempert, a source Professor Hoffman cites as support for his interpretation of statistical significance, notes that "the culture of social science calls for ruling out the chance explanation as a starting point for analysis."⁴⁰ Nevertheless, Professor Hoffman appears confident in skipping over this starting point and attributing any differences in activity from 2006 to 2010, statistically significant or otherwise, to the courts' reactions to the Supreme Court decisions.⁴¹

Professor Hoffman also misrepresents the debate within the applied research community about the role of statistical significance relative to substantive significance. He cites scholars who urge greater attention to substantive significance, wrongly implying that they oppose testing of statistical significance. As an example, he cites as support for his statistics-free approach the 2008 book by Stephen Ziliak and Deirdre McCloskey, *The Cult of Statistical Significance: How the Standard Error Costs us Jobs, Justice and Lives*.⁴² Ziliak and McCloskey offer an entertaining polemic on the development of statistics, told in terms of the oppression of the virtuous (personified by William Sealy Gosset, the "Student" of Student's t-test) and the domination by the wicked (personified by Ronald A. Fisher and his acolytes). Economists and others are taken to task for focusing on statistical significance, or "precision" to the exclusion of considering the estimates of the size of the effect, a practice that the authors refer to as "sizeless science." They

³⁹Kaye & Freedman, *supra* note 35, at 252 ("Significance depends not only on the magnitude of the effect, but also on the sample size (among other things). Thus, significant differences are evidence that something besides random error is at work, but they are not evidence that this "something" is legally or practically important. Statisticians distinguish between "statistical" and "practical" significance to make the point. When practical significance is lacking—when the size of a disparity or correlation is negligible—there is no reason to worry about statistical significance.").

⁴⁰ Richard Lempert, *The Significance of Statistical Significance: Two Authors Restate an Incontrovertible Caution. Why a Book?*, 34 LAW & SOC. INQ. 225, 232 (2009).

⁴¹ As support for the distinction between substantive and statistical significance, Professor Hoffman cites the recent Supreme Court decision in *Matrixx Initiatives Inc. v. Siracusano*, 131 S. Ct. 1309 (2011), which held that a complaint alleging that a pharmaceutical company failed to disclose reports of adverse events associated with a product was sufficient to state a claim for securities fraud, even though the number of reports did not reach a statistically significant number of adverse events. Of course, interpreting a statutory standard for establishing a duty to disclose material information to investors is quite different than determining broadly acceptable standards for empirical research. Furthermore, as Professor Hoffman notes, in that case the Supreme Court cites *Twombly* and *Iqbal* in upholding the complaint, raising further doubts about the extent to which *Twombly* and *Iqbal* invoke a more demanding standard for pleading a complaint.

⁴² Ann Arbor: The University of Michigan Press.

urge scientists to reject “testimation” and to focus on “substantive significance,” which they define as “oomph, a measure of possible expected loss or gain.”⁴³

While it is great fun to watch statisticians excoriate each other about the fundamental principles of their discipline, I can find no evidence that Ziliak and McCloskey would endorse Professor Hoffman’s broad dismissal of statistical significance and focus only on substantive significance. Quite the contrary, they regard statistical testing as an essential part, but not the most important part of the process. In their recommendations they endorse a different set of statistical tests with more flexible thresholds for declaring a significant effect,⁴⁴ rather than an abandonment of statistical testing.⁴⁵ Their concern arises when scientists go no further than testing for statistical significance and fail to determine if the differences detected are sufficiently large to be of substantive interest. In this study and almost all other similar assessments, both statistical significance and substantive significance are necessary to determine if the findings represent an important change over time.⁴⁶

We follow Professor Lempert’s advice and use statistical testing as a starting point in our analyses. Our report presents the results of both statistical tests and estimates of the size of the effect so readers can make judgments about substantive significance. In fact, we present so much evidence of the size of the effect that Professor Hoffman chooses to rely on the percentage differences in the crosstabs alone, ignoring the estimates of effect derived from the multinomial models. I believe that our practice of using statistical significance testing to rule out chance variation in our findings, and then focusing on the substantive significance of those statistically significant effects, as expressed by the effects estimates based on a multinomial model, is consistent with widely-accepted research practice in this area.⁴⁷

⁴³*Id.* at 43.

⁴⁴*Id.* at 249 (“[S]cientists should prefer Neyman’s *confidence intervals*, Rothman’s *p-value functions*, Zellner’s *random prior odds*, Rossi’s *real Type 1 Error*, Leaner’s *extreme bounds analysis*, and above all, Gusset’s *real error bars* to the Fisher-circumscribed method of reporting sampling variance.”) (citations omitted).

⁴⁵ As Lempert points out in his review of their book, “[The authors] do not deny the importance of appropriately used significance tests, but they are not as clear as they might be in explaining what the appropriate uses are. This may be because their primary imagined audience is economists, who presumably need no instruction on this score.” Lempert, *supra* note 40, at 230.

⁴⁶ Olle Häggström, Book Review: *The Cult of Statistical Significance*, 57 Notices Am. Math. Soc’y. 1130 (October 2010) (“Granted, the single-minded focus on statistical significance that they label sizeless science is bad practice. Still, to throw out the use of significance tests would be a mistake, considering how often it is a crucial tool for concluding with confidence that what we see really is a pattern, as opposed to just noise. For a data set to provide reasonable evidence of an important deviation from the null hypothesis, we typically need *both* statistical *and* subject-matter significance.”)

⁴⁷ We are open to relaxed standards of statistical significance testing in exploratory research when the relationship among the variables is unpredictable and theoretical constructs remain undeveloped. However, that is not the case in this instance. By now, the stack of law review articles predicting the effects of *Twombly* and *Iqbal* on the outcome of Rule 12(b)(6) motions is massive. After much discussion within the legal profession and the academy, the Advisory Committee has been urged to propose revisions to the Federal Rules of Civil Procedure to cure the presumed detrimental effect of these cases. Certainly, at this point, it is reasonable to expect that those presumed detrimental effects be demonstrated according to the widely-accepted standards of conventional empirical research, and not the looser standards that may be appropriate for exploratory research of factors whose effects are difficult to anticipate.

Inappropriately High Threshold for Testing Statistical Significance

Professor Hoffman contends that by using the conventional 0.05 level of statistical significance, we guard against wrongly deciding that dismissal rates have increased when in fact they have not (i.e., a false positive, or Type I error), but in turn accept an intolerably high risk of failing to detect a real increase in dismissal rate (i.e., a false negative, or Type II error). Professor Hoffman points out that minimizing one type of error will increase the other type of error, and suggests that we have minimized the importance of failing to detect a real increase. Professor Hoffman is correct in urging that both types of error should be considered. I believe that we have struck the proper balance between these two forms of error. No doubt that a failure to detect a real change would be an error of great concern. But, it would also be a serious error to wrongly claim that a change has taken place and needlessly invoke the statutory authority of the Rules Enabling Act⁴⁸ to amend the Federal Rules of Civil Procedure when no real change caused by the Supreme Court decisions has taken place. Amending the federal rules requires great time and effort, and places a burden on attorneys as they seek to conform their pleading practice to the new rules. Any decision includes the risk of making an error, and that error will impose costs on the disadvantaged parties. I believe that using the conventional 0.05 level of statistical significance represents a proper balance of risks of these two types of error.

In a related later section Professor Hoffman also contends that the analysis lacks a sufficient number of observations to provide an appropriately powerful test of the hypotheses.⁴⁹ I believe this claim is without merit. Because it is unclear if Professor Hoffman is claiming that we don't have a sufficiently large sample or that we don't have enough observations in subsamples of the data, I will address both issues.

While Professor Hoffman is correct that biomedical studies, such as clinical drug trials, often have a low number of participants, studies of civil litigation typically have substantially more cases on which to conduct an analysis. In fact, the portion of our study examining the presence of motions to dismiss within 90 days after filing has over 100,000 observations, hardly underpowered even for the most sophisticated statistical analysis. Likewise, the portion of the study examining the outcome of such motions has almost 2,000 observations. As introductory econometrics textbooks indicate,⁵⁰ for nonlinear models such as the maximum likelihood models employed in our analysis, confidence in the estimates increases as the sample size approaches infinity. This means that as the sample size increases, so does our confidence in the results. Maximum likelihood models are generally robust and consistent in sample sizes over 1,000, as our samples clearly are.⁵¹ The measures indicating the extent to which our statistical model fit the data further support the models we use. Thus, the argument that we don't have a sufficient sample size cannot be based on the econometrics literature as I understand it.

⁴⁸ 28 U.S.C. § 2072 (2006).

⁴⁹Hoffman, *supra* note 7, at 23.

⁵⁰DAMODAR N. GUJARATI, BASIC ECONOMETRICS XX (3d ed. 1995).

⁵¹SCOTT J. LONG, REGRESSION MODELS FOR CATEGORICAL AND LIMITED DEPENDENT VARIABLES 54 (1997) ("It is risky to use [maximum likelihood] with samples smaller than 100, while samples over 500 seem adequate.").

However, if Professor Hoffman is suggesting that our subgroups are underpowered, it is worth noting that the independent variables we used had to be present in at least 10% of the data in the sample, again a standard econometric baseline. Professor Hoffman also ignores the advantage of the multinomial model in assessing the power of the analysis.⁵² The statistical power of a multinomial model is based not just on the individual cell sizes, but also takes into account the size of the overall sample. This too is an instance in which Professor Hoffman would benefit from considering the results of the multinomial analysis.

Inappropriate Use of Two-Tailed Statistical Tests

In addition to criticizing our reliance on statistical significance testing in general, Professor Hoffman also takes issue with our decision to use two-tailed significance tests instead of one-tailed tests. He points out that a one-tailed test would have detected a statistically significant increase in the rate at which motions to dismiss in Civil Rights cases were granted, and would have come close to detecting statistical significance in the “other” category of cases.⁵³ A one-tailed test would certainly be an unconventional choice for this research design.⁵⁴ Professor Hoffman justifies his advocacy for use of a one-tailed statistical test as follows:

Even though the two-tailed test usually will be the more appropriate test to conduct, there are certainly reasonable arguments to be made in favor of the one-tailed test, particularly in this context where the effect of the Court’s cases

⁵² Professor Hoffman points to two cells, one with 15 observations and one with 32 observations. But, these cells – orders granting motions with leave to amend in torts cases in 2006 and 2007 -- present a subset, of a subset, of a subset, of a subset of the overall multinomial model. Professor Hoffman urges us to conduct power analyses to determine the risk of overlooking a true difference. However, I know of no form of power analysis that is appropriate to these multinomial models. The most common form of power analysis is designed for bivariate models, and fails to take into full account the advantages of multivariate models of this complexity. I am prepared to conduct any appropriate power analysis that Professor Hoffman identifies, but at present I am unaware of any such analyses.

⁵³ A one-tailed test looks for changes in only one direction, making it easier to reach common levels of statistical significance for such changes. But such tests ignore changes in the opposite direction that would have achieved statistical significance under the more conventional two-tailed tests. See William R. Rice & Stephen D. Gaines, “Heads I Win, Tails You Lose”: *Testing Directional Alternative Hypotheses in Ecological and Evolutionary Research*, 9 TRENDS IN ECOLOGY AND EVOLUTION 235-237, 235 (1994) (“The use of such one-tailed test statistics, however, poses an ongoing philosophical dilemma. The problem is a conflict between two issues: the large gain in power when one-tailed tests are used appropriately versus the possibility of ‘surprising’ experimental results, where there is strong evidence of non-compliance with the null hypothesis (H₀) but in the unanticipated direction.”).

⁵⁴ Anthony McCluskey & Abdul Ghaaliq Lalkhen, *Statistics IV: Interpreting the Results of Statistical Tests*, 7 CONTINUING EDUC. IN ANAESTHESIA, CRITICAL CARE & PAIN 221 (2007) (“It is almost always appropriate to conduct statistical analysis of data using two-tailed tests and this should be specified in the study protocol before data collection. A one-tailed test is usually inappropriate. It answers a similar question to the two-tailed test but crucially it specifies in advance that we are only interested if the sample mean of one group is greater than the other. If analysis of the data reveals a result opposite to that expected, the difference between the sample means must be attributed to chance, even if this difference is large.”).

are likely to be unidirectional (that is, where it is difficult to believe a stricter pleading test would lead to fewer dismissals).⁵⁵

But Professor Hoffman need not speculate about the possibility of *Twombly* and *Iqbal* leading to fewer dismissals. The table he reproduced in his critique clearly shows a lower percentage of motions granted *without leave to amend* in 2010. As indicated in Table 4 of our report and in the portion of that table reproduced by Professor Hoffman, the percent of civil rights cases granted without amendment *decreased* after *Iqbal* from 48% to 45%. If the magnitude of the decrease had been larger, or if the sample size had been larger, this difference might well have been statistically significant under a conventional two-tailed test, and that would certainly be a finding worth noting. In fact, the percentage of motions granted without leave to amend decreased in all case categories except financial instrument cases, and decreased by 5% overall.⁵⁶ Other possible circumstances could have led to a reasonable expectation of a lower percentage of dismissals after *Iqbal*. For example, one might expect a drop in the percentage of motions granted if *Iqbal* had resulted in an increase in the likelihood that motions to dismiss were filed, but the courts denied all of those motions that would not have been filed before *Iqbal*. Professor Hoffman's standard would restrict the opportunity for studies to identify such unexpected findings. Until we better understand the manner in which courts are responding to *Iqbal*, the conventional two-tailed significance test is the most appropriate test of statistical significance.⁵⁷

Professor Hoffman's advocacy for a one-tailed test also reveals a selective application of his unconventional interpretation. Throughout his extensive discussion of the findings of the report, Professor Hoffman studiously ignores the drop in the percentage of motions granted without leave to amend. I expected Professor Hoffman to be very interested in such cases, because they exclude the possibility that the plaintiff can cure the defect through an amended complaint. We do not make much of these differences in our report because these changes do not reach levels of statistical significance. But Professor Hoffman ignores such statistical tests,

⁵⁵Hoffman, *supra* note 7, at 27 (citing DAVID W. STOCKBURGER, INTRODUCTORY STATISTICS: CONCEPTS, MODELS, AND APPLICATIONS XXXX n.78 (1996) (“[T]he one-tailed t-test is performed if the results are interesting only if they turn out in a particular direction.”)).

⁵⁶CECIL ET AL., *supra* note 1, at 14 tbl.4.

⁵⁷ Professor Hoffman embraces the repeated use of one-tailed statistical tests to assess the differences of numerous factors, but fails to acknowledge the need to correct the significance level for multiple tests, which would make it harder to for Professor Hoffman to find significant differences, even using a one-tailed test. See Herve Abdi, *Holm's Sequential Bonferroni Procedure*, in ENCYCLOPEDIA OF RESEARCH DESIGN 1 (Neil Salkind ed., 2010) (“The more statistical tests we perform, the more likely we are to reject the null hypothesis when it is true (*i.e.*, a “false alarm,” also called a “Type 1” error). This is a consequence of the logic of hypothesis testing: We reject the null hypothesis for *rare* events, and the larger the number of tests, the easier it is to find rare events which are false alarms. This problem is called the *inflation* of the alpha level. In order to be protected from it, one strategy is to correct the alpha level when performing multiple tests. Making the alpha level more stringent (*i.e.*, smaller) will create less errors, but it may also make it harder to detect real effects.”); Juliet Popper Shaffer, *Multiple Hypothesis Testing*, 46 ANN. REV. PSYCHOL. 561-584 (1995) (“When many hypotheses are tested, and each test has a specified Type I error probability, the probability that at least some Type 1 errors are committed increases, often sharply, with the number of hypotheses. This may have serious consequences if the set of conclusions must be evaluated as a whole.”).

even though the size of the decrease in percentage of motions granted without leave to amend is twice the size as the 2.4% increase in the rate at which motions are filed, an increase that Professor Hoffman deems to reach levels of “substantive significance.” Professor Hoffman seems interested in discussing only those effects that indicate an increase in grant rate and ignores any evidence that points in the opposite direction. Otherwise, Professor Hoffman would have embraced the two-tailed statistical test and presented in his critique an equivalent number of charts showing the drop in percentage of motions granted without leave to amend.⁵⁸

Detering Valid Claims

Professor Hoffman accuses us of failing to assess other important effects, noting that our research design was not capable of measuring the extent to which *Twombly* and *Iqbal* may deter prospective claimants from seeking relief in federal court because of the Court’s more exacting pleading standard.⁵⁹ As an example, Professor Hoffman cites a recent study indicating that the Private Securities Litigation Reform Act of (PSLRA) may have had the effect of deterring securities claims that had some degree of merit.⁶⁰

One can argue about whether federal legislation requiring plaintiffs alleging a securities claim violation to state with particularity “facts giving rise to a strong inference that the defendant acted with the required state of mind”⁶¹ is comparable to a Supreme Court decision that “[does] not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face.”⁶² “Plausible” facts seem to be a much lower standard than facts “giving rise to a strong inference that the defendant acted with the required state of mind,” so the analogy may be inappropriate.

Still, several facts are worth pointing out. In the year after the *Iqbal* decision, as indicated in Table 1 below, federal court filings of cases of the types that are perceived by Professor Hoffman as most vulnerable to deterrence have increased.⁶³ This is contrary to the pattern of

⁵⁸ XXXXXXX For reasons I do not understand, Professor Hoffman’s charts repeatedly present information for five of the six case types, consistently omitting information for the financial instrument case category. Such cases were part of our analysis and should be presented in the charts as well, though this may require rescaling the charts and diminishing the appearance of increases in the other case types.

⁵⁹ Hoffman, *supra* note 7, at 28.

⁶⁰ Hoffman, *supra* note 7, at 28-29 (citing Stephen Choi, Karen Nelson, and A.C. Pritchard, *The Screening Effect of the Private Securities Litigation Reform Act*, 6 J. EMP. L. STUD. 35 (2009)).

⁶¹ Private Securities Litigation Reform Act of 1995 § 21D(b)(2), 15 U.S.C. § 78u-4(b)(2).

⁶² *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). See also Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 823 (2010) (describing the pleading standards as a “foggy test”).

⁶³ Professor Hoffman notes that many factors affect filing rates and that increases in case filings do not prove that cases are not being deterred from filing in federal courts. While that is true, the increase in case filings is also inconsistent with such a thesis, especially when filings of other types of cases, such as contract and antitrust cases, are declining. ADMIN. OFFICE OF THE U.S. COURTS, 2010 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS 147, 149 app. tbl.C-2 (2010).

declining filings in securities cases seen soon after passage of the PSLRA.⁶⁴ Also, we have seen no evidence of an increase in cases removed from state courts to the federal courts, as might be expected if cases with federal claims were being diverted to the state courts. A recent study that assessed removal rates as an indirect measure of cases with federal claims being diverted to state courts found no evidence of an increase in removal after *Iqbal*.⁶⁵ These findings do not prove that cases are not being deterred from filing in federal court, and Professor Hoffman acknowledges that such proof may be elusive.⁶⁶ Nevertheless, these findings offer no support to those who believe that such deterrence is taking place, and no better evidence appears to be available.⁶⁷

⁶⁴ Michael A. Perino, *Did the Private Securities Litigation Reform Act Work?*, 2003 U. ILL. L. REV. 913-97 (showing that securities lawsuit filings initially declined following enactment of the PSLRA but subsequently recovered).

⁶⁵ Jill Curry & Matthew Ward, *Are Twombly & Iqbal Affecting Where Plaintiffs File? A Study Comparing Removal Rates by State* 30 (May 25, 2011) (draft) (on file with author).

⁶⁶ Professor Hoffman notes that, "Indeed, it is not clear how any empirical study could measure the deterrent effect of the Court's decisions." Hoffman, *supra* note 7, at 28.

⁶⁷ A recent FJC survey of lawyers with the National Employment Lawyers Association (NELA) found only a modest increase in the likelihood of an employment discrimination case being dismissed under the *Twombly* and *Iqbal* standards. EMERY G. LEE III & THOMAS E. WILLGING, FED. JUDICIAL CTR., ATTORNEY SATISFACTION WITH THE FEDERAL RULES OF CIVIL PROCEDURE: REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 12 (2010), available at http://www.fjc.gov/library/fjc_catalog.nsf ("Finally, respondents were asked whether 'any of your employment discrimination cases have been dismissed for failure to state a claim under the standard announced in *Twombly/Iqbal*.' This question was asked of respondents who had filed an employment discrimination case post-*Twombly*. Only 7.2% of those respondents answered in the affirmative (14 total respondents)."). In other words, only one of the 14 responding attorneys who had filed such cases after *Twombly* had *any* case dismissed for failure to state a claim.

Table 1: Federal Civil Cases Commenced by Nature of Suit, During the 12-Month Periods Ending September 30, 2006 Through 2010⁶⁸

	2006	2007	2008	2009	2010	Percent Change 2006-2010	Percent Change 2009-2010
Total Civil Rights	32,865	31,756	32,132	33,761	34,872	6.1	3.3
Voting	150	118	145	127	102	-32.0	-19.7
Employment	14,353	13,375	13,219	14,036	14,543	1.3	3.6
Housing / Accommodations	643	665	644	746	687	6.8	-7.9
Welfare	56	27	48	71	58	3.6	-18.3
ADA—							
Employment	987	1,041	1,095	1,195	1,522	54.2	27.4
ADA—Other	1,381	1,277	1,583	1,974	2,309	67.2	17
Other Civil Rights	15,295	15,253	15,398	15,612	15,651	2.3	0.2
All Civil Cases	259,541	257,507	267,257	276,397	282,895	9.0	2.4

Lastly, Professor Hoffman criticizes our study as being unable to “tell us whether the Court’s decisions have significantly increased dismissals of complaints on the ground that they are factually insufficient.”⁶⁹ This is true; our study, like a number of other studies in this area,⁷⁰ does not distinguish between dismissals of complaints for being legally insufficient and for being factually insufficient. Certainly it would be preferable to compare cases that were vulnerable on the on the basis of insufficient facts, before and after *Twombly/Iqbal*. But, I know of no way to accurately identify such cases prior to *Twombly*. If Professor Hoffman is correct and *Twombly/Iqbal* caused a notable shift away from a notice pleading standard, such cases would not have triggered a motion to dismiss prior to *Twombly*. Therefore, any study that seeks to compare groups of cases before and after *Twombly/Iqbal* on the basis of motions challenging factual insufficiency alone will necessarily fail to identify the full range of relevant cases vulnerable to claims of factual insufficiency prior to *Twombly*, and almost certainly overlook pre-*Twombly* cases in which such a motion would be challenged for reasons of factual

⁶⁸ ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 63, at 147..

⁶⁹Hoffman, *supra* note 7, at 30.

⁷⁰See e.g., Kendall W. Hannon, *Much Ado About Twombly*, 83 NOTRE DAME L. REV. 1811 (2008); Joseph A. Seiner, *The Trouble With Twombly: A Proposed Pleading Standard for Employment Discrimination Cases*, 2009 U. ILL. L. REV. 1011; and Hatamyar, *supra* note 20, at 553.

insufficiency.⁷¹ Our research design of looking at all motions to dismiss is certainly not perfect,⁷² but it does have the advantage of including all motions to dismiss, including Pre-*Twombly* motions that would have been challenged on the basis of both factual and legal insufficiency. If we are willing to assume that the likelihood of challenges for legal insufficiency alone is stable over time, then we can begin to get an estimate of the challenges for factual insufficiency by assessing additional levels of activity.

In summary, Professor Hoffman builds his case for a detrimental effect of *Twombly* and *Iqbal* on the opportunity of plaintiffs to present a claim of legal merit by (1) ignoring the need to control for effects unrelated to *Twombly* and *Iqbal* through multinomial models; (2) ignoring the results of conventional statistical significance tests that assess the possibility that the results may have occurred by chance; and, (3) speculating about the possible deterrence of valid claims when the little information available shows an increase in filings of the most vulnerable types of cases and no increase in removal of such cases from state courts.

⁷¹ For further discussion of this issues, see *infra* note 132 and related text.

⁷² We are especially concerned that our study “included motions that challenged claims for reasons other than the sufficiency of the factual pleadings, and a more focused study of these types of cases may reveal changes that our study failed to detect.” CECIL, ET AL., *supra* note 1, at 23. For a discussion of this issue, see Kevin M. Clermont, *Three Myths About Twombly-Iqbal*, 45 WAKE FORREST L. REV. 1337, 1357 (2010).

The Moore Critique

In 2010, Professor Patricia Hatamyar Moore published a rigorous statistical analysis of the effects of *Twombly* and *Iqbal* on grants of motions to dismiss for failure to state a claim, employing multilinear models much as we do, to control for the effects of circuit and type of case.⁷³ That initial analysis found, as we did, an increase in motions granted with leave to amend, but no statistically significant increase in motions granted without leave to amend and no increase in cases terminated. Recently Professor Moore has released an updated analysis that discards the earlier post-*Iqbal* data, and adds twelve months of new data in its place.⁷⁴ Professor Moore's new analysis finds statistically significant increases after *Iqbal* in the likelihood that 12(b)(6) motions are granted both with and without leave to amend and an increase in the likelihood that cases are terminated after a motion is granted,⁷⁵ which she attributes to the effects of the Supreme Court decisions in *Twombly* and *Iqbal*. As part of this new report, Professor Moore also offers a critique of our original study. I will first respond to the critique of our study, then offer several comments on Professor Moore's new analysis.

Selection of Cases

Professor Moore expresses particular concern that we excluded a number of relevant types of cases from our analyses, including cases with motions seeking judgment on the pleading under Federal Rule of Civil Procedure 12(c), pro se cases, prisoner cases, as well as cases raising counterclaims, cross-claims, and the affirmative defenses of sovereign and qualified immunity. But such cases raise peripheral issues that may distort the application of pleading standards following *Twombly* and *Iqbal*. We excluded such cases to avoid the risk of diluting any estimate of the effects of *Twombly* and *Iqbal*.

At the time we developed our initial analysis, we sought to include only those cases that seemed to present a clear application of the standards for assessing Rule 12(b)(6) motions, uncomplicated by questions about the extent to which the *Twombly* and *Iqbal* standards would

⁷³ Hatamyar, *supra* note 20, at 553. Professor Moore has been generous with her time in responding to our questions and offering comments on this response. I greatly value her comments, and look forward to an ongoing discussion of these issues.

⁷⁴ Moore, *supra* note 20, at 603. As a preliminary matter, it is worth noting that Professors Hoffman and Moore provide extensive cross references to each other's papers, which is surprising since it would appear that Professor Moore's analysis shares in the many of the characteristics that Professor Hoffman objects to in our work. Professor Moore cites Professor Hoffman's paper "[f]or a discussion of why the FJC's focus on 'statistical significance' is both partially inaccurate and substantively misleading," then proceeds to use the same pattern of statistical analysis with multinomial models and conventional significance levels in her own work.

⁷⁵ *Id.* at 605. ("The updated results indicate that the relative risk of a 12(b)(6) motion being granted *without* leave to amend, compared to denied, was expected to be 1.75 times greater under *Iqbal* than under *Conley*, holding all other variables constant, and this increase is statistically significant. Further, my former study found that neither *Twombly* nor *Iqbal* had a statistically significant effect on whether a case was entirely dismissed upon the granting of a 12(b)(6) motion without leave to amend. In this updated study, the odds of the case being entirely dismissed upon the grant of a 12(b)(6) motion without leave to amend were 1.71 times greater under *Iqbal* than under *Conley*. Finally, the updated study continues to indicate that constitutional civil rights cases in particular were dismissed at a higher rate post-*Iqbal* than pre-*Twombly*." (citations omitted).

apply to cases that present special circumstances. We believed that we would have the best chance of identifying any effects that may be present by focusing only on those cases in which the *Twombly* and *Iqbal* standards clearly applied. If we had included such cases, then our inability to find statistically significant differences in the outcome of motions might fairly be attributed to a failure to focus on cases where such changes are most likely to occur.

We excluded pro se cases from our analysis of the outcome of motions due to uncertainty about the manner in which the *Twombly* and *Iqbal* standards would be applied in such cases. Soon after deciding *Twombly* the Supreme Court appeared to make a special effort to make clear that complaints by pro se litigants were to be liberally construed “however inartfully pleaded” and that the courts should apply “less stringent standards than those applied to formal pleadings drafted by lawyers.”⁷⁶ Faithful compliance with this guidance may diminish the rigor with which the courts apply the *Twombly* and *Iqbal* standards to pro se cases and result in a misleading assessment of the effect of these standards.⁷⁷

Similarly, we excluded motions decided on the basis of affirmative defenses due to uncertainty by scholars about the application of *Twombly* and *Iqbal* in such circumstances.⁷⁸ Such motions often raise issues of sovereign immunity or qualified immunity, which may be more properly considered as raising jurisdictional issues not within the standards of Rule 12(b)(6).⁷⁹

⁷⁶ *Erickson v. Pardus*, 551 U.S. 89, 94 (2007). *See also*, *Boykin v. Keycorp*, 521 F.3d 202, 213–14 (2d Cir. 2008) (assessing the complaint of a pro se litigant under the more lenient “fair notice” standard in which specific factual allegations are not necessary, despite the standards expressed in *Twombly*).

⁷⁷ Unlike our study, Professor Moore included pro se cases in her study. The presence of pro se cases, which comprise 29% of Professor Moore’s database, is one of the primary differences in our two studies. While Professor Moore excluded prisoner cases generally, she made an exception and included pro se prisoner cases raising constitutional civil rights claims that were subject to the consideration under the pleading standards of Rule 8(a)(2). Professor Moore did not code for cases brought by prisoners, but indicated that in her database, “constitutional civil rights cases brought pro se’ articulates an imperfect proxy for prisoner cases.” Moore, *supra* note 20, at 617. In her updated analysis, Professor Moore finds that motions to dismiss against pro se parties (which she identifies generally as “plaintiffs”, even though such motions may be in response to counterclaims and cross-claims) are more likely to be granted in full, both with and without leave to amend, throughout all three time periods she examined. *Id.* at 620. Such cases are also more likely to be dismissed following motions that are granted in full. Professor Moore’s multinomial model did not specifically test for changes in the rate at which such motions directed toward pro se parties are granted following *Twombly* and *Iqbal*. However, after controlling for pro se status, she did find significant increases in motions granted in full, with and without leave to amend, and a significant increase in cases terminated by motions granted in full following *Iqbal*. *Id.* at 620 and 625.

⁷⁸ *See, e.g.*, Melanie A. Goff & Richard A. Bales, *A “Plausible” Defense: Applying Twombly and Iqbal to Affirmative Defenses*, 34 AM. J. TRIAL ADVOC. ____ (2011), available at

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1737805; Seiner, Joseph A., *Plausibility Beyond the Complaint* (December 6, 2010). *William & Mary Law Review*, Vol. 53, 2012. Available at SSRN:

<http://ssrn.com/abstract=1721062>; Anthony Gambol, *The Twombly Standard and Affirmative Defenses: What is Good for the Goose is not Always Good for the Gander*, 79 *FORDHAM L. REV.* 2173 (2011).

⁷⁹ Professor Moore advises that we should include cases that raise immunity issues as an affirmative defense, since *Iqbal* itself raised immunity issues. Moore, *supra* note 20, at 641 (“It is startling that the FJC ‘excluded cases in which motions were granted on the basis of sovereign or qualified immunity, which [the FJC] regarded as a jurisdictional issue and which was usually raised as an affirmative defense.’ Since *Iqbal* itself involved a 12(b)(6) motion that raised the defense of qualified immunity, the FJC’s decision to exclude such cases arguably excludes the very cases that are most like *Iqbal*.”) (citing Wright, Miller, Kane & Marcus, *Federal Practice and Procedure* 5B,

We have not included cases filed by prisoners due to concerns about the accuracy of docketing the actions taken in such cases,⁸⁰ concerns that also extend to Professor Moore's data as well, because the Westlaw database she relies on in turn relies on docket entries as one means to identify relevant orders.

We excluded rulings on Rule 12(b)(6) motions responding to counterclaims and cross-claims because we wished to determine the extent to which rulings on motions to dismiss terminated the participation of one or more plaintiffs in the litigation, or terminated the litigation itself. Motions responding to counterclaims and cross-claims do not respond to issues raised in the initial complaint and resolution of such motions is unlikely to terminate the litigation.⁸¹

We excluded Rule 12(c) motions for judgment on the pleadings for a similar reason. Although such motions are governed by the Rule 12(b)(6) standard for dismissal, such motions are in a different procedural posture, being filed at the time the answer is filed or soon thereafter.⁸²

at §1357 & n.76 (3d ed. 1998) (internal citations omitted). In addition to its discussion of pleading standards, *Iqbal* also addressed the law of qualified immunity. See, Kit Kinports, *Iqbal and Supervisory Immunity*, 114 PENN ST. L. REV. 1291 (2010) (assessing the effect of *Iqbal* on doctrines of supervisory liability in actions brought under *Bivins* and § 1983). Sorting out the extent to which the pleading standards of *Iqbal* applies beyond the narrow category of qualified immunity cases is one of the purposes of our study, and justifies excluding such cases from the sample.

A second reason to exclude such immunity cases is because they typically raise Rule 12(b)(1) subject matter jurisdiction issues rather than Rule 12(b)(6) issues. Professor Moore acknowledges that sovereign immunity cases are jurisdictional, which we regard as sufficient justification to exclude such cases, but presses for the inclusion of motions raising issues of qualified immunity. Moore, *supra* note 20, at 641. ("The authors of this treatise further note that while a defense of sovereign immunity is often said to raise an issue of subject matter jurisdiction to be addressed by a 12(b)(1) motion, the 'great weight of authority adjudicates qualified immunity from constitutional torts under Rule 12(b)(6)'." *Id.*). Excluding the qualified immunity cases is a closer call. Strictly speaking, qualified immunity is an affirmative defense that should be raised through a responsive pleading, and Rule 12(b)(6) motions are raised before a responsive pleading. We therefore excluded these cases out of concern that inconsistent practices regarding the use of Rule 12(b)(6) motions might dilute any effect of *Twombly* and *Iqbal*. But, we also acknowledge that some judges allow affirmative defenses, including defenses of qualified immunity, to be raised as part of a 12(b)(6) motion when the complaint itself sets forth sufficient facts to show that the affirmative defense applies. See 2-12 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE - CIVIL § 12.34 [4][b] (3d ed. 1997) ("Defenses that require a factual review to be established (as ordinarily occurs with qualified immunity, for example) should not support a dismissal for failure to state a claim. If, however, the complaint itself sets forth facts showing that qualified immunity applies, the court may properly dismiss the claim.") (footnotes omitted). Nevertheless, in light of the variation in practice in asserting claims of qualified immunity, we chose the more cautious option of excluding such cases.

⁸⁰ CECIL, ET AL., *supra* note 1, at 6 n.10.

⁸¹ Professor Moore included in her analysis motions to dismiss filed in response to counterclaims and cross-claims and Rule 12(c) motions for judgment on the pleadings, and also measured the effects of such motions on terminating the litigation. Moore, *supra* note 20, at 635 tbl.6. However, these motions were not separately designated, and inclusion of such motions likely resulted in a misleading indication of the extent to which a ruling on such motions terminated the litigation. *Id.* at 649-650.

⁸² Professor Moore includes Rule 12(c) motions for judgment on the pleadings in her study, assuming that the *Twombly* and *Iqbal* standards will apply in the same manner as in Rule 12(b)(6) motions. Moore, *supra* note 20, at 641-42. But, Professor Moore also excludes from her database a number of other types of motions that also rely on the 12(b)(6) standard, on occasion for the same reasons that we excluded Rule 12(c) motions from our study. Professor Moore specifically excludes motions to amend a complaint, even though courts have also applied the

Since the Rule 12(c) motions, by definition, are accompanied by an answer, resolution of such a motion is unlikely to terminate the litigation and, thus, likely to provide a misleading indicator of the extent to which *Twombly* and *Iqbal* affect this measure.

Exclusion of the case types mentioned above is unlikely to diminish our estimate of effect of *Twombly* and *Iqbal*. However, including fraud cases in our analysis raises a different issue. Unlike the case types listed above, fraud cases were subject to a heightened standard prior to *Twombly*,⁸³ and as Professor Moore notes, inclusion of such cases may inflate our estimate of the grant rate in both 2006 and 2010.⁸⁴

In our attempt to minimize the need for our subjective judgment in classifying cases as to broad type of litigation, we relied on the nature of suit codes that are recorded at the time the case is filed.⁸⁵ Unfortunately, these nature-of-suit codes do not allow precise identification of cases that were subject to this heightened pleading standard. If we were to undertake the study again, we would make more of an effort at the outset to identify and remove such cases in order to focus better on the application of the *Twombly* and *Iqbal* standards. However, inclusion of such cases did not appear to suppress any differences in grant rate from 2006 and 2010. In fact, a supplemental analysis indicates that including such cases in our dataset may have exaggerated the extent of the increase in grant rate after *Iqbal*.⁸⁶ Even though inclusion of

12(b)(6) standard in determining whether an amendment to a complaint would be futile under F.R.C.P. 15(a)(2). See *Openshaw v. Cohen, Klingenstein & Marks, Inc.*, 320 F. Supp. 2d 357, 359 (D. Md. 2004) (citing *Perkins v. United States*, 55 F.3d 910, 917 (4th Cir. 1999)). Professor Moore explains in her original study that she “chose to exclude these cases on the ground that the strategic difference in the procedural posture of a motion to amend could potentially affect the ruling independently of the governing 12(b)(6) standard.” Hatamyar, *supra* note 20, at 587. Professor Moore also excludes motions to strike an affirmative or insufficient defense under Rule 12(f), which some courts view as applying the failure to state a claim standard, because of the different procedural posture of the motion. *Id.* See *Cobra Capital L.L.C. v. Stover Indus., Inc.*, No. 06-C02822, 2007 WL 844635, at *1 n.1 (D. Ill. 2007) and *In re Gabapentin Patent Litigation*, 648 F. Supp. 2d 641, 647 (D.N.J. 2009) (“[b]ecause a [12(f) motion] challenges the legal sufficiency of the pleading, it is governed by the same standards as a motion to dismiss filed pursuant to Fed. R. Civ. P. 12(b)(6)”). The Rule 12(b)(6) standard also governs a motion to remand based on improper joinder, which did not turn up in Professor Moore’s sample. Hatamyar, *supra* note 20, at 587. See *Grennell v. Western Southern Life Ins. Co.*, 298 F. Supp. 2d 390, 394 (S.D.W.V. 2004) and *Davis v. Prentiss Prop. Ltd.*, 66 F. Supp. 2d 1112, 1115-16 (C.D. Cal. 1999); Paul Rosenthal, *Improper Joinder: Confronting Plaintiff’s Attempts to Destroy Federal Subject Matter Jurisdiction*, 59 Am. U. L.R. 49, 75 (2009) (discussing whether this standard is more or less strict than the original 12(b)(6)).

⁸³Both fraud cases and securities cases require the claimant to plead the facts of the case with particularity. See Fed. R. Civ. P. 9(b) (“In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake.”); and, 15 U.S.C. §§ 78u-4(b)(1), (b)(2) (2006) (requiring pleading with particularity in private securities fraud actions).

⁸⁴Moore, *supra* note 20, at 643 (“[I]t is possible that the FJC’s inclusion of PSLRA and Rule 9(b) cases in its database may have slightly inflated the percentage of 12(b)(6) motions granted over that which would have been obtained by including only cases decided under Rule 8(a)(2).”).

⁸⁵Professor Moore’s classification of case types may be more precise than ours since Professor Moore classified cases based on “the issues raised in the order responding to the motion rather than the nature of suit code designated by the party filing the case.” Moore, *supra* note 20, at 635 tbl.6.

⁸⁶By searching the text of the orders I was able to identify and separately analyze those 324 cases that cite the higher fraud pleading standards of Federal Rule of Civil Procedure 9(b) or the Private Securities Litigation Reform Act. In fact, the cases that cited these more demanding pleading standards showed a 15% increase in 2010 in the

these cases in our dataset may have stacked the deck in favor of finding an increase in 2010, our multinomial models still detected no statistically significant increase in cases other than those involving financial securities.

Even acknowledging that we missed some cases in some districts, we believe that our definition of relevant cases has resulted in a dataset that offers a more precise assessment of the application of the standard for judging motions to dismiss following *Twombly* and *Iqbal* during comparable periods when the courts had the benefit of appellate guidance.⁸⁷ To respond to those who remain concerned about types of cases that we excluded from our analyses, we included in our most recent report an appendix that presents supplemental crosstabs of cases with respondents, prisoner cases, and cases with motions to dismiss filed in response to counterclaims and cross-claims. None of these supplemental analyses showed a statistically significant increase in the extent to which the movant prevails after *Iqbal*.⁸⁸

New Analysis

Professor Moore's critique of our report was incidental to the presentation of her new study in which, contrary to her previous study, she finds statistically significant increases in motions granted both with and without leave to amend, and in cases terminated following the grant of a motion. We believe Professor Moore's new analysis is biased in favor of finding a higher rate of dismissal following *Iqbal* because of: (1) exclusion of relevant variables from the statistical model; (2) improper reliance on a Westlaw database that systematically underrepresents orders that deny motions to dismiss, and (3) inappropriate omissions and inclusions of search terms in the post-*Iqbal* Westlaw search phrase.⁸⁹

Misspecification of Statistical Model. Design of a statistical model that will properly assess the issues of concern to policymakers is a difficult task, and there are often issues that, in

likelihood that a motion to dismiss would be granted in whole or in part, almost twice the 8% increase in cases that did not cite these higher fraud pleading standards. I suspect that the 15% increase is due in part to the increase in financial instrument cases that often include fraud claims.

⁸⁷ Professor Moore's analysis indicates that motions were granted at a higher rate in the months immediately after *Iqbal* was decided in May, 2009 than during period of our analysis, which began in January 2010. Moore, *supra* note 20, at 646. We believe this heightened grant rate was due to the absence of appellate court guidance, and this suggests to us it was wise to delay our data collection until such guidance became available.

⁸⁸ CECIL, ET AL., *supra* note 3, app. c at 13-14.

⁸⁹ I also have not addressed several additional concerns that I have about Professor Moore's methodology. Professor Moore controls for the effects of differences across circuits. Yet, in our analysis we saw marked differences in motion practices across district courts, some within the same circuit, and chose to control for individual courts. I also question the extent to which Professor Moore can determine that the grant of a Rule 12(b)(6) motion terminates a case on the basis of the contents of the order alone. This approach may incorrectly count ongoing cases as terminated. Even if the motion disposes of all claims addressed in the order, a case may continue with parties and claims not addressed by the order. This approach may also fail to recognize when cases are in fact terminated, since not all orders that terminate all claims in a case will include an explicit instruction that the case should be closed. In our study, we compare the date of the order and the termination date of the case to assess whether the grant of a motion terminates the case.

retrospect, would have benefited from greater attention or a different conceptualization. It is in this regard that Professor Moore registers her concern that we did not include pro se cases and control for such cases in our multinomial model. Similarly, we are concerned that Professor Moore's multinomial model did not control for whether the motion to dismiss responded to an amended complaint.⁹⁰

As we indicated in our study,⁹¹ we found that motions responding to amended complaints were more likely to be granted in whole or part both before and after *Iqbal*, and that motions responding to an amended complaint were far more common after *Iqbal*. In responding to Professor Hoffman's concerns, we explained that a proper assessment of the effects of *Twombly* and *Iqbal* requires that one control for the presence of an amended complaint, and our multinomial model found a significant effect for the presence of an amended complaint in our original analyses.⁹² Professor Moore fails to take this factor into account, and thereby fails to exclude the possibility that the significant effect that she attributes to *Iqbal* may, in fact, be simply due to the greater presence of motions responding to amended complaints following *Iqbal*. Because motions responding to amended complaints are more likely to be granted both before and after *Iqbal*, and because motions responding to amended complaints are more likely after *Iqbal*, perhaps the increase in grants following *Iqbal* is due to this confounding factor and not due to a change in pleading standards following *Iqbal*. It is not possible to separate the effects of *Iqbal* from the effects of this confounding factor without including the presence of an amended complaint as a factor in the multinomial model. When we include such a factor in our multinomial model, we find no independent effect of *Twombly* and *Iqbal*.

There are two other ways in which Professor Moore's statistical model is inferior to the model we developed. Professor Moore fails to control for financial instrument cases, even though these are the cases in which we found a significant increase in grant rates and the greatest increase in filing rates.⁹³ As we explained, we believe these cases are a direct consequence of an economic downturn in the housing market, and are unlike the cases that were filed in federal courts before *Twombly*. The sudden appearance of such cases with extraordinarily high grant rates after *Twombly* can easily inflate the overall grant rate and give the misleading impression that the increase is due to a change in pleading standards rather than the emergence of this distinctive type of case. Only by controlling for such cases in the context of the statistical model or by removing such cases from the study can the analysis control for the confounding effect of such cases.

⁹⁰ Our model differs from Professor Moore's model in a number of other ways: Professor Moore's models includes more types of cases sampled from all districts, and controls for the effect of the circuit in which the district is located; our model includes financial instrument cases, controls for the effect of the 23 individual districts included in the study, and assesses the effect of motions granted in whole or in part with and without leave to amend.

⁹¹ CECIL, ET AL., *supra* note 1, at 13.

⁹² *Id.* at 15, 29. This significant effect appeared only in cases that were granted with leave to amend. Our follow-up analysis that tracked the outcome of cases granted with leave to amend found no significant effect due to the presence of an amended complaint. CECIL, ET AL., *supra* note 3, at 8 tbl.A-2.

⁹³ CECIL, ET AL., *supra* note 1, at 29 tbl.A-2.

Lastly, our statistical model controls for distinctive motion practice in the 23 federal districts included in our study, which together comprise about half of the cases filed in the federal courts.⁹⁴ Individual districts may have distinctive patterns of motion practice, both in terms of filing rates and grant rates. We control for the individual differences in our statistical models in an effort to isolate the independent effect of *Twombly* and *Iqbal* on pleading practice. Professor Moore instead samples from all federal districts, but controls only for the circuit, not the district, in which the case arose. Sampling from all districts may draw upon a broader population of cases, but failure to control for idiosyncratic changes in motion filing rates and outcomes in individual districts leaves open the possibility that some of the effect that Professor Moore observes is due to increased filings of cases and motions after *Twombly* in districts with unusually high but steady rates of granting motions. Professor Moore does control for the effect of the circuit in which the motion originates, but, in the absence of distinctive circuit doctrine regarding pleading,⁹⁵ the circuit is a poor proxy for individual districts within the circuit, which may have more in common with litigation practice in adjacent districts in a different circuit than distant districts in the same circuit (e.g., compare California and Montana in the Ninth Circuit, Minnesota and Arkansas in the Eighth Circuit, Massachusetts and Puerto Rico in the First Circuit).

Improper Reliance on Westlaw Database for Case Selection. Professor Moore relies on a search of the Westlaw DCT database⁹⁶ to identify cases that represent the population of cases in which the courts apply the standards for judging the adequacy of pleading following *Twombly* and *Iqbal*. While this database offers an excellent opportunity to identify evolving legal doctrines, we believe it is a flawed database for sampling from the population of cases relevant to assessing changes following *Twombly* and *Iqbal*. It is beyond dispute that in the past, cases appearing in Westlaw constituted a non-representative selection of cases.⁹⁷ The

⁹⁴*Id.* at 5.

⁹⁵Memorandum from Andrea Kuperman to Civil Rules Comm. and Standing Rules Comm., Review of Case Law Applying *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal* (November 23, 2011), available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Iqbal_memo_121510.pdf (last visited December 11, 2011).

⁹⁶This database is described as having "all available federal district court cases with coverage beginning in 1945." Available at, http://web2.westlaw.com/scope/default.aspx?db=DCT&RP=/scope/default.wl&RS=WLW11.10&VR=2.0&SV=Split&FN=_top&MT=Westlaw&MST= (last visited December 11, 2011). However, it is not clear what is meant by "available" cases. We contacted the staff of Westlaw by phone and were told that generally Westlaw includes "every case in Westlaw we can get our hands on, unless we are explicitly told not to." Specifically, a case is included in the Westlaw database in one of three ways: (1) Judges label cases "To Be Published"; (2) an order is not so labeled as deemed to be of "legal value" and not just "procedural in nature" by a Westlaw attorney; or, (3) after the Westlaw editorial process, someone requests publication of an order that order is published at a later date. We believe instances of orders not included in the Westlaw database can be found by searching the Westlaw dockets database and noting those orders responding to motions to dismiss that are not linked to an order. Attempting to retrieve such a document usually results in a message that says "Send Runner to the Court."

⁹⁷See e.g., STEPHEN B. BURBANK, RULE 11 IN TRANSITION: THE REPORT OF THE THIRD CIRCUIT TASK FORCE ON FEDERAL RULE OF CIVIL PROCEDURE 11, 99 (1989) ("Rule 11 statistics based on published decisions are misleading and should not be relied on"); Theodore Eisenberg & Stewart J. Schwab, *What Shapes Perceptions of the Federal Court System?*, 56 U. CHI. L.

most rigorous recent assessment of the unrepresentative nature of cases that appear in Westlaw is Lizotte's effort to determine the extent to which cases identified through Westlaw and Lexis searches in 2000 offered an unbiased assessment of the outcome of summary judgment motions.⁹⁸ Lizotte found that only 41% of the summary judgment cases were available on Westlaw or Lexis, that there was great variation in availability across districts, and that cases with orders that granted motions were more likely to appear online.⁹⁹

The issue is whether Westlaw's recent efforts to capture more cases now allow scholars to identify a set of cases that are representative of the population of orders resolving Rule 12(b)(6) motions. Professor Moore discounts our concerns regarding the underrepresentation of orders denying motions to dismiss in the Westlaw database as follows:

Other than my own work in this paper that suggests the opposite, I am not aware of any evidence that orders ruling on 12(b)(6) motions to dismiss in computerized databases are more likely to grant than deny the motion, and the notion seems speculative. While there have been studies regarding the publishing of summary judgment orders, it is not clear that such results can be applied uncritically to the 12(b)(6) context.¹⁰⁰

But, clear evidence of a problem appears in our previous report. We noted that a quick examination of motions to dismiss in three districts found wide variation in the extent to which such motions appear in the Westlaw database.¹⁰¹ Professor Moore does not respond to this

REV. 501, 535 (1989), Stephen B. Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?*, 1 J. EMP. LEG. STUD. 591, 604 (2004) ("[T]he picture of a legal landscape that emerges from published opinions, at whatever court level, is very probably distorted."). See also, *Knight v. U.S. Fire Ins. Co.*, 804 F.2d 9, 12 (2d Cir. 1986) ("The widespread misperception regarding the disposition of appeals of summary judgment may be due to the fact that reversals are much more likely to be reported in published opinions than affirmances, which frequently are disposed of by unpublished orders . . .").

⁹⁸ Brian N. Lizotte, *Publish or Perish: The Electronic Availability of Summary Judgment Grants from Eight District Courts*, 2007 WIS. L. REV. 10. Lizotte compared a dataset of cases involving summary judgment motions collected by the Federal Judicial Center, described in Joe S. Cecil, et al., *A Quarter-Century of Summary Judgment Practice in Six Federal District Courts*, 4 *Journal of Empirical Legal Studies* 861–907, 874–880 (2007).

⁹⁹ Lizotte summarized his findings as follows:

Working from randomly selected docket sheets from eight federal district courts, I identified 607 cases terminated by a grant of summary judgment and thoroughly searched for those cases in the Lexis and Westlaw online databases. Only 247 cases (41%) were available on Lexis or Westlaw, and there was great variation by district (ranging roughly stepwise from 5% to 82% availability). Summary judgments awarded to plaintiffs were more likely to appear online than were judgments awarded to defendants, and appealed judgments were more likely to be available than those that were not appealed. In sum, two different researchers using these online databases to study summary-judgment rates in two different federal courts might attain very different results due to sampling biases, and both their reports might be skewed toward the unsupported conclusion that summary judgment is a plaintiff's weapon that the district courts favor but the appellate courts suspect. *Id.* at 109.

¹⁰⁰ Moore, *supra* note 20, at 644.

¹⁰¹ Our previous report included the following footnote:

finding, and I believe that this finding alone offers sufficient basis to conclude that orders resolving motions to dismiss follow a similar pattern of underrepresentation as summary judgment motions and indicate reasons for concern that the data on which Professor Moore relies presents a biased sample of orders that apply the post-*Iqbal* standards.

To support her argument that Westlaw is as inclusive as the FJC dataset, Professor Moore relies on evidence presented in the table reproduced below, which compares the outcome of motions to dismiss in her Westlaw-based dataset to our dataset that relied on such orders extracted from court records. For purposes of comparison, Professor Moore revises her dataset to be more similar to ours by excluding pro se plaintiffs and restricting the analysis to the years 2006 and 2010.¹⁰² She then argues that the similar findings in the two datasets in the rate at which motions are denied indicates that there is no bias that arises from relying on orders sampled from Westlaw:

Overall, as shown in Table 7, the two studies are close in their overall percentages, when looking at represented plaintiffs only. First, even when the plaintiff was represented, both studies found a significant increase, from 2006 to 2010, in the percentage of 12(b)(6) motions granted at least in part – from 66% to 75% in the FJC study, and from 66% to 73% in my study. Second, both studies found that 12(b)(6) motions were denied in 34% of cases in 2006 in which the plaintiff was represented by counsel. Finally, both studies show a ten-percentage-point increase from 2006 to 2010 in the rate of granting all relief sought by the motion, and the increase in rates is statistically significant at the 95% level in both studies. (In both studies, though, the increase is caused primarily by increases in the granting of motions *with* leave to amend.)¹⁰³

We found that the presence of 12(b)(6) orders in the Westlaw database varied greatly across federal districts. We searched in the Westlaw “allfeds” database, which includes the DTC database used by Professor Moore, for 30 to 40 Rule 12(b)(6) orders in each of three federal district courts: the Eastern District of Arkansas, the District of Colorado, and the District of Kansas. For the Eastern District of Arkansas, we found 87% of the orders on Westlaw, and for the District of Colorado, we found 82% of the orders. However, for the District of Kansas, we found only about 18% of the orders on Westlaw. These findings suggest that Westlaw may publish the majority of orders for some districts, but far less than the majority for other districts. In addition, whether an order was granted or denied may be related to its likelihood of publication. In the Eastern District of Arkansas, 65% of published orders were granted, and 100% of unpublished orders were granted (though there were only 4 unpublished orders). In the District of Colorado, 86% of published orders were granted, while only 62% of unpublished orders were granted. In the District of Kansas, about 71% of published and unpublished orders were granted. A search of Westlaw for a particular term or type of order may not present an accurate picture of the number or disposition of those cases in the district. We interpret these differences in publication rates and differences in grant rates as indicating a need for caution in basing conclusions regarding court practices on studies of orders appearing in the Westlaw federal court databases.

CECIL, ET AL., *supra* note 1, at 37 n.47.

¹⁰² Moore, *supra* note 20, at 643.

¹⁰³ *Id.* at 644.

Table 7
Comparison of Ruling Rates (and Frequencies) in FJC and Hatamyar Studies
2006 and 2010

	FJC Study		Hatamyar	
	2006	2010	2006	2010
Grant all relief sought by motion	36% (251)	46%* (562)	38% (57)	48%** (81)
Grant some relief sought by motion	30% (210)	29% (354)	28% (42)	25% (42)
Denied	34% (239)	25%* (305)	34% (50)	27% (46)
Total	100% (700)	100% (1221)	100% (149)	100% (169)

Notes: Represented plaintiffs only. The FJC figures include only orders entered in 23 districts from January through June 2006 and January through June 2010. The Hatamyar figures include orders entered in 86 districts **in all of calendar year 2006** and from January through May 18, 2010. Frequency numbers for the FJC Study were extrapolated from data at pp. 13-14 of the FJC Study. (emphasis added)

*Change in rate from 2006 to 2010 is significant at $p < 0.01$.

**Change in rate from 2006 to 2010 is significant at $p < 0.05$.

In a section entitled, “*Implications for the representativeness of computerized legal databases such as Westlaw*,” Moore concludes:

On another issue of interest to many researchers, a comparison of the FJC's and my results may shed some light on the debate as to whether orders reported in Westlaw fairly represent the “universe” of orders. My database included only cases reported in Westlaw, and the FJC's database included cases gleaned from the courts' electronic filing records. **Yet both studies found the same percentage – 34% -- of motions denied in 2006.** These results tend to disprove the hypothesis advanced by the FJC that published cases are more likely to report the *grant* of a 12(b)(6) motion to dismiss than unpublished cases.¹⁰⁴ (emphasis added)

However, evidence of bias in her Westlaw dataset favoring orders that grant motions to dismiss is found in Professor Moore's presentation and discussion of her own data. The note to Table 7 makes clear that the Westlaw data for 2006 is based on the full calendar year, not just the first six months of 2006 as is the case of the FJC data. Elsewhere in her report, Professor Moore indicates that the denial rate for the first six months of 2006 was only approximately 27%, not 34% as indicated in Table 7. The rate then jumped to approximately 38% in the second half of the year, resulting in an overall rate of 34%.¹⁰⁵ If we focus only on the first six months of 2006,

¹⁰⁴*Id.*

¹⁰⁵Moore, *supra* note 20, at 637 fig.8.

the period that is comparable to the FJC dataset, Professor Moore's Westlaw-based denial rate of about 27% is considerably less than the 34% rate found in the FJC data.¹⁰⁶ Consistent with our assertion, this lower apparent denial rate during the comparable first six months of 2006 suggests that the Westlaw database is less likely to include orders that deny such motions, resulting in an upward bias in the estimate of the rate at which such motions are granted. In fact, the 27% corrected rate at which motions are dismissed in the first six months of 2006 in the Moore dataset appears to be identical to the rate reported in for the first four and a half months of 2010,¹⁰⁷ raising further doubt about the claimed increase in motions granted following *Iqbal*.

Taking into account the faulty comparison on which Professor Moore relies and the empirical demonstration of a past bias in case selection that favors including grants of summary judgment motions, I continue to believe there is good reason to be concerned that Professor Moore's reliance on the Westlaw database yields estimates of the effects of *Twombly* and *Iqbal* that are biased toward a higher than actual rate at which motions to dismiss are granted.

Inappropriate Terms in Westlaw Search Request. Even if Westlaw did allow a full and complete selection of cases applying the *Twombly* and *Iqbal* standards, the means by which Professor Moore identified the cases to be included in her analysis also resulted in a biased selection of cases that further underrepresented those cases in which motions to be dismissed were denied. More specifically, our preliminary examination indicates that by including the phrase "Ashcroft /2 Iqbal" Professor Moore excluded many cases that involved the application of the post-*Iqbal* standards to motions to dismiss, and these excluded cases were more likely to deny motions to dismiss.¹⁰⁸

As a preliminary matter, it is worth noting that the search request framed by Professor Moore to assess the courts' practices following the *Iqbal* decision does not follow a parallel form in selecting cases across the other two periods. Here are the search phrases used by Professor Moore to identify relevant cases for the three periods:

Conley Cases: ("12(b)(6)" "12(c)") & ("*Conley*" /2 "gibson") &

¹⁰⁶ *Id.*

¹⁰⁷ Moore, *supra* note 20, at 643 tbl.7.

¹⁰⁸ Others have raised concerns about Professor Moore's practice of including the case names as search terms in selecting cases for analysis. Professors Clermont and Yeazell questioned whether including the search terms "Conley" and "no set of facts" in the previous study might exclude other cases that did not apply that very lenient standard. Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 839 n.66 (2010). In her more recent study Professor Moore responds that she deliberately included the terms because "whether there was a difference in results based on the key language of the cases is exactly what I set out to study." Professor Moore then cites the fact that both her study and the FJC study, which did not use those terms, found that 34% of the motions were denied in 2006, a comparison that we have shown to be in error. *Supra* note 102-104 and related text. Of course, a study of the use of key language is not the same as a study of the effect of changing substantive legal standards that apply even in the absence of mention of the case. Both we and Professor Moore are interested in the disposition of motions to dismiss for failure to state a claim, not just such cases that happened to mention the names of leading Supreme Court cases.

“no set of facts” & da(aft 05/21/2005) & da(bef 05/22/2007)¹⁰⁹

Twombly Cases: (“12(b)(6)” “12(c)”) & (“*Twombly*” /p
“plausib!”) & da(aft 05/21/2007) & da(bef 05/22/2009)¹¹⁰

Iqbal Cases: (“*Ashcroft*” /2 “*Iqbal*” & “12(b)(6)” & da(after
5/18/2009) & da(bef 5/19/2010))¹¹¹

The search request for the *Iqbal* cases differs in three important ways. First, the search for cases following *Iqbal* does not include the alternative phrase “12(c)”, which means that cases applying the *Iqbal* standard to motions for judgment on the pleadings under Federal Rule of Civil Procedure 12(c) are not included in the *Iqbal* set of cases unless they meet the other requirement of the search request. Such cases do appear in the search terms for cases decided under the *Conley* and *Twombly* standards. I am not certain of the effect of exclusion of this term in one of the three searches, and we chose not to include such cases in our analysis.¹¹² But, certainly Professor Moore must either include the “12(c)” term in all three searches, or exclude the term in all three searches.

Second, the *Iqbal* cases are selected from a twelve month period rather than a twenty-four month period for the *Twombly* and *Conley* cases. This is almost certainly due to the need to complete the data collection in time for analysis and development of the report that was recently released. However, Professor Moore’s own analysis indicates that the cases resolved in the first six months following *Iqbal* had higher grant rates than the cases resolved in the second six months.¹¹³ (Again, we believe this is due to the fact that more guidance by appellate courts was available in the second six month period, making cases decided in the first six month after the decision suspect.¹¹⁴) Therefore, the cases selected for the *Iqbal* analysis are twice as likely to come from the initial six month period after the Supreme Court decision, a period with higher grant rates, as the cases selected for the *Twombly* analysis, which relied on a twenty-four month period. Professor Moore notes that the likelihood of a motion being granted may be diminishing as time passes after *Iqbal*.¹¹⁵ If the post-*Iqbal* sample were to include a full twenty-four month period, comparable to the other searches, it appears likely that the claimed effect of *Iqbal* would be diminished as well.

Third, and of much greater concern, is that the inclusion of the case names in the search phrases appears to omit many cases that resolved motions to dismiss without citing the case

¹⁰⁹ Moore, *supra* note 20, at 610 n.33.

¹¹⁰ Moore, *supra* note 20, at 610 n.34.

¹¹¹ Moore, *supra* note 20, at 610 n.35.

¹¹² See *supra* note 82, and related discussion.

¹¹³ Moore, *supra* note 20, at 647 tbl.9.

¹¹⁴ CECIL, ET AL., *supra* note 1, at 36.

¹¹⁵ Moore, *supra* note 20, at 647.

names.¹¹⁶ At least, that is what I found in our preliminary inquiry into the results of the search phrase used to identify the *Iqbal* cases. When I attempted to replicate the *Iqbal* case search used by Professor Moore which included the phrase “Ashcroft /2 Iqbal”, I found 6,207 cases, a surprising 349 more cases than found by Professor Moore.¹¹⁷ When I altered the search phrase to identify cases that met the other terms of the search request but did not mention “Ashcroft” or “Iqbal,”¹¹⁸ I found an additional 7,518 cases that would not have been eligible to be selected as part of the sample and could not have been considered by Professor Moore.

Of course, some of these newly found cases may cite the phrase “12(b)(6)” in a context other than resolving a motion to dismiss for failure to state a claim, such as in a recitation of the history of the case. To determine if Professor Moore’s search request missed relevant cases by including the case names in the search, I selected a random one-percent sample of 75 cases and reviewed the orders according to the standards expressed in her report. Of those 75 cases, I found 35 that resolved the merits of Rule 12(b)(6) motions to dismiss and would have met the criteria to be included in Professor Moore’s analysis if they had appeared as a result of her search. Moreover, I found that among these 35 cases, motions to dismiss were denied in 10 cases, which amounts to a denial rate of 28% in these overlooked cases. This is a higher rate of denial than the 17% rate Professor Moore identified by including the case names,¹¹⁹ and suggests that including case names in the search request may introduce a bias that overstates the rate at which motions are granted after *Iqbal*. If this one-percent sample is representative of the cases that should also have been included in the analysis, then the post-*Iqbal* increase in motions granted would be diminished, perhaps to the point that the difference would not be statistically significant. At the very least, there is reason to question the accuracy of an estimate that excludes so many cases in which motions are likely granted at a lower rate.

Our own dataset offers further confirmation that including the case names as part of the search terms introduces a bias that exaggerates the likelihood that motions to dismiss will be granted. In our dataset, motions to dismiss were more likely to be granted in whole or in part in orders that mention the case names “*Conley*”, “*Twombly*” or “*Iqbal*” (74% of the motions were granted in orders that mention a case name v. 66% in orders that do not mention a case name). These findings suggest that including case names in the search terms excludes many cases that are

¹¹⁶ For an example of a study that used multiple searches with and without case names to assess the effects of *Twombly* and *Iqbal*, see Raymond H. Brescia, *The Iqbal Effect: The Impact of New Pleading Standards in Employment and Housing Discrimination Litigation*, 100 Ky. L. J. (forthcoming 2012) available at <http://ssrn.com/abstract=1941294> (last visited December 14, 2011) (“Similarly, in order to ensure that the study did not miss cases in the period post-*Twombly* in which the specificity of the pleadings were challenged but courts did not reference either the *Twombly* or *Iqbal* opinions in reaching their decisions on such motions, additional searches were conducted to identify such cases.”).

¹¹⁷ Professor Moore’s search revealed 5,958 cases. Moore, *supra* note 20, at 610 n.35. The greater number of cases retrieved by this more recent search for the same time period suggests that some relevant cases may not have been available when Professor Moore conducted her search, and underscores the indeterminate nature of this Westlaw database.

¹¹⁸ I altered the search phrase as follows: “12(b)(6)” & da(after 5/18/2009) & da(bef 5/19/2010) % (“Ashcroft” /2 “Iqbal”).

¹¹⁹ Moore, *supra* note 20, at 613 tbl. 1.

relevant to the inquiry, and that these cases tend to be somewhat less likely to include motions that are granted.

At the conclusion of her second study, Professor Moore is forthright in revealing her concern that *Twombly* and *Iqbal* will restrict access to the courts, saying:

I fear that *Iqbal* is another brick in the wall being built blocking access to civil justice and jury trial. The wall is taking shape with increased use of summary judgment, restrictive class action interpretations, the approval of mandatory arbitration clauses, a parsimonious attitude towards plaintiffs' attorney's fees, skepticism towards plaintiffs' expert witnesses, widespread remittitur, a deep antipathy towards punitive damages, federal preemption of state-law tort claims, and a seemingly inexorable flood of so-called "tort reform" measures.¹²⁰
(citations omitted)

Perhaps I should turn over my cards as well. I share Professor Moore's concern about ensuring appropriate access to the courts and to juries. When we began our study, I also expected that we would find higher grant rates, at least in civil rights and employment discrimination cases, as suggested by almost all of the scholarly commentary that immediately followed *Twombly* and *Iqbal*. The only difference is that our study fails to detect a consistent change in the outcome of motions (other than in cases challenging financial instruments, an effect we also did not anticipate), and Professor Moore finds such an effect.¹²¹

¹²⁰ *Id.* at 652.

¹²¹ Professor Moore also questions whether the federal judiciary is capable of conducting an objective study of pleading practices, saying:

I have no doubt that the FJC Study was expertly and meticulously performed. But let us not overlook the fact that it was conceived by and completed at the direction of-- although not directly performed by-- federal judges. I respectfully suggest that in attempting to study what they themselves are doing, they may not be completely impartial. *Id.* at 653.

I have spoken with Professor Moore a number of times, have great respect for her innovative work in this area, and certainly respect her right to disagree with our analysis. But if she perceives a problem with the analysis, that problem should be attributed directly to me and to the other research staff of the Federal Judicial Center. The Center was established as an independent agency within the judiciary precisely so we can conduct such studies and follow the evidence wherever it may lead. The judges who request our research understand and respect the independence of Center and the importance of exploring these issues in an impartial manner. We designed the study according to widely-accepted research standards and practices, conducted the research to the best of our ability, analyzed the data according to the conventions of the profession, and published the results as we found them, even though they led to a conclusion that few of on the research staff anticipated.

The Brescia Analysis

Professor Raymond Brescia has conducted a more focused study of motions to dismiss for failure to state a claim in employment and housing discrimination cases.¹²² The last section of his article offers a fascinating analysis of the manner in which the district courts have invoked the plausibility standard in resolving challenges to the specificity of the pleadings in such cases following *Iqbal*. His examination revealed that the common pattern of analysis by district court judges departs from the pattern of analysis set forth by the Supreme Court.¹²³ In roughly half the cases in which motions to dismiss were granted in their entirety, the court merely cited the *Twombly/Iqbal* standard but failed to undertake any explicit assessment of the plausibility of the underlying claims.¹²⁴ The courts also did not assess whether the plaintiff's claims were more or less plausible than lawful explanations for the defendant's conduct.¹²⁵ Instead, the courts appear to follow a more traditional approach and assess the sufficiency of the factual allegations of the complaint in relation to the necessary elements of the claim, without an explicit assessment of the plausibility of those allegations.¹²⁶ The district courts also appear reluctant to accept the Supreme Court's invitation to measure the plausibility of the factual allegations against "judicial experience and common sense."¹²⁷ In fact, Professor Brescia found only one case in which the judge made even a tangential reference to his own experience and common sense in considering the plausibility of factual allegations.¹²⁸

Although Professor Brescia found little evidence of change in his analysis of the manner in which judges invoke the plausibility standards of *Twombly* and *Iqbal* in employment and housing discrimination cases, he also presented a quantitative analysis indicating that motions in such cases are more likely to be filed and more likely to be granted following *Iqbal*. In a notable departure from the research designs in similar studies, including our own, Professor Brescia restricted his examination to only those orders that assessed the factual specificity of the pleadings. Such orders were filed during a continuous period starting before *Twombly* in 2004, and ending after *Iqbal* in 2010. In brief, Professor Brescia found, among other things, an increase in the grant rates of motions after *Iqbal* (61% before *Twombly*; 72% after *Iqbal*).¹²⁹ Looking only at those cases in which plaintiffs were represented by counsel, which is most comparable to our analysis, Professor Brescia still found an 11 percentage point increase in grant rate (57% before *Twombly*; 68% after *Iqbal*).¹³⁰ By way of contrast, in a supplemental

¹²² Brescia, *supra* note 116.

¹²³ *Id.* at 45.

¹²⁴ *Id.* at 46-47.

¹²⁵ *Id.* at 47.

¹²⁶ *Id.*

¹²⁷ *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009).

¹²⁸ Brescia, *supra* note 116, at 51.

¹²⁹ *Id.* at 6, 29-30.

¹³⁰ *Id.* at 39. Both studies coded motions that were granted at least in part as "granted." However, our studies differ in the manner in which we coded whether such motions were dismissed with prejudice. Professor Brescia coded a motion as "granted with prejudice" when any part of the motion was granted with prejudice, even though other aspects of the motion may have been granted with leave to amend. *Id.* at 37. By contrast, our study coded a

analysis of the 229 employment and housing discrimination cases in our dataset, I found an increase of less than three percentage points (59.6% (62 of 104 orders) in 2006 before *Twombly*, and 62.4% (78 of 125 orders) in 2010 after *Iqbal*), which does not meet conventional standards of statistical significance ($p=0.668$).

It is difficult to know what weight to give to Professor Brescia's findings at this point, because the article does not include statistical tests of these differences or information on the extent to which the screening process excluded orders that did not assess the factual specificity of the pleadings. (Such information may be included in a forthcoming appendix.) Also, Professor Brescia identified relevant orders by searching the LEXIS database of federal court decisions, which I believe underrepresents orders denying motions to dismiss in the same way that the similar Westlaw database underrepresents such cases.¹³¹ Nor does his analysis control for the effects of circuits or districts, the greater likelihood of motions responding to an amended complaint in the period following *Iqbal*, and the apparent decline in grant rate after the district courts received appellate court guidance following *Iqbal*.

My greatest difficulty in interpreting Professor Brescia's findings is with regard to the extent of the increase in grant rate after *Iqbal*. This increase was measured against the grant rate in the subset of cases prior to *Twombly* in which the court addressed the issue of the factual sufficiency of the pleadings. We simply do not know the extent to which pre-*Twombly* cases that depart from the notice pleading standard to focus on the factual sufficiency of the pleadings are fairly representative of motion practice during this period. Prior to *Twombly*, the Supreme Court had ruled that specific facts were not a pleading requirement in employment discrimination cases.¹³² Therefore, I suspect that pre-*Twombly* cases that raised questions of factual sufficiency are unlikely to represent typical motion practice during this period and may not be an appropriate benchmark against which to measure changes in practice. Although our

motion as granted with prejudice only when the motion was granted with prejudice as to all of the claims. Our coding policy eliminated the possibility that existed under Professor Brescia's coding practice that a motion coded as "granted with prejudice" may still allow those claims dismissed with prejudice to be rehabilitated and pursued through discovery. Such a circumstance may arise when a motion to dismiss is granted with prejudice as to some claims and granted with leave to amend as to other claims. If the complaint is successfully amended as to the remaining claims, and discovery related to those claims reveals evidence to support the claims previously dismissed with prejudice, a court may allow the party to amend the complaint to pursue those claims that were previously dismissed with prejudice. In this way, our coding practice recognizes that such an opportunity may mitigate to some extent any heightened pleading standard that results from *Twombly* and *Iqbal*. See e.g., *WPP Luxembourg Gamma Three Sarl v. Spot Runner, Inc.*, 655 F.3d 1039, 1059 (9th Cir. 2011) ("Here, where some claims survive a motion to dismiss, the district court, in its discretion, has power to allow an amended complaint even with regard to claims that it earlier dismissed. Although not common, this procedure would be appropriate should discovery reveal evidence indicating that previously dismissed Defendants were in fact involved in the alleged fraudulent conduct. To some extent, the ability of a district court to revive dismissed claims should evidence come to light tempers the heightened pleading standards of the PSLRA in securities actions where claims survive against co-defendants." (internal citations omitted)). I wish to thank Professor Steven Gensler for bringing this case to my attention.

¹³¹*Supra* notes 96-107, and related text.

¹³²See, e.g., *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002) ("[I]mposing the Court of Appeals' heightened pleading standard in employment discrimination cases conflicts with Federal Rule of Civil Procedure 8(a)(2) . . .").

method may have its own shortcomings (such as including some irrelevant cases that are not affected by the *Twombly/Iqbal* standard), our practice of including in the analyses all orders resolving the merits of a motion to dismiss for failure to state a claim provides a more objective benchmark to assess the courts' practices prior to *Twombly*.

Lastly, by focusing only on employment and housing discrimination cases, Professor Brescia's comparison fails to take into account recent efforts to ensure that litigants in employment discrimination cases are not precluded from gaining access to necessary information to support their claim prior to resolution of a motion to dismiss.¹³³ Even if Professor Brescia's concerns prove to be well-founded, these recent initiatives may provide a means of addressing the problems that arise in this narrow segment of civil rights cases without the need for an amendment of the Federal Rules of Civil Procedure. In any event, it is far from clear that findings in such a narrow segment of the civil caseload would offer a compelling justification for amendment of the federal rules that govern all civil litigation.¹³⁴

¹³³ See generally, FED. JUDICIAL CTR., PILOT PROJECT REGARDING INITIAL DISCOVERY PROTOCOLS FOR EMPLOYMENT CASES ALLEGING ADVERSE ACTION (2011) ("The Protocols create a new category of information exchange, replacing initial disclosures with initial discovery specific to employment cases alleging adverse action. This discovery is provided automatically by both sides within 30 days of the defendant's responsive pleading or motion.").

¹³⁴ Of the 282,859 civil cases commenced in the federal district courts in 2010, only 6% (16,752 cases) were employment or housing discrimination cases. ADMIN OFFICE OF THE U.S. COURTS, 2010 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS 144-45 app. at tbl.C-2 (2010). For a discussion of the transsubstantive role of Federal Rules of Civil Procedure and threats to transsubstantivity, see Geoffrey C. Hazard, Jr., *Discovery Vices and Transsubstantive Virtues in the Federal Rules of Civil Procedure*, 137 U. PA. L. REV. 2237, 2244-47 (1989) (describing the role of transsubstantivity); David Marcus, *The Past, Present, and Future of Trans-Substantivity in Federal Procedure*, 59 DEPAUL L. REV. 371, 401-15 (2010) (discussing modern changes, via legislation and court decisions, that serve to blur the line between substance and procedure). But see, Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 91 (2010) (arguing that *Twombly* and *Iqbal*, along with appellate court deference to judicial discretion in applying those standards undermine the transsubstantive nature of the federal rules).

The Gelbach Model

In a recent article, Professor Jonah Gelbach sought to extend the findings of our research to assess the extent to which the pleading standards under *Twombly* and *Iqbal* have disadvantaged plaintiffs by limiting the opportunity to settle cases rather than respond to a motion to dismiss and limiting the opportunity for discovery.¹³⁵ Professor Gelbach points out that an assessment of the effects of *Twombly* and *Iqbal* is incomplete without considering the extent to which these new standards affect the selection of cases filed in court by plaintiffs and decisions by defendants to file motions to dismiss.¹³⁶ He then adapts a common economic model of litigation¹³⁷ to the pretrial setting and develops theoretical constructs to account for the manner in which changes in cases filed by plaintiffs (i.e., “plaintiff selection effect”), changes in the likelihood of motions filed by defendants (i.e., “defendant selection effect”), changes in rulings on motions by judges (i.e., “judicial behavior effect”), and changes in settlement behavior (“settlement selection effect”).¹³⁸ interact to determine the opportunity for plaintiffs to participate in discovery and pursue their claims. Professor Gelbach adapts the findings of our updated report¹³⁹ to fit the constructs of his model, and concludes that

[f]or employment discrimination and civil rights cases, switching from *Conley* to *Twombly/Iqbal* negatively affected plaintiffs in at least 15.4% and at least 18.1% of cases, respectively, that faced MTDs in the *Iqbal* period. Among cases not involving civil rights, employment discrimination, or financial instruments, *Twombly/Iqbal* negatively affected at least 21.5% of plaintiffs.¹⁴⁰

I am in awe of Professor Gelbach’s skill in extending a common theoretical economic model to the pretrial litigation setting. Not being a practitioner of such dark arts, I will leave it to others to critique the economic model itself.¹⁴¹ But, I do know enough to recognize that such

¹³⁵ Jonah B. Gelbach, *Locking the Doors to Discovery? Conceptual Challenges in and Empirical Results for Assessing the Effects of Twombly and Iqbal on Access to Discovery*, 121 YALE L. J. ____ (forthcoming 2012) (February 5, 2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1990329&download=yes.

¹³⁶ *Id.* at 4.

¹³⁷ George L. Priest and Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984). This model is discussed at Gelbach, *supra* note 135, at 36-39. For another adaptation of this model to motions to dismiss which finds no change in judicial behavior attributable to *Twombly* and assesses the effects of *Twombly*, see William H. J. Hubbard, *The Problem of Measuring Legal Change, with Application to Bell Atlantic v. Twombly* (U. Chi. L. & Econ., Olin Working Paper No. 575, 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1883831.

¹³⁸ These factors are summarized at Gelbach, *supra* note 135, at 3-4.

¹³⁹ CECIL ET AL., *supra* note 1; CECIL ET AL., *supra* note 3.

¹⁴⁰ Gelbach, *supra* note 135, at 6.

¹⁴¹ For critiques of the Priest-Klein economic model of litigation, see Theodore Eisenberg, *Testing the Selection Effect: A New Theoretical Framework with Empirical Tests*, 19 J. LEGAL STUD. 337, 338-339 (1990) (suggesting that the model does not describe civil litigation when the issue in dispute is the extent of damages, or when an institutional litigant is worried about the effect of the outcome of the case on other litigation); Steven Shavell, *Any*

models are closely tethered to the assumptions that underlie their development, and I have a number of concerns about the assumptions on which Professor Gelbach erects his model. I am particularly concerned about the manner in which Professor Gelbach incorporates the findings of our studies into his economic model and the validity of his conclusion regarding the extent to which *Twombly* and *Iqbal* have restricted access to discovery.

As a preliminary matter, it appears that Professor Gelbach, like Professor Hoffman, chooses to ignore the contribution of the multinomial models to assessing the effect of *Twombly* and *Iqbal*. As discussed above, these models are necessary to avoid confounding the effects of the Supreme Court decisions with unrelated factors, such as variations in motion practice in individual districts.¹⁴² Any assessment of *Twombly* and *Iqbal* that does not control for such factors, even when using an otherwise sophisticated economic model, risks incorrectly attributing changes that are unrelated to *Twombly* and *Iqbal* to those decisions. Professor Gelbach dismisses such multinomial models, claiming “the multivariate results are broadly consistent with the simpler differences in grant rates.”¹⁴³ But this is simply incorrect. As noted in both of our reports, the corrections for factors unrelated to *Twombly* and *Iqbal* often account for the statistically significant differences that appear in the simple comparison between the pre-*Twombly* and post-*Iqbal* periods.¹⁴⁴ To ignore the findings of these multinomial models and rely on the raw frequencies confounds changes that can be attributed to *Twombly* and *Iqbal* with numerous other changes that are unrelated to the effect of those decisions on the substantive standards of pleadings and the extent to which cases may progress beyond the pleading stage to discovery.

Professor Gelbach’s article also would benefit from a clearer warning that his model estimates the lower bounds for discovery on *one or more claims* in a case, and not the opportunity for discovery in the case as a whole. This constraint stems from his reliance on our findings, which assess the outcome of the motions in terms of whether they were either denied, or granted in whole or in part.¹⁴⁵ For coding purposes, we considered all motions

Frequency of Plaintiff Victory at Trial is Possible, 25 J. LEGAL STUD. 493, 445 (1996) (“Although there are no errors of logic in the Priest-Klein model—and it is to be praised for its general and original conclusion that cases that go to trial are unrepresentative of settled cases—the assumptions of the model that lead to the 50 percent tendency [for success at trial] appear to be special, and they implicitly rule out a general range of plausible situations.”); Samuel R. Gross and Kent D. Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 MICH. L. REV. 319, 341 (1991) (finding that data on outcomes of trials depart from the prediction of the Priest-Klein model); Keith N. Hylton and Haizhen Lin, *Trial Selection Theory and Evidence: A Review* (Boston University School of Law Working Paper No. 09-27, May 20, 2009) (reviewing empirical support for and against the Priest-Klein model), available at <http://www.bu.edu/law/faculty/scholarship/workingpapers/2009.html>.

¹⁴² *Supra* notes 12-26, and related text. Professor Gelbach does not completely ignore the effects of the models. While he does not control for individual courts or some case types (i.e., contracts, torts), he does analyze separately employment discrimination cases, civil rights cases, and the remaining civil cases, while excluding from the analysis financial instrument cases and ADA civil rights cases. Gelbach, *supra* note 135, at 66 tbl3.

¹⁴³ Gelbach, *supra* note 135, at 23 n.97.

¹⁴⁴ CECIL ET AL., *supra* note 1, at 19; CECIL ET. AL., *supra* note 3, at 3.

¹⁴⁵ CECIL ET AL., *supra* note 1, at 5.

disposed of by a single judicial order as though they were a single motion.¹⁴⁶ If some but not all claims were dismissed, we regarded the motion as “granted in part.”¹⁴⁷ In many cases, such as civil rights cases, it is common for the plaintiff to name multiple defendants and a motion to dismiss may be granted as to only some parties or some claims.¹⁴⁸ As Professor Gelbach notes, *Iqbal* itself was such a case; the motion was granted as to Attorney General Ashcroft and FBI Director Mueller, but the motion was denied as to other defendants and those claims were free to proceed to discovery.¹⁴⁹ Consequently, by incorporating the findings of the FJC study, Professor Gelbach’s model speaks to the extent to which there may be increased restrictions on one or more claims within a case, and does not speak to the extent to which there may be increases in which cases themselves do not proceed to discovery.

To his credit, Professor Gelbach clearly notes this limitation in his discussion of the methodology of his study.¹⁵⁰ However, in constructing his model that relies on our data, Professor Gelbach employs a number of simplifying assumptions that are inconsistent with the data, including his assumption that “each case involves a single plaintiff and a single defendant, that each case involves a single claim, that Rule 12(b)(6) is the only type of MTD that can be filed, and that when MTDs are granted, they are always granted without leave to amend.”¹⁵¹ None of these assumptions are consistent with our datasets on which Professor Gelbach relies.

Moreover, in summarizing his findings Professor Gelbach relies on the vague and ambiguous phrase “negatively affected plaintiffs,”¹⁵² which obscures the fact that the effects he

¹⁴⁶ For a discussion of the ambiguous nature of “motion” as a unit of analysis, see CECIL ET AL., *supra* note 1, at 7 n.11.

¹⁴⁷ *Id.*

¹⁴⁸ CECIL ET AL., *supra* note 1, at app. A at 30-32. Amendments to the Federal Rules of Civil Procedure may have inadvertently led to increases in motions to dismiss. In 2000 Rule 26(b)(1) was amended to restrict discovery of information that is relevant to “any party’s claim or defense . . .”. FED. R. CIV. P. 26(b)(1) advisory committee’s note, 2000 amendment. Previously the rule allowed discovery of information of information that “was relevant to the ‘subject matter involved in the pending action.’” FED. R. CIV. P. 26(b)(1) (1993) (amended 2000). This amendment narrowing of the opportunity for discovery may have encouraged parties to include claims and defenses that would not have been named, and a corresponding increase in motions to dismiss some of all of the additional claims.

¹⁴⁹ Gelbach, *supra* note 135, at 69. *See also*, *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1952 (2009) (limiting the holding only to Attorney General Ashcroft and FBI Director Mueller, and excluding application of the opinion to other defendants).

¹⁵⁰ Gelbach, *supra* note 135, at 24 (“It is thus important to remember that the FJC’s grant data concern claims rather than cases, since some of a complaint’s claims might survive to discovery even as others will not. Thus, my results using the FJC data should be interpreted as telling us about the share of cases with at least some claims that have MTDs granted as a result of *Twombly* and *Iqbal*.”). *See also* discussion at *Id.* at 76-79.

¹⁵¹ *Id.* at 29.

¹⁵² *Id.* at 5 (“Taken together, discovery-prevented cases and settlement-prevented cases constitute the set of what I call ‘negatively affected cases’, because these are cases whose disposition leads to worse results for the plaintiffs who bring suit.” (footnote omitted)). In a previous version of the paper Professor Gelbach used the more precise but somewhat awkward term “cases in which plaintiffs fail to gain access to discovery concerning at least some claims.” (See Draft of December 19, 2011, p. 4.) Summaries of the research that fail to note this limitation appear at Gelbach, *supra* note 136, at 6 (“For employment discrimination and civil rights cases, switching from Conley to *Twombly/Iqbal* negatively affected plaintiffs in at least 15.4% and at least 18.1% of cases, respectively, that faced MTDs in the *Iqbal* period. Among cases not involving civil rights, employment discrimination, or financial

estimates through his model may restrict discovery in only one of many claims in a case. Of course, a plaintiff also may be “negatively affected” by having to respond to a motion to dismiss, even if the motion is denied. But Professor Gelbach’s findings are much narrower, extending only to cases where plaintiffs are denied the opportunity to settle or obtain access to discovery for at least one of what may be many claims in a case.

While Professor Gelbach may keep this distinction in the forefront of his mind, by characterizing the findings as related to “negatively affected plaintiffs” he allows others to misinterpret his findings as related to effects on all claims in a case. Such misinterpretation has been frequent as commentators reviewed earlier versions of Professor Gelbach’s article. The summary of his findings in the press release by his own law review fails to note this limitation,¹⁵³ allowing the easy and erroneous inference that that Professor Gelbach’s model estimates the extent to which discovery is precluded for all claims in such cases. On occasion Professor Gelbach’s quoted summaries of his findings also overlook this important qualification.¹⁵⁴ In fact, our data, on which Professor Gelbach relies, allows no inference regarding access to discovery for entire cases. When read carefully, on its own terms Professor Gelbach’s model addresses the much narrower issue of restriction on one or more claims among all claims raised in a case.¹⁵⁵ While our study does not examine the extent to which discovery in entire cases is

instruments, Twombly/Iqbal negatively affected at least 21.5% of plaintiffs facing MTDs in the Iqbal study period.”); at 72 (“The estimated lower bounds are large. For total other cases, the lower bound is 21.5 percentage points. This means that 21.5 percent of cases that faced MTDs in the FJC’s Iqbal period had the MTD granted—and thus had plaintiffs who were negatively affected—as a causal result of the switch from *Conley* to *Twombly/Iqbal*.”).¹⁵³ Julie Wang, *Recent Media Coverage of Forthcoming YLJ Note, Locking the Doors to Discovery? Conceptual Challenges in and Empirical Results for Assessing the Effects of Twombly and Iqbal on Access to Discovery*, YALE L. J. ONLINE (December 1, 2011) (“Gelbach concludes that ‘among cases not involving financial instruments, civil rights, or employment discrimination, at least 18% of those that faced a Rule 12(b)(6) MTD during the post-*Iqbal* period ultimately will have been prevented from reaching discovery as a result of the switch to heightened pleading.”), <http://www.yalelawjournal.org/journal-news/journal-happenings/recent-media-coverage-of-forthcoming-ylj-note,-locking-the-doors-to-discovery?-conceptual-challenges-in-and-empirical-results-for-assessing-the-effects-of-Twombly-and-Iqbal-on-access-to-discovery/>.

¹⁵⁴ Allison Frankel, *Twombly, Iqbal rulings have 'substantial impact': study*, Thomson Reuters News & Insight (November 28, 2011) (“Much math follows, including an analysis of how *Twombly* and *Iqbal* have affected the settlement calculus, but Gelbach’s takeaway is that ‘among cases not involving financial instruments, civil rights, or employment discrimination, at least 18 percent of those that faced a [motion to dismiss] during the post-*Iqbal* period ultimately will have been prevented from reaching discovery as a result of the switch to heightened pleading,’ he wrote.”), [http://druganddevicelaw.blogspot.com/2011/11/difficulty-of-quantifying-effect-of.html](http://newsandinsight.thomsonreuters.com/Legal/News/ViewNews.aspx?id=33303&terms=%40ReutersTopicCode s+CONTAINS+'ANV; Steve McConnell, The Difficulty of Quantifying the Effect of Twombly and Iqbal, Drug and Device Law Blog (November 28, 2011) (“The bottom line, according to Gelbach, is that ‘at least 18 percent of all cases facing MTDs in the post-<i>Iqbal</i> period failed to reach discovery because of the switch to heightened pleading.’”), <a href=).

¹⁵⁵ It is also worth keeping in mind that such a limitation may be overcome in some instances when discovery permitted on claims that were not dismissed reveals information that supports an amendment of the complaint to allow the plaintiff to pursue claims previously dismissed, even with prejudice. *Supra* note 130 and related text.

precluded, it is also worth repeating that our study did not find a significant increase in the likelihood that a case would be terminated following the grant of a motion to dismiss.¹⁵⁶

My greatest concern is the manner in which Professor Gelbach combines information from our two separate datasets in order to estimate the extent to which discovery will be impeded. Before explaining the nature of the problems that arise when estimates from these two incompatible datasets are combined, it is worth reviewing why it was necessary for us to collect two separate datasets and how these datasets relate to Professor Gelbach's model of pretrial practice.

As far as I am aware, ours is the only study to date that offers an assessment of changes in the rate at which defendants file motions to dismiss following *Twombly* and *Iqbal*.¹⁵⁷ To estimate the rate at which motions are filed after *Iqbal*, we examined motion activity in cases filed from October 2009 through June 2010, a period that would have allowed defendants to take into account the guidance of appellate courts' interpretation of *Twombly* and *Iqbal* in deciding whether to file a motion to dismiss. As noted previously, we did find that the likelihood of a defendant filing a motion to dismiss increased from 4.0% in 2006 to 6.2% in 2010. Professor Gelbach attributes this increase, in part, to the "defendant selection effect" in his model.¹⁵⁸ With that I have no quarrel.

Professor Gelbach's model also includes a "plaintiff selection effect," which is a bit more elusive. The plaintiff selection effect represents those cases that plaintiffs would have filed prior to *Twombly* and *Iqbal*, but were deterred from filing due to the plaintiffs' perception of poor prospects for surviving a motion to dismiss under the changed pleading standards. All other things being equal, one would expect plaintiffs to file fewer cases after *Twombly* and *Iqbal* if they perceive the pleading standards to be more demanding, and this decrease in case filing rate would represent the plaintiff selection effect. Cases filed after October 2009 also allowed sufficient time for plaintiffs to become familiar with the appellate courts' interpretations of *Twombly* and *Iqbal* and to take such factors into account in deciding whether to file the case in federal court. So presumably, our "filings" dataset would also include any plaintiff selection effects. Of course, cases that are never filed are hard to identify. Nevertheless, our data show very little evidence of a decrease in case filings in 2010 that would be consistent with the presence of a plaintiff selection effect.¹⁵⁹

¹⁵⁶ CECIL ET AL., *supra* note 1, at 16, tbl.6; *See also* CECIL ET AL., *supra* note 3, at 4 tbl.A 4. .

¹⁵⁷ The study by Professor Brescia found more orders responding to motions to dismiss following *Iqbal*, and noted that this is consistent with more motions being filed, but did not estimate the extent of the increase in motions. Brescia, *supra* note 116, at 53 ("A word of caution here: I am only claiming that of the 1,800 cases analyzed, the rate at which motions to dismiss based on specificity of the pleadings were filed accelerated considerably within this data base in the months after issuance of the *Iqbal* decision. Certainly further study is needed on this issue, for sure, particularly analysis that is based on all case filings, and on all reported and unreported decisions.").

¹⁵⁸ Professor Gelbach's model also recognizes that an increase in motions by defendants may be caused by a drop in the rate at which cases settle. This "settlement selection effect" that represents those cases that settle under one of the pleading regimes but not both. Gelbach, *supra* note 135, at 42-43.

¹⁵⁹ *Supra* note 59-67, and related text. Sorting out the contributions of the "plaintiff selection effect" and the "settlement selection effect" is a difficult task, at least for me. Professor Gelbach notes that the slight decrease in

The third factor in Professor Gelbach's model is the "judicial behavior effect," which represents change in the likelihood that judges will grant in whole or in part a motion to dismiss. This factor is the primary focus of our study and the focus of the comments mentioned in previous sections. Judges often take considerable time to resolve such motions, as plaintiffs submit amended complaints and the court focuses on other preliminary matters in the litigation. Our need to file a prompt report with the Advisory Committee on Civil Rules did not allow us sufficient time to assess the resolution of motions filed by defendants in the "filings" dataset described above. Instead we developed a second "outcomes" dataset, examining judicial orders resolving motions to dismiss during the period of January through June in 2010 and 2006. Although the orders resolving the motions to dismiss were filed during this period, some of the motions to dismiss and many of the cases were filed prior to the *Iqbal* opinion.¹⁶⁰ Cases filed before the *Iqbal* opinion would not include any of the deterred case filings that Professor Gelbach assumes result from plaintiffs' more selective case filing practices following *Iqbal* (the "plaintiff selection effect"). Nor can we be sure of the extent to which our estimate of judicial responses to such motions incorporates a defendant selection effect, since some of the motions on which the court ruled may have been filed before the appellate courts had offered guidance on the interpretation of *Iqbal*, or even before *Iqbal* itself was decided.¹⁶¹ Consequently, we were required to use two datasets, one to estimate the defendants' responses in filing motions to dismiss, and another dataset to estimate the judicial response to *Twombly* and *Iqbal*.

In estimating the lower boundary of the extent to which discovery of some claims will be restricted, Professor Gelbach combines our "filings" and "outcomes" datasets to yield results

"total other cases" filed in 2010 is "consistent with" a small plaintiff selection effect for those cases. Gelbach, *supra* note 135, at 66, n.169. (In Professor Gelbach's analysis "total other cases" include only contract cases, torts cases, and our miscellaneous category of "other" cases, thereby excluding civil rights, employment discrimination and financial instrument cases.) Gelbach, *supra* note 135, at 64-66. The evidence for such an effect seems very tenuous. The filing of "total other cases" decreased by less than 2% in 2010 (from 39,912 to 39,288 cases). *Id.* at 66. Our original report indicates that the sharpest drop in case filings within the "total other case" category came in torts cases, falling by approximately 6% in 2010 (from 10,604 to 9,947), and torts cases is the category least likely to have a motion to dismissed. CECIL ET AL., *supra* note 1, at 9 tbl.1. Filings of contract cases increased by 6% in 2010 (8,651 to 9139 cases) and filing of the "other" cases in our analysis remained essentially stable. When case filings increase, as they did for employment discrimination cases and civil rights cases, Professor Gelbach attributes this to a possible rise in the settlement effect, or the effects of a worsening economy. Gelbach, *supra* note 135, at 66, n.169, and at 75, n.188. But the effect of a worsening economy is also likely responsible for the increased filings of cases involving financial instruments, and these cases are excluded from his analysis. The presence of the "selection effect" makes it difficult to predict the effect of changes in pleading standards, since this effect can be used to explain both increases and decreases in filing patterns.

¹⁶⁰ To determine the extent to which the two dataset may differ, Professor Gelbach requested additional information on the filing dates of cases included in the judicial response study. A supplemental analysis revealed that 28% of the cases in our database of judicial orders from 2010 were filed before May, 2009, the date that the Supreme Court issued its decision in *Ashcroft v. Iqbal*. Over 70% of the cases were filed before October, 2009, at which time the plaintiffs would have had the benefit of appellate courts' interpretations of *Ashcroft v. Iqbal*.

¹⁶¹ Unfortunately our dataset of judges' responses to the motions to dismiss does not include the dates on which the motions were filed.

that I regard as misleading and inconsistent with his economic model. Professor Gelbach's model estimates this lower boundary for discovery in at least some claims by combining our finding of an increased likelihood of motions filed by defendants (the defendants effect) from the filings dataset with the estimates of judicial action on the motions from the "outcomes" dataset (the judicial response effect). But, our two datasets represent litigant and judge activity at two different stages of an evolving process. The filings dataset includes no information on the judicial response to increases in motions by defendants, and the judicial response dataset includes many cases filed before the decision in *Iqbal* was handed down and will not accurately reflect the courts' response to the increased likelihood that defendants will file a motion to dismiss. Professor Gelbach's model also anticipates that plaintiffs will be more selective in filing and pursuing cases, and such selectivity would likely remove the cases with weaker claims from the mix of cases considered by the courts. Yet the dataset on which he relies to assess the response of judges to motions to dismiss does not take such factors into account.

How courts respond to defendants' motions that would not have been filed in 2006 remains an object of some speculation. Professor Gelbach acknowledges that the response to *Twombly* and *Iqbal* continues to evolve,¹⁶² but ignores this fact when he combines the findings of our two datasets. He finds little or no plaintiff selection effect,¹⁶³ which is quite a surprise since such a plaintiff selection effect is a fundamental component of his model of pretrial litigation and the foundation of Priest/Klein model of litigation from which his model is derived. Professor Gelbach also assumes that the courts will respond to motions to dismiss for failure to state a claim in cases filed after *Iqbal* by granting such motions at approximately the same rate as in the past. But, this is nothing more than an assumption that is untethered to any empirical findings. In fact, the actual results might be quite different. Perhaps plaintiffs will now file only stronger cases, which would tend to drive down the rate at which defendants file motions to dismiss, or the rate at which judges grant such motions, or both. Perhaps courts will respond to increased defendants' motions by denying those that would not have been filed prior to *Twombly*, which would also drive down the rate at which motions are granted. At this point we simply don't know. But, we can be confident that combining two inconsistent datasets to obtain an estimate of the effect of *Twombly* and *Iqbal* on access to discovery is based more on a willingness to embrace unfounded assumptions than an assessment of relevant empirical data.

Professor Gelbach and I have had an extended and very beneficial exchange about this particular issue. In his paper, Professor Gelbach graciously notes my concern about combining these two datasets to obtain the estimates of the effects of *Twombly* and *Iqbal* on access to discovery. We both agree that a better measure would be "a cohort-based measure that

¹⁶² Gelbach, *supra* note 135, at 77.

¹⁶³ Gelbach, *supra* note 135, at 66, n.169. Professor Gelbach notes that the 1.6% drop in case filings for "total other cases" is consistent with a "combination of small plaintiff selection effects" for those cases." But such a drop may also be consistent with a "settlement selection effect", which can be invoked to explain both increases and decreases in case filings. In fact, Professor Gelbach notes that the increase in filings of civil rights and employment discrimination cases is consistent with the presence of a large number of such cases that would have settled before filing prior to *Twombly* and *Iqbal*, but that now are filed by plaintiffs and must confront a motion to dismiss. *Id.* I find it difficult to know what weight to give such possible explanations given the limitations of our data and the ambiguous predictions due to the "settlement selection effect."

followed a fixed set of cases from their filing, to the filing of initial Rule 12(b)(6) [motions to dismiss], and then over the period necessary to determine who ultimately prevails on these motions.”¹⁶⁴ We disagree about how to proceed in the absence of such a cohort study. Again, my view is that one should acknowledge the absence of information, show patience as the research catches up with his theory, and shun the likely misleading conclusions that are driven by such bold and unwarranted assumptions.¹⁶⁵

In responding to my concerns about combining the two FJC datasets within the context of his economic model, Professor Gelbach observes:

Does the FJC really believe that the cross-section from which its grants data were drawn is importantly unrepresentative of the cohorts of cases filed before and after *Twombly/Iqbal*? If so, why did the FJC commence such studies in the first place? And why did it release either report to the public? The original report declares that “This study was designed to assess changes in motions to dismiss and decisions on such motions over time in broad categories of civil cases.” How can one “assess changes” from a data set if the observations it contains on the two time periods it covers cannot be compared?¹⁶⁶ (footnote omitted)

The answer, of course, is that the study was conducted to determine the manner in which the courts were responding to these Supreme Court decisions, even while recognizing

¹⁶⁴ Gelbach, *supra* note 135, at 77.

¹⁶⁵ Professor Gelbach claims that “[w]hile there could be fatal inconsistencies between data sets, I do not believe the two FJC MTD reports contain any concrete reasons for concern” regarding combining the two datasets. Gelbach, *supra* note 135, at 76. But there are plenty of indications that that the datasets should not be combined. In discussing the limitation of the study, we make clear that the “study must be interpreted in the context of ongoing development of the case law in both the Supreme Court and the lower courts.” CECIL ET AL., *supra* note 1, at 22. The sample frame for the outcome study did not allow plaintiffs to take account of those changes in deciding whether to file a case. We indicated that the second database examining outcomes of motions was developed as an alternative to our preferred solution of determining the outcome in the “filings dataset” due to time constraints. See *supra* note 25 and related text. Certainly the fact that we chose not to combine the estimates from the two datasets in either of the reports indicated that we viewed these datasets as incompatible. To the extent that any doubts remained about our views regarding the propriety of combining the two datasets, that issue was addressed directly by then-Chair of the Advisory Committee on Civil Rules in his report to the Standing Committee on Rules of Practice and Procedure:

A succinct but potentially misleading statement of the central finding would be that the rate of filing 12(b)(6) motions has increased, while the rate of granting the motions as held constant. A natural conclusion would be that a constant rate of granting an increased number of motions means that more cases are dismissed for failure to state a claim. But the comparison is made between two data sets, and it is difficult to confirm or deny this possible conclusion.

Memorandum from Hon. Mark R. Kravitz, Chair, Advisory Committee on Civil Rules, to Hon. Lee H. Rosenthal, Chair, Standing Comm. on Rules of Practice and Procedure 53 (May 2, 2011), *available at* <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV05-2011.pdf>, and cited by Professor Gelbach, *supra* note 135, at 76.

¹⁶⁶ Gelbach, *supra* note 135, at 78-79.

that the response of the courts was continuing to evolve.¹⁶⁷ Previous empirical studies had offered assessments that we believed did not fairly represent the reaction of the courts to the guidance provided by the courts of appeals. This study was delayed until such guidance became available. Then separate datasets were developed to assess the reaction of the courts and defendant filing patterns during a similar period. While our data may not fit well within the constraints of Professor Gelbach's economic model, I continue to believe our study provides the best estimate of the federal district courts' responses to these decisions, for all the reasons stated above. But, as others have noted, the FJC study is not to be considered the last word on this issue.

¹⁶⁷ CECIL ET AL., *supra* note 1, at 22 (noting that the results of the FJC study must be interpreted in the context of evolving case law).

Conclusion

After this lengthy response to the critiques of the FJC studies and my own critiques of competing studies, one may well wonder if empirical research has, in fact, aided our understanding of the consequences of *Twombly* and *Iqbal*. To some it must seem that conflicting studies and the responses to the studies have just moved the debate to more esoteric and less easily accessible issues. But, our differences can easily obscure areas of consensus.

As an initial matter, it is worth emphasizing that all sides in this discussion are committed to ensuring access to the federal courts for claims that present a valid cause of action. Those claims that require factual support through information in the custody of the defendant represent the greatest challenge under the most restrictive interpretations of *Twombly* and *Iqbal*. But such restrictive interpretations seem to find greater expression in the work of legal scholars than in the opinions of district court judges. Professor Brescia's examination of post-*Iqbal* decisions suggests that, though the language has changed, in many cases the courts are following a traditional approach and assessing the sufficiency of the factual allegations of the complaint in relation to the necessary elements of the claim, without any explicit assessment of the plausibility of those allegations.¹⁶⁸ In response to the initial flurry of district court opinions, the courts of appeals also reversed a number of cases in which the plaintiffs were not given an opportunity for fair access to information to support their claims.¹⁶⁹ Judges are becoming more aware of the opportunities for staged discovery in cases where there is an imbalance in access to information relevant to the claims,¹⁷⁰ and the courts have initiated a pilot project to encourage parties in employment discrimination cases "to exchange the most relevant information and documents early in the case, to assist in framing the issues to be resolved and to plan for more efficient and targeted discovery."¹⁷¹ While reasonable persons may differ on the effects of *Twombly* and *Iqbal*, I can see no difference in the commitment of all participants in the discussion to the principle of ensuring access to the federal courts for valid federal claims.

It is also clear that defendants are more likely to file motions to dismiss, at least in the year following *Iqbal*. This effect was predicted by many commentators and confirmed by our study, which showed a 50% increase in motions filed by defendants in the first 90 days of the case.¹⁷² However, little is known about the filing patterns of defendants after the first 90 days. Perhaps

¹⁶⁸ *Supra* notes 123-127 and related text.

¹⁶⁹ Appellate court cases interpreting *Twombly* and *Iqbal* are summarized in Memorandum from Andrea Kuperman to Civil Rules Comm. and Standing Rules Comm., Review of Case Law Applying *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal* (November 23, 2011), available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/iqbalmemo_112311.pdf.

¹⁷⁰ XXXXX [Insert information about FJC educational programs]

¹⁷¹ *Supra* note 133.

¹⁷² CECIL ET AL., *supra* note 1, at 8-10 (motions filed by defendants increased from 4.0% to 6.2%, and increase of 55%, and increased by 100% over the baseline when statistical models were used to control for unrelated factors).

this increased rate of filing is sustained throughout the subsequent stages of the case, or perhaps *Twombly* and *Iqbal* simply moved filing dates forward, and the extent of the increase will be less than 50% when more lengthy periods of litigation are considered. Or, as time passes, perhaps plaintiffs will become more selective in filing cases that are vulnerable to motions to dismiss and the rate of motions filed by defendants will decline from their recent levels.

I would also like to believe that there is a consensus that the judicial response to such motions, at least in terms of the rate at which motions are granted without leave to amend across broad categories of cases, has either not increased, or increased at most by only a modest amount. Our research suggests that there have been no statistically significant increases in the rate at which motions are granted after controlling for factors other than *Twombly* and *Iqbal*.¹⁷³ Even Professor Moore's revised study shows only a modest increase in grant rate, and, as indicated above, I question whether even that moderate increase in fact exists. Professor Brescia's study of employment and housing discrimination cases found an increase in motions granted, but that study does not present a statistical analysis that controls for factors that are unrelated to the effect of the Supreme Court decisions. A modest effect will come as no surprise to those who anticipated that *Twombly* and *Iqbal* would be restricted to a narrow range of cases with motions to dismiss, but our studies of broad case types do not address concerns about the those cases that are especially vulnerable to heightened pleading standards. Nevertheless, it appears that our studies put to rest the direst predictions of a substantial increase in the rate at which motions are granted over a broad range of cases.

Despite this progress, many questions remain unanswered. Professor Gelbach has persuaded me that the effects of *Twombly* and *Iqbal* can be more fully understood by taking into account the combined responses of plaintiffs, defendants, and judges, even though I remain convinced that our current data do not fit within the assumptions of his more comprehensive model. If, as Professor Gelbach suggests, the combination of an increased rate at which motions to dismiss are filed and an unchanged rate at which such motions are granted has restricted access to discovery to a substantial extent (an assertion that I question¹⁷⁴) one might still ask whether any increase in motions granted has simply moved forward the disposition of cases that were destined for summary judgment.¹⁷⁵ Certainly the Supreme Court assumed that cases that are unable to state a plausible claim would be resolved by summary judgment even after the opportunity for discovery. None of the studies to date have examined the manner in which the resolution of motions to dismiss may interact with summary judgment. Perhaps any increase in

¹⁷³ *Id.* at 16; CECIL ET AL., *supra* note 3, at 4.

¹⁷⁴ *Supra* notes 90-119, and related text.

¹⁷⁵ See Andrew Blair-Stanek, *Twombly Is the Logical Extension of the Mathews v. Eldridge Test to Discovery*, 62 FLA. L. REV. 1, 36 (2010) (suggesting that granting of a motion to dismiss for failure to state a claim is "effectively just the denial of discovery, followed by summary judgment based solely on the facts alleged in the complaint."); Gelbach, *supra* note 135, at 79-80 ("One can view *Twombly*, and *Iqbal* by extension, as asking judges to forecast the results of discovery and thus the likely outcome of defense summary judgment motions. If judges are successful at this task, then cases that would previously have gone through discovery and been dismissed pursuant to defense summary judgment motions will now be dismissed before discovery at the MTD stage." (footnote omitted)).

cases dismissed for failure to state a claim is being offset by a drop in the rate at which cases are dismissed after summary judgment. Or perhaps, as others have suggested, the rate at which cases are resolved through summary judgment has increased, and that it is summary judgment motion practice that deserves closer examination.

At its January 2012 meeting the Judicial Conference Standing Committee in Rules of Practice and Procedure asked the Research Division of the Federal Judicial Center to prepare a research proposal for a more comprehensive and collaborative study that will examine the effect of the primary forms of dispositive motions, including all Rule 12(b) motions and summary judgment. The proposal currently being prepared will be designed to link with earlier studies¹⁷⁶ to provide a better understanding of changes in dispositive motions over time.

The tentative plan is to discuss such a proposal at the upcoming meeting of the Advisory Committee on Civil Rules. After that meeting, the proposal will be revised and we will solicit comments from judges, attorneys and legal scholars. Since multiple types of motions will be involved, several months of pilot work will be required before starting the actual data collection in October 2012. Once the report is presented to the Advisory Committee, the dataset will then be made available to legal scholars and others, within the constraints of the Judicial Conference policies. While this study also is unlikely to be the last word on this issue, it may provide an estimate of the more evolved responses of plaintiffs, defendants, and judges to *Twombly* and *Iqbal*, and to the appellate courts' interpretations of these decisions.

¹⁷⁶ We will attempt to link the findings of the new study to previous motions studies by the Federal Judicial Center (e.g., PAUL R. J. CONNOLLY, PATRICIA A. LOMBARD, FED. JUDICIAL CTR., JUDICIAL CONTROLS AND THE CIVIL LITIGATIVE PROCESS: MOTIONS (1980); THOMAS E. WILLGING, FED. JUDICIAL CTR., USE OF RULE 12(b)(6) IN TWO FEDERAL DISTRICT COURTS (1989); Joe S. Cecil, et al., *A Quarter-Century of Summary Judgment Practice in Six Federal District Courts*, 4 *Journal of Empirical Legal Studies* 861–907, 874-880 (2007)), and to studies by those outside the Center (e.g., Herbert M. Kritzer, *Studying Disputes: Learning from the CLRP Experience*, 15 *LAW & SOC'Y REV.* 503 (1980-81).

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TAB 9A

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DUKE SUBCOMMITTEE

In addition to manuals, judicial education, empirical research by the FJC, pilot projects, and other tasks, the Duke Subcommittee has worked through the lengthy lists of proposals for rules amendments advanced at the Duke Conference. Predictably, many of the proposals involve pleading, discovery, or both. The Discovery Subcommittee has taken on some of the discovery proposals, most notably preservation and sanctions, and may take on some others. Pleading remains in a posture of active waiting. Other proposals have not seemed to deserve further study at present. Many, however, have survived initial scrutiny and seem ready for the first tentative exploration by the full Committee.

The drafts set out here are preliminary. The goal has been to identify the most obvious issues that must be confronted with each proposal. Further work on any of them will undoubtedly find added complications and countervailing concerns. The present purpose is to explore the value of each proposal as a subject of continuing development, keeping in mind that proposals that may not seem particularly important standing alone may take on added value as integral parts of a larger package.

Notes on the January 31 Subcommittee Conference call considering these topics are attached.

The Subcommittee also is considering the possibility of holding a conference as a sequel to the Duke Conference. One topic for consideration could be further refined rules drafts based on the current drafts. The work of the Rule 23 Subcommittee might also be a good subject, depending in part on integration with any plans for a Rule 23 miniconference. Other panels could address innovations adopted in state courts; results of pilot projects, particularly as coordinated by the FJC; and more global questions about what the Committee should be doing. The Duke Conference seemed to reflect general acceptance of the basic framework that has evolved from the beginning in 1938, but it is important to ask continually whether the people we hear from are too familiar with the system, too good at working it, and too comfortable with it, to provide the objective advice we should be hearing. As usual, it will be wise to enlist the Bar Associations that regularly provide advice on Committee work. The Subcommittee solicits suggestions for other topics.

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TAB 9B

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DUKE CONFERENCE SUBCOMMITTEE RULES SKETCHES

The Duke Conference Subcommittee has sorted through many of the proposals advanced at the Conference, seeking in part to identify those that might be best served by considering amendments of the Civil Rules. Some of the possible amendments seem better addressed outside the Subcommittee. The Discovery Subcommittee continues to work on issues of preserving information for future discovery, work that might expand to consider the scope of discovery in more general terms, particularly with respect to electronically stored information. The continuing evolution of pleading practice in response to the *Twombly* and *Iqbal* decisions is the subject of continuing study, including ongoing empirical work by the Federal Judicial Center. A number of possible Rules amendments remain. These pages cover a number of topics, usually illustrated by preliminary sketches that depict the rough outlines of possible changes. Choosing these topics for discussion does not imply exclusion of other possible topics – the books are not closed.

1 **Discovery Before Conference**

2 These changes would enable a party to launch discovery
3 requests before the Rule 26(f) conference, but defer the obligation
4 to respond to a time after the conference. The idea is that the
5 conference may work better if the parties have some idea of what
6 the actual first wave of discovery will be. The Subcommittee has
7 rejected an approach that would enable a party to serve a
8 deposition notice, interrogatories, production requests, and
9 requests to admit with the complaint. That form might operate
10 primarily for the advantage of plaintiffs; defendants might not
11 have enough time to develop discovery requests, particularly if the
12 times for the Rule 26(f) conference and Rule 16(b) conference and
13 order are shortened. The surviving approach introduces some delay
14 between filing – or, more likely, service or appearance by a
15 defendant – and the first discovery requests. Drawing careful time
16 lines will be an important part of this approach.

17 **Rule 26(d): Waiting Period**

18 **(d) Timing and Sequence of Discovery.**
19 **(1) Timing.** A party may not seek discovery from any source before
20 [20 days after service of the summons and complaint on any
21 defendant]{45 days after the complaint is filed or 20 days
22 after any defendant appears, whichever is later},¹ the parties
23 have conferred as required by Rule 26(f), — except in a

¹ The suggested periods are first approximations. If we set the scheduling conference at 60 days after any defendant is served, and set the Rule 26(f) conference 14 days before the scheduling conference, the window for initiating discovery requests is reduced. Some workable compromise must be found.

24 proceeding exempted from initial disclosure under Rule
25 26(a)(1)(B), or when authorized by these rules, by
26 stipulation, or by court order.

- 27 (2) **Sequence.** Unless the parties stipulate, or, on motion,² the
28 court orders otherwise for the parties' and witnesses'
29 convenience and in the interests of justice:
30 (1) methods of discovery may be used in any sequence; and
31 (2) discovery by one party does not require any other party
32 to delay its discovery.

33 **Rule 30(a)**

34 * * *

- 35 (2) **With Leave.** A party must obtain leave of court, and the
36 court must grant leave to the extent consistent with Rule
37 26(b)(2):
38 (A) if the parties have not stipulated to the deposition³
39 and:
40 (i) the deposition would result in more than
41 [10][5] depositions being taken under this
42 rule or Rule 31 by the plaintiffs, or by the
43 defendants, or by the third-party defendants;
44 (ii) the deponent has already been deposed in the
45 case; or
46 (iii) the party seeks to take the deposition ~~before~~
47 ~~the time specified in Rule 26(d) less [fewer]~~
48 ~~than 14 days after a scheduling order enters~~
49 ~~under Rule 16(b), unless the proceeding is~~
50 ~~exempted from [initial disclosure under Rule~~
51 ~~26(b)(1)(B)] {Rule 16(b)} or unless the party~~
52 certifies in the notice, with supporting
53 facts, that the deponent is expected to leave
54 the United States and to be unavailable for
55 examination in this country after that time;
56 or * * *⁴

² This change was suggested during general discussion of discovery before the Rule 26(f) conference. The only purpose is to make clear the general understanding that ordinarily parties may stipulate to something the court can order.

³ It may be asked whether the parties should be allowed to stipulate out of these limits. The burdens of discovery do not fall on the parties alone. Perhaps this should be: "(A) if ~~the parties have not stipulated to the deposition and:~~

⁴ These choices suggest several questions. Should the delay be geared to the scheduling order, or instead to the Rule 26(f) conference? What is the appropriate time -- it is tempting to adopt the 30 days allowed to answer interrogatories or demands to produce, but there are so many variations of circumstances that it may be better to set a fairly short restraint on the deposition

57

Rule 31(a)(2)(A)(iii)

58 Rule 31(a)(2)(A) would, as now, mirror Rule 30(a)(2)(A),
 59 except that, as now, Rule 31 would not include a provision for
 60 deponents departing the country:

61 (iii) the party seeks to take the deposition before
 62 the time specified in Rule 26(d) less [fewer]
 63 than 14 days after a scheduling order is
 64 entered under Rule 16(b), unless the
 65 proceeding is exempted from [initial
 66 disclosure under Rule 26(b)(1)(B)] {Rule
 67 16(b)}; or * * *

68

Rule 33(b)(2)

69 (2) **Time to Respond.** The responding party must serve its
 70 answers and any objections within 30 days after being
 71 served with the interrogatories or within 30 days after
 72 any scheduling order is entered under Rule 16(b),
 73 whichever is later.⁵ A shorter or longer time may be

moratorium.

It is difficult to guess what to do about carrying forward the present provision that exempts from the Rule 26(d) moratorium a proceeding exempted from initial disclosure by Rule 26(a)(1)(B). Those proceedings are also exempt from the Rule 26(f) conference (is that a good idea?), but do not seem to be exempt from Rule 16(b). Not, that is, unless a local rule exempts them. (There is likely to be a substantial overlap between local Rule 16(b) exemption rules and Rule 26(a)(1)(B) – much of the inspiration for the list in (a)(1)(B) was drawn from the local rules exempting cases from 16(b).) RLM suggests that there is little reason to carry forward the part of Rule 16(b)(1) that recognizes local rules exempting categories of actions from the initial scheduling order requirement. The bow to local practices was made when some courts were still new to the concept of case management. The exemptions from initial disclosure might be incorporated in Rule 16(b) and adopted by cross-reference in Rule 26(a). Sketches of this approach are set out below.

⁵ If local rules exempt the case from the scheduling order requirement, it is likely that the case also is exempt from initial disclosure, thus exempt from Rule 26(f), and by that exempt from the Rule 26(d) moratorium. So far so good. But it remains possible that a local rule may exempt from Rule 16(b) a case that is not exempt from initial disclosures, not exempt from Rule 26(f), and thus not exempt from the Rule 26(d) moratorium. Drafting for that case will be awkward. But the difficulty will disappear if we amend Rule 16(b) to defeat the local rule exemptions, replacing it with the same exemptions that Rule 26(a)(1)(B) sets for initial

74 stipulated to under Rule 29 or be ordered by the court.

75 **Rule 34(b) (2) (A)**

76 **(2) Responses and Objections.**

77 (A) *Time to Respond.* The party to whom the request is
 78 directed must respond in writing within 30 days
 79 after being served or within 30 days after a
 80 scheduling order is entered under Rule 16(b),
 81 whichever is later. A shorter or longer time may be
 82 stipulated to under Rule 29 or be ordered by the
 83 court.

84 **Rule 35**

85 There is no apparent need to revise Rule 35 for this purpose.

86 **Rule 36(a) (3)**

87 **(3) Time to Respond; Effect of Not Responding.** A matter is
 88 admitted unless, within 30 days after being served or
 89 within 30 days after a scheduling order is entered under
 90 Rule 16(b), whichever is later, the party to whom the
 91 request is directed serves on the requesting party a
 92 written answer or objection addressed to the matter and
 93 signed by the party or its attorney. A shorter or longer
 94 time for responding may be stipulated to under Rule 29 or
 95 be ordered by the court.

96 **Rule 45(a) (1) (A) (iii)**

97 (iii) command each person to whom it is directed to do
 98 the following at a specified time and place:⁶ attend
 99 and testify;⁷ produce designated documents,

disclosures. That still leaves the possibility that a scheduling order will issue in a case exempt from the requirement, but that seems covered by the proposed rule text – the answer is due 30 days after the scheduling order enters.

Compare the Rule 30 and 31 drafts, which propose alternatives gearing the time for depositions to the exemptions in either Rule 16(b) or Rule 26(a) (1) (B).

⁶ Rule 45 governs trial subpoenas as well as discovery subpoenas. That may be part of the reason why it does not specify times to respond. And note the implication of Rule 45(c) (2) (B) – an objection to a subpoena duces tecum "must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served."

⁷ It seems sensible to adopt the same time limit as Rules 30 and 31; can that be done by cross-reference? "(iii) command each person to whom it is directed to do the following at a

100 electronically stored information, or tangible
 101 things in that person's possession, custody, or
 102 control; or permit the inspection of premises;⁸

103 **Rule 26(f) approach**

104 An alternative to serving early discovery requests might be
 105 found in amending Rule 26(f). This approach would allow a party to
 106 serve a notice of proposed discovery before the conference. This
 107 sketch situates the new provision in 26(f) (1); other locations are
 108 possible.

109 (1) *Conference Timing; Notice of Proposed discovery.*

110 (A) Except in a proceeding exempted from initial
 111 disclosure under Rule 26(a) (1) (B) or when the court
 112 orders otherwise, the parties must confer as soon
 113 as practicable – and in any event at least 21 days
 114 before a scheduling conference is to be held or a
 115 scheduling order is due under Rule 16(b).

116 (B) A party may serve a notice of proposed discovery on
 117 other parties before the [parties'] {Rule
 118 26(f) (1) (A) } conference [describing subjects and
 119 methods of discovery].⁹

specified time and place, subject to Rules 30(a) (2) (A) (iii) and
31(a) (2) (A) (iii): * * *."

⁸ Same question: can this be done by cross-referring to the time limits in Rule 34 – add Rule 34(a) (2) (A) to the list in note 7 above?

⁹ If the rule is to describe what a notice of proposed discovery is, more work is needed. The notice might be limited to the discovery the proposer plans to request. Or it might include a suggested plan for discovery by two or more parties. One thing to be avoided is anything that might seem to invite a meet-and-confer to prepare for the 26(f) conference; providing for comprehensive suggested discovery plans by all parties might veer in that direction.

120 **Conference Before Discovery Motion**

121 The basic suggestion is that a party must arrange a conference
 122 with the court before making a discovery motion. Several courts
 123 have adopted the practice.

124 The primary drafting question may be finding the best place to
 125 locate the new provision in the rules. There are so many possible
 126 occasions for motions regarding discovery that incorporation
 127 directly in the discovery rules, even as something like a new Rule
 128 26.1 that becomes the subject of cross-references in many other
 129 discovery rules, seems awkward. But putting it anywhere else
 130 raises a question of visibility. Two illustrations are offered
 131 here. The first amends Rule 7, the general rule on motions, and
 132 makes the premotion conference mandatory. Similar text could be
 133 adopted as a new Rule 26(h), or conceivably a new Rule 26.1, to
 134 avoid relettering any of the present Rule 26 subdivisions. The
 135 second adds the conference to the Rule 16(b)(3) list of subjects
 136 that may be included in a scheduling order.

137 **Rule 7(b)(3) [or 26(h)]**

138 (3) Conference for Discovery Motion. Before filing a motion
 139 for an order relating to [disclosure or] discovery¹⁰ the

¹⁰ Many rules refer to "discovery" without embellishment. It may be better to use this generic term than to attempt to refer to the discovery rules by number – e.g., "a motion under Rules 26 through 37 or 45." A Rule 27 proceeding to perpetuate testimony, for example, is commenced by a "petition." At the same time, it expressly provides for a motion to perpetuate testimony pending appeal, Rule 27(b). A catalogue of discovery rules would also have to wrestle with such matters as Rule 69(a)(2) discovery in aid of execution, which may invoke "the procedure of the state where the court is located." On the other hand, a generic reference to "discovery" might seem to invoke procedures for getting information from persons in foreign countries, or for providing discovery in aid of foreign proceedings. E.g., 28 U.S.C. §§ 1782, 1783. This might be "discovery under these rules." In a related vein, RLM asks whether these puzzles justify reconsideration of the decision in the Style Project to abandon the index section, most recently Rule 26(a)(5), that provided a list of discovery methods. That would provide an indirect definition, distinguishing discovery from disclosure and shortcircuiting arguments that, for example, Rule 36 requests to admit are not a "discovery" device.

RLM also asks whether this language covers submission to the court for a determination of privilege or protection as trial-preparation material after receiving the information in discovery and then receiving a Rule 26(b)(5) notice of the claimed protection. If Rule 26(b)(5) contemplates that the "determination" is itself an order, then the submission is a request for an order and, by Rule 7(b)(1), is a "motion." If the "determination" is

140 movant must [attempt to resolve the questions raised by
 141 the motion by meeting and conferring with other parties
 142 when required by these Rules and]¹¹ request [an informal
 143 conference with the court] [a Rule 16 conference with the
 144 court]. The motion may be filed if the request is denied
 145 or if the conference fails to resolve the issues [that
 146 would be] raised by the motion.

147 **Rule 16(b)(3)(B)(v)**

148 (3) * * *
 149 (B) *Permitted Contents.* The scheduling order may: * * *
 150 (v) direct that before filing a motion for an order
 151 relating to discovery the movant must request
 152 an informal conference with the court.
 153 [present (v) and (vi) would be renumbered; further
 154 renumbering could be required if the list in
 155 16(b)(3) is expanded to include setting a date
 156 for formally abandoning claims or defenses]

something less than an order, then we need decide whether we want to require a pre-submission conference.

¹¹RLM asks how this relates to the requirement that parties meet and confer before making a discovery motion. There is much to be said for requiring the meet-and-confer before the pre-motion conference. This presents a tricky drafting issue. The attempt in rule text is a place-keeper, no more. Some motions relating to discovery do not seem to require a pre-motion "meet and confer." In addition to Rule 26(b)(5)(B), noted above, Rule 26(b)(3)(C) provides a request to produce a witness statement and a motion to compel if the request is refused.

He also asks whether the rule should elaborate on what sorts of submissions should be made to the court in requesting the pre-motion conference. That may be more detail than we want.

157 **Rule 16(b): Conference, Timing, Permitted Subjects**

158 Three separate sets of suggestions for amending Rule 16(b) are
 159 plain enough to be presented pretty much together. They would
 160 require an actual conference, at least by telephone, before issuing
 161 a scheduling order; accelerate the time for issuing the order; and
 162 add a deadline for abandoning claims or defenses to the list of
 163 permitted subjects.

164 **(b) SCHEDULING.**

165 (1) *Scheduling Order.* Except in categories of actions
 166 exempted by local rule,¹² the district judge – or a
 167 magistrate judge when authorized by local rule – must
 168 issue a scheduling order:

169 (A) after receiving the parties' report under Rule
 170 26(f);¹³ or

171 (B) after consulting with the parties' attorneys and
 172 any unrepresented parties at a scheduling
 173 conference with the court [in person] or by a means
 174 of contemporaneous communication¹⁴ ~~by telephone,~~
 175 ~~mail, or other means.~~

176 (2) *Time to Issue.* The judge must issue the scheduling order
 177 as soon as practicable, but in any event within the
 178 earlier of ~~120~~ 60 days after any defendant has been
 179 served with the complaint or ~~90~~ 45¹⁵ days after any

¹² The question whether to adopt a uniform national set of exemptions modeled on Rule 26(a)(1)(B) is addressed at the end of this section.

¹³ Do we want to insist on a conference even if the parties agree on a scheduling order? The court may want one, but it may be content to rely on an apparently sensible order that seemingly sensible lawyers have agreed upon.

¹⁴ This could be "telephone," as in the present rule, but there is no reason to exclude video conferencing, Skype, or other devices that may become easily accessible and convenient.

RLM raises a separate question about the present rule. Why provide that the court may consult and enter the order without waiting for a Rule 26(f) report? Because there may be no Rule 26(f) report, or no timely report? Because the (b)(2) direction to issue the order "as soon as practicable" encourages what could become a court-supervised 26(f) conference? Perhaps the wish for voluntary party cooperation may yield to the opportunities of directed (if not coerced) cooperation?

¹⁵ "45 days" is selected only for illustration. Each period has an impact on timing the Rule 26(f) conference. Rule 26(f)(1) sets the conference "as soon as practicable – and in any event at least 21 days before a scheduling conference is to be held or a scheduling order is due under Rule 16(b)." Perhaps 24 days after

180 defendant has appeared.
 181 (3) *Contents of the Order.* * * *
 182 (B) *Permitted Contents.* The scheduling order may: * * *
 183 (vi)¹⁶ set a date for abandoning a claim or defense
 184 [that cannot be further advocated without
 185 violating Rule 11(b)]¹⁷
 186 (vi) **[Alternative]** set a date for amending the
 187 pleadings to delete a claim or defense that a
 188 party does not intend to maintain [further].¹⁸

189 Resetting the time to issue the scheduling order invites
 190 trouble when the time comes before all defendants are served.
 191 Later service on additional defendants may lead to another
 192 conference and order. That suggests that Rule 4(m) might be
 193 revised to shorten the presumptive time for making service.

appearing is long enough for a meaningful 26(f) conference. A party anxious to defer the 26(f) conference could delay making an appearance, at least within the constraints of Rule 12 time requirements. But what of defendants served after the first defendant is served? And perhaps served after the time for the 26(f) conference?

The Department of Justice is concerned that even 60 days after service is too soon – it has 60 days to answer, and often finds that time all too brief. Should a different time be specified, perhaps by reference to the cases enumerated in Rule 12(a)(2) and (3)?

¹⁶ The place in the sequence is nearly random. This seems to fit better after discovery, and perhaps after (v), which includes setting dates for pretrial conferences.

¹⁷ It seems wise to incorporate the Rule 11(b) standard, rather than attempt an independent concept of "good faith" or the like. If that position holds, the incorporation may be expressed more gracefully. The alternative that follows in text is simpler.

The overlap with Rule 11 is curious. Rule 11(b) extends beyond presenting a pleading, motion, or other paper to "later advocating it." That can run beyond a deadline set by the court. Surely expiration of the deadline set by the court does not oust the continued operation of Rule 11 – the obligation to abandon the claim or defense may not arise until the eve of trial, or even at trial. On the other hand, it seems limited to things set out in a pleading, motion, or other paper; sloppy disregard of the opportunity to amend may mean a claim or defense is advocated without yet appearing in a pleading, etc.

¹⁸ This alternative looks directly to withdrawal from positions that have been abandoned in fact but not formally. Would it accomplish anything if not enforced by sanctions? How would sanctions work if the test is whether a party has subjectively given up hope?

194 Shortening the Rule 4(m) time may be desirable for independent
 195 reasons, to encourage plaintiffs to be diligent in attempting
 196 service and getting the case under way. There may be some
 197 collateral consequences – Rule 15(c)(1)(C) invokes the time
 198 provided by Rule 4(m) for determining relation back of pleading
 199 amendments that change the party against whom a claim is asserted.
 200 But that may not deter the change.

201 Changing Rule 4(m) is easily illustrated:

202 **(m) Time Limit for Service.** If a defendant is not served
 203 within ~~120~~ 60 days after the complaint is filed, the
 204 court * * * must dismiss the action without prejudice
 205 against that defendant or order that service be made
 206 within a specified time. But if the plaintiff shows good
 207 cause * * *.

208 The provision for abandoning a claim or defense is sketched in
 209 a form that focuses on claims or defenses made in pleadings. If a
 210 claim or defense has been identified in a pretrial order,
 211 abandonment might be addressed through Rule 16(c)(2)(A), which
 212 includes "formulating and simplifying the issues, and eliminating
 213 frivolous claims or defenses," as well as (B), "amending the
 214 pleadings if necessary or desirable." But what about contention
 215 discovery? Suppose, for example, a plaintiff responds to an
 216 interrogatory by stating contentions that the defendant was
 217 negligent by speeding through a red light without looking where he
 218 was going. Then the plaintiff decides that there really is not any
 219 evidence to support the red-light claim. Rule 26(e)(1) may supply
 220 the answer – the plaintiff has "learned" that the response is
 221 incorrect, and must supplement the answer to correct it. So too if
 222 the plaintiff refused to admit that the light was green for the
 223 defendant, and later decides not to contest the point. Still, it
 224 is important to think about the various modes for asserting claims
 225 or defenses while drafting a rule designed to encourage formal
 226 notice of abandonment.

227 **Nationally Uniform Exemptions: Rule 16(b)**

228 Rule 16(b) provides that scheduling orders are not required
 229 "in categories of actions exempted by local rule." This bow to
 230 local practices may have been important when the rule was adopted
 231 in 1983, a time when active case management was less familiar than
 232 it is today. A survey of the local rules was made in developing
 233 the 2000 amendments that, in Rule 26(a)(1)(B), added exemptions
 234 that excuse nine categories of proceedings from the initial
 235 disclosure requirements. Cases exempted from initial disclosure
 236 are further exempted from the Rule 26(f) conference and from the
 237 Rule 26(d) discovery moratorium, which is geared to the 26(f)
 238 conference. The FJC reported at the time that the exempted
 239 categories accounted for 30% of the federal docket at the time.

240 It may be time to substitute a uniform set of exemptions from

241 Rule 16(b) for the present reliance on local rules. There are
 242 obvious advantages in integrating exemption from the scheduling
 243 order requirement with the exemptions from initial disclosure,
 244 parties' planning conference, and discovery moratorium. The main
 245 question may be location: should the list remain where it has been
 246 for several years, relying on incorporation by cross-reference in
 247 Rule 16(b)? That may be the best approach. To be sure, there is
 248 an aesthetic attraction to placing the list in Rule 16(b), so all
 249 cross-references are backward. But several counters appear. The
 250 first is familiarity – people are accustomed to the present system.
 251 Changing Rule 16(b) to adopt a cross-reference is simple, and
 252 avoids amending Rules 26(a)(1)(B), (d), and (f) to cross-refer to
 253 Rule 16(b). And little harm is done – indeed some good may come of
 254 it – if a court inadvertently enters a scheduling order where none
 255 is required. If pursued, the change would look like this:

256 (b) SCHEDULING.

257 (1) *Scheduling Order.* Except in a proceeding exempted
 258 from initial disclosure under Rule 26(a)(1)(B)
 259 categories of actions exempted by local rule, the
 260 district judge – or a magistrate judge when
 261 authorized by local rule – must issue a scheduling
 262 order: * * *

263 The alternative of listing the exemptions in Rule 16(b) could
 264 be accomplished by adding a new paragraph, as either a new (4)
 265 before present (4) on modifying a schedule, or as a new (5) at the
 266 end of the rule. This illustration includes a redundant cross-
 267 reference in (b)(1) to reflect the familiar concern that efficient
 268 drafting too often falls before the sins of sloppy reading:

269 (b) SCHEDULING.

270 (1) *Scheduling Order.* Except in a proceeding exempted
 271 by Rule 16(b)(5), the district judge * * *

272 (5) *Proceedings Exempt from Mandatory Scheduling Order.*
 273 The following proceedings are exempt from Rule
 274 16(b)(1)::

- 275 (A) an action for review on an administrative
 276 record;
 277 (B) a forfeiture action in rem arising from a
 278 federal statute;
 279 (C) a petition for habeas corpus or any other
 280 proceeding to challenge a criminal conviction
 281 or sentence;
 282 (D) an action brought without an attorney by a
 283 person in the custody of the United States, a
 284 state, or a state subdivision;
 285 (E) an action to enforce or quash an administrative
 286 summons or subpoena;
 287 (F) an action by the United States to recover
 288 benefit payments;
 289 (G) an action by the United States to collect on a

290 student loan guaranteed by the United States;
291 (H) a proceeding ancillary to a proceeding in
292 another court; and
293 (I) an action to enforce an arbitration award.

294 If desired, Rule 26(a)(1)(B) could be deleted, amending Rule
295 26(a)(1)(A):

296 **(A) In General.** Except ~~as~~ in a proceeding exempted
297 from a mandatory scheduling order by Rule
298 16(b)(5) by Rule 26(a)(1)(B) or as otherwise
299 stipulated or ordered by the court, a party
300 must * * *

301 Rules 26(d)(1) and (f)(1) would be amended to substitute Rule
302 16(b)(5) for Rule 26(a)(1)(B) in the cross-references.

303

Initial Disclosures

304 Conference reactions to Rule 26(a)(1) initial disclosures can
305 be roughly described. Many participants thought the practice
306 innocuous – it does not accomplish much, but does not impose great
307 burdens. Some believe that any burden is too great, since so
308 little is accomplished; given the limited nature of the
309 disclosures, discovery is not reduced. And there is always the
310 risk that an absent-minded failure to disclose will lead to
311 exclusion of a witness. Still others believe that there is a real
312 opportunity for good if the disclosure requirement is expanded back
313 to resemble the form that was reflected in the rules from 1993 to
314 2000. They point out that the scope of initial disclosures was
315 reduced only as a compromise to help win approval of the amendment
316 that deleted the opportunity to opt out of initial disclosure
317 requirements by local rule.

318

(Do we want to pursue this further?)

Proportionality: Rule 26(b)(1)

319

320 Both at the Duke Conference and otherwise, laments are often
 321 heard that although discovery in most cases is conducted in
 322 reasonable proportion to the nature of the case, discovery runs out
 323 of control in an important fraction of all cases. The rules
 324 provide for this. Rule 26(b)(2) is the most explicit provision,
 325 and also the most general. Rule 26(b)(2)(C) says that "On motion
 326 or on its own, the court must limit the frequency or extent of
 327 discovery otherwise allowed * * * if it determines * * * that the
 328 burden or expense outweigh the likely benefit." Rule 26(c)
 329 provides for orders to protect against "annoyance, embarrassment,
 330 oppression, or undue burden or expense." Rule 26(g)(1)(B)(iii)
 331 provides that signing a discovery request, response, or objection
 332 certifies that it is "neither unreasonable nor unduly burdensome or
 333 expensive," considering factors that parallel Rule 26(b)(2)(C).
 334 Rule 26(b)(1), after describing the general scope of discovery,
 335 concludes: "All discovery is subject to the limitations imposed by
 336 Rule 26(b)(2)(C)." This sentence was adopted as a deliberate
 337 redundancy, and preserved in the Style Project despite valiant
 338 efforts by the style consultants to delete it. Rules 30, 31, 33,
 339 and 34 expressly incorporate Rule 26(b)(2).

340 The question is whether still greater prominence should be
 341 accorded the proportionality limit, hoping that somehow one more
 342 rule behest to behave reasonably will revive a faltering principle.
 343 There is ample reason to doubt the efficacy of revising or adding
 344 to concepts that already are belabored in deliberately redundant
 345 rule text. And there is always a risk that any variation in rule
 346 language will provoke arguments – even successful arguments – that
 347 the meaning has changed.

348 Perhaps the most obvious strategy would be to move
 349 proportionality into a more prominent place in Rule 26(b)(1). That
 350 could be done in many ways. The simple cross-reference could be
 351 moved up, perhaps to the first sentence:

352 Unless otherwise limited by court order, and subject to
 353 [the limitations imposed by] Rule 26(b)(2)(C), the scope
 354 of discovery is as follows:

355 This approach is essentially a style change. That reduces the risk
 356 of unintended consequences. It also may reduce the chance of
 357 producing the intended consequences.

358 Much the same thing could be done in a slightly different
 359 style form, and with the same reservations:

360 Unless otherwise limited by court order, the scope of
 361 discovery is as follows: Parties may obtain discovery,
 362 within the limitations imposed by Rule 26(b)(2)(C),
 363 regarding any nonprivileged matter that is relevant to
 364 any party's claim or defense * * *

365 The word "proportionality" could be introduced, perhaps
 366 standing alone:

367 Parties may obtain discovery, proportional to the
 368 reasonable needs of the case, regarding any nonprivileged
 369 matter that is relevant to any party's claim or defense
 370 * * *

371 This version is at least consistent with retaining the cross-
 372 reference to Rule 26(b)(2)(C) at the end of (b)(1).

373 "Proportionality" also could be added to the text of Rule
 374 26(b)(2)(C)(iii):

375 The burden or expense of the proposed discovery outweighs
 376 its likely benefit and is not proportional to the
 377 reasonable needs of the case, ~~considering the needs of~~
 378 ~~the case,~~ the amount in controversy, * * *

379 If 26(b)(2)(C)(iii) were revised this way, it likely would be
 380 desirable to make a parallel change in Rule 26(g)(1)(B)(iii), so
 381 that signing a discovery request, objection, or response certifies
 382 that it is

383 proportional to the reasonable needs of the case, and is
 384 neither unreasonable nor unduly burdensome or expensive,
 385 ~~considering the reasonable needs of the case,~~ prior
 386 discovery in the case, the amount in controversy, and the
 387 importance of the issues at stake in the action.¹⁹

388 **Proportionality: Rule 1**

389 All of these approaches focus on the need for proportionality
 390 in discovery. That is the apparent focus of concern. It would be
 391 possible to generalize to address other behavior that some
 392 litigants lament as tactics in a war of attrition. Ill-founded
 393 motions to dismiss – whether for failure to state a claim or any
 394 other Rule 12(b) ground, motions for summary judgment, or other
 395 delaying tactics are examples. But it is questionable whether a
 396 general direction to engage only in tactics reasonably proportional
 397 to the needs of the case would accomplish much. Rule 11 already
 398 governs unreasonable motion practice, and there is little outcry
 399 for changing the standards defined by Rule 11.²⁰ And there is
 400 always the risk that the ploy of adding an open-ended duty to

¹⁹ Should "the parties' resources" or "and the importance of the discovery in resolving the issues" be added to complete the parallel to (b)(2)(B)(iii)?

²⁰ Nor is there any sense that the 1993 amendments softening the role of sanctions should be revisited, despite the continuing concern reflected in proposed legislation currently captioned as the Lawsuit Abuse Reduction Act.

401 cooperate will invite its own defeat by encouraging tactical
402 motions, repeating the sorry history of the 1983 Rule 11
403 amendments. But if something aspirational were intended,
404 proportionality could be added to Rule 1. Rule 1 now addresses the
405 courts, but could be amended to include the parties. Including the
406 parties has been suggested as a means of introducing a duty to
407 cooperate.

408 An illustration of a Rule 1 approach can be built out of the
409 ACTL/IAALS pilot project rules:

410 * * * [These rules] should be construed, and
411 administered, and employed by the court and parties to
412 secure the just, speedy, and inexpensive²¹ determination
413 of every action and proceeding[, and the parties should
414 cooperate to achieve these ends].²²

415 or:

416 * * * [These rules] should be construed and administered
417 by the court to achieve the just, speedy, and inexpensive
418 determination of every action and proceeding. The
419 parties should cooperate to achieve these ends.

420 There is something to be said for a purely aspirational rule.
421 But extending it to the parties – and thus to counsel – may be an
422 invitation to sanctions, beginning with admonishments from the
423 bench. Moving beyond that to more severe consequences should be
424 approached with real caution.

²¹ Here the ACTL/IAALS proposal would ratchet down the expectations of Rule 1: "~~speedy, and inexpensive~~ timely, efficient, and cost-effective determination * * *."

²² The ACTL/IAALS version is much longer. The court and parties are directed to "assure that the process and 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."

RLM adds a healthy note of skepticism. Does a duty to cooperate include some obligation to sacrifice procedural opportunities that are provided by the Rules? How much sacrifice? Is the obligation to forgo available procedures deepened if an adversary forgoes many opportunities, and defeated if an adversary indulges scorched-earth tactics? Is it conceivable that an open-ended rule could be read to impose an obligation to settle on reasonable terms – that is, terms considered reasonable by the court?

Cost Shifting (Discovery only)

425

426 Rule 26(c) authorizes "an order to protect a party or person
427 from annoyance, embarrassment, oppression, or undue burden or
428 expense, including one or more of the following: * * *." The list
429 of examples does not explicitly include cost shifting. Paragraph
430 (B) covers an order "specifying terms, including time and place,
431 for the disclosure or discovery." "Terms" could easily include
432 cost shifting, but may be restrained by its association with the
433 narrow examples of time and place. More importantly, "including"
434 does not exclude – the style convention treats examples as only
435 illustrations of a broader power. Rule 26(b)(2)(B), indeed, covers
436 the idea of cost shifting when the court orders discovery of
437 electronically stored information that is not reasonably accessible
438 by saying simply that "[t]he court may specify conditions for the
439 discovery." The authority to protect against undue expense
440 includes authority to deny discovery unless the requesting party
441 pays part or all of the costs of responding.

442 Notwithstanding the conclusion that Rule 26(c) now authorizes
443 cost shifting in discovery, this authority is not prominent on the
444 face of the rules. Nor does it figure prominently in reported
445 cases. If it is desirable to encourage greater use of cost
446 shifting, a more explicit provision could be useful. Rule
447 26(b)(2)(B) recognizes cost shifting for discovery of
448 electronically stored information that is not reasonably accessible
449 from concern that Rule 26(c) might not be equal to the task. So it
450 may also be desirable to supplement Rule 26(c) with a more express
451 provision.

452 The suggestion that more explicit provisions would advance the
453 use of cost shifting does not answer the question whether advance
454 is desirable. Cost shifting will be highly controversial, given
455 the still strong tradition that a party who has discoverable
456 information should bear the cost of retrieving it. (Rule
457 45(c)(2)(B)(iii) protects a nonparty against significant expense in
458 responding to a subpoena to produce.) Becoming accustomed to cost
459 shifting in the realm of electronically stored information may not
460 reduce the controversy, in part because the fear of computer-based
461 discovery makes it easier to appreciate the risks of overreaching
462 discovery requests.

463 If a cost-shifting order enters, it is important to consider
464 the consequences if the party ordered to bear an adversary's
465 response costs prevails on the merits. Prevailing on the merits
466 does not of itself mean that the discovery was justified. It may
467 be that none of the discovered information was used, or even
468 usable. Or it may have had only marginal value. On the other
469 hand, the fact that discovery materials were not used, whether to
470 support motions, summary judgment, or at trial, does not mean the
471 discovery was unjustified. The materials may have had value for
472 many pretrial purposes, and may have been winnowed out only to
473 focus on the most compelling materials. Or the discovered

474 information may have led a party to abandon a position that
 475 otherwise would have been pursued further, at additional cost. The
 476 most likely outcome is discretion to excuse part or all of the
 477 costs initially shifted to the requesting party. Rather than
 478 characterize the shifted costs as "costs" for Rule 54(d), this
 479 discretion can be directly built into the cost-shifting rule. The
 480 discretion could easily defer actual payment of the shifted costs
 481 to a time well after the discovery is provided and a bill is
 482 presented.

483 A conservative approach might do no more than add an express
 484 reference to cost shifting in present Rule 26(c)(1)(B):

485 (1) *In General.* * * * The court may, for good cause, issue an
 486 order to protect a party or person from annoyance,
 487 embarrassment, oppression, or undue burden or expense,
 488 including one or more of the following: * * *

489 (B) specifying terms, including time and place or the
 490 allocation of expenses, for the disclosure or
 491 discovery; * * *

492 A more elaborate approach might add a new paragraph I:

493 (I) requiring that the requesting party bear part or all
 494 of the expenses reasonably incurred in responding
 495 [to a discovery request],²³ including terms for
 496 payment and subject to reconsideration [at any time
 497 before final judgment].²⁴

²³ One reason to add the language in brackets is to avoid any confusion as to disclosure; Rule 26(c) seems haphazard in alternating between "disclosure or discovery" and simply "discovery."

²⁴ The bracketed phrase is a place-keeper. Reconsideration may be appropriate even as the discovery continues – the yield of important information may justify reverting to the assumption that a party who has discoverable information must bear the costs of uncovering it and providing it. And the allocation of expenses may be strongly influenced by the outcome on the merits. Perhaps the deadline should extend beyond entry of final judgment – a Rule 59(e) motion to alter or amend the judgment might be appropriate. If so, it might help to include an express cross-reference.

RLM adds this question, by analogy to a division of opinions under Rule 11. Some courts impose sanctions for filing an action without reasonable inquiry, even though subsequent proceedings show support for the positions taken. Might a comparable approach be justified when the response to an unreasonable discovery request yields information that could properly be requested? Something may turn on an ex post diagnosis of the difficulty of reaching the responsive information by a better-focused request, including an attempt to guess whether a better-focused request could have been

498 Still greater elaboration is possible, attempting to list
499 factors that bear on a cost-bearing order. A relatively safe
500 approach to that would be to build cost-bearing into Rule
501 26(b)(2)(C), adopting all of the factors in that rule:

502 (C) *When Required.* On motion or on its own, the court
503 must limit the frequency or extent of discovery
504 otherwise allowed by these rules or by local rule —
505 or require the requesting party to bear all or part
506 of the expenses reasonably incurred in responding —
507 if it determines that: * * *

framed in terms that would defeat a narrowing interpretation and
result in failure to produce the proper material.

508 **Discovery Stay Pending Motion To Dismiss**

509 Competing forces tug hard at any proposal to stay discovery
510 pending disposition of a motion to dismiss. Much of the attention
511 focuses on a motion to dismiss for failure to state a claim. A
512 stay seems attractive because it may save all the burdens and
513 expense of discovery if the entire action is dismissed, and may
514 reduce the burdens and expense if discrete parts of the action are
515 dismissed. The stay would serve the concerns that led to the
516 emphasis on pleading specific facts in the *Twombly* and *Iqbal*
517 decisions. It would specifically implement the statement in the
518 *Iqbal* opinion that the purposes of affording qualified immunity to
519 public officials include protection against the burdens of
520 discovery, so that there is no right to discovery when the
521 complaint fails to state a claim.

522 A discovery stay, on the other hand, would exacerbate the
523 concerns prompted by those who are wary of the *Twombly* and *Iqbal*
524 pleading standards. Particular concern is expressed over cases of
525 "asymmetric" information: the plaintiff needs to plead facts that
526 are available only from the defendant. The agenda materials that
527 carry forward the Committee's pleading work include several
528 approaches to allow discovery in aid of pleading. Discovery might
529 be allowed before an action is commenced, as some states permit.
530 Or a plaintiff might be allowed to file a complaint that identifies
531 facts that cannot be pleaded without an opportunity for discovery,
532 requesting discovery on those facts to support an amended
533 complaint. Or a defendant might be required to identify the facts
534 it believes would be required to frame a sufficient complaint,
535 leading to a right of discovery into those facts to support an
536 amended complaint. Still other variations are possible.

537 A further complication arises when a motion to dismiss
538 addresses only part of a complaint, or when there is a strong
539 prospect that at least part of the complaint will survive a motion
540 to dismiss all claims. Discovery is likely to remain available,
541 and there may be good reasons to get on with discovery in addition
542 to the possibility that discovery will enable more detailed
543 pleading.

544 The argument for a discovery stay diminishes rapidly, although
545 variably, when a motion to dismiss or strike is addressed to a
546 counterclaim, crossclaim, or third-party claim. So too if one
547 defendant moves to dismiss, while others do not. Discovery is
548 likely to proceed, and it may well involve present parties whether
549 they remain as parties or become subject to Rule 45 nonparty
550 discovery.

551 These competing concerns suggest that it would not be wise to
552 draft a rule that automatically stays discovery pending disposition
553 of any motion to dismiss, for a more definite statement, or to
554 strike. At most, a rule might emphasize the court's present ample
555 discretion to stay discovery.

556 Rather than attempt to draft a detailed rule that identifies
 557 the range of considerations to account for in deciding on a
 558 discovery stay, this draft illustrates an open-ended approach. A
 559 mandatory stay alternative is included in brackets, but without
 560 enthusiasm. The provision might fit best as a new Rule 26(d)(3),
 561 following the provisions on the discovery moratorium (as it might
 562 be modified) and sequence:

563 **(d) Timing, and Sequence, and Stay of Discovery.**

564 * * *

565 (3) *Stay or Limit Pending Motion.* The court may [must,
 566 unless it orders otherwise {for good cause}] stay
 567 or limit discovery pending disposition of a motion
 568 under Rule 12(b), (c), (e), or (f).²⁵

569 The Committee Note would discuss the factors that bear on the
 570 decision to stay or limit discovery.

571 The draft includes all motions under Rule 12(b), although they
 572 have not been prominent in the discussion. Discovery may not be
 573 waste effort if an action is eventually dismissed for lack of
 574 subject-matter jurisdiction, personal jurisdiction, or other
 575 matters that do not preclude a new action on the same claim. It is
 576 easy to draft a rule that applies only to a 12(b)(6) motion and the
 577 parallel uses of (c), (e), and (f).

578 The opportunity for discovery built into Rule 56(d) provides
 579 strong reason for not adding Rule 56 to the list. It also may be
 580 an independent source of caution. More than twenty years ago the
 581 advisory committee seriously considered a proposal to abolish Rule
 582 12(b)(6), folding it into a combined procedure under Rule 56 that
 583 would address both the sufficiency of the legal theory underlying
 584 the claim and the sufficiency of the evidence to support the facts
 585 required to invoke the legal theory. That proposal extended the
 586 Rule 56(d) provision for discovery to all aspects of the motion,
 587 including the equivalent of a 12(b)(6) motion.

²⁵ RLM emphasizes the observation that discovery is often sought to support decision of Rule 12(b) motions apart from 12(b)(6). If "may stay" is used, there should be no problem. Discovery of facts bearing on personal jurisdiction, for example, is a familiar practice that is essential to rule on the motion. "Must stay" might present problems that could not comfortably be left to comment in a Committee Note.

588 **Limiting the Number of Discovery Requests**

589 Many studies over the years, many of them by the FJC, show
 590 that most actions in the federal courts include only a modest level
 591 of discovery. Only a relatively small fraction of cases involve
 592 extensive discovery, and in some of those cases extensive discovery
 593 may be reasonably proportional to the needs of the case. But the
 594 absolute number of cases with extensive discovery is high, and
 595 there are strong reasons to fear that many of them involve
 596 unreasonable discovery requests. Many reasons may account for
 597 unreasonable discovery behavior – ineptitude, fear of claims of
 598 professional incompetence, strategic imposition, profit from hourly
 599 billing, and other inglorious motives. It even is possible that
 600 the presumptive limits now built into Rules 30, 31, and 33 operate
 601 for some lawyers as a target, not a ceiling.

602 Various proposals have been made to tighten the presumptive
 603 limits presently established in Rules 30, 31, and 33, and to add
 604 new presumptive limits to Rule 34 document requests and Rule 36
 605 requests to admit. The actual numbers chosen for any rule will be
 606 in part arbitrary, but they can reflect actual experience with the
 607 needs of most cases. Setting limits at a margin above the
 608 discovery actually conducted in most cases may function well,
 609 reducing unwarranted discovery but leaving appropriate discovery
 610 available by agreement of the parties or court order.

611 Illustration is easy for Rules 30(a)(2)(A)(i) and 30(d)(1):

612 **(a) When a Deposition May Be Taken. * * ***

613 (2) *With Leave.* A party must obtain leave of court,
 614 and the court must grant leave to the extent
 615 consistent with Rule 26(b)(2):

616 (A) if the parties have not stipulated to the
 617 deposition and:

618 (i) the deposition would result in more than
 619 ~~10~~ 5 depositions being taken under this
 620 rule or Rule 31 or by the plaintiffs, or
 621 by the defendants, or by the third-party
 622 defendants; * * *

623 **(d) Duration; Sanction; Motion to Terminate or Limit**

624 (1) *Duration.* Unless otherwise stipulated or ordered by
 625 the court, a deposition is limited to [~~one day of 7~~
 626 4 hours in a single day] [one day of ~~7~~ 4 hours].

627 A parallel change would be made in Rule 31(a)(2)(A)(i) as to
 628 the number of depositions. Rule 31 does not have a provision
 629 parallel to the "one day of 7 hours" provision in Rule 30(d)(1).

630 Rule 33(a)(1) is even simpler:

631 (1) Unless otherwise stipulated or ordered by the
 632 court, a party may serve on another party no more

633 than 25 15 interrogatories, including all discrete
634 subparts.

635 (This could be made more complicated by adding a limit for
636 multiparty cases – for example, no more than 15 addressed to any
637 single party, and no more than 30 in all. No one seems to have
638 suggested that. The complication is not likely to be worth the
639 effort.)

640 Things are not so simple for Rule 34. It may not be as easy
641 to apply a numerical limit on the number of requests; "including
642 all discrete subparts," as in Rule 33, may not work. This question
643 ties to the Rule 34(b)(1)(A) requirement that the request "must
644 describe with reasonable particularity each item or category of
645 items to be inspected." Counting the number of requests could
646 easily degenerate into a parallel fight over the reasonable
647 particularity of a category of items. But concern may be
648 overdrawn. Actual experience with scheduling orders that impose
649 numerical limits on the number of Rule 34 requests suggests that
650 parties can adjust to counting without any special difficulty. If
651 this approach is followed, the limit might be located in the first
652 lines of Rule 34(a):

653 (a) **In General.** A party may serve on any other party a no
654 more than [25] requests within the scope of Rule 26(b):

655 * * *

656 (3) Leave to serve additional requests may be
657 granted to the extent consistent with Rule
658 26(b)(2).

659 This form applies to all the various items that can be
660 requested – documents, electronically stored information, tangible
661 things, premises. It would be possible to draft a limit that
662 applies only to documents and electronically stored information,
663 the apparent subject of concern. But there is a manifest problem
664 in setting numerical limits. If a car is dismembered in an
665 accident, is it only one request to ask to inspect all remaining
666 parts? More importantly, what effect would numerical limits have
667 on the ways in which requests are framed? "All documents,
668 electronically stored information, and tangible things relevant to
669 the claims or defenses of any party?" Or, with court permission,
670 "relevant to the subject matter involved in this action"? Or at
671 least "all documents and electronically stored information relating
672 to the design of the 2008 model Huppmobile"?

673 The next complication is to integrate this limit with Rule 45.
674 If Rule 45 is not changed, a party could sidestep a Rule 34 limit
675 by simply serving a Rule 45 subpoena to produce rather than a Rule
676 34 request. This might be addressed in Rule 34 alone: "no more
677 than 25 requests under this rule or in Rule 45 subpoenas and within
678 the scope of Rule 26(b) * * *." That would leave nonparties
679 subject to more than 25 requests, however counted. Perhaps that is
680 tolerable because of the Rule 45(c)(2)(B)(ii) direction to protect

681 a nonparty against significant expense. Or an express limit might
682 be adopted, perhaps in Rule 45(c)(1):

683 (1) *Avoiding Undue Burden or Expense; Sanctions.* A
684 party or attorney responsible for issuing and
685 serving a subpoena must take reasonable steps to
686 avoid imposing undue burden or expense on a person
687 subject to the subpoena, and unless otherwise
688 stipulated or ordered by the court the subpoena may
689 command production and inspection of no more than
690 25 documents, categories of electronically stored
691 information,²⁶ tangible things, or premises
692 [described with reasonable particularity]. * * *

693 An alternative might be to put the limit in Rule 45(a)(1)(A),
694 subdividing present item (iii):

695 (A) *Requirements - In General.* Every subpoena
696 must: * * *
697 (iii) command each person to whom it is
698 directed to do the following attend and
699 testify at a specified time and place;
700 (iv) command each person to whom it is
701 directed to produce no more than 25
702 documents, categories of electronically
703 stored information, tangible things, or
704 premises [described with resonable
705 particularity]; and * * *

706 (The awkwardness of these alternatives might be reduced by reviving
707 the recently abandoned proposal to integrate the production
708 elements of Rule 45 into Rule 34, but that is not a likely option.)

709 Rule 36 requests to admit could be limited by a model that
710 conforms to Rule 33. Rule 36(a)(1) would begin:

711 (1) *Scope.* A party may serve on any other party a no
712 more than [25] requests to admit, including all
713 discrete subparts, for purposes of the pending
714 action only, the truth of any matters within the
715 scope of Rule 26(b)(1) relating to: * * *

716 That simple version lacks grace, and also lacks any provision
717 to change the number by agreement or court order. Adding that
718 wrinkle suggests that the limit might better be adopted as a new
719 paragraph, probably (2):

720 (2) Number. Unless otherwise stipulated or ordered by

²⁶ This obviously needs better drafting: a number of electronically stored information does not work. The alternatives will all be cumbersome at best. Time enough for that if the proposal advances further.

721 the court, a party may serve no more than 25
722 requests to admit on any other party, including all
723 discrete subparts [, and no more than 50 requests
724 to admit in all].

725 An all-encompassing limit to 25 requests may go too far with
726 respect to Rule 36(a)(1)(B) requests to admit the genuineness of
727 any described documents. Applying a numerical limit only to Rule
728 36(a)(1)(A) requests to admit the truth of facts, the application
729 of law to fact, or opinions about either, suggests different
730 drafting approaches. One that should not be ambiguous, but may
731 seem that way to some:

- 732 (1) *Scope.* A party may serve on any other party a
733 written request to admit, for purposes of the
734 pending action only, the truth of any matters
735 within the scope of Rule 26(b)(1) relating to:
736 (A) no more than 25 matters of facts, the
737 application of law to fact, or opinions about
738 either; and
739 (B) the genuineness of any described documents.

740 If there is a risk that hasty readers might extend the limit
741 from (A) to (B), cross-referencing might do the job, leaving all of
742 paragraph (1) as it is now and adding a new (2):

- 743 (2) *Number.* Unless otherwise stipulated or ordered by
744 the court, a party may serve no more than 25
745 requests to admit under Rule 36(a)(1)(A) on any
746 other party, including all discrete subparts.

747 **Rules 33 and 36: Contention Discovery**

748 Contention discovery was added to Rules 33 and 36 in 1970.
749 What has become Rule 33(a)(2) provides:

750 An interrogatory is not objectionable merely because it
751 asks for an opinion or contention that relates to fact or
752 the application of law to fact, but the court may order
753 that the interrogatory need not be answered until
754 designated discovery is complete, or until a pretrial
755 conference or some other time.

756 The 1970 Committee Note elaborated on the timing question:

757 Since interrogatories involving mixed questions of
758 law and fact may create disputes between the parties
759 which are best resolved after much or all of the other
760 discovery has been completed, the court is expressly
761 authorized to defer an answer. Likewise, the court may
762 delay determination until pretrial conference, if it
763 believes that the dispute is best resolved in the
764 presence of the judge.

765 Similarly, Rule 36(a)(1)(A) provides for requests to admit the
766 truth of "facts, the application of law to fact, or opinions about
767 either." The Committee Note is similar to the Rule 33 Note:

768 Requests for admission involving the application of
769 law to fact may create disputes between the parties which
770 are best resolved in the presence of the judge after much
771 or all of the other discovery has been completed. Power
772 is therefore expressly conferred upon the court to defer
773 decision until a pretrial conference is held or until a
774 designated time prior to trial. On the other hand, the
775 court should not automatically defer decision; in many
776 instances, the importance of the admission lies in
777 enabling the requesting party to avoid the burdensome
778 accumulation of proof prior to the pretrial conference.

779 It has been suggested that this open-ended approach to timing
780 should be tightened up by requiring court permission to submit
781 contention interrogatories or requests to admit before the close of
782 all other discovery. That would preserve the opportunity for early
783 contention discovery, but not permit it as freely as the present
784 rules.

785 The question is whether early contention discovery is so often
786 misused as to justify a change. An illustration of the potential
787 values of early contention discovery is provided by one of the
788 cases cited in the 1970 Committee Note to Rule 33. The FELA
789 plaintiff in *Zinsky v. New York Central R.R.*, 36 F.R.D. 680 (N.D.
790 Ohio 1964), alleged that at the time of his injury his duties were
791 in furtherance of interstate commerce. The railroad defendant

792 denied all allegations of the complaint. The plaintiff then served
 793 an interrogatory asking whether at the time of the accident, etc.
 794 There is a very real prospect that the denial of the commerce
 795 element was pro forma. Confronted with the interrogatory, there is
 796 a reasonable chance the railroad will admit the commerce element,
 797 putting that issue out of the case. Alternative forms of discovery
 798 aimed at showing that the New York Central really is engaged in
 799 commerce, at the nature of the plaintiff's duties in relation to
 800 the defendant's commerce, and so on, would impose substantial
 801 burdens, often serving little purpose.

802 As the Committee recognized in generating the 1970 amendments,
 803 the other side is equally clear. There may be no point in using
 804 contention discovery to supplement the pleadings until discovery is
 805 complete as to the issues underlying the contention discovery.
 806 Developing pleading practice may have a bearing – to the extent
 807 that fact pleading increases, there may be still better reason to
 808 defer the switch from pleading to discovery as a means of framing
 809 the parties' contentions.

810 Practical experience and judgment are called for. If early
 811 contention discovery is misused often enough to be a problem,
 812 either because it makes too much supervisory work for the courts or
 813 because the parties suffer through the battle without court
 814 intervention, it may be time to revise the rules.

815 One other difficulty must be noted. The 1970 Committee Note
 816 to Rule 33 observed: "Efforts to draw sharp lines between facts and
 817 opinions have invariably been unsuccessful * * *." The Note to
 818 Rule 36 was similar: "it is difficult as a practical matter to
 819 separate 'fact' from 'opinion' * * *." The Notes seem to assume
 820 that it is easier to separate law-application issues from fact or
 821 opinion, but that depends on clear analysis. Remember that
 822 "negligence" is treated as a question of fact to be decided by a
 823 jury, and to be reviewed for clear error when decided in a bench
 824 trial. The drafts that follow make no attempt to depart from the
 825 vocabulary adopted in 1970. They are offered without taking any
 826 position on the question whether it is better to leave the present
 827 rules unchanged, relying on specific case management to achieve
 828 proper timing in relation to the needs and opportunities presented
 829 by specific cases.

830 Revising Rule 33(a)(2) can be done directly, or it might be
 831 done in combination with Rule 33(b)(2) so as to avoid the need to
 832 resolve a seeming inconsistency.

833 **Rule 33(a)(2) Alone**

834 (2) *Scope.* * * * An interrogatory is not objectionable
 835 merely because it asks for an opinion or contention
 836 that relates to fact or the application of law to
 837 fact, but ~~the court may order that the~~
 838 interrogatory need not be answered until designated

839 [all other discovery is complete] [the close of
 840 discovery on the facts related to the opinion or
 841 contention] or until a pretrial conference or some
 842 other time designated by stipulation [under Rule
 843 29] or court order.

844 **Rules 33(a)(2), (b)(2) Together**

845 (a)(2) *Scope.* * * * An interrogatory is not
 846 objectionable merely because it asks for an opinion
 847 or contention that relates to fact or the
 848 application of law to fact, but the interrogatory
 849 need not be answered until the time set under Rule
 850 33(b)(2) until designated discovery is complete, or
 851 until a pretrial conference or some other time.

852 (b)(2) *Time to Respond.* The responding party must
 853 serve its answers and any objections within 30 days
 854 after being served with the interrogatories, but an
 855 answer to an interrogatory asking for an opinion or
 856 contention relating to fact or the application of
 857 law to fact need not be answered until [all other
 858 discovery is complete][the close of discovery on
 859 the facts related to the opinion or contention]. A
 860 shorter or longer time may be stipulated to under
 861 Rule 29 or be ordered by the court.

862 **Rule 36**

863 Rule 36 time provisions make for more difficult drafting. A
 864 temporary illustration may suffice. Rule 36(a)(1) is amended to
 865 enable cross-reference in (a)(3):

866 (a)(1) *Scope.* A party may serve on any other party a
 867 written request to admit, for purposes of the
 868 pending action only, the truth of any matters
 869 within the scope of Rule 26(b)(2) relating to:
 870 (A) facts;
 871 (B) the application of law to fact, or opinions
 872 about facts or the application of law to fact
 873 either; * * *

874 (a)(3) *Time to Respond; Effect of Not Responding.* A
 875 matter is admitted unless, within 30 days after
 876 being served – or for a request under Rule
 877 36(a)(1)(B) {within 30 days} after [all other
 878 discovery is complete][the close of discovery on
 879 the facts relevant to the request] – the party to
 880 whom the request is directed serves on the
 881 requesting party a written answer or objection
 882 addressed to the matter and signed by the party or
 883 its attorney. A shorter or longer time for
 884 responding may be stipulated to under Rule 29 or be

885

ordered by the court.

886 **Discovery Objections and Responses**

887 The common laments about excessive discovery requests are
 888 occasionally met by protests that discovery responses often are
 889 incomplete, evasive, dilatory, and otherwise out of keeping with
 890 the purposes of the rules. Several proposals have been made to
 891 address these problems.

892 **Rule 34: Specific Objections**

893 Two proposals have been advanced to improve the quality of
 894 discovery objections. The first would incorporate in Rule 34 the
 895 Rule 33 requirement that objections be stated with specificity.
 896 The second would require a statement whether information has been
 897 withheld on the basis of the objection.

898 Rule 33(b)(4) begins: "The grounds for objecting to an
 899 interrogatory must be stated with specificity." Two counterparts
 900 appear in Rule 34(b)(2). (B) says that the response to a request
 901 to produce must state that inspection will be permitted "or state
 902 an objection to the request, including the reasons." (C) says: "An
 903 objection to part of a request must specify the part and permit
 904 inspection of the rest." "[I]ncluding the reasons" in Rule
 905 34(b)(2)(B) may not convey as clearly as should be a requirement
 906 that the reasons "be stated with specificity." If the objection
 907 rests on privilege, Rule 26(b)(5)(A) should control. But for other
 908 objections, it is difficult to understand why specificity is not as
 909 important for documents, tangible things, and entry on premises as
 910 it is for answering an interrogatory. Even if the objection is a
 911 lack of "possession, custody, or control," the range of possible
 912 grounds is wide.

913 It would be easy to draft Rule 34(b)(2)(B) to parallel Rule
 914 33(b)(4):

915 **(B) Responding to Each Item.** For each item or category,
 916 the response must either state that inspection and
 917 related activities will be permitted as requested
 918 or state [the grounds for objecting {to the
 919 request} with specificity] [an objection to the
 920 request, including the specific reasons.]

921 **Rule 34: State What is Withheld**

922 Many Conference participants, both at the time of the
 923 Conference and since, have observed that responding parties often
 924 begin a response with a boilerplate list of general objections, and
 925 often repeat the same objections in responding to each individual
 926 request. At the same time, they produce documents in a way that
 927 leaves the requesting party guessing whether responsive documents
 928 have been withheld under cover of the general objections. (The
 929 model Rule 16(b) scheduling order in the materials provided by the
 930 panel on Eastern District of Virginia practices reflects a similar

931 concern: " * * * general objections may not be asserted to
 932 discovery demands. Where specific objections are asserted to a
 933 demand, the answer or response must not be ambiguous as to what if
 934 anything is being withheld in reliance on the objection.)

935 This problem might be addressed by adding a new sentence to
 936 Rule 34(b)(2)(C):

937 (C) *Objections.* An objection to part of a request must
 938 specify the part and permit inspection of the rest. An
 939 objection [to a request or part of a request] must state
 940 whether any responsive [materials] {documents,
 941 electronically stored information, or tangible things}
 942 are being withheld [under] {on the basis of} the
 943 objection.

944 **Rules 34 and 37: Failure to Produce**

945 Rule 34 is somewhat eccentric in referring at times to stating
 946 that inspection will be permitted, and at other times to
 947 "producing" requested information. Common practice is to produce
 948 a document or electronically stored information, rather than make
 949 it available for inspection. Two amendments have been proposed to
 950 clarify the role of actual production, one in Rule 34, the other in
 951 Rule 37.

952 Rule 34(b)(2)(B) would be expanded by adding a new sentence:

953 (B) *Responding to Each Item.* For each item or category, the
 954 response must either state that inspection and related
 955 activities will be permitted as requested or state an
 956 objection to the request, including the reasons.²⁷ If
 957 the responding party elects to produce copies of
 958 documents or electronically stored information [in lieu
 959 of permitting] {rather than permit} inspection, the
 960 response must state that copies will be produced, and the
 961 production must be completed no later than the date for
 962 inspection stated in the request.²⁸

963 Rule 37(a)(3)(B)(iv) would be amended to provide that a party
 964 seeking discovery may move for an order compelling an answer if:

965 (iv) a party fails to produce documents or fails to
 966 respond that inspection will be permitted – or

²⁷ This sentence would be amended to include a specificity requirement under the proposal described earlier in this section.

²⁸ Requiring complete production by the time stated for inspection may give a slight advantage to the requesting party – work with the produced copies often will be easier than inspection. But that seems a quibble.

967 fails to permit inspection – as requested under
968 Rule 34.

969 **Rule 26(g): Evasive Responses**

970 Rule 26(g) provides the counterpart of Rule 11 for discovery.
971 Signing a discovery request, response, or objection certifies that
972 it is consistent with the Rules. It also certifies that a request,
973 response, or objection is not interposed for any improper purpose,
974 such as to harass, cause unnecessary delay, or needlessly increase
975 the cost of litigation. Those strictures might seem to reach
976 evasive responses. And it has been protested that adding an
977 explicit prohibition of evasive responses will simply provide one
978 more occasion to litigate about discovery practices, not about the
979 merits. Nonetheless, it may be useful to add an explicit
980 prohibition to 26(b)(1)(B)(i). By signing, an attorney or party
981 certifies that the request, response, or objection is:

982 (i) not evasive, consistent with these rules and
983 warranted * * *.

TAB 9C

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**Duke Conference Subcommittee
Draft Meeting Notes, January 31, 2012**

The Duke Conference Subcommittee met by conference call on January 31, 2012. Participants included Judge John G. Koeltl, chair, and Subcommittee members Judge Paul W. Grimm, Peter D. Keisler, Esq., and Judge Gene E.K. Pratter. Judge David G. Campbell, chair of the Advisory Committee, also participated. Professors Edward H. Cooper and Richard L. Marcus participated as Reporters. Judge Jeremy Fogel represented the Federal Judicial Center. The Administrative Office was represented by Andrea Kuperman, Chief Counsel to the Rules Committees, Benjamin Robinson, Counsel, and Julie Wilson, Esq.

Judge Koeltl opened the call by suggesting that the drafts presented to illustrate possible approaches to eleven different rules topics provide a clear focus for discussing possible amendments. The purpose of this meeting is to determine whether some of these topics, which have survived a long process of filtering out other proposals, might be dropped from the active agenda. In addressing that question, it may be useful to suspend skepticism about any particular topic for a while longer. It may be that a change that seems inconsequential in itself will prove desirable as part of a larger, integrated package.

Discovery Before Rule 26(f) Conference

The first topic in the proposals asks whether it would be useful to discard the Rule 26(d) moratorium that, with some exceptions, bars discovery before the parties have conferred as required by Rule 26(f). Allowing discovery requests to be made before the conference, while delaying responses, could provide a useful focus for the conference. The work of preparing the requests and considering other parties' requests could give all parties a more realistic sense of what discovery is needed. Alternative versions are presented. One would allow any party to make discovery requests at any time, beginning with filing the complaint. Under this approach the plaintiff could serve discovery requests with the complaint and the defendant might well be able to serve requests before answering. The other imposes a waiting period, set at 20 days for purposes of illustration. The waiting period would reflect the time to respond to the complaint.

The drafts include separate time limits for responding to early discovery requests. These time limits could be adopted for either the no-delay or the delay models. As drafted, the sketches would set the times to respond to Rule 33, 34, and 36 requests at the later of 30 days after service or after a scheduling order is entered. Depositions could begin 14 days after a scheduling order is entered. Setting the time for a nonparty to respond to a Rule 45 subpoena to produce presents more complicated questions, not yet reduced to illustrative draft. The idea is that the benefits of propounding requests before the Rule 26(f) conference do not depend

on accelerated responses. To the contrary, exacting responses under existing time frames could impose undue burdens during the early phases of the case, and undermine the purposes of the 26(f) conference.

Discussion began with an account of experience under Pennsylvania state-court practice that allowed discovery requests to be served with the complaint. "It was a nightmare." The parties addressed by the requests are forced to seek relief from schedules and deadlines. "Newly retained defense counsel need" time to learn about the case.

Another participant asked what behaviors do we want to encourage? The hope is to facilitate Rule 26(f) discussions. "We do not want to encourage a barrage of initial shock and awe requests." We should encourage a period in which parties sit down and discuss what should be done about preservation, cooperation, and the like. There is a risk that discovery under Rules 33 and 34 before the 26(f) conference and the court's involvement through Rule 16(b) will encourage "fire, ready, aim" discovery behavior. Lawyers have not been heard to complain that they cannot make progress in Rule 26(f) conferences for want of actual discovery requests to discuss. These proposals may elicit more behavior of the sort we want to avoid than the kind we wish to encourage.

Rule 26(d) was adopted to get the benefits of the 26(f) conference before beginning discovery. Has that proved wrong?

Perhaps it is wrong. Having specific discovery requests available to discuss at the Rule 26(f) conference can focus the conference, and then the judge.

A different question asked whether there is any incentive to frame Rule 33 interrogatories if they will not be answered for three or four months. Would changing the rules actually lead to early requests? One suggestion was that allowing early service would make it more difficult to request more time to respond.

The earlier doubts were repeated. Early discovery will encourage shotgun requests served with the complaint. Defendants will respond with knee-jerk demands for relief. That was the experience in Pennsylvania.

Antipathy was expressed for the sketch that would allow a plaintiff to serve discovery requests with the complaint. But pre-26(f) conference requests might work better if there is a waiting period, after which all parties could serve requests. The delay might be geared to service on, or appearance by, a defendant. The time to answer would still be deferred.

As it is, many lawyers – even good lawyers – are not aware of

the Rule 26(d) moratorium. A frequent visible manifestation occurs when a lawyer requests a stay of discovery pending disposition of a Rule 12(b)(6) motion even though there has been no Rule 26(f) conference and Rule 26(d) itself bars discovery.

One possible approach would be to allow discovery to begin 45 days from the time of filing the complaint, or 20 days after appearance by a defendant, whichever is later. We do not want cases to languish, nor to be controlled by lazy defendants. On the other hand, carpet bombing at the outset is bad.

The question was reframed: Should we let one side – usually the plaintiff – identify early on what it would like to accomplish, so the defendant can look at it and help frame a joint discovery plan? The device might be a "notice of proposed discovery" that does not require specific interrogatories, requests to produce, or the like. The notice might resemble an outline of the initial discovery plan, identifying such topics as "who made the decision to terminate the plaintiff's franchise agreement," "who are the people who have knowledge of the decision," and so on. This would help set the stage for the Rule 26(f) conference. Then, if big issues remain after the conference, they can be worked out with the judge. Rather than amending Rule 26(d), this approach might be implemented by allowing (or requiring) service of the notice of proposed discovery before the 26(f) conference. That should be a relatively straight-forward addition to Rule 26(f). (This suggestion was repeated later in the meeting. But there was concern that failure to serve the notice would lead to disputes about sanctions or other consequences. Perhaps the notice should be made clearly optional. It was noted that nothing will work unless judges enforce it.)

A judge stated that his initial order requires the parties to address the subjects of discovery in their Rule 26(f) report. The usual response is a brief single paragraph. The conference works. And pre-conference discovery will advance things only if parties actually take up the opportunity to serve before the conference, if what they do illuminates discussion at the conference in ways that make up for some deficiencies that occur now. Another participant recalled the earlier warnings that pre-conference requests might be framed in deliberately overbroad terms, as many people believe now occurs with post-conference requests. It is lamented that overbroad requests are made deliberately, in part from anticipation that the responses will be overbroad objections, looking toward serious negotiations that still may lead to overbroad discovery.

Judge Koeltl suggested that the discussion had revealed opposition to the version that would allow service of discovery requests at any time after the filing of the complaint. There seems to be some support for allowing pre-Rule 26(f) conference requests after a waiting period. Rather than a flat period of

days, it might be along the suggested lines of 45 days after filing, or 20 days after appearance by a defendant, whichever is later. It was noted that the Sedona Conference is working on proposals that would address these questions.

It was concluded that the agenda should carry forward with pre-conference discovery only in the form that imposes some sort of waiting period.

Initial Disclosure

The discussion of early discovery led to the question whether the Subcommittee has abandoned consideration of Rule 26(a)(1) initial disclosures. Discussion at the Duke Conference suggested that many lawyers find the practice innocuous – it does little good, but little harm. But there were deeper undertones. The discussion suggested that present initial disclosures do little good because discovery must be addressed to all of the same things that would be addressed if the disclosures had not been made. At the same time, initial disclosures might become useful again if the rule were strengthened. The broader requirements adopted in 1993 were abandoned in 2000 for reasons that had nothing to do with any sense that the 1993 version had failed in the courts that actually implemented it. A return to the 1993 version, or something like it, still might achieve the goal of bypassing the fuss of first-wave discovery of matters that inevitably must be inquired into.

Judges noted that present Rule 26(a)(1)(A) does have some effect. It happens that parties fail to disclose the identity of their possible witnesses. When this is pointed out, usually at a final pretrial conference, the undisclosed witnesses are stricken. This seems to happen particularly as to categories of damages. These sanctions may help to educate the bar, teaching lawyers that they cannot get away with ignoring initial disclosure obligations.

Perhaps initial disclosure requirements should be restored to the agenda.

Conference Before Discovery Motion

Many judges require a conference with the court before filing a discovery motion. This has worked for any judge who has given it a try. The agenda illustrates two approaches. The first would adopt a specific rule requiring that a party request an informal conference with the court – or perhaps a Rule 16 conference – before filing a motion that relates to discovery. This approach might or might not require the intending movant to attempt to confer with other parties before making the request. The other approach would simply encourage the practice by adding it as one of the elements that may be included in a scheduling order.

It was observed that the actual working of this proposal would depend on what the request to the court looks like. In the Eastern District of New York "it looks a lot like a motion." How do judges handle it? Would implementation be as diverse as present practice seems to be?

A judge agreed that "it does depend a lot on the judge." He does not have rules on what the request for a conference must look like. "The result is we generally don't get motions." Another judge said that she tells the lawyers to "tie it up in a letter," and also advises them that the intended motion likely is a loser if it takes more than one page to describe the dispute. Yet another judge said that he does not require any form of written submission. He directs parties to call him if they have a discovery dispute. "95% of the time it works."

The attempt to include this practice in the rules may seem to go too far into docket management. "Good judges do it. Others won't, even if its' in a rule." The survey for the Duke conference shows that most districts do not have local rules on this, and that most judges do not require it. It will be hard to get everyone to do it the same way. It may be an uphill fight. But these drafts deserve to be carried forward on the agenda.

Rule 16(b) Revisions

The agenda materials illustrate three possible revisions of Rule 16(b). One would accelerate the time for issuing the order. Another would make it clear that there should be an actual conference of court and parties, in person or by direct simultaneous communication, before the order issues. The third would add to the list of optional topics by including a date for abandoning a claim or defense that a party does not intend to pursue.

The first question asked whether it is wise to issue a scheduling order before all defendants have been served. It can be a waste of time because the process has to be repeated when all parties are before the court. That problem arises from setting the time to run from service or appearance by any defendant, a problem that exists today. The only concern is that the problem might be aggravated if the period from service or appearance were shortened.

This problem led to agreement that shortening the period for issuing the scheduling order will not work unless the presumptive time for service in Rule 4(m) is also shortened. And it was suggested that amending Rule 4(m) is a good idea independently of any change in Rule 16(b) time limits. The next version of the agenda should include an illustrative Rule 4(m) change.

A separate question addressed a fourth possible change in Rule

16(b). When it was revised in 1983 it provided that local rules can exempt "categories of actions" from the scheduling-order requirement. The result has been considerable variations in the categories of actions exempted. The local rules were surveyed when the 2000 amendments of Rule 26(a)(1) were prepared, leading to the list of nine proceedings exempted from initial disclosure. It may make sense to establish national uniformity for Rule 16(b) by adopting the same exemptions as Rule 26(a)(1). The drafting might cross-refer to Rule 26(a)(1)(B) in Rule 16(b), in order to keep 16(b) short; add the list to 16(b), revising 26(a)(1)(B) to cross-refer to 16(b); or repeat the list in both rules. Illustrative drafts will be prepared.

Cost-Shifting

The agenda includes drafts that illustrate possible approaches to cost-shifting in discovery. Authority exists now to condition discovery on payment of part or all of the costs by the requesting party. But some observers of the rulemaking process believe that it is important to make the authority more prominent, in the hope that prominence will encourage more frequent use. On this view, it remains too easy for a requesting party to impose extravagant response costs while incurring minimal costs in making the requests.

Discussion recognized that any proposal that seeks to encourage cost-shifting will be highly controversial. No matter whether it is called cost-bearing or cost-sharing, many litigants benefit enormously from being able to put an adversary to work, at the adversary's own expense, to find information useful for the litigation. Their representatives will vigorously resist any change, as happened while discovery revisions were considered in 1998-2000.

The conclusion was that cost-shifting is highly controversial because the stakes are so high. The importance of the topic counsels that it remain on the agenda, at least for the time being.

Discovery Stay Pending Motion To Dismiss

The agenda materials include a draft Rule 26(d)(3) that, with several variations, would either allow or direct a stay of discovery pending disposition of a motion under Rule 12(b), (e), or (f). The Private Securities Litigation Reform Act mandates a stay of discovery pending disposition of a motion to dismiss for failure to state a claim. That is the only close model. Present practice recognizes discretion.

The sketch rule would cover all 12(b) motions to dismiss, including questions of jurisdiction, in addition to motions for a more definite statement or to strike. A motion for judgment on the

pleadings could easily be added. But the impetus for discussing this topic arises from the pleading decisions in *Twombly* and *Iqbal*. And there are, as with the pleading decisions themselves, strongly opposed views. One view is that the purpose of raising pleading standards is to shield defendants from the burdens of discovery on unfounded claims; a stay of discovery is necessary to serve this purpose. The opposing view is that elevated pleading standards make it essential to protect deserving claims against premature dismissal by allowing discovery of the facts necessary to support a sufficient pleading.

Discussion reflected a clear consensus that the integration of discovery with motions to dismiss should be accomplished on a case-specific basis. The parties are free to ask for a stay under present rules. A stay makes good sense when there is a substantial prospect that the motion to dismiss will lead to dismissal of the entire action. A stay may be counterproductive when there is a substantial prospect that at least some part of the action will survive the motion to dismiss and lead to discovery – often much the same discovery as would be required if the motion to dismiss fails entirely. And it is useful to have the parties discuss what are the prospects for the outcome on the particular motion.

There may be incidental concerns. Adopting an explicit stay provision may encourage motions that are not made now. And if Rule 26(d) is to be amended to allow discovery requests to be served before the Rule 26(f) conference, some integration of the new provisions would have to be made.

It may be that this topic is one of those better suited to education of bench and bar than to new rule provisions.

Number of Discovery Requests

The agenda drafts include several that would reduce present limits on the numbers of discovery requests, and add limits where none exist now. The number of depositions and interrogatories could be reduced. The duration of depositions could be shortened. Rule 34 might be limited, for example to requests to produce no more than 25 documents, categories of electronically stored information, tangible things, or inspection of premises. A similar limit might be imposed on Rule 45 subpoenas to produce. The number of Rule 36 requests to admit also could be limited.

None of the limits would be absolute. The effect of reducing present limits and imposing new limits would depend in part on enforcement by judges – if exceptions are routinely allowed, not much good would be done. But it seems likely that tighter presumptive limits would in fact reduce cost and delay.

One judge reported that having experienced routine sets of

Rule 34 requests ranging from 50 to 100, he adopted a limit of 25 requests, including subparts. "It never comes up." The concern that it can be difficult to count the number of requests may not be a real problem in practice.

Another response was that this issue may be in part one of best practices. Rather than count the number of requests, it works to impose a limit on the number of hours of work the requests can demand in response. Faced with the limit, requesting parties tend to focus their requests in desirable ways.

Suggestions have been made for limits in addition to the number of requests. Examples are ten custodians of discoverable information, the time period covered by the requested documents, and the like.

It was agreed that it will be useful to pursue these limits further. Reactions from the bar will be useful.

Scope of Rule 34

The agenda includes a reminder of proposals that have been made in the course of considering obligations to preserve information for future discovery. The Discovery Subcommittee has worked hard on these questions. Preservation obligations tie directly to discovery obligations: if new limits are imposed on what can be discovered, the obligation to preserve diminishes accordingly.

It was agreed that the Discovery Subcommittee should continue to bear the primary responsibility for considering these questions.

Contention Discovery

The agenda drafts include sketches that would presumptively defer the time to respond to contention interrogatories and requests to admit to the completion of all other discovery. Discussion focused primarily on the question whether contention discovery ever accomplishes anything worthwhile. The sketches will remain on the agenda for further consideration.

Rule 34: Improving Responses, Objections

Most of the drafts address concerns that discovery can expand to unreasonable limits. But the Conference reflected the opposite problems as well. Responses can be dilatory, obstructionist, and confusing. Several drafts address these concerns.

One draft would add to Rule 34 a provision parallel to the Rule 33(b)(4) requirement that the grounds for objecting to a request "be stated with specificity." Another would direct that

each objection must state whether any responsive documents have been withheld on the basis of that objection. These seem attractive for reasons explored in earlier meetings.

Another draft would amend Rule 26(g) to add an explicit certification that a discovery response is not evasive. That seems implicit in the present certification that a response is "consistent with these rules," but the rules do not say expressly that evasion is prohibited. The closest provision is Rule 37(a)(4), which says that for purposes of Rule 37(a), an incomplete or evasive response is treated as a failure to respond. And all that does is set the stage for a motion to compel a response.

Yet another draft would revise various parts of Rule 34 to make it clear that a failure to actually produce should be treated in the same way as a failure to respond that inspection will be allowed.

All of these proposals will be carried forward, possibly with some slight modifications, for further exploration.

Proportionality-Cooperation

Two of the most frequent and insistent complaints about discovery practice are that too often the parties fail to cooperate in setting sensible bounds, and seek discovery that is not reasonably proportional to the needs of the case. Proportionality is repeatedly emphasized in the discovery rules, and cooperation is exacted by "meet-and-confer" requirements. It is difficult to be confident that added exhortations will be effective. The need is so serious, however, that it is worth the attempt. The sketches that would add explicit duties to cooperate and to litigate with all due sense of proportion will be carried forward for more work.

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FJC REPORT: RULE 26(f) PRACTICE
(Report to be Distributed at March 2012 Civil Rules Meeting)

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RULE 84 FORMS

One consequence of *Twombly* and *Iqbal* has been to draw attention to the possible reconsideration of the pleading forms that Rule 84 describes as "suffic[ient] under these Rules." Although a footnote in the *Twombly* opinion seems to tepidly embrace the Form 11 negligence complaint (given Rule 84, the Court had little choice about the matter if the Form was to be mentioned at all), many of the pleading forms stand in stark tension with the apparent, new directions of pleading practice. Form 18, a complaint for patent infringement, has come in for special judicial and practitioner disdain, frustration or criticism with increasing frequency and directness. A partial list of citations to cases referencing forms-related issues follows this report.

Consideration of the pleading forms has led to the raising of the possibility of examination of the full body of forms. One immediate reaction was that the pattern of illustrating some of the specific rules by related forms seems odd. Some, indeed most, rules are bypassed completely, i.e., there are no illustrative forms. It is difficult to make much sense of the overall pattern, although some of the uses of illustrations make obvious sense. The pleading forms in particular were adopted to illustrate, as if by pictures, the simplicity and brevity of pleading that the words of Rule 8(a)(2) could suggest but not fully describe.¹

Inevitably, the possibility of expanding the body of forms suggests a second concern that has weighed heavily in initial deliberations of these issues. The forms have been maintained through the full Enabling Act process with proposal, publication, reconsideration in light of public comments, submission to the Judicial Conference, and thence on to the Supreme Court and Congress. The Appellate Rules Committee follows the same practice. There are only a few Appellate Forms, and the Appellate Rules Committee has been able to devote careful attention to those forms. In comparison, it would be difficult to claim that the Civil Rules Advisory Committee has been able to

¹Even if the present forms are to be carried forward without substantial change, at any rate, one chore will be to identify the gaps and ask whether they should be filled.

maintain a continuous and careful watch over the Rule 84 Forms. There is a constant press of business that seems to have a higher call on Committee energies and capacities. Having an incomplete set of forms, much less an expanded set, arguably carries with it an obligation, albeit unstated, to devote careful attention to the forms at regular intervals. This duty necessarily would divert attention from other possible projects.

Initial consideration of these questions led to appointment of an inter-committee Subcommittee under the auspices of the Standing Committee. Initial discussions have made it clear that each of the advisory committees has different approaches to the forms. Only the Appellate Rules Committee and the Civil Rules Committee follow the full Enabling Act process. Acting under a different statutory regime, the Bankruptcy Rules Forms take effect on approval by the Judicial Conference, and do not go on to the Supreme Court. The Criminal Rules do not have official forms in the Rule 84 sense; the implementing forms are crafted by the Administrative Office, occasionally consulting with the Criminal Rules Committee. These differences reflect not only different histories, but, of perhaps greater importance, also the different roles that forms play in each area of practice.

It does not appear to the Subcommittee that there is any practical or policy need to seek a uniform approach to adopting and maintaining forms. Each advisory Committee has been made aware of the approaches taken by others, and the framework exists for sharing ideas if any participating Committee undertakes reconsideration of its current form-related practices. In that spirit, these questions are raised for advice from this Committee:

*Should the Civil Rules Advisory Committee invigorate its supervision of the Rule 84 Forms, carrying them forward and perhaps expanding them to cover subjects not now addressed?

*If the Rule 84 Forms are generally carried forward, should the pleading forms be included? These forms may have been important with the advent in 1938 for what has come to be called "notice" pleading, but that function may have been fulfilled and may now be counterproductive, or at least ambiguous or confusing. Developing new pleading forms that conform to whatever standards emerge as pleading practice settles down to some generally

perceived understanding of *Twombly* and *Iqbal* may prove difficult to accommodate in new forms. At the present time, the process for developing an appropriate consensus seems daunting.

*More radical surgery would recommend abandonment of Rule 84, perhaps retaining a small number of forms adopted by specific rules but eliminating most of the present forms. The most apparent reasons for following this approach are easily stated: There is reason to doubt how often the forms are used, and, for that matter, how often they improve on forms available from other sources. At least most of the purposes served by the forms can be served as well by sample forms generated by the Administrative Office, in the model adopted by the Criminal Rules Committee. Retaining Rule 84 and a substantial set of Enabling Act forms will entail renewed Advisory Committee responsibility for actively reviewing the forms, a process that could easily drain away time and energy that might better be devoted to other projects.

*The reasons for retaining at least some forms rely more on example than theory. Some subjects may be so sensitive that the need for top-quality forms justifies invoking the full Enabling Act process. Others may benefit from national uniformity. A few illustrations may stimulate thought.

Uniformity may be important with respect to the caption, Form 1; the Date, Signature, and like lines, Form 2; the Summons, Form 3; the Notice and Complaint in condemnation, Forms 60 and 61; judgments, Forms 70 and 71; and perhaps some other forms. Even as to these forms, it may well be that appropriate forms are more commonly drawn from sources other than the appendix of Rule 84 forms. The Notice and Complaint in condemnation address a highly specialized audience, and there is not likely much need for an official form. Proper entry of a judgment in a form so succinct as to comply with Rule 58 continues to be a source of difficulty in establishing entry of a final judgment and the beginning of the appeal time clock, but the problem may be addressed more effectively by other means.

One potential advantage of uniformity might be to adopt forms with features that will facilitate research by way of searching docket entries. The research tools of clear coding, uniformly implemented and enforced, would be a great boon, as the

Federal Judicial Center research staff will eagerly proclaim. But this is a topic that may be addressed more effectively, and flexibly, by the Administrative Office. For that matter, the development of practices of electronic docketing may make the concept of "forms" obsolete, even without regard to issues relating to the lengthy Enabling Act process.

Importance and specific Rule requirements are a different matter. Forms 5 and 6, (the request to waive service and the waiver) were developed carefully at the same time as the Rule 4 waiver provisions. Rule 4(d)(1)(D) requires that the request for waiver use "text prescribed in Form 5." Rule 4(d)(1)(c) requires that two copies of a waiver form accompany the request, without explicitly invoking Form 6. Another possible illustration is Form 80, notice of a magistrate judge's availability. Rule 73(b)(1) requires the clerk give the parties notice of the opportunity to consent to trial before a magistrate judge. The form has not been made mandatory, but it may be important to provide model language that leaves no doubt that failure to consent carries no adverse consequences. (Form 80 states there are no adverse substantive consequences, and that the identity of any party consenting or withholding consent will not be disclosed to the judge assigned to the case or to any magistrate judge.)

The point of the immediate prior paragraphs is to point out that if only a few forms seem justified by importance or uniformity, they could be adopted by explicit provisions in the corresponding rules, e.g., Form 5, adopted in Rule 4(d), could be set out with Rule 4, perhaps as an appendix. Likewise for any other form so honored.

Some forms will present interesting tests if a highly selective approach is adopted. Form 52, the Report of the Parties' Planning meeting, is one of the very few forms to receive close Advisory Committee attention in recent years. It could be very helpful for less experienced attorneys, or for those facing reluctant adversaries, as a guide through the Rule 26(f) process. However, it may be that individual judges are so likely to have personal preferences that there is only minimal advantage in conferring official status on the form beyond its utility as part of an Administrative Office set of helpful samples.

Consideration of these questions may be aided by considering a few of the AO forms. Form 440, Summons in a Civil Action, compares to Form 3; unlike Form 3, it includes notice of the 60-day period to respond for a United States defendant. A few words vary from Form 3, and it includes a proof of service. Form 450, Judgment in a Civil Action, corresponds to Forms 70 and 71. It covers both jury and nonjury trials, and judgments after motion, and is more complete as to interest than Form 70. Form 85, Notice, Consent, and Reference of a Civil Action to a Magistrate Judge, corresponds to Forms 80, 81, and 82. It departs from them in some ways - as two examples, it says "you may consent" before it says "you may withhold your consent, and it omits the Form 80 advice that appeal from the magistrate judge goes directly to the court of appeals. Form 85A, Notice, Consent, and Reference of a Dispositive Motion to a Magistrate Judge, does not appear to have an analog in the Rule 84 forms (Form 80 might fit, but its appeal advice does not).

The AO forms at times seem clear improvements on the Rule 84 forms. If that impression bears out, it may offer an added incentive for at least bringing the Administrative Office into the process of generating the Rule 84 Forms.

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UNITED STATES DISTRICT COURT
for the

Plaintiff
v.
Defendant
Civil Action No.

SUMMONS IN A CIVIL ACTION

To: (Defendant's name and address)

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF COURT

Date:

Signature of Clerk or Deputy Clerk

Civil Action No. _____

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for *(name of individual and title, if any)* _____
was received by me on *(date)* _____.

I personally served the summons on the individual at *(place)* _____
_____ on *(date)* _____ ; or

I left the summons at the individual's residence or usual place of abode with *(name)* _____
_____, a person of suitable age and discretion who resides there,
on *(date)* _____, and mailed a copy to the individual's last known address; or

I served the summons on *(name of individual)* _____, who is
designated by law to accept service of process on behalf of *(name of organization)* _____
_____ on *(date)* _____ ; or

I returned the summons unexecuted because _____ ; or

Other *(specify)*:

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ _____ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____

Server's signature

Printed name and title

Server's address

Additional information regarding attempted service, etc:

UNITED STATES DISTRICT COURT

for the

Plaintiff v. Defendant Civil Action No.

JUDGMENT IN A CIVIL ACTION

The court has ordered that (check one):

- the plaintiff recover from the defendant the amount of dollars (\$), which includes prejudgment interest at the rate of % , plus post judgment interest at the rate of % per annum, along with costs.
the plaintiff recover nothing, the action be dismissed on the merits, and the defendant recover costs from the plaintiff.
other:

This action was (check one):

- tried by a jury with Judge presiding, and the jury has rendered a verdict.
tried by Judge without a jury and the above decision was reached.
decided by Judge on a motion for

Date:

CLERK OF COURT

Signature of Clerk or Deputy Clerk

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UNITED STATES DISTRICT COURT
for the

Plaintiff
v.
Defendant
Civil Action No.

NOTICE, CONSENT, AND REFERENCE OF A CIVIL ACTION TO A MAGISTRATE JUDGE

Notice of a magistrate judge's availability. A United States magistrate judge of this court is available to conduct all proceedings in this civil action (including a jury or nonjury trial) and to order the entry of a final judgment. The judgment may then be appealed directly to the United States court of appeals like any other judgment of this court. A magistrate judge may exercise this authority only if all parties voluntarily consent.

You may consent to have your case referred to a magistrate judge, or you may withhold your consent without adverse substantive consequences. The name of any party withholding consent will not be revealed to any judge who may otherwise be involved with your case.

Consent to a magistrate judge's authority. The following parties consent to have a United States magistrate judge conduct all proceedings in this case including trial, the entry of final judgment, and all post-trial proceedings.

Table with 3 columns: Parties' printed names, Signatures of parties or attorneys, Dates. Includes horizontal lines for input.

Reference Order

IT IS ORDERED: This case is referred to a United States magistrate judge to conduct all proceedings and order the entry of a final judgment in accordance with 28 U.S.C. § 636(c) and Fed. R. Civ. P. 73.

Date:

District Judge's signature

Printed name and title

Note: Return this form to the clerk of court only if you are consenting to the exercise of jurisdiction by a United States magistrate judge. Do not return this form to a judge.

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UNITED STATES DISTRICT COURT
for the

Plaintiff
v.
Defendant
Civil Action No.

NOTICE, CONSENT, AND REFERENCE OF A DISPOSITIVE MOTION TO A MAGISTRATE JUDGE

Notice of a magistrate judge's availability. A United States magistrate judge of this court is available to conduct all proceedings and enter a final order dispositive of each motion. A magistrate judge may exercise this authority only if all parties voluntarily consent.

You may consent to have motions referred to a magistrate judge, or you may withhold your consent without adverse substantive consequences. The name of any party withholding consent will not be revealed to any judge who may otherwise be involved with your case.

Consent to a magistrate judge's consideration of a dispositive motion. The following parties consent to have a United States magistrate judge conduct any and all proceedings and enter a final order as to each motion identified below (identify each motion by document number and title).

Motions:

Parties' printed names Signatures of parties or attorneys Dates

Reference Order

IT IS ORDERED: The motions are referred to a United States magistrate judge to conduct all proceedings and enter a final order on the motions identified above in accordance with 28 U.S.C. § 636(c).

Date: District Judge's signature
Printed name and title

Note: Return this form to the clerk of court only if you are consenting to the exercise of jurisdiction by a United States magistrate judge. Do not return this form to a judge.

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**Rule 84/Forms
Case Citation Compendium**

Swierkiewicz v. Sorema N.A., 534 U.S. 506 (2002)

Jacobs v. Tempur-Pedic Int'l, Inc., 626 F.3d 1327 (11th Cir. 2010)

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Colida v. Nokia, Inc., 347 F. App'x 568 (Fed. Cir. 2009)

Aktieselskabet AF 21. Nov. 2001 v. Fame Jeans Inc., 525 F.3d 8 (D.C. Cir. 2008)

Tamayo v. Blagojevich, 526 F.3d 1074 (7th Cir. 2008)

McZeal v. Sprint Nextel Corp., 501 F.3d 1354 (Fed. Cir. 2007)

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United States v. Bame, Civ. No. 11-62, 2011 WL 1167085 (D. Minn. Mar. 28, 2011)

Miller v. Montgomery Cty. R-II Sch. Dist., Bd. of Educ., No. 2:10 CV 78, 2011 WL 1299536 (E.D. Mo. Apr. 1, 2011)

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CBT Flint Partners, LLC v. Goodmail Sys., Inc., 529 F. Supp. 2d 1376 (N.D. Ga. 2007)

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RULE 23 ISSUES

During the Nov. 2011 Advisory Committee meeting, there was an initial discussion of possible issues for consideration concerning class-action practice. Since then, a Rule 23 Subcommittee has been formed and has begun work both to identify possible issues for further analysis and to perform triage on issues so identified. The goal of the discussion at the full Committee meeting is to carry that process further.

The purpose of this memorandum is to introduce the questions that have emerged so far. During the March 2012 meeting, the Subcommittee hopes to receive the reactions of the full Committee to this list of possible issues, both regarding additional questions that might be added to the list and the relative importance and appropriateness of focusing on various issues.

After receiving the Committee's feedback, the Subcommittee expects to reconvene to consider which issues seem most suitable for action. At some point, it is likely it will want to hold at least one mini-conference involving experienced judges and practitioners to shed additional light on these questions. The reality is that Rule 23 questions raise both important and controversial issues; obtaining broad input will likely pay dividends if the Committee eventually proposes rule amendments. Making any such proposals will depend on doing much more work than has been done to date.

For background, several other items should be included in the agenda book:

Notes on Jan. 27, 2012, conference call of the Discovery Subcommittee

Notes on the Jan. 5, 2012, class action panel during the Standing Committee meeting

Jan. 16, 2012, memo from Rick Marcus to the Rule 23 Subcommittee on possible amendment ideas contained in the ALI Aggregate Litigation Principles -- This analysis of the ALI Principles contains substantial detail about provisions in those Principles that might be mined for possible rule provisions. The Principles were drafted by a body comprised of a host of prominent people from the rules process, including two members of the Rule 23 Subcommittee. Below, references to specific sections of the Principles will point to the places where they address the ideas initially identified as possible subjects of Rule 23 reform. The Principles memo is organized as a section-by-section review of the ALI work product, and should be consulted for more information about the pertinent sections of the Principles.

Edited versions of several cases that bear on these questions:

Wal-Mart Stores v. Dukes, 131 S.Ct. 2541 (2011)
(excerpts on both the Rule 23(a)(2) common questions issue and the 23(b)(2) issue)

Amchem Products, Inc. v. Windsor, 521 U.S. 591 (1997)

In re Hydrogen Peroxide Antitrust Lit., 552 F.3d 303
(3d Cir. 2008)

American Honda Motor Co. v. Allen, 600 F.3d 813 (7th Cir. 2010)

Sullivan v. DB Investments, Inc., ___ F.3d ___ (3d Cir., Dec. 20, 2011) (en banc) (referred to as DeBeers)

The Rule 23 Subcommittee has attempted so far to try to identify the issues that seem most significant and also susceptible to improvement through rule change. Whatever the significance of the Supreme Court's evolving jurisprudence on applying the Federal Arbitration Act to require arbitration and also preclude class-action arbitration, for example, that concern seems to be about a statute and not a result of anything in Rule 23.

Background sketch on evolution of Rule 23

For class action mavens, the evolution of Rule 23 may be as familiar as the back of the hand, but for others a bit of background may prove helpful in approaching the issues now before the Committee.

The original Civil Rules included class-action provisions in Rule 23, but they were drafted in a very different way from the current rule. The original rule distinguished three types of class actions in Rule 23(b) -- "true," "hybrid," and "spurious" class actions. The third category -- "spurious" class actions -- was an opt-in arrangement; class members were included only if they affirmatively sought to be included.

For a variety of reasons the "true" and "hybrid" categories presented courts with great difficulty. As the 1966 Committee Note put it, "the basis of the Rule 23 classification proved obscure and uncertain." And the "spurious" class actions did not seem particularly effectual, although some courts began to allow class members to defer deciding whether to join until the outcome was known -- leading to the notion of "one way intervention." The concern was that class members could hang back and decide whether to join only after the court decided the merits against the class opponent. If the class opponent won, the class members

would remain on the sidelines and wait to sue another day. If their side won, they would join after decision of the merits -- the "one-way" intervention -- and share in the spoils of victory. Particularly in an era when nonmutual collateral estoppel was not permitted, this possibility was unnerving to many.

In the early 1960s, the Committee reexamined the joinder provisions -- Rules 13, 14, 19, 20, 23, and 24 -- and revised them along more functional lines. Although that revision of other joinder rules has sometimes presented courts with challenging problems of application, it was the revision of Rule 23 that generated the most controversy.

The Rule 23 revision in 1966 was designed to do several things. One was to reformulate Rule 23(b) to be more functional, and in keeping with the orientation of the revisions to the other joinder rules. Thus, rather than embracing categorical notions like distinguishing between "joint" rights (for the "true" class action) and "several" rights to specific property (as in the "hybrid" class action), Rule 23(b)(1) serves a purpose akin to the "required party" provisions of Rule 19(a) -- to permit a class action in some instances when proceeding individually as to some members of the class appears likely to affect the interests of the others or to put the class opponent at a risk of incompatible or inconsistent judicial directives.

Rule 23(b)(2) might have been encompassed within 23(b)(1), but it was thought necessary to make clear that class actions for injunctive relief were permitted, a matter of considerable consequence in connection with civil rights discrimination suits. The rule therefore says that a class action is available when:

the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the classes as a whole.

The Committee Note explained that "[t]he subdivision does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages." But the Note also included the following illustration:

[A]n action looking to specific or declaratory relief could be brought by a numerous class of purchasers, say retailers of a given description, against a seller alleged to have undertaken to sell to that class at prices higher than those set for other purchasers, say retailers of another description, when the applicable law forbids such a pricing differential.

It would seem that such a case would not "predominantly" seek money damages relief, but might include monetary relief to

reimburse class members, determined on the basis of past overcharges, in addition to enjoining future price discrimination.

Rule 23(b)(3) broke significantly with the "spurious" class action of the original rule. As the Supreme Court put it in *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), in adopting (b)(3) the Committee was "forward-looking," and "anticipating innovations." One major goal was to make the resulting judgment binding on all class members. This binding effect was accomplished in part by requiring that the decision to certify the class be made at the outset, and that class members then be given an opportunity to opt out, failing which they would be bound by the outcome in the case. "One-way intervention" (which had sometimes been permitted before 1966, enabling class members to defer decision whether to join the class until after the court decided the merits against the class opponent) would thus be stymied. This directive led in part to the notion that discovery about the merits should be postponed until after class certification was resolved, in part because the 1966 version directed that certification had to be decided "as soon as practicable."

Rule 23(b)(3) used a flexible standard to determine whether certification should be granted. The court could certify the class only if it found that common questions predominated and that the class action would be superior to other available methods for adjudicating the controversy.

The 1966 amendments were followed by a somewhat rollercoaster experience with class-certification decisions, particularly in (b)(3) cases. Until the mid-1970s, it was said, courts frequently certified classes with rather limited scrutiny whether or not they really satisfied the rule's requirements. From the late 1970s to the late 1980s, judicial receptiveness to class certification waned, and by the late 1980s a *New York Times* story reported (with a quotation from the Committee's Reporter at the time) that the class action had its day in the sun and was passing from the scene.

The class action did not pass from the scene; instead, it has become extremely important in a variety of legal areas, including mass torts (although mass tort class actions seem to have receded), securities fraud, consumer claims and wage and hour claims. It has also prompted legislation on two occasions - the Private Securities Litigation Reform Act in 1995 and the Class Action Fairness Act in 2005.

After 1966, the Committee did not return to Rule 23 for a quarter century. In 1991, however, the Judicial Conference (in part prompted by a study of the impact of asbestos litigation on the federal courts) urged the Committee to reexamine Rule 23 and

consider whether it should be changed. Initially, considerable work focused on whether Rule 23(b) should be rewritten entirely into functional terms, abandoning the categorical approach of the 1966 rule and emphasizing instead the discretion of the district court to determine whether class certification should be granted based on a balance of various factors. Eventually, that path was not followed.

After five years work, the Committee published a set of proposed amendments in 1996. The preliminary draft of rule changes proposed several revisions to Rule 23(b)(3) (new matter underlined, matter to be removed overstricken):

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:

(A) the practical ability of individual class members to pursue their claims without class certification;

~~(BA) the interest of members of the class in individually controlling the prosecution or defense of class members' interests in maintaining or defending separate actions;~~

~~(CB) the extent, and nature, and maturity of any related litigation concerning the controversy already commenced by or against involving class members of the class;~~

~~(DE) the desirability or undesirability of concentrating the litigation of the claims in the particular forum;~~

~~(ED) the difficulties likely to be encountered in the management of a class action; and~~

(F) whether the probable relief to individual class members justified the costs and burdens of class litigation.

The preliminary draft amendments also introduced a new category in Rule 23(b). It was prompted in part by Third Circuit decisions holding that settlement classes could be certified only in circumstances that would support litigation class certification. Those decisions threatened to end a practice that many courts and litigants had found desirable, certification for purposes of settlement in cases that might not qualify for full litigation certification. Proposed (b)(4) was as follows:

(4) the parties to a settlement request certification under subdivision (b)(3) for purposes of settlement, even though the requirements of subdivision (b)(3) might not be met for purposes of trial.

Finally, the 1996 proposed amendments added Rule 23(f), to provide for interlocutory review of class-certification decisions at the discretion of the court of appeals.

The 1996 proposals generated a great deal of interest and controversy. Eventually, the Rules Committees Office published the resulting materials in a four-volume set. Meanwhile, the Supreme Court granted cert. in Amchem and, in mid-1997, rejected the Third Circuit's rule that settlement certification could only be permitted when litigation certification would also be justified. After considering the public comments, and making an initial review of the Amchem decision, the Committee decided to proceed with only the Rule 23(f) proposal for interlocutory appellate review. That amendment became effective on Dec. 1, 1998.

In 2000, the Committee returned to Rule 23. This time, it did not focus on the standards for certification but rather the procedure for handling class actions. In 2001, it published proposed amendments that changed the timing provisions for certification decisions under Rule 23(c) to "[a]t an early practicable time," removed prior authorization for "conditional" class certification, and directed the court to "define the class and the class claims, issues, or defenses" if it certified the class. Rule 23(e) was substantially expanded regarding review of proposed settlements. And Rules 23(g) and (h), regarding appointment of class counsel and award of attorney's fees, were added.

Some additional mention of CAFA is also in order, even though it did not emerge from the rules process. Bills like CAFA had been introduced several times in Congress, and had been opposed by the Judicial Conference, in part at the urging of the Conference's Federal-State Jurisdiction Committee. As the 2003 Rule 23 amendments were proceeding through the rules process, the attitude of the Judicial Conference shifted after the rules committees suggested that some expansion of federal-court jurisdiction over state-law class actions could fit with the evolution of Rule 23. For a while, it seemed that CAFA and the 2003 amendments to Rule 23 might proceed in tandem. Thus, CAFA included a provision accelerating the effective date of those amendments should the legislation go into effect before Dec. 1, 2003, the effective date for the rule amendments. As it happened, CAFA did not go into effect until Feb. 18, 2005, but due to the sensitivity of the topic in Congress amendments were not allowed, even to remove moot provisions like the one about accelerating the effective date of the 2003 amendments. That

provision remained in CAFA when it was finally signed into law in 2005.

The point of remembering CAFA while focusing on Rule 23 is to appreciate that the 2003 amendments to the rule adopted provisions that Congress may have regarded as valuable tools for handling the multistate class actions the legislation was designed to move to federal court. CAFA itself included provisions bearing on settlement approval like special provisions for "coupon" settlements (28 U.S.C. § 1712) and notice to federal and state officials regarding proposed settlements, assuring those officials time to decide whether to object on behalf of their citizens. (28 U.S.C. § 1715) CAFA can be seen as designed to benefit class members while also guarding against perceived abuse of the class-action device, general goals consonant with the 2003 amendments, and possibly goals that would justify consideration of further changes to the rule.

This is the rulemaking background for the current consideration of Rule 23; knowing what has been proposed in the past may be useful as we consider what might be proposed in the future.

"Front burner" issues

The following list results from an initial cull of a large variety of possible issues, and builds on the brief Rule 23 discussion during the Committee's Nov. 2011 meeting. Besides identifying these issues, the memorandum will try to introduce them briefly, sometimes tying the current issues to the history sketched above. This does not presume to rank these issues, but does convey the initial impression that these issues seem more weighty than the "back burner" issues included in the following section. The discussion refers frequently to the ALI Aggregate Litigation Principles; more details about those provisions is included in the memo about them that should be in the agenda book.

Besides discussing the specific issues listed, a question is whether they are properly classified as "front burner" matters. Beyond that, it would be most helpful to know if Committee members feel that other issues not yet identified by the Subcommittee should be included on its list of possible topics. On that subject also, the memo on the ALI Aggregate Litigation Principles may be a useful resource, as it contains a wealth of ideas about potential improvements of class-action practice.

Settlement class certification

In 1996, the Third Circuit decisions noted above made it seem that settlement class certification might pass from the scene. In proposing the adoption of Rule 23(b)(4) as then

proposed, the Committee recognized the wide adoption of settlement classes. The Committee Note gave voice to some of the reasons for permitting that to continue, as well as limitations contemplated for the new (b) (4):

As with all parts of subdivision (b), all of the prerequisites of subdivision (a) must be satisfied to support certification of a (b) (4) settlement class. In addition, the predominance and superiority requirements of subdivision (b) (3) must be satisfied. Subdivision (b) (4) serves only to make it clear that implementation of the factors that control certification of a (b) (3) class is affected by the many differences between settlement and litigation of class claims or defenses. Choice-of-law difficulties, for example, may force certification of many subclasses, or even defeat any class certification, if claims are to be litigated. Settlement can be reached, however, on terms that surmount such difficulties. Many other elements are affected as well. A single court may be able to manage settlement when litigation would require resort to many courts. And, perhaps most important, settlement may prove far superior to litigation in devising comprehensive solutions to large-scale problems that defy ready disposition by traditional adversary litigation. Important benefits may be provided for those who, knowing of the class settlement and the opportunity to opt out, prefer to participate in the class judgment and avoid the costs of individual litigation.

The Supreme Court's 1997 Amchem decision (excerpted in the agenda book) recognized that "settlement is relevant to class certification." It said that Rule 23(e) "was designed to function as an additional requirement, not as a superseding direction" taking the place of the Rule 23(a) and (b) requirements. In the asbestos personal injury case before it, it held that "[t]he benefits asbestos-exposed persons might gain from the establishment of a grand-scale compensation scheme is a matter fit for legislative consideration," but that the predominance requirement precluded class certification because it "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." The Court added that "it is not the mission of Rule 23(e) to assure the class cohesion that legitimizes representative action in the first place. If a common interest in a fair compromise could satisfy the predominance requirement of Rule 23(b) (3), that vital prescription would be stripped of any meaning in the settlement context."

After the Amchem decision was rendered, the Committee determined that settlement class certification might operate effectively under it, and that rather than proceeding with something like proposed (b) (4) it should monitor developments.

Thereafter, with the assistance of the Federal Judicial Center, it received reports indicating that settlement class certification had continued to be available in some circumstances. There have been reports, however, that in some instances settlement class certification is not a workable option, and that "work-arounds" have been devised. Use of MDL procedures, in particular, has gained popularity as a way of confecting settlement regimes that might instead have been implemented through a class action. Some judges, indeed, have said that they regarded these situations as "quasi class actions" and borrowed class-action principles in handling them, particularly in relation to attorney's fees collected by plaintiff lawyers, and also in regard to oversight of settlement claims administration to ensure transparency and fair treatment of claimants.

§ 3.06 of the ALI Principles proposes a series of substitute criteria for approval of a settlement class, in place of the criteria for certifying a litigation class, and it might provide a starting point for drafting a settlement-class provision. The goal of these provisions is to focus attention on adequacy of representation and fair treatment of class members, moving the court's attention away from a hypothetical trial scenario. Also possibly of interest is § 3.12, which proposes immediate appellate review of a decision rejecting a proposed class-action settlement. Whether rule changes are needed to achieve this objective is not clear. It may be that Rule 23(f) would authorize such review to the extent the decision refusing to approve the proposed settlement also rejects class certification. It could be that review of the certification decision would be entwined with the settlement review itself so that the current rule is sufficient.

For the present, the question is whether revisiting the settlement class question would be a useful topic for the Subcommittee to pursue. If so, the 1996 experience with (b) (4) would certainly be a valuable piece of background, but it is not necessarily the only, or perhaps the best, model for dealing with these issues. At least some seem to think it would be useful to reconsider the Supreme Court's attitude that Rule 23(e)'s fairness review is no substitute for full application of Rule 23(a) and (b) analysis of the cohesiveness of the class. On that score, it might be noted that Rule 23(e) was significantly strengthened in the 2003 amendments, and also that settlement review is affected by some provisions of CAFA, particularly the requirement of notice to state attorneys general or comparable state authorities. At the same time, there may be an issue of whether a rule can itself become a device for implementing a "grand-scale compensation scheme," desirable as such a scheme might be from some perspectives. And the question whether nationwide solutions to nationwide problems should be preferred to less ambitious solutions may also prove important.

Class certification and merits scrutiny

The 1966 version of Rule 23 said that certification should be resolved "as soon as practicable." Coupled with the aversion to "one-way intervention," that directive led in some courts to the view that in proposed (b)(3) actions no "merits" decisions could be made until certification was resolved and class members had made their opt-out decisions. Some even refused to consider Rule 12(b)(6) motions before certification, and more would not entertain summary-judgment motions. The Supreme Court's decision in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), was read by many courts to forbid any consideration of the merits in connection with class certification. Routinely, courts would insist on postponing "merits" discovery until after certification was resolved. Altogether, these developments tended to expedite but simplify the certification decision, although there was a possibility that once "merits" discovery had been done the certification decision would have to be revisited.

That early resistance to considering the merits before certification weakened over time. In 1982, the Supreme Court emphasized in *General Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147 (1982), that courts should do a "rigorous" scrutiny of the likely proofs in deciding whether to certify classes. In *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541 (2011), the Court confirmed the need to address the merits in some cases (*id.* at 2551-52):

Rule 23 does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with the Rule -- that is, he must be prepared to prove that there are in fact sufficiently numerous parties, common questions of law or fact, etc. We recognized in *Falcon* that "sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question," 457 U.S., at 160, and that certification is proper only if "the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied," Frequently that "rigorous analysis" will entail some overlap with the merits of the plaintiff's underlying claim. That cannot be helped. "[T]he class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action.'" *Falcon* at 160.

The lower courts had already focused on the need to do such scrutiny before the Supreme Court spoke. A leading example is Chief Judge Scirica's opinion in *In re Hydrogen Peroxide Antitrust Lit.*, 552 F.3d 305 (3d Cir. 2008), which reversed class certification granted by the district court in reliance on the

opinion of plaintiffs' expert witness. An excerpt from this decision is included in these agenda materials.

The district judge in Hydrogen Peroxide had determined that the testimony of plaintiffs' expert witness would be admissible under Daubert, but refused to weigh the opinion of plaintiffs' expert against the opposing opinion of defendant's expert. This failure led to reversal (id. at 323):

Expert opinion with respect to class certification, like any matter relevant to a Rule 23 requirement, calls for rigorous analysis. It follows that opinion testimony should not be uncritically accepted as establishing a Rule 23 requirement merely because the court holds the testimony should not be excluded, under Daubert or for any other reason[s]. Under Rule 23 the district court must be "satisfied" or "persuaded" that each requirement is met before certifying a class. Like any evidence, admissible expert opinion may persuade its audience, or it may not. * * * Weighing conflicting expert testimony at the certification stage is not only permissible; it may be integral to the rigorous analysis Rule 23 demands.

More generally, the Hydrogen Peroxide court directed that (id. at 320):

Class certification requires a finding that each of the requirements of Rule 23 had been met. Factual determinations necessary to make Rule 23 findings must be made by a preponderance of the evidence. In other words, to certify a class the district court must find that the evidence more likely than not establishes each fact necessary to meet the requirements of Rule 23.

It cautioned, however, that "[a] court's determination that an expert's opinion is persuasive or unpersuasive on a Rule 23 requirement does not preclude a different view at the merits stage of the case."

Hydrogen Peroxide relied in significant part on the 2003 amendments in reaching its conclusions. It appears that various circuits have at least somewhat different attitudes toward the issues addressed in that case. See, e.g., Ellis v. Costco Wholesale Corp., 657 F.3d 970, 982-93 (9th Cir. 2011) ("the district court seems to have confused the Daubert standard it correctly applied to Costco's motion to strike with the 'rigorous analysis' standard to be applied when analyzing commonality. Instead of judging the persuasiveness of the evidence presented, the district court seemed to end its analysis of the plaintiffs' evidence after determining that such evidence was merely admissible.")

The need to support findings regarding the Rule 23 criteria -- particularly predominance -- tends to front-load cases. With regard to expert testimony, it may require that parties prepare their experts almost as fully at this point as for trial. Relatedly, it may in effect therefore require that the whole expert-preparation effort (and related discovery and disclosure) occur early in the case even though Rule 26(a)(2) seems to contemplate that they will occur only after other discovery is done. It is not presently clear what rule amendments might be considered to respond to these concerns, or whether any should be considered. But it is clear that the collection of concerns summarized above has drawn much attention and generated much concern.

Issue classes

Since 1966, Rule 23(c)(4) has existed in uneasy proximity to Rule 23(b)(3). The latter, of course, permits certification only if the court finds that common issues "predominate." That can mean that, even though there are important common issues, the individual issues predominate and certification is not permitted. Rule 23(c)(4) says that "[w]hen appropriate, an action may be brought or maintained as a class action with respect to particular issues." Is Rule 23(c)(4) treatment only possible when the action also satisfies Rule 23(b)(3)'s predominance requirement? Should the court contemplating use of Rule 23(c)(4) focus only on the issues on which it intends to certify under (c)(4) in determining whether there is predominance under (b)(3)? If that's so, is use of (c)(4) a method of undermining the predominance requirement by permitting the court to disregard all issues other than those issues to which it intends to limit certification?

The 1966 Committee Note did not provide extensive guidance. On this subject, it said, in its entirety:

This provision recognizes that an action may be maintained as a class action as to particular issues only. For example, in a fraud or similar case, the action may retain its "class" character only through the adjudication of liability to the class; the members of the class may thereafter be required to come in individually and prove the amounts of their respective claims.

The lower courts have divided on how these questions are to be resolved. The Fifth Circuit declared in *Castano v. The American Tobacco Co.*, 84 F.3d 734, 745-46 n.21 (5th Cir. 1996):

A district court cannot manufacture predominance through the nimble use of subdivision (c)(4). The proper interpretation of the interaction between subdivisions (b)(3) and (c)(4) is that a cause of action, as a whole, must satisfy the

predominance requirement of (b)(3) and that (c)(4) is a housekeeping rule that allows courts to sever the common issues for a class trial.

The Second Circuit has rejected the Fifth Circuit reading, and held that "district courts may employ Rule 23(c)(4) * * * to certify a class on a designated issue regardless of whether the claim as a whole satisfies the predominance test." *In re Nassau County Strip Search Cases*, 461 F.3d 219, 230 (2d Cir. 2006). Other courts of appeals have reached other conclusions.

The existence of this divergence among the courts of appeals is one reason for focusing on this rule. Another is that (c)(4) could introduce desirable flexibility into the certification decision in some cases, perhaps simplifying the task described in the prior section above. Focusing on (c)(4) does not ensure that there will be a good resolution of its seeming tension with the predominance requirement.

The ALI Principles favor use of issues classes. See § 2.08. They also propose, in § 2.09, that there be immediate appellate review of the court's resolution of the common issue.

In thinking about these issues, it may be useful to separate two somewhat discrete topics. First, one might focus on realizing the potential of Rule 23(c)(4) to advance the resolution of complex litigation by enabling binding determination of significant common questions, possibly without regard to whether other issues pertinent to the claims of individual class members are also resolved within the class proceeding. Facilitating such resolution might emphasize the functional utility of issues certification by ensuring that the collective litigation results are binding on individual litigants. One means of doing so might be to provide for immediate appellate review of the decision of those common issues.

Second, one could focus on unraveling the relationship between (b)(3) and (c)(4), which have coexisted in the rule since 1966. One view might be that (c)(4) can only be used if (b)(3) predominance is satisfied, which might be said to mean that (b)(3) "predominates" over (c)(4) within the rule. Another view might be to calibrate the (b)(3) predominance requirement so as to delineate the respective function of these two provisions in Rule 23. As noted above, it is not clear that this relationship received close scrutiny in the drafting of the 1966 amendments, and it may now be time for such attention.

Criteria for settlement review

Until 2003, Rule 23(e) commanded that no class action be dismissed unless the court so ordered, but provided no guidance

about how the court was to decide whether to permit the dismissal. More specifically, it provided no guidance about the standard a court should use in deciding whether to approve a proposed settlement. The courts filled this gap by developing the standard that settlements could be approved only if fair, reasonable, and adequate. They also developed a common procedure for settlement review -- initial inspection by the court before notice of the settlement was sent to the class, a time when the district judge could determine that it was flawed and, as a consequence, notice should not be given. If the judge did not disapprove the proposed settlement, notice could be given and class members could object. At least some lawyers gained reputations for representing objectors frequently; this recurrent activity received baleful attention from others in the class-action bar.

The 2003 amendments strengthened the rule in the settlement context. Not only did they adopt the standard that had emerged from the cases (Rule 23(e)(2)), they also said that decision should come "after a hearing." Rule 23(e)(3) requires the parties to the proposed settlement to file a statement identifying any side agreements made in connection with the proposal. In (b)(3) cases in which notice of certification has already been given and the time to opt out has expired, Rule 23(e)(4) alerts the judge that the court may refuse to approve the settlement unless it affords a second opportunity for class members to opt out. And Rule 23(e)(5) permits class members to object, but permits those objections to be withdrawn only with the court's permission.

The current Rule 23(e) criteria were developed from a variety of possibilities through considerable discussion and debate. One tension was an effort to balance the rights of objectors and the risks that they (or their lawyers) may attempt to profit disproportionately by holding up the settlement. For a time, there was discussion of whether objectors could be prevented from appealing the rejection of their objections unless the court granted them leave to intervene, but this idea was dropped and *Devlin v. Scardelletti*, 536 U.S. 1 (2002), later held that any class member who objects may appeal denial of the objection. There was discussion of whether objectors should be assured some right of discovery, and the question whether the emphasis should be on allowing discovery or assuring a right to opt out was also discussed. Making the second opt-out mandatory was seriously considered but eventually not included.

Experience has now developed under the Rule 23(e) criteria. Given the centrality of settlement, it may be timely to return to those criteria and the procedure for court approval of proposed settlements. The ALI Principles object that the array of factors used in reviewing settlements is too large, and that the courts' handling of them is in disarray. §§ 3.03 and 3.05 propose more

focused review and findings that might provide a starting point for a rulemaking effort. In addition, § 3.11 addresses the second opt-out issue, and states that Rule 23(e)(4) has had minimal effect in practice.

One feature that deserves separate mention is the use of cy pres provisions in class action settlements. § 3.07 of the ALI Aggregate Principles proposes an approach for handling cy pres treatment of class-action settlements. It has been adopted by some courts already. See, e.g., *Klier v. Elf Autochem North America, Inc.*, 658 F.3d 468, 474-75 (5th Cir. 2011) (per Higginbotham, J.). Whether that would be suitable for inclusion in a rule is uncertain.

Another abiding concern is the handling of future claims. § 3.10 of the ALI Principles addresses the handling of this problem. But the ALI Reporters were uncertain about whether any rule change would be necessary to adopt the approach they endorse.

§ 3.12 proposes immediate appellate review of the court's rejection of a proposed settlement. As noted above, Rule 23(f) might seem to authorize review in some instances, but further rulemaking might be considered.

An issue of settlement procedure that emerges from the ALI Principles is the "preliminary approval" that many courts perform before notice is sent to the class. § 3.03 urges that this activity should be a "preliminary review" and not an "approval" because the latter might tend to deter objections and to make a court unduly resistant to them when they do occur. The "preliminary approval" method is nowhere spelled out in the current rule, but perhaps it could be addressed, perhaps in Rule 23(e)(1), which already deals with notice to the class.

Rule 23(b)(2) and monetary relief

Whether or not foreseen in 1966, Rule 23(b)(2) became quite popular in a variety of kinds of cases, particularly employment discrimination cases. Some suggested this provision appealed to lawyers because they did not have to satisfy the (b)(3) predominance test and did not have to arrange for individual mailed notice to class members, as is required in (b)(3) actions. Monetary relief was often included in actions certified under (b)(2). In particular, backpay claims under Title VII were regularly found to fit within (b)(2) as "equitable" relief intrinsically linked to injunctive or declaratory relief in such cases.

The Civil Rights Act of 1991 complicated the picture, as it permitted Title VII claimants to seek compensation for discrimination. In *Allison v. Citgo Petroleum Corp.*, 152 F.3d

402 (5th Cir. 1998), the Fifth Circuit invoked the 1991 Act to hold that a Title VII employment discrimination action could not be certified under (b)(2) to the extent it sought monetary relief. Instead, said the Fifth Circuit, "[m]onetary relief predominates in (b)(2) class actions unless it is incidental to requested injunctive or declaratory relief, damages that flow directly from liability to the class as a whole on the claims forming the basis of the injunctive or declaratory relief." This decision prompted another Fifth Circuit judge to observe that the Allison court had found "a Title VII exception to Rule 23." Smith v. Texaco, Inc., 263 F.3d 394, 419 (5th Cir. 2001) (Reavley, J., dissenting). But the Fifth Circuit did recognize that monetary relief, individual determined, could nonetheless be included in some (b)(2) actions. See In re Monumental Life Ins. Co., 365 F.3d 408 (5th Cir. 2004) (upholding (b)(2) certification of action on behalf of victims of racial discrimination in marketing of life insurance policies, including monetary relief for disparities in charges or benefits).

In Wal-Mart Stores, Inc. v. Dukes, the Supreme Court held that Title VII backpay is not properly included in a (b)(2) action. Although it recognized that "incidental" monetary relief might still be included, it also said that "individualized" monetary relief could not be included under that section of the rule. Relief under (b)(2), it added, was typified by cases in which the class "seeks an indivisible injunction benefitting all its members at once." It declined to hold that (b)(2) applies only to claims for injunctive relief, but said that the 1966 Committee Note about cases in which final relief relates "exclusively or predominately to money damages" does not support a negative inference that (b)(2) actions may include monetary relief that does not "predominate." Justice Scalia also observed that the Rule controls, and that the Committee Note cannot add to the rule.

Before the Wal-Mart decision, there had been some disagreement among the courts of appeals on how one would decide whether monetary relief "predominates" for purposes of inclusion in a (b)(2) action. If the Committee wants to consider opening the possibility of such certification, amending the rule might be worth considering. Additionally, it is worth noting that the ALI principles (§ 2.04) contain language regarding "indivisible" remedies that might be considered to replace the "injunctive or corresponding declaratory relief" language now in the rule.

Certainly the 23(b)(2) feature of the Supreme Court's decision has prompted much comment. The question here is whether it should also result in consideration of amending the rule.

"Back burner" issues

The Subcommittee could also focus on a variety of other issues. They are "back burner" issues because they have, to date, received less attention than the ones listed above. One service that the full Committee could provide would be to consider which of these issues might properly be moved to the front burner.

Fundamental revision of Rule 23(b)

As noted above, twenty years ago there was some serious consideration of developing a more functional and flexible arrangement of Rule 23(b), but that was ultimately not pursued. Since then, one could say that the decisions have somewhat supported the notion that the various Rule 23(b) provisions meld together in ways that warrant reorganizing the subdivision. Increasingly, claims for money are classed as covered by (b)(3), with its opt-out requirements, where they formerly were often included under (b)(2). Increasingly, similar arguments may be made for alleged (b)(1) situations in which some or all class members have monetary claims. In short, the 1966 arrangement -- while it was a major improvement over the formalistic 1938 definition of categories -- may nevertheless no longer be as useful as a new approach, whether similar to the one considered twenty years ago or not.

Revisiting Rule 23(a)(2)

A core holding in *Wal-Mart Stores v. Dukes* is that common questions did not exist under Rule 23(a)(2), and that certification was therefore improper. That provision in Rule 23(a) coexists with other similar provisions in Rule 20(a) (permissive joinder of parties) and Rule 42(a) (consolidation of separate actions). It most certainly does not require that all questions be common, or that the common questions predominate.

There may be concern that the Wal-Mart interpretation of Rule 23(a)(2) makes it too great a barrier to certification. In Amchem, the Supreme Court said that "the predominance criterion is far more demanding" than the (a)(2) common question requirement. It also said that "[p]redominance is a test readily met in certain cases alleging consumer or securities fraud or violations of the antitrust laws."

One could therefore be concerned that the Court's holding could have very broad ramifications. On the other hand, it could also be interpreted as limited to the remarkable facts before the Court -- an immense class action (against the largest private employer in the nation, perhaps the world) alleging that individual managers across the country exercised discretion in their promotion and salary decisions. If one takes the outcomes

of those decisions (allegedly gender-skewed) as not proving a violation of Title VII, the case may simply hold that there is no other question in common among all the class members from across the country. All the case may mean, then, is that such employment discrimination claims will have to be brought with regard to smaller employers, or smaller units of large employers.

Some guidance might be found in § 2.01 of the ALI Principles, which speaks of "those legal or factual issues that are the same in functional content across multiple civil claims, regardless of whether their disposition would resolve all contested issues in the litigation." But this formulation may be more directed to predominance than to whether there are common questions at all (although that topic seems to be addressed in the ALI's § 2.02, not this provision).

If attention focuses on Rule 23(a)(2), it might also focus on other rules with similar provisions, such as Rules 20(a), 24(b), and 42(a). It might also be noted that 28 U.S.C. § 1407 -- the Multidistrict litigation statute -- speaks in terms of common questions.

Requiring court approval for "individual" settlements

Until 2003, the courts held pretty uniformly that a plaintiff who filed a case as a class action could not just dismiss it at will in return for an "individual" settlement. Instead, Rule 23(e) was interpreted to require that the judge ensure that the settlement did not involve an abuse of the class action by which the individual plaintiff profited and the class effectively lost out. The 2003 amendments were revised after the public comment period to remove this feature of Rule 23(e); now court approval is only required for settlement of certified classes.

The ALI Principles urge that the pre-2003 rule be restored. § 3.02(a) says that court approval should normally occur if the settlement "does not involve any payment or other special consideration to class counsel or the named representative." It also recognizes that the court may find itself in a somewhat difficult position if it refuses the dismissal request, but the attorney or the proposed class representative is unwilling to proceed with the case.

Revisiting the "predominance" or "superiority" language in Rule 23(b)(3)

The "predominance" finding required by Rule 23(b)(3) has often been challenging for courts. It certainly does not require that all issues affecting all class members be common. For example, in a case involving a plane crash, even if the cause of

the crash were clearly the predominant issue in litigation, the extent of individual damages would also need to be resolved.

§ 2.02(a) of the ALI Principles says that certification should occur only if resolution of common questions is feasible and will "materially advance the resolution of multiple civil claims." The comment to this section says that the goal of the section as a whole is to "delineate * * * the multifaceted inquiries presently encapsulated under the predominance concept."

§ 2.02(b) of the ALI Principles lists "realistic procedural alternatives" that might be considered for inclusion in Rule 23(b)(3) to focus the "superiority" analysis.

Revisiting the notice requirements

Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974), interpreted Rule 23 to require individual mailed notice of class certification to each member of a (b)(3) class who could be identified with reasonable effort. This notice requirement could impose heavy costs on class counsel, who usually would have to front the costs. It might also spur settlement, since the notice could be combined with Rule 23(e) notice of the settlement, and then the defendant would usually pay for it. For a long time, commentators have derided the notice requirement as unnecessary and unnecessarily costly.

In the current era, there seems to be considerable reason for alternative means of notice in (b)(3) cases -- often Internet-based -- to receive more respect. Whether there could be constitutional objections to substituting such means would have to be considered.

Another notice issue that could be revisited is whether to require some notice in (b)(1) and (b)(2) actions. In the preliminary draft of amendments published in 2001, there was a provision calling for notice in such cases. It did not specify the method, and certainly did not require mailed notice. But there was strong opposition to any required notice in (b)(2) actions, and the provision was modified to note that the court could direct notice. Of course, it could direct notice under the unamended rule, so the addition of this provision did not add much.

Particularly in contrast to the current requirement of mailed notice in (b)(3) actions, the absence of any requirement of any notice at all in (b)(1) and (b)(2) actions may seem odd. True, those are "mandatory" class actions, and class members have no right under the rule to opt out. Some cases have, however, permitted opting out despite certification under (b)(1) or (b)(2), perhaps suggesting that a rule revision on this score is worthy of attention. More generally, the fact there is no right

under the rule to opt out need not lead inexorably to the conclusion that class members in (b)(1) or (b)(2) classes have no legitimate interest in notice. Indeed, it is possible that the members of a (b)(2) class could be affected in more profound ways by the resulting judicial relief (e.g., by a judicial decree affecting pupil assignment in schools) than the members of a (b)(3) class (who reportedly often get relatively minor monetary payouts).

The ALI Principles address notice partly in terms of when there is a right to opt out; § 2.07 calls for notice unless "the aggregate proceedings should be mandatory in order to manage indivisible relief fairly and efficiently." But § 2.07(a)(3) proposes that individualized mailed notice may not actually be the best, referring to the alternative of Internet-based notice.

Responding to Shady Grove

In Shady Grove Orthopedic Assoc. v. Allstate Ins. Co., 130 S.Ct. 1431 (2010), the Court said that once the requirements of Rule 23(a) and (b) are satisfied, a district judge has no discretion to refuse to certify the class. This pronouncement stands in contrast to many lower court decisions saying that district court class certification is "discretionary." It also refused to honor New York's limitation on class actions in actions for penalties even though the claims were based on New York law.

Whether Shady Grove significantly constrains district-court consideration of certification is unclear. Certainly other factors can be cited as having a real impact on the latitude district judges exercise when making certification decisions. Rule 23(f), for example, permits disappointed litigants to seek immediate appellate review. That review, of course, will often be handled under an "abuse of discretion" standard. But a growing body of appellate case law may narrow district courts' actual discretion. One goal for 23(f) was to facilitate a body of appellate law on certification; surely the district judge's failure to follow the appellate court's stated views on class actions would be viewed as an abuse of discretion. Moreover, it may be that appellate scrutiny of the district judge's scrutiny of the class certification motion under such cases as Hydrogen Peroxide imposes a further constraint on the district judges' actions.

The other feature of Shady Grove -- holding that Rule 23 creates a right to file a class action even though the state-law claims being asserted are subject to an explicit prohibition on class actions unless the statute creating the penalty claim also authorizes class actions for penalties -- arguably fails to give appropriate attention to the remedial purposes of the lawgiver. This outcome could also be revised by rule amendment.

The agenda materials for the November meeting (at pp. 643-45) had relatively simply methods of restoring this discretion and forbidding class actions in federal court where "prohibited by the law that governs the claim." But it may be that making either change is not really an important undertaking.

Addressing choice of law

For class actions based on federal law, choice of law issues should not arise. But when the claims are based on state law, those problems can be extremely important. And CAFA has increased the number of class actions making state-law claims in federal court.

Rule 23 does not now address the choice-of-law question explicitly. The common questions provisions implicitly involve choice-of-law determinations because the framing of the questions depends on the legal principles that apply. That reality is true of other common issue questions (such as permissive party joinder under Rule 20), but it achieves much greater importance under Rule 23.

The ALI Principles place considerable stress on the resolution of choice-of-law issues as part of the aggregation decision. § 2.03 says that the underlying substantive law must inform the application of aggregation criteria. § 2.05(a) says that the court "must ascertain the substantive law" governing the allegedly common issues. That may be included within in the determinations that Rule 23(c)(1)(B) now requires the court to make. § 2.05(b) addresses the techniques courts might adopt to handle divergent substantive regimes in class actions.

Whether these issues -- important though they certainly are in class certification decisions -- could be handled more effectively by a rule amendment is not clear. As a starting point for discussion, one might refer to a proposed amendment to CAFA by Sen. Feinstein which said:

the district court shall not deny class certification, in whole or in part, on the ground that the law of more than one State will be applied.

S. 5, 109th Cong., Amend. 4, 151 Cong. Rec. S1215 (Feb. 9, 2005). Choice-of-law rule provisions along this line might raise a wide variety of challenges, such as calibrating the role of choice of law in evaluating predominance of common questions. Whether to include choice of law as a topic for possible rulemaking is therefore an issue.

Attorney's fees

Rule 23(h) was added in 2003 to provide the court with directions about attorney's fees. But the closest thing to substantive direction about measurement of fees is advice in the Committee Note. That Note emphasizes the importance of fees to the proper functioning of class actions. Rule 23(g) also invited the court to specify the method for awarding fees to class counsel in its order appointing class counsel.

§ 3.13 of the ALI Principles goes beyond this beginning and proposes principles for determining fee awards, displaying a clear preference for a percentage rather than a lodestar measure, although it also regards the lodestar as a suitable cross-check in some cases.

The Principles also address other fee-award issues. § 3.08(a) authorizes the court to award fees out of the settlement pot to objectors who improved it, something contemplated by the Committee Note to Rule 23(h). § 3.08(b) discusses the situation when objectors succeed in persuading the court to reject a proposed settlement. If a classwide recovery is later obtained, it proposes that the objectors could seek a fee award by demonstrating that their efforts contributed to an improved outcome. Comment (c) to § 2.09 deals with a fee award for attorneys representing a class in an issues-only class action. Because such cases might often not lead to the entry of a final judgment for monetary relief, that would create obstacles to a fee award. The Principles suggest that a "quasi-class action" approach might be employed to handle the problem.

The question for now is whether fee-award principles that go beyond what was done in Rule 23(h) should be considered; at least one concern would be whether rulemaking is an appropriate way to address these issues.

Binding effect of denial of certification or rejection of a proposed settlement

In 2000-2001, the Committee spent considerable time and effort on whether it could devise useful rule provisions that would limit the ability of other courts (mainly state courts, it was thought) to "second guess" a federal court's considered judgment that a certain class could not be certified, or to reject a certain settlement. There was concern about lawyers traipsing across the country searching for a judge somewhere who would approve what another judge had rejected.

Eventually, the Committee did not propose publishing proposed amendments along this line, but did produce an extensive memorandum about the possibilities it had considered that was extensively discussed at a class action conference the Committee

organized at the University of Chicago in late 2001. During that conference there was fairly intense academic debate about whether the rulemaking power would extend far enough to authorize such measures.

In *Smith v. Bayer Corp.*, 131 S.Ct. 2368 (2011), the Supreme Court held that a federal court has limited authority to enter an injunction against later efforts to obtain certification in a state court. The Court held that the Anti-Injunction Act invalidated the injunction before it. It did include one footnote that recognized that different legislation -- or perhaps even a rule -- could affect the result in the future. See *id.* at 2382 n.12. It should be noted that the sequence of events could be the other way around -- the federal court could be asked to approve something a state court had rejected. For a recent example in which objectors argued that was happening, see *Faught v. American Home Shield Corp.*, 661 F.3d 1040 (11th Cir. 2011), in which a district court in Alabama approved a class-action settlement somewhat like one previously rejected by San Diego Superior Court in California. The Eleventh Circuit rejected the objectors' arguments, finding at least five differences between the settlement rejected in San Diego and the one approved by the federal court in Alabama.

The ALI Principles touch on similar issues, but do not seem to urge any rule changes. § 2.11 (quoted by the Court in *Smith v. Bayer Corp.*, 131 S.Ct. at 2381 n.11) proposes that there be "a rebuttable presumption against" certification of the same class by another court if one court has denied it. § 3.14 addresses collateral challenges to settlements. Whether there is reason again to consider rule provisions on the binding effect of rejection of certification or a proposed settlement could be on the Subcommittee's agenda.

Aggregation by consent
Opt-in classes

§ 2.10 of the ALI Principles authorizes aggregation by consent in exceptional circumstances. In a sense, this might be seen as similar to the "spurious" class action under original Rule 23. But the Second Circuit held that an opt-in class is not authorized under the current rule in *Kern v. Siemens Corp.*, 393 F.3d 120 (2d Cir. 2004). Whether adding such a provision to the rule would be useful is debatable.

*Additional issues --
suitable for a Manual?*

The memorandum analyzing the ALI Principles points to a large number of additional issues that the ALI process brought to light. Any suggestions of issues mentioned there that should be on the Committee's agenda is most welcome. Besides that,

reviewing that memo may assist in identifying issues that might be suitable for some sort of manual on class action practice. When the 2003 amendments were proceeding through the Committee's review, for example, the Manual for Complex Litigation (4th) was also being drafted. It may be that some similar compilation of guidance for district courts and lawyers could be developed to address issues that are not thought suitable for Committee action. The rules process does not produce such documents, but its activity may provide sustenance for such an effort.

TAB 11B

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Notes on Conference Call
Rule 23 Subcommittee
Advisory Committee on Civil Rules
Jan. 27, 2012

On Jan. 27, 2012, the Rule 23 Subcommittee of the Advisory Committee on Civil Rules held a conference call. Participating were Hon. Michael Mosman (Chair), Dean Robert Klonoff, Elizabeth Cabraser, Esq., Prof. Edward Cooper (Reporter, Advisory Committee), Prof. Richard Marcus (Assoc. Reporter, Advisory Committee), and Andrea Kuperman (Chief Counsel, Rules Committees).

Judge Mosman introduced the call by proposing that the Subcommittee determine (1) whether it thought that it would be productive to commence work on Rule 23 at this time, and (2) if so, what would be the top-priority topics to address. On the first topic he noted that all rules can be improved, but that any change in rules is certain to produce costs.

Whether this is the right time

The first participant said that the Subcommittee should move forward. The class action panel during the Standing Committee meeting in January, for example, was unanimous on the proposition that there are a number of areas that deserve attention. This does not mean that there are obvious or easy solutions, but shows that there is much concern.

The second speaker agreed that the Phoenix panel showed that there was a need. Indeed, it showed a wide interest in specific topics, such as settlement classes. True, we know that the Rule 23(b)(4) proposal published for comment in 1996 was later withdrawn after the Supreme Court decided Amchem, but despite that there is reason to return to the topic, now that we have broad experience under that 1997 decision. Another topic that keeps coming up is the meaning and interpretation of "predominance" under Rule 23(b)(3). The ALI Principles of Aggregate Litigation provide a good alternative formulation. There are others; it's not possible now to predict the trajectory of any amendment proposals, if those eventuate, but it is clear there has been much activity.

The third participant recalled the reconsideration of Rule 23 beginning in 1991, which involved in particular consideration of the idea of fundamentally revising Rule 23(b) along even more functional lines. That proposal elicited objections that it would upset too much settled judicial experience under the current Rule 23(b) setup. The later experience with the published 1996 amendment proposals also saw almost all of them (except Rule 23(f)) eventually withdrawn. Only in 2001 were amendment proposals made and eventually adopted. In short, the obstacles to changing Rule 23 are daunting, and the very large body of existing case law, based on the 1966 rule, is something

that properly will give people pause in determining whether to make rule changes. At the same time, it is also true that the last decade has been a period of flux, with the 2003 rule changes, the 2005 adoption of CAFA, and the spate of Supreme Court decisions to change the class-action landscape. At least, it seems that the Manual for Complex Litigation might be ripe for revision, although that is not within the purview of the Advisory Committee. But many topics that are suitable for rulemaking attention have also been identified, and it would be premature to assume that none of them will eventually lead to a formal rule proposal.

Another participant began by noting that the process of reviewing the rule may itself pay dividends. That is a task the Advisory Committee would have to get to at some point, and this Subcommittee has been launched. Unless there is some good reason to hold back now, we should go ahead. Moreover, we should begin with a receptive attitude toward even basic or wholesale change. Even if that sort of change seems on examination not to be wise, it is the starting point. And even if few actual proposals emerge from this process, there may be other products that could result as well. For example, the Evidence Rules Committee has commissioned its Reporter on occasion to produce a study of a problem area under those rules. Those studies have provided guidance for the bench and bar, although they are not the official work product of that committee. Something along those lines might not be beyond the realm of possibility.

The final speaker agreed that the work should continue. The Phoenix panel demonstrated that there are lots of issues deserving attention. It is not appropriate now to prejudge which will prove to merit serious rulemaking attention.

The discussion was summed up as showing a broad consensus in favor of proceeding.

Most promising topics to address

The second focus of the call was on the topics that seemed most worthy of consideration. There surely are many, many possible topics for the Subcommittee to address, but it should try initially to pick three or four that stood out as most promising for rule changes.

The first speaker identified four topics:

(1) Hydrogen Peroxide and the problem of addressing the merits in connection with class certification: The rule calls for an early decision on whether the class will be certified, but the question whether this decision should be deferred until after full or considerable discovery has produced disarray in the lower

courts, as has the proper approach to deciding whether, in light of the merits, certification is warranted.

(2) Settlement classes: Amchem did not make settlement classes impossible, but did deter settlements. The Amchem insistence on considering predominance even for settlement classes may make settlement classes unnecessarily difficult to certify. But one could say that some lower courts just read out the Supreme Court's invocation of predominance in Amchem, which hardly seems appropriate. The consequence is to force lawyers and litigants into work-arounds like the "quasi-class action" concocted sometimes using the MDL Panel's powers.

(3) Settlement criteria: In 2003, Rule 23(e) was amended to provide much more detail about how the court is to determine whether to approve a proposed settlement. But further clarification may hold promise. In particular, the question of using cy pres techniques was carefully examined in the ALI project, and that project's recommendations have been adopted by a number of courts, including at least two courts of appeals.

(4) Issue classes: Rule 23(c)(4) says that courts can certify as to some but not all issues, but the lower courts have divided about whether or how that can be done. The Fifth Circuit has said that it may be done only if the whole case can be certified as a litigation class. If that is so, it is difficult to determine why plaintiffs would want only half a loaf. The Second Circuit has rejected the Fifth Circuit's view, and taken a much more receptive posture about issue classes.

Besides these four, there are many technical issues that are mentioned in Prof. Marcus's memo on the ALI project that would deserve attention. An example is whether preliminary review of a proposed settlement should be lead to initial "approval," which might skew the later review of the settlement. Another issue might be notice issues, possibly involving use of the Internet in place of regular mail.

The second speaker also identified four topics:

(1) Settlement class certification.

(2) Hydrogen Peroxide issues: Although there has been divergence on the rigorous examination required by the certification process and the role of merits issues, the lower courts have offered some reasonable formulations. The Ninth Circuit formulation in Dukes v. Wal-Mart was pretty good, and the Seventh Circuit has articulated a sensible approach.

(3) The 23(c)(4) issues certification problem: This might be linked to consideration of Rule 42, which invites a similar subdivision of cases.

(4) A cluster of the ALI Principles' recommendations. For example, the ALI's substitute language for the "predominance" standard has much to recommend it because it sidesteps subjectivity.

The third speaker started with "basic" changes and noted that a rethinking of Rule 23(b) might qualify because decisions in the last 15 years have cast serious doubt on whether the current rule's divisions continue to fit the actual court decisions. Settlement class certification and the Hydrogen Peroxide cluster of issues are clearly very important. Rule 23(c)(4) has long seemed inconsistent with the predominance requirement of Rule 23(b)(3), and the existence of a fairly obvious circuit split on its interpretation adds fuel to the idea of considering rulemaking to resolve the question. A smaller matter that was changed in 2003 might be changed back. Before 2003, all the circuits held that court approval was required even for "individual" settlement of suits filed as class actions. The 2001 published preliminary draft retained that requirement, but it was removed in the post-comment revisions. The ALI Principles urge restoring it.

The fourth participant identified the current notice requirement for Rule 23(b)(3) classes as ripe for review in the Internet age. Alternatively or additionally, one might consider providing notice to only a sample of the class -- not the whole class -- in some cases, particularly small value cases. Another possible notice issue is to require some notice in mandatory class actions. The 2003 amendments originally called for such notice, but representatives of the civil rights bar argued that such a requirement would unduly burden civil rights (b)(2) class actions for injunctive relief. The settlement class idea also seems worth serious attention; perhaps the cy pres issues could be included in that activity.

The fifth participant acknowledged the importance of the issues identified so far, and had no additional matters to propose.

It was asked whether rulemaking really is needed on some of these issues. For example, it seems that the ALI cy pres recommendations are being well-received in the courts. Two courts of appeals have adopted them, and so have a number of district courts. Is there a reason to complicate this situation with rulemaking? An answer was that one thing rule changes can do is build on judicial experience and make the widely-accepted practice the clear rule and the universal practice.

In sum, it appeared that there was relative agreement on a fairly short list of "prime candidates" for rulemaking attention, and a considerable supply of other issues.

Method of proceeding

The discussion shifted to the question "What should we do now?" The first reaction was that the Subcommittee should present its current thinking to the full Committee, along with the background materials that it has developed. Based on that background, it can discuss the various issues it has identified with the full Committee, and solicit views of Committee members about those issues and additional issues. That could be followed up with a mini-conference to involve a wider circle of experts in the discussion.

Another participant agreed with this approach. "We can go to the Committee with a shopping list." The range is from possible blockbusters to technical revisions. On some discrete topics, the ALI Principles might afford a model for initial rulemaking efforts. One benefit of this activity is to bring Rule 23 up to date. Any amendments from this process would not go into effect until about 2016, 50 years after the major revision to the rule. An enormous amount has happened, and courts and lawyers have learned a great deal about how to handle class actions. At the same time, class actions are not routine for most judges and lawyers, so refining the rule with the help of the experts could confer a wide benefit.

A third reaction was that it might be that a mini-conference would be more productive only after the Subcommittee had studied the issues more thoroughly and, perhaps, drafted some tentative rule language that could serve as a focus for discussion. It has often proved true that having possible rule language has served to focus discussion in a way not otherwise possible. Any such drafting would have to be surrounded by caveats that it was only for purposes of discussion and represented no commitment to proceeding with any particular rule-amendment ideas, but it could still prove very helpful. Doing that, however, would depend on more Subcommittee work before gathering together a group of experts in a mini-conference setting. The contributions of the full Committee would be an important feature of this refinement process. Getting to a mini-conference too soon might dilute its value.

A response was that this general mode of proceeding sounds wise, but that we might consider the possibility that we would benefit from having two mini-conferences, one early on to assist in shaping general contours and another after much more specific ideas had been developed. Something like that was the method used on Rule 56 several years ago. These mini-conferences can sometimes be scheduled in conjunction with regular Committee meetings, thereby minimizing travel and time commitments for Committee members. At the same time, even in an early "introductory" mini-conference, it would probably be a good idea

to consider having some rough drafting ideas to present, perhaps as alternative formulations.

It was agreed that an introductory presentation to the full Committee, inviting input on the issues already identified and others warranting attention, would be helpful. Then the Subcommittee would be in a better position to begin to refine issues for the initial mini-conference.

TAB 11C

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Rule 23 Panel
Standing Committee Meeting
Jan. 5, 2012
Phoenix, AZ

The following are informal notes on the discussion during the Class Action Panel held as part of the Standing Committee meeting in Phoenix, AZ, on Jan. 5, 2012. It attempts to provide some of the flavor of the discussion; it is no sense a "transcript," and any individual attributions of comments by panelists are for the convenience of the reader, and do not pretend to complete accuracy.

Introduction: Enough time has passed since the 2003 amendments to Rule 23 went into effect to warrant some reflection on the results of their operation in practice. In addition, CAFA has been in effect for nearly seven years. Beyond that, the Supreme Court has in the last two Terms decided a number of class-action cases, and lower courts have added several more important decisions. These recent decisions provide a further reason for reflection of the present state of class-action practice.

Girard: Hydrogen Peroxide is behind a trend that affects the way class actions are litigated. Until the last few years, district courts would ask only whether plaintiff had demonstrated an intention to prove the case by common evidence. Now district courts increasingly find that they must make findings by a predominance of the evidence on all Rule 23 topics. And increasingly they feel that they must resolve legal and factual issues to do so. In part, that may lead to a battle of the experts because, assuming the court concludes that the testimony of both sides' experts will be admissible under Daubert, the court may have to decide which is more persuasive. This set of requirements can create great settlement pressure.

A common plaintiff-side reaction with regard to evidence bearing on the merits that might affect certification is "use it or lose it." This prompts a proper desire by plaintiff counsel to obtain as much evidence as possible before certification is decided. Usually defendants want to limit discovery before certification, but that preference is hard to sustain now. In a recent Third Circuit securities fraud case, for example, plaintiffs had to do all their discovery before presenting a motion to certify the class. This impulse toward full discovery is compounded by the increased importance of electronic discovery, which does not lend itself to phasing. Defendants do not want to go through E-Discovery twice.

These circumstances are not universal. Hydrogen Peroxide has been rejected in some circuits. In particular, it is unclear whether a full-blown Daubert analysis is necessary at the class-certification stage. (Note that in Wal-Mart v. Dukes the Court did not decide this question, but the Court's opinion suggested that a full analysis would be required.)

One upshot of these developments is that there are, in effect, two expert discovery episodes because the preparation for certification exchange resembles the exchange required later in the case by Rule 26(a)(2) and (b)(4)(A).

Together, these developments lead to front-loading of the case. This development might be viewed as satisfactory on the notion that certification itself places extremely strong settlement pressure on defendants. But that assumption is hard to support in many or most cases. Important literature (e.g., Charles Silver's article in NYU Law Review) questions this conclusion.

California state-court practice offers an analogy. Under Brown v. Board of Regents, 198 Cal.Rptr. 916 (Cal. Ct. App. 1984), defendants were allowed to make a demurrer to the class allegations. And they did. But these demurrers were virtually never granted, and they just created extra work for the parties and the court. The thing to do is to require the plaintiff to bring on the motion to certify appropriately early in the case.

Despite these developments, it does not seem that there is an acute need for action. It can't confidently be said that good class actions are being killed off in the cradle because of these developments.

Another noteworthy development is the tendency to stress standing in connection with ascertainability and class definition. This tendency is a departure from the prior caselaw, which looked only to the standing of the class representative. There is a drift away from the Rule 23 criteria and toward using standing as a critical factor at the class-certification stage.

Overall, in addition, there is great uncertainty about what predominance means in (b)(3). Related to that is debate about the proper role of (c)(4).

One reaction to these circumstances is that the thing to do is to monitor the development of the law, and see if that justifies a rule change.

Question: Rule 23(c) was amended in 2003 to change the time for certification to "an early practicable time." Has that change provided desirable flexibility?

Girard: That language gets cited for every conceivable outcome. The courts are all over the map. Some say (or even have local rules that dictate) that the certification motion be made within a specific limited time such as 90 days. Others prefer that the motion be made at the close of discovery.

Beisner: The courts are finding ways to deal with this timing issue. The timing varies from case to case. The court usually engages in close management of the pre-certification discovery. This does not mean that all discovery must be completed before certification is resolved. But in its scheduling order the court can surely set a date for presentation of the class-certification motion.

More generally, there is a different perspective from the defense side. The uniting message of the recent cases is: "Figure out what a class trial would look like. Then ask whether you can fairly put before a jury evidence that will support a fair answer as to the entire class." This is the gatekeeper approach.

In that setting, Hydrogen Peroxide emphasizes the importance of a trial plan (something that the Committee Notes to the 2003 amendments mentioned). There is more certainty now about what must be brought forward to justify certification.

The concept of a motion to strike the class allegations is not useful. Such a motion could only work if focused on a really fundamental flaw in the class action, such as a personal injury class action. The federal courts have made it relatively clear that there simply cannot be a personal injury class action.

CAFA has had effects. There are surely more class actions in federal court. That certainly does not mean that none are in state court, but in some federal-court cases standing has presented a problem because state courts don't operate under Article III and would permit claims by persons who do not have standing to sue in a federal court.

In addition, plaintiff lawyers have developed a strategy of separating what might previously have been a proposed national class action into state-by-state class action. This "downsizing" of classes may also be a reaction to Wal-Mart v. Dukes. The bottom line is that there are going to be more class actions. The MDL process is sometimes used to put them together. But the results of such combination efforts have not been uniform. Transferor judges may try to resolve the certification issue for all cases, or regard that as a question best suited to a ruling by the transferor judge. Another tactic has been to move to stay later-filed class actions under the "first-filed rule" that federal courts have long followed with overlapping litigation.

Question: Is the standing problem in CAFA cases a result of CAFA -- that plaintiffs who could sue in state court are not allowed into federal court because Article III is more exacting than similar features of state law?

Beisner: A recurrent example is in California unfair business practices cases (Cal. Bus. & Prof. Code § 17400), in which standing may be a major obstacle. Ultimately this is something state courts have to resolve. (In California, due to an initiative measure several years ago, the state courts have had to address standing in unfair business practices cases.)

Question: How does the recent Third Circuit en banc opinion in DeBeers bear on the standing argument? It appeared to say that standing is a "merits" issue that is not pertinent to certification, or at least not relevant to settlement class certification. Will that be followed? Is it only about settlement classes?

Beisner: One solution would be to sort out the states by types of state law, and find a pattern. The Third Circuit recommended that in In re School Asbestos Litigation, 789 F.2d 996 (3d Cir. 1986). With settlement classes, this is a management issue, not a predominance issue. For a litigation class, the court must worry about how to charge the jury. For a settlement class, that is not a concern.

Question: How readily can cases be broken up? What is the role of (c)(4)?

Beisner: There are some circuits where issues classes might be used. But it seems odd for this rule provision to provide a major solution. It has been in the rule since 1966, and the notion of "issues classes" only emerged quite recently. Frankly, counsel do not want to go through a whole class action on a piecemeal basis.

For example, consider state courts that still adhere to a 1970s attitude toward certification, and look only to the pleadings. The defendant's reaction is often something like "Let's try this issue first, judge." If that's the common issue, the defendant ends the case if it wins. But if it loses, the case goes on and somebody has to find a way to prove the rest of each plaintiff's case. The plaintiff lawyer does not want this. Particularly in negative value cases, this is a dead end for the plaintiff lawyer.

Klonoff: Hydrogen Peroxide is a huge issue. It pushes back the certification decision. The trend began with the Seventh Circuit's decision in Szabo v. Bridgeport Machines, Inc., 249 F.3d 672 (7th Cir. 2001). On remand in that case, the district judge's solution was to put off certification for six months to

allow more discovery. Hydrogen Peroxide has created much heartburn for judges. Consider Judge Aldisert's opinion in Behrend v. Comcast Corp., 655 F.3d 182 (3d Cir. 2011), as an example.¹

¹ Behrend, like Hydrogen Peroxide, was an antitrust case, alleging that defendant had obtained a monopoly in the regional cable market and exploited it to the harm of customers there. The district court certified a class after a hotly contested hearing in which both plaintiffs and defendant offered expert evidence. Writing for the majority, Judge Aldisert began his opinion by observing that "[i]n 2008 this Court handed down the seminal case of *In re Hydrogen Peroxide Antitrust Litigation*, which outlines the standards a district court should apply to deciding whether to certify a class." *Id.* at 185. But the majority emphasized its limited role in reviewing the district court's decision (*id.* at 194-95):

Simply put, the District Court determined by a preponderance of the evidence that, when addressed on the merits, the class may be able to prove through common evidence that the relevant geographic market is the Philadelphia DMA. This determination did not exceed the Court's permissible discretion. To the extent Comcast reads the Court's opinion as actually fixing the relevant geographic market, we note that its determination was made solely for the purposes of class certification and will not be binding on the merits.

Reviewing the competing expert evidence, Judge Aldisert reiterated that the district court concluded that plaintiffs "could establish class-wide antitrust impact" using a "clustering" theory that evidently depended on what the parties called "overbuilding," and that the district judge "found unpersuasive the conclusions of Comcast's expert * * * that overbuilding is not a successful business model." *Id.* at 195. It added (*id.* at 198):

All of this evidence demonstrates that Comcast's alleged clustering conduct indeed could have reduced competition, raised barriers to market entry by an overbuilder, and resulted in higher cable prices to all of its subscribers in the Philadelphia Designated Market Area. Based on this evidence, we determine that the antitrust impact Plaintiffs allege is "plausible in theory" and "susceptible to proof at trial through evidence common to the class." [quoting *Hydrogen Peroxide*] We are satisfied that the District Court's findings were supported by the evidence and not clearly erroneous.

The panel therefore rejected defendant's arguments on appeal

The role of predominance in settlement classes has also become crucial. For example, in DeBeers the court was struggling with proper handling of the predominance issue. These problems were addressed extensively in the ALI Aggregate Litigation project.

Wal-Mart v. Dukes, meanwhile, is potentially a sea change in the application of (a)(2). But it may be too early to determine whether that really happens. There are many questions. For example, Rule 20 permissive party joinder also depends on a common question analysis. Will Wal-Mart affect the interpretation of the parallel "common question" criterion there? (Note that a similar question could be asked about Rules 24(b) and 42(a), which invoke a common question standard, and 28 U.S.C. § 1407. It cannot be said, however, that all these uses of the same term are treated the same in actual cases.)

Yet another big issue is Wal-Mart's handling of the (b)(2) treatment of backpay. All the lower courts had held that this could be included in a (b)(2) class action, but the Court appeared unanimously to hold that was not possible. Perhaps this is a portent of applying due process opt-out requirements to any claim for money.

Issues classes are an important problem. In Castano, the Fifth Circuit said (c)(4) was a mere "housekeeping" measure that could only be employed once a class has been fully certified as complying with the predominant common question requirement of

(id. at 199):

At bottom, Comcast misconstrues our role at this stage of the litigation. Comcast would have us decide on the merits whether there was actual or potential competition. * * * We are not the jury. Although in *Hydrogen Peroxide* we heightened the inquiry a district court must perform on the issue of class certification, nothing in that opinion indicated that class certification hearings were to become actual trials in which factual disputes were to be resolved.

Judge Jordan provided a 16-page separate opinion, concurring in part and dissenting in part, finding that plaintiffs did offer sufficient common evidence of antitrust impact, but not that damages could be assessed on a classwide basis. On damages, the dissent said, plaintiffs' expert opinion "is incapable of identifying any damages caused by reduced overbuilding in the Philadelphia DMA. Consequently [the expert's testimony] is irrelevant and should be inadmissible at trial, pursuant to Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*. Thus it cannot constitute common evidence of damages." Id. at 214-15.

(b) (3). The Second Circuit has explicitly rejected that position in In re Strip Searches. A recent decision by the Third Circuit (Scirica, J.)² says that the proper application of (c) (4) is not clear.

Issues classes have been used effectively in environmental cases. For example, in the Engle litigation in the Florida state courts [Engle v. Liggett Group, Inc., 945 So.2d 1246, 1254 (Fla. S. Ct. 2006)] the appellate courts eventually held that a class judgment against the defendants could not stand, but that some findings on which it was based could be used against the defendant in later litigation. This application of a form of issue preclusion made the class action essentially an issues class.

Yet another major development has been Concepcion v. AT&T, which could eviscerate a large number of small claims class actions. Amchem said that the class action was for small claims (as the Court had said before -- see Deposit Guaranty Nat. Bank v. Roper, 445 U.S. 326 (1980)), not for mass torts. But those small claims cases are regularly cases in which there is a contract between the plaintiffs and the defendants that could include an arbitration provision forbidding class actions. It may be that cases in which the party objecting to arbitration can prove that it is impossible to vindicate its rights without a class action could avoid this outcome. But this does not seem to be something that could be solved by a rule change. It is statutory.

Question: Would a rule change affect cooperation between federal and state courts?

Beisner: Coordination often exists. Fairly often, there will be a California state-court class action and federal-court class actions also. MDL judges are becoming proficient in dealing with state courts.

² In Hohinder v. United Parcel Service, Inc., 574 F.3d 169 (3d Cir. 2009), Judge Scirica noted that "[t]he interaction between the requirements for class certification under Rule 23(a) and (b) and the authorization of issues classes under Rule 23(c) (4) is a difficult matter that has generated divergent interpretations among the courts." Id. at 200 n.25. He added, however, that "[w]e have not engaged this specific question, nor need we do so here." Id. He went on to note that "a court's decision to exercise its discretion under Rule 23(c) (4), like any other certification determination under Rule 23, must be supported by rigorous analysis." Id. at 201.

Comment: In my state, there has been an effort to get the state and federal judges together to improve coordination of overlapping pieces of litigation. This effort is promising.

Question: I wanted to hear about settlement classes. Can a vigorous set of rules for settlement certification make sense?

Klonoff: The ALI looked hard at those issues in its Aggregate Litigation project. This work went well beyond the (b)(4) proposal published for comment in 1996. A good idea might be for the Advisory Committee's Subcommittee to look section by section at the ALI project's ideas.

Question: Does the absence of a settlement rule create a problem?

Beisner: Ever since Amchem, you've had to create work-arounds. This has pushed mass tort settlements outside the system. Some judges (e.g., Judge Fallon [In re Vioxx Products Liabil. Litig., 574 F.Supp.2d 606 (E.D. La. 2008)] and Judge Weinstein [In re Zyprexa Prods. Liabil. Litig., 424 F.Supp.2d 488 (E.D.N.Y. 2006)]) have invented the idea of a "quasi-class action" to describe this situation. These cases have been blockbusters on occasion. In Vioxx, defendant settled for multiple billions, but without the formal protection of class certification.

Klonoff: I agree. There are three impacts: (1) There are many nonclass settlements, but the rules provide no criteria for handling them; (2) class-action settlements have been struck down when they should not have been; and (3) it is very awkward for defendant to reach even class-action settlements because if the settlement falls apart the court may be inclined toward finding that defendant is estopped to deny that class certification is proper, albeit for litigation, not settlement.

Girard: The absence of clearly defined standards invites objectors. Some of them act almost like terrorists: "Do what I want or I'll pull the pin on this grenade and blow us all up."

Question: How are consumer class actions working? Is the state Attorney General review helping?

Girard: As a practical matter, the attorneys general call plaintiff counsel to learn about the work done and the considerations that went into the decision to settle. The courts have become sophisticated about scrutinizing settlements. They look closely at the value for the class, and the question whether the lawyers are benefitting unduly. As a consequence, the fee jurisprudence has evolved away from the common fund, which was ascendent until recently. CAFA has done what it was supposed to do.

Beisner: Before CAFA was adopted, attorneys general were bitterly opposed to the provision calling for notice to them. They feared that this would involve added work and the risk of being blamed for settlements their constituents did not like and thought (with 20/20 hindsight) that they should have prevented. In fact, using the National Association of Attorneys General, they have become more efficient in sharing information and evaluating proposed settlements.

Question: Does this development bear on the need for expansion of Rule 23(e)? Can courts (and the rulemakers) rely on the Attorneys General as a valuable backstop in scrutinizing proposed settlements?

Question: In the late 1990s, there was a broad concern in the academy that collusive settlements ("reverse auctions") were prevalent. On the defense side, there was concern that loosening standards for settlement certification would bleed over into litigation certification. It was unclear whether there was a feasible rule change to address these concerns, however.

Have things changed ten years later? Is there greater confidence in the Attorneys General and the overall settlement review under amended Rule 23(e)? Is there greater confidence in class certification decisions under Hydrogen Peroxide?

Girard: With abusive settlements, the courts will see people who are not routine objectors show up to challenge the settlement. Besides Attorneys General, there are public-spirited and careful observers who often raise important issues for judges. Moreover, most class actions are actually litigated in a relatively small number of districts. The judges in those districts are very sophisticated. There may nonetheless be a valuable role for a new (b)(4) on settlement certification. One place where it might matter is in mass tort cases.

Beisner: It is worth pursuing. The certification criteria in the rule are clear, but they are out of whack in the settlement setting. Under Amchem, you have to sidestep them.

Question: So what you are urging is to reject the statement in Amchem that satisfying 23(e) is not a substitute for satisfying 23(a) and (b)?

Beisner: To a point. It is important to focus on whether there is a conflict. If there's great diversity of claims, as in Amchem, that should raise questions. But a grid can resolve those questions. The basic point is to place the main reliance on 23(e)(2). That is the source of the inquiry that really matters in the settlement class situation. Trying to handle those concerns through 23(a) and (b) is not particularly helpful.

Klonoff: A related issue is the use of the cy pres power. The presumption should be that any surplus in settlement funds goes to the class. That might be the most important point of the ALI Aggregate Litigation Project. Judge Higginbotham recently adopted the ALI's view. [Klier v. EIC Autochem North America, Inc., 658 F.3d 468, 474-75 (5th Cir. 2011).] To date, that section of the Project has been cited by courts more frequently than all the other sections put together.

Question: The Fifth Circuit suggested that state unclaimed property laws might come into play. Is that a factor?

Beisner: A U.S. Senator said that those funds should escheat to the federal Treasury, not the states.

Question: How has appointment of lead counsel gone?

Girard: Rule 23(g) has done valuable work in providing the possibility of appointment of interim class counsel even before certification is decided. There can be a debate on whether it's needed if there is only one case. But if there are multiple cases it is very beneficial for the court to impose some order. Otherwise, there are huge problems controlling what other lawyers are doing. One good approach is reflected in Second Circuit and S.D.N.Y. decisions that pre-appointment work by counsel that's duplicative of that done by the ultimate class counsel is not compensable. This could be extended to become a general rule. Under CAFA, there can be a lot of jockeying.

Beisner: In MDL proceedings, many courts also use inherent authority to require that consolidated complaints be prepared for all the actions. That activity usually produces a management team.

Question: Which problems could be helpfully addressed through rule changes?

Girard: Acknowledging that there are usually some individual issues would be good. Pretending that's not so does not make sense. This might address the tension between (b)(3) and (c)(4). This might also lead to rethinking the idea of predominance. The thrust should be that class adjudication is warranted if it promises to resolve common issues in a way that advances the case. The rules could acknowledge that cases in which the class treatment is important often involve individual issues, and guide courts on how to handle this reality.

Beisner: My main candidate would be a distinct settlement class certification rule. It's not clear, however, that (b)(4) is the way to go.

Klonoff: Focus on the Hydrogen Peroxide issues. Guidance on what exactly plaintiff must prove, and what evidence is needed, would be desirable.

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TAB 11D

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MEMORANDUM

TO: Rule 23 Subcommittee
CC: Dave Campbell, Ed Cooper
FROM: Rick Marcus
RE: Ideas from ALI Aggregate Litigation Principles
DATE: Jan. 16, 2012

Among the sources of ideas for Rule 23 innovation that were mentioned during the Nov., 2011, full Committee meeting was the ALI project Principles of the Law of Aggregate Litigation (2010). This project involved the contribution of many involved in the rules process. Most notably, it included Bob Klonoff as Associate Reporter, Elizabeth Cabraser as an Adviser, and Ed Cooper as an Adviser. Also among the Advisers were former Advisory Committee members Sheila Birnbaum, David Levi, Arthur Miller, Lee Rosenthal, Shira Scheindlin, and Anthony Scirica (several of whom also served as Chairs of the Standing Committee), current Standing Committee member Diane Wood, and former Standing Committee members David Bernick, Geoffrey Hazard, and Mary Kay Kane. Other luminaries were among the Advisers. It is group whose experience cannot be equalled.

This memorandum results from an initial cruise through Chapter 2 and most of chapter 3 of the ALI's final report. (Chapter 1 is about general principles, and portions of Chapter 3 are about settlements of aggregate proceedings that are not class actions.) It is necessarily limited in both scope and depth, but may nonetheless prove useful in identifying possible foci for rule amendment. It is not intended either to urge that the items mentioned be included in serious study, or that items in the Principles but not included in this memorandum be excluded from such study. For purposes of simplicity, it proceeds front to back. Owing to the richness of the material, this memorandum cannot pretend to identify all possible issues addressed in the Principles. Given the broad involvement in the Principles of others from the rules process, it is hoped that important omissions can be identified.

Another function this rather extended review may serve is to highlight ways in which a new Manual for Complex Litigation might serve a purpose. The current Fourth Edition was drafted as the 2003 amendments to Rule 23 were being considered. It may well be that a number of the concerns that caused the drafters of the Principles to propose action do not seem suitable for rulemaking. But that does not mean they are not suitable for attention in some form like the Manual. So to the extent proposals made in the Principles do not appear suitable for rules, even though they seem worthy of note, a new edition of the Manual might be desirable. That new edition would not, of course, be a product of the rules process. But the rules process might be able to assist the process of drafting a new Manual.

§ 2.01

§ 2.01 defines "common issues" as "those legal or factual issues that are the same in functional content across multiple civil claims, regardless of whether their disposition would resolve all contested issues in the litigation." This formulation might be considered in place of the current terminology in Rule 23(a)(2). It might also be substituted in Rules 20(a) and 42(a). But the Reporters' Notes explain that it is "designed to reflect the merging judicial understanding of the term in class-action and consolidated litigation." (p. 82) There seems no suggestion to change those rules. Whether these issues deserve revisiting in the wake of Wal-Mart v. Dukes may depend on analysis of judicial decisions applying the new Supreme Court precedent.

Chapter 2 -- Certification and Related Issues

§ 2.02

§ 2.02 addresses class certification as a general matter. It might be mined for alternative language for Rule 23 to address topics that have been much discussed of late:

Predominance and superiority. § 2.02(a) says that aggregating is favored only if it will "materially advance the resolution of multiple civil claims." This formulation might be preferred to current Rule 23(b)(3)'s "predominance" standard.

Comment (a) says that the terminology "is in keeping with existing invocations of the phrase, or similar locutions, by courts," adding that "[t]his process of application is presently undertaken in terms of a predominance of common questions." (p. 83) It adds that "this Section as a whole -- not just the phrase 'materially advance' in section (a)(1) -- delineates the multifaceted inquiries presently encapsulated under the predominance concept." (p. 84) Whether substitute rule language would lead to improved decisions is uncertain. Comment (d) emphasizes the importance of fealty to applicable substantive law.

The Reporters' Notes observe that "both the predominance requirement of Rule 23(b)(3) and the authorization for issues classes in Rule 23(c)(4) are worthwhile components of the law of aggregate litigation." (p. 93)

§ 2.02(a) also says that aggregation is favored if it would "address * * * the core of the dispute in a manner superior to other realistic procedural alternatives, so as to generate significant judicial efficiencies." This

formulation might be preferred to current Rule 23(b)(3)'s "superiority" standard.

§ 2.02(b) lists five "realistic procedural alternatives" that might be considered, perhaps suggesting detail that could be added to (or used in place of) Rules 23(b)(3)(A) - (D). These are:

- (1) coordinated discovery;
- (2) pretrial rulings, such as on a motion for summary judgment or concerning the admissibility of evidence related to the common issue;
- (3) trial of an individual claimant's case or multiple individual cases;
- (4) an administrative aggregation within the meaning of § 1.02(a) ["a collection of related lawsuits * * * proceeding under common judicial supervision or control"]; or
- (5) another class action already pending in another judicial system.

Comment (b) explores the need to focus class-certification decisions on both "viability" (e.g., the negative value claim problem) and "variability" (particularly in personal injury situations). (pp. 85-86) It also explores the need to attend to "significant judicial efficiencies" in making the superiority analysis. (p. 87)

§ 2.02(d) recommends that, if needed to make the aggregation decision, the court "should set forth a plan whereby claimants and respondents may undertake controlled discovery of facts pertinent to that determination." This might be a starting point for a rule provision (perhaps in Rule 23(c) or (d)) to address the merits-related certification issues discussed in Hydrogen Peroxide and other cases.

Comment (h) emphasizes that this activity must be done in accord with § 2.06, regarding resolution of legal or factual issues in making the aggregating decision. (p. 92)

§ 2.02(e) directs the court to "identify the issues encompassed by aggregate treatment" and "explain how aggregation will resolve fairly and efficiently the common issues identified and materially advance the resolution of any remaining issues or claims." This language could be considered to refine the findings required by Rule 23(b)(3) and the definitions required by Rule 23(c)(1)(B).

Comment (a) says that "[i]dentification of a common issue, the resolution of which will 'materially advance the resolution' of such claims, * * * goes significantly beyond identification of the minimal commonality that is among the general requirements for certification of a class action under current rules." (p. 84) It goes on to emphasize that the term operates in tandem with other concepts explored in other sections of the Principles. (pp. 84-85)

§ 2.03

§ 2.03 recognizes that the underlying substantive law must inform the application of the aggregation criteria. This implicit factor is not addressed explicitly anywhere in current Rule 23. The courts have recognized its importance, but may not have been entirely consistent on how it should be respected. Judicial statements that no class can be certified if more than one state's law would be applied to claims of class members can be compared to other judicial statements that the law of various states is similar enough to permit grouping of claimants in class actions. Whether a rule provision attempting to prescribe methods of handling such issues would assist courts in making such determinations regarding divergent state law may be worth attention. CAFA increases the frequency of such issues in federal court. These issues should not matter when the substantive law is federal. The comment also addresses the Seventh Amendment issues some have confronted when aggregation leads also to bifurcation between two juries. (pp. 114-15)

§ 2.04

§ 2.04 seeks to distinguish cases involving "indivisible" and "divisible" remedies. This nomenclature found some favor in Wal-Mart v. Dukes. It might be considered a starting point for a reformulation of Rule 23(b)(2), and might also affect cases suitable for certification under Rule 23(b)(1). The principal focus of § 2.03 seems to be in (c), which excuses opt-out rights with respect to "indivisible" remedies.

The setup of the current rule distinguishes what might be called "functional" grounds for class certification, with less emphasis on remedy. Rule 23(b)(2) is now phrased in terms of remedy -- whether injunctive or declaratory relief is appropriate for "the class as a whole" because the opposing party "has acted or refused act on grounds that apply generally to the class." But (at least until Wal-Mart v. Dukes) courts had allowed a fair amount of monetary relief in (b)(2) cases, and also allowed individually tailored relief on the general notion that it "flowed from" the injunctive or declaratory relief. Wal-Mart included rather broad statements about the impropriety under (b)(2) of "individual" relief, and seemed to prohibit monetary relief unless "incidental" to the injunctive or declaratory

relief. (Arguably an order to refund illegal bank fees in a class action on behalf of account holders could be viewed as "incidental" to an injunction against continued imposition of the fees even if it required "individual" determinations regarding the amount of fees charged account holders.)

In short, we may be entering a period of uncertainty about the application of (b)(2); it could be that reformed language would improve handling of these issues.

Arguably § 2.04 addresses situations within Rule 23(b)(1) as well. § 2.04(b) says that "indivisible remedies" include situations in which "the distribution of relief to any claimant as a practical matter determines the application or availability of the same remedy to other claimants." That seems to comprehend limited fund situations (as noted in Comment (a) on p. 118), and might also include any situation in which granting injunctive or declaratory relief will, as a practical matter, affect all class members in the same way whether or not done in a case denominated a class action. An easier invocation of this principle is possible in cases under (b)(1)(A), for those cases (involving the validity of actions taken by an entity like a retirement plan whose benefits schedule is challenged -- see Illustration 1 on p. 120) seem to present a request for an "indivisible" decision on validity as to all.

Comment (b) explains the Principles' orientation (p. 119):

The distinction drawn in this Section between divisible and indivisible remedies focuses on structural characteristics of the remedies themselves. In characterizing a particular remedy for purposes of deciding whether to afford aggregate treatment, the court should look to the practical operation of the remedy rather than to its categorization along the law-equity divide. Prohibitory injunctions generally fit the description of an indivisible remedy, but other kinds of injunctions such as those that affirmatively compel specific remedial action may pose more difficult question of characterization in a given situation. The specific remedial action required by an affirmative injunction may be such that it realistically can be undertaken only in such a way that does not differentiate among persons affected by the underlying conduct on the defendant's part.

Whether there are indications that 23(b)(1) needs clarification is uncertain. The Reporters' Notes say that the section "builds on, but also simplifies, the existing categories of aggregation by way of class actions." (p. 123) They add that "[c]ourts, in short, have not succeeded in giving any distinct meaning to Rule 23(b)(1)(A) by comparison to Rule 23(b)(2)." (p. 123) It may be that the reverse observation could be made, and an argument could be made that 23(b)(2) is superfluous. The

Reporters also note that the 1966 Committee Note about whether monetary or injunctive relief "predominate" has given rise to uncertainty. (pp. 123-24) The Supreme Court's disapproval for this language in Wal-Mart v. Dukes may change that judgment.

The Reporters also explore the proper handling of medical monitoring claims. (pp. 124-28) Whether rule changes to address this challenging area would be helpful is uncertain.

§ 2.05

§ 2.05 addresses choice of law, also mentioned above. As noted above, this issue should not matter for claims based on federal law, but CAFA means that many class actions based on state law will be in federal court.

Whether rule provisions addressing this implicit concern would be beneficial is uncertain. § 2.05(a) says that the court "must ascertain the substantive law" governing the allegedly common issues. That might be added to the current definitional requirements of Rule 23(c)(1)(B). It seems connected to the current rule's requirement that the court certifying a class "define the class and the class claims, issues, or defenses." Perhaps the current rule does all that needs to be done.

§ 2.05(b) summarizes the sorts of judgments the court should make as it addresses the choice-of-law problems, and recognizes three ways the choice-of-law problem can be fit into the aggregate actions: (1) a single body of law applies to all (e.g., if the claim is created by federal law), (2) although claims are subject to the law of different states, the court can see that the various states' laws have the same "functional content," or (3) although the various states' laws are not all the same in "functional content," the differences present "a limited number of patterns" that the court can manage fairly and efficiently.

Comment (b) recognizes that the section "designed to reflect the permissible approaches that exist in current doctrine rather than to set forth new choice-of-law principles for aggregate litigation." (p. 131)

§ 2.06

This section provides direction on the issues addressed in Hydrogen Peroxide and similar cases about the analysis of the merits in order to decide certification. Something along these lines might be added to Rule 23(c)(1) regarding the certification order. Alternatively, (b)(3) might be expanded to include these points, but then they would not apply to (b)(2) or (b)(1) cases. The section provides:

(a) If the suitability of multiple civil claims for class-action treatment depends upon the resolution of an underlying question concerning the content of applicable substantive law or the factual situation presented, then the court must decide that question as part of its determination whether to certify the class. The obligation recognized in this subsection provides no authorization for the court in the posture of a class-certification ruling to decide a question of law or fact or a mixed question of law and fact if determination of that question is not relevant to the suitability of class-action treatment.

(b) When deciding a question of fact pursuant to subsection (a), the court should apply a preponderance-of-the-evidence standard. The court's decision on a question of fact for purposes of a class-certification ruling, however, should not be binding in subsequent proceedings in the litigation.

Whether any rulemaking on these subjects is needed would depend in part on how the courts are handling the issues. It is surely true that the former refusal under Eisen to address merits-related issues should not survive Wal-Mart. It might be odd were a findings requirement in the rule to prescribe a standard of proof here, but not for (b)(3) findings of predominance and superiority (unless this provision effectively would apply to them).

§ 2.07

This section addresses the rights of unnamed members of the class. One approach, based on Phillips Petroleum v. Shutts and supported by statements in Wal-Mart v. Dukes, is that due process requires that there be a right to opt out whenever monetary claims for individual class members are presented. That constitutional prescription might conflict with certification under (b)(1) or (b)(2), although the Wal-Mart treatment of monetary relief may reduce the frequency of that event.

In rulemaking terms, the starting point is that the rule requires an opt-out only in (b)(3) class actions, and a proposal to require some effort at notice in (b)(1) and (b)(2) class actions was published for comment in 2001 and later changed to what is now in Rule 23(c)(2)(A). Without notice, it is likely to opting out would not be very effective. The Comment (p. 153) recognizes that individualized notice is not always required, but there was considerable objection during the 2001-02 hearings to any required notice at all.

§ 2.07 begins with the assumption that there is always a right to opt out, and provides in (c):

If the court finds that the aggregate proceeding should be mandatory in order to manage indivisible relief fairly and efficiently as to the related claims, then aggregate treatment by way of a class action need not afford claimants an opportunity to avoid the preclusive effect of any determination of those claims.

§ 2.07(a)(1) also addresses conflicts of interest, directing that the court determine that there are no "structural conflicts of interest." Whether this finding requirement should be added to Rule 23(a) might be addressed, although it could certainly be argued that existing case law (including Amchem) adequately emphasizes the need to avoid conflicts of interest.

§ 2.07(a)(3) proposes amending Rule 23(c)(2)(B), which requires individual notice to all (b)(3) class members who can be identified through reasonable effort. Instead, it says "appropriate notice," and Comment (f) explains (p. 152):

Current law on class actions presumes that appropriate notice for claims seeking divisible relief consists of individualized notice to persons whose names and addresses are known and who can be contacted directly by mail or other means with reasonable effort. * * * As the methods of diffusion of information become more advanced with the development of Internet-based and other avenues for communication, however, individualized notice as conventionally understood may not necessarily be the best notice that is practicable in all situations. The reference to "appropriate" notice * * * is designed to accommodate these changes in the means available to provide notice.

§ 2.07(a)(3) not only requires notice to class members, but also that they receive "the opportunity to participate in the proceeding." Presently Rule 23(c)(2)(B)(iv) says that in a (b)(3) class action a class member "may enter an appearance through an attorney." Whether it would be desirable to assure class members of a chance "to participate" might be worth discussion. There are some cases involving efforts by class members to intervene in an ongoing class action (not just to oppose a proposed settlement), and some question about how these "free radicals" would function if intervention were allowed.

Finally, § 2.07(d) provides:

[T]he court shall ensure that aggregate treatment of related claims does not compromise the ability of any person opposing the aggregate group in the litigation to dispute the allegations made by claimants or to raise pertinent substantive issues.

Comment (j) explains that this provision is designed to underscore the due process rights of the party opposing the class. (p. 157) Nothing in the current rule explicitly says so, but case law on certification decisions has certainly emphasized this point. Whether it is valuable for the rules to contain such a warning not to violate due process is not clear.

§ 2.08

This section appears to address the issue certification possibility raised by Rule 23(c)(4), but in an abbreviated way invoking other provisions. One is a guaranteed appeal under § 2.09. A second is that the assurances of § 2.07(a) that there be no "structural conflicts of interest," and that there be notice and a right to opt out. The third is to assure the class opponent of the due process protections in § 2.07(d).

§ 2.09

This provision assures "an opportunity for interlocutory appeal" with respect to class certification and class-wide determination of a common issue in an issues class action under § 2.08. (It is not clear why that would be interlocutory in the § 2.08 situation, since it is not clear what's left of the class action after resolution of the sole common issue, but Comment (b) says that the decision "would not necessarily qualify as a final judgment, because that determination would leave other issues to be addressed in other proceedings." (p. 169)) But this is not a right to appellate review; § 2.09(b) says that the appellate court has discretion whether to hear the appeal.

Regarding class-certification decisions, § 2.09 restates Rule 23(f). Regarding the 23(c)(4)-type issues class, the proposal may not expand the current provisions of the rule, combined with 28 U.S.C. § 1292(b), which would seem to be a device by which the district court could assure that there is an opportunity to seek appellate review, but that depends on certification for immediate appellate review by the district judge. Perhaps the current statutory authorization for appeal invokes a different standard, since courts of appeals may regard the decision whether to accept the appeal as different under § 1292(b) and Rule 23(f). Comment (b) says that § 2.09 "effectively treats such a merits determination as being of sufficient centrality to proceedings on other issues * * * as to be tantamount * * * to the sort of 'controlling question of law' to which existing statutory law refers." (p. 171) Nonetheless, the Reporters' Notes (p. 176) say that "[s]tatutory amendment would be necessary to authorize the kind of interlocutory appeal on the merits of the common issue * * * albeit modeled closely on the existing authority of 28 U.S.C. § 1292(b)."

Assuming the existing rule and statute cover the basic problem, there is still an issue of what might be called pendent appellate jurisdiction. Comment (b) says that if an appeal of class certification is taken but declined by the appellate court when the district court certifies only as to one or some issues, "then the appeal on the merits determination of the common issue * * * may encompass both the merits and -- if challenged -- the underlying determination to aggregate." (p. 171)

Another loose end is attorneys' fees for class counsel in the issues class action, if it is limited to the common issue. Comment (c) (p. 172) recognizes that some courts use "quasi-class action" language in addressing such situations. Whether or how that would work for purposes of appellate review is not certain, although the notion seems to be that the court would enter judgment for attorneys' fees in some manner that might be appealable.

§ 2.10

Section 2.10 authorizes aggregation by consent "when justice so requires." This provision is designed to permit, in exceptional circumstances, an opt-in class. The Second Circuit rejected Judge Scheindlin's use of such a technique. See *Kern v. Siemens Corp.*, 393 F.3d 120 (2d Cir. 2004). The Reporters' Note says that it rejects the Second Circuit ruling as a reading of the current rule. It adds: "On the assumption that the Kern court properly read the current Rule 23, rule amendment would suffice for this purpose." (p. 178)

Adding this authority to Rule 23 might call for a new subdivision of the rule, unless the requirements of Rule 23(a) must be satisfied. If so, it might be added to Rule 23(b).

§ 2.11

This section addresses the preclusive effect of a decision to deny class certification. It proposes that there be "a rebuttable presumption against the same aggregate treatment in other courts as a matter of comity." Offhand, I am not sure whether there are other rules that require comity but nothing more.

This issue is part of a collection of questions (including also the effect of a federal court's refusal to approve a proposed settlement) that the Committee evaluated in detail in 2000-01. It decided then not to propose rule changes to address these issues, but did circulate a draft of possible rule provisions that was the subject of vigorous commentary heavily stressing Rules Enabling Act limitations. Smith v. Bayer, applying the Anti-Injunction Act, addresses those sorts of concerns.

§ 2.12

This is the final section in Chapter 2. It addresses judicial management of a class action, and says the court "should adopt an adjudication plan" that explains the reasons for aggregate treatment, the procedures to be used in the case, and the contemplated preclusive effect. It may be that requiring findings about these matters would be justified in an amended Rule 23(c), along with other possible changes to that rule provision noted above. It does not seem that the proposal adds any authority not already conferred by Rule 16 and Rule 23(d). The Reporters' Note says this provision "describes broadly accepted judicial practice with regard to trial plans under current law." (p. 188)

Chapter 3 -- Class settlements

Chapter 3 addresses both class and nonclass settlements, but most of it is about class settlements.

§ 3.02

Like current Rule 23(e), § 3.02(a) permits settlement of a certified class action only after notice to the class and approval by the court. § 3.02(b), however, would undo a feature of the 2003 amendments. Before 2003, the universal or near-universal rule was that after an action was filed as a class action court approval was required for an "individual" settlement even if no action had been taken on class certification. Many courts said the district judge should make sure there had been no abuse of the class device, and some district courts reacted to this concern by ordering notice. § 3.02(b) requires approval for the individual settlement, and proposes the following standard:

When a proposed settlement or dismissal does not involve any payment or other special consideration to class counsel or the named representative, a court should presume the propriety of the decision not to prosecute the claims and should rarely withhold approval or require notice to the class.

Comment (d) recognizes some possible problems with this provision:

If the court refuses to permit a representative and class counsel to go forward with a precertification settlement or voluntary dismissal, the court may be faced with a dilemma if the proposed settlement reflected an attempt by class counsel or the representative to extract a large payment by leveraging the threat of a class action. The court may conclude, as a result of the proposed settlement, that the putative class counsel and representative are not adequate

to represent the class. The court's options at that point would be (1) to dismiss the class-action allegations on grounds of inadequacy of representation, or (2) leave the case open for a short period of time to allow an opportunity for other putative class representatives and class counsel to come forward and assume representation of the class. In implementing the latter alternative, the court may wish to consider conditioning dismissal on the defendant's extension of the statute of limitations to permit new counsel and representatives to come forward.

§ 3.03

This section provides specifics about the process of reviewing a proposed class settlement that vary current practice. Implementing them by rule amendment would seemingly call for additions to the rule. The pertinent additions would be:

Preliminary review. The court must conduct a preliminary review "to determine whether any defects in the proposed notice or other formal or substantive irregularities exist that warrant withholding notice."

This sort of preliminary review is not required by the current rule, but is a widespread practice. The parties have an incentive to get the court's o.k., and since the notice comes from the court (as a matter of form, at least), the court has reason to attend to its contents. Presumably, it's in nobody's interest to go through a notice effort when it's apparent at the outset that the deal cannot be approved.

Preliminary review not preliminary "approval". Having done such a review, courts sometimes say they have given the proposed settlement preliminary approval. This proposal largely declares that practice inappropriate.

It is not surprising that a judge who has spent time reviewing the notice and the settlement and given it the nod will think that it has been preliminarily approved. Comment (a) explains: "Even a preliminary decision in favor of the settlement may, as a practical matter, given an unwarranted presumption of correctness to a proposal that the court has not carefully considered. A 'preliminary approval' -- described as such to the class -- may make a court reluctant at the fairness hearing to reject the settlement." (p. 197)

It seems that this may be a semantic issue. Comment (a) adds: "By refraining from using the term 'approve' to describe the preliminary review * * * the court can avoid having the preliminary-review stage interpreted as an implicit guarantee regarding how the court will rule, after a full hearing, at the approval stage."

Comment (a) also proposes that "[i]f feasible," the court give notice of the preliminary review event to interested persons, such as counsel with similar cases. (p. 198) Would this include those who represent non-class members? Should a rule require such an effort?

Schedule for objectors. Absent special circumstances, there should be a reasonable time for objectors to respond.

All agree now that the notice should set forth the time for objecting. Rule 23(e)(5) says any class member may object, but does not say anything about a schedule. The question of "objector rights" was a very contentious one in the 2000-02 discussions of Rule 23 amendments. Such issues as discovery by objectors sometimes became the focus of discussion. Those issues could bear on timing. Comment (b) says: "Discovery requests in the context of settlement objections require a careful exercise of the court's discretion to balance the interests among the objectors' need for information to support a good-faith objection, the cost and delay involved, the potential for strategic abuse of discovery, and any work-product considerations involved." Another thing that bears on timing is the requirement of 28 U.S.C. § 1715 that state officials be given 90 days' notice of the proposed settlement.

In-court hearing. The proposal says that the court must conduct "an in-court hearing."

Comment (b) says that "[t]he court should normally permit the parties to offer live evidence before it makes findings regarding the fairness of the settlement." Rule 23(e)(2) says that the court may approve only after "a hearing." Whether that must be "in court" is not certain. It does not invite live evidence.

Findings and conclusions required for approval or disapproval. The proposal would require "on-the-record findings and conclusions in support of [the court's] decision" whether it is to approve or disapprove.

Rule 23(e)(2) says that the court can approve a proposed settlement only "on finding that it is fair, reasonable, and adequate." Assuming that suffices for findings in support of approval, the proposal would add a similar requirement for disapproval.

§ 3.04

Rule 23(e)(1) requires that "[t]he court must direct notice in a reasonable manner to all class members who would be bound by the proposal." In reality, when settlement of a (b)(3) class action is proposed along with certification, Rule 23(c)(2)(B)'s

requirement of notice to all class members who can be notified with reasonable effort is required. § 3.04(b) would forgo individual notice in cases in which § 2.07(a)(3) would also forgo such notice, but this change (compared to the § 2.07(a)(3) change) would not seem to call for an amendment. But the calculus can be more precise in the settlement setting:

In fashioning notice of a class settlement, the court should consider the cost of notice and the likely recovery involved under the proposed settlement to ascertain whether individual notice is required, or whether some other form of notice would suffice. Individual notice should be presumptively viewed by a court as less important when the claims are likely too small to be pursued individually in the absence of a class action.

Whether this sort of notice would work well if individual claims must be submitted to obtain individual relief is one issue. As noted below, the Principles endorse techniques that make submission of claims unnecessary in some cases.

§ 3.05

This section follows up on § 3.03 regarding the judicial review of the fairness of proposed settlements. According to the Reporters' Note (p. 212), "a rule change would be necessary in most jurisdictions to implement this Section because the requirements vary from jurisdiction to jurisdiction." Although this observation presumably resulted from the fact that the Principles speak to state courts as well as to federal courts, it surely can be said that § 3.05 includes many more specifics than Rule 23(e), even after the 2003 amendments. (Before 2003, Rule 23(e) said virtually nothing about the content or method of settlement review.) § 3.05 therefore offers a variety of possible foci for modifying Rule 23(e).

Required findings. Recall that § 3.03 requires that the court hold an in-court hearing and make findings on the record whether or not it approves the settlement. § 3.05(a) specifies that those findings must address whether:

(1) the class representatives and class counsel have been and currently are adequately representing the class;

(2) the relief awarded to the class (taking into account any ancillary agreement that may be part of the settlement) is fair and reasonable given the costs, risks, probability of success, and delays of trial and appeal;

(3) class members are treated equitably (relative to each other) based on their facts and circumstances and are

not disadvantaged by the settlement considered as a whole;
and

(4) the settlement was negotiated at arm's length and was not the product of collusion.

Comment (a) begins by asserting that "[t]he current case law on the criteria for evaluating settlements is in disarray." (p. 205) The Committee Note to the 2003 amendment to Rule 23(e) had limited guidance on court review:

A helpful review of many factors that may deserve consideration is provided by *In re Prudential Ins. Co. America Sales Practice Litigation Agent Actions*, 148 F.3d 283, 316-24 (3d Cir. 1998). Further guidance can be found in the Manual for Complex Litigation.

Perhaps due in part to the variety of potential factors in various cases, the courts articulate a wide range of factors but don't discuss the weighting or importance of the factors. Sometimes courts seem to emphasize things that the Reporters think should not count for much, such as counsel's support for the settlement. Since counsel negotiated the settlement, they must be expected to endorse it. Similarly, the length of time the case was pending before settlement was reached should not normally weigh heavily in the decision. Other factors that get cited frequently and may seem more pertinent may not matter much. For example, the number of objectors or opt-outs may or not be probative of the settlement's fairness. (pp. 205-07) A point for discussion is whether the seeming current cacophony on settlement-review criteria (or the enormous variety of "factors" cited by courts) calls for more rulemaking.

The apparent goal of § 3.05(a) is at least to require attention to the listed factors. It does not forbid consideration of other factors under § 3.05(b), but Comment (a) notes that "the sheer number of factors [under current case law] -- and the confusion about their relative merit -- make it difficult for class counsel, counsel for the defendant, and counsel for the objectors to address the pertinent considerations in a meaningful way." (p. 207)

Currently Rule 23(e) does specify considerations like those spelled out in § 3.05(b). (Until 2003, it did not do that.) But the rule does not have more focused finding requirements like those in § 3.05(a). Whether it would be helpful to clarify and sharpen the rule along these lines may warrant considerable discussion.

Whether these are the right factors to include if added precision is desired also deserves attention. In cases involving the proposed settlement of a case in which certification has

already been granted, factor (1) has already been the focus of the court's certification decision, at least as a matter of forecast. But perhaps the hard facts of actual representation are more reliable than the forecast of likely future representation. In terms of possible grounds for objector discovery (also discussed above), emphasis on this factor may add momentum to the desire for such discovery. Comment (b) observes that "a fresh examination of adequacy may be the most productive way to assess the ultimate fairness of the settlement." (p. 207) And the requirements of Rule 23(g) (also added in 2003) that the court appoint class counsel provide further reasons for careful attention to this matter in the settlement certification context.

§ 3.05(b) says that, based on the factors listed in § 3.05(a), the court may approve the settlement only on finding that it "would be fair to the class and to every substantial segment of the class." Whether this locution is preferable to Rule 23(e)(2)'s requirement that the court find that the settlement is "fair, reasonable, and adequate" may be explored. § 3.05(b) confirms that the court may disapprove a settlement for any other significant reason that bears on a particular case. (Note that it seems these other reasons do not save a settlement if any of the four factors specified in § 3.05(a) is not proven.)

Factor (3), regarding equitable treatment of class members, may somewhat overlap with 28 U.S.C. § 1714 (forbidding preferences based on geographical location).

Burdens of proof. Rule 23(e) does not address the burden of proof in the rule. Although the Committee Note speaks of "parties seeking approval of a settlement" (seemingly recognizing that they are the proponents and therefore normally would bear the burden of proof), it does not really say so. § 3.05(c) makes this definite:

The burden is on the proponents of a settlement to establish that the settlement is fair and reasonable to the absent class members who are to be bound by that settlement. In reviewing a proposed settlement, a court should not apply any presumption that the settlement is fair and reasonable.

In part, this provision connects with § 3.03, which says that a "preliminary review" is not a "preliminary approval." The fact that notice has been given after that preliminary review does not relieve the proponents of their burden to establish at least that the settlement is fair in light of the four factors listed above. Beyond that, it is designed to rebut case law that seems to adopt a presumption of fairness if the lawyers are experienced class-action lawyers and few class members object. (p. 208)

There is a question whether rule changes would be desirable to articulate the burden of proof and to confirm that there is no presumption of validity in recurrent situations.

Modification of proposed agreement during fairness review. There is a certain all-or-nothing aspect of settlement review by the court. In general, the court is not in a position to rewrite the settlement. But if it concludes that some provisions are inappropriate, the court may suggest to the parties that their chances of approval would improve significantly if those provisions were changed, perhaps even suggesting specific changes.

All this seems implicit in current Rule 23(e). It becomes explicit in Rule 23(e)(4), which affirms that the court may refuse to approve a settlement in a (b)(3) case unless class members are given a new opportunity to request exclusion. This provision was one of the most hotly-debated additions in the 2003 amendment package.

In the background is the basic question whether the court is ever *required* to approve a proposed settlement. To the extent the court is not, it would seem that the judge could insist on most any change to obtain approval. As noted in relation to § 3.03, the Principles' requirement of findings for disapproval seems a move in the direction of constraining the court's authority to refuse to approve. Certainly the court can't say "I'll approve this only if both sides donate \$1 million to my nephew's trust fund." And I am not aware of any concern with venality in relation to class-settlement approval. The nature and extent of any problem may warrant discussion.

§ 3.05(d) says that the court may not itself amend a proposed settlement, but may "inform the parties that it will not approve a settlement unless the parties amend the agreement in a manner specified by the court." § 3.05(e) adds that if the parties agree to modify the settlement "in any material way" (whether or not suggested by the court), there must be a new notice to the class members who may be "substantially adversely affected by this change." Finally, § 3.05(f) says that there is no need for a new notice to class members if their benefits under the revised agreement are "not substantially less than those proposed in the original settlement agreement."

Whether new rule provisions are needed to address these topics is uncertain.

Need for submission of claims. As noted above, the nature of the notice may be important if class members must submit claims to get paid. Comment (f) urges that, when feasible, courts avoid the need for such submissions, and suggests that direct distributions are usually possible when the settling party

has reasonably up-to-date and accurate records. This suggestion is not obviously tied to any blackletter provision.

The whole problem of claims processing may deserve attention. It is not currently the focus of any rule provisions. It may relate to the cy pres phenomenon (discussed in relation to § 3.07 below). If defendant gets back any residue of the settlement funds, it may have an incentive to make the claims procedure long and difficult. Keeping an eye on that sort of thing is a valid consideration for the court when it passes on the fairness of the settlement. In addition, in terms of valuing the settlement for the class as part of the attorneys' fee decision, the rate of actual claiming may be an important criterion. If there is a way to avoid the entire effort of claims submission and review, that might solve a number of problems that have plagued some cases in the past.

At the same time, a "streamlined" claims payment procedure may benefit some class members at the expense of others. A more particularized claims process might differentiate between class members in terms of their actual injuries in ways not readily achievable using only the defendant's records.

Altogether, these issues present challenges. Whether they are suitable topics for a rule provision is another matter. Up until now, they have largely been regarded as matters of judicial management rather than things to be addressed by rule. See Manual for Complex Litigation (4th) § 21.66 (regarding settlement administration).

§ 3.06

In 1996, the Committee published a proposal to adopt a new Rule 23(b)(4) permitting certification in case that satisfies the requirements of Rule 23(a) if:

- (4) the parties to a settlement request certification under subdivision (b)(3) for purposes of settlement, even though the requirement of subdivision (b)(3) might not be met for purposes of trial.

This proposal responded to a 1995 Third Circuit decision that said the standards for settlement class certification were identical to those for certification of a litigation class. The goal of the proposal was change that Third Circuit conclusion. After this rule proposal was published, the Supreme Court granted cert. in Amchem, another Third Circuit decision saying that settlement certification was to be evaluated under precisely the same standards as litigation certification. In Amchem, the Court affirmed the Third Circuit's rejection of the settlement, but included the following very gentle rejection of the idea that settlement certification is the same as litigation certification:

We agree with petitioners to this limited extent: settlement is relevant to a class certification. The Third Circuit's opinion bears modification in that respect.

But later in the decision, the Amchem Court made clear that settlement certification nonetheless did require a genuine certification review; fairness and adequacy of the settlement under Rule 23(e) was no substitute for certification review as well.

Proposed changes to Rule 23(b)(3) were published for comment at the same time as the proposal to add a new (b)(4). There was a lot of comment, and the Advisory Committee eventually collected the commentary into a four-volume set that it published. Meanwhile, in light of the Supreme Court's Amchem decision, it decided not to proceed with the (b)(4) idea. (It also did not proceed with the various possible changes to (b)(3), which were the focus of much adverse commentary.)

Since 1997, the Committee has several times considered whether, in the wake of Amchem, rule changes were appropriate. According to the Reporters' Note, portions of § 3.06 "would move away from Amchem's interpretation of Rule 23 and thus would potentially require a rule change." (p. 217) As to other topics addressed in the section, a rule change would be helpful, the Reporters report. (p. 217)

The Reporters regard rule change as necessary to implement § 3.06(a) and (c). It is useful to set forth subsections (a), (b), and (c):

(a) In any case in which the parties simultaneously seek certification and approval of the settlement, the case need not satisfy all of the requirements for certification of a class for purposes of litigation, but instead need satisfy only the requirements of subsections (b) and (c) of this Section.

(b) Subject to subsection (c) of this Section, a court may approve a settlement class if it finds that the settlement satisfies the criteria of § 3.05, and it further finds that (1) significant common issues exist, (2) the class is sufficiently numerous to warrant classwide treatment, and (3) the class definition is sufficient to ascertain who is and who is not included in the class. The court need not conclude that common issues predominate over individual issues.

(c) In addition to satisfying the requirements of subsection (b) of this Section, in cases seeking settlement certification of a mandatory class, the proponents of the settlement must also establish that the claims subject to

settlement involve indivisible remedies, as defined in the Comment to § 2.04.

Obviously this provision depends on others discussed earlier. Subsection (b) is designed to identify "core requirements" that should constrain certification even for settlement purposes. The findings requirement regarding adequacy of representation included in § 3.05's settlement review provisions addresses those concerns in a way that suffices for these purposes as well.

Whether anything need be done now in the rules depends on a judgment about whether the current post-Amchem situation is inadequate. Subsection (c) may be necessary to the extent that courts gloss over determining whether the case is a proper (b)(2) action when deciding to certify mandatory settlement classes. (As written, it also depends on whether the "indivisible remedy" approach of the Principles should be included in the rules, but presumably a different locution could be used here.) The Reporters offer the following explanation (p. 216):

The primary effect of this proposal would be to refocus attention on the adequacy of representation and the fair treatment of class members relative to each other and to the potential value of their claims. This approach would move the judicial inquiry at the class-settlement stage away from a hypothetical trial scenario and toward the critical indicia of proper representation.

In addition, it might be said that this approach somewhat downplays the Amchem insistence that Rule 23(e) review is no substitute for Rule 23(a) and (b) certification review. In the background, one might say that there is an arguable Erie or Rules Enabling Act issue if the claims are based on state law. As noted above, there may be differing attitudes about whether nationwide settlements are to be fostered; to the extent federal courts embrace nationwide solutions to such problems that don't emphasize divergent state law, it is arguable that they may be tempted to substitute their judgments about a sensible legal regime to govern all claimants for fealty to divergent state-law regimes. The Principles emphasize in § 2.05 that choice of law is integral to proper aggregation decisions.

Protection against adverse use of arguments should settlement class certification be disapproved. § 3.06(d) provides further that if settlement class certification is not granted "no statements, representations, or arguments made by the proponents of the settlement in the settlement context may be used against the proponent making the statement in any subsequent litigation of class-certification or merits issues."

This provision would be new to the rules. Whether it is necessary as a practical matter to effective use of the settlement class is debatable. It seems to have been prompted by one 2004 Seventh Circuit decision (see p. 216). Whether a federal rule can prevent a state court from giving weight to these sorts of matters is an interesting issue. As a general matter, this provision seems similar to other provisions about the preclusive effect of class-certification rulings or to decisions disapproving a proposed class settlement.

§ 3.07

This section addresses cy pres settlements. The handling of cy pres actions has received a great deal of attention. In California, it is the subject of a statute -- Cal. Code Civ. Proc. § 384, which prohibits reversionary provisions in class action settlements and provides general directions about how the residue from a settlement is to be used. The question whether this state statute could apply to a federal court class action making claims based on California law in a California federal court could be an interesting Erie issue, although Shady Grove might strongly argue against such conformity. It is unlikely there are other such state statutes, and the reverse argument (i.e., that a federal court may not use cy pres because there is no state law authorizing it) probably does not work even after CAFA.

There is nothing now in Rule 23 that explicitly addresses the use of cy pres. A basic question might be whether the rule can really do that sort of thing, at least for claims based on state law. (Actually, given the content and history of the Rules Enabling Act -- it was adopted when *Swift v. Tyson* was the law of the land -- it may be argued that it does not matter whether the claims are based on state or federal law.) But the basic fairness review called for by current Rule 23(e) includes consideration of the content of substantive claims and the value of proposed remedies. Unless any such review is permitted, it is not clear why certain arrangements are off limits. At least for purposes of discussion, it may be safe to assume some cy pres rule provisions could be added. Depending on what provisions seem promising, it may be necessary to examine these points more carefully.

§ 3.07 explicitly authorizes court approval of a settlement that includes a cy pres remedy. It incorporates what might be called a hierarchy of preferences about use of cy pres. The first priority (in subsection (a)) is that if individual class members can be identified through reasonable effort and distributions can be made so that they are "economically viable" settlement proceeds should be distributed to individual class members. Recall on this score that Comment (f) to § 3.05 urged that direct distributions rather than a claims process be used if

possible. Presumably that effort would focus on the same sorts of things that might be important in relation to this concern.

Subsection (b) seems to address the situation when submission of a claim is required (although it also applies to direct-distribution schemes if some class members cannot be identified). If funds remain after initial distribution, the remaining funds should be distributed to those who already received distributions unless that does not make economic sense given the small amount remaining. As Comment (b) notes (p. 219), 100% payment to all claimants is rare in class-action settlements; a further payment will rarely result in a windfall to class members who initially received "all they were entitled to" under the settlement.

Subsection (c) then permits cy pres only if the court finds that the first two techniques will not work. Then the court may approve payment instead to "a recipient whose interests reasonably approximate those being pursued by the class." And if there is no such recipient, the court may approve payment to another recipient even though it does not reasonably approximate the interests being pursued by the class. This sort of allocation may create the greatest risks of seeming self-dealing. Comment (b) observes (p. 219): "A cy pres remedy should not be ordered if the court or any party has any significant prior affiliation with the intended recipient that would raise substantial questions about whether the selection of the recipient was made on the merits."

Comment (a) says that the intention is to include within the "cy pres" label the use of a "fluid recovery" remedy. That method early raised somewhat feverish hackles among some federal judges. "Even if amended Rule 23 could be read so as to permit any such fantastic procedure, the courts would have to reject it as an unconstitutional violation of the requirement of due process of law. * * * We hold the 'fluid recovery' concept and practice to be illegal, inadmissible as a solution to the manageability problems of class actions and wholly improper." *Eisen v. Carlisle & Jacqueline*, 479 F.2d 1005 (2d Cir. 1973), vacated and remanded, 417 U.S. 156 (1974).

A basic question is whether to pursue rulemaking on cy pres and related topics. Comment (c) says (p. 220):

Nothing in this Section would require that a settlement actually recover money for class members, so long as the class is apprised of that fact in a properly constructed settlement notice. For instance, nothing in this Section prohibits a settlement that is limited entirely to injunctive relief. Likewise, nothing in this Section limits the ability of legislatures to designate appropriate

recipients of remaining funds in particular circumstances, including pro bono legal-services providers.

§ 3.08

Section 3.08 is something of a grab bag of provisions about situations in which the court rejects a proposed settlement. Whether any of these provisions should be considered depends in significant measure on the degree to which there seems to be a need, and may also depend on whether they should suitably be included in Rule 23 rather than some other source such as the Manual for Complex Litigation. For simplicity's sake, an effort will be made to break out different measures.

Appointment of new class counsel and/or representative. § 3.08(a) says that if the court rejects a proposed settlement it may appoint new class counsel or representatives. Whether this adds anything to the court's ongoing power to supervise the class action is unclear. Certainly rejection of the proposed settlement endorsed by class counsel and representatives could sometimes raise questions about whether they were actually good choices.

Attorneys' fees for objectors who materially improve a settlement. § 3.08(a) also authorizes the court to award attorneys' fees out of a settlement improved by the objections. The 2003 Committee Note to Rule 23(h) said that "[i]n some situations, there may be a basis for making an award to other counsel whose work produced a beneficial result for the class, such as * * * attorneys who represented objectors at a proposed settlement under Rule 23(e) or to the fee motion of class counsel." Whether more need be said is unclear. It may also be worth noting that this provision depends on ultimate approval of the settlement; to the extent the result of the unsuccessful effort at settlement approval is to cause the court to replace class counsel or representatives, if a new settlement results they would presumably not need this provision to get paid.

Successful objectors' right to be paid out of later settlement. § 3.08(b) deals with the situation of complete rejection of a settlement. Then the successful objectors should, it says, be able to recover fees "if a classwide judgment or settlement is later obtained in a new or reconfigured case involving the same basic allegations of wrongdoing" providing "they can demonstrate that their efforts in challenging the prior settlement were instrumental in laying a basis for the ensuing benefit enjoyed by the class."

This is not something that the current rule obviously addresses. It seems to raise a number of questions. Presumably it does not describe a situation in which the objectors themselves already had a class action on file and objected that

it was a better vehicle for gaining relief for the class. In that situation, they would presumably be in line for an appropriate award in that separate case. And it's not for cases in which they are appointed to be the new class counsel and representatives in the current case, for then no special provision would seem necessary for them.

That leaves other cases brought by other parties (probably in other courts). Whether Rule 23 should try to tell the judges in those other cases (perhaps in state courts) how to award fees to the parties before them is debatable. Comment (a) explains (p. 225):

This Section is also designed to fill a serious gap under existing law: the absence of any mechanism for compensating objectors who succeed in convincing the court to reject a settlement altogether. Because of this gap, counsel for legitimate objectors have little incentive to object when the result of a successful objection would be to invalidate the entire settlement.

Detering unjustified objections. To say that some objectors have a bad reputation is putting it mildly. During the development of the 2003 amendments, many experienced class-action lawyers described repeat objectors and their counsel as "pond scum" and in much stronger words. § 3.08(c) and (d) seek to deter or punish bad objectors by recommending that the court impose sanctions if the objectors "misrepresent the benefits of the proposed settlement" or if the objections "are insubstantial and not reasonably advanced for the purpose of rejecting or improving the settlement."

The 2003 amendments included Rule 23(e)(5), which says an objector may withdraw an objection only with the approval of the court. That was designed to deter holdups by objectors. Whether it is been useful is uncertain. Whether more is necessary depends on experience. The Reporters' Note (p. 227) says that rule changes are needed "only in jurisdictions whose existing sanctions rules are not sufficiently broad to cover these situations."

§ 3.09

In 2003, Rule 53 was extensively amended to correspond to the actual use of Special Masters in contemporary litigation. 28 U.S.C. § 636 has a number of techniques for delegating responsibilities to Magistrate Judges. For decades, Fed. R. Evid. 706 has authorized court-appointed experts. Those provisions form a backdrop for considering § 3.09.

§ 3.09 is a grab bag of provisions authorizing use of powers like these to manage class actions. It also authorizes the court

to solicit the views of governmental officials regarding the fairness of proposed settlements. 28 U.S.C. § 1715 already requires notice to public officials in some instances. It is difficult to imagine anything that forbids invitations to others.

It seems unlikely that revisions to Rule 23 are needed here.

§ 3.10

Section 3.10 deals with settlement of future claims. The challenge of future claims has persisted for years; on occasion, some have expressed uncertainty about whether it could be surmounted. See, e.g., Hazard, *The Futures Problem*, 148 U. Pa. L. rev. 1901 (2000).

In general, the effort has been to develop a grid (as in Amchem and Ortiz) to include such claims. In Amchem in particular, the Court expressed uneasiness about the absence of provisions that guarded the rights and interests of future claimants, mentioning such things as inflation adjustments and back-end opt-out rights, and some method of taking account of new insights into medical causation that might affect the viability of claims. (It may be assumed that such insights can only benefit future claimants, but it is at least possible that some might not.)

§ 3.10(b) says that a class settlement may not include future claims unless the court determines that there is no structural conflict of interest working against the interests of the future claimants. (In Amchem, the existence of one "humongous" class, and of a side deal for "inventory" settlement of other clients of class counsel, created such a conflict.) § 3.10(c) says that such conflicts can be avoided if the class settlement:

- (1) does not make tradeoffs with respect to class members with future claims vis-a-vis other class members; or
- (2) provides additional structural assurance of protection for persons with future claims, such as deferred opt-out rights or delayed determination of the fee award for class counsel pending experience with the operation of the settlement as to future claims.

Rule 23 does not presently say anything explicitly about future claims, so an initial question is whether it should. Comment (b) (p. 233) explains:

The challenges presented by class settlements encompassing future claims are substantial, but they remain worth facing forthrightly due to the considerable potential for joint gains to all concerned with the class action. The

encompassing of future claims is what gives the class settlement the potential to achieve a conclusive, comprehensive peace in the underlying litigation.

Whether rule changes are needed is another matter; the Reporters' Note concludes (p. 242):

This Section is largely consistent with emerging trends in mass-harm settlements. At the same time, the focus on the nature of potential conflicts between present and future claimants is inconsistent with some of the more formalistic readings of Amchem and Ortiz.

Whether bankruptcy may offer some alternative solace for those seeking a solution to the futures problem is also uncertain. Cf. *In re Combustion Eng'g, Inc.*, 391 F.3d 190 (3d Cir. 2004) (rejecting prepackaged reorganization plan under special provision of Bankruptcy Code because of disparate treatment of future claimants).

§ 3.11

As noted above, the second opt-out now included in Rule 23(e)(4) was among the most vigorously debated provisions in the 2003 amendment package. It went through a variety of versions during the drafting process, at one point including a command to permit a second opt-out. To some extent, the strength of objector rights (e.g., discovery) might be linked to opt-out provisions.

§ 3.11 endorses something like a right to a second opt out, saying that class members "should ordinarily have the right to opt out" if the initial time to opt out expired before the settlement terms became known. It adds that the court may deny the second opt-out only if it makes an one-the-record finding that "specific reasons exist for its refusal."

Comment (a) says that Rule 23(e)(4) "has not had a substantial impact [because] few courts have ordered a second opt-out." (p. 242) This proposal is designed to make the parties come up with terms that are "sufficiently attractive to deter massive opt-outs." (p. 243)

A beginning question is therefore whether it is agreed to experience has shown the current rule to be ineffective, and whether a stronger rule would likely have desirable effects. Any court could condition settlement approval on providing a second opt-out, but by the time the court gets to the point of considering one it would also confront the cost and delay of re-noticing the class.

Another point that might be made is that, to the extent that the level of opt-outs really is a good indicator for the court about whether the settlement is a good deal, having a second opt-out might actually assist the judge in evaluating the value of the proposed settlement.

§ 3.12

This section calls for immediate review of court orders rejecting a proposed class-action settlement. Arguably that is included in Rule 23(f) if the order rejecting the proposed settlement also refuses to certify a settlement class, although the scope of "pendent appellate jurisdiction" may be uncertain. As to cases in which a litigation class has already been certified, it would not seem that Rule 23(f) would afford a ground for immediate appeal.

As noted above with regard to required findings for refusal to approve a settlement, one can argue that district court refusals to approve settlements should be subject to some constraints. § 3.12(c) says that the decision is reviewed for an abuse of discretion. Absent some appellate review, a findings requirement seems not to achieve much.

§ 3.13

Before 2003, nothing in Rule 23 addressed attorneys' fees; Rule 23(h) was added then to fill this gap. But it says only that the court may award a "reasonable attorney's fee," although the Committee Note contains considerable discussion of both the lodestar and percentage methods of fixing the fee amount. The Note also stresses the importance of focusing on the actual value for the class (as opposed to the hypothetical value of a coupon settlement or a fund subject to a reversion if money is left over after all actual claims are satisfied). The Note also embraced "[c]ontinued reliance on caselaw development fee-award measures."

§ 3.13 goes beyond this beginning. It emphasizes (in 3.13(a)) that the "actual value of the judgment or settlement to the class" is a key referent. That is consistent with the 2003 effort. The Committee Note then said that "[o]ne fundamental focus [in measuring fees] is the result actually achieved for class members." § 3.13(a) explicitly adds consideration of the value of a cy pres remedy, and calls as well for valuation of nonmonetary relief, although Comment (a) notes that this is difficult.

§ 3.13(b) and (c) express a clear preference for a percentage rather than a lodestar method to set the fee, although (c) does recognize the use of the lodestar as cross-check and that it may be used when based on a fee-shifting statute that requires use of this method. This goes beyond the Rule 23(h)

Committee Note, which was fairly agnostic about which method to use.

§ 3.13(d) recommends that the court consider setting the percentage early in the litigation. This possibility is also one contemplated in 2003; Rule 23(g)(1)(C) specifically invites lawyers applying to be class counsel to "propose terms for attorney's fees and nontaxable costs."

Altogether, these provisions invite discussion about whether the rule should be clarified beyond what was done in 2003. To the extent it seems desirable to do so, it may also be important to reflect on whether the Rules Enabling Act suitably authorizes direct rulemaking about the criteria for fee awards. As the authorization for using the lodestar in § 3.13(c)(1) for cases governed by fee-shifting statutes suggests, there are grounds to consider the specific fee-measurement calculus beyond the rulemaking power. The Reporters' Notes do not indicate an interest in revision of Rule 23 (p. 254):

Subsection (a) rejects cases that uphold awards of attorneys' fees based on the total fund regardless of the actual value of the judgment or settlement to the claimants. Subsections (b) and (c) reject cases that prefer the lodestar approach to the percentage-of-the-fund approach or that allow a choice between the two methods.

Final accounting requirement. § 3.13(e) seems to add something new that might be appropriate whether or not the rule adds specifics regarding measure of attorney fee awards:

(e) In any litigated judgment or settlement in which monetary relief is awarded, a court should, absent special circumstances, require the parties to submit to the court a final accounting describing the amount and distribution of all benefits to class members, other beneficiaries, and counsel.

This provision might be a free-standing addition to Rule 23(e) or 23(h). It might also support a Committee Note suggesting that in appropriate cases the court might defer payment of some attorneys' fees until receiving such a report. Whether this requirement would produce more trouble than it would be worth, however, is worth considering. When does this accounting have to be filed? Does the court have an open case then? Does this mean the judgment is not final (and therefore that an appeal is not yet possible) until this report is submitted? What is the remedy if nobody submits this report?

§ 3.14

As noted above, in 2001 the Committee developed a set of rule-based approaches to ensuring that a federal court's denial of class certification or refusal to approve a proposed settlement would be respected in other cases. Eventually, it was concluded that this topic was not suitable for inclusion in the amendment package. Last year the Supreme Court decided Smith v. Bayer, emphasizing the Anti-Injunction Act limitations on formal injunctions against class certification based on the federal court's denial of certification.

§ 3.14 attempts to regulate collateral challenges to settlements (not certification). It seems not to be designed to favor any Rule 23 provisions on the subject. To the contrary, the Reporters' Note (p. 257) says that it seeks "to endorse the emerging understanding of preclusion in the context of aggregate litigation."

There is a very interesting and lively argument about whether the Constitution ensures class members at least some right to challenge the adequacy of representation they received in connection with a class action when confronted with a preclusion argument, as the Reporters' Note recognizes (p. 256). But there does not seem to be a recommendation that rule changes be added to the mix.

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TAB 11E

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WAL-MART STORES, INC. v. DUKES
[Commonality Issue]

Supreme Court of the United States, 2011.
131 S.Ct. 2541.

JUSTICE SCALIA delivered the opinion of the Court.

We are presented with one of the most expansive class actions ever. The District Court and the Court of Appeals approved the certification of a class comprising about one and a half million plaintiffs, current and former female employees of petitioner Wal-Mart who allege that the discretion exercised by their local supervisors over pay and promotion matters violates Title VII by discriminating against women.

* * *

I

A

Petitioner Wal-Mart is the Nation's largest private employer. It operates four types of retail stores throughout the country: Discount Stores, Supercenters, Neighborhood Markets, and Sam's Clubs. Those stores are divided into seven nationwide divisions, which in turn comprise 41 regions of 80 to 85 stores apiece. Each store has between 40 and 53 separate departments and 80 to 500 staff positions. In all, Wal-Mart operates approximately 3,400 stores and employs more than one million people.

Pay and promotion decisions at Wal-Mart are generally committed to local managers' broad discretion, which is exercised "in a largely subjective manner." Local store managers may increase the wages of hourly employees (within limits) with only limited corporate oversight. As for salaried employees, such as store managers and their deputies, higher corporate authorities have discretion to set their pay within preestablished ranges.

Promotions work in a similar fashion. Wal-Mart permits store managers to apply their own subjective criteria when selecting candidates as "support managers," which is the first step on the path to management. Admission to Wal-Mart's management training program, however, does require that a candidate meet certain objective criteria, including an above-average performance rating, at least one year's tenure in the applicant's current position, and a willingness to relocate. But except for those requirements, regional and district managers have discretion to use their own judgment when selecting candidates for management training. Promotion to higher office—*e.g.*, assistant manager, co-manager, or store manager—is similarly at the discretion of the employee's superiors after prescribed objective factors are satisfied.

B

The named plaintiffs in this lawsuit, representing the 1.5 million members of the certified class, are three current or former Wal-Mart employees who allege that the company discriminated against them on the basis of their sex by denying them equal pay or promotions, in violation of Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. § 2000e-1 *et seq.*

Betty Dukes began working at a Pittsburgh, California, Wal-Mart in 1994. She started as a cashier, but later sought and received a promotion to customer service manager. After a series of disciplinary violations, however, Dukes was demoted back to cashier and then to greeter. Dukes concedes she violated company policy, but contends that the disciplinary actions were in fact retaliation for invoking internal complaint procedures and that male employees have not been disciplined for similar infractions. Dukes also claims two male greeters in the Pittsburgh store are paid more than she is.

Christine Kwapnoski has worked at Sam's Club stores in Missouri and California for most of her adult life. She has held a number of positions, including a supervisory position. She claims that a male manager yelled at her frequently and screamed at female employees, but not at men. The manager in question "told her to 'doll up,' to wear some makeup, and to dress a little better."

The final named plaintiff, Edith Arana, worked at a Wal-Mart store in Duarte, California, from 1995 to 2001. In 2000, she approached the store manager on more than one occasion about management training, but was brushed off. Arana concluded she was being denied opportunity for advancement because of her sex. She initiated internal complaint procedures, whereupon she was told to apply directly to the district manager if she thought her store manager was being unfair. Arana, however, decided against that and never applied for management training again. In 2001, she was fired for failure to comply with Wal-Mart's timekeeping policy.

These plaintiffs, respondents here, do not allege that Wal-Mart has any express corporate policy against the advancement of women. Rather, they claim that their local managers' discretion over pay and promotions is exercised disproportionately in favor of men, leading to an unlawful disparate impact on female employees, *see* 42 U.S.C. § 2000e-2(k). And, respondents say, because Wal-Mart is aware of this effect, its refusal to cabin its managers' authority amounts to disparate treatment, *see* § 2000e-2(a). * * *

Importantly for our purposes, respondents claim that the discrimination to which they have been subjected is common to *all* Wal-Mart's female employees. The basic theory of their case is that a strong and uniform "corporate culture" permits bias against women to infect, perhaps subconsciously, the discretionary decisionmaking of each one of Wal-Mart's

thousands of managers—thereby making every woman at the company the victim of one common discriminatory practice. Respondents therefore wish to litigate the Title VII claims of all female employees at Wal-Mart’s stores in a nationwide class action.

C

* * * Under Rule 23(a), the party seeking certification must demonstrate, first, that: “(1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.”

* * *

* * * [R]espondents moved the District Court to certify a plaintiff class consisting of “[a]ll women employed at any Wal-Mart domestic retail store at any time since December 26, 1998, who have been or may be subjected to Wal-Mart’s challenged pay and management track promotions policies and practices.” As evidence that there were * * * “questions of law or fact common to” all the women of Wal-Mart, as Rule 23(a)(2) requires, respondents relied chiefly on three forms of proof: statistical evidence about pay and promotion disparities between men and women at the company, anecdotal reports of discrimination from about 120 of Wal-Mart’s female employees, and the testimony of a sociologist, Dr. William Bielby, who conducted a “social framework analysis” of Wal-Mart’s “culture” and personnel practices, and concluded that the company was “vulnerable” to gender discrimination. * * *

Wal-Mart unsuccessfully moved to strike much of this evidence. It also offered its own countervailing statistical and other proof in an effort to defeat Rule 23(a)’s requirements of commonality, typicality, and adequate representation. * * *

* * *

[The district court certified a nationwide class of female Wal-Mart employees. On the (a)(2) issue, it noted that “Wal-Mart raised a number of challenges to Plaintiffs’ evidence of commonality but concluded that, in fact, most of these objections related *not* to * * * commonality but to the ultimate merits of the case and ‘thus should properly be addressed by a jury considering the merits’ rather than a judge considering class certification.” 509 F.3d at 1168, 1177–78 (9th Cir. 2007) (quoting district court; emphasis in original). The Ninth Circuit panel endorsed this analysis. *Id.* The Court of Appeals, rehearing the case *en banc*, affirmed in substantial part. 603 F.3d 571 (9th Cir. 2010) (*en banc*). As to Rule 23(a)(2), it held that “Plaintiffs’ factual evidence, expert opinions, statistical evidence, and anecdotal evidence

provide sufficient support *to raise the common question* whether Wal-Mart’s female employees nationwide were subjected to *a single set of corporate policies* (not merely a number of independent discriminatory acts) that may have worked to unlawfully discriminate against them in violation of Title VII.” *Id.* at 612 (emphases in original). Judge Ikuta, joined by four other judges, dissented, reasoning that the class failed to meet, inter alia, the commonality requirement of 23(a)(2), because “[n]one of plaintiffs’ evidence is probative of company-wide discrimination.” *Id.* at 640 (Ikuta, J., dissenting). In the dissent’s view, “[e]very piece of evidence merely purport[ed] to support another,” and “the plaintiffs’ circular presentation cannot conceal the fact that they have failed to offer any significant proof of a company-wide policy of discrimination * * *.” *Id.* at 640–41. *See also id.* at 652 (Kozinski, C.J., dissenting) (“the half-million members of the majority’s approved class * * * have little in common but their sex and this lawsuit.”)]

* * *

II

* * *

A

The crux of this case is commonality—the rule requiring a plaintiff to show that “there are questions of law or fact common to the class.” Rule 23(a)(2).⁵ That language is easy to misread, since “[a]ny competently crafted class complaint literally raises common ‘questions.’ ” Richard Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 131–132 (2009). For example: Do all of us plaintiffs indeed work for Wal-Mart? Do our managers have discretion over pay? Is that an unlawful employment practice? What remedies should we get? Reciting these questions is not sufficient to obtain class certification. Commonality requires the plaintiff to demonstrate that the class members “have suffered the same injury.” This does not mean merely that they have all suffered a violation of the same provision of law. Title VII, for example, can be violated in many ways—by intentional discrimination, or by hiring and promotion criteria that result in disparate impact, and by the use of these practices on the part of many

⁵ We have previously stated in this context that “[t]he commonality and typicality requirements of Rule 23(a) tend to merge. Both serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff’s claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence. Those requirements therefore also tend to merge with the adequacy-of-representation requirement, although the latter requirement also raises concerns about the competency of class counsel and conflicts of interest.” *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 157–58, n.13 (1982). In light of our disposition of the commonality question, however, it is unnecessary to resolve whether respondents have satisfied the typicality and adequate-representation requirements of Rule 23(a).

different superiors in a single company. Quite obviously, the mere claim by employees of the same company that they have suffered a Title VII injury, or even a disparate-impact Title VII injury, gives no cause to believe that all their claims can productively be litigated at once. Their claims must depend upon a common contention—for example, the assertion of discriminatory bias on the part of the same supervisor. That common contention, moreover, must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.

“What matters to class certification . . . is not the raising of common ‘questions’—even in droves—but, rather the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers.” Nagareda, *supra*, at 132.

Rule 23 does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc. We recognized in *Falcon*[, 457 U.S. 147 (1982),] that “sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question,” and that certification is proper only if “the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied.” Frequently that “rigorous analysis” will entail some overlap with the merits of the plaintiff’s underlying claim. That cannot be helped. “[T]he class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff’s cause of action.” *Id.* at 160.

In this case, proof of commonality necessarily overlaps with respondents’ merits contention that Wal-Mart engages in a *pattern or practice* of discrimination.⁷ That is so because, in resolving an individual’s Title VII claim, the crux of the inquiry is “the reason for a particular employment decision,” *Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867, 876 (1984). Here respondents wish to sue about literally millions of employment decisions at once. Without some glue holding the alleged reasons for all those decisions together, it will be impossible to say that

⁷ In a pattern-or-practice case, the plaintiff tries to “establish by a preponderance of the evidence that . . . discrimination was the company’s standard operating procedure[,] the regular rather than the unusual practice.” *Teamsters v. United States*, 431 U.S. 324, 358 (1977); see also *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 772 (1976). If he succeeds, that showing will support a rebuttable inference that all class members were victims of the discriminatory practice, and will justify “an award of prospective relief,” such as “an injunctive order against the continuation of the discriminatory practice.”

examination of all the class members' claims for relief will produce a common answer to the crucial question *why was I disfavored*.

B

This Court's opinion in *Falcon* describes how the commonality issue must be approached. There an employee who claimed that he was deliberately denied a promotion on account of race obtained certification of a class comprising all employees wrongfully denied promotions and all applicants wrongfully denied jobs. We rejected that composite class for lack of commonality and typicality, explaining:

“Conceptually, there is a wide gap between (a) an individual's claim that he has been denied a promotion [or higher pay] on discriminatory grounds, and his otherwise unsupported allegation that the company has a policy of discrimination, and (b) the existence of a class of persons who have suffered the same injury as that individual, such that the individual's claim and the class claim will share common questions of law or fact and that the individual's claim will be typical of the class claims.” *Id.*, at 157–58.

Falcon suggested two ways in which that conceptual gap might be bridged. First, if the employer “used a biased testing procedure to evaluate both applicants for employment and incumbent employees, a class action on behalf of every applicant or employee who might have been prejudiced by the test clearly would satisfy the commonality and typicality requirements of Rule 23(a).” Second, “[s]ignificant proof that an employer operated under a general policy of discrimination conceivably could justify a class of both applicants and employees if the discrimination manifested itself in hiring and promotion practices in the same general fashion, such as through entirely subjective decisionmaking processes.” We think that statement precisely describes respondents' burden in this case. The first manner of bridging the gap obviously has no application here; Wal-Mart has no testing procedure or other companywide evaluation method that can be charged with bias. The whole point of permitting discretionary decisionmaking is to avoid evaluating employees under a common standard.

The second manner of bridging the gap requires “significant proof” that Wal-Mart “operated under a general policy of discrimination.” That is entirely absent here. Wal-Mart's announced policy forbids sex discrimination, and * * * the company imposes penalties for denials of equal employment opportunity. The only evidence of a “general policy of discrimination” respondents produced was the testimony of Dr. William Bielby, their sociological expert. * * * Bielby testified that Wal-Mart has a “strong corporate culture,” that makes it “‘vulnerable’” to “gender bias.” He could not, however, “determine with any specificity how regularly stereotypes

play a meaningful role in employment decisions at Wal-Mart. At his deposition . . . Dr. Bielby conceded that he could not calculate whether 0.5 percent or 95 percent of the employment decisions at Wal-Mart might be determined by stereotyped thinking.” The parties dispute whether Bielby’s testimony even met the standards for the admission of expert testimony under Federal Rule of [Evidence] 702 and our *Daubert* case, see *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). The District Court concluded that *Daubert* did not apply to expert testimony at the certification stage of class-action proceedings. We doubt that is so, but even if properly considered, Bielby’s testimony does nothing to advance respondents’ case. “[W]hether 0.5 percent or 95 percent of the employment decisions at Wal-Mart might be determined by stereotyped thinking” is the essential question on which respondents’ theory of commonality depends. If Bielby admittedly has no answer to that question, we can safely disregard what he has to say. It is worlds away from “significant proof” that Wal-Mart “operated under a general policy of discrimination.”

C

The only corporate policy that the plaintiffs’ evidence convincingly establishes is Wal-Mart’s “policy” of *allowing discretion* by local supervisors over employment matters. On its face, of course, that is just the opposite of a uniform employment practice that would provide the commonality needed for a class action; it is a policy *against having* uniform employment practices. It is also a very common and presumptively reasonable way of doing business—one that we have said “should itself raise no inference of discriminatory conduct,” *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 990 (1988).

To be sure, we have recognized that, “in appropriate cases,” giving discretion to lower-level supervisors can be the basis of Title VII liability under a disparate-impact theory—since “an employer’s undisciplined system of subjective decisionmaking [can have] precisely the same effects as a system pervaded by impermissible intentional discrimination.” But the recognition that this type of Title VII claim “can” exist does not lead to the conclusion that every employee in a company using a system of discretion has such a claim in common. To the contrary, left to their own devices most managers in any corporation—and surely most managers in a corporation that forbids sex discrimination—would select sex-neutral, performance-based criteria for hiring and promotion that produce no actionable disparity at all. Others may choose to reward various attributes that produce disparate impact—such as scores on general aptitude tests or educational achievements. And still other managers may be guilty of intentional discrimination that produces a sex-based disparity. In such a company, demonstrating the invalidity of one manager’s use of discretion will do nothing to demonstrate the invalidity of another’s. A party seeking to certify a nationwide class will be unable to

show that all the employees' Title VII claims will in fact depend on the answers to common questions.

Respondents have not identified a common mode of exercising discretion that pervades the entire company—aside from their reliance on Dr. Bielby's [testimony] that we have rejected. In a company of Wal-Mart's size and geographical scope, it is quite unbelievable that all managers would exercise their discretion in a common way without some common direction. Respondents attempt to make that showing by means of statistical and anecdotal evidence, but their evidence falls well short.

The statistical evidence consists primarily of regression analyses performed by Dr. Richard Drogin, a statistician, and Dr. Marc Bendick, a labor economist. Drogin conducted his analysis region-by-region, comparing the number of women promoted into management positions with the percentage of women in the available pool of hourly workers. After considering regional and national data, Drogin concluded that "there are statistically significant disparities between men and women at Wal-Mart . . . [and] these disparities . . . can be explained only by gender discrimination." Bendick compared work-force data from Wal-Mart and competitive retailers and concluded that Wal-Mart "promotes a lower percentage of women than its competitors."

Even if they are taken at face value, these studies are insufficient to establish that respondents' theory can be proved on a classwide basis. In *Falcon*, we held that one named plaintiff's experience of discrimination was insufficient to infer that "discriminatory treatment is typical of [the employer's employment] practices." 457 U.S. at 158. A similar failure of inference arises here. * * * A regional pay disparity, for example, may be attributable to only a small set of Wal-Mart stores, and cannot by itself establish the uniform, store-by-store disparity upon which the plaintiffs' theory of commonality depends.

There is another, more fundamental, respect in which respondents' statistical proof fails. Even if it established (as it does not) a pay or promotion pattern that differs from the nationwide figures or the regional figures in *all* of Wal-Mart's 3,400 stores, that would still not demonstrate that commonality of issue exists. Some managers will claim that the availability of women, or qualified women, or interested women, in their stores' area does not mirror the national or regional statistics. And almost all of them will claim to have been applying some sex-neutral, performance-based criteria—whose nature and effects will differ from store to store. In the landmark case of ours which held that giving discretion to lower-level supervisors can be the basis of Title VII liability under a disparate-impact theory, the plurality opinion *conditioned* that holding on the corollary that merely proving that the discretionary system has produced a racial or sexual disparity is *not enough*. "[T]he plaintiff must begin by identifying the specific

employment practice that is challenged.” *Watson*, 487 U.S., at 994. * * * That is all the more necessary when a class of plaintiffs is sought to be certified. Other than the bare existence of delegated discretion, respondents have identified no “specific employment practice”—much less one that ties all their 1.5 million claims together. Merely showing that Wal-Mart’s policy of discretion has produced an overall sex-based disparity does not suffice.

Respondents’ anecdotal evidence suffers from the same defects, and in addition is too weak to raise any inference that all the individual, discretionary personnel decisions are discriminatory. In *Teamsters v. United States*, 431 U.S. 324 (1977), in addition to substantial statistical evidence of company-wide discrimination, the Government (as plaintiff) produced about 40 specific accounts of racial discrimination from particular individuals. That number was significant because the company involved had only 6,472 employees, of whom 571 were minorities, and the class itself consisted of around 334 persons. The 40 anecdotes thus represented roughly one account for every eight members of the class. Moreover, the Court of Appeals noted that the anecdotes came from individuals “spread throughout” the company who “for the most part” worked at the company’s operational centers that employed the largest numbers of the class members. Here, by contrast, respondents filed some 120 affidavits reporting experiences of discrimination—about 1 for every 12,500 class members—relating to only some 235 out of Wal-Mart’s 3,400 stores. More than half of these reports are concentrated in only six States (Alabama, California, Florida, Missouri, Texas, and Wisconsin); half of all States have only one or two anecdotes; and 14 States have no anecdotes about Wal-Mart’s operations at all. Even if every single one of these accounts is true, that would not demonstrate that the entire company “operate[s] under a general policy of discrimination,” which is what respondents must show to certify a companywide class.⁹

The dissent misunderstands the nature of the foregoing analysis. It criticizes our focus on the dissimilarities between the putative class members on the ground that we have “blend[ed]” Rule 23(a)(2)’s commonality requirement with Rule 23(b)(3)’s inquiry into whether common questions “predominate” over individual ones. That is not so. We quite agree that for purposes of Rule 23(a)(2) “ ‘[e]ven a single [common] question’ ” will do. We consider dissimilarities not in order to determine (as Rule 23(b)(3) requires) whether common questions predominate, but in order to determine (as Rule 23(a)(2) requires) whether there is “[e]ven a single [common] question.” And

⁹ The dissent says that we have adopted “a rule that a discrimination claim, if accompanied by anecdotes, must supply them in numbers proportionate to the size of the class.” That is not quite accurate. A discrimination claimant is free to supply as few anecdotes as he wishes. But when the claim is that a company operates under a general policy of discrimination, a few anecdotes selected from literally millions of employment decisions prove nothing at all.

there is not here. Because respondents provide no convincing proof of a companywide discriminatory pay and promotion policy, we have concluded that they have not established the existence of any common question.¹⁰

* * *

The judgment of the Court of Appeals is

Reversed.

* * *

JUSTICE GINSBURG, with whom JUSTICE BREYER, JUSTICE SOTOMAYOR, and JUSTICE KAGAN join, [dissenting in relevant part].

* * * Whether the class the plaintiffs describe meets the specific requirements of Rule 23(b)(3) is not before the Court, and I would reserve that matter for consideration and decision on remand. The Court, however, disqualifies the class at the starting gate, holding that the plaintiffs cannot cross the “commonality” line set by Rule 23(a)(2). In so ruling, the Court imports into the Rule 23(a) determination concerns properly addressed in a Rule 23(b)(3) assessment.

I

A

Rule 23(a)(2) establishes a preliminary requirement for maintaining a class action: “[T]here are questions of law or fact common to the class.” The Rule “does not require that all questions of law or fact raised in the litigation be common;” indeed, “[e]ven a single question of law or fact common to the members of the class will satisfy the commonality requirement,” Richard Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 Colum. L. Rev. 149, 176, n.110 (2003). A “question” is ordinarily understood to be “[a] subject or point open to controversy.” American Heritage Dictionary 1483 (3d ed. 1992). Thus, a “question” “common to the class” must be a dispute, either of fact or of law, the resolution of which will advance the determination of the class members’ claims.³

¹⁰ For this reason, there is no force to the dissent’s attempt to distinguish *Falcon* on the ground that in that case there were “no common questions of law or fact” between the claims of the lead plaintiff and the applicant class.” Here also there is nothing to unite all of the plaintiffs’ claims, since (contrary to the dissent’s contention) the same employment practices do not “touch and concern all members of the class.”

³ The Court suggests Rule 23(a)(2) must mean more than it says. If the word “questions” were taken literally, the majority asserts, plaintiffs could pass the Rule 23(a)(2) bar by “[r]eciting . . . questions” like “Do all of us plaintiffs indeed work for Wal-Mart?” Sensibly

B

The District Court, recognizing that “one significant issue common to the class may be sufficient to warrant certification,” found that the plaintiffs easily met that test. Absent an error of law or an abuse of discretion, an appellate tribunal has no warrant to upset the District Court’s finding of commonality. The District Court certified a class of “[a]ll women employed at any Wal–Mart domestic retail store at any time since December 26, 1998.” The named plaintiffs, led by Betty Dukes, propose to litigate, on behalf of the class, allegations that Wal–Mart discriminates on the basis of gender in pay and promotions. They allege that the company “[r]eli[es] on gender stereotypes in making employment decisions such as . . . promotion[s] [and] pay.” Wal–Mart permits those prejudices to infect personnel decisions, the plaintiffs contend, by leaving pay and promotions in the hands of “a nearly all male managerial workforce” using “arbitrary and subjective criteria.” Further alleged barriers to the advancement of female employees include the company’s requirement, “as a condition of promotion to management jobs, that employees be willing to relocate.” Absent instruction otherwise, there is a risk that managers will act on the familiar assumption that women, because of their services to husband and children, are less mobile than men.

Women fill 70 percent of the hourly jobs in the retailer’s stores but make up only “33 percent of management employees.” “[T]he higher one looks in the organization the lower the percentage of women.” The plaintiffs’ “largely uncontested descriptive statistics” also show that women working in the company’s stores “are paid less than men in every region” and “that the salary gap widens over time even for men and women hired into the same jobs at the same time.”

The District Court identified “systems for . . . promoting in-store employees” that were “sufficiently similar across regions and stores” to conclude that “the manner in which these systems affect the class raises issues that are common to all class members.” The selection of employees for promotion to in-store management “is fairly characterized as a ‘tap on the shoulder’ process,” in which managers have discretion about whose shoulders to tap. Vacancies are not regularly posted; from among those employees satisfying minimum qualifications, managers choose whom to promote on the basis of their own subjective impressions.

Wal–Mart’s compensation policies also operate uniformly across stores, the District Court found. The retailer leaves open a \$2 band for every position’s hourly pay rate. Wal–Mart provides no standards or criteria for setting wages within that band, and thus does nothing to counter unconscious bias on the part of supervisors.

read, however, the word “questions” means disputed issues, not any utterance crafted in the grammatical form of a question.

Wal-Mart’s supervisors do not make their discretionary decisions in a vacuum. The District Court reviewed means Wal-Mart used to maintain a “carefully constructed . . . corporate culture,” such as frequent meetings to reinforce the common way of thinking, regular transfers of managers between stores to ensure uniformity throughout the company, monitoring of stores “on a close and constant basis,” and “Wal-Mart TV,” “broadcas[t] . . . into all stores.”

The plaintiffs’ evidence, including class members’ tales of their own experiences,⁴ suggests that gender bias suffused Wal-Mart’s company culture. Among illustrations, senior management often refer to female associates as “little Janie Qs.” One manager told an employee that “[m]en are here to make a career and women aren’t.” A committee of female Wal-Mart executives concluded that “[s]tereotypes limit the opportunities offered to women.”

Finally, the plaintiffs presented an expert’s appraisal to show that the pay and promotions disparities at Wal-Mart “can be explained only by gender discrimination and not by . . . neutral variables.” Using regression analyses, their expert, Richard Drogin, controlled for factors including, inter alia, job performance, length of time with the company, and the store where an employee worked.⁵ The results, the District Court found, were sufficient to raise an “inference of discrimination.”

C

The District Court’s identification of a common question, whether Wal-Mart’s pay and promotions policies gave rise to unlawful discrimination, was hardly infirm. The practice of delegating to supervisors large discretion to make personnel decisions, uncontrolled by formal standards, has long been known to have the potential to produce disparate effects. Managers, like all humankind, may be prey to biases of which they are unaware.⁶ The risk of

⁴ The majority purports to derive from *Teamsters v. United States*, 431 U.S. 324 (1977), a rule that a discrimination claim, if accompanied by anecdotes, must supply them in numbers proportionate to the size of the class. *Teamsters*, the Court acknowledges, instructs that statistical evidence alone may suffice; that decision can hardly be said to establish a numerical floor before anecdotal evidence can be taken into account.

⁵ The Court asserts that Drogin showed only average differences at the “regional and national level” between male and female employees. In fact, his regression analyses showed there were disparities within stores. The majority’s contention to the contrary reflects only an arcane disagreement about statistical method—which the District Court resolved in the plaintiffs’ favor. Appellate review is no occasion to disturb a trial court’s handling of factual disputes of this order.

⁶ An example vividly illustrates how subjective decisionmaking can be a vehicle for discrimination. Performing in symphony orchestras was long a male preserve. Goldin and Rouse, *Orchestrating Impartiality: The Impact of “Blind” Auditions on Female Musicians*, 90 Am. Econ. Rev. 715, 715–16 (2000). In the 1970’s orchestras began hiring musicians through auditions open to all comers. Reviewers were to judge applicants solely on their musical

discrimination is heightened when those managers are predominantly of one sex, and are steeped in a corporate culture that perpetuates gender stereotypes.

* * *

We have held that “discretionary employment practices” can give rise to Title VII claims, not only when such practices are motivated by discriminatory intent but also when they produce discriminatory results. *See Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 988, 991 (1988). In *Watson*, as here, an employer had given its managers large authority over promotions. An employee sued the bank under Title VII, alleging that the “discretionary promotion system” caused a discriminatory effect based on race. Four different supervisors had declined, on separate occasions, to promote the employee. Their reasons were subjective and unknown. The employer, we noted “had not developed precise and formal criteria for evaluating candidates”; “[i]t relied instead on the subjective judgment of supervisors.”

Aware of “the problem of subconscious stereotypes and prejudices,” we held that the employer’s “undisciplined system of subjective decisionmaking” was an “employment practic[e]” that “may be analyzed under the disparate impact approach.”

The plaintiffs’ allegations state claims of gender discrimination in the form of biased decisionmaking in both pay and promotions. The evidence reviewed by the District Court adequately demonstrated that resolving those claims would necessitate examination of particular policies and practices alleged to affect, adversely and globally, women employed at Wal-Mart’s stores. Rule 23(a)(2), setting a necessary but not a sufficient criterion for class-action certification, demands nothing further.

II

A

The Court gives no credence to the key dispute common to the class: whether Wal-Mart’s discretionary pay and promotion policies are discriminatory. “What matters,” the Court asserts, “is not the raising of common ‘questions,’ ” but whether there are “[d]issimilarities within the proposed class” that “have the potential to impede the generation of common answers.” (quoting Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 132 (2009)).

abilities, yet subconscious bias led some reviewers to disfavor women. Orchestras that permitted reviewers to see the applicants hired far fewer female musicians than orchestras that conducted blind auditions, in which candidates played behind opaque screens.

The Court blends Rule 23(a)(2)'s threshold criterion with the more demanding criteria of Rule 23(b)(3), and thereby elevates the (a)(2) inquiry so that it is no longer "easily satisfied."⁷ Rule 23(b)(3) certification requires, in addition to the four 23(a) findings, determinations that "questions of law or fact common to class members predominate over any questions affecting only individual members" and that "a class action is superior to other available methods for . . . adjudicating the controversy."

The Court's emphasis on differences between class members mimics the Rule 23(b)(3) inquiry into whether common questions "predominate" over individual issues. And by asking whether the individual differences "impede" common adjudication, the Court duplicates 23(b)(3)'s question whether "a class action is superior" to other modes of adjudication. Indeed, Professor Nagareda, whose "dissimilarities" inquiry the Court endorses, developed his position in the context of Rule 23(b)(3). * * * "The Rule 23(b)(3) predominance inquiry" is meant to "tes[t] whether proposed classes are sufficiently cohesive to warrant adjudication by representation." If courts must conduct a "dissimilarities" analysis at the Rule 23(a)(2) stage, no mission remains for Rule 23(b)(3).

Because Rule 23(a) is also a prerequisite for Rule 23(b)(1) and Rule 23(b)(2) classes, the Court's "dissimilarities" position is far reaching. Individual differences should not bar a Rule 23(b)(1) or Rule 23(b)(2) class, so long as the Rule 23(a) threshold is met. For example, in *Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976), a Rule 23(b)(2) class of African-American truck drivers complained that the defendant had discriminatorily refused to hire black applicants. We recognized that the "qualification[s] and performance" of individual class members might vary. "Generalizations concerning such individually applicable evidence," we cautioned, "cannot serve as a justification for the denial of [injunctive] relief to the entire class."

B

The "dissimilarities" approach leads the Court to train its attention on what distinguishes individual class members, rather than on what unites them. Given the lack of standards for pay and promotions, the majority says,

⁷ The Court places considerable weight on *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147 (1982). That case has little relevance to the question before the Court today. The lead plaintiff in *Falcon* alleged discrimination evidenced by the company's failure to promote him and other Mexican-American employees and failure to hire Mexican-American applicants. There were "no common questions of law or fact" between the claims of the lead plaintiff and the applicant class. The plaintiff-employee alleged that the defendant-employer had discriminated against him intentionally. The applicant class claims, by contrast, were "advanced under the 'adverse impact' theory," appropriate for facially neutral practices. "[T]he only commonality [wa]s that respondent is a Mexican-American and he seeks to represent a class of Mexican-Americans." Here the same practices touch and concern all members of the class.

“demonstrating the invalidity of one manager’s use of discretion will do nothing to demonstrate the invalidity of another’s.”

Wal-Mart’s delegation of discretion over pay and promotions is a policy uniform throughout all stores. The very nature of discretion is that people will exercise it in various ways. A system of delegated discretion, *Watson* held, is a practice actionable under Title VII when it produces discriminatory outcomes. A finding that Wal-Mart’s pay and promotions practices in fact violate the law would be the first step in the usual order of proof for plaintiffs seeking individual remedies for company-wide discrimination. *Teamsters v. United States*, 431 U.S. 324, 359 (1977). That each individual employee’s unique circumstances will ultimately determine whether she is entitled to backpay or damages, § 2000e-5(g)(2)(A) (barring backpay if a plaintiff “was refused . . . advancement . . . for any reason other than discrimination”), should not factor into the Rule 23(a)(2) determination.

* * *

The Court errs in importing a “dissimilarities” notion suited to Rule 23(b)(3) into the Rule 23(a) commonality inquiry. I therefore cannot join Part II of the Court’s opinion.

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WAL-MART STORES, INC. v. DUKES
[Rule 23(b)(2) Issue]

Supreme Court of the United States, 2011.
131 S.Ct. 2541.

JUSTICE SCALIA delivered the opinion of the Court.

* * * The District Court and the Court of Appeals approved the certification of a class comprising about one and a half million plaintiffs, current and former female employees of petitioner Wal-Mart who allege that the discretion exercised by their local supervisors over pay and promotion matters violates Title VII by discriminating against women. In addition to injunctive and declaratory relief, the plaintiffs seek an award of backpay. We consider whether the certification of the plaintiff class was consistent with * * * [Rule 23(b)(2)].

* * *

The named plaintiffs in this lawsuit, representing the 1.5 million members of the certified class, are three current or former Wal-Mart employees who allege that the company discriminated against them on the basis of their sex by denying them equal pay or promotions, in violation of Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. § 2000e-1 *et seq.* * * * [Plaintiffs] complaint seeks injunctive and declaratory relief, punitive damages, and backpay. It does not ask for compensatory damages.

* * *

[In addition to meeting the requirements of Rule 23(a)], the proposed class must satisfy at least one of the three requirements listed in Rule 23(b). Respondents rely on Rule 23(b)(2), which applies when “the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.”

Invoking these provisions, respondents moved the District Court to certify a plaintiff class consisting of “[a]ll women employed at any Wal-Mart domestic retail store at any time since December 26, 1998, who have been or may be subjected to Wal-Mart’s challenged pay and management track promotions policies and practices.” * * * Wal-Mart * * * contended that respondents’ monetary claims for backpay could not be certified under Rule 23(b)(2), first because that Rule refers only to injunctive and declaratory relief, and second because the backpay claims could not be manageably tried as a class without depriving Wal-Mart of its right to present certain statutory defenses. With one limitation not relevant here, the District Court granted respondents’ motion and certified their proposed class.

A divided en banc Court of Appeals substantially affirmed the District Court’s certification order. * * * With respect to the Rule 23(b)(2) question, the Ninth Circuit held that respondents’ backpay claims could be certified as part of a (b)(2) class because they did not “predominat[e]” over the requests for declaratory and injunctive relief, meaning they were not “superior in strength, influence, or authority” to the nonmonetary claims.

* * *

III

We * * * conclude that respondents’ claims for backpay were improperly certified under Federal Rule of Civil Procedure 23(b)(2). Our opinion in *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 121 (1994) (per curiam) expressed serious doubt about whether claims for monetary relief may be certified under that provision. We now hold that they may not, at least where (as here) the monetary relief is not incidental to the injunctive or declaratory relief.

A

Rule 23(b)(2) allows class treatment when “the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.” One possible reading of this provision is that it applies *only* to requests for such injunctive or declaratory relief and does not authorize the class certification of monetary claims at all. We need not reach that broader question in this case, because we think that, at a minimum, claims for *individualized* relief (like the backpay at issue here) do not satisfy the Rule. The key to the (b)(2) class is “the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them.” Richard Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 132 (2009). In other words, Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class. It does not authorize class certification when each individual class member would be entitled to a *different* injunction or declaratory judgment against the defendant. Similarly, it does not authorize class certification when each class member would be entitled to an individualized award of monetary damages.

That interpretation accords with the history of the Rule. Because Rule 23 “stems from equity practice” that pre-dated its codification, *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 613 (1997), in determining its meaning we have previously looked to the historical models on which the Rule was based, *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 841–45 (1999). As

we observed in *Amchem*, “[c]ivil rights cases against parties charged with unlawful, class-based discrimination are prime examples” of what (b)(2) is meant to capture. In particular, the Rule reflects a series of decisions involving challenges to racial segregation—conduct that was remedied by a single classwide order. In none of the cases cited by the Advisory Committee as examples of (b)(2)’s antecedents did the plaintiffs combine any claim for individualized relief with their classwide injunction. See Advisory Committee’s Note, 39 F.R.D. 69, 102 (1966) (citing cases).

* * *

Permitting the combination of individualized and class-wide relief in a (b)(2) class is also inconsistent with the structure of Rule 23(b). Classes certified under (b)(1) and (b)(2) share the most traditional justifications for class treatment—that individual adjudications would be impossible or unworkable, as in a (b)(1) class, or that the relief sought must perforce affect the entire class at once, as in a (b)(2) class. For that reason these are also mandatory classes: The Rule provides no opportunity for (b)(1) or (b)(2) class members to opt out, and does not even oblige the District Court to afford them notice of the action. Rule 23(b)(3), by contrast, is an “adventuresome innovation” of the 1966 amendments, framed for situations “in which ‘class-action treatment is not as clearly called for.’” It allows class certification in a much wider set of circumstances but with greater procedural protections. Its only prerequisites are that “the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.” And unlike (b)(1) and (b)(2) classes, the (b)(3) class is not mandatory; class members are entitled to receive “the best notice that is practicable under the circumstances” and to withdraw from the class at their option.

Given that structure, we think it clear that individualized monetary claims belong in Rule 23(b)(3). The procedural protections attending the (b)(3) class—predominance, superiority, mandatory notice, and the right to opt out—are missing from (b)(2) not because the Rule considers them unnecessary, but because it considers them unnecessary *to a (b)(2) class*. When a class seeks an indivisible injunction benefitting all its members at once, there is no reason to undertake a case-specific inquiry into whether class issues predominate or whether class action is a superior method of adjudicating the dispute. Predominance and superiority are self-evident. But with respect to each class member’s individualized claim for money, that is not so—which is precisely why (b)(3) requires the judge to make findings about predominance and superiority before allowing the class. Similarly, (b)(2) does not require that class members be given notice and opt-out rights, presumably because it is thought (rightly or wrongly) that notice has no purpose when the class is mandatory, and that depriving people of their right

to sue in this manner complies with the Due Process Clause. In the context of a class action predominantly for money damages we have held that absence of notice and opt-out violates due process. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985). While we have never held that to be so where the monetary claims do not predominate, the serious possibility that it may be so provides an additional reason not to read Rule 23(b)(2) to include the monetary claims here.

B

Against that conclusion, respondents argue that their claims for backpay were appropriately certified as part of a class under Rule 23(b)(2) because those claims do not “predominate” over their requests for injunctive and declaratory relief. They rely upon the Advisory Committee’s statement that Rule 23(b)(2) “does not extend to cases in which the appropriate final relief relates *exclusively or predominantly* to money damages.” The negative implication, they argue, is that it *does* extend to cases in which the appropriate final relief relates only partially and nonpredominantly to money damages. Of course it is the Rule itself, not the Advisory Committee’s description of it, that governs. And a mere negative inference does not in our view suffice to establish a disposition that has no basis in the Rule’s text, and that does obvious violence to the Rule’s structural features. The mere “predominance” of a proper (b)(2) injunctive claim does nothing to justify elimination of Rule 23(b)(3)’s procedural protections: It neither establishes the superiority of *class* adjudication over *individual* adjudication nor cures the notice and opt-out problems. We fail to see why the Rule should be read to nullify these protections whenever a plaintiff class, at its option, combines its monetary claims with a request—even a “predominating request”—for an injunction.

Respondents’ predominance test, moreover, creates perverse incentives for class representatives to place at risk potentially valid claims for monetary relief. In this case, for example, the named plaintiffs declined to include employees’ claims for compensatory damages in their complaint. That strategy of including only backpay claims made it more likely that monetary relief would not “predominate.” But it also created the possibility (if the predominance test were correct) that individual class members’ compensatory-damages claims would be *precluded* by litigation they had no power to hold themselves apart from. If it were determined, for example, that a particular class member is not entitled to backpay because her denial of increased pay or a promotion was *not* the product of discrimination, that employee might be collaterally estopped from independently seeking compensatory damages based on that same denial. That possibility underscores the need for plaintiffs with individual monetary claims to decide *for themselves* whether to tie their fates to the class representatives’ or go it alone—a choice Rule 23(b)(2) does not ensure that they have.

The predominance test would also require the District Court to reevaluate the roster of class members continually. The Ninth Circuit recognized the necessity for this when it concluded that those plaintiffs no longer employed by Wal-Mart lack standing to seek injunctive or declaratory relief against its employment practices. The Court of Appeals' response to that difficulty, however, was not to eliminate *all* former employees from the certified class, but to eliminate only those who had left the company's employ by the date the complaint was filed. That solution has no logical connection to the problem, since those who have left their Wal-Mart jobs *since* the complaint was filed have no more need for prospective relief than those who left beforehand. As a consequence, even though the validity of a (b)(2) class depends on whether "final injunctive relief or corresponding declaratory relief is appropriate respecting the class *as a whole*," about half the members of the class approved by the Ninth Circuit have no claim for injunctive or declaratory relief at all. Of course, the alternative (and logical) solution of excising plaintiffs from the class as they leave their employment may have struck the Court of Appeals as wasteful of the District Court's time. Which indeed it is, since if a backpay action were properly certified for class treatment under (b)(3), the ability to litigate a plaintiff's backpay claim as part of the class would not turn on the irrelevant question whether she is still employed at Wal-Mart. What follows from this, however, is not that some arbitrary limitation on class membership should be imposed but that the backpay claims should not be certified under Rule 23(b)(2) at all.

Finally, respondents argue that their backpay claims are appropriate for a (b)(2) class action because a backpay award is equitable in nature. The latter may be true, but it is irrelevant. The Rule does not speak of "equitable" remedies generally but of injunctions and declaratory judgments. As Title VII itself makes pellucidly clear, backpay is neither. *See* 42 U.S.C. § 2000e-5(g)(2)(B)(i) and (ii) (distinguishing between declaratory and injunctive relief and the payment of "backpay," *see* § 2000e-5(g)(2)(A)).

C

In *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 415 (5th Cir. 1998), the Fifth Circuit held that a (b)(2) class would permit the certification of monetary relief that is "incidental to requested injunctive or declaratory relief," which it defined as "damages that flow directly from liability to the class *as a whole* on the claims forming the basis of the injunctive or declaratory relief." In that court's view, such "incidental damage should not require additional hearings to resolve the disparate merits of each individual's case; it should neither introduce new substantial legal or factual issues, nor entail complex individualized determinations." We need not decide in this case whether there are any forms of "incidental" monetary relief that are consistent with the interpretation of Rule 23(b)(2) we have

announced and that comply with the Due Process Clause. Respondents do not argue that they can satisfy this standard, and in any event they cannot. Contrary to the Ninth Circuit’s view, Wal-Mart is entitled to individualized determinations of each employee’s eligibility for backpay. Title VII includes a detailed remedial scheme. If a plaintiff prevails in showing that an employer has discriminated against him in violation of the statute, the court “may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, [including] reinstatement or hiring of employees, with or without backpay . . . or any other equitable relief as the court deems appropriate.” § 2000e–5(g)(1). But if the employer can show that it took an adverse employment action against an employee for any reason other than discrimination, the court cannot order the “hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any backpay.” § 2000e–5(g)(2)(A).

We have established a procedure for trying pattern-or-practice cases that gives effect to these statutory requirements. When the plaintiff seeks individual relief such as reinstatement or backpay after establishing a pattern or practice of discrimination, “a district court must usually conduct additional proceedings . . . to determine the scope of individual relief.” *Teamsters*, [431 U.S. 324, 361 (1977)]. At this phase, the burden of proof will shift to the company, but it will have the right to raise any individual affirmative defenses it may have, and to “demonstrate that the individual applicant was denied an employment opportunity for lawful reasons.”

The Court of Appeals believed that it was possible to replace such proceedings with Trial by Formula. A sample set of the class members would be selected, as to whom liability for sex discrimination and the backpay owing as a result would be determined in depositions supervised by a master. The percentage of claims determined to be valid would then be applied to the entire remaining class, and the number of (presumptively) valid claims thus derived would be multiplied by the average backpay award in the sample set to arrive at the entire class recovery—without further individualized proceedings. We disapprove that novel project. Because the Rules Enabling Act forbids interpreting Rule 23 to “abridge, enlarge or modify any substantive right,” 28 U.S.C. § 2072(b), a class cannot be certified on the premise that Wal-Mart will not be entitled to litigate its statutory defenses to individual claims. And because the necessity of that litigation will prevent backpay from being “incidental” to the classwide injunction, respondents’ class could not be certified even assuming, *arguendo*, that “incidental” monetary relief can be awarded to a 23(b)(2) class.

* * *

The judgment of the Court of Appeals is

Reversed.

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AMCHEM PRODUCTS., INC. v. WINDSOR

Supreme Court of the United States, 1997.
521 U.S. 591.

JUSTICE GINSBURG delivered the opinion of the Court.

This case concerns the legitimacy under Rule 23 of the Federal Rules of Civil Procedure of a class-action certification sought to achieve global settlement of current and future asbestos-related claims. The class proposed for certification potentially encompasses hundreds of thousands, perhaps millions, of individuals tied together by this commonality: Each was, or some day may be, adversely affected by past exposure to asbestos products manufactured by one or more of 20 companies. Those companies, defendants in the lower courts, are petitioners here.

The United States District Court for the Eastern District of Pennsylvania certified the class for settlement only, finding that the proposed settlement was fair and that representation and notice had been adequate. That court enjoined class members from separately pursuing asbestos-related personal-injury suits in any court, federal or state, pending the issuance of a final order. The Court of Appeals for the Third Circuit vacated the District Court's orders, holding that the class certification failed to satisfy Rule 23's requirements in several critical respects. We affirm the Court of Appeals' judgment.

I.

A.

* * *

In the face of legislative inaction, the federal courts—lacking authority to replace state tort systems with a national toxic tort compensation regime—endeavored to work with the procedural tools available to improve management of federal asbestos litigation. Eight federal judges, experienced in the superintendence of asbestos cases, urged the Judicial Panel on Multidistrict Litigation (MDL Panel), to consolidate in a single district all asbestos complaints then pending in federal courts. [The MDL Panel decides whether to transfer federal district court civil cases involving common factual questions for coordinated or consolidated pretrial proceedings. *See* discussion *infra* Chapter 12(B)(1).] Accepting the recommendation, the MDL Panel transferred all asbestos cases then filed, but not yet on trial in federal courts to a single district, the United States District Court for the Eastern District of Pennsylvania; pursuant to the transfer order, the collected cases were consolidated for pretrial proceedings before Judge Weiner. The order aggregated pending cases only * * *.

B.

After the consolidation, attorneys for plaintiffs and defendants formed separate steering committees and began settlement negotiations. Ronald L. Motley and Gene Locks—later appointed, along with Motley’s law partner Joseph F. Rice, to represent the plaintiff class in this action—cochaired the Plaintiffs’ Steering Committee. Counsel for the Center for Claims Resolution (CCR), the consortium of 20 former asbestos manufacturers now before us as petitioners, participated in the Defendants’ Steering Committee. Although the MDL order collected, transferred, and consolidated only cases already commenced in federal courts, settlement negotiations included efforts to find a “means of resolving . . . future cases.”

* * *

[After initial negotiations failed,] CCR counsel approached the lawyers who had headed the Plaintiffs’ Steering Committee in the unsuccessful negotiations, and a new round of negotiations began; that round yielded the mass settlement agreement now in controversy. At the time, the former heads of the Plaintiffs’ Steering Committee represented thousands of plaintiffs with then-pending asbestos-related claims—claimants the parties to this suit call “inventory” plaintiffs. CCR indicated in these discussions that it would resist settlement of inventory cases absent “some kind of protection for the future.”

Settlement talks thus concentrated on devising an administrative scheme for disposition of asbestos claims not yet in litigation. In these negotiations, counsel for masses of inventory plaintiffs endeavored to represent the interests of the anticipated future claimants, although those lawyers then had no attorney-client relationship with such claimants.

Once negotiations seemed likely to produce an agreement purporting to bind potential plaintiffs, CCR agreed to settle, through separate agreements, the claims of plaintiffs who had already filed asbestos-related lawsuits. In one such agreement, CCR defendants promised to pay more than \$200 million to gain release of the claims of numerous inventory plaintiffs. After settling the inventory claims, CCR, together with the plaintiffs’ lawyers CCR had approached, launched this case, exclusively involving persons outside the MDL Panel’s province—plaintiffs without already pending lawsuits.³

C.

The class action thus instituted was not intended to be litigated. Rather, within the space of a single day, January 15, 1993, the settling

³ It is basic to comprehension of this proceeding to notice that no transferred case is included in the settlement at issue, and no case covered by the settlement existed as a civil action at the time of the MDL Panel transfer.

parties—CCR defendants and the representatives of the plaintiff class described below—presented to the District Court a complaint, an answer, a proposed settlement agreement, and a joint motion for conditional class certification.

The complaint identified nine lead plaintiffs, designating them and members of their families as representatives of a class comprising all persons who had not filed an asbestos-related lawsuit against a CCR defendant as of the date the class action commenced, but who (1) had been exposed—occupationally or through the occupational exposure of a spouse or household member—to asbestos or products containing asbestos attributable to a CCR defendant, or (2) whose spouse or family member had been so exposed. Untold numbers of individuals may fall within this description. All named plaintiffs alleged that they or a member of their family had been exposed to asbestos-containing products of CCR defendants. More than half of the named plaintiffs alleged that they or their family members had already suffered various physical injuries as a result of the exposure. The others alleged that they had not yet manifested any asbestos-related condition. The complaint delineated no subclasses; all named plaintiffs were designated as representatives of the class as a whole.

The complaint invoked the District Court’s diversity jurisdiction and asserted various state-law claims for relief * * *. [The] CCR defendants’ answer denied the principal allegations of the complaint and asserted 11 affirmative defenses.

A stipulation of settlement accompanied the pleadings; it proposed to settle, and to preclude nearly all class members from litigating against CCR companies, all claims not filed before January 15, 1993, involving compensation for present and future asbestos-related personal injury or death. An exhaustive document exceeding 100 pages, the stipulation presents in detail an administrative mechanism and a schedule of payments to compensate class members who meet defined asbestos-exposure and medical requirements. * * * The stipulation describes four categories of compensable disease: mesothelioma; lung cancer; certain “other cancers” (colon-rectal, laryngeal, esophageal, and stomach cancer); and “nonmalignant conditions” (asbestosis and bi-lateral pleural thickening). Persons with “exceptional” medical claims—claims that do not fall within * * * the four described diagnostic categories—may in some instances qualify for compensation, but the settlement caps the number of “exceptional” claims CCR must cover.

* * *

For each qualifying disease category, the stipulation specifies the range of damages CCR will pay to qualifying claimants. Payments under the settlement are not adjustable for inflation. Mesothelioma claimants—the

most highly compensated category—are scheduled to receive between \$20,000 and \$200,000. The stipulation provides that CCR is to propose the level of compensation within the prescribed ranges; it also establishes procedures to resolve disputes over medical diagnoses and levels of compensation.

Compensation above the fixed ranges may be obtained for “extraordinary” claims. But the settlement places both numerical caps and dollar limits on such claims. The settlement also imposes “case flow maximums,” which cap the number of claims payable for each disease in a given year.

Class members are to receive no compensation for certain kinds of claims, even if otherwise applicable state law recognizes such claims. * * * Claims that garner no compensation under the settlement include claims by family members of asbestos-exposed individuals for loss of consortium, and claims by so-called “exposure-only” plaintiffs for increased risk of cancer, fear of future asbestos-related injury, and medical monitoring. “Pleural” claims, which might be asserted by persons with asbestos-related plaques on their lungs but no accompanying physical impairment, are also excluded. Although not entitled to present compensation, exposure-only claimants and pleural claimants may qualify for benefits when and if they develop a compensable disease and meet the relevant exposure and medical criteria. Defendants forgo defenses to liability, including statute of limitations pleas.

Class members, in the main, are bound by the settlement in perpetuity, while CCR defendants may choose to withdraw from the settlement after ten years. A small number of class members—only a few per year—may reject the settlement and pursue their claims in court. Those permitted to exercise this option, however, may not assert any punitive damages claim or any claim for increased risk of cancer. Aspects of the administration of the settlement are to be monitored by the AFL–CIO and class counsel. Class counsel are to receive attorneys’ fees in an amount to be approved by the District Court.

D.

On January 29, 1993, as requested by the settling parties, the District Court conditionally certified, under Federal Rule of Civil Procedure 23(b)(3), an encompassing opt-out class. The certified class included persons occupationally exposed to defendants’ asbestos products, and members of their families, who had not filed suit as of January 15. * * * At no stage of the proceedings * * * were additional counsel * * * appointed. Nor was the class ever divided into subclasses. In a separate order, Judge Weiner assigned to Judge Reed, also of the Eastern District of Pennsylvania, “the task of conducting fairness proceedings and of determining whether the proposed settlement is fair to the class.” Various class members raised objections to

the settlement stipulation, and Judge Weiner granted the objectors full rights to participate in the subsequent proceedings.

* * *

Objectors raised numerous challenges to the settlement[, but] Judge Reed concluded that the settlement terms were fair and had been negotiated without collusion. He also found that adequate notice had been given to class members, and that final class certification under Rule 23(b)(3) was appropriate.

As to the specific prerequisites to certification, the District Court observed that the class satisfied Rule 23(a)(1)'s numerosity requirement, a matter no one debates. The Rule 23(a)(2) and (b)(3) requirements of commonality and preponderance were also satisfied, the District Court held, in that

[t]he members of the class have all been exposed to asbestos products supplied by the defendants and all share an interest in receiving prompt and fair compensation for their claims, while minimizing the risks and transaction costs inherent in the asbestos litigation process as it occurs presently in the tort system. Whether the proposed settlement satisfies this interest and is otherwise a fair, reasonable and adequate compromise of the claims of the class is a predominant issue for purposes of Rule 23(b)(3).

The District Court held next that the claims of the class representatives were "typical" of the class as a whole, a requirement of Rule 23(a)(3), and that, as Rule 23(b)(3) demands, the class settlement was "superior" to other methods of adjudication.

Strenuous objections had been asserted regarding the adequacy of representation, a Rule 23(a)(4) requirement * * * [, but] the District Court rejected these objections. Subclasses were unnecessary, the District Court held, bearing in mind the added cost and confusion they would entail and the ability of class members to exclude themselves from the class during the three-month opt-out period. Reasoning that the representative plaintiffs "have a strong interest that recovery for *all* of the medical categories be maximized because they may have claims in *any*, or several categories," the District Court found "no antagonism of interest between class members with various medical conditions, or between persons with and without currently manifest asbestos impairment." Declaring class certification appropriate and the settlement fair, the District Court preliminarily enjoined all class members from commencing any asbestos-related suit against the CCR defendants in any state or federal court.

The objectors appealed. The United States Court of Appeals for the Third Circuit vacated the certification, holding that the requirements of Rule 23 had not been satisfied.

* * *

IV.

We granted review to decide the role settlement may play, under existing Rule 23, in determining the propriety of class certification. The Third Circuit’s opinion stated that each of the requirements of Rule 23(a) and (b)(3) “must be satisfied without taking into account the settlement.” That statement, petitioners urge, is incorrect.

We agree with petitioners to this limited extent: Settlement is relevant to a class certification. The Third Circuit’s opinion bears modification in that respect. But * * * the Court of Appeals in fact did not ignore the settlement; instead, that court homed in on settlement terms in explaining why it found the absentees’ interests inadequately represented. The Third Circuit’s close inspection of the settlement in that regard was altogether proper.

Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems, for the proposal is that there be no trial. But other specifications of the Rule—those designed to protect absentees by blocking unwarranted or overbroad class definitions—demand undiluted, even heightened, attention in the settlement context. Such attention is of vital importance, for a court asked to certify a settlement class will lack the opportunity, present when a case is litigated, to adjust the class, informed by the proceedings as they unfold.

* * *

* * * [The approval] prescription [in Rule 23(e)] was designed to function as an additional requirement, not a superseding direction, for the “class action” to which Rule 23(e) refers is one qualified for certification under Rule 23(a) and (b). Subdivisions (a) and (b) focus court attention on whether a proposed class has sufficient unity so that absent members can fairly be bound by decisions of class representatives. That dominant concern persists when settlement, rather than trial, is proposed.

The safeguards provided by the Rule 23(a) and (b) class-qualifying criteria, we emphasize, are not impractical impediments—checks shorn of utility—in the settlement class context. First, the standards set for the protection of absent class members serve to inhibit appraisals of the chancellor’s foot kind—class certifications dependent upon the court’s gestalt judgment or overarching impression of the settlement’s fairness.

Second, if a fairness inquiry under Rule 23(e) controlled certification, eclipsing Rule 23(a) and (b), and permitting class designation despite the

impossibility of litigation, both class counsel and court would be disarmed. Class counsel confined to settlement negotiations could not use the threat of litigation to press for a better offer, and the court would face a bargain proffered for its approval without benefit of adversarial investigation.

Federal courts, in any case, lack authority to substitute for Rule 23's certification criteria a standard never adopted—that if a settlement is “fair,” then certification is proper. Applying to this case criteria the rulemakers set, we conclude that the Third Circuit’s appraisal is essentially correct. Although that court should have acknowledged that settlement is a factor in the calculus, a remand is not warranted on that account. The Court of Appeals’ opinion amply demonstrates why—with or without a settlement on the table—the sprawling class the District Court certified does not satisfy Rule 23’s requirements.

A.

We address first the requirement of Rule 23(b)(3) that “[common] questions of law or fact . . . predominate over any questions affecting only individual members.” The District Court concluded that predominance was satisfied based on two factors: class members’ shared experience of asbestos exposure and their common “interest in receiving prompt and fair compensation for their claims, while minimizing the risks and transaction costs inherent in the asbestos litigation process as it occurs presently in the tort system.” The settling parties also contend that the settlement’s fairness is a common question, predominating over disparate legal issues that might be pivotal in litigation but become irrelevant under the settlement.

* * *

The predominance requirement stated in Rule 23(b)(3), we hold, is not met by the factors on which the District Court relied. The benefits asbestos-exposed persons might gain from the establishment of a grand-scale compensation scheme is a matter fit for legislative consideration, but it is not pertinent to the predominance inquiry. That inquiry trains on the legal or factual questions that qualify each class member’s case as a genuine controversy, questions that preexist any settlement.

The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation. * * * [I]t is not the mission of Rule 23(e) to assure the class cohesion that legitimizes representative action in the first place. If a common interest in a fair compromise could satisfy the predominance requirement of Rule 23(b)(3), that vital prescription would be stripped of any meaning in the settlement context.

The District Court also relied upon this commonality: “The members of the class have all been exposed to asbestos products supplied by the defendants” Even if Rule 23(a)’s commonality requirement may be

satisfied by that shared experience, the predominance criterion is far more demanding. Given the greater number of questions peculiar to the several categories of class members, and to individuals within each category, and the significance of those uncommon questions, any overarching dispute about the health consequences of asbestos exposure cannot satisfy the Rule 23(b)(3) predominance standard.

The Third Circuit highlighted the disparate questions undermining class cohesion in this case:

Class members were exposed to different asbestos-containing products, for different amounts of time, in different ways, and over different periods. Some class members suffer no physical injury or have only asymptomatic pleural changes, while others suffer from lung cancer, disabling asbestosis, or from mesothelioma Each has a different history of cigarette smoking, a factor that complicates the causation inquiry.

The [exposure-only] plaintiffs especially share little in common, either with each other or with the presently injured class members. It is unclear whether they will contract asbestos-related disease and, if so, what disease each will suffer. They will also incur different medical expenses because their monitoring and treatment will depend on singular circumstances and individual medical histories.

Differences in state law, the Court of Appeals observed, compound these disparities.

No settlement class called to our attention is as sprawling as this one. Predominance is a test readily met in certain cases alleging consumer or securities fraud or violations of the antitrust laws. Even mass tort cases arising from a common cause or disaster may, depending upon the circumstances, satisfy the predominance requirement. The Advisory Committee for the 1966 revision of Rule 23, it is true, noted that “mass accident” cases are likely to present “significant questions, not only of damages but of liability and defenses of liability, . . . affecting the individuals in different ways.” And the Committee advised that such cases are “ordinarily not appropriate” for class treatment. But the text of the rule does not categorically exclude mass tort cases from class certification, and district courts, since the late 1970s, have been certifying such cases in increasing number. The Committee’s warning, however, continues to call for caution when individual stakes are high and disparities among class members great. As the Third Circuit’s opinion makes plain, the certification in this case does not follow the counsel of caution. * * *

B.

Nor can the class approved by the District Court satisfy Rule 23(a)(4)'s requirement that the named parties "will fairly and adequately protect the interests of the class." The adequacy inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent. "[A] class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members."

* * *

As the Third Circuit pointed out, named parties with diverse medical conditions sought to act on behalf of a single giant class rather than on behalf of discrete subclasses. In significant respects, the interests of those within the single class are not aligned. Most saliently, for the currently injured, the critical goal is generous immediate payments. That goal tugs against the interest of exposure-only plaintiffs in ensuring an ample, inflation-protected fund for the future.

The disparity between the currently injured and exposure-only categories of plaintiffs, and the diversity within each category are not made insignificant by the District Court's finding that petitioners' assets suffice to pay claims under the settlement. Although this is not a "limited fund" case certified under Rule 23(b)(1)(B), the terms of the settlement reflect essential allocation decisions designed to confine compensation and to limit defendants' liability. For example, as earlier described, the settlement includes no adjustment for inflation; only a few claimants per year can opt out at the back end; and [certain] claims are extinguished with no compensation.

The settling parties, in sum, achieved a global compromise with no structural assurance of fair and adequate representation for the diverse groups and individuals affected. Although the named parties alleged a range of complaints, each served generally as representative for the whole, not for a separate constituency. * * *

* * *

C.

Impediments to the provision of adequate notice, the Third Circuit emphasized, rendered highly problematic any endeavor to tie to a settlement class persons with no perceptible asbestos-related disease at the time of the settlement. Many persons in the exposure-only category, the Court of Appeals stressed, may not even know of their exposure, or realize the extent of the harm they may incur. Even if they fully appreciate the significance of class notice, those without current afflictions may not have the information or foresight needed to decide, intelligently, whether to stay in or opt out.

Family members of asbestos-exposed individuals may themselves fall prey to disease or may ultimately have ripe claims for loss of consortium. Yet

large numbers of people in this category—future spouses and children of asbestos victims—could not be alerted to their class membership. And current spouses and children of the occupationally exposed may know nothing of that exposure.

Because we have concluded that the class in this case cannot satisfy the requirements of common issue predominance and adequacy of representation, we need not rule, definitively, on the notice given here. In accord with the Third Circuit, however, we recognize the gravity of the question whether class action notice sufficient under the Constitution and Rule 23 could ever be given to legions so unselfconscious and amorphous.

V.

* * *

For the reasons stated, the judgment of the Court of Appeals for the Third Circuit is

Affirmed.

JUSTICE BREYER, with whom JUSTICE STEVENS joins, concurring in part and dissenting in part.

Although I agree with the Court’s basic holding that “settlement is relevant to a class certification,” I find several problems in its approach that lead me to a different conclusion. * * *

* * *

I.

First, I believe the majority understates the importance of settlement in this case. Between 13 and 21 million workers have been exposed to asbestos in the workplace—over the past 40 or 50 years—but the most severe instances of such exposure probably occurred three or four decades ago. This exposure has led to several hundred thousand lawsuits, about 15% of which involved claims for cancer and about 30% for asbestosis. About half of the suits have involved claims for pleural thickening and plaques—the harmfulness of which is apparently controversial. * * * Some of those who suffer from the most serious injuries, however, have received little or no compensation. These lawsuits have taken up more than 6% of all federal civil filings in one recent year, and are subject to a delay that is twice that of other civil suits.

* * *

Although the transfer of the federal asbestos cases [to the Eastern District] did not produce a general settlement, it was intertwined with and led to a lengthy year-long negotiation between the co-chairs of the Plaintiff's Multi-District Litigation Steering Committee (elected by the Plaintiff's Committee Members and approved by the District Court) and the 20 asbestos defendants who are before us here. These "protracted and vigorous" negotiations led to the present partial settlement, which will pay an estimated \$1.3 billion and compensate perhaps 100,000 class members in the first 10 years. "The negotiations included a substantial exchange of information" between class counsel and the 20 defendant companies, including "confidential data" showing the defendants' historical settlement averages, numbers of claims filed and settled, and insurance resources. "Virtually no provision" of the settlement "was not the subject of significant negotiation," and the settlement terms "changed substantially" during the negotiations. In the end, the negotiations produced a settlement that, the District Court determined based on its detailed review of the process, was "the result of arms-length adversarial negotiations by extraordinarily competent and experienced attorneys."

The District Court, when approving the settlement, concluded that it improved the plaintiffs' chances of compensation and reduced total legal fees and other transaction costs by a significant amount. Under the previous system, according to the court, "[t]he sickest of victims often go uncompensated for years while valuable funds go to others who remain unimpaired by their mild asbestos disease." The court believed the settlement would create a compensation system that would make more money available for plaintiffs who later develop serious illnesses.

I mention this matter because it suggests that the settlement before us is unusual in terms of its importance, both to many potential plaintiffs and to defendants, and with respect to the time, effort, and expenditure that it reflects. All of which leads me to be reluctant to set aside the District Court's findings without more assurance than I have that they are wrong. I cannot obtain that assurance through comprehensive review of the record because that is properly the job of the Court of Appeals and that court, understandably, but as we now hold, mistakenly, believed that settlement was not a relevant (and, as I would say, important) consideration.

Second, the majority, in reviewing the District Court's determination that common "issues of fact and law predominate," says that the predominance "inquiry trains on the legal or factual questions that qualify each class member's case as a genuine controversy, questions that preexist any settlement." I find it difficult to interpret this sentence in a way that could lead me to the majority's conclusion. If the majority means that these pre-settlement questions are what matters, then how does it reconcile its statement with its basic conclusion that "settlement is relevant" to class

certification, or with the numerous lower court authority that says that settlement is not only relevant, but important?

Nor do I understand how one could decide whether common questions “predominate” in the abstract—without looking at what is likely to be at issue in the proceedings that will ensue, namely, the settlement. * * *

* * *

The settlement is relevant because it means that * * * common features and interests are likely to be important in the proceeding that would ensue—a proceeding that would focus primarily upon whether or not the proposed settlement fairly and properly satisfied the interests class members had in common. That is to say, the settlement underscored the importance of (a) the common fact of exposure, (b) the common interest in receiving *some* compensation for certain rather than running a strong risk of *no* compensation, and (c) the common interest in avoiding large legal fees, other transaction costs, and delays.

* * *

Third, the majority concludes that the “representative parties” will not “fairly and adequately protect the interests of the class.” It finds a serious conflict between plaintiffs who are now injured and those who may be injured in the future because “for the currently injured, the critical goal is generous immediate payments,” a goal that “tugs against the interest of exposure-only plaintiffs in ensuring an ample, inflation-protected fund for the future.”

I agree that there is a serious problem, but it is a problem that often exists in toxic tort cases. And it is a problem that potentially exists whenever a single defendant injures several plaintiffs, for a settling plaintiff leaves fewer assets available for the others. * * *

* * * [T]his Court cannot easily safeguard such interests through review of a cold record. “What constitutes adequate representation is a question of fact that depends on the circumstances of each case.” * * *

Further, certain details of the settlement that are not discussed in the majority opinion suggest that the settlement may be of greater benefit to future plaintiffs than the majority suggests. The District Court concluded that future plaintiffs receive a “significant value” from the settlement due to a variety of its items that benefit future plaintiffs, such as: (1) tolling the statute of limitations so that class members “will no longer be forced to file premature lawsuits or risk their claims being time-barred”; (2) waiver of defenses to liability; (3) payment of claims, if and when members become sick, pursuant to the settlement’s compensation standards, which avoids “the uncertainties, long delays and high transaction costs [including attorney’s fees] of the tort system”; (4) “some assurance that there will be funds available if and when they get sick,” based on the finding that each defendant

“has shown an ability to fund the payment of all qualifying claims” under the settlement; and (5) the right to additional compensation if cancer develops (many settlements for plaintiffs with noncancerous conditions bar such additional claims). For these reasons, and others, the District Court found that the distinction between present and future plaintiffs was “illusory.”

* * *

Fourth, I am more agnostic than is the majority about the basic fairness of the settlement. The District Court’s conclusions rested upon complicated factual findings that are not easily cast aside. It is helpful to consider some of them, such as its determination that the settlement provided “fair compensation . . . while reducing the delays and transaction costs endemic to the asbestos litigation process” and that “the proposed class action settlement is superior to other available methods for the fair and efficient resolution of the asbestos-related personal injury claims of class members.” * * * “The inadequate tort system has demonstrated that the lawyers are well paid for their services but the victims are not receiving speedy and reasonably inexpensive resolution of their claims. Rather, the victims’ recoveries are delayed, excessively reduced by transaction costs and relegated to the impersonal group trials and mass consolidations. The sickest of victims often go uncompensated for years while valuable funds go to others who remain unimpaired by their mild asbestos disease. Indeed, these unimpaired victims have, in many states, been forced to assert their claims prematurely or risk giving up all rights to future compensation for any future lung cancer or mesothelioma. The plan which this Court approves today will correct that unfair result for the class members and the . . . defendants.” * * * [S]ettlement “will result in less delay for asbestos claimants than that experienced in the present tort system” and will “result in the CCR defendants paying more claims, at a faster rate, than they have ever paid before.” Indeed, the settlement has been endorsed as fair and reasonable by the AFL–CIO (and its Building and Construction Trades Department), which represents a “‘substantial percentage’ ” of class members, and which has a role in monitoring implementation of the settlement.

Finally, I believe it is up to the District Court, rather than this Court, to review the legal sufficiency of notice to members of the class. * * *

II.

The issues in this case are complicated and difficult. The District Court might have been correct. Or not. Subclasses might be appropriate. Or not. I cannot tell. And I do not believe that this Court should be in the business of trying to make these fact-based determinations. That is a job suited to the district courts in the first instance, and the courts of appeal on review. But there is no reason in this case to believe that the Court of Appeals conducted its prior review with an understanding that the

settlement could have constituted a reasonably strong factor in favor of class certification. For this reason, I would provide the courts below with an opportunity to analyze the factual questions involved in certification by vacating the judgment, and remanding the case for further proceedings.

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IN RE HYDROGEN PEROXIDE ANTITRUST LITIGATION

United States Court of Appeals, Third Circuit, 2008.
552 F.3d 305.

Before SCIRICA, CHIEF JUDGE, AMBRO, and FISHER, CIRCUIT JUDGES.

Scirica, CHIEF JUDGE.

[A class of purchasers of hydrogen peroxide (a chemical used in the pulp and paper industry, and for other purposes, such as making cleaning chemicals, textiles, and electronics) brought suit against a group of chemical manufacturers, alleging that the manufacturers had conspired to keep the prices of their products artificially high, in violation of federal antitrust laws. The district court certified a class under Rule 23(b)(3) consisting of “[a]ll persons or entities * * * who purchased hydrogen peroxide, [and/or two related chemicals] in the United States * * * or from a facility located in the United States * * * directly from any of the defendants, or [entities affiliated with defendants] during the period from September 14, 1994 to January 5, 2005.” *In re Hydrogen Peroxide Antitrust Litig.*, 240 F.R.D. 163, 178 (E.D.Pa. 2007). Although defendants challenged the appropriateness of class treatment on a number of grounds, the district court interpreted existing case law as “obliging [it] to limit [the certification] inquiry to the minimum necessary at this juncture.” *Id.* at 170. The district court added that, “[s]o long as plaintiffs demonstrate their intention to prove a significant portion of their case though factual evidence and legal arguments common to all class members, that will now suffice.” *Id.* The Third Circuit granted defendants’ petition for interlocutory appeal under Rule 23(f).]

* * *

* * * In this appeal, we clarify three key aspects of class certification procedure. First, the decision to certify a class calls for findings by the court, not merely a “threshold showing” by a party, that each requirement of Rule 23 is met. Factual determinations supporting Rule 23 findings must be made by a preponderance of the evidence. Second, the court must resolve all factual or legal disputes relevant to class certification, even if they overlap with the merits—including disputes touching on elements of the cause of action. * * *

[The third issue addressed by the court, regarding evaluation of expert testimony at the class certification stage, is taken up in the following subsection. [Eds.]]

* * *

II.

Class certification is proper only “if the trial court is satisfied, after a rigorous analysis, that the prerequisites” of Rule 23 are met.⁵ *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 161 (1982): * * * “A class certification decision requires a thorough examination of the factual and legal allegations.” *Newton [v. Merrill Lynch, Pierce, Fenner & Smith, Inc.]*, 259 F.3d 154, 166 (3d Cir. 2001)].

* * *

The trial court, well-positioned to decide which facts and legal arguments are most important to each Rule 23 requirement, possesses broad discretion to control proceedings and frame issues for consideration under Rule 23. But proper discretion does not soften the rule: a class may not be certified without a finding that each Rule 23 requirement is met. Careful application of Rule 23 accords with the pivotal status of class certification in large-scale litigation, because:

denying or granting class certification is often the defining moment in class actions (for it may sound the “death knell” of the litigation on the part of plaintiffs, or create unwarranted pressure to settle nonmeritorious claims on the part of defendants)

Newton, 259 F.3d at 162. * * *

III.

Here, the District Court found the Rule 23(a) requirements were met, a determination defendants do not now challenge. Plaintiffs sought certification under Rule 23(b)(3) * * *.

Only the predominance requirement is disputed in this appeal. Predominance “tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation,” *Amchem [Prods., Inc. v. Windsor]*, 521 U.S. 591, 623 (1997)] * * *. Because the “nature of the evidence that will suffice to resolve a question determines whether the question is common or individual,” “a district court must formulate some prediction as to how specific issues will play out in order to determine whether common or individual issues predominate in a given case.” “If proof of the essential elements of the cause of action requires individual treatment, then class certification is unsuitable.” Accordingly, we examine the elements of

⁵ Although the Supreme Court in the quoted statement addressed Fed.R.Civ.P. 23(a), there is “no reason to doubt” that the language “applies with equal force to all Rule 23 requirements, including those set forth in Rule 23(b)(3).” *In re Initial Pub. Offering Sec. Litig.*, 471 F.3d 24, 33 n.3 (2d Cir. 2006).

plaintiffs' claim "through the prism" of Rule 23 to determine whether the District Court properly certified the class.

A.

The elements of plaintiffs' claim are (1) a violation of the antitrust laws—here, § 1 of the Sherman Act, (2) individual injury resulting from that violation, and (3) measurable damages. Importantly, individual injury (also known as antitrust impact) is an element of the cause of action; to prevail on the merits, every class member must prove at least some antitrust impact resulting from the alleged violation.

In antitrust cases, impact often is critically important for the purpose of evaluating Rule 23(b)(3)'s predominance requirement because it is an element of the claim that may call for individual, as opposed to common, proof. * * * Plaintiffs' burden at the class certification stage is not to prove the element of antitrust impact, although in order to prevail on the merits each class member must do so. Instead, the task for plaintiffs at class certification is to demonstrate that the element of antitrust impact is capable of proof at trial through evidence that is common to the class rather than individual to its members. Deciding this issue calls for the district court's rigorous assessment of the available evidence and the method or methods by which plaintiffs propose to use the evidence to prove impact at trial. * * *

[Plaintiffs' expert economist opined that the alleged conspiracy could be shown at trial by evidence common to the class. Defendants' expert economist opined to the contrary.]

* * * The District Court held that it was sufficient that [plaintiffs' expert] proposed reliable methods for proving impact and damages; it did not matter that [plaintiffs' expert] had not completed any benchmark or regression analyses, and the [district] court would not require plaintiffs to show at the certification stage that either method would work.

IV.

A.

Defendants contend the District Court applied too lenient a standard of proof with respect to the Rule 23 requirements by (1) accepting only a "threshold showing" by plaintiffs rather than making its own determination, (2) requiring only that plaintiffs demonstrate their "intention" to prove impact on a class-wide basis, and (3) singling out antitrust actions as appropriate for class treatment even when compliance with Rule 23 is "in doubt."

Although it is clear that the party seeking certification must convince the district court that the requirements of Rule 23 are met, little guidance is available on the subject of the proper standard of "proof" for class

certification. The Supreme Court has described the inquiry as a “rigorous analysis,” *Falcon*, 457 U.S. at 161, and a “close look,” *Amchem*, 521 U.S. at 615, but it has elaborated no further.

1.

The following principles guide a district court’s class certification analysis. First, the requirements set out in Rule 23 are not mere pleading rules. *Szabo [v. Bridgeport Machines, Inc.]*, 249 F.3d 672, 675–77 (7th Cir. 2001)]. The court may “delve beyond the pleadings to determine whether the requirements for class certification are satisfied.” *Newton*, 259 F.3d at 167 (quoting 5 James Wm. Moore et al., *Moore’s Federal Practice* § 23.61[5]) * * *.

An overlap between a class certification requirement and the merits of a claim is no reason to decline to resolve relevant disputes when necessary to determine whether a class certification requirement is met. Some uncertainty ensued when the Supreme Court declared in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974), that there is “nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action.” * * * As we explained in *Newton*, 259 F.3d at 166–69, *Eisen* is best understood to preclude only a merits inquiry that is not necessary to determine a Rule 23 requirement. Other courts of appeals have agreed. Because the decision whether to certify a class “requires a thorough examination of the factual and legal allegations,” *Newton*, 259 F.3d at 166, the court’s rigorous analysis may include a “preliminary inquiry into the merits,” *id.* at 168, and the court may “consider the substantive elements of the plaintiffs’ case in order to envision the form that a trial on those issues would take,” *id.* at 166. A contested requirement is not forfeited in favor of the party seeking certification merely because it is similar or even identical to one normally decided by a trier of fact. Although the district court’s findings for the purpose of class certification are conclusive on that topic, they do not bind the fact-finder on the merits.

The evidence and arguments a district court considers in the class certification decision call for rigorous analysis. A party’s assurance to the court that it intends or plans to meet the requirements is insufficient.

Support for our analysis is drawn from amendments to Rule 23 that took effect in 2003. First, amended Rule 23(c)(1)(A) altered the timing requirement for the class certification decision. The amended rule calls for a decision on class certification “[a]t an early practicable time after a person sues or is sued as a class representative,” while the prior version had required that decision be made “as soon as practicable after commencement of an action.” * * * Relatedly, in introducing the concept of a “trial plan,” the Advisory Committee’s 2003 note focuses attention on a rigorous evaluation of the likely shape of a trial on the issues:

A critical need is to determine how the case will be tried. An increasing number of courts require a party requesting class certification to present a “trial plan” that describes the issues likely to be presented at trial and tests whether they are susceptible of class-wide proof.

Fed.R.Civ.P. 23 advisory committee’s note, 2003 Amendments.

Additionally, the 2003 amendments eliminated the language that had appeared in Rule 23(c)(1) providing that a class certification “may be conditional.” The Advisory Committee’s note explains: “A court that is not satisfied that the requirements of Rule 23 have been met should refuse certification until they have been met.” * * *

While these amendments do not alter the substantive standards for class certification, they guide the trial court in its proper task—to consider carefully all relevant evidence and make a definitive determination that the requirements of Rule 23 have been met before certifying a class.

To summarize: because each requirement of Rule 23 must be met, a district court errs as a matter of law when it fails to resolve a genuine legal or factual dispute relevant to determining the requirements.

2.

Class certification requires a finding that each of the requirements of Rule 23 has been met. Factual determinations necessary to make Rule 23 findings must be made by a preponderance of the evidence. In other words, to certify a class the district court must find that the evidence more likely than not establishes each fact necessary to meet the requirements of Rule 23.

In reviewing a district court’s judgment on class certification, we apply the abuse of discretion standard. * * * Under these Rule 23 standards, a district court exercising proper discretion in deciding whether to certify a class will resolve factual disputes by a preponderance of the evidence and make findings that each Rule 23 requirement is met or is not met, having considered all relevant evidence and arguments presented by the parties. * * *

B.

Although the District Court properly described the class certification decision as requiring “rigorous analysis,” some statements in its opinion depart from the standards we have articulated. The District Court stated, “So long as plaintiffs demonstrate their intention to prove a significant portion of their case through factual evidence and legal arguments common to all class members, that will now suffice. It will not do here to make judgments about whether plaintiffs have adduced enough evidence or whether their evidence is more or less credible than defendants’.” With respect to predominance, the District Court stated that “[p]laintiffs need only make a threshold showing

that the element of impact will predominantly involve generalized issues of proof, rather than questions which are particular to each member of the plaintiff class.” As we have explained, proper analysis under Rule 23 requires rigorous consideration of all the evidence and arguments offered by the parties. It is incorrect to state that a plaintiff need only demonstrate an “intention” to try the case in a manner that satisfies the predominance requirement. Similarly, invoking the phrase “threshold showing” risks misapplying Rule 23. A “threshold showing” could signify, incorrectly, that the burden on the party seeking certification is a lenient one (such as a prima facie showing or a burden of production) or that the party seeking certification receives deference or a presumption in its favor. So defined, “threshold showing” is an inadequate and improper standard. “[T]he requirements of Rule 23 must be met, not just supported by some evidence.”

* * *

To the extent that the District Court’s analysis reflects application of incorrect standards, remand is appropriate. We recognize that the able District Court did not have the benefit of the standards we have articulated. Faced with complex, fact-intensive disputes, trial courts have expended considerable effort to interpret and apply faithfully the requirements of Rule 23. * * *

* * * We do not question plaintiffs’ general proposition, which the District Court accepted, that a conspiracy to maintain prices could, in theory, impact the entire class despite a decrease in prices for some customers in parts of the class period, and despite some divergence in the prices different plaintiffs paid. But the question at class certification stage is whether, if such impact is plausible in theory, it is also susceptible to proof at trial through available evidence common to the class. When the latter issue is genuinely disputed, the district court must resolve it after considering all relevant evidence. Here, the District Court apparently believed it was barred from resolving disputes between the plaintiffs’ and defendants’ experts. Rule 23 calls for consideration of all relevant evidence and arguments, including relevant expert testimony of the parties. * * *

* * *

For the foregoing reasons, we will vacate the class certification order and remand for proceedings consistent with this opinion.

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AMERICAN HONDA MOTOR CO., INC v. ALLEN

United States Court of Appeals, Seventh Circuit, 2010.
600 F.3d 813.

Before POSNER, EVANS, and TINDER, CIRCUIT JUDGES.

PER CURIAM.

American Honda Motor Company and Honda of America Manufacturing (collectively “Honda”) seek leave to appeal the district court’s grant of class certification pursuant to Federal Rule of Civil Procedure 23(f). Specifically, Honda asks us to resolve whether the district court must conclusively rule on the admissibility of an expert opinion prior to class certification in this case because that opinion is essential to the certification decision. * * *

Plaintiffs are purchasers of Honda’s Gold Wing GL1800 motorcycle; they allege that the motorcycle has a design defect that prevents the adequate dampening of “wobble,” that is, side-to-side oscillation of the front steering assembly about the steering axis. In other words, they claim that the defect makes the steering assembly shake excessively and they want Honda to fix the problem. Plaintiffs moved for class certification pursuant to Rule 23(b)(3). To demonstrate the predominance of common issues, they relied heavily on a report prepared by Mark Ezra, a motorcycle engineering expert. Ezra’s report opined that motorcycles should “by [their] design and manufacture exhibit[] decay of any steering oscillations sufficiently and rapidly so that the rider neither reacts to nor is frightened by such oscillations.” Assuming that human reaction time to wobble is 1/2 to 3/4 of a second, Ezra opined that wobble should decay, or dissipate, to 37% of its original amplitude within 3/4 of a second to ensure that riders do not perceive and react to the oscillations. This standard, which Ezra devised himself and characterizes as “reasonable,” was published in the June 2004 edition of the *Journal of the National Academy of Forensic Engineers*. After testing one used GL1800 serviced to factory condition, Ezra concluded that it failed to meet his wobble decay standard. He also concluded that his standard could be achieved in the GL1800 motorcycle by replacing the regular ball bearings in the steering assembly with tapered ones.

Honda moved to strike the report pursuant to *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993), arguing that Ezra’s wobble decay standard was unreliable because it was not supported by empirical testing, was not developed through a recognized standard-setting procedure, was not generally accepted in the relevant scientific, technical, or professional

community, and was not the product of independent research.* In the alternative, Honda argued that even if the standard was reliable, Ezra did not reliably apply it to this case because he only tested one motorcycle and did not account for variables that could affect the wobble decay rate.

The district court concluded that it was proper to decide whether the report was admissible prior to certification because “most of Plaintiffs’ predominance arguments rest upon the theories advanced by Mr. Ezra.” * * * [The district] court then concluded, “Viewing all of the arguments together, the court has definite reservations about the reliability of Mr. Ezra’s wobble decay standard. Nevertheless, the court declines to exclude the report in its entirety at this early stage of the proceedings.” The court denied Honda’s motion to exclude “without prejudice,” and granted Plaintiffs’ motion for class certification in part, certifying two classes of individuals who purchased GL1800s.

In *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 676 (7th Cir. 2001), we held that a district court must make whatever factual and legal inquiries are necessary to ensure that requirements for class certification are satisfied before deciding whether a class should be certified, even if those considerations overlap the merits of the case. And in *West v. Prudential Sec., Inc.*, 282 F.3d 935, 938 (7th Cir. 2002), we held that a plaintiff cannot obtain class certification just by hiring a competent expert. We emphasized, “A district judge may not duck hard questions by observing that each side has some support Tough questions must be faced and squarely decided, if necessary by holding evidentiary hearings and choosing between competing perspectives.” But we have not yet specifically addressed whether a district court must resolve a *Daubert* challenge prior to ruling on class certification if the testimony challenged is integral to the plaintiffs’ satisfaction of Rule 23’s requirements.

* * *

We hold that when an expert’s report or testimony is critical to class certification, as it is here, a district court must conclusively rule on any challenge to the expert’s qualifications or submissions prior to ruling on a class certification motion. That is, the district court must perform a full *Daubert* analysis before certifying the class if the situation warrants. If the challenge is to an individual’s qualifications, a court must make that determination “by comparing the area in which the witness has superior

* *Daubert* directed federal courts to evaluate the relevance and reliability of expert testimony by assessing the expert’s reasoning or methodology with reference to general scientific principles, including whether the theory or methodology: (1) can be tested; (2) has been subjected to peer review and publication; (3) has a known error rate; and (4) is generally accepted within the “relevant scientific community.” 509 U.S. at 589–95. A subsequent case, *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999), extended *Daubert* to apply to “all expert testimony,” not “only to ‘scientific’ testimony.” *Id.* at 147. [Eds.]

knowledge, skill, experience, or education with the subject matter of the witness's testimony." The court must also resolve any challenge to the reliability of information provided by an expert if that information is relevant to establishing any of the Rule 23 requirements for class certification.

* * * The district court acknowledged Honda's concerns about the reliability of Ezra's testimony and largely agreed with them. It expressed reservations about Ezra's failure to "establish the minimal amplitude required for a rider to detect an oscillation," his failure to "verif[y] whether a lesser or greater percentage of decay would also provide an appropriate margin of safety," the fact that his wobble decay standard was developed "to assist with a lawsuit and was not conceived through the logical flow of independent research," the questionable peer-review process that his article underwent, the engineering community's lack of acceptance of his proposed standard, and his test sample size of one used GL1800. Yet the district court ultimately declined, without further explanation, "to exclude the report in its entirety at this early stage of the proceedings."

* * * The court's effective statement of admissibility here is not even conclusory; it leaves open the questions of what portions of Ezra's testimony it may have decided (or will decide) to exclude, whether Ezra reliably applied the standard to the facts of the case, and, ultimately, whether Plaintiffs have satisfied Rule 23(b)(3)'s predominance requirement. As a result, the district court never actually reached a conclusion about whether Ezra's expert report was reliable enough to support Plaintiffs' class certification request. Instead it denied Honda's motion to exclude without prejudice and noted that the case was in an "early stage of the proceedings." This was not sufficient. Indeed, it was an abuse of discretion. * * *

As we have explained, a district court must make the necessary factual and legal inquiries and decide all relevant contested issues prior to certification. The district court's actions here were more akin to the "provisional" approach that we rejected in *Szabo*. Ezra's testimony is necessary to show that Plaintiffs' claims are capable of resolution on a class-wide basis and that the common defect in the motorcycle predominates over the class members' individual issues. Therefore, by failing to clearly resolve the issue of its admissibility before certifying the class, the district court erred.

* * *

The "theory" here is Ezra's wobble decay standard, and, as the district court thoroughly enumerated, there are many reasons to harbor "definite reservations" about its reliability. Ezra originally developed the standard for use in a mid-1980s lawsuit in which he testified as an expert against Honda and subsequently published it in a journal article aimed at forensic engineers who testify as experts on motorcycle instability, see Mark A.M. Ezra, *Forensic*

Engineering Investigation of Motorcycle Instability Induced Crashes, 21 J. Nat'l Acad. Forensic Eng'rs 69, 80–84 (2004) (discussing seven common “attacks by opposing counsel,” including “You Did What While Testing the Motorcycle?!”, and instructing future experts to “be ready to defend in simple lay terms the standard [they have] proposed and relied upon in evaluating the motorcycle and its reasonableness”). Despite its publication, there is no indication that Ezra’s wobble decay standard has been generally accepted by anyone other than Ezra.

* * *

Even if we were to assume that Ezra’s standard is generally accepted by mere virtue of its publication in a peer-reviewed journal, its reliability remains in question. Ezra has never conducted any rider confidence studies to determine when motorcycle riders perceive wobble, or performed any tests to determine the minimal wobble amplitude at which riders detect oscillation. His report merely deemed “reasonable” his proposed standard, relying solely on his own previous (and similarly unsupported) assessment of the same for support. The “principles and methodology” underlying his findings, then, are questionable at best.

* * *

Without Ezra’s testimony, * * * Plaintiffs are not only unable to support their theory that all GL1800 motorcycles use ball bearings that fail to adequately dampen wobble, they are also unable to demonstrate that their wobble claim sufficiently predominates as to warrant class certification under Rule 23(b)(3).

We therefore * * * VACATE the district court’s denial of Honda’s motion to strike and its order certifying a class, and REMAND for proceedings consistent with this opinion.

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PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 08-2784/2785/2798/2799/
2818/2819/2831/2881

SHAWN SULLIVAN;
ARRIGOTTI FINE JEWELRY;
JAMES WALNUM, on behalf of themselves
and all others similarly situated,

v.

DB INVESTMENTS, INC; DE BEERS S.A.;
DE BEERS CONSOLIDATED MINES, LTD; DE BEERS
A.G.;
DIAMOND TRADING COMPANY; CSO VALUATIONS
A.G.;
CENTRAL SELLING ORGANIZATION; DE BEERS
CENTENARY A.G.

DAVID T. MURRAY, Appellant in 08-2784
(Pursuant to Fed. R. App. P. 12(a))

SUSAN M. QUINN, Appellant in 08-2785
(Pursuant to Fed. R. App. P. 12(a))

MARVIN L. UNION; TIM HENNING;
NEIL FREEDMAN; KYLIE LUKE; WILLIAM

BENJAMIN COFFEY, Jr., Appellants in 08-2798
(Pursuant to Fed. R. App. P. 12(a))

AARON PETRUS, Appellant in 08-2799
(Pursuant to Fed. R. App. P. 12(a))

JANET GIDDINGS, Appellant in 08-2818
(Pursuant to Fed.R.App.P. 12(a))

FRANK ASCIONE; ROSAURA BAGOLIE;
MATTHEW DELONG; SANDEEP GOPALAN;
MANOJ KOLEL-VEETIL; MATTHEW METZ;
ANITA PAL; DEB K PAL; JAY PAL;
PETER PERERA; RANGESH K. SHAH; ED
MCKENNA; THOMAS VAUGHAN,
Appellants in 08-2819
(Pursuant to Fed.R.App.P. 12(a))

KRISTEN DISHMAN; MARGARET MARASCO,
Appellants in 08-2831
(Pursuant to Fed.R.App.P. 12(a))

JAMES B. HICKS, Appellant in 08-2881
(Pursuant to Fed. R. App. P. 12(a))

Appeals from the United States District Court
for the District of New Jersey
(D.C. Civil No. 2-04-cv-02819)
District Judge: Honorable Stanley R. Chesler

No. 08-2785 Argued on January 28, 2010
Nos. 08-2784/2798/2799/2818/2819/2831/2881 Submitted
Under Third Circuit L.A.R. 34.1(a) on January 28, 2010

Before: RENDELL and JORDAN, Circuit Judges, and
AMBROSE*, District Judge.

Reargued En Banc
on February 23, 2011

Before: SCIRICA, RENDELL, AMBRO, FUENTES,
SMITH, FISHER, CHAGARES, JORDAN and VANASKIE,
Circuit Judges.

(Opinion Filed December 20, 2011)

*Honorable Donetta W. Ambrose, United States District
Court Judge for the Western District of Pennsylvania, sitting
by designation.

OPINION OF THE COURT

RENDELL, *Circuit Judge*, with whom *Circuit Judges* SCIRICA, AMBRO, FUENTES, FISHER, CHAGARES and VANASKIE, join.

At issue on appeal in this class action litigation is the propriety of the District Court's certification of two nationwide settlement classes comprising purchasers of diamonds from De Beers S.A. and related entities ("De Beers").¹ The settlement provided for a fund of \$295 million to be distributed to both the direct and indirect purchasers: the direct purchasers were to receive \$22.5 million of the fund, while the indirect purchasers would receive \$272.5

¹ The Settlement involved five individual class actions pending in federal court and two other class suits pending in state court. The individual federal suits presently before us are: *Sullivan v. DB Investments, Inc.*, Index No. 04-cv-02819 (D.N.J.); *Null v. DB Investments, Inc.*, Madison Co. No. 05-L-209 (Madison County, Ill. Cir. Ct., removed to S.D. Ill.); *Leider v. Ralfe*, No. 01-CV-3137 (S.D.N.Y.); *Anco Industrial Diamond Corp. v. DB Investments, Inc.*, No. 01-cv-04463 (D.N.J.); and *British Diamond Import Co. v. Central Holdings Ltd.*, No. 04-cv-04098 (D.N.J.). The two other class actions pending in state court pertinent to the Settlement and this set of appeals are: *Hopkins v. De Beers Centenary A.G.*, San Francisco County No. CGC-04-432954 (Cal. Super. Ct.), and *Cornwell v. DB Investments, Inc.*, Maricopa Co. No. CV2005-2968 (Ariz. Super. Ct.).

million. A panel of our Court held that the District Court's ruling was inconsistent with the predominance inquiry mandated by Federal Rule of Civil Procedure 23(b)(3), and remanded the matter for further proceedings. *See Sullivan v. DB Investments, Inc.*, 613 F.3d 134 (3d Cir. 2010), *reh'g en banc granted and vacated by Sullivan v. DB Investments, Inc.*, 619 F.3d 287 (3d Cir. 2010). We then granted the plaintiffs' petition for rehearing en banc and vacated the prior order. Accordingly, we address anew the propriety of the District Court's certification of the direct and indirect purchaser classes pursuant to Federal Rule of Civil Procedure 23(b)(2) and 23(b)(3), and also consider for the first time the objections raised to the fairness of the class settlement.²

We believe that the predominance inquiry should be easily resolved here based on De Beers's conduct and the injury it caused to each and every class member, and that the straightforward application of Rule 23 and our precedent should result in affirming the District Court's order certifying the class. But the objectors to the class certification and our dissenting colleagues insist that, when deciding whether to certify a class, a district court must ensure that each class member possesses a viable claim or "some colorable legal claim," (Dissenting Op. at 10). We disagree, and accordingly, we will reason through our analysis in a more

² Because the Panel found the certification of the class to be flawed, it did not reach the Rule 23 fairness objections to the settlement, distribution plan, and fee award, or the District Court's resolution of these objections. *See Sullivan*, 613 F.3d at 142 n.6. Because we now conclude that the District Court's certification of the proposed settlement was appropriate, we will also address these issues.

deliberate manner in order to explain why the addition of this new requirement into the Rule 23 certification process is unwarranted.

Sullivan v. DB Investments, et al.,
Nos. 08-2784/2785/2798/2799/2818/2819/2831/2881

SCIRICA, *Circuit Judge*, concurring.

I fully concur in the Court’s opinion. I write separately to address this case in the wider context of the evolving law on settlement classes.

Ever since the Supreme Court’s landmark decisions in *Amchem Products Inc. v. Windsor*, 521 U.S. 591 (1997) and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), one of the most vexing questions in modern class action practice has been the proper treatment of settlement classes, especially in cases national in scope that may also implicate state law. Grounded in equitable concepts of structural and procedural fairness for absent plaintiffs—competent and conflict-free representation, fair allocation of settlement, absence of collusion—*Amchem* and *Ortiz* set down important standards and guidelines for settlement classes.¹

¹ The class action device has a venerable pedigree in equity practice. As early as the seventeenth century, English chancery courts employed bills of peace to facilitate representative suits analogous to “common question” suits under Rule 23(b)(3). Geoffrey C. Hazard, Jr. et al., *An Historical Analysis of the Binding Effect of Class Suits*, 146 U. Pa. L. Rev. 1849, 1861-65 (1998). Inchoate class actions continued in the American legal system until codified under Rule 23 in Federal Rules of Civil Procedure in 1938. *Id.* at

Despite initial uncertainty the opinions might pose formidable obstacles for settling massive, complex cases, this has not, for the most part, proved to be the case. Nonetheless, class settlement in mass tort cases (especially personal injury claims) remains problematic, leading some practitioners to avoid the class action device—most prominently in the recent \$4.85 billion mass settlement of 50,000 claims arising out of use of the drug Vioxx. In fact, some observers believe there has been a shift in mass personal injury claims to aggregate non-class settlements. “The *Zyprexa* and *Ephedra* settlements, as well as the more recent *Guidant* and *Vioxx* settlements, suggest that the MDL process has supplemented and perhaps displaced the class action device as a procedural mechanism for large settlements.” Thomas E. Willging & Emery G. Lee III, *From Class Actions to Multidistrict Consolidations: Aggregate Mass-Tort Litigation after Ortiz*, 58 U. Kan. L. Rev. 775, 801 (2010); *see also* Thomas E. Willging & Shannon R. Wheatman, *Attorney Choice of Forum in Class Action Litigation: What Difference Does It Make?*, 81 Notre Dame L. Rev. 591, 636 tbl. 12 (2006) (presenting evidence that, in sample, 41% of cases denied

1878-1942. The 1966 amendments to Rule 23 substantially modified earlier practice and ushered in a class action “revolution” by introducing most of the current aspects of class action litigation, particularly the broad provisions of 23(b)(3) and the concomitant procedural safeguards requiring predominance and notice. Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, 156 U. Pa. L. Rev. 1439, 1484-89 (2008).

class certification ended in non-class settlement). This is significant, for outside the federal rules governing class actions,² there is no prescribed independent review of the structural and substantive fairness of a settlement including evaluation of attorneys' fees, potential conflicts of interest, and counsel's allocation of settlement funds among class members.³

Because of the pivotal role and ensuing consequences of the class certification decision, trial courts must conduct a "rigorous analysis" of Rule 23's prerequisites. *Wal-Mart Stores, Inc. v. Dukes*, --- U.S.---, 131 S. Ct. 2541, 2551-52 (2011); *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 315-21 (3d Cir. 2008); *In re Initial Pub. Offerings Secs. Litig.*, 471 F.3d 24, 31-42 (2d Cir. 2006).⁴ The same

² Bankruptcy may also provide a vehicle for some measure of compensation to mass claimants (creditors) and for resolution of liability.

³ Nevertheless, some MDL transferee judges have treated the MDL proceedings as quasi class actions and restricted contingent fee agreements in non-class aggregate settlements under their equitable and supervisory powers. *See In re Vioxx Prods. Liab. Litig.*, 650 F. Supp. 2d 549, 558-62 (E.D. La. 2009); *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, MDL No. 05-1708 (DWF/AJB), 2008 WL 682174 (D. Minn. Mar. 7, 2008); *In re Zyprexa Prods. Liab. Litig.*, 424 F. Supp. 2d 488, 491 (E.D.N.Y. 2006).

⁴ For a litigation class, the key decision is whether or not to certify the class. Once a class is certified, the dynamics of the case change dramatically. For many plaintiffs, denial of

analytical rigor is required for litigation and settlement certification, but some inquiries essential to litigation class certification are no longer problematic in the settlement context. A key question in a litigation class action is manageability—how the case will or can be tried, and whether there are questions of fact or law that are capable of common proof. But the settlement class presents no management problems because the case will not be tried. Conversely, other inquiries assume heightened importance and heightened scrutiny because of the danger of conflicts of interest, collusion, and unfair allocation. *See Amchem*, 521 U.S. at 620 (“[O]ther specifications of the Rule [23]—those designed to protect absentees by blocking unwarranted or overbroad class definitions—demand undiluted, even heightened, attention in the settlement context.”).

In conducting a “rigorous analysis” under Rule 23, lower courts have applied the strictures laid down in *Amchem* and *Ortiz*, and added some of their own. So far, the developing jurisprudence appears to have justified the judgment of the Judicial Conference’s Committee on Rules of Practice and Procedure and Advisory Committee on Civil

certification may sound the death knell of the action because the claims are too small to be prosecuted individually. For many defendants, class certification may create hydraulic pressure to settle, even for claims defendants deem non-meritorious. For these reasons, the Supreme Court adopted Federal Rule of Civil Procedure 23(f) to permit a discretionary interlocutory appeal from the grant or denial of class certification.

Rules to defer consideration of a variant rule for settlement class actions.

Rule 23(a) sensibly provides that every certified class must share common questions of law or fact. For (b)(3) classes, common questions must predominate over individual questions, claims must be typical, and the class action device must be superior to other available methods for fairly and efficiently adjudicating the controversy. Naturally, there is some overlap in the requirements for commonality, typicality, and predominance—all of which must be shown.

Commonality for a settlement class should be satisfied under the standard for supplemental jurisdiction first set forth in *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 725 (1966), allowing joinder of claims deriving from a common nucleus of operative fact. *See also Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, --- U.S. ---, 130 S. Ct. 1431, 1443 (2010) (Scalia, J., plurality opinion) (“A class action, no less than traditional joinder (of which it is a species), merely enables a federal court to adjudicate claims of multiple parties at once, instead of in separate suits.”). Variation in state law should not necessarily bar class certification. The focus in the settlement context should be on the conduct (or misconduct) of the defendant and the injury suffered as a consequence. The claim or claims must be related and cohesive and should all arise out of the same nucleus of operative fact. The “common contention, moreover, must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the

validity of each one of the claims in one stroke.” *Dukes*, 131 S.Ct. at 2551. The interests of the class members should be aligned.

The nature of the predominance analysis reflects the purpose of the inquiry, which is to determine whether “a class action would achieve economies of time, effort, and expense, and promote . . . uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.” *Amchem*, 521 U.S. at 615 (quoting Fed. R. Civ. P. 23 advisory committee note). This is important even though, in the settlement context, a court need not worry about the challenge of litigating the claims to a verdict in a single proceeding. If the class presented a grab-bag of unrelated claims, a trial court would be unable to ensure that absent class members’ interests were protected. The question, then, is what kind of common issues a settlement class must share to satisfy commonality and predominance.

In certain areas, such as antitrust, common issues tend to predominate because a major focus is the allegedly anticompetitive conduct of the defendant and its downstream effects on plaintiffs. *See In re Ins. Brokerage Antitrust Litig.*, 579 F.3d 241, 268 (3d Cir. 2009). Commonality and predominance are usually met in the antitrust settlement context when all class members’ claims present common issues including (1) whether the defendant’s conduct was actionably anticompetitive under antitrust standards; and (2) whether that conduct produced anticompetitive effects within the relevant product and geographic markets. *See id.* at 267.

Even when a settlement class satisfies the predominance requirement, the inclusion of members who have a questionable chance of a favorable adjudication may present fairness concerns that demand the district court's attention. Trial courts must enforce the Rule 23(a) and (b) requirements in order to obtain a "structural assurance of fair and adequate representation for the diverse groups and individuals affected." *Amchem*, 521 U.S. at 627. In discharging this responsibility, district courts have a number of ways to address fairness concerns.⁵ Due to the context-

⁵ Trial courts can certify subclasses in situations where divergent interests implicate fair allocation—a situation not presented here, as all indirect class members have aligned interests. Certifying subclasses may be proper "[w]here a class is found to include subclasses divergent in interest." *In re Ins. Brokerage Antitrust Litig*, 579 F.3d at 271 (quoting Fed. R. Civ. P. 23(c) advisory committee note). Even the conflicts in *Amchem* were amenable to resolution through sub-classes. *See Ortiz*, 527 U.S. at 856 (explaining that *Amchem* requires "a class divided between holders of present and future claims" to be "divi[ded] into homogeneous subclasses . . . with separate representation to eliminate conflicting interests of counsel"). Objector Quinn, in her answer to the petition for rehearing, states that subclasses would adequately address the *Illinois Brick*-based disparities in this case; she does not argue that it would be categorically improper to afford class treatment to indirect purchasers governed by *Illinois Brick*. *See Quinn Answer* at 11. The District Court here examined whether indirect purchasers'

specific nature of these judgments, district courts should be afforded a broad ambit of discretion.

For viable settlement classes, *Amchem* and *Ortiz* made clear that expediency could not negate the requirements of Rule 23, which serve to protect absent class members. *See Amchem*, 521 U.S. at 621 (“Subdivisions (a) and (b) [of Rule 23] focus court attention on whether a proposed class has sufficient unity so that absent members can be fairly bound by decisions of class representatives. That dominant concern persists when settlement, rather than trial, is proposed.”). The principal danger of collusion lies in the prospect that class counsel, induced by defendants’ offer of attorneys’ fees, will “trade away” the claims of some or all class members for inadequate compensation. There is also the possibility that a settlement will not serve the interests of all of the class members, which may be in tension. In *Amchem*, for instance, the Court concluded the settlement was not demonstrably fair—there was insufficient allocation to asbestos claimants who were seriously injured (e.g. mesothelioma) and insufficient protection of non-impaired plaintiffs. 521 U.S. at 625-28. The Court worried that the claims of the exposure-only class members were being released without adequate protection. *Id.*; *see also In re Prudential Ins. Co. of Am. Sales Practice Litig.*, 148 F.3d 283, 315 (3d Cir. 1998) (“*Prudential*”) (identifying and distinguishing *Amchem*’s

interests diverged depending on the law applied to their claims, and found such differences to be irrelevant in the context of this settlement. I find no abuse of discretion in such a conclusion.

concerns); *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liability Litig.*, 55 F.3d 768, 784-86 (3d Cir. 1995) (providing summary of the debate regarding propriety of mass tort settlements prior to *Amchem*).

These observations elucidate the issues of predominance and fairness present in this case. Here, the objectors contend certain claims (claims under state-law following *Illinois Brick*) are not viable--that is, they fail to state a cause of action.⁶ For this reason, objectors believe that defendants are barred from settling these claims in a settlement class action because of the predominance requirement. Under objectors' view of Rule 23, trial courts would be obligated at the settlement class certification stage to decide which state's law would govern for that particular plaintiff, and whether a plaintiff has stated a valid cause of action, even if no defendant has raised a Rule 12(b)(6) objection—the usual way to contest the validity of a claim. Objectors contend they seek to protect absent class members, but fail to explain how absent class members—all of whom claim injury—are harmed by the defendants' willingness to settle all potential claims.

This interpretation also presents significant administrative problems. Objectors view the indirect purchaser class as composed of members who either have valid claims under the laws of states with *Illinois Brick*

⁶ Objectors also claim that variance on state claims (based on consumer protection and unjust enrichment laws) defeats predominance as well.

repealers or members who have invalid claims under the laws of non-repealer states. But a claim cannot be declared invalid without proper analysis, which would require a choice-of-law examination for each class member's claim. Such analyses may pose difficulties in cases where the residence of the class member is not the sole consideration; modern choice-of-law standards often consider an array of factors particular to individual plaintiffs. Consequently, individual 12(b)(6) inquiries for settlement class certification could present serious difficulties in administration and greatly increase costs and fees, and may deplete rather than increase the recovery of even successful plaintiffs.⁷

⁷ The purported "overbreadth" of the putative class at issue here is qualitatively different from the Supreme Court's concerns in *Amchem*. Under *Amchem* the significance of variations in state laws is properly assessed in terms of the interests of absent class members. The proposed *Amchem* settlement, extinguishing claims for different injuries with different onsets incurred at different times due to conduct of different defendants, undercompensated exposure-only claims and those with mesothelioma. Here, objectors contend some class members do not have a valid cause of action, but these class members with non-repealer state law claims have lost nothing through inclusion in the class. Objectors speculate inclusion of non-repealer state law claims necessarily diminishes the settlement accrued to class members whom they contend have undisputedly valid claims. But they provided no support for their assertion. In *Amchem* the objectors provided evidence of intraclass conflicts detrimental

Issues of predominance and fairness do not undermine this settlement. All plaintiffs here claim injury that by reason of defendants' conduct—market manipulation and fraud—has caused a common and measurable form of economic damage. They seek redress under federal antitrust laws and state antitrust, consumer protection, and unjust enrichment laws. All claims arise out of the same course of defendants' conduct; all share a common nucleus of operative fact, supplying the necessary cohesion. Class members' interests

to class members. For example, 15% of the proposed *Amchem* settlement's mesothelioma claims arose in California, where the average recovery for a mesothelioma claim was more than double their maximum recovery in the settlement. *Amchem*, 521 U.S. at 610 n.14.

The objectors have not shown that plaintiffs suffering identical economic injuries due to a single course of conduct on the part of the defendant have conflicting interests solely because some class members may have stronger claims depending upon variation in state law. Objectors assume that the non-repealer state claims have zero settlement value and that defendants would contribute the same amount to the common settlement fund regardless of how many claims the settlement may extinguish. But the settlement of the considerable bulk of claims against the defendants for a prior course of conduct may be of substantially greater value to defendants than a settlement of only the strongest claims against them. And, unlike in *Amchem*, objectors have not shown the inclusion of more claims was achieved by grossly underpaying some class members.

are aligned. The entire DeBeers settlement class consists of members with some pleaded claim (but not necessarily the exact same one) arising out of the same course of allegedly wrongful conduct such that shared issues of fact or law outweigh issues not common to the class and individual issues do not predominate. As the class structure and settlement assure fairness to all class members, there appears to be nothing in Rule 23 that would prohibit certification and settlement approval.

Moreover, the focus on the alleged insufficiency of some members' claims is misplaced. Settlement of a class action is not an adjudication of the merits of the members' claims. It is a contract between the parties governed by the requirements of Rule 23(a), (b), and particularly (e),⁸ and

⁸ Rule 23(e) is especially relevant in this context because it governs the settlement, dismissal, or compromise of a class action. It requires court approval of any agreement, and establishes five procedural requirements that must be satisfied:

- (1) The court must direct notice in a reasonable manner to all class members who would be bound by the proposal.
- (2) If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.
- (3) The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.

establishes a contractual obligation as well as a contractual defense against future claims. Here, class members and DeBeers want to settle all state and federal claims arising out of defendant's alleged misconduct. *Amchem* recognized the legitimacy of such a settlement under Rule 23, setting forth applicable parameters. The court's responsibility is to supervise and assume control over a responsible and fair settlement. Those requirements have been met here.

A responsible and fair settlement serves the interests of both plaintiffs and defendants and furthers the aims of the class action device. Plaintiffs receive redress of their claimed injuries without the burden of litigating individually. Defendants receive finality. Having released their claims for consideration, class members are precluded from continuing to press their claims. Collateral attack of settlements and parallel proceedings in multiple fora are common realities in modern class actions—features that can imperil the feasibility of settlements if defendants lack an effective way to protect

(4) If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(5) Any class member may object to the proposal if it requires court approval under this subdivision (e); the objection may be withdrawn only with the court's approval.

Fed. R. Civ. P. 23(e).

bargained-for rights. *See Prudential*, 314 F.3d at 104-05. If the indirect-purchaser claims at issue here were excluded, nothing would bar the plaintiffs from bringing them as separate class actions or as aggregate individual actions, leaving defendants “exposed to countless suits in state court” despite the settlement. *In re Prudential Ins. Co. of Am. Sales Practice Litig.*, 261 F.3d 355, 367 (3d Cir. 2001) (“*Prudential II*”). (Here, prior to removal and MDL consolidation, it appears an Illinois state court certified a nationwide litigation class asserting indirect-purchaser claims under the laws of all 50 states.) Perhaps a defendant will be willing and able to defend or settle all of these actions separately, or perhaps it won’t. Either way, the costs (direct and indirect) and risks of continuing litigation will be greater. A defendant, therefore, may be motivated to pay class members a premium and achieve a global settlement in order to avoid additional lawsuits, even ones where it might be able to file a straightforward motion to dismiss for failure to state a claim.⁹

Finally, new limitations such as those proposed by objectors would, I believe, undercut the policy goals of the

⁹ Facing liability for alleged misconduct, a defendant may desire global settlement for several possible reasons: (1) redressing plaintiffs’ injuries; (2) the possibility of liability; (3) the direct costs of defending suits, often in multiple fora; (4) the risk of financially unmanageable jury verdicts which may threaten bankruptcy; (5) the effects of pending or impending mass litigation on its stock price or access to capital markets; (6) the stigma of brand-damaging litigation; and (7) maintaining financial stability.

Class Action Fairness Act of 2005 (“CAFA”), Pub. L. No. 109-2, 119 Stat. 4, and the Multidistrict Litigation Statute, 28 U.S.C. § 1407, both of which are designed to encourage the consolidation of mass claims national in scope—and in the case of CAFA, with particular reference to class actions based on state law claims. Of course, district courts must fully enforce the requirements of Rule 23. But the limitations objectors propose here “would seriously undermine the possibility for settling any large, multi district class action.” *Prudential II*, 261 F.3d at 367.¹⁰

¹⁰ In *Prudential II*, we affirmed the grant of an injunction enjoining a state-court action brought by policyholders who were members of the *Prudential* class to the extent the state-law claims were based on or related to claims released in the class action. We agreed with the district court that allowing the policyholders to prosecute their civil actions in state court “would allow an end run around the Class settlement by affording them (and other class members who might later attempt the same strategy) an opportunity for relitigation of the released claims.” 261 F.3d at 367 (internal quotation marks omitted). We noted that the position urged by the policyholders “would seriously undermine the possibility for settling any large, multi district class action. Defendants in such suits would always be concerned that a settlement of the federal class action would leave them exposed to countless suits in state court despite settlement of the federal claims. . . . [S]uch state suits could number in the millions.” *Id.* It is for this reason that releases of all claims—whether state or federal—have been held valid, “provided they are based on

The class action device and the concept of the private attorney general are powerful instruments of social and economic policy. Despite inherent tensions, they have proven efficacious in resolving mass claims when courts have insisted on structural, procedural, and substantive fairness. Among the goals are redress of injuries, procedural due process, efficiency, horizontal equity among injured claimants, and finality. Arguably a legal system that permits robust litigation of mass claims should also provide ways to fairly and effectively resolve those claims. Otherwise, mass claims will likely be resolved without independent review and court supervision.¹¹

the same factual predicate.” *Prudential*, 148 F.3d at 326 n.82. So long as a sufficient factual predicate exists, a release can even bar later claims which could not have been brought in the court rendering the settlement judgment. *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 377 (1996).

¹¹ The final draft of the American Law Institute’s *Principles of the Law of Aggregate Litigation* points out the current lack of judicial oversight over non-class aggregate settlement. § 3.15 cmt. a (2010). It notes that, unlike class settlements, “[n]on-class aggregate settlements are governed primarily by ethical rules and are rarely subject to court review or approval for fairness” and so advocates “a fresh look . . . at how non-class aggregate settlements should be regulated.” *Id.* In particular, it proposes a rule to provide each plaintiff a nonwaivable right to challenge in court a settlement that is allegedly “not procedurally and substantively fair and reasonable.” § 3.18(a). The ALI *Principles* analogizes these

proposed requirements to those applied to class settlements.
§ 3.17 cmt. e.

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TAB 12A

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Rule 55(c): Style Clarification

The interplay of Rule 55(c) with Rule 54(b) and Rule 60(b) was discussed at the November, 2011 meeting. The discussion revealed a latent ambiguity in Rule 55(c) that is detailed in the attached memorandum from Judge Harris. The question arises when a default judgment does not dispose of all claims among all parties to an action. Rule 54(b) directs that the judgment is not final unless the court directs entry of final judgment. Rule 54(b) also directs that the "judgment" "may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities." Rule 55(c) provides simply that the court "may set aside a default judgment under Rule 60(b)." Rule 60(b), in turn provides a list of reasons to "relieve a party * * * from a final judgment, order, or proceeding * * *."

Close reading of the three rules together establishes that relief from a default judgment is limited by the demanding standards of Rule 60(b) only if the default judgment is made final under Rule 54(b) or when there is a final judgment adjudicating all claims among all parties. The cases described by Judge Harris, however, show that several courts have recognized the risk that unreflected reading of Rule 55(c) may lead a court astray.

Rule 55(c) is easily clarified by adding a single word. If the question had been recognized at the time, the change would have been suitable for the Style Project. The change can be recommended now, although it may be better to schedule publication for comment with a suitable package of proposals. Remembering the distinction between a default and a default judgment, Rule 55(c) would be revised:

- (c) **SETTING ASIDE A DEFAULT OR A DEFAULT JUDGMENT.** The court may set aside an entry of default for good cause, and it may set aside a final default judgment under Rule 60(b).

COMMITTEE NOTE

Rule 55(c) is amended to make plain the interplay between Rules 54(b), 55(c), and 60(b). A default judgment that does not dispose of all of the claims among all parties is not a final judgment unless the court directs entry of final judgment under Rule 54(b). Until final judgment is entered, Rule 54(b) allows revision of the default judgment at any time. The demanding standards set by Rule 60(b) apply only in seeking relief from a final judgment.

[This amendment is a matter of style only. It responds to observations by some courts recognizing

that the interplay of the rules is not apparent at first blush.]

[This amendment does not address the question whether it is suitable to direct entry of a final default judgment against a single defendant or other party opposing a claim. In many circumstances it is inappropriate to enter final judgment because proceedings that remain among other parties may show that there is no claim against the party subjected to the default judgment. See *Frow v. De La Vega*, 15 Wall. (82 U.S.) 552 (1872).]

TAB 12B

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MEMORANDUM

To: Professor Edward H. Cooper, Reporter
Advisory Committee on Civil Rules

cc: Honorable David G. Campbell, Chair
Advisory Committee on Civil Rules

Professor Richard Marcus, Reporter
Advisory Committee on Civil Rules

From: Arthur I. Harris, U.S. Bankruptcy Judge and Liaison from Bankruptcy
Rules Advisory Committee to Civil Rules Advisory Committee

Date: December 14, 2011

Re: Motions to set aside nonfinal default judgments under Fed. R. Civ. P.
55(c), 54(b), and 60(b)

This memorandum follows up on an issue I raised during the “mailbox” portion of the meeting of the Advisory Committee on Civil Rules on Nov. 8, 2011. At the meeting, I flagged a potential conflict in the way the Federal Rules of Civil Procedure address motions to set aside nonfinal default judgments. Under Rule 55(c) a court “may set aside a default judgment under Rule 60(b),” however, a nonfinal default judgment (where claims remain pending against one or more parties) is an interlocutory order that is arguably governed by Rule 54(b), which does not carry the same restrictions as Rule 60(b).

As I explain in more detail below, Sixth Circuit precedent permits me to use the more lenient standard in Rule 54(b) for setting aside nonfinal default judgments. On the other hand, it may be worth considering an amendment to Rule 55(c) to clarify to judges and attorneys that motions to set aside nonfinal default judgments, like all other interlocutory judgments, are not governed by Rule 60(b). In any event, the exercise of writing this memo has helped me better understand these issues and, I hope, is worthy of sharing with my former teacher and longtime rules committee reporter.

In re Brown

Confusion as to whether Rule 60(b) governs relief from nonfinal default judgments is illustrated in an adversary proceeding and two appeals that arose from a bankruptcy case called *In re Brown*. In this case, everyone involved – including the party seeking Rule 60(b) relief, the bankruptcy court, the Bankruptcy Appellate Panel (BAP), and the Sixth Circuit – apparently assumed that the motion to set aside the nonfinal default judgment was governed by Rule 60(b).¹ Had the courts applied the more lenient standard for reconsidering interlocutory orders under the last sentence of Rule 54(b), the outcome in all likelihood would have been different.

In *Brown*, the bankruptcy trustee filed an adversary complaint seeking to avoid a mortgage and obtain other relief under the Bankruptcy Code because of an alleged defect in the acknowledgement of the debtor’s mortgage. The alleged defect was that the notary who notarized the mortgage was not authorized to be a notary because the notary’s application was incomplete, even though the State of Kentucky had approved the notary’s application. The trustee obtained a default judgment against defendant Countrywide, but claims remained pending in the same adversary proceeding against another defendant, First Liberty.

Ten weeks after entry of a default judgment against Countrywide, Countrywide moved to set aside the default judgment under Rule 60(b)(1), (b)(4), and (b)(6). At the time, cross motions for summary judgment remained pending as to the trustee’s claims against defendant First Liberty. Countrywide argued that

¹ Although this matter arose in the context of an adversary proceeding – essentially a civil action within a bankruptcy case – the situation is essentially the same as one arising in a civil case in district court. Rule 7055 of the Federal Rules of Bankruptcy Procedure incorporates Fed. R. Civ. P. 55; Rule 7054 of the Federal Rules of Bankruptcy Procedure incorporates Fed. R. Civ. P. 54(a)-(c); and Rule 9024 of the Federal Rules of Bankruptcy Procedure generally incorporates Fed. R. Civ. P. 60. In addition, the more pragmatic concept of finality in bankruptcy cases generally does not apply to appeals from adversary proceedings. *See, e.g., Millers Cove Energy Co. v. Moore (In re Millers Cove Energy Co.)*, 128 F.3d 449, 451-52 (6th Cir. 1997) (noting that adversary proceedings can be viewed as “stand-alone lawsuits”).

under a Kentucky statute, a trustee cannot collaterally attack a notarized document simply because the notary's application to be a notary should not have been approved.

The bankruptcy court held a hearing on Countrywide's Rule 60(b) motion. At the hearing, Countrywide abandoned its Rule 60(b)(1) argument and specifically stated that it was focusing its request for relief under Rule 60(b)(4) and (b)(6). At the hearing, the bankruptcy court stated:

The Court will grant the motion to vacate the order under Rule 60(b)(6). I don't think 60(b)(4) applies. . . . Countrywide has not offered any particular reason why they can't seem to get their act together, didn't get their act together in this case. But, it does appear that there is a meritorious defense and maybe a winning defense. And there will not be prejudice to the plaintiff in this case because the case is ongoing. And with respect to culpable conduct and whether or not that's applicable here, we just don't know. The switch of service of process agents may have, in fact, contributed to the problem that's before the Court today. But, I think it's a matter of, in this case, because the really driving concern is the question of the likelihood of a meritorious defense in this case.

Bankr. Ct. Tr. at 14-15. The bankruptcy court later entered summary judgment in Countrywide's favor, upholding the validity and enforceability of the mortgage, and dismissed the Trustee's claims against all remaining defendants. The Trustee appealed the order granting summary judgment and the order vacating the default judgment to the BAP.

The BAP reversed the decision of the bankruptcy court after concluding that the bankruptcy court abused its discretion in setting aside the default judgment. *See Rogan v. Countrywide Home Loans, Inc. (In re Brown)*, 413 B.R. 700 (B.A.P. 6th Cir. 2009). The BAP noted that Countrywide had abandoned its arguments under Rule 60(b)(1) and (b)(4) and held that Countrywide had not met its burden of showing "extraordinary circumstances" for relief under Rule 60(b)(6). 413 B.R. at 705 (citing *Pioneer Inv. Serv. Co. v. Brunswick Assocs. Ltd. P'ship.*, 507 U.S. 380, 393 (1993)). Countrywide appealed the decision to the Sixth Circuit.

In an unpublished decision, the Sixth Circuit affirmed the decision of the BAP. *Countrywide Home Loan, Inc. v. Rogan (In re Brown)*, No. 09-6198, Document: 006110766206 (6th Cir. Oct. 21, 2010)(unpublished Order). The Sixth Circuit held:

In the absence of evidence demonstrating “exceptional and extraordinary circumstances,” the bankruptcy court abused its discretion in vacating the default judgment. Contrary to Countrywide’s argument on appeal, the existence of a meritorious defense and the avoidance of its mortgage does not satisfy the “exceptional and extraordinary circumstances” requirement of Rule 60(b)(6).

Id. at 4 (citation omitted).²

In none of these decisions, did any of the courts consider the possibility that a standard other than Rule 60(b) should apply to a motion to set aside a nonfinal default judgment.³

Discussion

The decisions by the bankruptcy court, the BAP, and the Sixth Circuit in the *Brown* case illustrate the possible confusion created by the language in Rule 55(c) that a court “may set aside a default judgment under Rule 60(b).” It is true that Rule 60(b) indicates in several places that it addresses *final* judgments:

- the adding of the word “final” to the heading of Rule 60(b) in the 2007 restyling;
- the adding of the word “final” before “judgment” in the 1948 amendment;
- the language in the 1946 committee note explaining that Rule 60(b) affords relief from *final* judgments; “and hence interlocutory judgments are not brought within the restrictions of the rule, but rather they are left subject to

² A copy of the Sixth Circuit’s unpublished Order in *Brown* is attached.

³ Although I was initially assigned to the panel hearing the appeal to the BAP, that appeal was later reassigned to a randomly drawn reconstituted panel that did not include me.

the complete power of the court rendering them to afford such relief from them as justice requires.”

And it is true that the last sentence of Rule 54(b) provides that nonfinal orders may be revised at any time before entry of final judgment. Nevertheless, there appear to be many judges and attorneys who read the literal language of Rule 55(c) as directing them to consider or draft motions to set aside all default judgments, even nonfinal ones, within the restrictions of Rule 60(b).

Proposed Amendment to Fed. R. Civ. P. 55(c)

I have included a proposed amendment to Rule 55(c) to clarify that Rule 60(b) affords relief from *final* judgments. The added word is *italicized*.

Rule 55

1. (c) **Setting Aside a Default or a Default Judgment.**
2. The court may set aside an entry of default for good cause, and it
3. may set aside a *final* default judgment under Rule 60(b).

Possible Committee Note

The qualifying word “final” is added to clarify that Rule 60(b) affords relief from *final* judgments. Consistent with the last sentence of Rule 54(b) and the 1946 Advisory Committee Note to Rule 60(b), interlocutory judgments, including nonfinal default judgments, are not subject to the restrictions of Rule 60(b), “but rather they are left subject to the complete power of the court rendering them to afford such relief from them as justice requires.”

Other Case Law

Serendipitously, on December 13, 2011, the Sixth Circuit issued a new opinion that addressed almost exactly the same issue. *See Dassault Systemes, SA v. Childress*, ___ F.3d ___, 2011 WL 6157308 (6th Cir. Dec. 13, 2011).⁴ The only difference was that in the *Dassault* case the default judgment was not final because the amount of damages had yet to be determined when the motion to set aside the default judgment was filed. Judge Karen Nelson Moore, writing for the Sixth Circuit, explained:

Because of the initial grant of default judgment and the timing of Childress's motion to set aside entry of default judgment, it is not immediately clear which rule should have been applied. At first blush, the district court's grant of Dassault's motion for default judgment suggests that Rule 60(b) should apply. But, because final judgment was not entered until after Childress filed his motion to set aside entry of default judgment, applying the Rule 60(b) standard to a motion challenging a not-yet-final default judgment seems premature.

....

An order granting default judgment without any judgment entry on the issue of damages is no more than an interlocutory order to which Rule 60(b) does not yet apply. . . . Thus, absent entry of a final default judgment, the more lenient Rule 55(c) standard governs a motion to set aside a default or default judgment.

Id. at *6-8 (citations omitted).

My nonexhaustive review of relevant case law indicates several other circuit courts hold, or at least suggest, that Rule 60(b) does not apply to motions to set aside nonfinal default judgments. *See Swarna v. Al Awadi*, 622 F.3d 123, 140 (2d Cir. 2010) (default judgment that left open the issue of damages was a nonfinal order for purposes of appeal); *FDIC v. Francisco Inv. Corp.*, 873 F.2d 474, 478 (1st Cir. 1989); *Jackson v. Beech*, 636 F.2d 831, 835-36 & n.7

⁴ A copy of the Sixth Circuit's slip opinion in *Dassault* is attached.

(D.C. Cir. 1980); *see also*; *O'Brien v. R.J. O'Brien & Assoc., Inc.*, 998 F.2d 1394, 1401 (7th Cir. 1993) (declining to state whether Rule 60(b) standard or less restrictive standard applied to motion to set aside a default judgment that had not become final and appealable).

Among these additional cases, the First Circuit's *FDIC v. Francisco* decision provides perhaps the most definitive analysis:

A cursory reading of [Rule 55(c)] seems to mandate the application of the stricter standards of Rule 60(b) to all requests to set aside default judgments. However, the Rule 60(b) standards were tailored for setting aside *final* judgments. In the case at bar, when the court denied defendants' motion to set aside default judgment, it had not become final. Fed.R.Civ.P. 54(b).

Thus, the more liberal "good cause" standard should be applied. . . . Generally, non-final judgments can be set aside or otherwise changed by the district court at any time before they become final. Fed.R.Civ.P. 54(b). If we were to apply the 60(b) standard to non-final default judgments we would have the anomaly of using the strict standard envisioned for final judgments to non-final default judgments and the more liberal standard of Rule 54(b) to other non-final judgments. This result would be inconsistent with the purposes underlying the Federal Rules of Civil Procedure, especially considering that when deciding whether to set aside entries of default and default judgments courts favor allowing trial on the merits.

873 F.2d at 478 (citations omitted) (emphasis in original).

Whether this is a problem that warrants discussion as a possible amendment to the Civil Rules is for you and the civil rules committee to decide. Certainly there is case law to support the proposition that Rule 60(b) does not apply to motions to set aside nonfinal default judgments, even absent any amendment to the Civil Rules. On the other hand, the fact that attorneys and lower courts continue to apply the more restrictive Rule 60(b) standard to nonfinal default judgments suggests that an amendment to clarify Rule 55(c) may be in order.

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NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 09-6198

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In re: DAVID D. BROWN; JACQUELINE M.)
 BROWN,)
)
 Debtors,)
 _____)
)
 COUNTRYWIDE HOME LOAN,)
 INCORPORATED,)
)
 Appellant,)
)
 v.)
)
 J. JAMES ROGAN,)
)
)
 Appellee.)
)

FILED
Oct 21, 2010
 LEONARD GREEN, Clerk

ON APPEAL FROM THE
 BANKRUPTCY APPELLATE
 PANEL OF THE UNITED STATES
 COURT OF APPEALS FOR THE
 SIXTH CIRCUIT

ORDER

Before: BOGGS, DAUGHTREY, and WHITE, Circuit Judges.

Countrywide Home Loan, Inc. (Countrywide) appeals from the Bankruptcy Appellate Panel’s (“BAP”) decision reversing the bankruptcy court’s order that granted Countrywide’s motion for relief from the default judgment entered against Countrywide in an adversary proceeding in which the United States Trustee alleged that the debtors’ mortgage was avoidable under 11 U.S.C. § 544(a). The parties have waived oral argument, and this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

In March 2007, debtors David and Jacqueline Brown executed a promissory note and granted a mortgage to First Liberty Financial Group, LLC (“First Liberty”). First Liberty assigned the note and mortgage to Countrywide. The mortgage was filed in the Fayette County Clerk’s Office on March 29, 2007.

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In July 2007, the Debtors filed a petition for relief under chapter 7 of the Bankruptcy Code. In June 2008, the chapter 7 Trustee filed an adversary complaint against Countrywide, alleging that the mortgage was avoidable under 11 U.S.C. § 544(a). Summons was issued to Countrywide and the bankruptcy court ordered Countrywide to respond to the complaint within 30 days of the issuance of the summons, or by August 8, 2008. Countrywide was served with the complaint and summons by certified mail on July 18, 2008. Countrywide did not respond to the complaint by the deadline set by the bankruptcy court. The Trustee filed a motion for default judgment on August 11, 2008. The bankruptcy court entered a default judgment against Countrywide on August 12, 2008.

On October 6, 2008, Countrywide entered an appearance in the adversary proceeding. On October 21, 2008, Countrywide filed a motion to vacate the default judgment pursuant to Federal Rule of Civil Procedure 60(b)(1), (4) and (6). In support of its motion, Countrywide argued that the default judgment was prematurely entered, that the Trustee would not be prejudiced if the default judgment were vacated, that it had a meritorious defense, and that no culpable conduct of Countrywide led to the default. Countrywide asserted that its change of statutory agent “around the time” the complaint was served, “may have resulted in some delay in getting the Complaint properly routed in order to retain counsel. . . .” No evidence was offered in support of the Rule 60(b) motion.

The bankruptcy court held a hearing on Countrywide’s Rule 60(b) motion. At the hearing, Countrywide abandoned its Rule 60(b)(1) argument and specifically stated that it was focusing its request for relief under subsections (4) and (6). After the hearing, the bankruptcy court dismissed Countrywide’s argument under subsection (4), and granted the relief requested under Rule 60(b)(6). The bankruptcy court then entered summary judgment in Countrywide’s favor, upholding the validity and enforceability of its mortgage, and dismissed the Trustee’s claims against all remaining defendants. The Trustee appealed the order granting summary judgment and the order vacating the default judgment to the BAP. The BAP reversed the decision of the bankruptcy court after concluding that the bankruptcy court abused its discretion in setting aside the default judgment.

On appeal, Countrywide argues that the bankruptcy court did not abuse its discretion in setting aside the default judgment. Countrywide specifically argues that the existence of a

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meritorious defense and the avoidance of Countrywide's mortgage satisfied the "exceptional circumstances" required for Rule 60(b)(6) relief.

When an appeal of the bankruptcy court's decision comes to us by way of the BAP, we "independently review the decision of the bankruptcy court that has been appealed to the BAP." *B-Line, LLC v. Wingerter (In re Wingerter)*, 594 F.3d 931, 935 (6th Cir. 2010). "The bankruptcy court's findings of fact are reviewed under the clear-error standard, and its conclusions of law are reviewed de novo." *Id.* at 935-36. The bankruptcy court's decision to grant relief under Federal Rule of Civil Procedure 60(b)(6), however, is reviewed for an abuse of discretion. *See Pruzinsky v. Gianetti (In re Walter)*, 282 F.3d 434, 440 (6th Cir. 2002). "A clear example of an abuse of discretion exists where the trial court fails to consider the applicable legal standard or the facts upon which the exercise of its discretionary judgment is based." *Id.* (quoting *Ohlander v. Larson*, 114 F.3d 1531, 1537 (10th Cir. 1997)). "The question is not how the reviewing court would have ruled, but rather whether a reasonable person could agree with the bankruptcy court's decision; if reasonable persons could differ as to the issue, then there is no abuse of discretion." *Barlow v. M.J. Waterman & Assocs. (In re M.J. Waterman & Assocs.)*, 227 F.3d 604, 608 (6th Cir. 2000) (citations omitted).

Federal Rule of Civil Procedure 60(b)(6) is the catch-all provision allowing a court to set aside a judgment for any other reason that justifies relief. Fed. R. Civ. P. 60(b)(6). "[We have] stated that Rule 60(b)(6) provides relief 'only in exceptional and extraordinary circumstances,' which are defined as those 'unusual and extreme situations where principles of equity mandate relief.'" *Export-Import Bank of U.S. v. Advanced Polymer Scis., Inc.*, 604 F.3d 242, 247 (6th Cir. 2010) (quoting *Jinks v. AlliedSignal, Inc.*, 250 F.3d 381, 387 (6th Cir. 2001)). In addition to showing "exceptional and extraordinary circumstances," the movant must also demonstrate that the three equitable factors enumerated in *United Coin Meter Co. v. Seaboard Coastline R.R.*, 705 F.2d 839, 845 (6th Cir. 1983), weigh in favor of granting of such relief, those being: "(1) lack of prejudice; (2) a meritorious defense; and (3) whether the defendant's culpable conduct led to the [default] judgment." *Export-Import Bank of U.S.*, 604 F.3d at 247 (citing *Thompson v. Am. Home Assurance Co.*, 95 F.3d 429, 433 (6th Cir. 1996)).

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Countrywide's argument for Rule 60(b)(6) relief relies solely on the three *United Coin Meter* factors, and does not point to any "exceptional and extraordinary circumstances" that would warrant relief under Rule 60(b)(6). Indeed, the bankruptcy court concluded that Countrywide did not present "exceptional and extraordinary circumstances" but, nevertheless, granted the requested relief. In vacating the default judgment, the bankruptcy court stated:

The Court will grant the motion to vacate the order under Rule 60(b)(6). I don't think 60(b)(4) applies. . . . Countrywide has not offered any particular reason why they can't seem to get their act together, didn't get their act together in this case. But, it does appear that there is a meritorious defense and maybe a winning defense. And there will not be prejudice to the plaintiff in this case because the case is ongoing. And with respect to culpable conduct and whether or not that's applicable here, we just don't know. The switch of service of process agents may have, in fact, contributed to the problem that's before the Court today. But, I think it's a matter of, in this case, because the really driving concern is the question of the likelihood of a meritorious defense in this case.

Bankr. Ct. Tr. at 14-15. In the absence of evidence demonstrating "exceptional and extraordinary circumstances," the bankruptcy court abused its discretion in vacating the default judgment. Contrary to Countrywide's argument on appeal, the existence of a meritorious defense and the avoidance of its mortgage does not satisfy the "exceptional and extraordinary circumstances" requirement of Rule 60(b)(6). *See Export-Import Bank of U.S.*, 604 F.3d at 247; *Smith v. Bounds*, 813 F.2d 1299, 1303-05 (4th Cir. 1987).

Accordingly, the BAP's decision reversing the bankruptcy court's order that granted Countrywide's motion for relief from the default judgment entered against Countrywide is affirmed.

ENTERED BY ORDER OF THE COURT



Clerk

File Name: 11a0309p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DASSAULT SYSTEMES, SA,

Plaintiff-Appellee,

v.

KEITH CHILDRESS, dba Practical Catia
Training,

Defendant-Appellant.

No. 10-1987

Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.
No. 09-10534—Lawrence P. Zatkoff, District Judge.

Decided and Filed: December 13, 2011

Before: MARTIN, MOORE, and COOK, Circuit Judges.

COUNSEL

ON BRIEF: Douglas P. LaLone, RADER, FISHMAN & GRAUER PLLC, Bloomfield Hills, Michigan, for Appellee. Keith Childress, Algonac, Michigan, pro se.

OPINION

KAREN NELSON MOORE, Circuit Judge. Plaintiff-Appellee Dassault Systemes, SA (“Dassault”) filed suit against Defendant-Appellant Keith Childress, d.b.a. Practical Catia Training (“Childress”), seeking damages for copyright and trademark infringement, unfair competition, and Michigan Consumer Protection Act violations arising from Childress’s allegedly unauthorized use of Dassault’s name and software licenses to operate a for-profit training course. Upon final judgment for Dassault, Childress filed a notice of appeal challenging a number of the district court orders,

including the denial of Childress's motion to set aside entry of default judgment, the grant of Dassault's motion for leave to subpoena the FBI, the denial of Childress's motion to strike certain paragraphs from Dassault's complaint, and the judgment entry and order for a permanent injunction. For the reasons set out below, we **REVERSE** the district court's order denying Childress's motion to set aside entry of default judgment, **VACATE** the award of damages in Dassault's favor and the order for a permanent injunction, and **REMAND** for further proceedings. Because we generally agree with the district court's assessment of both the Federal Rule of Criminal Procedure 6(e) nondisclosure requirements and Childress's motion to strike, we **AFFIRM** the district court's judgment on those issues.

I. BACKGROUND & PROCEDURE

A. Factual Background

For about fifteen years, Childress has owned and operated Practical CATIA, a small business that trained individuals to use the computer-aided design program CATIA, which was developed by the French company Dassault. Dassault owns the copyrights for its CATIA software products, including the CATIA V5 software at issue in this case. Dassault has also registered the CATIA trademark with the United States Patent and Trademark Office ("USPTO"). Citing the potential for confusion and the similarity of the marks and underlying services, the USPTO denied Childress's request for a trademark on the name "Practical Catia Training" in August 2003.

In 2001, Childress obtained the initial license for Dassault's CATIA V5 software through IBM, which was a business partner of Dassault and was involved in licensing CATIA software. The license was issued to the name "G. Bailey and Associates," which Childress asserts was the original name of his business and was located at Childress's address. The license agreement provided for one annual nodelock license that permits the CATIA software to be used on a single computer based on a unique Target ID. Childress paid the approximately \$2,380 yearly fee for that license from 2002 until 2010.

The parties do not dispute that Childress operated CATIA software on multiple computers during the course of his training classes. Childress claims that IBM and MSC, which is a business partner of IBM and an authorized CATIA reseller, began providing additional licenses in 2001 in exchange for Childress's willingness to provide sales leads and to place MSC advertising on his website. According to Childress, an agreement with MSC provided that IBM would supply Practical CATIA with fully functional licenses for use in the training courses, as well as temporary licenses for students' personal use. Although Childress admitted to copying his single nodelock license to multiple computers, Childress maintains that he was merely implementing a "workaround" provided by MSC that avoided certain problems with the license server used to access the software on the training computers. R. 55 (Childress Aff. ¶¶ 59–61).

Dassault counters that Childress had no such licenses, and that Childress instead conducted his training courses using bootlegged copies of the CATIA software created from his single legitimate license. Dassault maintains that Childress illegally cloned the Target IDs and software to permit him to upload the software onto multiple additional machines. According to Dassault, any software issues requiring a "workaround" were the result of Childress's attempts to operate unlicensed and illegitimate copies of the CATIA software. R. 54-3 (Clarkson Aff. ¶ 15).

B. Procedural History

On October 30, 2006, the FBI executed a search warrant for Practical CATIA's office and training site, during which time it confiscated twenty computers alleged to contain "bootlegged" copies of the CATIA software in violation of federal copyright law. R. 55 (Childress Aff. ¶ 74). The search warrant authorized the agents to seize records, documents, correspondence, and other materials pertaining to alleged violations U.S. copyright law. Grand jury subpoenas issued to Childress, G. Bailey and Associates, and Practical Catia on the same date broadly sought access to any records or materials associated with Childress's training business, and therefore encompassed the materials seized in the FBI raid. The FBI ultimately declined to prosecute the case.

Dassault filed its civil complaint on February 12, 2009. In his initial response to Dassault's complaint, Childress sought an extension, which the district court granted. The district court ordered Childress to file an answer by March 27, 2009. Childress proceeded to file a number of other motions that purported to respond to the complaint, but he never filed an answer. On April 1, 2009, for example, Childress filed a Federal Rule of Civil Procedure 12(e) motion for a more definite statement, which the district court denied; the district court then ordered Childress to file his answer within thirty days of the court's May 22 order. Childress's response to that order was a Rule 12(f) motion to strike information from the complaint, which he filed on June 25, 2009. Along with the motion to strike, Childress also filed a letter explaining why he filed the Rule 12(f) motion in lieu of the answer that the district court had demanded.

Because Childress had yet to file a responsive pleading, Dassault filed a motion for default judgment on July 6, 2009. On October 27, 2009, the district court entered an order directing Childress to show cause why default judgment should not be entered. Childress responded by explaining that he believed in good faith that his actions were permitted under the Federal Rules of Civil Procedure. Childress indicated that he had filed the initial motion for a more definite statement to avoid disclosing confidential information related to the grand jury investigation. After entering the grand jury subpoenas and search warrants into the record, Childress filed a motion to strike, instead of an answer, based on his belief that the filing was his only recourse to Dassault's inclusion of allegedly secret grand jury information in its complaint.

Childress subsequently filed a handful of additional motions, seeking, among other things, reconsideration of earlier court orders and a stay against the district court's order permitting Dassault to issue a subpoena to the FBI. Finally, on December 7, 2009, after determining Childress's show-cause response to be insufficient to justify his failure to file a responsive pleading, the district court granted Dassault's motion for default judgment. Childress then filed a motion on January 27, 2010, requesting that the district court set aside the entry of default judgment. On July 20, 2010, the district court denied Childress's motion and, after considering the parties' motions addressing the appropriate

measure of damages, entered both a permanent injunction against Childress's further use of the CATIA software and a judgment in Dassault's favor in the amount of \$964,465 plus attorney fees and costs. Childress filed this timely appeal.

II. ANALYSIS

A. The District Court's Entry of Default

Childress first contends that the district court abused its discretion by failing to set aside the entry of default after he demonstrated good cause in accordance with Rule 55(c) of the Federal Rules of Civil Procedure. To evaluate fully the merits of that argument, we must, as a preliminary matter, address an issue that appears to have created some inconsistencies within our precedents: the application of Rule 55(c), which permits a court to set aside a default or default judgment for good cause, versus the application of Rule 60(b), which grants relief from final judgments.

Under either rule, our review invokes the well-established factors set forth in *United Coin Meter Co. v. Seaboard Coastline Railroad*, which assess "whether (1) the default was willful, (2) a set-aside would prejudice plaintiff, and (3) the alleged defense was meritorious." 705 F.2d 839, 844 (6th Cir. 1983). Although the elements are the same, the standard for applying them to a motion to set aside a final default judgment under Rule 60(b) is more demanding than their application in the context of a motion to set aside an entry of default under Rule 55(c). *O.J. Distrib., Inc. v. Hornell Brewing Co.*, 340 F.3d 345, 352 (6th Cir. 2003).

The ambiguity in this case stems from the following course of events. Dassault framed its initial motion as a request for default judgment, and the district court granted the motion in those terms. The final entry of default judgment, however, did not occur until July 20, 2010, after the district court fully considered the damages question and determined the amount that Childress owed. Prior to the judgment entry, Childress filed a "motion to set aside order granting plaintiff's motion for entry of default judgment or to set aside entry of default judgment." R. 49. The district court denied Childress's "motion to set aside default" in a July 20, 2010 order. *Dassault Systemes, SA v.*

Childress, No. 09-10534, 2010 WL 2854339 (E.D. Mich. July 20, 2010). In doing so, the district court did not identify which standard applied, but “out of caution” analyzed Childress’s request to set aside the entry of default under the Rule 55(c) analysis. *Id.* at *4. The district court ultimately concluded that Childress could not meet the requirements to set aside default under either Rule 55(c) or Rule 60(b). *Id.* at *7.

Because of the initial grant of default judgment and the timing of Childress’s motion to set aside entry of default judgment, it is not immediately clear which rule should have been applied. At first blush, the district court’s grant of Dassault’s motion for *default judgment* suggests that Rule 60(b) should apply. But, because final judgment was not entered until after Childress filed his motion to set aside entry of default judgment, applying the Rule 60(b) standard to a motion challenging a not-yet-final default judgment seems premature.

We have previously differentiated between the Rule 55(c) “good cause” standard and the Rule 60(b) standard for setting aside a default judgment as follows:

Once a defendant fails to file a responsive answer, he is in *default*, and an entry of *default* may be made by either the clerk or the judge. A *default judgment* can be entered by the clerk only if a claim is liquidated or, if a claim is unliquidated, by the judge after a hearing on damages. A *default* can be set aside under rule 55(c) for “good cause shown,” but a default that has become final as a *judgment* can be set aside only under the stricter rule 60(b) standards for setting aside final, appealable orders.

Shepard Claims Serv., Inc. v. William Darrah & Assocs., 796 F.2d 190, 194 (6th Cir. 1986) (internal quotation marks omitted). Subsequent cases have clarified that the stricter Rule 60(b) standard for setting aside a default judgment applies “once [the default] has ripened into a judgment,” meaning “*once the court has determined damages and a judgment has been entered.*” *O.J. Distrib., Inc.*, 340 F.3d at 353 (emphasis added) (internal quotation marks omitted); *Waifersong, Ltd. v. Classic Music Vending*, 976 F.2d 290, 292 (6th Cir. 1992) (“[O]nce the court has determined damages and a judgment has

been entered, the district court's discretion to vacate the judgment is circumscribed by public policy favoring finality of judgments and termination of litigation.”¹

These rulings are also consistent with the well-established rule that Rule 60(b) applies only to final, appealable judgments. See 12 James Wm. Moore et al., *Moore's Federal Practice* §§ 60.22(3)(b), 60.23 (3d ed. 2000); cf. *Berthelsen v. Kane*, 907 F.2d 617, 620 (6th Cir. 1990) (noting that “a default judgment may be vacated only by satisfying the stricter standards applied to *final, appealable orders* under Fed. R. Civ. P. 60(b)”). An order granting default judgment without any judgment entry on the issue of damages is no more than an interlocutory order to which Rule 60(b) does not yet apply. See *Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1364 n.27 (11th Cir. 1997) (“When the amount of damages is in dispute . . . only the court may enter judgment, and then only after determining the amount of damages. There can be no ‘judgment’ without a determination of relief. Thus, the document entitled ‘default judgment’ in this case is more properly termed simply a ‘default.’” (citation omitted)); *Dow Chem. Pac. Ltd. v. Rascator Mar. S.A.*, 782 F.2d 329, 335–36 (2d Cir. 1986) (stating that absent a determination on damages, the court's entry of default judgment “was in fact no more than another interlocutory entry of default,” and determining that the defendant would have been entitled to move to set aside the default under Rule

¹We acknowledge that our prior precedent, *INVST Financial Group, Inc. v. Chem-Nuclear Systems, Inc.*, 815 F.2d 391 (6th Cir.), cert. denied, 484 U.S. 927 (1987), is somewhat inconsistent with these rulings. In fact, the procedural posture of that case was quite similar to the one at hand: the district court's grant of the plaintiff's motion for default judgment was followed by the defendant's motion opposing the entry of default judgment well before the district court conducted any hearing on damages. *Id.* at 396–97. *INVST Financial Group, Inc.*, however, was preceded by *Shepard Claims* and *United Coin Meter*, which both indicate that as a matter of procedure, a judge does not enter a default judgment until after the damages have been ascertained. *Shepard Claims*, 796 F.2d at 194 (stating that “a *default judgment* can be entered . . . by the judge *after a hearing on damages*” (second emphasis added)); *United Coin Meter*, 705 F.2d at 844 (discussing the procedural steps to default judgment and indicating that after entry of default, the defendant can seek to have the default set aside under Rule 55(c); if the defendant's “motion is not made or is unsuccessful, and if no hearing is needed to ascertain damages, judgment by default may be entered by the court” (emphasis added) (internal quotation marks omitted)).

Although it cited the correct standards, the *INVST* court assumed without analysis that the order granting default judgment actually qualified as “an order that has become final as a *judgment*” and that the Rule 60(b) standard therefore applied. *INVST Fin. Group*, 815 F.2d at 398. Had it properly applied *Shepard Claims* and *United Coin Meter*, however, the *INVST* court could not have concluded that an order granting a motion for default judgment issued prior to any hearing on the issue of damages qualified as a final judgment for purposes of applying the Rule 60(b) standard. Insofar as *INVST* conflicts with our earlier published decisions differentiating between the applicable standards for entry of default and default judgment, we are bound by those earlier decisions. *United States v. Caruthers*, 458 F.3d 459, 472 n.6 (6th Cir. 2006).

55(c)). Thus, absent entry of a final default judgment, the more lenient Rule 55(c) standard governs a motion to set aside a default or default judgment. *FDIC v. Francisco Inv. Corp.*, 873 F.2d 474, 478 (1st Cir. 1989).

In granting Dassault's motion for default judgment, the district court indicated that "[j]udgment [would] enter *after* the issue of damages is resolved." R. 40 (Dec. 7, 2009 Op. & Order at 6) (emphasis added). The final default-judgment entry on the docket was filed on July 20, 2010. Because Childress filed his motion to set aside entry of default judgment on January 27, 2010, well before the district court entered a final judgment, we conclude that the Rule 55(c) "good cause" standard should be applied.

We review for abuse of discretion the district court's denial of Childress's motion to set aside entry of default judgment under Federal Rule of Civil Procedure 55(c). *O.J. Distrib., Inc.*, 340 F.3d at 352. Because of our general preference for judgments on the merits, however, "a 'glaring abuse' of discretion is not required for reversal of a court's refusal to relieve a party of the harsh sanction of default." *United Coin Meter*, 705 F.2d at 846. Our review is therefore a "forgiving" one, *United States v. \$22,050.00 U.S. Currency*, 595 F.3d 318, 322 (6th Cir. 2010), and applies a "less deferential species of abuse of discretion rather than the normal abuse of discretion review," *id.* at 324. In conducting this review, we "construe[] all ambiguous or disputed facts in the light most favorable to the defendant[]," resolving any doubts in his favor. *INVST Fin. Group, Inc.*, 815 F.2d at 398 (alterations in original).

Childress's argument rests on the assertion that the district court's analysis of the three relevant factors presented an unfair evaluation of the facts. In particular, Childress argues that the district court (1) failed to take into account his "meritorious defenses"; (2) improperly determined that Dassault would be prejudiced; and (3) too hastily dismissed his "credible explanation" for failing to comply with the court order requiring him to file an answer to Dassault's complaint. *See* Appellant Br. at 25–30, 31–38, 38–45. We agree as explained below.

1. Childress's Culpability

The district court's decision to deny Childress's motion to set aside entry of default judgment was based in large part on its perception that Childress had engaged in deliberately dilatory motions practice—including ignoring two court orders that he file an answer—rather than answering Dassault's complaint. *Dassault*, 2010 WL 2854339, at *4–5. “To be treated as culpable, the conduct of a defendant must display either an intent to thwart judicial proceedings or a reckless disregard for the effect of its conduct on those proceedings.” *Shepard Claims Serv.*, 796 F.2d at 194.

Although we sympathize with the district court's exasperation at Childress's numerous lengthy filings, we do not agree that the facts support the conclusion that Childress was engaged in an egregious motions practice that embodied a “calculated strategy to delay these proceedings and avoid discovery.” Appellee Br. at 37. Concededly, it is possible that Childress was intentionally undermining Dassault's discovery efforts. More likely, however, is that Childress, as a pro se litigant, was merely attempting to navigate the none-too-intuitive labyrinth of procedural rules. Indeed, his show-cause response, the letter accompanying his Rule 12(f) motion, and a sworn affidavit of his cousin, Lisa Oliver, a legal secretary, which documents his confusion and his attempts to reach out to her for assistance in interpreting the Federal Rules of Civil Procedure, all support this view. Furthermore, Childress filed his motion to set aside entry of default judgment within a reasonable time after the district court entered the order. This also weighs against the district court's finding that Childress was intentionally disrespectful of the court proceedings. *Shepard Claims Serv.*, 796 F.2d at 194. Taking these facts in the light most favorable to Childress as our precedent requires, we do not believe that the culpability factor weighs as heavily in the equation as the district court concluded. *See Krowtoh II LLC v. Excelsius Int'l Ltd.*, 330 F. App'x 530, 537 (6th Cir. 2009) (assessing a foreign defendant's culpability for failing to respond to court orders and concluding that “[w]hile the facts suggest that [defendant] made a conscious—although misguided—decision to ignore the district court

proceedings, his explanation demonstrates that he did not intend to disrespect the court proceedings”).

2. Prejudice

Dassault maintains that it has experienced prejudice due to (1) Childress’s attempts to thwart discovery, which Dassault for the first time asserts could result in its inability to retrieve data from the computers because of the potential that the machines “freez[e] up due to inaction[,] which means the data on these [hard] drives may be spoiled,” Appellee Br. at 31; (2) Childress’s continued operation of his training facilities in violation of Dassault’s copyrights, causing avoidance of royalty payments, frustration of competition, and diminished copyright value; and (3) increased legal fees due to discovery issues and the need to defend against “baseless motion[s],” *id.* at 32.

“[D]elay alone is not a sufficient basis for establishing prejudice.” *INVST Fin. Group*, 815 F.2d at 398 (internal quotation marks omitted). Nor does increased litigation cost generally support entry of default. *\$22,050*, 595 F.3d at 325. Instead, “it must be shown that delay will result in the loss of evidence, create increased difficulties of discovery, or provide greater opportunity for fraud and collusion.” *INVST Fin. Group*, 815 F.2d at 398 (internal quotation marks omitted). Additionally, the relevant inquiry concerns the future prejudice that will result from reopening the judgment, not prejudice that has already resulted from the defendant’s conduct. *Berthelsen*, 907 F.2d at 620–21.

Taking each of Dassault’s arguments in turn, we conclude that the district court also gave undue weight to the prejudice element of the *United Coin Meter* analysis. Initially, we observe that Dassault’s newly presented assertion that the hard drives of the computers in the FBI’s possession could freeze up and destroy the evidence is completely unsupported, and appears to be a questionable attempt to reframe its argument into one that demonstrates a potential loss of evidence. Dassault’s concern about legal fees is similarly unpersuasive. It goes without saying that further proceedings would have such an impact. *See \$22,050*, 595 F.3d at 325 (“[I]t does not make intuitive sense that simply claiming an increase in litigation cost should be sufficient to establish prejudice. Setting aside default will *always* increase litigation cost

to the plaintiff because the plaintiff will actually have to litigate the case.”). *But see United States v. Goist*, 378 F. App’x 517, 519 (6th Cir. 2010) (concluding that the need to defend against “additional frivolous filings” can constitute prejudice under the *United Coin Meter* analysis). Thus, this argument also does not strongly militate in Dassault’s favor on the issue of prejudice. Finally, Dassault’s argument that it is prejudiced by its inability to enforce its intellectual property rights largely boils down to prejudice that resulted from past conduct, which is irrelevant to the question whether to set aside the entry of default. To the extent that Dassault’s argument could be construed as addressing prejudice that could result upon reopening the case, it amounts to little more than an assertion of prejudice by delay. Although a trial would likely prolong the time during which Dassault remains uncompensated for alleged violations of its intellectual-property rights, the ultimate purpose of that trial would be to determine whether Dassault is entitled to compensation. To that end, if Childress were found liable, the licensing fees and royalties owed would be assessed as damages and Dassault would presumably be made whole upon successfully demonstrating Childress’s alleged infringement. The prejudice element therefore is significantly less compelling than the district court concluded, and it does not weigh heavily in favor of denying Childress’s motion.

3. The Existence of a Meritorious Defense

Childress finally raises a number of defenses, which he claims have the potential to absolve him of liability for copyright and trademark infringement. These include express and implicit license, fair use, copyright and trademark estoppel, statute of limitations, and trademark laches. Because it determined the first two elements (culpability and prejudice) to weigh heavily against Childress, the district court erroneously skipped any analysis of Childress’s purported meritorious defenses. Despite the district court’s failure to consider them, we may nonetheless evaluate those defenses on appeal. *See Amernational Indus., Inc. v. Action–Tungfram, Inc.*, 925 F.2d 970, 977 (6th Cir.), *cert. denied*, 501 U.S. 1233 (1991).

A defense is “meritorious” if it is “good at law.” *\$22,050*, 595 F.3d at 326 (quoting *Williams v. Meyer*, 346 F.3d 607, 614 (6th Cir. 2003)). Attempting to

demonstrate that Childress does not meet this prerequisite, Dassault engages in a lengthy evaluation of the merits of each of Childress's defenses. But the test is not whether a defense is likely to succeed on the merits; rather, the criterion is merely whether "there is some possibility that the outcome of the suit after a full trial will be contrary to the result achieved by the default." *Id.* (quoting *Burrell v. Henderson*, 434 F.3d 826, 834 (6th Cir. 2006)). Thus, even conclusory assertions may be sufficient to establish the "hint of a suggestion" needed to present a meritorious defense. *Id.* (internal quotation marks omitted).

Childress correctly points out that he is not obligated at this stage to provide detailed factual allegations. *See id.* (noting the absence of any factual allegations and the conclusory nature of the defenses, but nonetheless concluding that the asserted defenses were meritorious as the term is defined in the context of setting aside default). Even so, Childress presented the district court with factual allegations and legal arguments to support each of his asserted defenses. Although he may not succeed on the merits of those defenses, that does not foreclose a determination that at least one of his asserted defenses may meet the relatively lenient "good at law" standard.

The statute-of-limitations defense satisfies the hint-of-a-suggestion requirement, particularly in light of Dassault's inconsistent statements concerning when the company actually learned of the alleged infringement. Indeed, although Dassault's later motions and its appellate brief adamantly maintain that it learned of the possible copyright infringement as a result of the FBI investigation, Dassault initially stated that it had informed the FBI of Childress's alleged infringement. *Compare* R. 53 (Pl.'s Br. in Opp. to Mot. to Set Aside Order at 17) ("The FBI conducted its raid in October of 2006, giving rise to Dassault's knowledge of the infringement and starting the clock for accrual of an infringement claim. Once Dassault learned that the FBI would take no action to protect its valid copyrights, Dassault filed suit in February of 2009; well within the three year period."), *with* R. 12 (Pl.'s Mot. for Entry of a Protective and Privacy Act Order at 1) ("Dassault informed the FBI about Childress' illegal activity. The FBI ultimately conducted a raid on Childress' business and seized his computers."). This discrepancy

raises the possibility that Dassault's infringement claims were barred by the statute of limitations. *See* 17 U.S.C. § 507(b) (prohibiting copyright-infringement claims that are filed more than three years after they accrued). Childress has thus raised at least one defense that presents "some possibility" of a different outcome. "All that matters is whether a well-stated defense, if sustained, would change the outcome." §22,050, 595 F.3d at 326. Childress meets this burden.

4. Rebalancing the *United Coin Meter* Factors

After reweighing the *United Coin Meter* factors based on the above analysis, we conclude that the balance does not tip in Dassault's favor. Childress has met his burden of demonstrating a possibly meritorious defense, and the prejudice element also does not tilt strongly toward Dassault. Furthermore, even if there were some culpability on Childress's part, there is not evidence to support an "intent to thwart judicial proceedings or a reckless disregard for the effect of its conduct on those proceedings," particularly given his status as a pro se defendant. *Shepard Claims Serv.*, 796 F.2d at 194. The balance of those factors is thus insufficient to support the district court's refusal to set aside the entry of default. *Cf. Waifersong, Ltd.*, 976 F.2d at 293 (stating that where "defendants came perilously close to articulating the existence of a meritorious defense . . . and demonstrating the absence of substantial prejudice to plaintiffs, . . . it would require particularly culpable conduct by the defendants to outweigh those two factors and tip the balance toward denial of relief"). Our conclusion is particularly appropriate in light of the precedential directive that "[a]ny doubt should be resolved in favor of the petition to set aside the judgment so that cases may be decided on their merits." *United Coin Meter*, 705 F.3d at 846 (internal quotation marks omitted). We therefore reverse the district court's order denying Childress's motion to set aside entry of default judgment, its order granting Dassault's motion for default judgment, and its July 20, 2010 default-judgment entry, and remand for proceedings consistent with this opinion.²

²We note also that given the above analysis on the three *United Coin Meter* elements, we would have reached the same result even under the stricter Rule 60(b) standard. Though perhaps misguided, Childress's responses did not demonstrate the level of culpability required to preclude a determination of excusable neglect under Federal Rule of Civil Procedure 60(b)(1). Coupled with a possibly meritorious defense and a lack of significant prejudice to Dassault, relief even from final default judgment would have

B. The FBI Subpoena

Childress next asserts that the district court erred when it granted Dassault's motion to subpoena the FBI for access to the documents and computers that were seized during the FBI's execution of the search warrant in 2006. According to Childress, access to that information would violate the presumption of nondisclosure afforded by Rule 6(e) of the Federal Rules of Criminal Procedure because the FBI seizures were made pursuant to a grand jury investigation.³

We review the district court's decision to permit disclosure of grand jury materials for abuse of discretion. *United States v. Alpha Med. Mgmt., Inc.*, No. 96-5825, 1997 WL 359065, at *5 (6th Cir. June 26, 1997) (unpublished opinion) (citing *Douglas Oil Co. v. Petrol Stops Nw.*, 441 U.S. 211, 223 (1979)). Federal Rule of Criminal Procedure 6(e) creates an obligation of secrecy that prevents certain persons from disclosing "a matter occurring before the grand jury." FED. R. CRIM. P. 6(e)(2)(B). "[C]onfidential documentary information not otherwise public obtained by the grand jury by coercive means is presumed to be 'matters occurring before the grand jury.'" *In re Grand Jury Proceedings*, 851 F.2d at 866. Thus, even documents that were originally prepared in the ordinary course of business are presumptively "matters occurring before the grand jury" when they have been requested pursuant to a grand jury investigation. *FDIC v. Ernst & Whinney*, 921 F.2d 83, 87 (6th Cir. 1990).

"Mere contact with a grand jury, however, does not change every document into a matter 'occurring before a grand jury' within the meaning of Rule 6." *United States v. Rutherford*, 509 F.3d 791, 795 (6th Cir. 2007). Rather, a party can rebut the

been warranted. See *Waifersong*, 976 F.2d at 292 (stating that when a defendant falls within one of the Rule 60(b)(1) categories, relief should be granted if he can also show a meritorious defense and an absence of substantial prejudice).

³ After the district court granted leave to do so, Dassault issued a subpoena to the FBI requesting "[a]ll computers, materials and documents that were seized at Keith Childress' business, Practical Catia, at the address of . . ." R. 38 (Emergency Mot. for Stay Ex. C). Because the subpoena did not contain a particularized description of the information sought and its relevance to Dassault's case, the FBI has not agreed to turn over the requested information. R. 17 (Ex. 6) (citing 28 C.F.R. §§ 16.21–16.29, which governs the disclosure of information pertaining to Department of Justice business by current or former Department of Justice employees, as justification for the FBI's refusal).

presumption that the sought-after materials should be so classified by demonstrating that “the information is ‘public or was not obtained through coercive means or that disclosure would be otherwise available by civil discovery and would not reveal the nature, scope, or direction of the grand jury inquiry.’” *Id.* (quoting *In re Grand Jury Proceedings*, 851 F.2d at 866–67).

Because the search warrants and grand jury subpoenas were issued on the same date and to the same FBI special agent, the district court correctly erred on the side of determining that the investigations were linked and that computers and records were obtained via the grand jury’s coercive process. As a result, the district court assumed that the presumption against nondisclosure applied.⁴ The question then becomes whether Dassault can overcome the presumption by demonstrating that the materials did not in fact constitute “matters occurring before the grand jury.” Childress does not dispute the district court’s determination that both the computers and the business records would be discoverable as relevant evidence. Thus, our analysis begins with the question whether those materials would “reveal the nature, scope, or direction of the grand jury inquiry.”

We evaluated a similar question in *United States v. Alpha Medical Management, Inc.*, No. 96-5825, 1997 WL 359065, at *5 (6th Cir. June 26, 1997). There, we determined that the business records at issue would not reveal information concerning the grand jury inquiry, stating:

⁴ It is an open question in this circuit whether materials sought pursuant to a search warrant issued at about the same time as a grand jury subpoena fall within the scope of “matters occurring before the grand jury.” The Fourth Circuit, in an opinion addressing a similar issue held that, as long as the search warrant is not a de facto grand jury process, the materials obtained pursuant to that warrant generally will not be subject to Rule 6(e) disclosure restrictions, even if a parallel grand jury investigation is occurring simultaneously. *See In re Grand Jury Subpoena*, 920 F.2d 235, 243 (4th Cir. 1990); *see also In re Grand Jury Matter*, 682 F.2d 61, 64 (3d Cir. 1982) (“The disclosure of information obtained from a source independent of the grand jury proceeding, such as a prior government investigation, does not violate Rule 6(e).” (internal quotation marks omitted)). The Fourth Circuit’s decision, however, was based on a close evaluation of the facts, which made clear that the “IRS investigation and the grand jury investigation were not indiscriminately merged [and] that the initial IRS investigation was conceived and initiated without any connection to a grand jury proceeding.” *In re Grand Jury Subpoena*, 920 F.2d at 243. In this case, the district court merely assumed that the investigations were related and, perhaps because the parties presented no facts addressing the relatedness of the FBI and grand jury investigations, did not conduct a specific factual inquiry. We need not resolve that issue on appeal.

Although the grand jury's subpoena of these records reveals that the investigation must in some way be correlated to the business affairs of Alpha, the fact that the grand jury subpoenaed *all* of Alpha's records for a certain time period makes any link between these records and the determination of the nature or direction of the investigation tenuous. Furthermore, because these records were prepared in the ordinary course of business, this information would not tend to reveal the substance of the grand jury inquiry, as might be the case with records prepared by prosecutors or transcripts of witness testimony.

Id. A similar line of reasoning can be applied in this case. Dassault asserts that "100% of the requested materials in [its] subpoena existed in the ordinary course of Childress' business," and that its subpoena deliberately "did not seek any of the substance of grand jury testimony, the identity of any grand jury witness(es), FBI investigative notes, or the like." Appellee Br. at 42–43 (emphasis omitted). Although the search warrants that defined the records to be seized by the FBI sought materials specifically related to violations of U.S. copyright law, the grand jury subpoenas sought a broad swath of materials, including records pertaining to Childress's software and hardware licenses and expenses, client lists, design work, student enrollment, income, as well as any other records related to Childress or his business. Given the scope of the grand jury's potential investigation, it is unlikely that Dassault's attempt to obtain only the computers and business records that the FBI seized will shed light on the scope or substance of the grand jury investigation. That the information Dassault seeks is limited to preexisting computers and business records makes it further unlikely that the disclosure would somehow reveal the scope or nature of the grand jury inquiry. The district court therefore did not abuse its discretion in determining that Dassault had rebutted any presumption that the materials sought in its subpoena were matters occurring before the grand jury.

C. Motion to Strike

Childress next argues that the district court erred by denying his motion to strike certain paragraphs from Dassault's complaint, which Childress maintains revealed "secret" information concerning the grand jury investigation that was protected under Federal Rule of Criminal Procedure 6(e). Federal Rule of Civil Procedure 12(f) permits

a court to “strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.” “We review the decision to grant or deny a motion to strike for an abuse of discretion, and decisions that are reasonable, that is, not arbitrary, will not be overturned.” *Seay v. Tenn. Valley Auth.*, 339 F.3d 454, 480 (6th Cir. 2003) (internal quotation marks omitted).

Federal Rule of Criminal Procedure 6(e)(2) applies only to grand jurors; interpreters; court reporters; operators of recording devices; persons transcribing recorded testimony; attorneys for the government; and persons to whom disclosure is made under Rule 6(e)(3)(A)(ii) or (iii), which encompasses government personnel assisting in the enforcement of federal law. The rule imposes no obligation of secrecy on persons or entities that are not included on that list. *United States v. Jeter*, 775 F.2d 670, 675 (6th Cir. 1985); *see also* 1 Charles Alan Wright & Andrew D. Leipold, *Federal Practice and Procedure* § 106 (4th ed. 2008). Thus, the district court correctly determined that Dassault “is a private corporation not implicated by the restrictions of Rule 6(e)(2).” *Dassault Systemes, SA v. Childress*, No. 09-10534, 2009 WL 3602084, at *5 (E.D. Mich. Oct. 27, 2009). Indeed, even if the FBI did improperly disclose information, Dassault, as a non-covered entity, is not sanctionable under Rule 6(e)(2) for that disclosure.⁵ Accordingly, Dassault’s allegations were neither immaterial nor scandalous, and the district court did not abuse its discretion in refusing to strike them.

D. Right to a Jury Trial

Childress’s final argument centers on his right to a jury trial. Specifically, Childress argues that the district court violated his Seventh Amendment rights when it entered damages against him without affording him the trial he requested in his opposition motion to Dassault’s statement of damages and proposed injunctive relief. Because we are reversing and remanding due to the district court’s erroneous refusal to set aside the entry of default judgment, we need not address whether the district court

⁵ Although Childress is correct in his observation that the limited scope of Federal Rule of Criminal Procedure 6(e) does not prevent a court’s imposition of other statutory penalties arising from the disclosure of protected grand jury information, *see Jeter*, 775 F.2d at 675, Childress offers no basis for imposing such penalties here.

erred in denying Childress's request for a jury trial, and instead we vacate the district court's damages award in favor of Dassault and its order granting Dassault's request for a permanent injunction.

III. CONCLUSION

For the foregoing reasons, we **AFFIRM** the district court's judgment in part and **REVERSE** in part. We **REVERSE** the district court's orders granting Dassault's motion for default judgment and denying Childress's motion to set aside entry of default judgment, **VACATE** the permanent injunction against Childress and the default-judgment entry awarding damages to Dassault, and **REMAND** for proceedings consistent with this opinion. Because we agree with the district court's conclusion that the materials Dassault seeks from the FBI are not comprised of protected grand jury information, we **AFFIRM** the district court's judgment that Dassault's subpoena does not violate Federal Rule of Criminal Procedure 6(e). For the reasons stated above, we also **AFFIRM** the district court's denial of Childress's motion to strike.