

Revised 6/1/10

SUMMARY OF PANEL OF USERS
Moderator, Judge John G. Koeltl, S.D.N.Y.
Prepared by Alan B. Morrison

The purpose of the Panel was to provide an overview of the perspectives of various parties who regularly litigate in the Federal Courts.

Amy Schulman (Pfizer):

Ms. Schulman's perspective is that of inside corporate counsel for a company that defends against mass tort claims. She is not asking to sacrifice the perspective of the individual claimant, but to be sure that her perspective is heard also.

She supports having clients (not just lawyers) present at certain conferences, and this includes the individual plaintiff who, she finds, often lacks the information needed to assess the actual strength of their cases and of the defendant's. She doubts that that rules can legislate cooperation and sees them as a reflection of a failure to achieve that. In her view, judges are required to help the parties do what needs to be done.

She noted that defendants are asked, why don't you admit that you are wrong and pay? When the companies are wrong, she observed, they often settle, but sometimes they are not wrong, in which case they need the help of judges and the rules to defend themselves. Moreover, there are many cases that fall into the gray area. She believes that defendants are wrongly accused of always gaming the system. Overall she sees the system as striking a balance and in general operating fairly.

As an example of why she thinks that getting the plaintiff into a conference would be useful, she described cases in which the claims are that sales reps have made misstatements about a drug. She admitted that, because there are so many reps, and because they make oral statements, they will make mistakes about the drug, but that these are isolated and do not establish a company policy. The individual plaintiffs often do not understand this and she feels that the cases could be resolved more readily if the plaintiffs were brought in and given this information. Further, the number of plaintiffs with actual claims could be pared down if information were obtained early about the facts of the individual cases.

She also stressed the importance of continuity of presence of counsel in a case, giving the example of a case that she and Elizabeth Cabraser eventually settled (Celebrex & Bextra). They initially agreed to turn over all documents specifically related to each plaintiff, they had an early Daubert hearing, and they had case-specific expert discovery, which corrected information asymmetry in both directions. They managed to settle these cases, including both federal and state cases, without unnecessary disputes, in part because of the lawyers.

Ariana Tadler (Milberg):

Ms. Tadler said that she had no choice but to learn about electronic records, and she has learned the importance of three things: accountability; judicial management & cooperation. If the rules are applied correctly, they do not need to be changed. She strongly opposes heightened pleadings because they violate Rule 1 which begins with “just” as in “justice.” The civil lawsuit process is the way that law is shown to exist in the world and not just on the books. In order for justice to be done, the courts must be able to get at the truth, for which the discovery rules are an important part, although she finds that many lawyers are not familiar with them.

On the specifics of the discovery rules, she believes that the mandatory disclosures in Rule 26(a) are useless: all they do is create paperwork, wasting time and money to tell the court that the parties have complied when no one really ever does. On depositions, she agrees with Steve Susman that they are too long, mainly because lawyers who take them do not have sufficient experience and never learn how to do them properly. As for interrogatories, she noted that many people think they are useless, but she thinks they can be effective in some situations, in particular using them to gain basic information to commence meaningful electronic discovery. On Rule 34, the problem of document requests is cost, and on that plaintiffs’ attorneys should be doing a better job of tailoring their requests, both to cut down on costs to the defendant and because plaintiffs really do not want everything, just what is at the heart of the case. As for the conferences under Rule 16 & 26, she believes that they need to be tailored to each case. The judge should use them to lay down ground rules for both sides. One of the problems that she sees with electronic records is that the parties do not have good information management system, by which she means a system that makes it possible to preserve, produce and review in a proper manner the reasonable requests made of it, from both sides.

Tony West (Civil Division, DOJ):

The Civil Division, which is the largest litigating component of DOJ, is on both sides of the “v.” and has large cases as well as small. Their focus in this discussion is on achieving a proper balance with the primary goal of seeking the truth. The Division has a duty to represent its client agencies and also to consider the overall best interests of the United States, which makes its role unique.

Mr. West did an informal poll within the Division and found a general satisfaction with the operation of the federal courts and that it was functioning effectively. Specifically, he suggested the need to have an early narrowing of issues using Rule 26(f), especially in the area of environmental torts. He said that it would be desirable to focus early on the outlines of a possible resolution, even though it would likely take a while to get there. He also supported having an engaged and educated judge from early on to resolve disputes, in particular where there were numerous documents, both paper and electronic. He saw the role of the judge as addressing the concerns of the parties on a case by case basis, and he supported the use of early dispositive motions. Finally, he rejected the idea that the Rules needed significant changes.

Thomas Gottschalk (Kirkland & Ellis):

As a former general counsel at GM, Mr. Gottschalk found that the issue of justice was high on his list, but that it could be achieved only if one had the time and money to stay the course. Company management is not hopeful of meaningful change, but he is more so.

He sees the main problem as costs, both for individuals and for companies. For US companies, litigation is a major cost center, taking 10% or about one month's profits, form the bottom line. It is a mistake to look only at corporate revenue because companies are in business to turn a profit. The primary cause of these costs is discovery, principally e-discovery, with motion practice a secondary cause. He said that 10% of the cost of the general counsel's budget at GM was for an upgrade of the information system, which has to process 17 million pages per year. Discovery is driving the information management systems at corporations these days, especially matters involving litigation holds where there are so many employees with access to so much information in so many places around the world. To him, there is no difference between the reality of these costs and their perception, since companies settle cases to minimize what they fear will be excessive discovery costs.

His other suggestions included early focus on the actual contested issues in the case and more active judicial management. On the issue of amending the Rules, he has a different view. He fears that the committee will follow the path of least resistance and do nothing. He does not believe that encouraging judges to manage their cases will be helpful, alone. He urges the Committee to do what Judge Hornby said and listen to the users who are unhappy with the system as is because it costs too much and takes too long. He supports the recommendations of the American College of Trial Lawyers 100%.

He urges the committee to re-think Rule 26 which is too complicated and does not direct lawyers to do the right thing. There is much more that needs to be done with proportionality, especially for e-discovery. He accepts the notion that there will be bona fide disputes that are required to be decided by the trier of facts, but that you can't get there by advocating best practices alone, in part because many lawyers do not understand what they are. In short, he advocates a fundamental change in the culture of American litigation.

Joe Sellers (Cohen Millstein):

The perspective of M. Sellers is that of someone who represents individuals who are trying to protect fundamental rights (often in employment matters) and who often have limited resources and access to limited information.

On issues of pleading, the Rule should not be construed to expect more information than what is reasonably available to the plaintiff. On the example that Judge Kravitz gave in a prior panel on a barebones hostile work environment complaint, he agreed that there is no reason why the plaintiff cannot provide the necessary specifics in

that situation, but that when issues such as scienter arise, or where others beside the immediate supervisor may be responsible, limited discovery should be allowed. He is not sure that a rule changed is needed if the rules are properly interpreted.

He considers many Rule 16 conferences to be formalities where lawyers sign the paper and leave immediately. He views this as the first, but not the only opportunity for the parties and the judge to try to understand what the case is really about. He said that the suggestion of Judge Campbell at a prior panel to have the parties make an opening statement was enormously valuable. He also urged that problems relating to information gaps be addressed and that the judge should discuss a discovery plan with the parties. His experience is that, once the parties obtain the necessary information they often have fundamental changes in their valuation of the worth of the case, in both directions. He urged judges to stage discovery, focusing on the central issues in the case, followed by early neutral evaluation or mediation. Some cases turn on expert testimony, and he urged early Daubert hearings after a modest amount of discovery.

In employment discrimination cases, class certification is the Holy Grail that plaintiffs seek for which they need discovery. In particular, the employer has central workforce data that could show (or not show) disparities between the affected group and others. Plaintiffs need about six months to gather that data and analyze it (with their experts), at which point it is possible to have meaningful discussions about what can and can not be proven. This process will often cause the parties to reevaluate their case and can be a game changer in either direction.

He is big fan of frequent and active judicial involvement through regular telephone status conferences (which are often canceled when not needed). He remarked at how much work was done the week before the scheduled status conference.

Alan Morrison (George Washington Law School, formerly Public Citizen Litigation Group):

Mr. Morrison began by pointing out that Rule 1's goal of a "just, speedy, and inexpensive" resolution of cases is a false promise because most just results do not come quickly or inexpensively, and conversely, flipping a coin is a speedy and inexpensive way to resolve a dispute, but hardly a just one. At best we should strive for relatively just, relatively, speedy, and relatively inexpensive outcomes, with the real question being the mix of each, which inevitably involves tradeoffs. He noted that none of the speakers urged that plaintiffs be denied a fair chance to prove their cases, but the real issue is, what is fair?

He pointed out that several prior speakers had recognized that one size does not fit all because cases are different. He urged the committee to reject the attempt to define cases by categories, whether by amount in controversy, the legal theory behind the claim, whether the case is primarily one of fact or law and whether there are public policy questions involved. He said that life and litigation are too complicated to create categories and surely too complex for the Rules to try to differentiate, in part because

these categories are often found in combinations. Instead of categories, he urged that the judge become involved early to find out what each case is about and how it might be managed to achieve early resolution of key issues including formulation of a discovery plan that fits this case. He also supported Judge Campbell's idea of making the equivalent of an opening statement to the judge as a means to help the judge assess what the case is really all about. He suggested that the parties exchange written statements in advance, similar to those used by some mediators before they start mediation.

On pleading, he pointed out that in most cases the lawyer includes all facts that are available because there is nothing to gain from hiding them. The problem is the *Iqbal* type case (he assisted in the Supreme Court) where the information about the roles of the two high level defendants was not available before filing suit, or even in discovery against the other defendants for whom the facts were available pre-litigation. He asked the committee to ask who should bear the risk of error in that situation: the person who has a claim, but lacks specific information as to these two defendants, or the defendants who have neither denied the facts nor provided information as to their roles in the case. On the one hand, if the case goes forward, the defendants will have to bear some cost and possible time burdens, but if it does not, the plaintiff will be denied a day in court (or in this case, against some of the defendants, but in others, there will be no remaining defendants). In his view, cases such as *Iqbal* should not be dismissed without allowing the plaintiff some limited discovery to determine what role, if any, the defendants had in the case.

He also discussed a proposal that he called "optional exhaustion" that is spelled out in an appendix to the paper that he submitted for the conference. Under it, a plaintiff could provide the relevant facts (or a draft complaint) to the putative defendant who could choose to respond or not. If the defendant did not respond, plaintiff would be entitled to take some discovery, assuming that there was no other (non-*Iqbal*) basis for dismissing the complaint. If the defendant did produce a meaningful factual response, plaintiff would have to make specific factual allegations in response to them in order to avoid an *Iqbal* dismissal.

His bottom line is that legitimate claims must have a chance to go forward and that imbalances on access to evidence must be taken into account in assessing whether the pleading suffices. The Rules Committee has many means at its disposal to accomplish this end, and it should find a way to do, either by fixing old tools or finding new ones to protect the ability of the court to decide a claim on the merits.

Common Themes:

There was general agreement about the usefulness of early and active judicial intervention to help determine what the true issues of fact and law are in a case and help shape the discovery plan in the case. There was less consensus on whether any changes were necessary in the Rules to accomplish these changes.