SUPPLEMENT TO THE AGENDA BOOK

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

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TAB 1

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Rule 26. General Provisions Governing Discovery; *Duty of Disclosure*

(a) ***Required Disclosures; ~~Discovery~~ Methods to Discover Additional Matter.***

(1) Initial Disclosures. *Except to the extent otherwise stipulated or directed by the court, a party shall, without awaiting a discovery request, provide to other parties:*

(A) the name and, if known, the address and telephone number of each individual likely to have discoverable information relevant to disputed facts alleged with particularity in the pleadings, identifying the subjects of the information;

(B) a copy of, or a description by category and location of, all documents, data compilations, and tangible things in the possession, custody, or control of the party that are relevant to disputed facts alleged with particularity in the pleadings;

(C) a computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34 the documents or other evidentiary material, not privileged or protected from disclosure, on which such computation is based, including materials bearing on the nature and extent of injuries suffered; and

(D) for inspection and copying as under Rule 34 any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment.

Unless otherwise stipulated or directed by the court, these disclosures shall be made

at or within 10 days after the meeting of the parties under subdivision (f). A party shall make its initial disclosures based on the information then reasonably available to it and is not excused from making its disclosures because it has not fully completed its investigation of the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

(2) Disclosure of Expert Testimony.

(A) In addition to the disclosures required by paragraph (1), a party shall disclose to other parties the identity of any person who may be used at trial to present evidence under Rules 702, 703, or 705 of the Federal Rules of Evidence.

(B) Except as otherwise stipulated or directed by the court, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

(C) These disclosures shall be made at the times and in the sequence directed by the court. In the absence of other directions from the court or stipulation by the parties, the disclosures shall be made at least 90 days before the trial date or the date the case is to be ready for trial or, if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under paragraph (2)(B), within 30 days after the disclosure made by the other party. The parties shall supplement these disclosures when required under subdivision (e)(1).

(3) Pretrial Disclosures. In addition to the disclosures required in the preceding paragraphs, a party shall provide to other parties the following information regarding the evidence that it may present at trial other than solely for impeachment purposes:

(A) the name and, if not previously provided, the address and telephone number of each witness, separately identifying those whom the party expects to present and those whom the party may call if the need arises;

(B) the designation of those witnesses whose testimony is expected to be presented by means of a deposition and, if not taken stenographically, a transcript of the pertinent portions of the deposition testimony; and

(C) an appropriate identification of each document or other exhibit, including summaries of other evidence, separately identifying those which the party expects to offer and those which the party may offer if the need arises. Unless otherwise directed by the court, these disclosures shall be made at least 30 days before trial. Within 14 days thereafter, unless a different time is specified by

the court, a party may serve and file a list disclosing (i) any objections to the use under Rule 32(a) of a deposition designated by another party under subparagraph (B) and (ii) any objection, together with the grounds therefor, that may be made to the admissibility of materials identified under subparagraph (C). Objections not so disclosed, other than objections under Rules 402 and 403 of the Federal Rules of Evidence, shall be deemed waived unless excused by the court for good cause shown.

(4) Form of Disclosures; Filing. Unless otherwise directed by order or local rule, all disclosures under paragraphs (1) through (3) shall be made in writing, signed, served, and promptly filed with the court.

(5) Methods to Discover Additional Matter. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property *under Rule 34 or 45(a)(1)(C),* for inspection and other purposes; physical and mental examinations; and requests for admission. *Discovery at a place within a country having a treaty with the United States applicable to the discovery must be conducted by methods authorized by the treaty except that, if the court determines that those methods are inadequate or inequitable, it may authorize other discovery methods not prohibited by the treaty.*

(b) Discovery Scope and Limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action,

whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. ~~It is not a ground for objection that t~~The information sought *need not be* ~~will be in~~admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(2) Limitations. By order or by local rule, the court may alter the limits in these rules on the number of depositions and interrogatories and may also limit the length of depositions under Rule 30 and the number of requests under Rule 36. ~~T~~t frequency or extent of use of the discovery methods ~~set forth in subdivision (a)~~ *otherwise permitted under these rules and by any local rule* shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) ~~the discovery is unduly burdensome or expensive~~ *the burden or expense of the proposed discovery outweighs its likely benefit*, taking into account the needs of the case, the amount in controversy, ~~limitations on~~ the parties' resources, ~~and~~ the importance of the issues at stake in the litigation, *and the importance of the proposed discovery in resolving the issues*. The court may act upon its own initiative after reasonable notice or pursuant to a motion under subdivision (c).

~~(2) Insurance Agreements. A party may obtain discovery of the existence~~

~~and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purpose of this paragraph, an application for insurance shall not be treated as part of an insurance agreement.~~

* * * *

(4) Trial Preparation: Experts. ~~Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:~~

~~(A)(i)~~ A party may ~~through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. (ii) Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subdivision (b)(4)(C) of this rule, concerning fees and expenses as the court may deem appropriate.~~ *depose any person who has been identified as an expert whose opinions may be presented at trial. If a report from the expert is required under subdivision (a)(2)(B), the deposition shall*

not be conducted until after the report is provided.

(B) A party may, *through interrogatories or by deposition,* discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under *this* subdivisions ~~(b)(4)(A)(ii) and (b)(4)(B) of this rule~~; and (ii) with respect to discovery obtained under ~~subdivision (b)(4)(A)(ii) of this rule the court may require, and with respect to discovery obtained under~~ subdivision (b)(4)(B) of this rule the court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(5) Claims of Privilege or Protection of Trial Preparation Materials. When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess

the applicability of the privilege or protection.

(c) **Protective Orders.** Upon motion by a party or by the person from whom discovery is sought, *accompanied by a certificate that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action,* and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(1) that the *disclosure or* discovery not be had;

(2) that the *disclosure or* discovery may be had only on specified terms and conditions, including a designation of the time or place;

(3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

(4) that certain matters not be inquired into, or that the scope of the *disclosure or* discovery be limited to certain matters;

(5) that discovery be conducted with no one present except persons designated by the court;

(6) that a deposition, after being sealed, be opened only by order of the court;

(7) that a trade secret or other confidential research, development, or commercial information not be ~~disclosed~~ *revealed* or be ~~disclosed~~ *revealed* only in a designated way; *and*

(8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or *other* person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(d) ~~Sequence and~~ Timing *and Sequence* of Discovery. *Except when authorized under these rules or by local rule, order, or agreement of the parties, a party may not seek discovery from any source before the parties have met and conferred as required by subdivision (f).* Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence, and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

(e) Supplementation of *Disclosures and* Responses. A party who has *made a disclosure under subdivision (a) or* responded to a request for discovery with a *disclosure or* response ~~that was complete when made~~ is under ~~no~~ *a* duty to supplement *or correct* the *disclosure or* response to include information thereafter acquired, ~~except as follows~~ *if ordered by the court or in the following circumstances*:

(1) A party is under a duty ~~seasonably~~ to supplement ~~the response with respect to any question directly addressed to (A) the identity and location of persons having knowledge of discoverable matters, and (B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which the person is expected to testify, and the substance of the person's~~

~~testimony.~~ *at appropriate intervals its disclosures under subdivision (a) if the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing. With respect to testimony of an expert from whom a report is required under subdivision (a)(2)(B) the duty extends both to information contained in the report and to information provided through a deposition of the expert, and any additions or other changes to this information shall be disclosed by the time the party's disclosures under Rule 26(a)(3) are due.*

(2) A party is under a duty seasonably to amend a prior response *to an interrogatory, request for production, or request for admission* if the party *learns* ~~obtains information upon the basis of which (A) the party knows~~ that the response ~~was incorrect when made, or (B) the party knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment~~ *is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.*

~~(3) A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to trial through new requests for supplementation of prior responses.~~

(f) *Meeting of Parties; Planning for* **Discovery** ~~**Conference.** At any time after commencement of an action the court may direct the attorneys for the parties to~~

~~appear before it for a conference on the subject of discovery. The court shall do so upon motion by the attorney for any party if the motion includes~~ *Except in actions exempted by local rule or when otherwise ordered, the parties shall, as soon as practicable and in any event at least 14 days before a scheduling conference is held or a scheduling order is due under Rule 16(b), meet to discuss the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case, to make or arrange for the disclosures required by subdivision (a)(1), and to develop a proposed discovery plan. The plan shall indicate the parties' views and proposals concerning:*

(1) ~~A statement of the issues as they then appear;~~ *what changes should be made in the timing, form, or requirement for disclosures under subdivision (a) or local rule, including a statement as to when disclosures under subdivision (a)(1) were made or will be made;*

(2) ~~A proposed plan and schedule of discovery;~~ *the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused upon particular issues;*

(3) ~~Any limitations proposed to be placed on discovery;~~ *what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and*

(4) ~~A~~any other ~~proposed~~ orders ~~with respect to discovery~~ *that should be entered by the court under subdivision (c) or under Rule 16(b) and (c).*~~; and~~

~~(5) A statement showing that the attorney making the motion has made a reasonable effort to reach agreement with opposing attorneys on the matters~~

~~set forth in the motion. Each party and each party's attorney are under a duty to participate in good faith in the framing of a discovery plan if a plan is proposed by the attorney for any party. Notice of the motion shall be served on all parties. Objections or additions to matters set forth in the motion shall be served not later than 10 days after service of the motion.~~

The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging and being present or represented at the meeting, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 10 days after the meeting a written report outlining the plan. ~~Following the discovery conference, the court shall enter an order tentatively identifying the issues for discovery purposes, establishing a plan and schedule for discovery, setting limitations on discovery, if any; and determining such other matters, including the allocation of expenses, as are necessary for the proper management of discovery in the action. An order may be altered or amended whenever justice so requires.~~

~~Subject to the right of a party who properly moves for a discovery conference to prompt convening of the conference, the court may combine the discovery conference with a pretrial conference authorized by Rule 16.~~

(g) Signing of *Disclosures,* Discovery Requests, Responses, and Objections.

(1) Every disclosure made pursuant to subdivision (a)(1) or subdivision (a)(3) shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. An unrepresented party shall sign the disclosure and state the party's address. The signature of the attorney or party constitutes a certification that to the best of the signer's knowledge, information, and

belief, formed after a reasonable inquiry, the disclosure is complete and correct as of the time it is made.

(2) Every *discovery* request, ~~for discovery or~~ response, or objection ~~thereto~~ made by a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A*n unrepresented* party ~~who is not represented by an attorney~~ shall sign the request, response, or objection and state the party's address. The signature of the attorney or party constitutes a certification ~~that the signer has read the request, response, or objection, and~~ that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, ~~it~~ *the request, response, or objection* is:

(~~1~~*A*) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;

(~~2~~*B*) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and

(~~3~~*C*) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation.

—If a request, response, or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response, or objection, and a party shall not be obligated to

take any action with respect to it until it is signed.

(3) If *without substantial justification* a certification is made in violation of the rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the *disclosure,* request, response, or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney's fee.

COMMITTEE NOTES

Subdivision (a). Through the addition of paragraphs (1)-(4), this subdivision imposes on parties a duty to disclose, without awaiting formal discovery requests, certain basic information that is needed in most cases to prepare for trial or make an informed decision about settlement. The rule requires all parties (1) early in the case to exchange information regarding potential witnesses, documentary evidence, damages, and insurance, (2) at an appropriate time during the discovery period to identify expert witnesses and provide a detailed written statement of the testimony that may be offered at trial through specially retained experts, and (3), as the trial date approaches, to identify the particular evidence that may be offered at trial. The enumeration in Rule 26(a) of items to be disclosed does not prevent a court from requiring by order or local rule that the parties disclose additional information without a discovery request. Nor are parties precluded from using traditional discovery methods to obtain further information regarding these matters, as for example asking an expert during a deposition about testimony given in other litigation beyond the four-year period specified in Rule 26(a)(2)(B).

A major purpose of the revision is to accelerate the exchange of basic information about the case and to eliminate the paper work involved in requesting such information, and the rule should be applied in a manner to achieve those objectives. The concepts of imposing a duty of disclosure were set forth in Brazil, The Adversary Character of Civil Discovery: A Critique and Proposals for Change, 31 Vand. L. Rev. 1348 (1978), and Schwarzer, The Federal Rules, the Adversary Process, and Discovery Reform, 50 U. Pitt. L. Rev. 703, 721-23 (1989).

The rule is based upon the experience of district courts that have required disclosure of some of this information through local rules, court-approved standard interrogatories, and standing orders. Most have required pretrial disclosure of the kind of information described in Rule 26(a)(3). Many have required written reports from experts containing information like that specified in Rule 26(a)(2)(B). While far more limited, the experience of the few state and federal courts that have required pre-discovery exchange of core information such as is contemplated in Rule 26(a)(1) indicates that savings in time and expense can be

achieved, particularly if the litigants meet and discuss the issues in the case as a predicate for this exchange and if a judge supports the process, as by using the results to guide further proceedings in the case. Courts in Canada and the United Kingdom have for many years required disclosure of certain information without awaiting a request from an adversary.

Paragraph (1). As the functional equivalent of court-ordered interrogatories, this paragraph requires early disclosure, without need for any request, of four types of information that have been customarily secured early in litigation through formal discovery. The introductory clause permits the court, by local rule, to exempt all or particular types of cases from these disclosure requirement or to modify the nature of the information to be disclosed. It is expected that courts would, for example, exempt cases like Social Security reviews and government collection cases in which discovery would not be appropriate or would be unlikely. By order the court may eliminate or modify the disclosure requirements in a particular case, and similarly the parties, unless precluded by order or local rule, can stipulate to elimination or modification of the requirements for that case. The disclosure obligations specified in paragraph (1) will not be appropriate for all cases, and it is expected that changes in these obligations will be made by the court or parties when the circumstances warrant.

Authorization of these local variations is, in large measure, included in order to accommodate to the Civil Justice Reform Act of 1990, which implicitly directs districts to experiment during the study period with differing procedures to reduce the time and expense of civil litigation. The civil justice delay and expense reduction plans adopted by the courts under the Act differ as to the type, form, and timing of disclosures required. Section 105(c)(1) of the Act calls for a report by the Judicial Conference to Congress by December 31, 1995, comparing experience in twenty of these courts; and section 105(c)(2)(B) contemplates that some changes in the Rules may then be needed. While these studies may indicate the desirability of further changes in Rule 26(a)(1), these changes probably could not become effective before December 1998 at the earliest. In the meantime, the present revision puts in place a series of disclosure obligations that, unless a court acts affirmatively to impose other requirements or indeed to reject all such requirements for the present, are designed to eliminate certain discovery, help focus the discovery that is needed, and facilitate preparation for trial or settlement.

Subparagraph (A) requires identification of all persons who, based on the investigation conducted thus far, are likely to have discoverable information relevant to the factual disputes between the parties. All persons with such information should be disclosed, whether or not their testimony will be supportive of the position of the disclosing party. As officers of the court, counsel are expected to disclose the identity of those persons who may be used by them as witnesses or who, if their potential testimony were known, might reasonably be expected to be deposed or called as a witness by any of the other parties. Indicating briefly the general topics on which such persons have information should not be burdensome, and will assist other parties in deciding which depositions will actually be needed.

Subparagraph (B) is included as a substitute for the inquiries routinely made about the

existence and location of documents and other tangible things in the possession, custody, or control of the disclosing party. Although, unlike subdivision (a)(3)(C), an itemized listing of each exhibit is not required, the disclosure should describe and categorize, to the extent identified during the initial investigation, the nature and location of potentially relevant documents and records, including computerized data and other electronically-recorded information, sufficiently to enable opposing parties (1) to make an informed decision concerning which documents might need to be examined, at least initially, and (2) to frame their document requests in a manner likely to avoid squabbles resulting from the wording of the requests. As with potential witnesses, the requirement for disclosure of documents applies to all potentially relevant items then known to the party, whether or not supportive of its contentions in the case.

Unlike subparagraphs (C) and (D), subparagraph (B) does not require production of any documents. Of course, in cases involving few documents a disclosing party may prefer to provide copies of the documents rather than describe them, and the rule is written to afford this option to the disclosing party. If, as will be more typical, only the description is provided, the other parties are expected to obtain the documents desired by proceeding under Rule 34 or through informal requests. The disclosing party does not, by describing documents under subparagraph (B), waive its right to object to production on the basis of privilege or work product protection, or to assert that the documents are not sufficiently relevant to justify the burden or expense of production.

The initial disclosure requirements of subparagraphs (A) and (B) are limited to identification of potential evidence "relevant to disputed facts alleged with particularity in the pleadings." There is no need for a party to identify potential evidence with respect to allegations that are admitted. Broad, vague, and conclusory allegations sometimes tolerated in notice pleading--for example, the assertion that a product with many component parts is defective in some unspecified manner--should not impose upon responding parties the obligation at that point to search for and identify all persons possibly involved in, or all documents affecting, the design, manufacture, and assembly of the product. The greater the specificity and clarity of the allegations in the pleadings, the more complete should be the listing of potential witnesses and types of documentary evidence. Although paragraphs (1)(A) and (1)(B) by their terms refer to the factual disputes defined in the pleadings, the rule contemplates that these issues would be informally refined and clarified during the meeting of the parties under subdivision (f) and that the disclosure obligations would be adjusted in the light of these discussions. The disclosure requirements should, in short, be applied with common sense in light of the principles of Rule 1, keeping in mind the salutary purposes that the rule is intended to accomplish. The litigants should not indulge in gamesmanship with respect to the disclosure obligations.

Subparagraph (C) imposes a burden of disclosure that includes the functional equivalent of a standing Request for Production under Rule 34. A party claiming damages or other monetary relief must, in addition to disclosing the calculation of such damages, make available the supporting documents for inspection and copying as if a request for such materials had been made under Rule 34. This obligation applies only with respect to documents then reasonably available to it and not privileged or protected as work product.

Likewise, a party would not be expected to provide a calculation of damages which, as in many patent infringement actions, depends on information in the possession of another party or person.

Subparagraph (D) replaces subdivision (b)(2) of Rule 26, and provides that liability insurance policies be made available for inspection and copying. The last two sentences of that subdivision have been omitted as unnecessary, not to signify any change of law. The disclosure of insurance information does not thereby render such information admissible in evidence. See Rule 411, Federal Rules of Evidence. Nor does subparagraph (D) require disclosure of applications for insurance, though in particular cases such information may be discoverable in accordance with revised subdivision (a)(5).

Unless the court directs a different time, the disclosures required by subdivision (a)(1) are to be made at or within 10 days after the meeting of the parties under subdivision (f). One of the purposes of this meeting is to refine the factual disputes with respect to which disclosures should be made under paragraphs (1)(A) and (1)(B), particularly if an answer has not been filed by a defendant, or, indeed, to afford the parties an opportunity to modify by stipulation these obligations. The time of this meeting is generally left to the parties provided it is held at least 14 days before a scheduling conference is held or before a scheduling order is due under Rule 16(b). In cases in which no scheduling conference is held, this will mean that the meeting must be held within 75 days after a defendant has first appeared in the case.

Before making its disclosures, a party has the obligation under subdivision (g)(1) to make an inquiry into the facts of the case. The rule does not demand an exhaustive investigation at this stage of the case, but one that is reasonable under the circumstances, focusing on the facts that are alleged with particularity in the pleadings. As provided in the last sentence of subdivision (a)(1), a party is not excused from the duty of disclosure merely because its investigation is incomplete. The party should make its initial disclosures based on the pleadings and the information then reasonably available to it. As its investigation continues and as the issues in the pleadings are clarified, it should supplement its disclosures as required by subdivision (e)(1). A party is not relieved from its obligation of disclosure merely because another party has not made its disclosures or has made an inadequate disclosure.

Paragraph (2). This paragraph imposes an additional duty to disclose information regarding expert testimony sufficiently in advance of trial that opposing parties have a reasonable opportunity to prepare for effective cross examination and perhaps arrange for expert testimony from other witnesses. Normally the court should prescribe a time for these disclosures in a scheduling order under Rule 16(b), and in most cases the party with the burden of proof on an issue should disclose its expert testimony on that issue before other parties are required to make their disclosures with respect to that issue. In the absence of such a direction, the disclosures are to be made by all parties at least 90 days before the trial date or the date by which the case is to be ready for trial, except that an additional 30 days is allowed (unless the court specifies another time) for disclosure of expert testimony to be used solely to contradict or rebut the testimony that may be presented by another

party's expert. For a discussion of procedures that have been used to enhance the reliability of expert testimony, see M. Graham, Expert Witness Testimony and the Federal Rules of Evidence: Insuring Adequate Assurance of Trustworthiness, 1986 U. Ill. L. Rev. 90.

Paragraph (2)(B) requires that persons retained or specially employed to provide expert testimony, or whose duties as an employee of the party regularly involve the giving of expert testimony, must prepare a detailed and complete written report, stating the testimony the witness is expected to present during direct examination, together with the reasons therefor. The information disclosed under the former rule in answering interrogatories about the "substance" of expert testimony was frequently so sketchy and vague that it rarely dispensed with the need to depose the expert and often was even of little help in preparing for a deposition of the witness. Revised Rule 37(c)(1) and revised Rule 702 of the Federal Rules of Evidence provide an incentive for full disclosure; namely, that a party will not ordinarily be permitted to use on direct examination any expert testimony not so disclosed. Rule 26(a)(2)(B) does not preclude counsel from providing assistance to experts in preparing the reports, and indeed, with experts such as automobile mechanics, this assistance may be needed. Nevertheless, the report, which is intended to set forth the substance of the direct examination, should be written in a manner that reflects the testimony to be given by the witness and it must be signed by the witness.

The report is to disclose the data and other information considered by the expert and any exhibits or charts that summarize or support the expert's opinions. Given this obligation of disclosure, litigants should no longer be able to argue that materials furnished to their experts to be used in forming their opinions--whether or not ultimately relied upon by the expert--are privileged or otherwise protected from disclosure when such persons are testifying or being deposed.

Revised subdivision (b)(3)(A) authorizes the deposition of expert witnesses. Since depositions of experts required to prepare a written report may be taken only after the report has been served, the length of the deposition of such experts should be reduced, and in many cases the report may eliminate the need for a deposition. Revised subdivision (e)(1) requires disclosure of any material changes made in the opinions of an expert from whom a report is required, whether the changes are in the written report or in testimony given at a deposition.

For convenience, this rule and revised Rule 30 continue to use the term "expert" to refer to those persons who will testify under Rule 702 of the Federal Rules of Evidence with respect to scientific, technical, and other specialized matters. The requirement of a written report in paragraph (2)(B), however, applies only to those experts who are retained or specially employed to provide such testimony in the case or whose duties as an employee of a party regularly involve the giving of such testimony. A treating physician, for example, can be deposed or called to testify at trial without any requirement for a written report. By local rule, order, or written stipulation, the requirement of a written report may be waived for particular experts or imposed upon additional persons who will provide opinions under Rule 702.

Paragraph (3). This paragraph imposes an additional duty to disclose, without any request, information customarily needed in final preparation for trial. These disclosures are to be made in accordance with schedules adopted by the court under Rule 16(b) or by special order. If no such schedule is directed by the court, the disclosures are to be made at least 30 days before commencement of the trial. By its terms, rule 26(a)(3) does not require disclosure of evidence to be used solely for impeachment purposes; however, disclosure of such evidence--as well as other items relating to conduct of trial--may be required by local rule or a pretrial order.

Subparagraph (A) requires the parties to designate the persons whose testimony they may present as substantive evidence at trial, whether in person or by deposition. Those who will probably be called as witnesses should be listed separately from those who are not likely to be called but who are being listed in order to preserve the right to do so if needed because of developments during trial. Revised Rule 37(c)(1) provides that only persons so listed may be used at trial to present substantive evidence. This restriction does not apply unless the omission was "without substantial justification" and hence would not bar an unlisted witness if the need for such testimony is based upon developments during trial that could not reasonably have been anticipated--e.g., a change of testimony.

Listing a witness does not obligate the party to secure the attendance of the person at trial, but should preclude the party from objecting if the person is called to testify by another party who did not list the person as a witness.

Subparagraph (B) requires the party to indicate which of these potential witnesses will be presented by deposition at trial. A party expecting to use at trial a deposition not recorded by stenographic means is required by revised Rule 32 to provide the court with a transcript of the pertinent portions of such depositions. This rule requires that copies of the transcript of a nonstenographic deposition be provided to other parties in advance of trial for verification, an obvious concern since counsel often utilize their own personnel to prepare transcripts from audio or video tapes. By order or local rule, the court may require that parties designate the particular portions of stenographic depositions to be used at trial.

Subparagraph (C) requires disclosure of exhibits, including summaries (whether to be offered in lieu of other documentary evidence or to be used as an aid in understanding such evidence), that may be offered as substantive evidence. The rule requires a separate listing of each such exhibit, though it should permit voluminous items of a similar or standardized character to be described by meaningful categories. For example, unless the court has otherwise directed, a series of vouchers might be shown collectively as a single exhibit with their starting and ending dates. As with witnesses, the exhibits that will probably be offered are to be listed separately from those which are unlikely to be offered but which are listed in order to preserve the right to do so if needed because of developments during trial. Under revised Rule 37(c)(1) the court can permit use of unlisted documents the need for which could not reasonably have been anticipated in advance of trial.

Upon receipt of these final pretrial disclosures, other parties have 14 days (unless a different time is specified by the court) to disclose any objections they wish to preserve to

the usability of the deposition testimony or to the admissibility of the documentary evidence (other than under Rules 402 and 403 of the Federal Rules of Evidence). Similar provisions have become commonplace either in pretrial orders or by local rules, and significantly expedite the presentation of evidence at trial, as well as eliminate the need to have available witnesses to provide "foundation" testimony for most items of documentary evidence. The listing of a potential objection does not constitute the making of that objection or require the court to rule on the objection; rather, it preserves the right of the party to make the objection when and as appropriate during trial. The court may, however, elect to treat the listing as a motion "in limine" and rule upon the objections in advance of trial to the extent appropriate.

The time specified in the rule for the final pretrial disclosures is relatively close to the trial date. The objective is to eliminate the time and expense in making these disclosures of evidence and objections in those cases that settle shortly before trial, while affording a reasonable time for final preparation for trial in those cases that do not settle. In many cases, it will be desirable for the court in a scheduling or pretrial order to set an earlier time for disclosures of evidence and provide more time for disclosing potential objections.

Paragraph (4). This paragraph prescribes the form of disclosures. A signed written statement is required, reminding the parties and counsel of the solemnity of the obligations imposed; and the signature on the initial or pretrial disclosure is a certification under subdivision (g)(1) that it is complete and correct as of the time when made. Consistent with Rule 5(d), these disclosures are to be filed with the court unless otherwise directed. It is anticipated that many courts will direct that expert reports required under paragraph (2)(B) not be filed until needed in connection with a motion or for trial.

Paragraph (5). Language is added to this paragraph to reflect a policy of balanced accommodation to international agreements bearing on methods of discovery. Cf. Société Nationale Industrielle Aérospatiale v. United States District Court, 482 U.S. 522 (1987). Although such treaties typically do not preclude the use of Rules 26-37 to secure information from persons in other countries, attorneys and judges should be cognizant of the adverse impact upon international relations of unduly intrusive discovery methods that offend the sensibilities of those governing other countries. See generally J. Weis, The Federal Rules and the Hague Conventions: Concerns of Conformity and Comity, 50 U. Pitt. L. Rev. 903 (1989); E. Alley & D. Prescott, Recent Developments in the United States under the Hague Evidence Convention, 2 Leiden J. Int'l Law 19 (1989). If certain methods of discovery have been approved for international use, positive international relations require that these methods be preferred, and that ordinarily other methods should not be employed in discovery at places in foreign countries, at least if the approved methods are adequate to meet the need of the litigant for timely access to the information.

The new provision applies only with respect to discovery sought to be conducted within a country that has an applicable convention or treaty with the United States. It does not cover discovery requests that a party subject to the power of the court provide in the United States (such as by answering interrogatories, appearing at a deposition, or producing documents for inspection in this country) information that may be located abroad or derived

from materials located abroad. Nevertheless, in such situations, although not governed by the amendment to Rule 26(a)(5), the court should consider, as part of its obligation to prevent discovery abuses involving foreign litigants, the availability and practicality of discovery through convention methods. See Société Nationale Industrielle Aérospatiale v. United States District Court, 482 U.S. 522 (1987). Likewise, the court should consider the general principles of comity in deciding what discovery to permit in countries not signatories to a convention or treaty with the United States.

The rule does not require resort to convention methods where such methods would be "inadequate." This provision allows the court to make a discreet determination on the particular facts as to the sufficiency of the internationally agreed discovery methods. For example, the court might excuse a party from having to resort to Hague Convention procedures if a country in which necessary information is located has imposed a blanket reservation that would prevent such discovery.

The rule also permits the court to authorize the use of non-convention discovery methods when needed to assure that discovery is not "inequitable." Foreign litigants should not be placed in a favored position when compared to domestic parties in the litigation, especially in commercial matters with respect to which the American litigants may be their economic competitors. Thus, an international litigant should not be permitted to obtain discovery from its American adversaries using the broader forms of discovery contained in Rules 26-37, while asserting constraints under a convention or the law of the party's own country to create obstacles to equivalent discovery initiated by its adversaries.

Indeed, the court is not precluded by the rule from authorizing use of discovery methods that may violate the laws of another country if necessary to assure that discovery is not inadequate or inequitable and if not prohibited by a treaty or convention with the United States. The court should, however, exercise caution in ordering such discovery, particularly if the impediment to the discovery is imposed at the instance of the foreign authority, not at the request of the litigant or non-party from whom information is sought. Moreover, in deciding upon an appropriate sanction for failure to comply with an order for such discovery, the court should take into account the fact that non-compliance was motivated by the party's need to conform to the law of a foreign country. See Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197 (1958). In no circumstance can the court authorize discovery methods that are prohibited by a treaty that is the law of the United States, for the proscriptions of the treaty take precedence over these rules.

This paragraph is also revised to take note of the availability of revised Rule 45 for inspection from non-parties of documents and premises without the need for a deposition.

Subdivision (b). This subdivision is revised in several respects. First, former paragraph (1) is subdivided into two paragraphs for ease of reference and to avoid renumbering of paragraphs (3) and (4). Textual changes are then made in new paragraph (2) to enable the court to keep tighter rein on the extent of discovery. The information explosion of recent decades has greatly increased both the potential cost of wide-ranging

discovery and the potential for discovery to be used as an instrument for delay or oppression. Amendments to Rules 30, 31, and 33 place presumptive limits on the number of depositions and interrogatories, subject to leave of court to pursue additional discovery. The revisions in Rule 26(b)(2) are intended to provide the court with broader discretion to impose additional restrictions on the scope and extent of discovery and to authorize courts that develop case tracking systems based on the complexity of cases to increase or decrease by local rule the presumptive number of depositions and interrogatories allowed in particular types or classifications of cases. The revision also dispels any doubt as to the power of the court to impose limitations on the length of depositions under Rule 30 or on the number of requests for admission under Rule 36.

Second, former paragraph (2), relating to insurance, has been relocated as part of the required initial disclosures under subdivision (a)(1)(D), and revised to provide for disclosure of the policy itself.

Third, paragraph (4)(A) is revised to provide that experts who are expected to be witnesses will be subject to deposition prior to trial, conforming the norm stated in the rule to the actual practice followed in most courts, in which depositions of experts have become standard. Concerns regarding the expense of such depositions should be mitigated by the fact that the expert's fees for the deposition will ordinarily be borne by the party taking the deposition. The requirement under subdivision (a)(2)(B) of a complete and detailed report of the expected testimony of certain forensic experts may, moreover, eliminate the need for some such depositions or at least reduce the length of the depositions. Accordingly, the deposition of an expert required by subdivision (a)(2)(B) to provide a written report may be taken only after the report has been served.

Paragraph (4)(C), bearing on compensation of experts, is revised to take account of the changes in paragraph (4)(A).

Paragraph (5) is a new provision. A party must notify other parties if it is withholding materials otherwise subject to disclosure under the rule or pursuant to a discovery request because it is asserting a claim of privilege or work product protection. To withhold materials without such notice is contrary to the rule, subjects the party to sanctions under Rule 37(b)(2), and may be viewed as a waiver of the privilege or protection. The paragraph also applies

The party must also provide sufficient information to enable other parties to evaluate the applicability of the claimed privilege or protection. Although the person from whom the discovery is sought decides whether to claim a privilege or protection, the court ultimately decides whether, if this claim is challenged, the privilege or protection applies. Providing information pertinent to the applicability of the privilege or protection should reduce the need for in camera examination of the documents.

The rule does not attempt to define for each case what information must be provided when a party asserts a claim of privilege or work product protection. Details concerning time, persons, general subject matter, etc., may be appropriate if only a few items are

withheld, but may be unduly burdensome when voluminous documents are claimed to be privileged or protected, particularly if the items can be described by categories. A party can seek relief through a protective order under subdivision (c) if compliance with the requirement for providing this information would be an unreasonable burden. In rare circumstances some of the pertinent information affecting applicability of the claim, such as the identity of the client, may itself be privileged; the rule provides that such information need not be disclosed.

The obligation to provide pertinent information concerning withheld privileged materials applies only to items "otherwise discoverable." If a broad discovery request is made--for example, for all documents of a particular type during a twenty year period--and the responding party believes in good faith that production of documents for more than the past three years would be unduly burdensome, it should make its objection to the breadth of the request and, with respect to the documents generated in that three year period, produce the unprivileged documents and describe those withheld under the claim of privilege. If the court later rules that documents for a seven year period are properly discoverable, the documents for the additional four years should then be either produced (if not privileged) or described (if claimed to be privileged).

Subdivision (c). The revision requires that before filing a motion for a protective order the movant must confer--either in person or by telephone--with the other affected parties in a good faith effort to resolve the discovery dispute without the need for court intervention. If the movant is unable to get opposing parties even to discuss the matter, the efforts in attempting to arrange such a conference should be indicated in the certificate.

Subdivision (d). This subdivision is revised to provide that formal discovery--as distinguished from interviews of potential witnesses and other informal discovery--not commence until the parties have met and conferred as required by subdivision (f). Discovery can begin earlier if authorized under Rule 30(a)(2)(C) (deposition of person about to leave the country) or by local rule, order, or stipulation. This will be appropriate in some cases, such as those involving requests for a preliminary injunction or motions challenging personal jurisdiction. If a local rule exempts any types of cases in which discovery may be needed from the requirement of a meeting under Rule 26(f), it should specify when discovery may commence in those cases.

The meeting of counsel is to take place as soon as practicable and in any event at least 14 days before the date of the scheduling conference under Rule 16(b) or the date a scheduling order is due under Rule 16(b). The court can assure that discovery is not unduly delayed either by entering a special order or by setting the case for a scheduling conference.

Subdivision (e). This subdivision is revised to provide that the requirement for supplementation applies to all disclosures required by subdivisions (a)(1)-(3). Like the former rule, the duty, while imposed on a "party," applies whether the corrective information is learned by the client or by the attorney. Supplementations need not be made as each new item of information is learned but should be made at appropriate intervals during the discovery period, and with special promptness as the trial date approaches. It may be useful

for the scheduling order to specify the time or times when supplementations should be made.

The revision also clarifies that the obligation to supplement responses to formal discovery requests applies to interrogatories, requests for production, and requests for admissions, but not ordinarily to deposition testimony. However, with respect to experts from whom a written report is required under subdivision (a)(2)(B), changes in the opinions expressed by the expert whether in the report or at a subsequent deposition are subject to a duty of supplemental disclosure under subdivision (e)(1).

The obligation to supplement disclosures and discovery responses applies whenever a party learns that its prior disclosures or responses are in some material respect incomplete or incorrect. There is, however, no obligation to provide supplemental or corrective information that has been otherwise made known to the parties in writing or during the discovery process, as when a witness not previously disclosed is identified during the taking of a deposition or when an expert during a deposition corrects information contained in an earlier report.

Subdivision (f). This subdivision was added in 1980 to provide a party threatened with abusive discovery with a special means for obtaining judicial intervention other than through discrete motions under Rules 26(c) and 37(a). The amendment envisioned a two-step process: first, the parties would attempt to frame a mutually agreeable plan; second, the court would hold a "discovery conference" and then enter an order establishing a schedule and limitations for the conduct of discovery. It was contemplated that the procedure, an elective one triggered on request of a party, would be used in special cases rather than as a routine matter. As expected, the device has been used only sparingly in most courts, and judicial controls over the discovery process have ordinarily been imposed through scheduling orders under Rule 16(b) or through rulings on discovery motions.

The provisions relating to a conference with the court are removed from subdivision (f). This change does not signal any lessening of the importance of judicial supervision. Indeed, there is a greater need for early judicial involvement to consider the scope and timing of the disclosure requirements of Rule 26(a) and the presumptive limits on discovery imposed under these rules or by local rules. Rather, the change is made because the provisions addressing the use of conferences with the court to control discovery are more properly included in Rule 16, which is being revised to highlight the court's powers regarding the discovery process.

The desirability of some judicial control of discovery can hardly be doubted. Rule 16, as revised, requires that the court set a time for completion of discovery and authorizes various other orders affecting the scope, timing, and extent of discovery and disclosures. Before entering such orders, the court should consider the views of the parties, preferably by means of a conference, but at the least through written submissions. Moreover, it is desirable that the parties' proposals regarding discovery be developed through a process where they meet in person, informally explore the nature and basis of the issues, and discuss how discovery can be conducted most efficiently and economically.

As noted above, former subdivision (f) envisioned the development of proposed discovery plans as an optional procedure to be used in relatively few cases. The revised rule directs that in all cases not exempted by local rule or special order the litigants must meet in person and plan for discovery. Following this meeting, the parties submit to the court their proposals for a discovery plan and can begin formal discovery. Their report will assist the court in seeing that the timing and scope of disclosures under revised Rule 26(a) and the limitations on the extent of discovery under these rules and local rules are tailored to the circumstances of the particular case.

To assure that the court has the litigants' proposals before deciding on a scheduling order and that the commencement of discovery is not delayed unduly, the rule provides that the meeting of the parties take place as soon as practicable and in any event at least 14 days before a scheduling conference is held or before a scheduling order is due under Rule 16(b). (Rule 16(b) requires that a scheduling order be entered within 90 days after the first appearance of a defendant or, if earlier, within 120 days after an answer has been served on any defendant.) The obligation to participate in the planning process is imposed on all parties that have appeared in the case, including defendants who, because of a pending Rule 12 motion, may not have yet filed an answer in the case. Each such party should attend the meeting, either through one of its attorneys or in person if unrepresented. If more parties are joined or appear after the initial meeting, an additional meeting may be desirable.

Subdivision (f) describes certain matters that should be accomplished at the meeting and included in the proposed discovery plan. This listing does not exclude consideration of other subjects, such as the time when any dispositive motions should be filed and when the case should be ready for trial.

The parties are directed under subdivision (a)(1) to make the disclosures required by that subdivision at or within 10 days after this meeting. The additional time is afforded in recognition that the discussion at the meeting of the claims and defenses may be useful in defining the issues with respect to which the initial disclosures should be made. The parties should also discuss at the meeting what additional information, although not subject to the disclosure requirements, can be made available informally without the necessity for formal discovery requests.

The report is to be submitted to the court within 10 days after the meeting and should not be difficult to prepare. In most cases counsel should be able to agree that one of them will be responsible for its preparation and submission to the court. Form 35 has been added in the Appendix to the Rules, both to illustrate the type of report that is contemplated and to serve as a checklist for the meeting.

The litigants are expected to attempt in good faith to agree on the contents of the proposed discovery plan. If they cannot agree on all aspects of the plan, their report to the court should indicate the competing proposals of the parties on those items, as well as the matters on which they agree. Unfortunately, there may be cases in which, because of disagreements about time or place or for other reasons, the meeting is not attended by all parties or, indeed, no meeting takes place. In such situations, the report--or reports--should

describe the circumstances and the court may need to consider sanctions under Rule 37(g).

By local rule or special order, the court can exempt particular cases or types of cases from the meet-and-confer requirement of subdivision (f). In general this should include any types of cases which are exempted by local rule from the requirement for a scheduling order under Rule 16(b), such as cases in which there will be no discovery (e.g., bankruptcy appeals and reviews of social security determinations). In addition, the court may want to exempt cases in which discovery is rarely needed (e.g., government collection cases and proceedings to enforce administrative summonses) or in which a meeting of the parties might be impracticable (e.g., actions by unrepresented prisoners). Note that if a court exempts from the requirements for a meeting any types of cases in which discovery may be needed, it should indicate when discovery may commence in those cases.

Subdivision (g). Paragraph (1) is added to require signatures on disclosures, a requirement that parallels the provisions of paragraph (2) with respect to discovery requests, responses, and objections. The provisions of paragraph (3) have been modified to be consistent with Rules 37(a)(4) and 37(c)(1); in combination, these rules establish sanctions for violation of the rules regarding disclosures and discovery matters. Amended Rule 11 no longer applies to such violations.

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Pretrial limitations on extent of evidence. Several opposed the proposed amendment of subdivision (c)(15) authorizing the court, after meeting with counsel, to enter "an order establishing a reasonable limit on the length of time allowed for the presentation of evidence or on the number of witnesses or documents that may be presented." The opposition reflects, in part, a concern about managerial judging or about infringing on counsels' ability to control the trial process, and in part a fear that many judges will misuse this discretion. The Advisory Committee has modified the language of this subdivision, but remains convinced that a reasonable limit on the length of trial is desirable in some cases, that such a limitation can be fairer to the parties when determined in advance of trial than when imposed during trial, and that abuses can be corrected through appellate review.

Timing of scheduling orders. The published draft changed the date by which a scheduling order should be entered from 120 days after the complaint is filed to 60 days after a defendant has appeared. Several suggest that this deadline may come too early, particularly in multi-party cases. The Advisory Committee concludes that the language from the published draft should be changed to provide that the order be entered within 90 days after a defendant has appeared or within 120 days after the complaint has been served on a defendant. Of course, courts can and frequently should enter scheduling orders before such deadlines.

The Advisory Committee has carefully considered the various criticisms and suggestions, as well as those comments favoring the published proposal. The Committee is unanimous in recommending adoption of the proposed amendment of Rule 16. As noted above, several changes have been made to the language of the amendment as originally published. These changes, however, either are essentially technical and clarifying in nature, or represent less of a modification of the current Rule 16 than had been proposed in the published draft; and the Committee believes that the proposed amendment can and should be forwarded to the Judicial Conference without an additional period for public notice and comment.

Fed. R. Civ. P. 26. (Drafts published October 1989 and August 1991)

Controversial. The last sentence in subdivision (a)(5) was contained in the draft published in October 1989. The other proposed changes were contained in the draft published in August 1991 and, particularly with respect to proposed subdivision (a)(1), have provoked the most intense division within the bench and bar of any of the proposed amendments. However, as discussed below, the Advisory Committee has made changes to the language contained in the published drafts which should eliminate many of the concerns expressed. The principal criticisms and suggestions are as follows:

Mandatory early pre-discovery disclosures. Subdivision (a)(1) of the August 1991 published draft required litigants to disclose specified core information about the case; namely, potential witnesses, documentary evidence, damage claims, and insurance. The objectives were to eliminate the time and expense of preparing formal discovery requests with respect to that information and to enable the parties to plan more effectively for the discovery that would be needed. Critics attacked the timing and scope of the disclosure requirements, as well as the related penalty provisions for noncompliance, viewing them as both impractical, counterproductive, and disruptive of the attorney-client relationship. On further consideration, the Advisory Committee has made certain changes with respect to the scope of the disclosures and provisions for sanctions that, coupled with the provisions mandating an early meeting of the parties, should alleviate some of these concerns. One Committee member preferred, as suggested by many critics, that initial disclosures be limited to potential witnesses and documents supporting the party's contentions; the other members, however, remained of the view that the obligation should relate to all such witnesses and documents. Many critics also urged that early disclosure requirements not be adopted until after the studies of the experience of courts under the Civil Justice Reform Act. To delay consideration of rules changes until completion of those studies would effectively postpone the effective date of any national standards until December 1998, a delay the Advisory Committee believed unwise. However, the proposed rule is written in a manner that permits district courts during the period of experimentation to depart from the national standards and determine whether and to what extent pre-discovery disclosures should be required.

Pre-discovery planning meeting of parties. The August 1991 published draft contemplated that the exchange of pre-discovery disclosures under subdivision (a)(1) should preferably occur at a meeting of the parties, but did not require that such a meeting take place. The most severe critics of the disclosure requirement supported the concept of an early meeting of the parties to explore and clarify the issues in the case as a prelude to conduct of discovery and, indeed, generally urged that such a meeting be mandatory, whether or not early disclosures were required. Complementing the changes made in subdivision (a)(1), the Advisory Committee has changed the published draft so that subdivision (f), rather than being deleted, is modified to require that the parties meet and attempt to agree on a proposed discovery plan for incorporation in the scheduling order and to facilitate the exchange of required disclosures.

"Notice pleading" and scope of discovery. Many comments suggested that reductions in the time and expense of discovery and other pretrial proceedings require a reconsideration of "notice pleading" and discovery relevant to the "subject matter" or "reasonably calculated to lead to the discovery of admissible evidence." While these suggestions may have merit, they could not, in the opinion of the Advisory Committee, be effected incident to the present publication notice and are ones that should be given careful study and consideration in the future.

Expert reports. The August 1991 published draft required that detailed written reports of parties' experts be exchanged during the discovery period and generally limits the direct testimony of such experts to the matters contained in those reports as may have been seasonably supplemented prior to trial. Several comments argued that this requirement would cause unnecessary additional expenses, discourage "real" experts from agreeing to testify, and create problems at trial. Requirements such as these have, however, been beneficially used in several courts for many years, and the Advisory Committee remains convinced that the concept is sound. However, the Committee has changed the language in subdivision (a)(2) to make clear that it applies only to specially retained or employed experts--and not, for example, to treating physicians. It has also made changes in the text of subdivision (e) to lessen the burden of supplementation and in the Notes to proposed FRE Rule 702 in recognition that intervening events may sometimes justify a change in expert testimony.

Discovery in a foreign country. The last sentence in proposed subdivision (a)(5) is drawn from language published in October 1989 and later submitted to the Supreme Court, which, like Rule 4, was subsequently returned by the Supreme Court for further consideration. While the amendment was pending before the Court, the British Embassy had expressed its concern that, particularly with respect to the Committee Notes, the provisions relating to discovery in foreign countries were inconsistent with the Hague Convention. A similar concern was more recently expressed by Switzerland. On the other hand, the Department of Justice believes the change unnecessarily restricts discovery from foreign litigants and has urged that the Rule not contain any language relating to foreign discovery. The Committee has made minor changes in the text of the rule and more significant changes in the Notes that, in the Committee's view, represent an appropriate balance between the competing considerations that affect foreign discovery. The proposed revision does not, however, attempt to overturn Société Nationale Industrielle Aérospatiale v. United States District Court, 482 U.S. 522 (1987), which, no doubt, is what some foreign litigants would prefer.

> Special Note: If the Committee's proposal regarding foreign discovery is disapproved, the remainder of Rule 26 need not be rejected. The last sentence of proposed Rule 26(a)(5) could be deleted, together with introductory clause to Rule 28(b). The Committee Notes would be modified for conformity with those changes.

Claims of privilege. The August 1991 published draft contains, like Rule 45 as became effective in December 1991, provisions requiring that notice be given when information is withheld on a claim of privilege or work product. Based upon suggestions made in several comments, the Advisory Committee has changed the language of the draft to make clear that the obligation to describe items withheld does not require disclosure of matters that are themselves privileged and only relates to items that are otherwise discoverable (and hence not when unreasonably burdensome requests are made).

The Advisory Committee has carefully considered the various criticisms and suggestions, as well as those

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phenomenon, albeit in a setting quite different from the small-claims class action that acts on claims that otherwise would be abandoned without litigation. There are interdependencies between the Enabling Act rules process and legislation that cannot be ignored.

Various models will be drafted "just to see what they look like." It is hoped that the specific focus provided by even a crude first attempt to anticipate some of the procedural and jurisdictional questions raised by various approaches will enrich the advice provided to the working group.

After the April and May meetings, the working group and staff will reflect on the advice gathered at the meetings and attempt to refine the initial models or develop new models. This experience may suggest the need for a third and similar meeting early in the fall. The target will be to prepare a draft report for consideration by the Advisory Committee at its fall meeting. Although it is not entirely clear what date should be viewed as the beginning and end of the one-year term of the working group, the report should be made no later than the March 4 anniversary of the first group meeting. Consideration by the Advisory Committee thus must be at a fall meeting.

Minutes approved

The Minutes for the October, 1997 meeting were approved.

Discovery

Judge Niemeyer opened discussion of the report presented by the Discovery Subcommittee. He noted that the question is whether changes can be made in discovery that will reduce cost while preserving the full information values we now enjoy. Related questions are whether we can restore a uniform national practice, particularly with respect to disclosure, and whether it is possible to elicit greater judicial involvement with discovery problems.

The Boston College conference in September, 1997, provided fine support for the developing efforts of the Discovery Subcommittee. The symposium articles and working papers will be a good resource for the future, as the conference itself has provided strong support for the subcommittee.

The subcommittee report itself is consistent with the three-level model of discovery that has been before the committee. There is initial disclosure, followed by attorney-managed discovery, within a framework that will provide for judicially managed discovery for cases that extend beyond a reasonably permissive core level of attorney-managed discovery.

The discovery discussion was then turned over to the subcommittee, led by Judge Levi and Professor Marcus.

Disclosure

Four disclosure alternatives were presented by the subcommittee.

The first alternative would retain the disclosure system adopted in 1993, but eliminate the provision that allows individual districts to opt out by local rule. This would establish national uniformity. As reflected in the subcommittee working papers, this alternative would be supported by the initial studies that find the present system effective. The Federal Judicial Center study is the most recent and detailed. On the other hand, this approach would likely encounter vigorous resistance in districts that have chosen to opt out of the national rule. An attempt to force disclosure on reluctant courts, with no more support than the tentative conclusions of early studies, could fail, leaving no disclosure system at all.

The second alternative would repeal most of the present disclosure rule, leaving only the damages and insurance disclosure provisions of Rule 26(a)(1)(C) and (D). These limited disclosures would again be made uniform by defeating the opportunity to opt out by local rule. This approach has the virtue of simplicity, and would accommodate the resistance to disclosure found in many courts.

The third alternative is the main "middle-ground" proposal. This approach would be to retain the present disclosure system and make it national, but limit the witness and document disclosure requirement to items that are in some way favorable to the disclosing party. This proposal would eliminate the "heartburn" that arises from requiring disclosure of the identity of unfavorable witnesses and documents. The model built to illustrate this alternative includes several features that probably should be added to the present rule if it is retained and made nationally uniform. One new feature is an express provision for parties who join the action after disclosure by the original parties. A second is a method of designating the exclusion of categories of cases that should not routinely be made the subjects of disclosure and the Rule 26(f) party conference. Exclusion could be accomplished either by designating categories of excluded cases in the national rule or by incorporating by reference the local district categories of cases excluded from Rule 16(b). The third reaches cases at the opposite end, allowing exemption from initial disclosure because the case is so complex or contentious that it seems more useful to proceed straight to discovery. The draft provides for exclusion by allowing any party to stall disclosure until the district court has an opportunity to review the objection as part of the Rule 26(f) process.

The final alternative is a much-reduced system that virtually eliminates disclosure by reducing it to an item to be considered by the parties at the Rule 26(f) conference. There would be initial disclosure only if the parties agree on it, a possibility that in any event is available without encouragement in the rules. Form 35 would be amended to emphasize the need to consider disclosure.

All subcommittee members agreed that the Rule 26(f) conference was a successful innovation, and should be retained whatever may be done with initial disclosure. It was suggested that Rule 26(f) provides a natural occasion for opening settlement discussions, and that the parties will exchange the information needed to support settlement whether or not there is any disclosure system.

The approach of abandoning disclosure was supported by the observation that in the real world, people know how to use discovery effectively as soon as the action is filed. A great deal of effort should be devoted to preparation and investigation before the case is filed, providing the framework within which discovery can be managed without any need for delay while the limited and relatively formal information required by Rule 26(a)(1) is exchanged. Many districts have decided to manage without disclosure, and are managing quite well. Many problems would disappear if we got rid of this initial disclosure.

In response, it was observed that there are studies indicating that initial disclosure often is a neutral force, but -- as in the FJC study results -- rather often succeeds in reducing cost or delay, or promoting settlement, or leading to better outcomes. The subcommittee as a whole thought that some form of disclosure should be retained.

The reformulated response was that the names-and-addresses-of-witnesses form of disclosure can help, but that it is not enough to justify the moratorium on discovery that was adopted to support initial disclosure. The names of witnesses and identity of documents can be obtained on first-wave discovery, and the overall discovery process will work more efficiently if there is no need to wait for several months while process is served and the Rule 26(f) conference is arranged.

The subcommittee report then made it explicit that the subcommittee's first choice is the mid-ground that requires

disclosure of information favorable to the disclosing party. This approach is, to be sure, a compromise. But it seems to work well in two districts that now have it, the Central District of California and the Northern District of Alabama. If this form of disclosure is adopted on a uniform national basis and continues to work well, it may provide the foundation for an eventual return to the 1993 disclosure system as a uniform national system.

The Rule 26(f) meeting was again hailed as the key, with the suggestion that it should be made to run with as little interference as possible. The middle ground, synthesized with Rule 26(f), is the best system. Paul Carrington's approach seems best. We should set out the things the parties must exchange, and time limits. The court should become involved only if the parties cannot do it. This alternative would include more detailed instructions on what must be accomplished at the Rule 26(f) conference.

Another approach, not recommended by the subcommittee, is to separate disclosure into separate phases, with the plaintiff making disclosure first. The defendant would follow after a suitable period, responding directly to the plaintiff's disclosures as well as to the issues framed by the pleadings. This approach could support much more detailed disclosures than can be made with simultaneous exchanges based on notice pleadings. The District of South Carolina standing interrogatory approach provides an illustration. It was asked why the subcommittee has not recommended this approach. The subcommittee response was that most cases now have minimal discovery. And in most cases what discovery there is works well. The prospect of forcing detailed discovery of the sort reflected in the South Carolina interrogatories on all cases seems unattractive. They cover more ground than seems likely to be covered in most cases now, and more than is likely to be needed in most cases.

The South Carolina standing interrogatories approach suggests a different possibility, that of drafting pattern discovery requests for complex cases in specific subject areas. Allen Black and Robert Heim are working on an illustrative set for antitrust cases to help measure whether this task is feasible. If promising results emerge, the subcommittee will want to consider the means for generating pattern discovery systems and for advancing them to the world.

Disclosure could be sequenced in waves without adopting the South Carolina interrogatories. Sequencing, however, increases the number of conflict points. It also encourages those who go next to protest that those who went first did not fulfill the disclosure obligation and that this excuses their own failure to respond or sketchy responses.

The need for disclosure was then championed as a prop for the Rule 26(f) conference. Knowing that disclosure will be required soon after the conference encourages preparation for the conference. The mid-ground that requires disclosure of favorable information was supported on the related ground that if the conference does not lead to settlement, the parties know that the disclosures will be followed immediately by discovery demands for unfavorable information.

Brief mention was made of the subcommittee's review of (a)(2) expert-witness disclosure and (a)(3) pretrial disclosure. The subcommittee believes they should be retained. They now are national rules without the opportunity to opt out by local rule that is available for (a)(1) initial disclosure. Some districts, to be sure, have adopted local rules that purport to opt out of these disclosure requirements. The local rules are not consistent with the national rule and appear invalid.

A question was asked as to the strength of the positive responses to disclosure experience. Is it simply a matter that lawyers think they can live with the present (a)(1) system, or that it actually accomplishes real benefits? The FJC study seems encouraging, but is it enough?

The mid-ground proposal discussion then turned to the means of excluding "low-end" cases from the obligation to disclose even favorable information. One possibility studied by the subcommittee but not advanced for further discussion would be delegation to the Judicial Conference. Disclosure would be required in all cases except those excluded by resolution of the Judicial Conference. The possible advantage of this approach is that it would allow more flexible adaptation of the exemption list to changing experience, free from the lengthy Enabling Act process. It was concluded, however, that this advantage also is the vice of this technique. This matter is too much part of the procedure rules to be delegated out of the deliberately thorough Enabling Act process.

A variation on the subcommittee proposal would be to list some excluded categories of cases, in the manner of the list of affirmative defenses in Rule 8(c), with a concluding catch-all equivalent to the Rule 8(c) "and any other matter constituting an avoidance or affirmative defense." It was quickly concluded that this approach would provide more confusion than guidance. It was pointed out that the FJC discovery study sought to exclude cases that typically have little or no discovery, and by adopting half a dozen excluded categories eliminated more than half the cases on a typical docket. It should be possible to adopt a specific list of eight or ten or twelve categories that will exclude a great share of the cases that ought not be subject to the burdens of even limited, favorable-information disclosure.

One additional safety valve is provided by the opportunity of the parties to agree that disclosure is not appropriate. Rule 26(a)(1) now allows the parties to stipulate out of disclosure, and this provision will be retained. The Rule 26(f) conference, in addition, provides the natural focus for agreeing to exclude disclosure when it seems redundant or unnecessary.

The alternative middle ground, which would essentially eliminate witness and document disclosure but leave agreement on such disclosure as an explicit topic for the Rule 26(f) conference was noted briefly. It was provided as an alternative to the "favorable information" disclosure, but without strong support.

Turning to the "high-end" exclusion, it was asked whether there was a risk that obstructionist parties would overuse the opportunity to stall disclosure by objecting. The draft Committee Note attempts to deal with this by discussing the nature of the cases that might make disclosure inappropriate. As an illustration, the draft suggests that disclosure may properly be deferred pending disposition of motions challenging the court's jurisdiction. The draft raises the question whether deferral also may be appropriate pending decision of dispositive motions, particularly those addressed to the pleadings. This sort of question is something that can be worked out in generating the next draft.

The subcommittee's support for the mid-ground approach was reiterated. There are some challenging drafting problems, but they are not so great as to defeat the enterprise. Disclosure in some form should be retained, and made uniform on a national basis.

It was asked whether trial judges would encounter substantial burdens in administering the distinction between favorable and not favorable information. Thomas Willging responded that in studying the two districts that take this approach to disclosure, the FJC found that attorneys spend less time with the court, and more time meeting and conferring with each other. It seems to work. But this information does not address the prospect that claimed failures to disclose will become issues at trial. At the same time, limiting the disclosure requirement to favorable information provides a much more natural and effective base for the exclusion sanction at trial. The threat of exclusion does not work well as to information a party does not want to use at trial, but should work well as to information a party does want to use.

Professor Carrington observed that the 1991 committee would say that the mid-ground proposal goes in the right

direction. During the deliberations then, disclosure was not limited to favorable information because of the expectation that favorable-information disclosure would inevitably be followed by discovery demands for unfavorable information. But in the setting of adopting a truly national rule, the recommendation is a politic step. There is no virtue in the local option, which was added to the 1993 amendments from a sense of compulsion arising from the variety of practices that had proliferated under the Civil Justice Reform Act. There are enough virtues in disclosure to support adoption of a uniform national rule.

The committee voted unanimously to adopt the favorable-information approach to disclosure, and to work further on the details.

Work on the details must be done expeditiously after the committee has gone as far as can be done in full meeting to establish the general directions. The Style Subcommittee must be allowed time to review the drafts, and then the full Advisory Committee must review them. A report to the Standing Committee must be prepared by mid-May.

The first detailed drafting question is how to describe "favorable information." Those words will not do the job; too much information is potentially favorable or unfavorable to any given position. Three alternatives were considered: (1) "information that tends to support the positions that the disclosing party has taken or is reasonably likely to take in the action"; (2) "information that the disclosing party may use to support its positions in the action"; and (3) "information upon which the party bases its claims, prayer for damages or other relief, denials, or defenses in the action." Difficulties can be imagined in each formulation, and offsetting advantages.

The "may use" formulation was supported on the ground that it ties directly to the incentive to disclose, and best describes to all parties the disclosure obligation. The subcommittee recommended -- with the support of the committee -- that the duty to supplement disclosures imposed by Rule 26(e)(1) be retained. A party can easily understand and implement the duty to disclose the names of witnesses and identity of documents it may want to use at trial. It can as easily understand and implement its freedom to fail to identify the material -- which may amount to warehouses full of documents -- that it does not want to use at trial. As trial preparation proceeds, the disclosure obligation can be supplemented easily and naturally. There is no real risk that a party can avoid the duty to supplement by arguing that it did not know at the time of the initial disclosure that it might want to use information it later decided to use.

The formulation that addresses information on which a party bases its claims, denials, or defenses was supported on the ground that "bases" implies that the information is significant. The information need not be everything that the party may want to use at trial; this formulation narrows the obligation of initial disclosure. In particular, it avoids the need to identify witnesses or documents that will be used only for impeachment purposes.

Discussion of the draft drawn from information on which claims are based quickly concluded that whatever approach is taken, there is no need to refer to the "prayer for damages or other relief." Damages and relief are part of the claim, and the disclosure requirement of Rule 26(a)(1)(C), which will be continued under all proposals, will catch up most of the damages element as a double precaution.

An initial expression of preferences canvassed four possible descriptions of disclosure information: "tends to support" got one vote. "Supports" got three votes. "May use to support" got three votes. "Upon which bases" got four votes. Further discussion led to further endorsements for "supports." It was urged that this term fits the time of initial disclosure, a time when the parties do not know what they may want to use at trial. "We want to know what you know will support your positions." "Supports" clearly signals the intention to exclude an obligation to disclose unfavorable information. "May," in the "may use" formulation, is equivocal. And "positions," in any of the

formulations, is too broad. "May use" again was endorsed because it provides the focus for enforcement by exclusion at trial. It is an essential qualifier, because a party may not know with certainty what it will use. And "use" avoids the ambiguity of "supports," since the same information may both support and undermine a position -- many a witness has both supporting and undercutting information, as does many a document. And parties will disclose more than they will with "supports."

The next vote provided 7 votes for "supports claims, denials, or defenses," no votes for the "bases" formulation, and 4 votes for "may use to support the disclosing party's claims, denials, or defenses." It was decided to adopt the "supports" formulation, most likely to be rendered as "discoverable information supporting the claims, denials, or defenses of the disclosing party."

With disclosure limited to supporting information, attention turned to the limitation in present (a)(1)(A) and (B) that witnesses and documents need be identified only as relevant "to disputed facts alleged with particularity in the pleadings." This limit was introduced to the disclosure provision because notice pleading often makes it very difficult for an opposing party to know the contours of the case as it will emerge from discovery. The whole design of the 1938 system, indeed, was to transfer much of the information exchange between the parties from pleading to discovery. Contention interrogatories, requests for admission, and Rule 16 practice have developed over the years to augment the subordination of pleading even as to identification of the legal issues. But this concern is greatly reduced when the nature of disclosure is reduced to disclosure of information supporting the claims, denials, or defenses of the disclosing party. The disclosing party presumably knows at the time of disclosure what its positions will be, and is obliged to supplement its disclosure as it perfects its understanding of its own positions. Nor is it simply that there is no apparent reason for continuing this limitation. A major reason for adopting it was the hope that it would encourage each party to plead with greater particularity so as to enhance the disclosure obligation imposed on its adversaries. With disclosure changed to supporting witnesses and documents only, the limitation would encourage each party -- and perhaps most especially the plaintiff -- to plead in broad terms so that it has no disclosure obligation. The committee voted 9 to 2 to delete the words that limit disclosure to disputed facts pleaded with particularity.

Discussion next turned to the draft designed to relieve the parties of the disclosure obligation in "high-end" cases that are better handled through court-managed discovery. The draft Rule 26(a)(1)(E) provides for disclosure with 10 days [later changed to 14 days] after the Rule 26(f) meeting "unless a party contends that initial disclosure is inappropriate in the circumstances of the action, in which event disclosure need not be made until 10 [later changed to 14] days after the initial scheduling order is entered by the court pursuant to Rule 16(b)." The effect would be that disclosure occurs if all parties want it, and -- under the "unless otherwise stipulated" language carried over from the current rule -- does not happen if all parties agree to dispense with it.

It was asked whether language should be included to identify "complex or class actions" as inappropriate for disclosure. The subcommittee responded that this possibility had been considered because it is indeed the complex cases that today are routinely exempted from disclosure in favor of judicial discovery management. Anecdotal experience suggests strongly that disclosure is inappropriate in such cases. But all of the studies suggest that it is not possible to define "complex" cases by subject-matter or other criteria.

Further discussion of drafting alternatives led to adoption of this formulation:

These initial disclosures must be made at or within 14 days after the subdivision (f) meeting of the parties unless otherwise stipulated or directed by the court. If a party objects before this time that initial disclosures are not appropriate in the circumstances of the action, the court must determine what disclosures -- if any -- are to be made, and direct that any disclosures be made no earlier than 14 days after entry of the initial scheduling order

under Rule 16(b).

The next set of problems arises from the failure of the present rule to address the disclosure obligation of parties who join the action after the time for initial disclosures. The Rule 26(e)(1) duty to supplement does not reach later-added parties because it applies only to a party who has made a disclosure. The proposed draft, also part of proposed 26(a)(1)(E), would provide that: "Any party not served at the time of the meeting of the parties under subdivision (f) shall make these disclosures within 30 days after the date on which the party first appears in the action unless otherwise stipulated or ordered by the court, or unless the disclosure obligation has been excused for other parties by stipulation or order." Difficulties in this formulation were recognized. The reference to a party "served" seems to overlook those who join by intervention, plaintiffs added by amendment of the complaint, and perhaps others. The reference to a person not a party "at the time of the meeting of the parties" seems to fit awkwardly with those who become parties immediately before the meeting. It was agreed that the problem of later-added parties should be addressed, and that these apparent drafting glitches should be worked out. The resolution may look something like this: "A person who becomes a party after the eleventh day before the subdivision (f) meeting of the parties must make these disclosures within 30 days after becoming a party unless otherwise stipulated or ordered by the court, or unless the disclosure obligation has been excused for other parties by stipulation or order."

A question not raised by the subcommittee was presented by the question whether disclosure should occur before the Rule 26(f) meeting. Paul Carrington noted that this had been the initial thought of the committee when Rule 26(f) was rewritten for 1993, but that it had been concluded that the meeting is necessary to make disclosure effective. The need may be reduced to some extent by the proposed retrenchment of disclosure to supporting information. But even under this reduced disclosure system, the meeting may well serve to focus the positions -- the claims, denials, and defenses -- of the parties. It was suggested that perhaps the note to the amended Rule 26(f) should suggest that disclosure before the meeting is desirable. But it was responded that even if that would be desirable in an ideal world, the meeting is where arrangements particular to the case are made. Disclosure may not be important to what actually is done. And the committee was reminded that Rule 26(f) seems widely regarded as the most useful of the 1993 discovery changes -- and there have not been any complaints that it would be improved by requiring disclosure before the meeting. The meeting "breaks the ice." Disclosure often occurs at the meeting. The committee agreed that no change should be made.

Another question not raised by the subcommittee was identified in the timing provisions of Rule 26(f). It sets the meeting at least 14 days before a scheduling conference is held or a scheduling order is due under Rule 16(b). It requires a report to the court "within 10 days after the meeting." Because of Rule 6(a), "intermediate Saturdays, Sundays, and legal holidays" are excluded from the 10-day period. With a three-day legal holiday weekend, it is possible that the report will be due one day after the scheduling conference or order (the intermediate weekend and holidays are not excluded from a 14-day period). The need to have the report due in time to allow consideration before the conference has led one member to routinely order that the Rule 26(f) conference be held within 30 days after an answer is filed; the report is to be filed 14 days after the meeting. The Rule 16(b) conference follows the report unless the parties do not want the conference -- and most often the parties work things out at the meeting. It might be desirable to adopt an idea suggested by Paul Carrington, setting the meeting within 90 days after a defendant is served.

Renewed discussion of the 26(f) time limits agreed that it is not desirable to have the report of the meeting presented to the court for the first time at the scheduling conference. It was agreed that the time for the meeting should be set at 21 days, rather than the present 14 days, before the scheduling conference or order. The time for the report of the meeting also should be changed, to 14 days after the meeting. This change will coincide with the change to Rule 26(a)(1)(E) that sets the time for disclosure at 14 days after the Rule 26(f) meeting, and -- in part

by moving outside the Rule 6(a) rules for calculating periods of less than 11 days -- set a clear date one week before the scheduling conference. This sequence will allow the parties to focus on a common deadline for disclosures and report, and will ensure adequate time for the court's consideration of the report.

Other Rule 26(f) matters also were raised. The subcommittee report had not suggested any exclusions, but its recommendation to delete the power to adopt exclusions by local rule is accepted by the committee. That leaves a need to provide for exclusion in low-end cases. It was noted at the Boston College conference that the meet-and-confer requirement is an unnecessary burden in many simple cases, simply one more useless hoop to jump through. The committee agreed that Rule 26(f) should be modified to incorporate the same low-end exclusions as are adopted for initial disclosures under Rule 26(a)(1). The court will continue to have discretion to exclude other cases.

The final Rule 26(f) question is posed by the language requiring that the parties "meet to discuss," and making them responsible for "being present or represented at the meeting." The 1993 Committee Note states that the rule requires a face-to-face meeting. This obligation ordinarily is reasonable in dense urban areas, but may impose untoward burdens in large and sparsely populated districts. The present power to exempt cases by local rules enables each district to take account of its own circumstances and adopt mollifying exemptions -- one example was offered of a rule that allows a telephone meeting when any attorney is located more than 100 miles from the court. Removal of the option to have local rules requires that this issue be reconsidered for the national rules. There are great advantages in a face-to-face meeting that cannot be duplicated by telephone, and are not likely soon to be duplicated by videoconferencing. It might be possible to adopt a compromise rule that seeks to preserve these advantages by requiring the parties to "confer in person if geographically practicable." Potential administrative difficulties, however, persuaded the committee to agree without dissent to change the "meet" requirement to a "confer" requirement.

The topic of low-end exclusions from disclosure and the Rule 26(f) meeting returned. With the help of the Federal Judicial Center, a survey of exclusions adopted by local rules shows an astonishing array of categories of cases that have been excluded in at least one district. Some of the exclusions are unique, and a few are inscrutable. Some are fairly common, and some are almost universal. The effort must be directed toward identifying common categories of actions that typically will not benefit from disclosure or a Rule 26(f) meeting because typically there is little or no occasion for discovery. A first rough estimate includes at least these cases: bankruptcy appeals; bankruptcy matters withdrawn from the bankruptcy court (see § 157(d)); actions for review on an administrative record; social security review cases; prisoner pro se cases; habeas corpus; actions challenging conditions of institutional confinement (perhaps unnecessary if prisoner pro se cases are excluded, particularly since complex actions needing discovery are brought under the Civil Rights of Institutionalized Persons Act); actions to enforce or quash administrative summonses or subpoenas; other Internal Revenue Service actions; government collection actions; civil forfeiture proceedings; student loan collections (perhaps only those below $75,000); proceedings ancillary to proceedings in other courts -- as for discovery or to register or enforce a judgment; and actions to enforce arbitral awards. Further thought will be given to which of these categories may make most sense, and the Administrative Office will be asked for help in developing formulas that accurately describe the intended categories. It was agreed that it would be unwise to exclude all pro se cases; the disclosure requirement can prove especially useful in focusing some pro se actions.

Scope of Discovery

The subcommittee reminded the committee that a major impetus for the present discovery project was the recommendation of the American College of Lawyers that the committee adopt the discovery scope limitation first advanced by the American Bar Association Litigation Section in 1977. The subcommittee brought three

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An alternate dispute resolution bill was enacted, requiring that every court have some type of ADR system. The choice of ADR systems is left to local rule; the Administrative Office worked with Congress to improve the provisions invoking the local rulemaking power.

Class-action bills have been introduced. They bear directly on class-action practice, removal of class actions from state court, and other matters. Civil Rule 11 would be restructured for class actions by at least one bill. It is likely that many of these bills will reappear.

Offer-of-judgment proposals have been perennial topics of Congressional attention, and seem likely to return.

Report on Standing Committee

Judge Niemeyer reported on the consideration of Civil Rules proposals at the June meeting of the Standing Committee. Discussion of the proposals to publish discovery rules amendments for comment went rather well. There was less enthusiastic support for some of the proposals than for others. It is clear that the vote to approve publication does not represent a commitment by the Standing Committee to recommend adoption of any proposal that emerges unscathed from the public comment process. The Standing Committee did direct a change in proposed Rule 5(d). As proposed by the Advisory Committee, the rule would provide that discovery materials "need not be filed" until used in the action. The Standing Committee directed that the proposal be that the materials "must not be filed" until used in the action. Discussion of the change was rather cursory; it may be that after public comment and testimony, the Advisory Committee should consider whether a strong case can be made for returning to the "need not" formulation.

The proposed one-day, seven-hour limit for depositions was approved for publication by the narrowest margin, a vote of 6 for to 4 against. The reasons for concern are summarized in the draft Standing Committee minutes at pages 27 to 28. There is concern that the limit will not work well, particularly in multiparty cases. There has been favorable experience, however, with an Arizona rule that sets a presumptive 3-hour time limit for depositions. The proposal was made by the Advisory Committee in part because of the complaints of plaintiffs that deposition practice in some courts is being used to impose unwarranted, and at times unbearable, costs. Mr. Schreiber observed that he continues to believe that it would be desirable to supplement the one-day limit with a requirement that documents be exchanged before the deposition. This practice would facilitate the best use of the limited time. There also is concern about the provision that requires consent of the deponent for a stipulated extension of time; deponent consent may become a problem when the deponent is a party, or a person designated to testify for an organization party under Civil Rule 30(b)(6).

The progress of the Mass Torts Working Group also was reported to the Standing Committee.

The Standing Committee also approved publication of proposed amendments to Civil Rules 4 and 12, dealing with actions brought against United States employees in their individual capacities, and to Admiralty Rules B, C, and E.

Discovery

A number of proposed discovery rule amendments were published for comment last August. Hearings will be held in Baltimore in December, and in San Francisco and Chicago in January. The development of these proposals was reviewed, in part for the benefit of new Committee members and in part to inform all Committee members of the steps that were taken by the Discovery Subcommittee to implement the decisions made at the

March Committee meeting.

Judge Niemeyer began the discussion by noting that the discovery effort had been as streamlined as seems possible for a big project. From the beginning, the question has been whether we can get pretty much the same exchange of information at lower cost. After the undertaking was launched by appointing the Discovery Subcommittee, the first step was a January, 1997 meeting with experienced lawyers, judges, and academics. This meeting gave some sense of the areas in which it may be possible to improve on present discovery practice without forcing sacrifice of some recognizable sets of interests for the benefit of other recognizable sets of interests. This small conference was followed by a large-scale conference at Boston College in September, 1997. The conference was designed to provide expression of every point of view, and succeeded in this ambition. In addition to the information gathered at these conferences, empirical work was reviewed. The RAND data on experience under local Civil Justice Reform Act plans were studied, and the Federal Judicial Center undertook a new survey for Committee use. The FJC data proved very interesting. The data, in line with earlier studies, show that discovery is not used at all in a substantial fraction of federal civil actions, and that in more than 80% of federal civil actions discovery is not perceived to be a problem.

The Subcommittee compiled a list of nearly forty discovery proposals for consideration by the Committee. The Committee chose the most promising proposals and asked the Subcommittee to refine these proposals for consideration at the March, 1998 meeting. The refined proposals were further modified at the March meeting, with directions to the Subcommittee to make further changes. The proposals presented to the Standing Committee in June conformed to the Committee's actions and directions. Approval for publication, it must remembered, does not represent unqualified Standing Committee endorsement of the proposals. Even apart from the lessons to be learned from public comments and testimony, the Standing Committee expressed reservations that must be addressed if this Committee recommends adoption of any of the proposals.

Professor Marcus then provided a detailed review of the published proposals and their origins. The Discovery Subcommittee met in San Francisco in April, in conjunction with a conference held by the Judicial Conference Mass Torts Working Group. The revised discovery proposals were then circulated to the full Committee, and the Committee reactions were incorporated in the set of proposals approved by the Standing Committee.

Some preliminary reactions were provided by an ABA Litigation Section Panel during the August annual meeting. The first small set of written comments are starting to come in, including an analysis by the New York State Bar Association that runs more than forty pages. The topics that most deserve summary reminders and updating at this meeting include uniformity; disclosure; the scope of discovery; cost-sharing; and the duration of depositions. These are the topics that are most likely to provoke extensive public comments.

Uniformity. The local rule opt-out provision built into Rule 26(a)(1) in 1993 was not intended to endure for many years. The published proposal deletes the opt-out provision, and indeed proposes to prohibit local rules variations on discovery topics other than the number of Rule 36 requests to admit and the Rule 26(f) "conference" requirement. The proposed Committee Notes contain strong language invalidating local rules that are inconsistent with present and proposed national rules.

There is likely to be much comment about the need for national uniformity as against the value of local rules. Many district judges are strongly attached to their local rules. Some local rules, indeed, may provide practices that are more effective than present or proposed national practices. The strength of the desire for local autonomy is reflected by local rules that purport to opt out of portions of Rule 26(a) that do not authorize local rule departures.

Local rules, however, undercut the national rules regime. They also complicate the handling of cases that are transferred between districts that adhere to different practices. And local rules even complicate life for judges who are assigned to cases in districts away from home.

Disclosure. The disclosure obligations set out in Rule 26(a)(1)(A) and (B) were discussed extensively during the Subcommittee and Committee deliberations. The eventual recommendation limits the disclosure requirement to "supporting" information, not because of any direct ground for dissatisfaction with the 1993 rule but because of the desire to achieve a uniform national practice. Uniform adherence in all districts to the 1993 rule does not seem achievable now. The question remains whether this retrenchment is appropriate. The proposal proved popular at the August ABA Litigation Section meeting. Disclosure is described as information that supports the disclosing party's claims or defenses, drawing from the phrase used to define the scope of discovery. Some uncertainty was expressed at the Standing Committee meeting as to the reach of this phrase -- does it require disclosure of information that will support a party's efforts to controvert a defense? This issue may need to be addressed.

A minority drafting view won significant support in Committee deliberations, and has been pointed out in Judge Niemeyer's memorandum to Judge Stotler inviting public comment, on page 8 of the publication book. This drafting view would require disclosure of information that "may be used to support" the claims or defenses of the disclosing party. This issue should be kept in mind during the comment process and subsequent deliberations.

Proposed Rule 26(a)(1)(E) seeks to address arguments that disclosure is appropriate only in a middle run of litigation. It is too much to ask in "small" cases, and superfluous in complex or hotly contested cases. The approach taken to the complex cases is to allow any party to postpone disclosure by objecting to the process, forcing determination by the court whether disclosure is appropriate for the case. The alternative of attempting to define complex or contentious cases by rule was thought unattractive. The approach for small cases became known as the "low-end" exclusion. It was readily agreed that disclosure often is unsuitable for cases that would not involve discovery in the ordinary course of litigation. The drafting approach has been to attempt to identify categories of cases in which discovery is unlikely and in which disclosure often would be unnecessary work. Inspiration was sought in local rules that identify categories of cases excluded from Rule 16(b) requirements, but the inspiration was mixed -- there are only a few categories of cases that are excluded by many local rules, and there are many categories of cases that are excluded by one local rule or a small number of local rules. After the March meeting, a list of 10 categories was prepared. At the Standing Committee meeting, however, the Bankruptcy Rules Advisory Committee pointed out flaws in two categories aimed at bankruptcy proceedings even before the discussion began. These two categories were withdrawn; the published draft excludes eight categories of cases. These categories are avowedly tentative -- advice is sought on whether all of these cases should be excluded, whether other categories of cases should be excluded, and whether the words used to describe the excluded cases are appropriate. A preliminary review by Federal Judicial Center staff suggests that the proposed list would exclude about 30% of federal civil actions. The exemptions carry over, excepting the same cases from the Rule 26(f) party conference requirement and the Rule 26(d) discovery moratorium.

It was pointed out that the published proposals do not revise Rule 16(b), leaving in place the provision that authorizes local rules that exempt categories of cases from Rule 16(b) requirements. It was recognized that Rule 16(b) could be tied in to the same approach, identifying categories of cases to be excluded. But it is too late to graft this approach onto the current proposals -- separate publication of a Rule 16(b) proposal would be required. And it also is a question whether there is a need for national uniformity in this area that parallels the perceived need for uniformity in disclosure practice. The wide variation that exists among local exemption rules today also may suggest grounds for going slow. It also was observed that it would be risky to go the other way, adopting local Rule 16(b) exclusions into disclosure practice -- districts opposed to disclosure might adopt Rule 16(b) exclusions for the purpose of defeating disclosure.

Returning to the exclusion of "high-end" cases, it was noted that any case can be excluded from disclosure on stipulation of all the parties. It cannot be predicted what fraction of all federal cases may be excluded either by party stipulation or by the process of objection and eventual court order.

Rule 26(a)(1)(E) also would address, for the first time, the problem of late-added parties. An attempt was made to draft detailed provisions for this problem, but the drafting exercise identified too many problems to permit sensible resolution by uniform rule. The published proposal is deliberately open-ended and flexible.

Finally, some early reactions to the broad disclosure proposal were reported. The New York State Bar Association wants a uniform national rule, but a rule of no disclosure at all. A Magistrate Judges group, on the other hand, has urged continuation of the full present disclosure practice, including "heartburn" information that harms the position of the disclosing party.

Rule 26(b)(1) Scope of Discovery. A Committee Note has been written to explain the proposal. The goal is to win involvement of the court when discovery becomes a problem that the lawyers cannot manage on their own. The present full scope of discovery remains available, as all matters relevant to the subject matter of the litigation, either when the parties agree or when a recalcitrant party is overruled by the court. Absent court order, discovery is limited to matters relevant to the claims or defenses of the parties. No one is entirely clear on the breadth of the gap between information relevant to the claims and defenses of the parties and information relevant to the subject matter of the action, but the very juxtaposition makes it clear that there is a reduction in the scope of discovery available as a matter of right. There have been some preliminary responses to this proposal. One is that simply because it is a change, it will generate litigation over the meaning of the change. Another, from the New York State Bar Association, applauds the proposal, but urges that the Committee Note state that it is a clear change. And the concept of "good cause" for resorting to "subject-matter" discovery is thought too vague.

Committee discussion urged that the Note not belittle the nature of the change -- this is a significant proposal. But it was urged that the draft Note in fact is strict. Another observation was that any defendant will move that discovery is too broad; the proposal, if adopted, will generate a "huge load of motion practice." Together with the cost-bearing proposal [more accurately called cost-shifting, on this view], thousands of motions will be generated.

Cost-bearing. The published Rule 34(b) language was drafted after the March meeting, in response to deserved dissatisfaction with the proposals offered there. At the Standing Committee meeting, it was asked whether the proposed language adequately describes the intent to apply cost-bearing only as an implementation of Rule 26(b)(2) principles -- whether cost-bearing could be ordered as to discovery that would be permitted to proceed under present applications of (b)(2) principles. The problem of drafting Rule 34 language, indeed the general problem of incorporating this provision specifically in Rule 34, joined with policy doubts to suggest reconsideration of the question whether cost-bearing would better be incorporated directly in Rule 26(b)(2). There was extensive debate of this question at the April Subcommittee meeting, leading to a close division of views. The Rule 26(b)(2) approach would have at least two advantages in addition to better drafting. The Reporters believe that Rule 26(b)(2) and Rule 26(c) now authorize cost-bearing orders; incorporation in Rule 26(b)(2) would quash the doubts that might arise by implication from location in Rule 34. In addition, it is important to emphasize that the cost-bearing principle can be applied in favor of plaintiffs as well as in favor of defendants; there is a risk that location in Rule 34 will stir questions whether the proposal is aimed to help defendants in light of the fact that defendants complain of document production, while plaintiffs tend to complain more of deposition practice. This question is raised in Judge Niemeyer's letter to Judge Stotler, at pages 14 to 15 of the publication book.

It was observed that the arguments for relocation of the cost-bearing provision in Rule 26(b)(2) are strong. The Committee should feel free to consider the matter further in light of the views that may emerge from the public comments and testimony.

An important question was raised at the Standing Committee meeting that may deserve a drafting response. After a court allows discovery on condition that the requesting party pay the costs of responding, the response may provide vitally important information that belies the court's initial prediction that the request was so tenuous that the requesting party should bear the response costs. Should the rule provide a clear answer whether the cost-bearing order can be overturned in light of the value of the information provided in response?

The New York State Bar Association opposes this proposal because it agrees that the intended authority already exists. Adoption of an explicit rule will lead some litigants to contend for -- and perhaps win -- a broader sweep of cost-sharing than is intended.

Some preference was expressed for leaving the proposed amendment in Rule 34. This view was that "there is too much in Rule 26" now; "no one reads all of Rule 26." The most important source of the most extravagantly expensive over-discovery is document production. The explicit cost-bearing protection should be expressed in Rule 34.

It also was noted that at the Standing Committee meeting, it had been urged that if the target is the complex or "big documents" case, the rule should be drafted expressly in terms of complex cases. It also was feared that the proposal will create a "rich-poor" issue: there will be a marked effect on civil rights and employment cases, where poor plaintiffs will be denied necessary discovery because neither they nor their lawyers can afford to pay for response costs. There have been few cost-bearing orders in the past; no matter what the rule intends, it will be difficult to convince lawyers that they can continue to afford to bring these cases. They will fear that cost-bearing will be ordered in cases where discovery is now allowed.

These concerns were met by responses that Rule 26(b)(2) now says that the court shall deny disproportionate discovery; the cost-bearing provision simply confirms a less drastic alternative that allows access to otherwise prohibited discovery. No one is required to pay for anything; it is only that if you want to force responses to discovery requests that violate Rule 26(b)(2) limits, you can at times obtain discovery by agreeing to pay the costs of responding. All reasonable discovery will be permitted without interference, as it now is under Rule 26(b)(2). Rule 26(b)(2) principles expressly include consideration of the parties' resources; there is no reason to anticipate that poor litigants will be put at an unfair disadvantage. And it has proved not feasible, even after some effort, to define "big," "complex," or "contentious" cases in terms that would make for administrable rules.

Deposition Length. The proposal is to establish a presumptive limit of one business day of seven hours for a deposition. The most frequently expressed concern is that this proposal will prove too rigid, and by its rigidity will promote stalling tactics. The Standing Committee also expressed concern over allocation of the time in multiparty cases; perhaps the Committee Note should be revised to address this concern. The proposal also requires consent of the deponent as well as the parties for an extension by consent without court order. The Committee may well not have thought hard enough about the requirement of deponent consent for cases in which the deponent is a party; perhaps further thought should be given to requiring deponent consent only when the deponent is not a party. It also might be desirable to amend the Note to express general approval of the practice of submitting documents to the deponent before the deposition occurs, so as to save time during the deposition. Among early comments, the New York State Bar Association opposes this proposal for fear that it will promote undesirable behavior at depositions.

Other Matters. Rule 26(f) would be amended to delete the requirement of a face-to-face meeting; recognizing the great values of a face-to-face meeting, however, provision has been made for local rules that require the meeting. The draft Committee Note emphasizes the success of present practice, but recognizes that some districts may be so geographically extended that face-to-face meetings cannot realistically be required in every case.

This Committee recommended publication of a draft Rule 5(d) that would have provided that discovery materials "need not" be filed until used in the action or ordered by the court. The Standing Committee changed the provision, so that the rule published for comment provides that discovery materials "must not" be filed until used in the action or ordered by the court. The discussion in the Standing Committee did not focus special attention on the public access debate that met a similar proposal in 1980. Depending on the force of public comments and testimony on the published proposal, the Advisory Committee may wish to urge reconsideration of this issue.

It was asked in the Standing Committee whether there had been a "judicial impact study" of the proposed amendments. The amendments are designed to encourage -- and perhaps force -- greater participation in discovery matters by the substantial minority of federal judges who may not provide as much supervision as required to police the lawyers who appear before them. But it is not clear whether these judges in fact have time to devote to discovery supervision. It also was asked why the rules should be changed for all cases, if fewer than 20% of the cases are causing the problems. In considering this question, it should be remembered that it is difficult to draft rules only for "problem" cases. And it also should be remembered that figures that refer only to percentages of all cases in federal courts are misleading. There is no discovery at all in a significant fraction of cases, and only modest discovery in another substantial number of cases. Rules changes that nominally apply to all cases are not likely to affect these cases in any event. Lawyers perceive significant problems in a large portion of the cases that have active discovery. It is worthwhile to attempt to reach these cases.

It was suggested that if possible, it would be useful to acquire information -- including anecdotal information, if as seems likely nothing rigorous is available -- about the experiences in Arizona and Illinois with rules that limit the time for depositions. And it was predicted that one effect of deposition time limits will be that documents are exchanged before the litigation, even though there is no express requirement. And even without an express requirement that a deponent read the documents provided, failure to read them will provide a strong justification for an order directing extra time. The potential problems are likely to be sorted out in practice by most lawyers in most cases.

It was noted that discovery is likely to be the central focus of the agenda for the spring meeting.

Mass Tort Working Group

Judge Niemeyer noted that class actions have been on the Advisory Committee agenda since 1991. The Rule 23 proposals published in 1996 generated many enlightening comments that addressed mass torts among other topics. The problems identified by the comments were far-reaching, and often seemed to call for answers that are beyond the reach of the Enabling Act process. The Committee found so many puzzles that it recommended present adoption only for the interlocutory appeal provision that is about to take effect as new Rule 23(f).

The Judicial Conference independently began to consider appointment of a "blue ribbon" committee on mass torts. An entirely independent committee seemed likely to duplicate work already done by the Advisory Committee. It was suggested that the best approach would be to establish a cooperative process among the several Judicial Conference committees that might be interested in the mass torts phenomenon. An initial recommendation was made to establish a formal task-force across committee lines. The Chief Justice reacted to

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in Rule 30(f)(1).

Another protest was that a lawyer cannot lose or destroy documents during a litigation. The Note, in attempting to address this issue in incomplete terms, will lead to mischief. There is a risk that the Note language will be read to narrow the duty that presently exists. We just do not need this language; both sides have discovery material, and all parties recognize the need and obligation to preserve it.

An alternative suggestion was that the Note could refer to the duty to preserve discovery materials indirectly by stating that the prohibition on filing does not alter the responsibility to preserve.

On the question whether to add lines 271 to 282 of the Subcommittee Memorandum to the Rule 5(d) note, it was decided unanimously not to add this material.

Rule 26(a)(1): "May use" formulation. After extensive discussion at the March, 1998 meeting, it was decided to frame the revised initial disclosure provisions of Rule 26(a)(1) to require a party to disclose witnesses and documents "supporting its claims or defenses, unless solely for impeachment." The alternative formulation called for a party to disclose information it "may use to support its claims or defenses, unless solely for impeachment." In publishing the Rule 26(a)(1) proposal, the alternative formulation was identified for comment. There was little comment.

The choice between "supporting" and "may use to support" divided the committee by a margin of 7 to 4 in 1998. The Subcommittee has reconsidered the question, and concluded to submit the issue to the committee without recommendation. Because there is no Subcommittee recommendation, the question whether to depart from the earlier vote and from the published version was opened without a motion. A motion was then made to change to the "may use" formulation.

The arguments for the competing proposals were set out at some length in summaries by the Reporter and the Special Reporter, appearing at pages 11 to 21 of the Subcommittee Memorandum. The Reporter and Special Reporter presented these arguments in condensed form. The supporting memoranda are set out as Appendix A to these Minutes.

Committee discussion began with an expression of concern about the cost of extensive disclosure. The "supporting" approach requires disclosure of information that the disclosing party has no intention to use, requires investigation to unearth supporting information that the party would not undertake for its own purposes, and may require disclosure of witnesses or documents that in any way involve supporting information even though the balance is heavily unfavorable to the disclosing party. An example was offered of an automobile design developed from 1985, first produced in 1990, and embodied in a vehicle sold in 1995 that was involved

in a 1997 accident. Information about all of these matters will be used, and is properly disclosed. Information about events in 1955 that might seem to support the continuing evolution of automobile design would not be sought out or used, and should not be subject to a disclosure requirement.

An alternative view was that the narrower version is better, but that it is not clear whether "supporting" is broader or narrower than "may use." The committee should adopt the language that is narrower, less open-ended. We should focus on material that a party actually intends, at the time of disclosure, to use at trial. It was responded that "may use" is closer to intent, and narrows the obligation in a way that "supporting" does not. The Reporter and Special Reporter agree that "may use" would create a lesser disclosure duty. The proponent of the "intent" approach urged that the Note should say that "may use" means "intends at this time to use."

It was noted that Rule 26(a)(1) already provides that disclosure is to be made "based on information then reasonably available to" a party and is not excused because the disclosing party "has not fully completed its investigation of the case." This provision is supplemented by the continuing duty to supplement created by Rule 26(e)(1). "May use" is not "will use," but speaks only to current estimates. The duty to supplement means that the disclosure obligation in effect merges with the discovery process: the more thorough the discovery process is, the less occasion there will be to disclose.

It also was suggested that in reality, most parties pay little attention to initial disclosure obligations. Most plaintiffs would rather get on directly to discovery.

Scott Atlas noted that when the ABA Litigation Section selected "supporting" over "may use," it had not particularly focused on the arguments presented to the committee. He suspected that the Section would prefer the narrower version.

When the alternative formulations were put to a vote, 11 votes preferred "may use," and 1 vote preferred "supporting."

It was urged again that the Note should say that the "may use" formulation is narrower than the published proposal to require disclosure of "supporting" information.

Rule 26(a)(1): "High-end exclusion". Proposed Rule 26(a)(1) provides that initial disclosures are to be made within 14 days after the Rule 26(f) conference unless a party objects during the conference that initial disclosures are not appropriate in the circumstances of the action. This proposal reflects the view that in some circumstances it may be better to proceed directly to discovery and other pretrial management devices. Lines 784 to 795 of the Subcommittee Memorandum propose language that might be added to the Committee Note to provide examples of such circumstances. Many lawyers have advised the committee that initial disclosures

are routinely bypassed in complex litigation. The prospect of early disposition for lack of jurisdiction, or failure to state a claim, suggests other circumstances that might justify delay or disregard of initial disclosure procedure.

It was suggested that it would be better not to address this topic in the Committee Note. There is a special risk that suggesting that dispositive motions may toll disclosure will invite more motions.

The committee mustered 3 votes to include the proposed Note language, and 8 votes to omit it.

Rule 26(a)(1)(E): "Low-end exclusion". Proposed Rule 26(a)(1)(E) enumerates eight categories of proceedings that are exempted from the initial disclosure requirement. These exemptions are incorporated as well in proposed Rules 26(d) and 26(f) — in these categories of proceedings there is no Rule 26(f) conference obligation, and no Rule 26(d) discovery moratorium. When the proposals were published, the committee asked for comment on the categories chosen for exemption, and also on the ways to express the exemptions. There were not many comments.

The first exemption, (i), covers "an action for review on an administrative record." Some of the comments suggested that this description is ambiguous because administrative actions are at times "reviewed" in settings that are collateral to the main object of a proceeding. The committee approved the addition of two new sentences to the Committee Note, following the statement that the descriptions of the exemptions are generic and are to be administered flexibly: "The exclusion of an action for review on an administrative record, for example, is intended to reach a proceeding that is framed as an 'appeal' based solely on an administrative record. The exclusion would not apply to a proceeding in a form that commonly permits admission of new evidence to supplement the record."

The third exemption, (iii), covers "an action brought without counsel by a person in custody of the United States, a state, or a state subdivision." One suggestion was that disclosure should be required of the government when it is involved in such an action, but not of the plaintiff. Another suggestion was that the exemption should cover all pro se actions. Committee discussion noted that pro se employment cases have come to occupy a substantial portion of the docket in some courts, and that there can be problems with disclosure and the Rule 26(f) conference in such cases. But it also was observed that the practice in both the Eastern and Southern Districts of New York is that the defense discloses to a pro se plaintiff, and that this works. Another judge observed that disclosure and the Rule 26(f) conference help to move pro se cases. When the parties come to court, there has been at least an initial discussion, and the plaintiff often has a better idea of what the case is about. The committee concluded that the exemption should not be changed.

The fifth and sixth exemptions, (v) and (vi), cover "an action by the United States to recover benefit payments" and "an action by the United States to collect on a student loan guaranteed by the United States." The Department of Justice urged that these two exemptions be combined into one exemption, and extended to cover all actions by the United States to recover on a loan. Consumer groups urged that the exemptions be deleted, urging that disclosure is important because the United States frequently fails to maintain adequate records and will be forced by disclosure to present a coherent account of the amounts due. Committee discussion suggested that the consumer group concerns do not have much support. These actions are not filed without thought, and usually the information underlying the claim is narrow, straightforward, and clear. The reasons for not requiring disclosure apply at least to all loans. But it also was noted that there are many foreclosure actions, and that foreclosure actions may not be so simple. The committee concluded that these exemptions should not be changed.

A motion was made to drop the student loan exemption on the ground that disclosure and the Rule 26(f) conference will expedite the proceedings. It was further observed that once the defendant "knows the number," there are a lot of quick settlements. If there is not a settlement, disclosure and a Rule 26(f) conference may be the most efficient means to dispose of these cases. But it also was observed that there is disclosure in practice — that the collection process typically is managed by a paralegal or other staff person who calculates the amount due and delivers the calculation to the debtor. Even in cases that do not go by default, the answer typically admits the amount due. The vote was one to drop the exemption, and all others to retain the exemption.

The seventh exemption, (vii), covers "a proceeding ancillary to proceedings in other courts." This exemption was intended to reach such matters as ancillary discovery proceedings, judgment registration, an action to enforce a judgment entered by a state or foreign court, and the like. A group of bankruptcy judges, however, expressed concern that the exemption might apply to an adversary proceeding in bankruptcy. The Reporter for the Bankruptcy Rules Committee agreed that the exemption should not be read to reach adversary proceedings in bankruptcy, but suggested that the Committee Note might include an express statement on this subject. The Committee determined to add this new sentence at the end of the last full paragraph on page 51 of the published proposals: "Item (vii), excluding a proceeding ancillary to proceedings in other courts, does not refer to bankruptcy proceedings; application of the Civil Rules to bankruptcy proceedings is determined by the Bankruptcy Rules."

In addition to discussion of the exemptions included in proposed Rule 26(a)(1)(E), the comments and testimony suggested another 23 enumerated exemptions. It also was suggested that the rule should authorize further exemptions by local district rule.

The committee agreed that it is better not to propose additional exemptions for public comment. It will be time enough to consider additional exemptions after developing experience with the present proposals.

Rule 26(b)(1): Drafting Change. The Discovery Subcommittee offered no recommendations with respect to the substance of the proposal to redefine the scope of discovery in Rule 26(b)(1). It did, however, suggest a one-word change in drafting. Rule 26(b)(1), now and as it would be amended, allows discovery of "any matter" relevant to the litigation. In the present rule, it is any matter relevant to the subject matter of the pending action. In the proposed rule, it is any matter relevant to the claim or defense of any party. The proposed rule then allows the court to expand discovery back to the "subject matter" scope. As published, see line 131 on page 42, the expansion allows the court to order discovery of any "information" relevant to the subject matter. Use of "information" in this setting introduces a potential ambiguity. The intent of this "court-managed" discovery provision is to allow discovery within the full scope of the present rule; the only change is that discovery to this extent requires a showing of good cause and a court order. Unambiguous communication of this intention requires that the court-managed discovery provision be drafted in the language of the present rule. The committee unanimously agreed to change this provision to read: "For good cause shown, the court may order discovery of any ~~information~~ matter relevant to the subject matter involved in the action."

Rule 26(b)(1): "Background" information. Many of the comments on proposed Rule 26(b)(1) expressed doubt whether the change in lawyer-managed discovery from information relevant to the "subject matter" to information relevant to a claim or defense would require a court order to win discovery of various forms of information now commonly discoverable. This doubt was expressed in general terms of "background" information, but also in more focused terms. The most common examples involved impeachment information; "organizational" information identifying the people and documents or things to be subjected to further discovery; and "other incident" information involving such matters as other injuries involving similar products or the treatment of other employees for comparison with an employment-discrimination plaintiff. Additional Committee Note language was proposed to address these concerns, appearing at lines 1110 to 1123 of the agenda materials. This language is rather general. The material at lines 1112 to 1115 dealing with "other incident" information was discussed by the Discovery Subcommittee.

Discussion of the proposed Note language began with the observation that such phrases as "could be" and "might be" are troubling. They imply that the described information also might not be discoverable. The Note material, moreover, "reads like an application note to a Sentencing Guideline."

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MINUTES

CIVIL RULES ADVISORY COMMITTEE

October 14 and 15, 1999

The Civil Rules Advisory Committee met on October 14 and 15, 1999, at Kennebunkport, Maine. The meeting was attended by Judge Paul V. Niemeyer, Chair; Sheila Birnbaum, Esq.; Judge John L. Carroll; Justice Christine M. Durham; Mark O. Kasanin, Esq.; Judge David F. Levi; Myles V. Lynk, Esq.; Judge John R. Padova; Acting Assistant Attorney General David W. Ogden; Judge Lee H. Rosenthal; Judge Shira Ann Scheindlin; and Andrew M. Scherffius, Esq.. Chief Judge C. Roger Vinson and Professor Thomas D. Rowe, Jr., attended this meeting as the first meeting following conclusion of their two terms as Committee members. Professor Richard L. Marcus was present as Special Reporter for the Discovery Subcommittee; Professor Edward H. Cooper attended by telephone as Reporter. Judge Anthony J. Scirica attended as Chair of the Standing Committee on Rules of Practice and Procedure, and Professor Daniel R. Coquillette attended as Standing Committee Reporter. Judge Adrian G. Duplantier attended as liaison member from the Bankruptcy Rules Advisory Committee. Peter G. McCabe and John K. Rabiej represented the Administrative Office of the United States Courts. Thomas Willging, Judith McKenna, and Carol Krafka represented the Federal Judicial Center; Kenneth Withers also attended for the Judicial Center. Observers included Scott J. Atlas (American Bar Association Litigation Section); Alfred W. Cortese, Jr.; and Fred Souk.

Judge Niemeyer introduced Judge Padova as one of the two new members of the committee. Professor John C. Jeffries, Jr., the other new member, was unable to attend because of commitments made before appointment to the committee.

Judge Niemeyer expressed the thanks of the committee to Chief Judge Vinson and Professor Rowe for six years of valuable contributions to committee deliberations. Each responded that the privilege of working with the committee had provided great professional and personal rewards.

Introduction

Judge Niemeyer began the meeting by summarizing the discovery proposals that emerged from the committee's April meeting and describing the progress of those proposals through the next steps of the Enabling Act process. The April debates in this committee were at the highest level. Committee members were arguing ideas. If the ideas are inevitably influenced by personal experience, the discussion was enriched by the experiential foundation. It is difficult to imagine a better culmination of the painstaking process that led up to the April meeting. During those debates the disclosure amendments were shaped to win acceptance despite the strong resistance from many district judges who did not want to

have local practices disrupted by national rules. The decision to reallocate the present scope of discovery between lawyer-managed discovery and court-directed discovery met the question whether the result would be to increase abuses by hiding information and would lead to increased motion practice. The committee concluded that any initial increase of motion practice would be likely to subside quickly, and that the result would be the same level of useful information exchange. The committee also decided to recommend an explicit cost-bearing provision, notwithstanding the belief that this power exists already. The opposing motion made by committee member Lynk proved prophetic, as his arguments proved persuasive to the Judicial Conference. The seven-hour deposition limit also provoked much discussion, and significant additions to the Committee Note, before it was approved.

The responsibility of presenting the multi-tiered advisory committee debates and recommendations to the Standing Committee was heavy. The Standing Committee, however, provided a full opportunity to explore all the issues. The carefulness of the advisory committee inquiry, the deep study, and the broad knowledge brought to bear persuaded the Standing Committee to approve the recommendations by wide margins.

The Standing Committee recommendations then were carried to the Judicial Conference, where the central discovery proposals were moved to the discussion calendar. Because all members of the Judicial Conference are judges, there were no practicing lawyer members to reflect the concerns of the bar with issues like national uniformity of procedural requirements and the desire to win greater involvement of judges in policing discovery practices. Some of the district judge members were presented resolutions of district judges in their circuits, and felt bound to adopt the positions urged by the resolutions. Practicing lawyers sent letters. The Attorney General wrote a letter expressing the opposition of the Department of Justice to the discovery scope provisions of Rule 26(b)(1).

With this level of interest and opposition, the margin of resolution seemed likely to be close. Judge Scirica and Judge Niemeyer were allowed considerably more time for their initial presentations than called for by the schedule, and then sufficient time for each individual proposal.

Discussion of the disclosure proposals began with a motion to vote on two separate issues — elimination of the right to opt out of the national rule by local rule, and elimination of the requirement to find and disclose unfavorable information that the disclosing party would not itself seek out or present at trial. The proposal to restore national uniformity was approved by a divided vote. Approval likewise was given to the proposal to scale back initial disclosure to witnesses and documents a party may use to support its claims or defenses.

The proposal to divide the present scope of discovery between attorney-managed discovery and court-directed discovery was discussed before the lunch break, while the vote came after the break. This vote too was divided, but the proposal was approved. The discussion mirrored, in compressed form, the debates in the advisory committee. Professor Rowe's motion to defeat the proposal was familiar to the Conference members, who explored the concern that the proposal might lead to suppression of important information.

The presentation of the cost-bearing proposal was not long. It was noted that the advisory committee believes courts already have the power to allow marginal discovery only on condition that the demanding party bear the cost of responding. Although the purpose is only to make explicit a power that now exists, several Conference members feared that public perceptions would be different. Again, the views expressed in advisory committee debates on Myles Lynks's motion to reject cost-bearing were reviewed by the Conference. The Conference rejected the proposal.

The presumptive seven-hour limit on depositions met a much easier reception; it was quickly approved.

The next step for the discovery amendments lies with the Supreme Court. There may well be some presentations by members of the public to the Court. If the Court approves, the proposals should be sent to Congress by the end of April, to take effect — barring negative action by Congress — on December 1, 2000.

In the end, the discovery proposals were accepted not only because the content seems balanced and modest, but also because of the extraordinarily careful and thorough process that generated the amendments. The Discovery Subcommittee's work was a model. It is to be hoped that a detailed account of this work will be prepared for a broader audience, as an inspiration for important future Enabling Act efforts.

Judge Scirica underscored the observations that the debate on the discovery proposals was very close. The debate, with the help of Judge Niemeyer's excellent presentation, mirrored the discussions in the advisory committee. Conference members know a lot about these issues. They came prepared; some had called either Judge Scirica or Judge Niemeyer before the meeting to ask for additional background information. All of the arguments were put forth; nothing was overlooked.

Assistant Attorney General Ogden noted that the Department of Justice appreciated the efforts that were made to explain the advisory committee proposals to Department leaders. Although official Department support was not won on all issues, the Department supports ninety percent of the proposals. The Department, moreover, recognizes that its views were given full consideration. For that matter, there are differences of view within the Department itself. Opposition to the proposed changes

in the scope-of-discovery provision, however, was strongly held by some in the enforcement divisions. From this point on, it is important that the Enabling Act process work through to its own conclusion.

Judge Niemeyer responded that it is important that the advisory committee maintain a full dialogue with the Department of Justice. The Department works with the interests of the whole system in mind.

Judge Duplantier reported that he had observed the Standing Committee debate. The written materials submitted by the advisory committee were read by district judges, and they recognized that the advisory committee had worked hard on close issues. This recognition played an important role in winning approval of the proposals.

Judge Niemeyer observed that the questions that arise from local affection for local rules will continue to face the advisory committee.

Scott Atlas expressed appreciation for the efforts of the advisory committee to keep the ABA Litigation Section informed of committee work. The Section will continue to support the discovery proposals.

It also was noted that the Judicial Conference considered on its consent calendar the packages of proposals to amend Civil Rules 4 and 14, and to amend Admiralty Rules B, C, and E with a conforming change to Civil Rule 14. These proposals were approved and sent on to the Supreme Court.

In June, the Standing Committee approved for publication a proposal to amend Rule 5(b) to provide for electronic service of papers other than the initial summons and like process, along with alternatives that would — or would not — amend Rule 6(e) to allow an additional 3 days to respond following service of a paper by any means that requires consent of the person served. A modest change in Rule 77(d) would be made to parallel the Rule 5(b) change. Publication occurred in August, in tandem with the proposal to repeal the Copyright Rules of Practice, and make parallel changes in Rule 65 and 81; these proposals were approved by the Standing Committee last January.

Judge Niemeyer noted that the admiralty rules proposals grew from an enormous behind-the-scenes effort by Mark Kasanin, the Maritime Law Association, the Department of Justice, and the Admiralty Rules Subcommittee. The package was so well done and presented that it has not drawn any adverse reaction.

Appointment of Subcommittees

Judge Niemeyer announced that changes in advisory committee membership and new projects require revisions in the subcommittee assignments and creation of a new subcommittee.

TAB 1D

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tions. The 1984 amendment to Rule 11 adequately accomplishes the purposes of Federal Rule 26(g).

The rejection of Federal Rule 26(g), and the concomitant loss of its language expressly requiring certification that the discovery request, response or objection is not unreasonable or unduly burdensome or expensive, is not intended to diminish the protection provided by Rule 26(c).

Rule 26(g). Discovery motions

No discovery motion will be considered or scheduled unless a separate statement of moving counsel is attached thereto certifying that, after personal consultation and good faith efforts to do so, counsel have been unable to satisfactorily resolve the matter.

Added and effective June 27, 2001.

Rule 26(h). Deleted. Effective Nov. 1, 1970

Rule 26.1. Prompt disclosure of information

(a) Duty to Disclose, Scope. Within the times set forth in subdivision (b), each party shall disclose in writing to every other party:

(1) The factual basis of the claim or defense. In the event of multiple claims or defenses, the factual basis for each claim or defense.

(2) The legal theory upon which each claim or defense is based including, where necessary for a reasonable understanding of the claim or defense, citations of pertinent legal or case authorities.

(3) The names, addresses, and telephone numbers of any witnesses whom the disclosing party expects to call at trial with a fair description of the substance of each witness' expected testimony.

(4) The names and addresses of all persons whom the party believes may have knowledge or information relevant to the events, transactions, or occurrences that gave rise to the action, and the nature of the knowledge or information each such individual is believed to possess.

(5) The names and addresses of all persons who have given statements, whether written or recorded, signed or unsigned, and the custodian of the copies of those statements.

(6) The name and address of each person whom the disclosing party expects to call as an expert witness at trial, the subject matter on which the expert is expected to testify, the substance of the facts and opinions to which the expert is expected to testify, a summary of the grounds for each opinion, the qualifications of the witness and the name and address of the custodian of copies of any reports prepared by the expert.

(7) A computation and the measure of damage alleged by the disclosing party and the documents or testimony on which such computation and measure are based and the names, addresses, and telephone numbers of all damage witnesses.

(8) The existence, location, custodian, and general description of any tangible evidence, relevant documents, or electronically stored information that the disclosing party plans to use at trial and relevant insurance agreements.

(9) A list of the documents or electronically stored information, or in the case of voluminous documentary information or electronically stored information, a list of the categories of documents or electronically stored information, known by a party to exist whether or not in the party's possession, custody or control and which that party believes may be relevant to the subject matter of the action, and those which appear reasonably calculated to lead to the discovery of admissible evidence, and the date(s) upon which those documents or electronically stored information will be made, or have been made, available for inspection, copying, testing or sampling. Unless good cause is stated for not doing so, a copy of the documents and electronically stored information listed shall be served with the disclosure. If production is not made, the name and address of the custodian of the documents and electronically stored information shall be indicated. A party who produces documents for inspection shall produce them as they are kept in the usual course of business.

Court Comment to 1991 Amendment

In March, 1990 the Supreme Court, in conjunction with the State Bar of Arizona, appointed the Special Bar Committee to Study Civil Litigation Abuse, Cost and Delay, which was specifically charged with the task of studying problems pertaining to abuse and delay in civil litigation and the cost of civil litigation.

Following extensive study, the Committee concluded that the American system of civil litigation was employing methods which were causing undue expense and delay and threatening to make the courts inaccessible to the average citizen. The Committee further concluded that certain adjustments in the system and the Arizona Rules of Civil Procedure were necessary to reduce expense, delay and abuse while preserving

the traditional jury trial system as a means of resolution of civil disputes.

In September, 1990 the Committee proposed a comprehensive set of rule revisions, designed to make the judicial system in Arizona more efficient, more expeditious, less expensive, and more accessible to the people. It was the goal of the Committee to provide a framework which would allow sufficient discovery of facts and information to avoid "litigation by ambush." At the same time, the Committee wished to promote greater professionalism among counsel, with the ultimate goal of increasing voluntary cooperation and exchange of information. The intent of the amendments was to limit the adversarial nature of proceedings to those areas where there is a true and legitimate dispute between the parties, and to preclude hostile, unprofessional, and unnecessarily adversarial conduct on the part of counsel. It was also the intent of the rules that the trial courts deal in a strong and forthright fashion with discovery abuse and discovery abusers.

After a period of public comment and experimental implementation in four divisions of the Superior Court in Maricopa County, the rule changes proposed by the Committee were promulgated by the Court on December 18, 1991, effective July 1, 1992.

Committee Comment to 1991 Amendment

This addition to the rules is intended to require cooperation between counsel in the handling of civil litigation. The Committee has endeavored to set forth those items of information and evidence which should be promptly disclosed early in the course of litigation in order to avoid unnecessary and protracted discovery as well as to encourage early evaluation, assessment and possible disposition of the litigation between the parties.

It is the intent of the Committee that there be a reasonable and fair disclosure of the items set forth in Rule 26.1 and that the disclosure of that information be reasonably prompt. The intent of the Committee is to have newly discovered information exchanged with reasonable promptness and to preclude those attorneys and parties who intentionally withhold such information from offering it later in the course of litigation.

The Committee originally considered including in Rule 26.1(a)(5) a requirement for disclosure of all cases in which an expert had testified within the prior five (5) years. The Committee recognized in its deliberations that information as to such cases might be important in certain types of litigation and not in others. On balance, it was decided that it would be burdensome to require this information in all cases.

Committee Comment to 1996 Amendment

Rule 26.1(a)(3). With regard to the degree of specificity required for disclosing witness testimony, it is the intent of the rule that parties must disclose the substance of the witness' expected testimony. The disclosure must fairly apprise the parties of the information and opinion known by that person. It is not sufficient to simply describe the subject matter upon which the witness will testify.

Rule 26.1(a)(5) was not intended to require automatic production of statements. Production of statements remains subject to the provisions of Rule 26(b)(3).

Rule 26.1(a)(6). A specially retained expert as described in Rule 26(b)(4)(B) is not required to be disclosed under Rule 26.1.

(b) Time for Disclosure; a Continuing Duty.

(1) The parties shall make the initial disclosure required by subdivision (a) as fully as then possible within forty (40) days after the filing of a responsive pleading to the Complaint, Counterclaim, Crossclaim or Third Party Complaint unless the parties otherwise agree, or the Court shortens or extends the time for good cause. If feasible, counsel shall meet to exchange disclosures; otherwise, the disclosures shall be served as provided by Rule 5. In domestic relations cases involving children whose custody is at issue, the parties shall make disclosure regarding custody issues no later than 30 days after mediation of the custody dispute by the conciliation court or a third party results in written notice acknowledging that mediation has failed to settle the issues, or at some other time set by court order.

(2) The duty prescribed in subdivision (a) shall be a continuing duty, and each party shall make additional or amended disclosures whenever new or different information is discovered or revealed. Such additional or amended disclosures shall be made seasonably, but in no event more than thirty (30) days after the information is revealed to or discovered by the disclosing party. A party seeking to use information which that party first disclosed later than sixty (60) days before trial shall seek leave of court to extend the time for disclosure as provided in Rule 37(c)(2) or (c)(3).

(3) All disclosures shall include information and data in the possession, custody and control of the parties as well as that which can be ascertained, learned or acquired by reasonable inquiry and investigation.

Committee Comment to 1991 Amendment

The Committee does not intend to affect in any way, any party's right to amend or move to amend or supplement pleadings as provided in Rule 15.

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SIMPLIFIED RULES OF FEDERAL PROCEDURE?

*Edward H. Cooper**

FOREWORD

Writing in 1924, seventy-eight volumes ago, Professor Edson R. Sunderland began *The Machinery of Procedural Reform* with this sentence: "Much has been said and written about the imperfections of legal procedure."[1] Much of his article describes circumstances in which procedural reform occurred only in response to conditions that had become "intolerable." A decade later, Congress enacted the Rules Enabling Act that still provides the framework for reforming federal procedure.[2] The Enabling Act establishes a deliberate and open process for amending the rules initially adopted under its authority. It may take longer today to consider and adopt a single rule amendment than the original rulesmakers took to create the original body of Civil Rules.[3] The process surely provides the "close and pains-taking study

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Professor Cooper is Reporter for the United States Judicial Conference Advisory Committee on the Federal Rules of Civil Procedure. The draft rules discussed here were prepared for consideration by the Advisory Committee. The Advisory Committee has begun work on the draft, but has not yet decided whether there is reason to pursue the project further. If the project is pursued, any rules that emerge will be strongly influenced by the designation of the cases that may be governed by the rules. The draft thus remains in its original form as an outline of one of many possible approaches to the task. It is a Reporter's draft and does not in any way represent the work or position of the Advisory Committee. — Ed.

1. Edson R. Sunderland, *The Machinery of Procedural Reform*, 22 MICH. L. REV. 293 (1924).

2. The core of the current version is 28 U.S.C. § 2072 (1994). The full scope of the enterprise is reflected in 28 U.S.C. §§ 331, 2071-77. Section 331 directs the Judicial Conference of the United States to:

> carry on a continuous study of the operation and effect of the general rules of practice and procedure now or hereafter in use as prescribed by the Supreme Court for the other courts of the United States pursuant to law. Such changes in and additions to those rules as the Conference may deem desirable to promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay shall be recommended by the Conference from time to time to the Supreme Court * * *.

3. A succinct summary of the creation of the Civil Rules is provided in 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE: CIVIL § 1004 (2d ed. 1987). The original Advisory Committee — of which Professor Sunderland was a member — was appointed on June 3, 1935. The Committee submitted its third draft to the Supreme Court in May 1936. The final report issued in November 1937. After submission to Congress, the rules took effect on September 16, 1938.

of an intricate mechanism which is necessary for successful regulation" that Professor Sunderland hoped for.[4] It is difficult to be as confident about the overall effect of the painstaking changes that have gradually accumulated since the Civil Rules first took effect in 1938.

It may be inevitable that a continuing revision process lengthens the rules and adds complexity to them. Doubts grow up around old solutions, and new problems appear. The Civil Rules have not escaped this effect. Yet time and again, the Rules adhere to a pervading characteristic. The effort is less to provide detailed controls and more to establish general policies that guide discretionary application on a case-specific basis. Many a district judge may view one provision or another as an unwarranted intrusion on the proper sovereignty of a trial court, but vast discretion remains at virtually every turn. It does not yet seem fair to charge the revision process with a descent into the niggling detail and sterile ossification that have overtaken earlier procedural systems.

Rigidity is not, however, the only danger to be avoided. Discretion is a useful rulemaking technique when it is difficult — as it almost always is — to foresee even the most important problems and to determine their wise resolution. Reliance on discretion is vindicated only when district judges and magistrate judges use it wisely most of the time and in most cases. The ongoing revisions of the Civil Rules time and again reflect an implicit judgment that confidence is well placed in the discretionary exercise of power by federal trial judges. In a wonderful way, there may be an interdependence at work — the very fact that there is discretionary authority to guide litigation to a wise resolution may enable us to attract to the bench judges who will use the authority wisely. It is not clear beyond dispute, but let us assume that the open-textured reliance on trial-judge discretion is working well. Even then, another set of questions remains.

Open-ended rules that call for wise discretion cannot depend on the wisdom of trial judges alone. The structure of our courts — considered in relation to the volume of litigation, the structure of the legal

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Current consideration of Rule 23, the class-action rule, has been rather more deliberate. After a deliberate moratorium following the 1966 amendments, the Advisory Committee took the subject up again in 1991. An interim memorial of the project is provided by the four-volume ADMIN. OFF. OF THE U.S. CTS., WORKING PAPERS OF THE ADVISORY COMMITTEE ON CIVIL RULES ON PROPOSED AMENDMENTS TO CIVIL RULE 23 (1997). A related undertaking is reflected in ADVISORY COMM. ON CIVIL RULES & WORKING GROUP ON MASS TORTS, REPORT ON MASS TORT LITIGATION (Feb. 15, 1999). The only amendment yet to be adopted was the addition of a new Rule 23(f), effective on December 1, 1998, establishing a system for permissive interlocutory appeals from orders granting or denying class certification. The continuing work is reflected in proposed amendments to Rule 23 and 23(f) published for comment in August 2001. *See* 201 F.R.D. 586. The amendments also are available at http://www.uscourts.gov/rules. Still further amendments remain under consideration. This is not the work pace of the original rulemakers.

4. Sunderland, *supra* note 1, at 298.

profession, and the basic nature of an adversary system — requires reliance on the willingness of litigators to work within the general spirit of the rule structure. One cause for concern is doubt whether we have sufficiently contained the risks of inept misuse and the temptations of deliberate strategic over-use of the rules. There are some grounds for reassurance on that score, noted tangentially below, but also grounds for continuing concern. A different cause for concern is that the sheer power of the rules structure, with the concomitant complexity and cost, has grown out of proportion. Some litigation that might better be brought in federal court may be discouraged, either to go to state court or to vanish without filing.

This fear that the *Federal Rules of Civil Procedure* provide too much procedure for some cases underlies a current Advisory Committee project. The Simplified Rules project was launched at the suggestion of Judge Paul V. Niemeyer during his term as Advisory Committee Chair. Part of the inspiration for considering adoption of an alternative and simplified procedure was the ongoing work on The American Law Institute/UNIDROIT *Principles and Rules of Transnational Civil Procedure*.[5] The evolving transnational rules model involves, among many other things, a paring back and simplification. This Introduction is a brief description of the general issues that surround a vaguely similar undertaking to simplify federal procedure for an uncertainly defined subset of cases. The pages that follow set out the first draft to be submitted to the Advisory Committee, (many) imperfections and all.

The basic character of the draft is easily described. The draft proposes more detailed pleading, enhanced disclosure obligations, and restricted discovery opportunities. Other provisions seek to reduce the burden of motion practice and establish an early and firm trial date. The core justification for this approach is that current reliance on notice pleading and searching discovery puts too much weight on time-consuming and expensive discovery. This justification deserves a few more words of examination, after a preliminary look at the question of choosing the cases that might come within the simplified rules.

Draft Rule 102 is no more than a preliminary sketch of the issues that must be addressed in determining the cases that might come within a set of simplified rules. It was drafted for purposes of illustra-

5. Discussion Draft No. 2 of this project was circulated for discussion and comment on April 12, 2001. The basic purpose is to draft a set of procedure rules for transnational disputes, based on the common principles that underlie both "common" and "civil" law systems, as well as other legal systems that do not derive from either of those great traditions. The hope is that the rules could be adopted in many countries, providing a good procedure that is comfortingly familiar to litigants from many different systems. Even as the project remains in midstream, it is apparent that it requires simplification, a stripping away of details to reveal a basic core procedure that is significantly different from any particular domestic system.

tion, suggesting the issues by seeming to resolve them. It would make application of the rules mandatory in an action "in which the plaintiff seeks only monetary relief and the amount is less than $50,000." Rather complicated provisions contemplate application to other actions by consent of the parties and exclude certain categories of actions. All of the other rules depend on the choices made in determining which cases are covered. As one simple illustration, a decision to apply the rules only when all parties consent would open the possibility of discarding jury trial. Any attempt to discard jury trial without party consent would require such elaborate justification, and encounter such stiff resistance, as to impede seriously, if not fatally, any serious attempt at adoption.

The justification for attempting to frame a simplified procedure must withstand many challenges. Most of the challenges raise empirical issues. Two sets of empirical issues lead the list. One ties directly to the definition of cases covered by the rules — it makes little sense to create a set of rules for cases that do not, and should not, come to the federal courts. The other set goes directly to the underlying premise: are the present rules in fact too complex, too full of opportunities for excessive lawyering and strategic manipulation, to work well with some cases that do, or should, come before the federal courts?

The draft that applies the simplified rules to all actions that seek money only, and less than $50,000, prompted the question whether such actions exist in the federal courts. The Federal Judicial Center — a constant source of valuable assistance in considering empirical rules-reform questions — undertook to examine the data currently available. Looking at all cases filed in federal courts from 1989 through 1998 — some 2,248,547 cases — they found that information about a stated money demand greater than $0 was available for only 610,002, less than 28%. Of this reduced set of cases, 236,212 involved demands from $1 to $50,000. Another 103,326 involved demands from $51,000 to $150,000.[6] It is not possible to assume that the same distribution would hold for all cases if the amount of the dollar demand were known for all. That more than one-half of the cases in this subset involved demands for less than $150,000 is an interesting datum, but little more. That nearly a quarter of a million cases in ten years involved less than $50,000 is more tangible. If there is otherwise reason to fear that the Civil Rules provide more procedure than is appropriate for relatively small-dollar litigation, there are cases enough to justify further consideration.

That observation leads directly to the empirical question whether general federal procedure is indeed too elaborate for many of the actions brought in federal court. There are many reasons to question the

6. Letter from Thomas E. Willging to Hon. Paul V. Niemeyer, Chair, Civil Rules Advisory Committee (Dec. 21, 1999) (on file with author).

premise that federal procedure often proves unnecessarily burdensome. Empirical studies of discovery have repeatedly disclosed that for most cases in federal court no discovery occurs, or only a few hours are devoted to it.[7] Recent amendments have sought to reduce the burden of discovery still further by adopting and then modifying disclosure requirements and by providing for the Rule 26(f) meeting of the parties. Many practicing lawyers have reported that the Rule 26(f) meeting has proved useful. If lawyers actually confer about the realistic needs of the case, they commonly agree to behave reasonably.

The counterpoint to assertions that federal procedure is too elaborate for some cases commonly is that state procedure is more suitable. But many state systems are modeled on the federal rules, and outsiders are not likely to view the more distinctive state systems as more efficient. If there is a point in this comparison, the most likely support lies in the procedures adopted for state courts of limited, not general, jurisdiction.

Even if there is reason to fear that general federal procedure should not apply in all its sweep to every case in federal court, it is not clear that "general federal procedure" is as procrustean as the champions of simplified procedure may claim. The Civil Rules provide many opportunities for tailoring procedure to the realistic needs of individual actions. Judges are given general and discretionary authority to cabin discovery and to manage the litigation. Vigorous use of this authority can directly limit the dangers of excessive procedure. Indirect benefits may prove even greater as lawyers come to understand that they will be forced to behave reasonably.

The general power to shape procedure to specific cases has been elaborated in some districts by adoption of differentiated case management plans. Several courts have established tracking systems that are designed to provide expedited procedures for cases that do not require full utilization of all the tools the Civil Rules make available. The experience of these courts is important to the simplified procedure proposal for at least two reasons. The first is that these practices may provide all the relief that is needed. If so, reliance on these procedures may prove more effective than an attempt to generate special rules and to identify the categories of cases to be covered by special rules. The second is that if special rules remain a promising approach, local tracking systems may point the way toward the kinds of procedures that prove useful and the kinds of cases that benefit from them.

Examples of the more specific issues presented by local tracking systems are easy to provide. Several systems attempt to assign tracks by case categories only for cases that can be categorized with relative ease — cases involving review on an administrative record, bank-

7. *See* THOMAS E. WILLGING ET AL., DISCOVERY AND DISCLOSURE PRACTICE, PROBLEMS, AND PROPOSALS FOR CHANGE (1997).

ruptcy appeals, and so on. Other cases are assigned to tracks by a judge after a Rule 16 conference that considers such matters as the number of parties, the degree of contentiousness, the stakes, the level of agreement on what issues need to be resolved, and so on. Most cases wind up on the "standard" track. "Expedited" tracks seem not to draw many cases. All of this may suggest that case-by-case determinations by a judge who is actively involved in the early stages are better than an attempt to establish more abstract definitions and categories.[8]

Another example is provided by the common requirement in differentiated case management plans, similar to the Rule 26(f) meeting, that attorneys meet to prepare a joint statement before the first Rule 16 conference. This joint statement supports the track assignment. When approached in the proper spirit, the attorney conference and Rule 16 conference may provide a far more direct and effective method of identifying the nature of the dispute and the issues that need to be resolved than any method that relies on detailed pleading and unilateral disclosure.

Yet another alternative is possible. In 1992, the Advisory Committee proposed to amend Civil Rule 83 to authorize adoption, with Judicial Conference approval, of experimental local rules inconsistent with the national rules. The proposal was withdrawn in the June 1992 Standing Committee meeting. The proposal presented obvious statutory difficulties — 28 U.S.C. § 2071(a) authorizes district courts to prescribe rules "consistent with * * * rules of practice and procedure prescribed under section 2072 * * *." It may seem circular to make an inconsistent local rule consistent with the national rules by adopting a national rule that authorizes inconsistent local rules. There also may be some hesitation about wishing the tasks of review and approval on the Judicial Conference. But as compared to the uncontrolled proliferation of local rules, more or less at random, there may be real advantages in facilitating well-designed and carefully monitored local experiments. Empirical data are hard to come by in the world of procedure. "Pilot" and "demonstration" programs may yield valuable insights. Rather than adopt national rules that apply to all federal courts at once, local experiments might better advance progress toward simplified procedure, whether for some distinctive portion of the federal docket or for all cases.

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8. Information about differentiated case management plans remains diffuse. Two good sources provide information about general variations; although the details of specific court programs have surely changed, the overall picture remains useful. *See* DAVID RAUMA & DONNA STIENSTRA, THE CIVIL JUSTICE REFORM ACT EXPENSE AND DELAY REDUCTION PLANS: A SOURCEBOOK (1995); DONNA STIENSTRA ET AL., REPORT TO THE JUDICIAL CONFERENCE COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT: A STUDY OF THE FIVE DEMONSTRATION PROGRAMS ESTABLISHED UNDER THE CIVIL JUSTICE REFORM ACT OF 1990 (1997). A summary of Judge Jean C. Hamilton's description of the expedited track in the Eastern District of Missouri plan is provided in the Civil Rules Advisory Committee, Minutes (Oct. 16-17, 2000), *available at* http://www.uscourts.gov/rules.

These empirical questions, and the possibility of experimental local rules, point to another possible purpose in adopting simplified rules for a yet-to-be-defined portion of federal civil actions. The simplified rules could themselves be an experiment, designed to pave the way for gradual revision of the rules for all actions. The approach that combines notice pleading with sweeping discovery is deeply entrenched. But it is not inevitable. Discovery and the recently adopted and amended disclosure rules have been the subject of continual study by the Advisory Committee since the work that led to the 1970 discovery amendments.[9] Should some form of simplified rules be adopted, it is possible that several years of developing experience would provide the foundations for simplifying the general rules as well.

SIMPLIFIED PROCEDURE

INTRODUCTION

Some of the persisting questions about the Federal Rules of Civil Procedure arise from the "one size fits all" character of the Rules. The Committee has struggled regularly with the "transsubstantive" character of the rules, ordinarily reaching the conclusion that serious Enabling Act questions are posed by any effort to create special rules for specific substantive problems. Perhaps the time has come to consider a different aspect of the Rules' unvarying uniformity. As they stand now, and as they have been from the beginning, the Rules apply alike to all cases, no matter how complex or how simple. It has been common to wonder whether the inevitable compromises have produced rules that work well for most litigation in the middle range, but do not work as well for cases at the extremes. One extreme has been frequently studied. The recent discovery proposals are only the most recent in a long line of efforts to adapt the rules to the needs of complex or contentious litigation. Not as much has been done for simple litigation. It is possible to adopt special provisions for simple litigation without in any way departing from the transsubstantive principle. The purpose would not be to establish a second-class set of procedures for second-class litigation, but to provide procedures that provide more efficient, more affordable, and better justice for litigation that cannot reasonably bear the costs of unnecessarily complex procedures.

The simplified rules that follow are very much a first draft. Coverage is limited to actions demanding only money damages, and in relatively small amounts, unless all parties agree to adopt the rules. The central feature is a major transfer of pretrial communication away

9. A concise history of the discovery rules is provided in 8 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE: CIVIL §§ 2002-2003.1 (2d. ed. 1994).

from discovery and to fact pleading and disclosure. There also is a demand-for-judgment procedure that could accelerate and clarify disposition of many actions that today go by default. Use of Rule 16(b) scheduling orders is made optional. Finally, there is a beguiling proposal to require court permission for presentation of expert testimony under Evidence Rules 702, 703, or 705.

The draft is presented to stimulate thinking at several levels. The first is consideration of whether it is sensible to launch a project of this nature. It should be easier to consider this question in light of a model, however crude, of the core topics that are likely to be addressed in any effort to create a simplified procedure track.

A second set of questions goes directly to the topics addressed by the draft. Can we effectively restore fact pleading that achieves the hopes of the Field Code drafters, not the sorry legalisms that lawyers and judges conspired to inflict on the worthy Code provisions? Should we require pleading of law as well as fact — something not done by the draft? Should we at least provide limited law-pleading requirements for special situations? (One possibility would be to require a party to plead the source of the governing law — federal or state, which state or foreign country, and so on.) How far should initial disclosure be expanded beyond the 1993 26(a)(1) model? How far should discovery be restricted — an illustration is provided by the alternatives in Rule 106 that either allow three depositions as a matter of right or require court permission for any deposition?

A third set of questions goes to the questions that might be addressed outside the core. One possibility, for instance, would be to encourage the parties to agree to a partly paper trial, in which witness statements or deposition transcripts are used in place of direct testimony and live trial testimony focuses on cross-examination and, perhaps, rebuttal. Or, as a variation, trial could be integrated with summary judgment in a process by which the court first considers the paper record, then determines what witnesses should be heard in court and shapes the trial accordingly. The following list exemplifies, but does not begin to exhaust, the questions that might be addressed.

Finally, review of questions not addressed suggests a different issue. It is tempting to adopt in the simplified rules provisions that seem to be improvements for all actions but that also seem easier to move through the Enabling Act process if limited to actions that do not have an actively involved constituency. Summary judgment procedure is an illustration. Rule 56 could be substantially improved. A substantially improved Rule 56 failed in the Judicial Conference nearly a decade ago, and it has been difficult to muster enthusiasm for a renewed attempt. But it might be possible to adopt revisions for the simplified rules.

Should permissive Rule 13(b) counterclaims be permitted in a simplified action? Why not make optional counterclaims that arise out

of the same transaction or occurrence as the claim, and prohibit others? If counterclaims are permitted, should all claims be aggregated to determine whether the simplified rules apply? Should a counterclaim for injunctive relief automatically oust application of the simplified rules in the cases identified by Rule 102 for mandatory application?

It seems likely that a relatively high proportion of simplified procedure cases will be resolved by default. The Rule 104 demand for judgment is a beginning effort to expedite and clarify this outcome, but — even if something like Rule 104 is adopted — cannot resolve all default cases. Should we adopt an express requirement for proof of the claim by affidavit? Should the requirement be measured differently than the test that would justify summary judgment on the affidavits if there are no opposing affidavits? Is this an illustration of a reform that should be adopted as part of Rule 55 for all cases?

Direct attorney-fee provisions seem outside the scope of Enabling Act rules. But many people believe that the rules can affect implementation of fee statutes. One temptation is to revise the offer-of-judgment procedure so that a Rule 68 offer does not cut off the right of a prevailing plaintiff to recover statutory attorney fees. (An illustration: the rejected offer is for $100,000; the plaintiff wins $90,000. The offer now destroys the right of the plaintiff to recover statutory attorney fees if, but only if, the statute describes the fee recovery as "costs." This wildly improbable result cries out for correction for all cases. But correction quickly becomes bogged down in the dismal swamp of Rule 68.) There may be a special justification for addressing this question in the simplified rules, since they will apply in many actions that will be feasible only if there is a realistic prospect of recovering attorney fees. Fear of the strategic gamesmanship inherent in Rule 68 may deter initial filing, and may easily distort the decision whether to accept an unfair Rule 68 offer.

Now that the rulemaking power includes determinations of appealability, it would be possible to seek out rules that impose particular burdens in small-stakes litigation. The most obvious candidate, official-immunity appeals, is likely to prove untouchable. The sorrily confused discussion in 15A Federal Practice & Procedure: Jurisdiction 2d, § 3914.10 (current supplement) reflects an even deeper confusion in the law. One suspicion, increasingly voiced by the courts of appeals, is that official defendants are using immunity appeals to inflict delay. There may be a substantial number of small-stakes § 1983 actions and potential actions that are deterred by the availability of (potentially multiple) interlocutory appeals. The deterrent effect is likely to be greater in small-stakes cases, affording some excuse to approach these problems in the simplified rules. One easy but partial remedy would be to provide that only one pretrial immunity appeal may be taken. A more effective remedy would be to expand the scope of the one permitted appeal, permitting direct review of a denial of summary judg-

ment. Official-immunity appeal doctrine, however, derives from the substantive perception that this form of immunity — unlike many other important protections, such as the rules of personal jurisdiction — affords a right to be protected against the burdens of pretrial and trial procedures. Even with the enthusiastic cooperation of the Appellate Rules Committee and staunch support of the Standing Committee, efforts to address these problems could undermine a simplified rules project.

As drafted, the simplified rules model does not address a set of scope problems that likely require consideration. If application of the rules is defined in terms of amount in controversy, what happens when cases are consolidated or claims are severed?

Would it be desirable to consider a majority-verdict rule for jury trials? (There is no possibility of ousting jury trial, and little point in making it more difficult to demand jury trial.)

Should the Rule 53 special masters Subcommittee be asked to consider a provision barring reference to a special master in a simplified rules case?

How about a rule that establishes presumptive time limits for trial — perhaps one day per "side"? (See this again with Rule 109.)

Traditionally the rules have left res judicata to be developed by decisional law. But the nature of simplified procedure raises at least one question. Is it fair to base nonmutual issue preclusion on a simplified-procedure judgment? How far should this question depend on the nature of the simplified rules: is it unwise to belittle the fairness and adequacy of the rules by providing that the results are acceptable to dispose of "small" claims but not to govern something that "really matters"?

If simplified rules are adopted, Rule 81 should be amended to recognize them.

There is another frustrating choice that also must be considered. The draft simply incorporates the Civil Rules for most questions. That approach makes the project much easier. But it also defeats one of the goals of a simplified procedure. A pro se party will not find any of the comfort that might be provided by a self-contained, short, and clearly stated set of rules. This draft does not address directly any of the questions that are raised by the proposal of the Federal Magistrate Judges' Association that a special set of rules should be adopted for pro se actions.

Many other questions are likely to be raised as collective deliberation is brought to bear. The immediate questions are two: Should this project be developed? And if it is to be developed, what forms of support might be sought in developing a more polished model for publication?

A more general question might be added. What sorts of actions are likely to be encouraged by these rules? Will the result be to bring to

federal courts actions that otherwise would be brought in state courts — and is that a good use of federal judicial resources? Will the result be to encourage people to bring in federal court actions that otherwise would not be brought in any court? If the ceiling for mandatory application is set at $50,000, is there something awkward about wishing on civil rights actions, or maintenance-and-cure claims, or proceedings that cannot readily be inflated above $50,000, procedures that are not invoked for any diversity action?

XII. SIMPLIFIED PROCEDURE[10]

Rule 101. Simplified Rules

These simplified rules govern the procedure in actions described in Rule 102. They should be construed and administered to secure the advantages of simplified procedure to serve the just, speedy, and economical determination of these actions.

Committee Note

The Civil Rules have applied a single general form of procedure to all civil actions. Many changes have been made over the years to facilitate individualized adaptation of the general rules to the distinctive needs of complex litigation and to the need to provide increased judicial management when adversary contentiousness threatens to disrupt orderly disposition. Not as much has been done to adapt the rules to the needs of simple litigation that can be managed by the parties with little need for elaborate discovery or pretrial management. Often the parties meet this need on their own. Several studies have shown, for example, that no discovery at all is conducted in a significant portion of federal civil cases. See *Willging, Shapard, Stienstra, & Miletich, Discovery and Disclosure Practice, Problems, and Proposals for Change* (Federal Judicial Center 1997). The lack of discovery, and the limited use of formal discovery in another significant portion of cases, often reflects a low level of fact dispute. In other cases the parties recognize the need to hold the costs of litigation in sensible proportion to the stakes. Yet such restraint is not universal. Whether from excessive zeal, ineptitude, or deliberate motive to increase cost and delay, notice pleading and sweeping discovery practices can entail pretrial practice out of any sensible relationship to the stakes or needs of relatively simple litigation. These rules are designed to provide an improved package of pleading and discovery procedures that will enhance the opportunity to avoid costly discovery. More exacting pleading and dis-

10. The following is the Reporter's Draft, reproduced in its original form.

closure requirements are provided to reduce further the need for formal discovery.

Other changes are made to complement the alternative pleading, disclosure, and discovery practices. These changes, however, are modest. The core of the simplified procedure is the alternative pleading, disclosure, and discovery practice.

Rule 102. Application of Rules

(a) Except as provided in Rule 102(b), these simplified rules apply in an action:

(1) in which the plaintiff seeks only monetary relief and the amount is less than $50,000; or

(2) in which the plaintiff seeks only monetary relief and the amount is less than $250,000, if all plaintiffs elect [in the complaint] to proceed under these rules [and if no defendant objects to application of these rules by notice filed no later than 20 days after service of the summons and complaint {on the objecting defendant}].

(b) These simplified rules do not apply in an action described in Rule 102(a):

(1) for interpleader under Rule 22 or under 28 U.S.C. § 1335;

(2) under Rules 23, 23.1, or 23.2;

(3) under 28 U.S.C. §§ 1602-1611;

(4) for condemnation of real or personal property under Rule 71A;

(5) in which the United States is a party and objects to application of these rules

(A) in the complaint, or

(B) — if a defendant — by notice filed no later than

(i) 30 days after service of the summons and complaint, or

(ii) a motion to substitute the United States as party-defendant; or

(6) if the court, on motion or on its own, finds good cause to proceed under the regular rules.

(c) These simplified rules apply in an action in which:

(1) all plaintiffs offer in the complaint to proceed under these rules,

(2) all defendants named in the complaint accept the offer by notice filed no later than 20 days after the last of these defendants is served, and

(3) no party involuntarily joined after the offer is accepted shows good cause to proceed under the regular rules.

Committee Note

Determination of the actions that the simplified rules govern should be approached conservatively at the outset. Broader application may prove appropriate after experience with the rules determines their success and points the way to improvements.

Subdivision (a) establishes the basic core of application. The simplified rules apply to all actions in which the plaintiff seeks only monetary relief less than $50,000. They apply also to actions for only monetary relief less than $250,000 if the plaintiff elects to invoke them and no defendant makes timely objection. The rules do not apply if the plaintiff seeks specific relief such as a declaratory judgment, an injunction, specific performance, or habeas corpus, unless the parties agree to apply the rules under subdivision (c). The exclusion of actions for specific relief enables a plaintiff to impose the regular civil rules on a defendant who would prefer simplified procedures. The cost of attempting to measure the significance of the stakes in actions that seek more than money, however, seems too great to bear, at least while the simplified rules are new.

Subdivision (b) excludes specific categories of actions that do not seem amenable to simplified procedure because of the dignity of a party or the potential complexities of multiparty proceedings. Paragraph (6) allows the court to exclude any other action for good cause. The court may exercise this power at any time, and may act at the behest of a party or on its own.

Subdivision (c) allows the parties to any action to agree to follow the simplified rules. The agreement is made by the plaintiffs and defendants identified in the initial complaint; a party who is involuntarily joined after the agreement may move to have the action governed by the regular rules for good cause.

Reporter's Comment

The scope of the simplified rules is critical. The choice as to scope is bound up with the actual rules. The more curtailed the simplified rules, the narrower the scope of initial application. The more closely the simplified rules approach the regular rules, the broader the scope of application might be.

The brackets in Rule 102(a)(2) flag one of the issues that deserves attention: Should the plaintiff be given sole choice whether to invoke

these rules for an action seeking less than $250,000? Or should the plaintiff be given only the power to invite the defendant to accept the rules? There is a powerful argument that allowing a defendant to opt back into the regular Civil Rules will lead many defendants to choose the more cumbersome, prolonged, and expensive procedure for wrong reasons — the hope is to harass and wear down the plaintiff, not to achieve a better disposition on the merits. On the other hand, few people would regard stakes between $50,000 and $250,000 as insignificant, and lawsuits are brought against real people as well as institutions that may view the loss of a quarter of a million dollars with equanimity. The issues may have a factual complexity beyond the dollars involved. In the end, the choice may turn on our level of confidence in the rules that emerge. If we believe that they will work well even in more complex cases, we might simply raise the mandatory threshold, or give the plaintiff — but not the defendant — a choice. Giving the plaintiff a unilateral choice may not be unfair — if the action is indeed one that requires resort to the regular rules, the plaintiff may be relied upon to choose them.

All of the exclusions in Rule 102(b) are tentative; perhaps none of them deserve adoption. The exclusion of the United States, for example, may be challenged; an accommodation is made in Rule 109 to allow an additional month before trial when the action involves the United States or a United States agency or employee.

Subdivision (c) is an effort to allow all parties to agree to proceed under the simplified rules, free from any of the limits in (a) or (b). The provision that allows later-added parties to defeat the initial election is limited in two ways. It does not apply to those who voluntarily become parties, as by an amended complaint or intervention. And it requires a showing of good cause. These limitations are suggested because of the risks of disruption that would follow if it were too easy to shift procedural tracks after the initial election. Perhaps it would be better to add a simpler alternative: "These simplified rules apply in an action in which all parties agree to proceed under these rules, or * * *."

If we go down this road, consideration must be given to several complicating factors. Rule 81(c) applies "these rules" to removed actions, but requires repleading only if ordered by the court. Pleading a dollar amount may not be required, or even permitted, by state practice. Must we provide for this in the rule?

Another problem arises from Rule 54(c) — "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings." More than $50,000 or $250,000? Injunctive relief? Can we allow curtailed procedure to yield unrestricted judgments? To the extent that we make the simplified rules mandatory, we cannot rely on a waiver theory, unless it is waiver by choosing to go to federal court [and not be removed]. (A much smaller problem arises with

respect to declaratory judgments: there is no apparent reason to oust these rules in a "reversed parties" action in which the declaratory plaintiff seeks only to establish nonliability for less than $50,000.)

Rule 103. Pleading

(a) General Rules. Except as provided in Rule 103(b), (c), (d), (e), (f), and (g), pleading in actions governed by these rules is governed by Rules 7 through 15.

(b) Stating a claim. A pleading that asserts a claim for relief must, to the extent reasonably practicable:

(1) state the details of the time, place, participants, and events involved in the claim; and

(2) attach each document the pleader may use to support the claim.

(c) Answering a claim. A pleading that answers a claim for relief must admit or deny the matters pleaded in asserting the claim under Rule 8(b) and also, to the extent reasonably practicable:

(1) state the details of the time, place, participants, and events involved in the claim to the extent those details are not admitted; and

(2) attach each document the pleader may use to support its denials or Rule 103(c)(1) statement.

(d) Avoidances and affirmative defenses. A pleading that asserts an avoidance or affirmative defense must:

(1) identify the avoidance or affirmative defense as an avoidance or affirmative defense; and

(2) plead the avoidance or affirmative defense under the requirements of Rule 103(b) for making a claim for relief[, including attachment of each document the pleader may use to support the avoidance or affirmative defense].

(e) Reply.

(1) A party must reply to an avoidance or affirmative defense identified under Rule 103(d)(1) by admissions, denials, and avoidances or affirmative defenses.

(2) A party must serve a reply no more than twenty days after being served with the pleading addressed by the reply.

(f) Length. No pleading may exceed a limit of twenty pages, eight and one-half inches by eleven inches, with reasonable spacing, type size, and margins.

(g) Forms. Forms 3 through 22 in the Appendix of Forms do not suffice under Rule 103.

Committee Note

The fact pleading required by Rule 103 is, with the expanded disclosure requirements in Rule 105, the foundation for the Rule 106 discovery limits and the core of the simplified rules. Fact pleading is adopted for these rules to encourage careful preparation before filing. The general system of notice pleading and sweeping discovery works well for most litigation, but can, when misused, impose undue costs. It is hoped that shifting part of the pretrial exchanges between the parties from discovery to more detailed pleading and disclosure can enhance the realistic opportunity of all parties to litigate effectively claims that involve amounts of money that are relatively small in relation to the costs that litigation can entail. Plaintiffs can better afford to pursue worthy claims, and defendants can better afford to resist rather than capitulate to unworthy claims.

Fact pleading cannot be successful if it is approached in a spirit of technicality, much less hypertechnicality. Neither can it be successful if it assumes the mien of detailed witness statements or deposition transcripts. The spirit that has characterized notice pleading should animate Rule 103 fact pleading. What is expected is a clear statement of the pleader's claim, denial, or defense in the detail that might be provided in proposed findings of fact, recognizing that the information available at the pleading stage often is not as detailed or as reliable as the information available at the trial stage.

The test for measuring attachment of a document as one a party "may use" to support a claim, denial, or defense is the same as the test used under Rule 26(a)(1)(A) and (B). The duty to supplement the initial attachments to reflect information gained after filing the pleading is not a matter of pleading but of disclosure under Rule 105.

A reply is required to respond to an avoidance or affirmative defense, but only if the avoidance or affirmative defense is identified under Rule 103(d). To the extent that a reply asserts an avoidance or affirmative defense, a reply to the reply is required, although it is expected that this situation will arise infrequently. The twenty-day period to reply is borrowed from Rule 12(a)(2) because it seems better to have a single period to reply to a pleading that states both an avoidance or affirmative defense and also a counterclaim.

A party who believes that its positions cannot be pleaded adequately in 20 pages may seek leave to amend under Rule 15.

Reporter's Comment

This rule really gets to the heart of the project.

The decision to invoke the general pleading rules has great and obvious advantages. One obvious question is whether to incorporate all of Rule 9, which includes particularity requirements not only in the oft-invoked provisions of Rule 9(b) but also in Rules 9(a) and 9(c). Rule 9(g) on pleading special damage may raise a similar question. On balance, it seems better to retain these familiar provisions. The fact pleading required by this draft should not be equated automatically to the "particularity" requirements attached to specific claims, and most especially should not be equated to the statutory pleading requirements in the securities laws.

Another question is whether to retain the time provisions of Rule 12. The 60-days to answer allowed the United States or its employees seems long, but the reasons for allowing the additional time seem compelling even in this setting. Compare the proposal that the United States be allowed to opt out of the simplified rules, Rule 102(b)(5). There also is a temptation to expedite matters by providing that the time to answer is not suspended by a Rule 12(b) motion. On balance, this temptation seems better resisted.

Perhaps the most important question is whether to retain without change the Rule 15 amendment provisions. A policy of free amendment might undermine the purposes of fact pleading. But easy amendment may be even more important in a system that requires the parties to state relatively detailed positions early in an action; this need may be enhanced by the prospect that expensive prefiling investigation may not make sense in low-stakes actions. The greatest temptation, indeed, is to use the simplified rules as the excuse for a change in Rule 15 that may well be warranted for all cases. There is much to be said for allowing a plaintiff to amend once, as a matter of course, after an answer points out defects in the complaint. The same is true when a reply points out defects in an answer. Present Rule 15(a) allows amendment once as a matter of course if a defect is pointed out by motion but not if it is pointed out by pleading. This question deserves further consideration.

The reply obligation is limited to an avoidance or affirmative defense identified as such. Too much grief would come from requiring a reply to "new matter."

The particularized pleading requirement raises interesting questions about compliance with Rule 11: is more careful investigation required to support more careful pleading? Is that backward — we make it more difficult to bring a small-stakes action, even though the burdens are less, than to bring a more complex action?

Rule 104. Demand for Judgment

(a) Demand for judgment. A party may attach a demand for judgment to a pleading that asserts a contract claim for a sum certain. The demand must be supported by:

(1) a verified copy of any writing that evidences the obligation, and

(2) a sworn statement of

(A) facts establishing any obligation that is not completely evidenced by a writing,

(B) facts establishing total or partial nonperformance of the obligation, and

(C) the amount due.

(b) Response to demand for judgment.

(1) Within the time provided for answering the pleading asserting the claim, a party served with a demand for judgment must admit the amount due stated in the demand or file a response.

(2) The response must be sworn, and must respond specifically by admission, denial, avoidance, or affirmative defense to each matter set forth in the demand for judgment. The answer to the pleading asserting the claim may incorporate the response by reference.

(c) Judgment. Unless the court directs otherwise, the clerk must prepare, sign, and enter judgment for any amount admitted due under Rule 104(b). A judgment that does not completely dispose of the action is not final unless the court directs entry of final judgment under Rule 54(b).

Committee Note

The demand-for-judgment procedure is new. A substantial number of actions in federal court are brought by the United States to collect relatively small sums that are due on unpaid loans or overpaid benefits. The demand procedure is essentially a motion for summary judgment that is made with the pleading that states the claim, paving the way for efficient and inexpensive disposition of the cases in which the plaintiff sues only for the amount that in fact is due. This procedure also may be useful in other small claims brought under federal law, and in diversity actions that fall under these rules through Rules 102(a)(2) or 102(c).

Reporter's Comment

It may be asked why this procedure is not available to defendants as well as plaintiffs: an opportunity to confess judgment in a stated

amount. At least two observations may be offered. Defendants have summary judgment. And a competing offer-of-judgment procedure would be just that: a Rule 68-like device. Probably we do not want to go down that road with a simplified procedure. A defendant always can concede liability even if the plaintiff does not make a demand for judgment.

Rule 104A. Motion Practice

(a) Rule 12 applies to actions under these simplified rules except as provided by Rule 104A(b), (c), and (d).

(b) The times to answer provided by Rule 12(a)(1), (2), and (3) are not suspended by any motion; Rule 12(a)(4) does not apply to an action governed by these simplified rules.

(c) The answer to a pleading stating a claim for relief must state any defenses described in Rule 12(b).

(1) A motion to dismiss based on any of the defenses enumerated in Rule 12(b)(2), (3), (4), (5), or (7) may be made in the answer or by separate motion filed no later than 10 days after the answer is filed.

(2) A motion under Rule 104A(c)(1) does not suspend any time limitation for further proceedings unless the court by order in the particular case directs a different time limitation.

(d) A party seeking an order under Rules 12(b)(6), 12(c), 12(f), or 56 must combine the relief sought under any of those Rules into a single motion filed no later than 30 days after the filing of the answer or reply to the pleading stating the claim for relief addressed by the motion. If one party makes a timely motion under this Rule 104A(d), any other party may file a motion under this Rule 104A(d) no later than 20 days after being served with the first Rule 104A(d) motion.

Committee Note

Many lawyers and judges express frustration with the delays that arise from pretrial motion practice, and often note a suspicion that pretrial motions frequently are made for the purpose of inflicting delay and expense on an adversary. Rule 104A is designed to reduce the delay, while preserving the necessary functions served by Rules 12 and 56. Other pretrial motions are not affected by Rule 104A.

Subdivision (b) removes the delay that may be occasioned by Rule 12(a)(4). To make the meaning clear, the redundant clauses both state that Rule 12(a)(4) does not apply and that the time to answer is not suspended by any motion. It is important to establish the basic frame-

work of the pleadings as early as possible so that other pretrial activities can proceed.

Subdivision (c) sets outer limits on the time to move to dismiss on grounds that go to personal jurisdiction or venue. A motion based on failure to join a party under Rule 19 is included as well, but the court retains power to act on its own or on suggestion by a party when needed to protect the interests of an absent person. This subdivision further provides that a motion to dismiss under paragraph (1) does not suspend the time limitations for further proceedings; Rule 105 disclosures provide an immediate illustration.

Subdivision (d) combines into a single motion the motions to dismiss for failure to state a claim, for judgment on the pleadings, to strike matters from the pleadings, and for summary judgment. Because the time provided is short with respect to summary judgment, the moving party may add to the motion a request for additional time under Rule 56(f).

Reporter's Comment

This is a very rough first pass at a very complicated set of questions. The questions addressed seem likely candidates for discussion. It is possible that we will want to consider time limits on motion practice, or perhaps elimination of some motions, even if we decide to abolish the dramatic 6-month trial date proposed in Rule 109. But if we adhere to Rule 109 or anything much like it, we almost certainly will have to do something to prevent the use of motion practice to make a shambles of pretrial preparation.

It might be possible to add deadlines for ruling on motions. There are so many problems, however, that perhaps this question can be put aside.

Rule 105. Disclosure

(a) General. Disclosure requirements are governed by Rule 26(a), 26(e), 26(f), 26(g), [and 37(c)(1)], except as provided in Rule 105(b), (c), (d), and (e).

(b) Plaintiff's disclosure. No later than twenty days after the last pleading due from any present party is filed, each plaintiff must, with respect to its own claims, provide to other parties:

(1) the name and, if known, the address and telephone number of each individual likely to have discoverable information relevant to facts disputed in the pleadings, identifying the subjects of the information *[, together with a sworn statement of relevant facts made by plaintiff, if the plaintiff has discoverable information, and by any other person whose sworn statement is reasonably available to the plaintiff]*;

(2) a copy of all documents, data compilations, and tangible things in the possession, custody, or control of the party that are known to be relevant to facts disputed in the pleadings; and

(3) the damages computations and insurance information described in Rule 26(a)(1)(C) and (D).

(c) Other Parties' Disclosures. No later than twenty days after a plaintiff's Rule 105(a) disclosures are due, unless the time is extended by stipulation or court order, each other party must provide to all other parties a disclosure that meets the requirements of Rule 105(a)(1), (2), and (3) *{, including a sworn statement made by the disclosing party, if the disclosing party has discoverable information, and by any other person whose sworn statement is reasonably available to the disclosing party and has not already been provided in the action}*.

(d) Disclosure of Expert Testimony. If the court permits expert testimony under Rule 108, Rule 26(a)(2) governs disclosure unless the court limits or excuses the disclosure.

(e) Available Information; Obligation not Excused.

(1) A disclosure under Rule 105(a), (b), (c), or (d) must be based on the information then reasonably available to the disclosing party.

(2) The disclosure obligation is not excused because the disclosing party:

(A) has not fully completed its investigation of the case,

(B) challenges the sufficiency of another party's disclosure, or

(C) has not been provided another party's disclosures.

Committee Note

The disclosure obligation is expanded beyond Rule 26(a)(1)(A) and (B) obligations to disclose witnesses and documents in the belief that disclosure will prove more efficient than discovery for many of the actions governed by these simplified rules. Disclosure is required, however, only with respect to facts disputed in the pleadings. If a defendant defaults, or concedes liability under Rule 104, a plaintiff need not make any disclosure.

As to witnesses, it is required that a party provide the party's own sworn statement if the party has discoverable information, and also the sworn statement of any other witness that is reasonably available to the disclosing party. The test of reasonable availability is deliberately pragmatic, and is to be administered in the understanding that a party is not

always able to secure a statement from a person that seemingly would be willing to cooperate. If a person's sworn statement has already been provided in the action, another disclosing party need provide a supplemental statement by the same person only if the disclosing party wishes to elicit additional evidence from that person. Disclosure of these statements is an important support for the restrictions on deposition practice in Rule 106(d).

Disclosure requires copies of documents, not mere identification, but extends only to documents known to be relevant to facts disputed in the pleadings. A document is "known to be relevant" if a party, an agent of a party, or an attorney responsible for participating in the litigation is consciously aware of the document and its relevance. No duty is imposed to search for documents that a party does not seek out in its own investigation and preparation of the case.

Disclosures are sequenced, with plaintiffs going first, so that the plaintiffs' disclosures will provide a framework for more meaningful disclosures by other parties. Disclosures by other parties are due twenty days after plaintiffs' disclosures are due, whether or not plaintiffs have complied with their disclosure obligations. The parties may stipulate to a later date for disclosures after the first plaintiff's disclosure. The court likewise may order a later date; the best reason for deferring disclosure by other parties is a substantial failure of disclosure by the plaintiffs. A plaintiff who makes Rule 105(b) disclosures with respect to its own claims may make separate disclosures as to the claims of other parties under Rule 105(c), but may elect instead to combine those disclosures with its Rule 105(b) disclosures.

Rule 108 discourages the use of expert testimony in actions governed by these simplified rules. But if expert testimony is to be permitted at trial, Rule 26(a)(2) disclosure may be an important substitute for discovery. In determining whether to direct Rule 26(a)(2) disclosure, the court should consider whether the need for disclosure justifies the expense of securing a written report from the expert.

Reporter's Comment

Rule 105(e)(2) is taken from the final paragraph of Rule 26(a), as a matter of emphasis without cross-reference.

Rule 106. Discovery

(a) General. Discovery is governed by Rules 26 through 37, except as provided in Rule 106(b), (c), (d), (e), (f), and (g).

(b) Discovery Conference. A Rule 26(f) conference must be held only if requested [in writing] by a party. The request may be made before or after disclosures are due under Rule 105.

(c) Timing of Discovery. A party may make discovery requests only after a Rule 26(f) conference, or on stipulation of all parties or court order.

(d) Depositions.

(1) Number. The number of depositions permitted under Rule 30(a)(2)(A) and Rule 31(a)(2)(A) without leave of court is three. *{Alternative: A deposition may be taken under Rule 30 or Rule 31 only on stipulation of all parties or court order.}*

(2) Duration. The presumptive time limit for a deposition under Rule 30(d)(2) is one day of three, not seven, hours.

(e) Interrogatories. The presumptive number of interrogatories permitted under Rule 33 is ten.

(f) Rule 34 Discovery. A request for production or inspection of documents and tangible things under Rule 34 must specifically identify the things requested *{unless the court grants permission to identify the things requested by reasonably particular categories}*.

(g) Requests to Admit. A party may serve more than ten Rule 36 requests to admit on another party only on stipulation of all parties or court order.

Committee Note

The Rule 106 limitations on discovery are made possible by the expanded pleading requirements of Rule 103 and the expanded disclosure requirements of Rule 105. Together, these rules seek to assure plaintiffs that an action for relatively small stakes can be brought without undue expense, and to provide comparable assurance to defendants contemplating the costs of defending rather than defaulting.

The Rule 26(f) discovery conference is made available on request by any party. The discovery conference is not made mandatory because it is expected that the pleading and disclosure requirements of Rules 103 and 105, supplemented by the Rule 104 demand for judgment, will greatly reduce the need for discovery. But if a party wishes to use any discovery device, it must request a discovery conference or obtain a stipulation or court order allowing discovery without the conference.

Limits on the numbers of depositions and interrogatories are reduced to match the predictable reasonable limits of discovery in cases governed by the simplified rules. Expansion in the numbers may be obtained in the same way as under Rules 30, 31, and 33. A parallel limitation has been created for requests to admit.

Rule 34 requests are subjected to an obligation to specifically identify the documents or tangible things requested. Rule 105 imposes an

obligation to produce, as disclosure, copies of all documents known to be relevant to facts disputed in the pleadings. Full and honest compliance with this obligation, including the duty to supplement initial disclosures under Rule 26(e)(1), will meet the reasonable needs of most litigation governed by these simplified rules. *{Although no express limit is built into the provision allowing a court to permit a request that identifies the things requested by reasonably particularized categories, permission should be granted only if there is some reason to suspect that a reasonable further inquiry will produce useful information.}*

Reporter's Comment

Rules 106(d) and (e) are drafted by reference. The intention is to incorporate, for example, all of Rule 30(a)(2)(A), substituting "three" for "ten." That means all plaintiffs get three depositions, all defendants get three, all third-party defendants get three. It may be better to adopt a lengthier, but self-contained version that tracks the language of Rules 30, 31, 33, and 36.

Rule 107. Scheduling Orders

A rule 16(b) scheduling order is not required, but the court may, on its own or on request of a party, make a scheduling order.

Committee Note

Although Rule 16(b) scheduling orders may be useful in an action governed by the simplified rules, it is hoped that the shift in the balance between pleading, disclosure, and discovery will enable the parties to manage most actions without need for judicial administration.

Reporter's Comment

It is tempting to attempt to provide a firm discovery cutoff and a firm trial date by uniform rule. It seems likely, however, that the obstacles that persuaded the Advisory Committee not to adopt that approach for all civil actions will be found even with simplified actions. There may be a significant number of districts where it is not possible to provide a meaningfully firm trial date even for small-claims actions. In addition, it may be wondered whether it is wise to introduce an indirect docket priority for these actions by way of a firm trial date.

Rule 108. Expert Witnesses.

A party who wishes to present evidence under Federal Rules of Evidence 702, 703, or 705 must move for permission no later than the time for serving its initial disclosures under Rule 105, ten days after another party has moved for permission to present such evidence, or a different time set by the court. The court should consider the nature of

the disputed issues, the amount in controversy, and the resources of the parties in determining whether to permit expert testimony. The court also may consider appointment of an expert under Rule 706 of the Federal Rules of Evidence as an alternative to hearing testimony from experts retained by the parties.

Committee Note

There is a risk that a party to an action governed by these simplified rules may seek to increase the costs of litigating by offering expert testimony that would not be offered if the only motive were a desire to invest an amount reasonably proportioned to the stakes of the litigation. A party who seeks to offer expert testimony that is reasonably justified in terms of the difficulty of the issues to be tried should be allowed to present the testimony, even though the expense seems great in relation to the money at stake, unless the result may be an unfair advantage in relation to another party who cannot reasonably incur the cost of securing its own expert testimony.

Rule 108 cannot be applied to exclude expert testimony that is required by applicable substantive law. In professional malpractice actions, for example, expert testimony often is required to establish the elements of the claim.

Rule 109. Trial date

(a) Trial Date Set on Filing. At the time an action governed by these rules is filed, the clerk must set a trial date that is [no later than]:

(1) six months from the filing date, or

(2) seven months from the filing date if any party is the United States, an agency of the United States, an officer or employee of the United States sued in an official capacity, or an officer or employee of the United States sued in an individual capacity for acts or omissions occurring in connection with the performance of duties on behalf of the United States.

(b) Serving Notice of Trial Date. Notice of the Rule 109(a) trial date must be served

(1) with the summons and complaint or,

(2) if a defendant has waived service, promptly after the action is {filed} [commenced].

(c) Amending Trial Date. The Rule 109(a) trial date may be extended by order [of the court] to a date later than the period set by Rule 109(a) only on showing that:

(1) the plaintiff had good reason for failing to serve a defendant within 20 days from the filing date, or

(2) extraordinary reasons require a deferred trial date, but it is not sufficient reason **(A)** that the parties have not completed disclosure or discovery, nor **(B)** that the nature of the action requires deferral.

Committee Note

Expeditious disposition is an important element of these simplified rules. Setting a firm trial date when the action is filed will prompt the parties to proceed expeditiously. This effect requires that the date be quite firm. Extensions are allowed only when there is good reason for failing to effect service within 20 days from filing, or when extraordinary reasons require greater time. Failure to complete disclosure and discovery, and pleas that an action is by its nature too complex to prepare in six months (or seven months if the parties include the United States or its agents), do not provide sufficient reason. It is expected that courts will manage their dockets so that only extraordinary docket conditions will require an extension because the court is unable to honor the initial trial date.

Reporter's Comment

This provision might well be moved up to lie between Rule 103 and Rule 104.

The draft Committee Note points to the objections that may be advanced to the "speedy trial" requirement. Particularly with individual docket systems, it may prove very difficult to honor a trial date set at the time of filing. On the other hand, the importance of speedy trial cannot be denied, particularly with a procedural system that is designed to achieve economy. These issues are important, and deserve hard work to craft the best possible rule. A firm six-month trial date could be more easily achieved if districts that have a substantial number of judges would adopt a centralized docket for these cases. If indeed these cases are amenable to simplified procedure, a centralized docket system might work reasonably well.

Because this draft rule was a last-minute addition, it has been created without attempting to work through the many issues that should be considered if it is to be adopted. A six-month trial date could create havoc if the plaintiff is allowed to make service at any time within the 120-day period allowed by Rule 4(m). Many other time periods also need to be considered, including those that suspend the time to answer while a Rule 12 motion is pending, the time to complete disclosure, and so on. Beyond the time periods set in the Rules, it may be necessary to consider time periods set by local rules — a lengthy notice requirement for motions in general, or more specific timing requirements for summary judgment motions, could be incompatible with the 6-month trial date.

Another source of time problems may arise from local ADR practices. Commonly ADR establishes a "time out" from ordinary requirements. Adjustments may be needed on this score as well.

All of these firm timing requirements suggest another problem. If firm deadlines are set for several steps along the way, the result may be more expensive litigation. Forced to "do it now or never," lawyers may feel compelled to do many things that, without this pressure, would never be done. It is not necessarily a good answer to require that all motions be made within X days, or to require that an answer be filed before the court decides a motion to dismiss or for more definite statement, and so on.

A firm trial date provision could be drafted in different terms that might reduce these difficulties. For example, the date might be set by order after the pleadings are closed.

In addition to a firm trial date, it also may be desirable to think about trial time limits. It might be provided, for instance, that good cause must be shown to obtain more than one trial day for all plaintiffs or for all defendants.

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Is Now the Time for Simplified Rules of Civil Procedure

Paul V. Niemeyer

IS NOW THE TIME FOR SIMPLIFIED RULES OF CIVIL PROCEDURE?

Paul V. Niemeyer*

On June 15, 1215, at Runnymede along the banks of the River Thames, King John agreed, in response to forceful demands of the English barons, to the restoration of the traditional English liberties included in Henry I's Charter of Liberties. The document, later denominated the Magna Carta, promised, as an early form of due process, that "no free man shall be taken or imprisoned or dispossessed, or outlawed, or banished, or in any way destroyed . . . except by the legal judgment of his peers or by the law of the land."[1] And it included immediately thereafter the procedural promise, "To no one will we sell, to no one will we deny, or *delay* right or justice."[2]

Just as the Magna Carta's promise of judgment by peers under the law of the land animates current notions of due process, its promise not to sell, deny, or delay justice is the fountainhead of the stated role of the Federal Rules of Civil Procedure, which directs that the Rules "should be construed and administered to secure the just, *speedy*, and *inexpensive* determination of every action and proceeding."[3] Thus beginning with the Magna Carta and continuing to now, we happily subscribe to the fundamental goal that our civil process not *delay* right or justice.

* * *

Unfortunately, any objective evaluation of current federal civil process will inevitably lead to the conclusion that the process is functioning inadequately in its purpose of discharging justice speedily and inexpensively. One need only ask any trial lawyer whether he can try a medium-sized commercial dispute to judgment in a federal court in less than three years and at a cost of less than six figures. Is the iconic appellation of "making a federal case

* Judge, United States Court of Appeals, Fourth Circuit; Chairman, Judicial Conference Advisory Committee on the Federal Rules of Civil Procedure, 1996–2000; Member, 1993–96.

1. KING JOHN, MAGNA CARTA (1215), *reprinted in* SOURCES OF OUR LIBERTIES 17 (Richard L. Perry & John C. Cooper eds., rev. ed. 1991).

2. *Id.* (emphasis added).

3. FED. R. CIV. P. 1 (emphasis added).

out of a dispute" not the ultimate condemnation of current judicial process in federal courts? Can we understand the private bar's flight from federal courts to arbitrations, mediations, and other methods of alternative dispute resolution as anything but the bar's vote against the process provided by the Federal Rules of Civil Procedure?

We rightly fear the answers to these questions, which we see in our own observations and in the available empirical evidence. And because we do, I submit, the time has come for a systematic review of civil process with a genuine openness to undertaking a serious and determined effort to simplify the Federal Rules of Civil Procedure.

When I was Chairman of the Civil Rules Advisory Committee, Professor Edward H. Cooper, the Committee's Reporter, and I initiated just such an undertaking. My tenure as Chairman, however, which had already been extended, ended in 2000, before we made much progress in this endeavor. Professor Cooper nonetheless preserved the beginnings of our effort in his essay, *Simplified Rules of Federal Procedure?*.[4] It is now time, I suggest, to revisit these beginnings and draw upon Professor Cooper's experience and leadership to resurrect this important and necessary effort.

* * *

With the adoption in 1938 of the Federal Rules of Civil Procedure, a new experiment in judicial process was begun. Before 1938, the rules of pleading were strict and complicated, and discovery was minimal and difficult to obtain. Charles Edward Clark, the first Reporter of the Civil Rules Committee, did not believe "that most lawyers were sufficiently skilled to meet rigorous pleading requirements" or that "elaborate pleadings were a useful way to expose facts or narrow issues."[5] He advocated simple, flexible rules that combined law and equity and afforded broader discovery. As George Ragland, Jr., author of the then-famous 1932 book, DISCOVERY BEFORE TRIAL, had observed, "'[t]he lawyer who does not use discovery procedure is in the position of a physician who treats a serious case without first using the X-ray.'"[6] Both Ragland and Clark believed that greater clarity in the definition of the issues

4. Edward H. Cooper, *Simplified Rules of Federal Procedure?*, 100 MICH. L. REV. 1794 (2002).

5. Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691, 711 n.133 (1998).

6. GEORGE RAGLAND, JR., DISCOVERY BEFORE TRIAL 251 (1932).

would be obtained by greater discovery, adopting the views of Professor Edson R. Sunderland of the University of Michigan:

> False and fictitious causes and defenses thrive under a system of concealment and secrecy in the preliminary stages of litigation followed by surprise and confusion at the trial. . . . All this is well recognized by the profession, and yet there is widespread fear of liberalizing discovery. Hostility to "fishing expeditions" before trial is a traditional and powerful taboo.[7]

Indeed, Sunderland, who later became the principal drafter of the new discovery rules, believed that "[m]ost of the restrictions upon the free use of discovery are not only unnecessary but cause an enormous amount of trouble to the parties and the courts in construing and applying them."[8]

Accordingly, the newly adopted 1938 Rules merged the diverse procedures for law and equity and simplified pleading, adopting what we now refer to as "notice pleading."[9] At the same time, they transferred the function of fleshing out complaints to discovery and an expanded motions practice. To serve this "revolutionary" new role, the scope of discovery was broadened and greatly facilitated.[10] Discovery devices were granted as of right, and its scope was broad, ultimately defined to permit inquiry into information not only relevant to claims and defenses but also relevant to the subject matter involved—and the term relevant information was not limited to admissible evidence but included information "reasonably calculated" to lead to admissible evidence.[11] In addition, the regulation of discovery was largely transferred from the court to the attorneys for the parties. With these changes, the 1938 Rules and its subsequent amendments prescribed what would inevitably become a more protracted pretrial process.

While the 1938 Rules thus shifted procedural battles, perhaps unwittingly, from pleading to discovery, they also reassigned resolution of the battles from the court to the attorneys for the litigants.

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7. Edson R. Sunderland, *Foreword* to GEORGE RAGLAND, JR., DISCOVERY BEFORE TRIAL, at iii (1932).

8. Subrin, *supra* note 5, at 716 (quoting Edson R. Sunderland, *Improving the Administration of Civil Justice*, *in* 167 ANNALS OF THE AM. ACAD. OF POL. & SOC. SCI. 75–76 (1933)).

9. *See, e.g.*, Swierkiewicz v. Sorema N.A., 534 U.S. 506, 611 (2002); Conley v. Gibson, 355 U.S. 41, 47–48 (1957).

10. *See* Armistead M. Dobie, *The Federal Rules of Civil Procedure*, 25 VA. L. REV. 261, 275 (1939) ("If the term 'revolutionary' can be correctly applied to any part of the new rules, that part is discovery.").

11. FED. R. CIV. P. 26(b) (1970).

As enigmatic as this idea would appear when considered for application in a strong *adversarial* context, it was nonetheless taken as a well-intended experiment to replace the highly restrictive pretrial process that had existed before. In addition to failing to anticipate the problems that would arise from adversaries being directed to resolve their own disputes, the idea failed to recognize that such disputes would also enhance attorney compensation.

The bench and bar were initially hesitant to move in this novel and "revolutionary" direction for resolving civil disputes, and this prompted a campaign to highlight its benefits. In a speech before the annual meeting of the State Bar of California shortly after the 1938 Rules were adopted, entitled "The New Spirit in Federal Court Procedure," Judge Lewis E. Goodman urged those of the bench and bar who were hesitant to get with the program.[12] Judge Goodman explained:

> The adroit procedural maneuvering of the earlier days in the pleading stage, often invoked to deprive a litigant of his day in court, is now relegated to the archives. . . . Thus the complaint and the answer need do no more than, in colloquial manner, state on the part of the complaining party "you did" and on the part of the answering party, "I did not." . . . But pleadings no longer determine the issues to be tried. In effect, all they do is generally apprise the parties of the nature of the claim and the defense. Thus time and effort and expense is saved. Much of the reluctance to accept the philosophy of the new procedure was due to a failure on the part of many lawyers and of some judges to distinguish between the pleading stage in litigation and the trial preparation stage. Information in the pleadings stage is widely different from information as to evidentiary matters necessary for proper trial preparation.
>
> Whereas simplification is made the keynote of pleadings, wide opportunity and liberality in the obtaining of information as to factual matters needed for the trial is made the keynote of the discovery rules.[13]

The new era of dispute resolution was thus launched, based on the commencement of cases with minimally articulated complaints and the provision for liberal discovery thereafter, with the idea that the case could suitably be tested for viability later in the process

12. Lewis E. Goodman, The New Spirit in Federal Court Procedure, 7 F.R.D. 449 (1947).
13. *Id.* at 450.

with a robust motions practice. And, as could be anticipated, discovery thus became the vogue, and experts in discovery became the successful litigators.

Over the years, more expansive discovery was authorized through a series of amendments to the Civil Rules in 1946, 1963, 1966, and 1970. The 1938 idea of shifting evaluation of the case from the pleading stage to a time after the completion of discovery was increasingly emphasized, and with the increased emphasis grew a more expensive and expansive procedural process, not only because of the expansion of discovery rights but also because of the explosive growth of recordkeeping, recorded information, and data. In addition, the self-regulation aspect of discovery contributed to new rights. Professor Paul Carrington, a professor at Duke Law School and a former Reporter to the Civil Rules Committee, observed that we now have "900,000 attorneys running about with almost unrestrained subpoena power."[14]

Under the new scheme, it was anticipated that the parties would go to court infrequently to resolve discovery disputes, as they were expected to act in good faith to resolve their differences. But when aggressive discovery and motions practice became a successful approach to pursuing litigation, discovery disputes became the prime source of cost and delay. Indeed, attorney self-regulation routinely deteriorated into warlike, mean-spirited brawls. Document production often became synonymous with "flood the opposition and expense them into submission." Depositions often became multi-day grilling sessions in which grace, manners, and gentility became the exception. Lamenting the burdens of discovery costs, the Supreme Court noted that one deposition in a defamation case "continued intermittently for over a year and filled 26 volumes containing nearly 3,000 pages."[15] And parties and witnesses, who had experienced depositions, sought to avoid them as they would the plague.

The crisis was exacerbated in no small part by the Supreme Court's decision in *Hickman v. Taylor*,[16] which directed courts to accord discovery "broad and liberal treatment."[17] In *Hickman*, the Court explained that "[n]o longer can the time-honored cry of 'fishing expedition' serve to preclude a party from inquiring into the facts underlying his opponent's case. Mutual knowledge of all

14. Statement of Paul Carrington, Professor of Law, Duke University to author about renovating discovery, (Mar. 1997) (on file with author); *accord* Paul D. Carrington, *Renovating Discovery*, 49 ALA. L. REV. 51, 54 (1997).

15. Herbert v. Lando, 441 U.S. 153, 176 n.25 (1979).

16. 329 U.S. 495 (1947).

17. *Id.* at 507.

the relevant facts gathered by both parties is essential to proper litigation."[18] Over the next twenty years, *Hickman*, combined with the pro-discovery mantra stated in the Rules' amendments, led courts to resolve most doubts about the propriety of discovery in favor of providing the discovery. And the bar—and indeed soon, the public—began to complain.

* * *

The liberalization of discovery, and its attendant costs, soon led to a multifaceted movement to restrict its broad scope. In 1976, Chief Justice Warren Burger convened the Pound Conference in order "to assess the troubled state of litigation."[19] The conference concluded that "[w]ild fishing expeditions, since any material which might lead to the discovery of admissible evidence is discoverable, seem to be the norm."[20]

In 1977, the American Bar Association (ABA) embarked on a major effort to persuade the Civil Rules Committee to restrict the broad scope of discovery delineated in Rule 26, proposing to limit discovery to "any matter, not privileged, which is relevant to the *issues raised by the claims or defenses* of *any* party."[21] This proposal was initially accepted by the Civil Rules Committee in proposed amendments. After circulation for public comment, however, it was eliminated from the final draft, along with other aspects of the ABA reform proposals.[22] Three justices of the Supreme Court dissented from the eventual adoption of only minor adjustments to the Rules and the rejection of the ABA's recommendations, suggesting that the "Court's adoption of these inadequate changes could postpone effective reform for another decade."[23]

But the ABA proposal did not die, and it was again presented to the Civil Rules Committee by the American College of Trial Lawyers, informally in 1995 and formally in 1997. At the time, Rule 26

18. *Id.* (footnote omitted).

19. Griffin B. Bell et al., *Automatic Disclosure in Discovery—The Rush to Reform*, 27 GA. L. REV. 1, 9 (1992).

20. William H. Erickson, The Pound Conference Recommendations: A Blueprint for the Justice System in the Twenty-First Century, 76 F.R.D. 277, 288 (1978).

21. Report of the Special Committee for the Study of Discovery Abuse, 92 F.R.D. 149, 157 (1977).

22. *See* Edward D. Cavanagh, *The August 1, 1983 Amendments to the Federal Rules of Civil Procedure: A Critical Evaluation and a Proposal for More Effective Discovery Through Local Rules*, 30 VILL. L. REV. 767, 779 n.54 (1985).

23. Dissenting Statement of Justice Powell, joined by Justices Stewart and Rehnquist, 446 U.S. 997, 998 (1980).

permitted discovery relevant to "the *subject matter* involved in the pending action."[24] The College proposed an amendment to the rule that would provide that "parties may obtain discovery regarding any matter, not privileged, which is related to the *claim or defense of a party*."[25] The College anticipated that such an amendment would help stem the tide of emerging complaints. In 2000, the Rules Committee and the Supreme Court adopted this recommendation in part, replacing the phrase "subject matter" with "claim or defense" in Rule 26(b)(1).[26] The new rule, however, still provided the court with authority to order discovery into matters relevant to the "subject matter" if the party seeking such information could show good cause. The amendment was thus "designed to involve the court more actively in regulating the breadth of sweeping or contentious discovery."[27]

By the late 1980s and early 1990s, even lay observers of the legal system began complaining that the costs of pretrial discovery were out of proportion to the contribution that discovery made to the dispute-resolution process. In August 1991, the President's Council on Competitiveness issued a report claiming that the judicial system had become burdened with excessive costs and long delays. The report claimed that each year the United States was spending an estimated $300 billion as "indirect cost[s] of the civil justice system" and $80 billion in direct costs.[28] And the report blamed discovery as the chief culprit. It claimed that "[o]ver 80 percent of the time and cost of a typical lawsuit involves pretrial examination of facts through discovery."[29]

Congress too began to focus on the issue; in 1988, it enacted the Judicial Improvements and Access to Justice Act of 1988[30] with the longstanding goal that the federal court system secure the "just, speedy and inexpensive determination of every action."[31] Congress concluded then that

> the Federal judiciary is beset by problems in all three of these areas: delay caused by rising caseloads and insufficient support

24. FED. R. CIV. P. 26(b) (1993).

25. Letter from American College of Trial Lawyers to Advisory Committee on Civil Rules (c. 1995) (on file with author).

26. FED. R. CIV. P. 26(b)(1) advisory committee's note to the 2000 amendments.

27. *Id.*

28. Dan Quayle, *Agenda for Civil Justice Reforms in America*, 60 U. CIN. L. REV. 979, 980 (1991).

29. *Id.* at 981.

30. Pub. L. No. 100-702, 102 Stat. 4642 (codified as amended in scattered sections of 28 U.S.C. and 42 U.S.C.).

31. H.R. REP. No. 100-889, at 23 (1988) (footnote omitted).

> services; spiraling costs caused by litigation expenses and attorneys' fees; and unfair and inconsistent decision caused by the pressures placed on judges who must cope with the torrent of litigation.[32]

The Act was thus enacted with the specific purpose of "modernizing" the rule-making process, to recognize and encourage alternative dispute resolution, to deal with mass disasters, and to improve the Federal Judicial Center.[33]

But even with enactment of the 1988 Act, public pressure persisted, and Congress again undertook to enact legislation to reduce costs and delay in litigation. Prompted by this pressure, then-Senator Joseph Biden initiated a study by the Brookings Institution, and proposed a bill for numerous judicial "improvements" based on its findings.[34] Under the proposed bill, Congress intended to become significantly involved in the day-to-day management of federal cases to reduce costs and delay and to increase judicial efficiency. Alarmed by perceived threats to judicial independence, the Third Branch initiated discussions and negotiations with Senator Biden and Congress, resulting in substantial reductions of Congress's proposed intrusion. The compromise became the Civil Justice Reform Act of 1990 (CJRA).[35]

The CJRA required each federal district to conduct self-study and to develop a civil case management plan for the purpose of reducing costs and delay in litigation.[36] Also, to evaluate a package of congressionally mandated management techniques, the Act provided for the establishment of ten pilot districts employing the mandated techniques and ten comparator districts, with an evaluation of the twenty districts to follow.[37] The Institute for Civil Justice at RAND was then retained to conduct the evaluation. Its unprecedented study of the federal courts collected data from over twelve thousand cases in twenty representative districts.[38] When evaluated,

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32. *Id.*

33. *Id.*

34. THE BROOKINGS INST., JUSTICE FOR ALL: REDUCING COST AND DELAY IN CIVIL LITIGATION (1989).

35. Pub. L. No. 101-650, 104 Stat. 5089 (1990) (codified as amended at 28 U.S.C. §§ 471–482 (2006)).

36. *Id.* § 104.

37. *Id.* § 105.

38. The four reports that comprise that evaluation are JAMES S. KAKALIK ET AL., INST. FOR CIVIL JUSTICE, JUST, SPEEDY, AND INEXPENSIVE? AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT (1996); JAMES S. KAKALIK ET AL., INST. FOR CIVIL JUSTICE, IMPLEMENTATION OF THE CIVIL JUSTICE REFORM ACT IN PILOT AND COMPARISON DISTRICTS (1996); JAMES S. KAKALIK ET AL., INST. FOR CIVIL JUSTICE, AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT (1996), *available at* http://www.rand.

the data revealed no single, easy path to reducing costs and delay. Indeed, it was striking that the study did not find much difference in the levels of judicial efficiency between the pilot districts and the comparator districts, indicating that the congressionally mandated techniques for case management yielded little improvement to judicial efficiency. Some explained that the judges involved in the mandated program did not come to the experiment with the positive attitude necessary to make the program work, and others concluded that the entire experiment was ill conceived and doomed at the outset by its vagueness.

The RAND study did, however, reveal several important facts that could be useful in guiding any future reform initiatives. *First*, the data supported the conclusion that early court intervention in the management of cases reduced delay, even though it also increased litigant costs.[39] *Second*, the data confirmed that setting a firm trial date early was the most effective tool of case management, reducing delay without any adverse impact on cost.[40] And *third*, the data indicated that controlling discovery by reducing its length (i.e., by establishing an early cutoff date) reduced both costs and delay without adversely affecting attorney satisfaction.[41]

Following the enactment in 1990 of the CJRA, although not directly responsive to it, the Civil Rules Committee did adopt several amendments in 1993 to the Civil Rules relating to case management and discovery.[42] The case management rules focused principally on providing more explicit flexibility and guidance in entering case management orders, discovery orders, and other pretrial orders. Most of these changes were made to Rule 16. The Committee at the time also elected to amend the discovery rules to

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org/content/dam/rand/pubs/monograph_reports/2007/MR802.pdf; and JAMES S. KAKALIK ET AL., INST. FOR CIVIL JUSTICE, AN EVALUATION OF MEDIATION AND EARLY NEUTRAL EVALUATION UNDER THE CIVIL JUSTICE REFORM ACT (1996). This essay focuses on the third report, EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT [hereinafter "REPORT"].

39. REPORT, *supra* note 38, at 55 ("Early judicial case management is associated with both significantly reduced time to disposition and significantly increased lawyer work hours. Our sample data show that the costs to litigants were also higher in dollar terms, and in litigant hours spent, when cases were managed early.").

40. *Id.* at 56 ("In terms of predicting reduced time to disposition, setting a schedule for trial early was the most important component of early management. Including early setting of trial date as part of the early management package provides an additional reduction in time to disposition, but no further significant change in lawyer work hours.").

41. *Id.* at 67–68 ("Shorter time from setting a discovery schedule to discovery cutoff is associated with both significantly reduced time to disposition and significantly reduced lawyer work hours. . . . These benefits are achieved without any significant change in attorney satisfaction or views of fairness.").

42. *See* FED. R. CIV. P. 26 advisory committee's note to the 1993 amendments.

require mandatory disclosure of specified discoverable information. These changes, which are included in Rule 26(a), require parties to disclose up front—without the need for a request—witnesses, documents, damage computations, and expert testimony.

In 2000, the Rules Committee made more changes, which further expanded mandatory disclosure, limited the scope of discovery as of right by enacting the proposal made by the American College of Trial Lawyers, and limited the use of various discovery tools by reducing the length and number of depositions, as well as the number of interrogatories.

Finally, the Supreme Court, in its decisions, also reacted directly to problems of costs and delay in civil process. Beginning about the same time as the Pound Conference and the initial ABA effort, the decisions and language of the Court began to reflect more hesitancy toward broad discovery rules and, in a variety of ways, indicated a need to control discovery. The Court's decisions also began to focus on the benefits of enhancing pleading requirements.

For example, in a 1975 decision, the Court lamented the "potential for possible abuse of the liberal discovery provisions of the Federal Rules of Civil Procedure" and the importance of preventing parties from utilizing discovery as a means of influencing the "settlement value" of a case rather than as a means of "reveal[ing] relevant evidence."[43] Several years later, in *Herbert v. Lando*, the Court noted that "mushrooming litigation costs" were in large part due to pretrial discovery, declaring that "[t]here have been repeated expressions of concern about undue and uncontrolled discovery, and voices from this Court have joined the chorus."[44] The *Herbert* Court emphasized that discovery rules are "subject to the injunction of Rule 1 that they 'be construed to secure the just, *speedy*, and *inexpensive* determination of every action'" and that district judges should therefore "not hesitate to exercise appropriate control over the discovery process."[45] And it made clear that appropriate control over the discovery process meant protecting parties and persons from "annoyance, embarrassment, oppression, or undue burden or expense."[46]

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43. Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 741 (1975).

44. 441 U.S. 153, 176 (1979).

45. *Id.* at 177 (quoting FED. R. CIV. P. 1) (emphasis added).

46. *Id.* (quoting FED. R. CIV. P. 26(c)); *see also* Seattle Times Co. v. Rhinehart, 467 U.S. 20, 34 (1984) ("It is clear from experience that pretrial discovery by depositions and interrogatories has a significant potential for abuse."); Roadway Express, Inc. v. Piper, 447 U.S. 752, 757 n.4 (1980) ("[M]any actions are extended unnecessarily by lawyers who exploit or abuse judicial procedures, especially the liberal rules for pretrial discovery. The glacial pace of much litigation breeds frustration with the federal courts and, ultimately, disrespect for the law.") (internal citations omitted).

The Supreme Court also tightened qualified immunity standards in constitutional tort litigation, with a focus on the high cost of discovery, and it took a restrictive view of discovery in transnational commercial litigation so as to "protect public officials from the 'broad-ranging discovery' that can be 'peculiarly disruptive of effective government,'"[47] and to "protect foreign litigants from the danger [of] unnecessary[ ] or unduly burdensome[ ] discovery."[48]

In addition to addressing the costs and delay inherent in discovery, the Court also began to address the benefits of enhanced pleading and summary-judgment procedures. In *Celotex Corp. v. Catrett*,[49] the Court noted the importance of the summary-judgment process to the protection of the rights of defendants faced with meritless claims in a notice pleading system. And in *Bell Atlantic Corp. v. Twombly*,[50] the Court addressed directly how the quality of pleading was a facet of mitigating potential abuses in discovery. It explained that "it is self-evident that the problem of discovery abuse cannot be solved by 'careful scrutiny of evidence at the summary judgment stage,' much less 'lucid instructions to juries,' . . . ; the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings."[51] The *Twombly* Court accordingly held that a complaint must allege "enough factual matter (taken as true) to suggest that an [antitrust] agreement was made," characterizing this requirement as a "plausibility" standard.[52] A couple of years later, in *Ashcroft v. Iqbal*,[53] the Court restated the standard, holding that to survive a motion to dismiss, a complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'"[54] Explaining its adjustment to the 1938 notice pleading concept, the Court stated "Rule 8 [General Rules of Pleading] marks a notable and generous departure from the hypertechnical, code-pleading regime of a prior era, but it does not unlock the doors of

47. Anderson v. Creighton, 483 U.S. 635, 646 n.6 (1987) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 817 (1982)).

48. Société Nationale Industrielle Aérospatiale v. U.S. Dist. Ct. for the S. Dist. of Iowa, 482 U.S. 522, 546 (1987).

49. 477 U.S. 317, 327 (1986).

50. 550 U.S. 544 (2007).

51. *Id.* at 559 (internal citation omitted); *see also id.* at 557–58 ("[S]omething beyond the mere possibility of loss causation must be alleged, lest a plaintiff with 'a largely groundless claim' be allowed to 'take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value'") (quoting Dura Pharm., Inc. v. Broudo, 544 U.S. 336, 347 (2005)).

52. *Twombly*, 550 U.S. at 556.

53. 556 U.S. 662 (2009).

54. *Id.* at 678 (internal citation omitted).

discovery for a plaintiff armed with nothing more than conclusions."[55]

At bottom, however, these reform efforts by Congress, the Civil Rules Committee, and the Supreme Court have not taken on the larger structural problem arising directly from the 1938 experiment, and an inappropriate level of costs and delay persists in civil process.

* * *

To learn more about the root causes of cost and delay in civil process, the Civil Rules Committee requested two studies to collect empirical data. At the Committee's request, the Federal Judicial Center conducted a national survey of lawyers, the response to which was broad and informative.[56] The Committee also requested that the RAND Institute for Civil Justice review its massive database, developed in connection with its evaluation under the CJRA in 1990, and provide answers to particular questions about discovery that those data might reveal.[57] Both the Federal Judicial Center and the RAND Institute provided the Committee with comprehensive reports.

From the reports, as well as conferences it held in San Francisco and Boston, the Civil Rules Committee learned that the mechanism for obtaining information through discovery in connection with the resolution of civil disputes was thought to be both necessary and desirable by virtually all legal constituencies. No one in the legal community seemed to be interested in eliminating the requirement of full pretrial disclosure of relevant information.

The Committee also learned that discovery was working effectively and efficiently in the majority of federal cases. Indeed, discovery was not used in almost 40 percent of the federal cases and was used to the extent of three hours or less in another 25–30 percent of the cases.

In civil cases where discovery was actively used, however, both plaintiffs' and defendants' attorneys found it unnecessarily expensive and burdensome. The plaintiffs' attorneys complained most intensely about the length, number, and cost of depositions, while

55. *Id.* at 678–79.

56. The Federal Judicial Center's study was reported at a conference at the Boston College Law School in September 1997. *See* Thomas E. Willging et al., *An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rules Amendments*, 39 B.C. L. REV. 525 (1998).

57. James S. Kakalik et al., *Discovery Management: Further Analysis of the Civil Justice Reform Act Evaluation Data*, 39 B.C. L. REV. 613 (1998).

defendants' attorneys complained most intensely about the number of documents required for production by document requests and the cost of selecting and producing them. While the data revealed that the cost of discovery in all federal cases represented approximately 50 percent of litigation costs, in those cases where discovery tools were actively employed, it represented roughly 90 percent of litigation costs.

The data also showed that trial attorneys representing both plaintiffs and defendants believed that the costs of discovery disputes would be reduced substantially by greater and earlier judicial involvement in the process. They maintained that the level of efficiency was directly proportional to the level of early judicial involvement in the process. These conclusions seemed to challenge one of the premises of the 1938 Rules experiment: that discovery could carry the burden of fleshing out claims and that the management of discovery could be managed well by the adversaries themselves. Remarkably, the Federal Judicial Center found that approximately 83 percent of all attorneys polled wanted some change to the discovery rules.

Finally, the Committee learned that early discovery cutoff dates and firm trial dates were the best court management tools for reducing costs and delay in litigation.

* * *

From 1999 to 2000, as Chairman of the Civil Rules Committee, I began to recognize that the 1993 and proposed 2000 amendments to the Civil Rules were little more than band-aids for addressing the complaints of cost and delay in the judicial process. Litigants were still complaining and seeking to avoid court process through alternative dispute resolution.

In thinking about the problem, I had extended discussions with Professor Cooper, our Reporter, and Professor Geoffrey Hazard, who was leading the American Law Institute's effort in designing transnational rules of civil procedure. We explored what features might be considered essential to civil process, what might be considered baggage, and what a fair and inexpensive process might look like.

As a result of these discussions, Professor Cooper and I broached the idea of initiating a project to draft "simplified rules" of federal procedure to the Civil Rules Committee and to the Standing Rules Committee. All members who expressed any view welcomed the idea. Professor Cooper then wrote and presented an initial draft of

the *Simplified Rules* that would be included as supplemental rules to the Federal Rules of Civil Procedure.[58] The Civil Rules Committee was never able, however, to begin a detailed debate on the project, as my tenure ran out. But Professor Cooper's early work was not undertaken in vain, as it is preserved, and now should be employed as a starting point to revisit the 1938 experiment.

As Professor Cooper later wrote of the draft, it has as its "central feature . . . a major transfer of pretrial communication away from discovery and to fact pleading and disclosure."[59] This observation articulated a fundamental and necessary course correction to the approach taken in 1938.

The proposed draft specified a mandatory application of the Simplified Rules to all small money-damage actions and an elective application to larger money-damage actions. It would not require that the Simplified Rules be applicable to all money-damage actions or to other actions.

Substantially, the draft incorporates five basic elements, all of which neatly address known problems of costs and delay in federal civil process. *First,* the draft requires pleadings to become more detailed, enabling an early serious look at the merits of a case. Under the proposal, a complaint would state "the details of the time, place, participants, and events involved in the claim," and would have attached to it "each document the pleader may use to support the claim."[60] This approach to some degree anticipated the approach that the Supreme Court later took in *Twombly* and *Iqbal.* In *Iqbal,* for example, the Court stated:

> To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.'"[61]

58. Cooper, *supra* note 4, at 1804–20 (reproduction of the Reporter's Draft).

59. *Id.* at 1800–01.

60. *Id.* at 1808 (quoting Draft Rule 103(b)(1)).

61. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (internal citations omitted).

The draft also authorized the immediate disposition of some claims through the use of verified complaints and answers and a mini-summary-judgment process. Under the draft, the answer would likewise have to state the defendant's position with the same detail required for the complaint, including the factual basis for any avoidances and affirmative defenses.[62]

Second, the draft would enhance early discovery disclosures, which would have to be made within twenty days of the filing of the last pleading. While retaining Rule 26 requirements in part, the draft would mandate a greater level of disclosure, more closely imitating what would amount to a fundamental level of discovery but without the need for a request. Combined with the enhanced pleadings, this second proposal "front-loads" pretrial communications so as to enable earlier and less expensive disposition of cases.

Third, the draft would restrict discovery, presumptively authorizing only three three-hour depositions, ten interrogatories, and only requests for documents and intangible things that "specifically identify" the matters requested.[63]

Fourth, the draft would reduce the burden of the motions practice, requiring that all motions be combined and filed early in the proceedings—within thirty days of the last pleading[64]—and providing that their filing not suspend any other time limitation established by the Rules.

Fifth and finally, the draft would require that when a complaint is filed, the clerk of the district court would have to schedule the trial of the case not later than six months after the filing date,[65] and that the trial date would be included in the summons served with the complaint.[66] This one change was found by the RAND Institute to be the single best practice for reducing costs and delay in litigation.[67]

Although Professor Cooper's draft proceeds with caution—perhaps wisely—had I been able to continue with the project, I would have pressed for consideration of three additional ideas. *First,* I

62. Cooper, *supra* note 4, at 1808 (quoting Draft Rule 103(b)(2)).

63. Cooper, *supra* note 4, at 1818 (referencing Draft Rule 106(d)-(f)).

64. *Id.* at 1812 (referencing Draft Rule 104A(d)).

65. *Id.* at 1818 (referencing Draft Rule 109(a)(1)).

66. *Id.* at 1818 (referencing Draft Rule 109(b)(1)).

67. Kakalik et al., *supra* note 57, at 655 ("In our further analysis of judicial discovery management policies, we again found that a statistically significant reduction in time to disposition was associated with early management without setting a trial schedule early, and a significantly larger reduction was associated with early management that included setting a trial schedule early.").

would have asked that we consider expanding the scope of applicability for the Simplified Rules, making them *available for all* damage actions and *mandatory for a larger segment* of damage actions.

Second, I would have us explore whether incentives could be enhanced to encourage both plaintiffs' and defendants' attorneys to elect to use the Simplified Rules in all money damage actions. Making the Simplified Rules mandatory or enhancing incentives would address the problems recently identified by the 2010 Conference on Civil Litigation, which concluded that "few lawyers would opt for a simplified track and that many would seek to opt out if initially assigned to it."[68]

Third, I would have initiated a discussion aimed at trimming down the scope of and practice under Rule 56, which now has become an expensive mini-trial within the pretrial phase of the larger case, resulting in disproportionate costs and delay.[69] The Supreme Court's trilogy of summary-judgment cases in the mid-1980s appears to have expanded the use of Rule 56 summary judgment and emphasized its importance in a system of notice pleading that allows broad discovery.[70] Under Simplified Rules that would place a greater emphasis on pleading, the role and scope of the Rule 56 motions practice could be reduced. Indeed, in my later years of trying cases as a lawyer, I found that it was often more efficient and less costly (and also strategically superior) to press for trial without engaging in the summary-judgment process.

* * *

As matters currently stand, federal civil process is simply too time-consuming and costly, by a large margin. While the intents and purposes of the 1938 experiment were laudable in the context in which they were conceived, it is now time to review the experiment with, I suggest, a consideration of the Simplified Rules project. Moreover, the growth of new forms of documents and new

68. JUDICIAL CONFERENCE ADVISORY COMMITTEE, REPORT TO THE CHIEF JUSTICE OF THE UNITED STATES ON THE 2010 CONFERENCE ON CIVIL LITIGATION 9 (2010), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/Report%20to%20the%20Chief%20Justice.pdf.

69. *See* D. Brock Hornby, *Summary Judgment Without Illusions*, 13 GREEN BAG 2D 273 (2010).

70. *See* Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986); Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

concerns about preserving them to avoid sanctions have only escalated the need for a *fundamental* reform.[71] Nothing short of a serious dialogue on reform would discharge the Judiciary's current unmet responsibilities under Article III.

To be sure, it would be naive to suggest that Simplified Rules would solve all problems—today's litigation world is too complex for such a hope. But such an undertaking would refocus attention on the big picture, as was done in 1215 and 1938, and open the way to the implementation of modern thinking on our judicial process.

71. *See* Patrick E. Higginbotham, *The Present Plight of the United States District Courts*, 60 DUKE L.J. 745, 751 (2010) ("Efforts to construct gates for access to discovery must address the marriage of notice pleading and discovery that was fundamental to the 1938 Federal Rules of Civil Procedure, confronting both the difficulties it has wrought and its instrumental role in enforcing legislative and constitutional norms."); *see also* John H. Beisner, *Discovering a Better Way: The Need for Effective Civil Litigation Reform*, 60 DUKE L.J. 547 (2010).

TAB 3

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PILOT PROJECT REGARDING
INITIAL DISCOVERY PROTOCOLS
FOR EMPLOYMENT CASES ALLEGING ADVERSE ACTION

November 2011

The Federal Judicial Center is making this document available at the request of the Advisory Committee on Civil Rules, 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 contents as responsible and valuable, it does not reflect policy or recommendations of the Board of the Federal Judicial Center.

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INTRODUCTION

The Initial Discovery Protocols for Employment Cases Alleging Adverse Action provide a new pretrial procedure for certain types of federal employment cases. As described in the Protocols, their intent is to "encourage parties and their counsel 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." Individual judges throughout the United States District Courts will pilot test the Protocols and the Federal Judicial Center will evaluate their effects.

This project grew out of the 2010 Conference on Civil Litigation at Duke University, sponsored by the Judicial Conference Advisory Committee on Civil Rules for the purpose of re-examining civil procedures and collecting recommendations for their improvement. During the conference, a wide range of attendees expressed support for the idea of case-type-specific "pattern discovery" as a possible solution to the problems of unnecessary cost and delay in the litigation process. They also arrived at a consensus that employment cases, "regularly litigated and [presenting] recurring issues,"[1] would be a good area for experimentation with the concept.

Following the conference, Judge Lee Rosenthal convened a nationwide committee of attorneys, highly experienced in employment matters, to develop a pilot project in this area. Judge John Koeltl volunteered to lead this committee. By design, the committee had a balance of plaintiff and defense attorneys. Joseph Garrison[2] (New Haven, Connecticut) chaired a plaintiff subcommittee, and Chris Kitchel[3] (Portland, Oregon) chaired a defense subcommittee. The committee invited the Institute for the Advancement of the American Legal System at the University of Denver (IAALS) to facilitate the process.

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[1] Civil Rules Advisory Committee, *Report to the Standing Committee*, 10 (May 17, 2010).

[2] Mr. Garrison was a panelist at the Duke Conference. He also wrote and submitted a conference paper, entitled *A Proposal to Implement a Cost-Effective and Efficient Procedural Tool Into Federal Litigation Practice*, which advocated for the adoption of model or pattern discovery tools for "categories of cases which routinely appear in the federal courts" and suggested the appointment of a task force to bring the idea to fruition.

[3] Ms. Kitchel serves on the American College of Trial Lawyers Task Force on Discovery and Civil Justice, which produced the *Final Report on the Joint Project of the American College of Trial Lawyers Task Force on Discovery and the Institute for the Advancement of the American Legal System*, 268 F.R.D. 407 (2009). As a result of her role on the ACTL Task Force, Ms. Kitchel had already begun discussing possibilities for improving employment litigation with Judge Rosenthal when she attended the Duke Conference.

The group worked diligently over the course of one year. Committee members met at IAALS for valuable in-person discussions in March and July of 2011. Judge Koeltl was in attendance as well, to oversee the process and assist in achieving workable consensus. In addition, committee members exchanged hundreds of emails, held frequent telephone conferences, and prepared numerous drafts. The committee's final product is the result of rigorous debate and compromise on both sides, undertaken in the spirit of making constructive and even-handed improvements to the pretrial process.

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. While the parties' subsequent right to discovery under the F.R.C.P. is not affected, the amount and type of information initially exchanged ought to focus the disputed issues, streamline the discovery process, and minimize opportunities for gamesmanship. The Protocols are accompanied by a standing order for their implementation by individual judges in the pilot project, as well as a model protective order that the attorneys and the judge can use a basis for discussion.

The Federal Judicial Center will establish a framework for effectively measuring the results of this pilot project.[4] If the new process ultimately benefits litigants, it is a model that can be used to develop protocols for other types of cases. **Please note:** Judges adopting the protocols for use in cases before them should inform FJC senior researcher Emery Lee, elee@fjc.gov, so that their cases may be included in the evaluation.

[4] Civil Rules Advisory Committee, *Draft Minutes of April 2011 Meeting*, 43 (June 8, 2011).

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INITIAL DISCOVERY PROTOCOLS
FOR EMPLOYMENT CASES ALLEGING ADVERSE ACTION

PART 1: INTRODUCTION AND DEFINITIONS.

(1) Statement of purpose.

a. The Initial Discovery Protocols for Employment Cases Alleging Adverse Action is a proposal designed to be implemented as a pilot project by individual judges throughout the United States District Courts. The project and the product are endorsed by the Civil Rules Advisory Committee.

b. In participating courts, the Initial Discovery Protocols will be implemented by standing order and will apply to all employment cases that challenge one or more actions alleged to be adverse, except:
   i. Class actions;
   ii. Cases in which the allegations involve only the following:
      1. Discrimination in hiring;
      2. Harassment/hostile work environment;
      3. Violations of wage and hour laws under the Fair Labor Standards Act (FLSA);
      4. Failure to provide reasonable accommodations under the Americans with Disabilities Act (ADA);
      5. Violations of the Family Medical Leave Act (FMLA);
      6. Violations of the Employee Retirement Income Security Act (ERISA).

   If any party believes that there is good cause why a particular case should be exempted, in whole or in part, from this pilot program, that party may raise such reason with the Court.

c. The Initial Discovery Protocols are not intended to preclude or to modify the rights of any party for discovery as provided by the Federal Rules of Civil Procedure (F.R.C.P.) and other applicable local rules, but they are intended to supersede the parties' obligations to make initial disclosures pursuant to F.R.C.P. 26(a)(1). The purpose of the pilot project is to encourage parties and their counsel 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.

d. The Initial Discovery Protocols were prepared by a group of highly experienced attorneys from across the country who regularly represent plaintiffs and/or defendants in employment matters. The information and documents identified are those most likely to be requested automatically by experienced counsel in any similar case. They are unlike initial disclosures pursuant to F.R.C.P. 26(a)(1) because they focus on the type of information most likely to be useful in narrowing the issues for employment discrimination cases.

(2) Definitions. The following definitions apply to cases proceeding under the Initial Discovery Protocols.

a. ***Concerning*.** The term "concerning" means referring to, describing, evidencing, or constituting.

b. ***Document.*** The terms "document" and "documents" are defined to be synonymous in meaning and equal in scope to the terms "documents" and "electronically stored information" as used in F.R.C.P. 34(a).

c. ***Identify (Documents)*.** When referring to documents, to "identify" means to give, to the extent known: (i) the type of document; (ii) the general subject matter of the document; (iii) the date of the document; (iv) the author(s), according to the document; and (v) the person(s) to whom, according to the document, the document (or a copy) was to have been sent; or, alternatively, to produce the document.

d. ***Identify (Persons)*.** When referring to natural persons, to "identify" means to give the person's: (i) full name; (ii) present or last known address and telephone number; (iii) present or last known place of employment; (iv) present or last known job title; and (v) relationship, if any, to the plaintiff or defendant. Once a person has been identified in accordance with this subparagraph, only the name of that person need be listed in response to subsequent discovery requesting the identification of that person.

(3) Instructions.

a. For this Initial Discovery, the relevant time period begins three years before the date of the adverse action, unless otherwise specified.

b. This Initial Discovery is not subject to objections except upon the grounds set

forth in F.R.C.P. 26(b)(2)(B).

c. If a partial or incomplete answer or production is provided, the responding party shall state the reason that the answer or production is partial or incomplete.

d. This Initial Discovery is subject to F.R.C.P. 26(e) regarding supplementation and F.R.C.P. 26(g) regarding certification of responses.

e. This Initial Discovery is subject to F.R.C.P. 34(b)(2)(E) regarding form of production.

PART 2: PRODUCTION BY PLAINTIFF.

(1) Timing.

a. The plaintiff's Initial Discovery shall be provided within 30 days after the defendant has submitted a responsive pleading or motion, unless the court rules otherwise.

(2) Documents that Plaintiff must produce to Defendant.

a. All communications concerning the factual allegations or claims at issue in this lawsuit between the plaintiff and the defendant.

b. Claims, lawsuits, administrative charges, and complaints by the plaintiff that rely upon any of the same factual allegations or claims as those at issue in this lawsuit.

c. Documents concerning the formation and termination, if any, of the employment relationship at issue in this lawsuit, irrespective of the relevant time period.

d. Documents concerning the terms and conditions of the employment relationship at issue in this lawsuit.

e. Diary, journal, and calendar entries maintained by the plaintiff concerning the factual allegations or claims at issue in this lawsuit.

f. The plaintiff's current resume(s).

g. Documents in the possession of the plaintiff concerning claims for unemployment benefits, unless production is prohibited by applicable law.

h. Documents concerning: (i) communications with potential employers; (ii) job search efforts; and (iii) offer(s) of employment, job description(s), and income

and benefits of subsequent employment. The defendant shall not contact or subpoena a prospective or current employer to discover information about the plaintiff's claims without first providing the plaintiff 30 days notice and an opportunity to file a motion for a protective order or a motion to quash such subpoena. If such a motion is filed, contact will not be initiated or the subpoena will not be served until the motion is ruled upon.

i. Documents concerning the termination of any subsequent employment.

j. Any other document(s) upon which the plaintiff relies to support the plaintiff's claims.

(3) Information that Plaintiff must produce to Defendant.

a. Identify persons the plaintiff believes to have knowledge of the facts concerning the claims or defenses at issue in this lawsuit, and a brief description of that knowledge.

b. Describe the categories of damages the plaintiff claims.

c. State whether the plaintiff has applied for disability benefits and/or social security disability benefits after the adverse action, whether any application has been granted, and the nature of the award, if any. Identify any document concerning any such application.

PART 3: PRODUCTION BY DEFENDANT.

(1) Timing.

a. The defendant's Initial Discovery shall be provided within 30 days after the defendant has submitted a responsive pleading or motion, unless the court rules otherwise.

(2) Documents that Defendant must produce to Plaintiff.

a. All communications concerning the factual allegations or claims at issue in this lawsuit among or between:
   i. The plaintiff and the defendant;
   ii. The plaintiff's manager(s), and/or supervisor(s), and/or the defendant's human resources representative(s).

b. Responses to claims, lawsuits, administrative charges, and complaints by the plaintiff that rely upon any of the same factual allegations or claims as those at issue in this lawsuit.

c. Documents concerning the formation and termination, if any, of the employment relationship at issue in this lawsuit, irrespective of the relevant time period.

d. The plaintiff's personnel file, in any form, maintained by the defendant, including files concerning the plaintiff maintained by the plaintiff's supervisor(s), manager(s), or the defendant's human resources representative(s), irrespective of the relevant time period.

e. The plaintiff's performance evaluations and formal discipline.

f. Documents relied upon to make the employment decision(s) at issue in this lawsuit.

g. Workplace policies or guidelines relevant to the adverse action in effect at the time of the adverse action. Depending upon the case, those may include policies or guidelines that address:
    i. Discipline;
    ii. Termination of employment;
    iii. Promotion;
    iv. Discrimination;
    v. Performance reviews or evaluations;
    vi. Misconduct;
    vii. Retaliation; and
    viii. Nature of the employment relationship.

h. The table of contents and index of any employee handbook, code of conduct, or policies and procedures manual in effect at the time of the adverse action.

i. Job description(s) for the position(s) that the plaintiff held.

j. Documents showing the plaintiff's compensation and benefits. Those normally include retirement plan benefits, fringe benefits, employee benefit summary plan descriptions, and summaries of compensation.

k. Agreements between the plaintiff and the defendant to waive jury trial rights or to arbitrate disputes.

l. Documents concerning investigation(s) of any complaint(s) about the plaintiff or made by the plaintiff, if relevant to the plaintiff's factual allegations or claims at issue in this lawsuit and not otherwise privileged.

m. Documents in the possession of the defendant and/or the defendant's agent(s) concerning claims for unemployment benefits unless production is prohibited by applicable law.

n. Any other document(s) upon which the defendant relies to support the defenses, affirmative defenses, and counterclaims, including any other document(s) describing the reasons for the adverse action.

(3) Information that Defendant must produce to Plaintiff.

a. Identify the plaintiff's supervisor(s) and/or manager(s).

b. Identify person(s) presently known to the defendant who were involved in making the decision to take the adverse action.

c. Identify persons the defendant believes to have knowledge of the facts concerning the claims or defenses at issue in this lawsuit, and a brief description of that knowledge.

d. State whether the plaintiff has applied for disability benefits and/or social security disability benefits after the adverse action. State whether the defendant has provided information to any third party concerning the application(s). Identify any documents concerning any such application or any such information provided to a third party.

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Jurisdiction	Program Name	Applicable Statute/Rule	Date First Enacted	Voluntary or Mandatory	Discovery	Evidentiary Agreements	Pretrial Conference	Trial Date	Length of Trial	Judicial Officer	Jury Selection Procedure	Number of Jurors	Witnesses	Transcript	High-Low Agreements Allowed	Binding or Appealable
N.D. Cal.	Expedited Trial Procedure	General Order No. 64	2011	Voluntary	Absent agreement, limited to 10 interrogatories, 10 requests for production, 10 requests for admission, and 15 hours of deposition time, per side; experts limited to one per side absent agreement or leave		Initial expedited trial conference within 30 days after agreement filed; pretrial motions require leave of court and may not exceed 3 pages; pretrial conference shall be held no later than 150 days after agreement approved	Unless otherwise ordered, trial is to be held no later than 6 months after the agreement is approved by the court	The judge sets limits for opening and closing with 3 hours per side for introduction of evidence		May be tried to a judge or a jury; the judge conducts voir dire	6 jurors and may proceed with 5				Binding with limited grounds for appeal
D. Minn.	Expedited Trials Program	U.S. District Court for the District of Minnesota Rules of Procedure for Expedited Trials	2001	Voluntary	Expectation that Rule 26(a)(1) will be more vigorously followed and enforced; documents under Rule 26(a)(3) to be exchanged within 30 days of pretrial conference and all disovery within 120 days of the pretrial conference; discovery limited to 10 interrogatories, 5 requests for production, 5 requests for admission, and 2 depositions per party		Pretrial conference to be scheduled with magistrate within 30 days of the date the Complaint was served; pretrial order to be issued at pretrial conference	Trial to be held no later than 6 months after the pretrial conference; if the parties consent to trial before a magistrate judge, trial shall be held within 120 days of the date of the pretrial conference	8 hours per side				Only one expert witness may testify per party; written witness statements may be offered in lieu of direct testimony			

Jurisdiction	Program Name	Applicable Statute/Rule	Date First Enacted	Voluntary or Mandatory	Discovery	Evidentiary Agreements	Pretrial Conference	Trial Date	Length of Trial	Judicial Officer	Jury Selection Procedure	Number of Jurors	Witnesses	Transcript	High-Low Agreements Allowed	Binding or Appealable
D. Nev.	Short Trial Program	General Order 2013-01 and Short Trial Rules 1-26	2013	Voluntary	Exchange initial disclosures within 7 days after Stipulation approved; parties must submit a Stipulated Scheduling Order and Discovery Plan within 30 days after appointment of judge and meet with judge to confer, exchange documents not previously produced; extent to which discovery is allowed is at discretion of judge	Subject to timely objections, documents admitted without necessity for authentication; joint evidentiary booklets created, to be submitted with joint pretrial memorandum	Joint pretrial memorandum due to judge 7 days prior before pretrial conference; pretrial conference held no later than 10 days before trial	Trial to commence no later than 150 days from the date presiding judge is assigned	Allowed up to 9 hours each to present the case unless a different time frame is stipulated to and approved, including voir dire, opening and closing			4, or 6 if good cause shown	Parties can quote directly from relevant depositions, interrogatories, requests for admissions, or any other evidence as stipulations by the parties; parties not required to present oral testimony			Parties may agree the results are binding final and non-appealable; otherwise parties have the right to file a direct appeal

Jurisdiction	Program Name	Applicable Statute/Rule	Date First Enacted	Voluntary or Mandatory	Discovery	Evidentiary Agreements	Pretrial Conference	Trial Date	Length of Trial	Judicial Officer	Jury Selection Procedure	Number of Jurors	Witnesses	Transcript	High-Low Agreements Allowed	Binding or Appealable
W.D. Pa.	Pilot Program for Expedited Civil Litigation		2012	Voluntary	Exchange initial disclosures within 7 days after Stip. approved if not previously; Rule 26(a)(2) disclosures no later than 30 days prior to discovery close; discovery to be completed no later than 90 days after the Expedited Trial Conf.; discovery limited to 20 interrogatories, 10 requests for production, 10 requests for admission, and 15 hours of depositions, per side	Documents may be admitted without authentication	Initial Case Management Conference serves as Expedited Trial Conference	Trial to be held no later than 6 months after the Expedited Trial Conference	3 hours per side, not including opening and closing		Court to set time limits for voir dire, opening statements, and closing argument	6 jurors, may proceed with 5	Testimony limited to one expert per side; parties may agree to submit expert reports in lieu of testimony			Binding with limited grounds for appeal
W.D. Wash.	Individualized Trial Program	Local Civil Rule 39.2	2012	Voluntary; parties complete an "Agreement for Individualized Trial and Request for Approval"	Initial disclosures due in 7 days after agreement approved if not already exchanged; discovery to be completed no later than 90 days after the individualized trial conference; discovery limited to 10 interrogatories, 10 requests for production, 10 requests for admissions, and 15 deposition hours, per side		Individualized trial conference within 30 days of filing the agreement; joint individualized trial statement due 7 days before invidualized trial conference; pretrial conference held no later than 150 days after agreement approved	Trial to be held no later than 6 months after the agreement is approved	3 hours per side, not including opening and closing		Includes a trial before a judge or a jury	7 jurors and may proceed with 6	Only one expert witness may testify per party			Binding with limited grounds for appeal

Jurisdiction	Program Name	Applicable Statute/Rule	Date First Enacted	Voluntary or Mandatory	Discovery	Evidentiary Agreements	Pretrial Conference	Trial Date	Length of Trial	Judicial Officer	Jury Selection Procedure	Number of Jurors	Witnesses	Transcript	High-Low Agreements Allowed	Binding or Appealable
Alabama	Expedited Civil Actions	Ala. Code § 6-1-3; draft rules currently under consideration by the Supreme Court	2012	To be determined; to be applicable to civil actions not exceeding $50,000												
Arizona, Maricopa County Superior Court	Short Trial Program	Affiliated with ADR program	1997	Alternative to mandatory arbitration or as an appeal from an unfavorable arbitration decision; also used voluntarily separate from ADR	Uses abbreviated discovery process	Stipulations to documentary evidence and pretrial motions strongly encouraged; evidentiary notebooks	Telephonic conference to be held at least three days prior to short trial; 7 days prior to trial, a Joint Pre-Trial Memorandum should be sent to JPT	Short Trials generally scheduled within 90 days of referral	1 day jury trial; 2 hours per side with 10 minutes for opening and closing statements	Judge pro tempore oversees the trial only	Parties allocated 3 peremptory challenges	4 jurors; 3 required for verdict	Live testimony discouraged; witnesses can be used by deposition or affidavit; evidentiary notebooks may also be used	No record		Binding with limited grounds for appeal

Jurisdiction	Program Name	Applicable Statute/Rule	Date First Enacted	Voluntary or Mandatory	Discovery	Evidentiary Agreements	Pretrial Conference	Trial Date	Length of Trial	Judicial Officer	Jury Selection Procedure	Number of Jurors	Witnesses	Transcript	High-Low Agreements Allowed	Binding or Appealable
California	Expedited Jury Trial Program	Expedited Jury Trials Act, 2010 Cal. Stat. 3660 (codified at Cal. Civ. Proc. Code §§ 630.01-.12); Cal. R. Ct. 3.1545-3.1552	2010	Voluntary	The parties may follow existing rules and procedures or may modify the rules by joint stipulation; pretrial exchange between parties no later than 25 days prior to trial; supplemental exchange of evidence no later than 20 days before trial	Rules of evidence apply unless agreed to otherwise; parties allowed to enter into agreements governing the rules of procedure, including manner and method of presenting evidence; evidentiary notebooks encouraged	Pretrial conference to be held no later than 15 days prior to trial		3 hours per side, excluding jury selection	Presiding judge is responsible for assignment; may assign civil court judge or a temporary judge to conduct expedited trial	One hour for voir dire, with 15 minutes for the judicial officer and 15 minutes per side; three peremptory challenges per party; joint form questionnaire encouraged	8 jurors (or fewer by stipulation); 6 required for verdict	Parties are encouraged to limit the number of live witnesses		Yes	Binding, subject to any high/low agreement. Right to bring appeal or bring post-trial motions waived except on limited grounds

Jurisdiction	Program Name	Applicable Statute/Rule	Date First Enacted	Voluntary or Mandatory	Discovery	Evidentiary Agreements	Pretrial Conference	Trial Date	Length of Trial	Judicial Officer	Jury Selection Procedure	Number of Jurors	Witnesses	Transcript	High-Low Agreements Allowed	Binding or Appealable
Colorado	Simplified Procedure for Civil Actions	Colorado Rule of Civil Procedure 16.1	2003	Applicable where a party claims $100,000 or less, although parties may elect to be excluded (no cause required); various case types are automatically excluded (e.g. domestic relations); recovery limited to $100,000	Automatic disclosures due 35 days after the case is at issue; depositions available only in lieu of trial testimony or to obtain and authenticate documents; no additional discovery unless as agreed to by parties	Juror notebooks; rules of evidence and procedure apply except as provided in Colo. R. Civ. P. 16.1(k)		Cases proceeding under simpolified procedure to be given early trial settings and hearings				No less than 6 jurors and one alternate unless stipulated otherwise	Direct testimony limited to discussing information in disclosures, with exceptions			Binding
Florida	Expedited Trials	Florida Stat. § 45.075	1999	Voluntary	Discovery to be completed within 60 days of the court adopting the joint stipulation; all interrogatories and requests for production to be served within 10 days after the order is entered and responses served within 20 days	Standard rules of evidence and procedure apply, except where otherwise stated		Case may be tried within 30 days after the 60 day discovery cutoff, if such schedule does not impose undue burden on the court calendar	1 day jury trial; 1 hour for jury selection, 3 hours per side inclusive of opening and closing statements		Voir dire limited to one hour		Parties are permitted to introduce written reports by experts instead of testimony; deposition excerpts and video permissible			Binding

Jurisdiction	Program Name	Applicable Statute/Rule	Date First Enacted	Voluntary or Mandatory	Discovery	Evidentiary Agreements	Pretrial Conference	Trial Date	Length of Trial	Judicial Officer	Jury Selection Procedure	Number of Jurors	Witnesses	Transcript	High-Low Agreements Allowed	Binding or Appealable
Georgia	Summary Jury Trial	Ga. Code. Ann. § 15-23-2; Ga. Alt. Dispute. Resolution R. I. Ga. Unif. R. Dispute Resolution Programs, App'x A, Introduction, R.2	1993	Voluntary												Advisory
Indiana	Mini trial	Ind. Alt. Dispute Resolution R. 4	1991		Discovery proceeds according to standard rules						Jury deliberations time-limited		Evidence to be presented in expedited fashion	Deemed confidential		Advisory
Indiana	Summary Jury Trial	Ind. Alt. Dispute Resolution R. 5	1991				Agreement must set date for pretrial conference	Firmly fixed time for trial must be set at pretrial conference	Evidence to be presented in expedited fashion			6 jurors; jury deliberations time-limited		Deemed confidential		The parties may agree to make the verdict binding

Jurisdiction	Program Name	Applicable Statute/Rule	Date First Enacted	Voluntary or Mandatory	Discovery	Evidentiary Agreements	Pretrial Conference	Trial Date	Length of Trial	Judicial Officer	Jury Selection Procedure	Number of Jurors	Witnesses	Transcript	High-Low Agreements Allowed	Binding or Appealable
Iowa	Expedited Civil Action	Iowa Court Rule 1.281	2014, takes effect 1/01/2015	Voluntary by plaintiffs, based on claimed damages of $75,000 in damages or less; both parties can request through joint motion, without limit on damages	Must be completed 60 days before trial; no more than 10 interrogatories per side, no more than 10 requests for production per side, no more than 10 requests for admission			Within 12 mos, with extension to 15 months possible	2 days, unless extended for good cause; each side allowed 6 hours for jury selection, opening statements, presentation of evidence, examination and cross-examination of witnesses, and closing arguments	If jury desired, must file a demand for jury trial	6 jurors, 5 must agree for a verdict; each side must strike 3 out of 12 person panel		One party depostion per side; two non-party depositions per side; one expert each, unless showing good cause to increase; witness/expert can complete Healthcare Provider Statement in lieu of testimony			
Minnesota	Expedited Civil Litigation Track Pilot Project	Special Rules for the Pilot Expedited Civil Litigation Track	2013	Mandatory for included civil actions filed in First and Sixth Judicial Districts on or after July 1, 2013	Parties required to serve automatic disclosures; discovery period limited to 90 days post Case Management Conference; limited to 15 interrogatories, 15 rquests for production, 25 admissions		A Case Management Conference is held within 45 to 60 days of the date of filing (or ELT Election)	Trial is to be held within four to six months								

Jurisdiction	Program Name	Applicable Statute/Rule	Date First Enacted	Voluntary or Mandatory	Discovery	Evidentiary Agreements	Pretrial Conference	Trial Date	Length of Trial	Judicial Officer	Jury Selection Procedure	Number of Jurors	Witnesses	Transcript	High-Low Agreements Allowed	Binding or Appealable
Minnesota	Summary Jury Trial	Minn. Gen. R. Prac. 114.02, 114.08, 114.13; Minn. Stat. §604.11	1993									6		Deemed confidential		Advisory
Nebraska	Summary Jury Trial	L.B. 225, 1987 Neb. Laws 600 (1987), codified at Neb. Rev. Stat. §25-1154 to -1157	1987	Voluntary					As agreed to by parties and court			6	Parties to exchange summaries of evidence at least ten days prior to trial			Advisory and not appealable

Jurisdiction	Program Name	Applicable Statute/Rule	Date First Enacted	Voluntary or Mandatory	Discovery	Evidentiary Agreements	Pretrial Conference	Trial Date	Length of Trial	Judicial Officer	Jury Selection Procedure	Number of Jurors	Witnesses	Transcript	High-Low Agreements Allowed	Binding or Appealable
Nevada	Short Trial Program	Nev. Rev. Stat. Ann. § 38.250; Nev. Rev. Stat. Ann. § 67.060 /Nevada Short Trial Rules	2000	Mandatory component of the ADR program in Clark and Washoe Counties; also used voluntarily in 2 other counties; recovery not to exceed $50,000 excl. attys fees, costs, and interest, unless otherwise stipulated	Parties required to meet with judge for a mandatory discovery conference to exchange documents, identify witnesses, formulate discovery plan	Evidentiary objections to be submitted at time of pretrial memorandum; subject to timely objection, documentary evidence may be admitted without necessity of authentication or foundation of a live witness; joint evidentiary notebooks	Joint pretrial memorandum due to judge 7 days prior before pretrial conference; pretrial conference held no later than 10 days before trial	Not later than 120 days after assignment of presiding judge, and 240 days after filing of a written stipulation for parties that enter by stipulation	Typically one day, with 3 hours per side unless otherwise agreed to by parties and court	Judge pro tempore assigned by ADR Commissioner	15 minutes per side for voir dire, two peremptory challenges each	4 or 6 members (up to 8 if good cause)	Parties encouraged to use written reports in lieu of oral testimony in court; written reports by experts encouraged in lieu of live testimony; numerous mandatory provisioins to simplify presentation of evidence	No formal reporting of the proceedings unless paid for by the party or parties	Parties may set high/low; $3,000 cap on attorneys fees; and $500 cap on expert witness fees that can be recovered by a party	Advisory, unless otherwise agreed the results are binding. Direct appeal available to state supreme court, except where the parties have agreed the results are binding

Jurisdiction	Program Name	Applicable Statute/Rule	Date First Enacted	Voluntary or Mandatory	Discovery	Evidentiary Agreements	Pretrial Conference	Trial Date	Length of Trial	Judicial Officer	Jury Selection Procedure	Number of Jurors	Witnesses	Transcript	High-Low Agreements Allowed	Binding or Appealable
New Hampshire	Summary Jury Trial	Civil Rule 31 of the Superior Court of the State of New Hampshire	1986	Voluntary; the parties may stipulate that the verdict is a final determination on the merits, or any other use of the verdict to help aid resolution of the case		Exhibits must be marked and exchanged prior to trial and objections raised			Each side has 1 hour to present their case			6 jurors or fewer if stipulated	No direct testimony. Evidence to be presented through the attorneys	No record permitted except in extraordinary circumstances.		Advisory unless otherwise agreed; counsel may stipulate that a consensus verdict will be deemed a final determination on the merits and that judgment will be entered
New Jersey	Expedited Jury Trial Program	Available through Civil Complementary Dispute Resolution Program		Voluntary			The parties meet prior to trial for a preliminary hearing at which time exhibits are entered into evidence and all objections heard and ruled on		Typically one to two days; time limits only on opening statements (15 minutes) and summations (30 minutes)		Jury selection is streamlined by limiting jury to six members and 3 peremptory challenges	Six jurors, may proceed with 5	Generally only the parties testify live and the remaining evidence is presented by counsel (via report and deposition)			No limits on damages and final judgments appealable

Jurisdiction	Program Name	Applicable Statute/Rule	Date First Enacted	Voluntary or Mandatory	Discovery	Evidentiary Agreements	Pretrial Conference	Trial Date	Length of Trial	Judicial Officer	Jury Selection Procedure	Number of Jurors	Witnesses	Transcript	High-Low Agreements Allowed	Binding or Appealable
New York	Summary Jury Trial Program	Various local court rules.	1998	Voluntary		Generally relaxed rules of evidence, subject to determinations at evidentiary hearing	All documentary evidence exchanged prior to trial; evidentiary hearing prior to trial/	Placed on calendar for trial at earliest possible date	Generally a one-day jury trial; 10 minute opening and closing and one hour presentation of case	No less than 6 jurors and one alternate unless stipulated otherwise	If conducted by court, parties have 10 minutes to also voir dire the jury; 2 peremptory challenges		Live witnesses limited to two; portions of video may be played in lieu of actual appearances		Yes, recited in stipulation signed by attorneys	Generally binding. Right to appeal waived
North Carolina (under general court rules)	Summary Jury Trial	N.C. Super. & Dist. Cts. R. 23	1991	Voluntary				As per agreement of the parties	As agreed to by parties and court	Presider is referee selected by parties	As agreed to by the parties		As agreed to by parties and court			Advisory, unless otherwise agreed
North Carolina (under mediated settlement rules)	Summary Bench Trial or Summary Jury Trial	N.C. Super. Ct. Mediated Settlement Conf. R. 13	2002	Voluntary						Presiding officer selected by parties	Three peremptory challenges per side	Procedure for jury selection provided	Evidence presented in summary fashion by the attorneys			Advisory or binding upon agreement of parties

Jurisdiction	Program Name	Applicable Statute/Rule	Date First Enacted	Voluntary or Mandatory	Discovery	Evidentiary Agreements	Pretrial Conference	Trial Date	Length of Trial	Judicial Officer	Jury Selection Procedure	Number of Jurors	Witnesses	Transcript	High-Low Agreements Allowed	Binding or Appealable
North Dakota	Summary Jury Trial	N.D. R. Ct. 8.8	1999	Voluntary					To be conducted in a summary abbreviated fashion				Expert-jurors may be used	Deemed confidential		Advisory
Oregon	Expedited Civil Jury Trial Program	Or. Unif. Trial Ct. R. 5.150	2012	Voluntary, the decision to accept or reject a case for designation is within the sole discretion of the presiding judge; if accepted, the case is removed from mandatory arbitration and all forms of required ADR	Discovery must be complete no later than 21 days prior to trial; discovery may proceed by stipulation (if not, 2 depositions, 1 set of requests for production; 1 set of requests for admission; all discovery requests served no later than 60 days before trial)	Encouraged to expedite trial	Initial case conference within 10 days of the expedited case designation with all trial counsel and self-represented parties required to appear; pretrial conference no later than 14 days before trial; pretrial motions not allowed without prior leave of court	Trial date set no later than 4 months from the date of the order	No time limits		Short voir dire		Parties encouraged to limit live witness testimony			No limits on appeals
Ohio	Summary Jury Trial	Wood Cnty. (Ohio) Gen. Div. C.P. Ct R. 7.12					Court may conduct pre-hearing conference		1 hour per side			6	Evidence presented through the attorneys	No record unless otherwise arranged for by the parties		Non-binding unless otherwise stipulated to by the parties

Jurisdiction	Program Name	Applicable Statute/Rule	Date First Enacted	Voluntary or Mandatory	Discovery	Evidentiary Agreements	Pretrial Conference	Trial Date	Length of Trial	Judicial Officer	Jury Selection Procedure	Number of Jurors	Witnesses	Transcript	High-Low Agreements Allowed	Binding or Appealable
Pennsylvania (various counties)	Summary Jury Trial	Various local court rules.	2003			Partially provided for in local rule			One hour per side			6, with 5 needed for verdict	Presentation of evidence by counsel	No record		Generally non-binding
South Carolina	Fast Track Jury Trial Process	March 7, 2013 Admin. Order implementing program statewide and providing Rules and Procedures/Order on Fast Track Jury Trial Process, Appellate Case No. 2013-000389 (S.C. Mar. 7, 2013)(state supreme court administrative order)	2013	Voluntary		The parties may agree to use streamlined rules of evidence	A pretrial conference is typically held 10 days prior to trial during which the Special Hearing Officer rules on objections to documentary evidence previously exchanged and witness lists are exchanged	Trial set for a mutually convenient date; standard trials to have priority over Fast-Track Jury trials in scheduling or use of court resources	Generally a one-day jury trial	Special Hearing Officer chosen and compensated by the parties	Voir dire to be conducted by Special Hearing Officer or judge; two peremptory challenges per side	6	Parties encouraged to limit live witness testimony	No record of proceeding unless either party elects to have a transcript of the proceeding, which shall be at that party's expense	High-low agreements honored	Binding; parties may waive right to post-trial motions and parties waive appeal absent fraud
Tennessee	Summary Jury Trial	Tenn. Sup. Ct. R. 31 § 2-3, 10, 24							To be conducted in an expedited fashion				Evidence presented through the attorneys	Not recorded unless otherwise agreed by the parties		Advisory

Jurisdiction	Program Name	Applicable Statute/Rule	Date First Enacted	Voluntary or Mandatory	Discovery	Evidentiary Agreements	Pretrial Conference	Trial Date	Length of Trial	Judicial Officer	Jury Selection Procedure	Number of Jurors	Witnesses	Transcript	High-Low Agreements Allowed	Binding or Appealable
Texas	Expedited Actions	Texas Rule of Civil Procedure 169	2013	Mandatory in all cases where all claimants affirmatively plead that they seek only monetary relief aggregating $100,000 or less, including damages, penalties, costs, expenses, pre-judgment interest, and attorneys fees (with case type exceptions); $100,000 cap on recovery	Discovery ends 180 days after the first request for discovery is served; discovery is limited to 6 hours of depositions/15 written interrogatories, requests for production, and admissions			Trial must be set within 90 days of the end of discovery	8 hours/side for jury selection, opening, presentation, and closing		Total time for trial, including jury selection, limited to eight hours per side, with exceptions		Ability to challenge expert testimony limited			Binding
Texas	Mini trial	Tex. Civ. Prac. & Rem. Code Ann. § 154.024	1987	Voluntary										Each party and counsel present the position of the party before select representatives or an impartial third party		Advisory

Jurisdiction	Program Name	Applicable Statute/Rule	Date First Enacted	Voluntary or Mandatory	Discovery	Evidentiary Agreements	Pretrial Conference	Trial Date	Length of Trial	Judicial Officer	Jury Selection Procedure	Number of Jurors	Witnesses	Transcript	High-Low Agreements Allowed	Binding or Appealable
Texas	Summary Jury Trial	Tex. Civ. Prac. & Rem. Code Ann. § 154.026	1987	Voluntary								6				Advisory
Utah	Expedited Jury Trial	Utah Code Ann. 78B-3-901-to 909; Utah R. Jud. Admin. R 4-501	2011	Voluntary					No more than 3 hours per side	Jury	Limited to 1 hour, each side will exercise no more than one peremptory challenge	Six jurors with no alternates, five required for verdict	Agreement of parties to include limitations on witnesses		High-low agreement mandatory	Binding; limited right to appeal or to seek new trial
Virginia	Summary Jury Trial	Va. Code Ann. §8.01-576.1 to 576.3	1988	Voluntary						Jury		7	Parties to present a summary of evidence and given opportunity to rebut			Non-binding unless otherwise stipulated to by the parties

TAB 4B

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A Return to Trials:

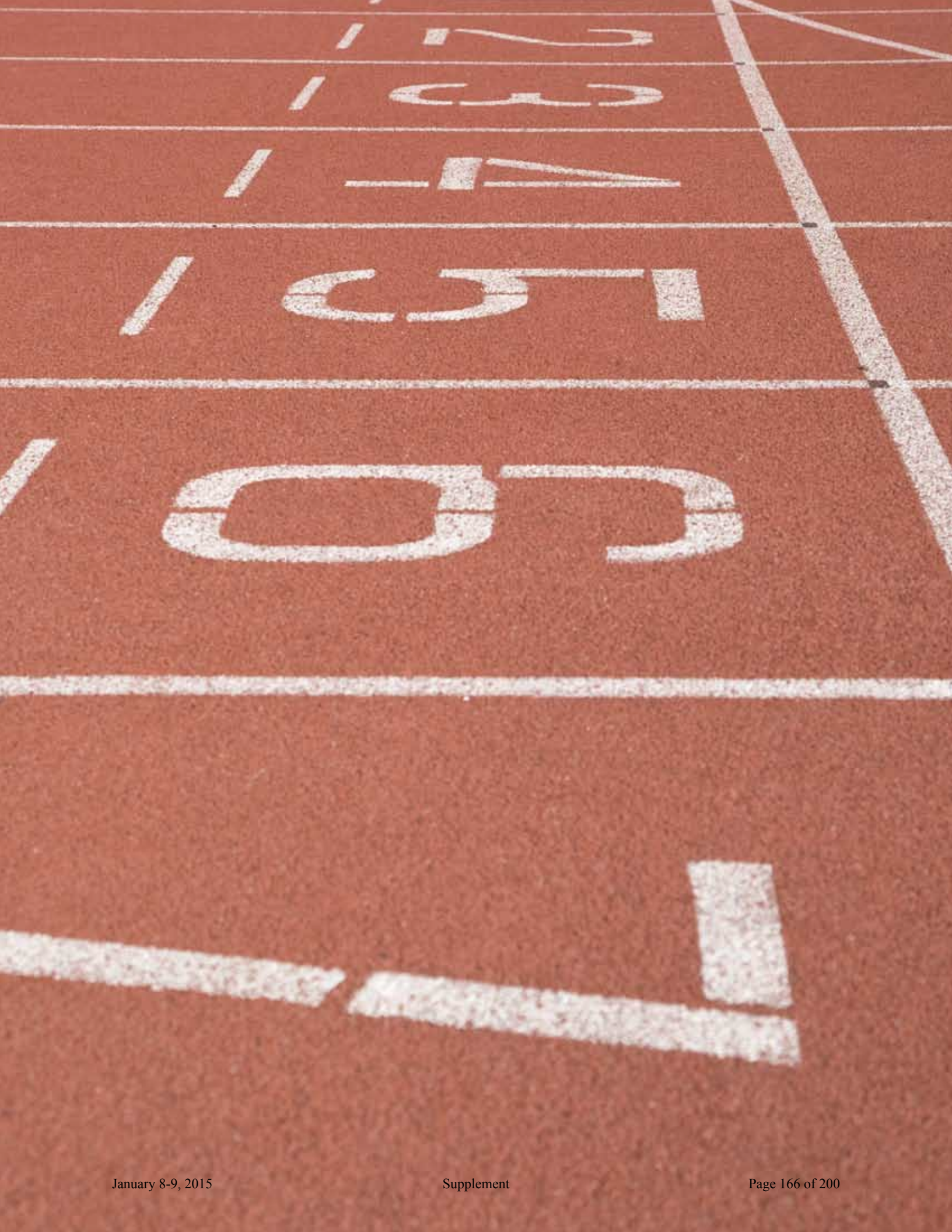
Implementing Effective Short, Summary, and Expedited Civil Action Programs

RULE ONE INITIATIVE

IAALS
EMPOWERING IMPROVEMENT. ADVANCING EXCELLENCE.
INSTITUTE for the ADVANCEMENT of the AMERICAN LEGAL SYSTEM
UNIVERSITY of DENVER

AMERICAN BOARD OF TRIAL ADVOCATES

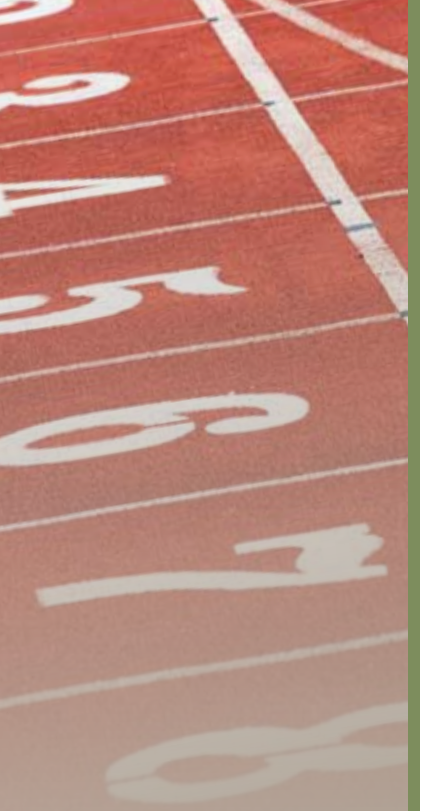
NCSC
National Center for State Courts



A Return to Trials:

Implementing Effective Short, Summary, and Expedited Civil Action Programs

October 2012



IAALS—Institute for the Advancement of the American Legal System

John Moye Hall, 2060 South Gaylord Way, Denver, CO 80208

Phone: 303-871-6600

http://iaals.du.edu

IAALS, the Institute for the Advancement of the American Legal System, is a national independent research center at the University of Denver dedicated to continuous improvement of the process and culture of the civil justice system. By leveraging a unique blend of empirical and legal research, innovative solutions, broad-based collaboration, communications, and ongoing measurement in strategically selected, high-impact areas, IAALS is empowering others with the knowledge, models, and will to advance a more accessible, efficient, and accountable civil justice system.

Rebecca Love Kourlis — Executive Director

Brittany K.T. Kauffman — Manager, *Rule One Initiative*

Rule One is an initiative of IAALS dedicated to advancing empirically informed models to promote greater accessibility, efficiency, and accountability in the civil justice system. Through comprehensive analysis of existing practices and the collaborative development of recommended models, *Rule One Initiative* empowers, encourages, and enables continuous improvement in the civil justice process.

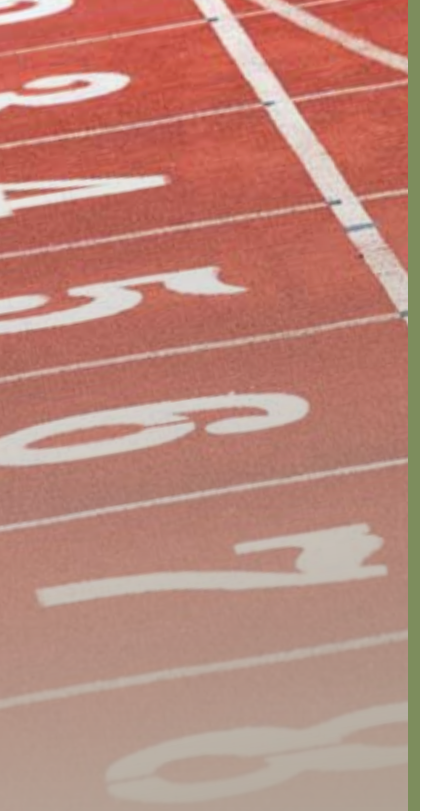
About ABOTA

The American Board of Trial Advocates, founded in 1958, is an organization dedicated to defending the American civil justice system. With a membership of 6,800 experienced attorneys representing both plaintiffs and defendants in civil cases, ABOTA is uniquely qualified to speak for the value of the constitutionally mandated jury system as the protector of the rights of persons and property. ABOTA publishes *Voir Dire* magazine, which features in-depth articles on current and historical issues related to constitutional rights, in particular the Seventh Amendment right to trial by jury.

ABOTA's National Board of Directors has taken a stand regarding expedited jury trials and unanimously passed the following resolution:

> **Expedited Jury Trials**
>
> Whereas, ABOTA recognizes that the number of civil cases in the United States actually tried to a jury is rapidly decreasing and that litigation costs and delays are a major contributor to the reduction in the number of civil juries trials, and
>
> Whereas, ABOTA recognizes that several states have adopted expedited jury trial programs which provide for streamlined pretrial procedures and abbreviated jury trials in many civil cases in an effort to thereby reduce the cost and time involved, yet preserving the civil jury system in this Country,
>
> It is therefore, RESOLVED, that ABOTA supports the concept of streamlined pretrial procedures and expedited jury trials and that ABOTA, through its leaders and members, should support existing expedited jury trial programs and encourage the adoption of similar programs throughout all jurisdictions.
>
> — Jan. 14, 2012

American Board of Trial Advocates
2001 Bryan St., Suite 3000, Dallas, TX 75201
(800) 93-ABOTA (932-2682) | www.abota.org



National Center for State Courts
300 Newport Avenue
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Phone: 800-616-6164
www.ncsc.org

The National Center for State Courts (NCSC) is a nonprofit organization dedicated to improving the administration of justice by providing leadership and service to the state courts and courts around the world. Founded in 1971, the NCSC provides education, training, technology, management, and research services to the nation's state courts. The NCSC Center for Jury Studies engages in cutting-edge research to identify practices that promote broad community participation in the justice system, that enhances juror confidence and satisfaction with jury service, that provides jurors with decision-making tools necessary to make informed and fair judgments in the cases submitted to them, and that respects jurors contributions to the justice system by using their time effectively and making reasonable accommodations for their comfort and privacy. The NCSC is headquartered in Williamsburg, Virginia and has offices in Denver, Colorado, Arlington, Virginia, and Washington, DC.

Mary C. McQueen President

Richard Schauffler Director of Research Services

Paula Hannaford-Agor Director, NCSC Center for Jury Studies

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Introduction

There is a widespread perception—among lawyers and litigants—that the civil justice system is too complex, costs too much, and takes too long. There is also data documenting that civil jury trials have decreased precipitously over the last decade.[1] The decline in jury trials has meant fewer cases that have the benefit of citizen input, fewer case precedents, fewer jurors who understand the system, fewer judges and lawyers who can try jury cases—and overall, a smudge on the Constitutional promise of access to civil, as well as criminal, jury trials.

As one response to these realities, various jurisdictions—both state and federal—have implemented an alternative process that is designed to provide litigants with speedy and less expensive access to civil trials. The programs involve not only a simplified pretrial process, but also a shortened trial on an expedited basis. While some programs focus on jury trials, the overall goal of such programs is to provide access to a shorter pretrial and trial procedure, both for jury and bench trials. For purposes of this report, we are calling these programs Short, Summary, and Expedited Civil Action programs (SSE programs).

The National Center for State Courts (NCSC) has just completed a report detailing the elements of various examples of these programs.[2] In the wake of that report, the NCSC, IAALS (the Institute for the Advancement of the American Legal System at the University of Denver), and the American Board of Trial Advocates (ABOTA) have taken on the task of collating information about what seems to be working in these programs, how to use the process well, and how a jurisdiction might choose to put a program in place if it does not now have one.

For all three organizations, this work represents an ongoing commitment to processes that provide less expensive access to the civil justice system and a commitment to the preservation of the civil jury trial.

In preparation for the drafting of this report, the three organizations formed a Committee (members listed on Appendix A), agreed upon a charge to the Committee (Appendix B), and reviewed all available information regarding existing programs around the country. The Committee then met in person and thereafter worked collaboratively on the report. The Committee was chosen on the basis of balance, knowledge about different programs, and experience.

The recommendations that follow are designed to assist those around the country who are considering implementing an SSE program. Because of the variability

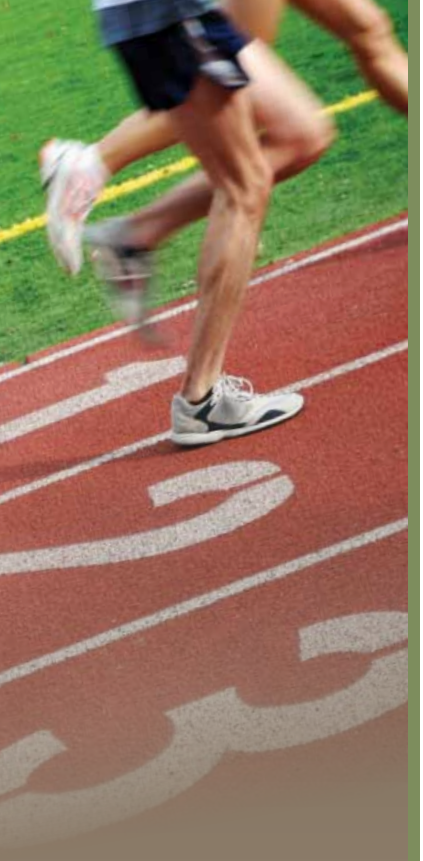
1 According to state court disposition data collected by NCSC from 2000 to 2009, the percentage of civil jury trials dropped 47.5% across the period to a low 0.5% in 2009. Data on federal civil cases shows a decline in cases resolved by trial from 11.5 percent in 1962 to 1.8 percent in 2002, illustrating the historic trend away from trials. Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. Empirical Legal Stud. 459, 461, 464 (2004) (noting that in 1938, "the year that the Federal Rules of Civil Procedure took effect, 18.9 percent of terminations were by trial").

2 National Center for State Courts, Short, Summary & Expedited: The Evolution of Civil Jury Trials (2012), *available at* http://www.ncsc.org/SJT/.

of existing programs, and the different needs that each of these programs meet in their respective jurisdictions, the Committee has chosen not to recommend a specific set of parameters to be implemented in every program and for every case. Instead, the following recommendations are meant to serve as a flexible roadmap for reform, with the details of each program to be determined at the local level.

Just as importantly, we hope this manual also serves as a call for implementation of such programs on a national scale. The organizations and individual members who make up this Committee believe in the importance of Rule One of the Federal Rule of Civil Procedure's goals of a "just, speedy, and inexpensive determination" of every civil action. Yet today, pressures on client and court resources have only increased, making access even more problematic. While these pressures make attainment of this goal more difficult, they also create space for innovation. Our organizations hope that what follows is a resource for creating and implementing these innovative programs in your jurisdiction.

"The following recommendations are meant to serve as a flexible roadmap for reform, with the details of each program to be determined at the local level. Just as importantly, we hope this manual also serves as a call for implementation of such programs on a national scale."



What is a Short, Summary, and Expedited (SSE) Civil Action Program?

Before trying to identify what works and what does not, it is important to define the characteristics of an SSE program for purposes of this Report. The programs vary greatly across the country, and none are identical.

However, there are five constants that the Committee suggests are present in almost all of the programs and are critical for success:

First, the trial itself is short.

Most jurisdictions limit the trial to one or two days. The Committee believes that the length is not necessarily dispositive, but there must be an expectation that the trial will be short and to the point. By necessity, the evidence also must be limited. Length of trial is a critical component, both for purposes of the trial itself and for purposes of structuring the pretrial process, which is then necessarily focused and abbreviated.

Second, the trial date must be certain and fixed.

The trial date must not be susceptible to continuance, at the behest of the court or counsel, except in extraordinary circumstances. One of the key features of the programs is the fact that litigants know they must be prepared for the trial on the date on which it is set. Such certainty drives the pretrial process and many of the benefits of the programs. In some of the more successful programs, the litigants also know who their judge will be if they choose the SSE program: either they have access to a judge pro tempore, whom they jointly choose, or they know who the judge assigned to the case will be. Hence, the program achieves a level of certainty and predictability that may not otherwise be available.

Third, the program extends to the whole litigation process—not just the trial.

The pretrial process is also expedited and focused.

Fourth, the program encourages issue agreements and evidentiary stipulations.

Rules promoting evidentiary agreements, encouraging stipulations, and allowing relaxed evidentiary foundational standards save time and narrow the focus to the key issue(s) to be addressed at trial.[3]

3 For examples of pretrial and trial agreements, *see* Stephen D. Susman, Trial by Agreement, http://trialbyagreement.com (last visited Sept. 24, 2012).

Fifth, almost all of the programs are either partially or wholly voluntary.

The litigants have the option of choosing this particular track for their case, and they are not forced to do so. Although voluntary processes are often slow to catch on, because people in general—and attorneys in particular—do not embrace change, voluntary programs nonetheless preserve the right of the litigants and counsel to decide whether the case at issue is appropriate for an abbreviated process and the program.

While one or a few of these characteristics may be instrumental in achieving greater access and quicker resolution, such as establishing a firm trial date and utilizing agreements and stipulations to achieve a more streamlined trial, the SSE programs discussed here generally include most, if not all five, of these characteristics. While generally applicable rules and case management techniques that mandate streamlined pretrial process and expedited trial settings do not in and of themselves satisfy the defining characteristics of an SSE program (such as voluntariness), the Commitee does not mean to infer that such procedures may not also be an effective means of assuring access and efficiency.

Beyond these fundamental characteristics, however, there are a host of variations. All of these variations are components that the local bench and bar can review and build upon. The program characteristics chosen by a particular jurisdiction should be responsive to its needs and is likely to be quite individualized.

Benefits of SSE Programs

There are a variety of benefits that SSE programs can provide. First, the BENEFITS TO THE COURT SYSTEM itself include the dedication of fewer judicial officers and court staff to the process. In one jurisdiction, the whole process happens without any involvement from the court, except for the assignment of a courtroom and the summoning of jurors. In other jurisdictions, sitting judges oversee the process, but it takes far less time than civil cases handled under the traditional rules of civil procedure. Once judges become familiar with the SSE program, they tend to like the process because it allows them to clear their docket, achieve better closed case numbers, and preside over jury trials, without investing weeks of court time. The system also benefits from the increased numbers of jury trials, which involve more people in the system and inform them about the process. More broadly, by making good on the promise of access to a civil jury trial, it is possible that such a program can revive confidence in the jury system to some extent, particularly if jury trials increase in frequency and the quality of the verdicts is well-regarded. The court system benefits equally from SSE bench trials. Judges are able to resolve matters more quickly and efficiently, with streamlined procedures and a short trial that resolves the case in a day or two.

“By making good on the promise of access to a civil jury trial, it is possible that such a program can revive confidence in the jury system to some extent, particularly if jury trials increase in frequency and the quality of the verdicts is well-regarded.”

> "SSE programs seek to address inefficiencies that currently exist in our civil justice system by streamlining both pretrial and trial proceedings in select cases."

The BENEFITS FOR THE LITIGANTS are, first and foremost, that their case will take less time and cost less money than if they had proceeded along a regular case track. In short, the process increases access to the system and decreases expense and time. But there are additional benefits as well. The process may provide more certainty. This can include certainty of trial date and perhaps of judge assignment. In some programs, this can include certainty of outcome, with limited appeal rights, and possible risk containment, if damages are limited or agreed to on a high-low basis.[4]

BENEFITS FOR JURORS include more opportunity to participate and a shorter, more focused process when they do participate. Jurors benefit from serving for both a shorter and more defined period of time.[5] Because of the streamlined process, and resulting streamlined issues, SSE programs also create less confusion and greater clarity for jurors about what is being asked of them. For these reasons, SSE programs may actually result in a better process for the jurors.

BENEFITS FOR ATTORNEYS are both immediate and long-term. First, these trials may provide an opportunity for younger attorneys to handle jury trials. Second, being able to take smaller or less complex cases for less investment on a per-case basis may actually serve to increase an attorney's client base and build good will. Lastly, an expedited process forces attorneys to focus very acutely on what is important in a case—and to shape both the discovery and the trial presentation around those key issues. It improves case management skills, attention to what is important, and clarity and brevity of trial presentations. It can also encourage cooperation in the discovery process in order for the attorneys to get the discovery they need in a short period of time. In jurisdictions where the whole process is the result of attorney negotiation, there is additional incentive to cooperate. Appendix C identifies a set of criteria that counsel can use to identify appropriate cases for an SSE program, as well as recommendations for maximizing effective preparation for and presentation at an SSE trial.

The development of all of those skills has possible pervasive implications. The current litigation process encourages attorneys to develop an all-inclusive, litigious approach to cases, whereas the SSE program prioritizes and hones the skill of highlighting only what is important. SSE programs seek to address inefficiencies that currently exist in our civil justice system by streamlining both pretrial and trial proceedings in select cases. It is also possible to make the pretrial and trial process more efficient in non-SSE program cases by incorporating some of these same principles. Moreover, the more attorneys try cases in front of juries, the more comfortable they become both with the process and the potential outcome. Thus, it is possible that use of SSE programs could actually change the litigation culture as a whole over time.

4 Some parties that agree to a short, summary, and expedited procedure also enter into a high-low agreement, where both parties agree that the outcome of the case will be no less than the low amount, nor in excess of the high amount.

5 Employers also benefit significantly from reduced employee absence and, as a result, employers may be more willing to pay employee wages even when not required by law.

Implementing an SSE Program

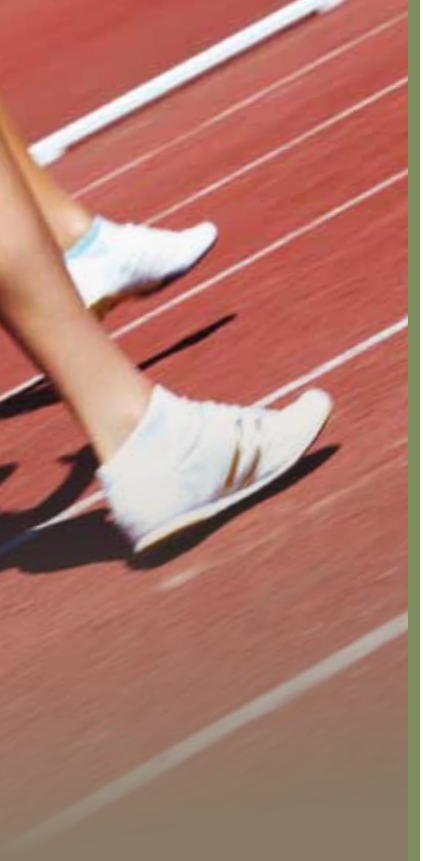
The Design

The Committee has pooled both anecdotal and empirical data about SSE programs around the country and has drawn from the individual expertise of the Committee members. Out of that pool of information, the Committee has distilled the elements that characterize the more successful programs and has also created a check-list of decisions that a jurisdiction should review when designing a program.

The SSE program should be designed to address existing obstacles that impede efficient case processing and resolution in that jurisdiction, but without introducing procedures or requirements that affect otherwise well-functioning processes. The table below identifies some common obstacles described in the NCSC study and the solutions that the SSE programs implemented to address those obstacles. At the same time, changes in procedures should be made only as needed to craft an effective SSE program. For example, jury procedures should be the same in the SSE programs as in regular civil litigation wherever possible.

The obstacles posed, and the corresponding SSE program benefits that may be achieved, may also shift during the course of an individual case. For this reason, programs should be sufficiently flexible to permit early entry, for those who seek a streamlined pretrial procedure, and late entry, for those who just want an abbreviated trial, perhaps because only one issue remains after summary judgment. Other components of successful programs appear to be presenting the option to counsel and the parties on an individualized basis (through case management orders or at status conferences) and creating certainty regarding who the judge will be for the case.

Common Obstacles	Potential SSE Program Solutions
Civil case backlogs create scheduling delays for civil trials with regularly assigned civil trial judges	Permit SSE program trials to be tried to non-judicial personnel (e.g., special referees, judges pro tempore) or magistrate judges
Calendaring preferences for non-civil trials undermine trial date certainty	Permit SSE program trials to be tried to non-judicial personnel (e.g., special referees, judges pro tempore) or magistrate judges
Pretrial case management does not permit early identification of trial judge	Assign SSE program cases to one or more highly qualified and SSE designated trial judges
Length of civil trials makes it difficult to calendar cases for trial	Restrict trial length; restrict amount or form of trial evidence
Length of voir dire makes civil jury trials too lengthy	Designate smaller jury panel size; provide fewer peremptory challenges; shorter voir dire time
Expert witness fees make it too expensive to take cases to trial	Restrict expert evidence (number and/or form)
Discovery process is disproportionately excessive for lower value or less complex cases	Restrict the scope and/or time limit for discovery
Discovery disputes take too long to resolve, increasing expenses and delaying trial readiness	Create a process to expedite resolution of discovery disputes, including more immediate access to trial judge or discovery master and preference for informal telephonic conferences rather than formal motions, briefs, and hearings
Mandatory ADR creates needless procedural hurdles without significantly improving case resolution rates	Permit SSE program cases to opt out of mandatory ADR



When implementing a program, the local jurisdiction should review the following checklist of possible components:

- Rigid versus tailor-made procedures:
  - Some programs allow counsel great latitude in deciding upon the particular rules that will govern both the trial and the pretrial process.
  - Other jurisdictions have fairly rigid procedures that apply to every case submitted to the program.
- The questions to be addressed—either by counsel in a stipulation, or by rules or case management orders—are:
  - Time limits: How much time is allotted for discovery, as well as the length of the trial itself?
  - Rules of evidence: Do they apply, and to what extent?
  - Discovery: Requests for production, depositions, and interrogatories—what will be allowed?
  - Experts: Are expert witnesses allowed? If so, do they provide a report, can they be deposed, and do they testify at trial?
  - Motions: Will motions be allowed? If so, what kinds of motions? Does the court provide an expedited process for the resolution of those motions?
  - Client consent: Is a client's signature documenting informed consent required?
- Selection of judge: Will the judge be assigned or chosen by the parties (e.g., a senior judge, judge pro tempore, magistrate judge, or sitting judge)?
- When opt-in may occur: Is there a limited window of time at the beginning of the case when the parties may opt in, or is it available throughout the litigation process?
- Number of jurors (almost all specify a smaller panel than other civil jury trials).
- Unanimous jury verdict? If non-unanimous verdicts are permitted, what decision rule applies?
- Binding decision or not?
- On the record or not?
- Appealable decision or not?
- Is the program perceived as a form of alternative dispute resolution (this relates directly to whether it is binding)?
- Is the program statutory, supported by statewide rules, or put in place by a particular judge in his or her courtroom?
- Extent of informal versus formal procedures recognized.
- Restrictions on the amount of trial time and division of that time between the parties.
- Calendaring variations (some programs mandate a trial within four months, others within six months).
- Limits on damage awards coming out of the process: Many jurisdictions specifically limit the process to smaller cases and cap damage awards; other jurisdictions make the process available more broadly, but attorneys often agree to high-low parameters for the verdict.

This list illustrates the variation in program elements across the country. As a jurisdiction is designing an SSE program, it should balance the tailoring of the above variations to meet its specific needs with the benefits of uniformity and consistency. There is value in uniformity where program elements have continually been successful, and we encourage anyone implementing a program to look both at what works within their own jurisdictions already and the successful elements of existing SSE programs around the country.

The New York model provides a useful example. What began as a local Summary Jury Trial (SJT) program on a pilot basis has since expanded to all thirteen judicial districts in the state. The New York program was not expanded wholesale, but rather has been implemented with flexibility to allow the program to meet local needs. Nevertheless, there are rules and procedures that are consistent across the program, including

> (1) an evidentiary hearing before trial; (2) a statement determining whether the SJT is binding or nonbinding: (3) expedited jury selection with limited time for attorney voir dire; (4) opening statements limited to ten minutes; (5) case presentation limited to one hour; (6) modified rules of evidence, such as acceptance of affidavits and reports in lieu of expert testimony; and (7) presentation of trial notebooks provided to the jury, and closing statements limited to ten minutes.[6]

Judicial support of the program has been a hallmark since its inception, first under Justice Joseph Gerace's guidance, and today with the efforts of the program's statewide coordinator Justice Lucindo Suarez.[7]

In contrast, the South Carolina's Summary Jury Trial program is an attorney-controlled program that takes advantage of relatively abundant court resources such as courtrooms and jurors, while addressing the need for additional judicial resources by utilizing temporary judges.[8] Because jury trials are assigned to a rolling docket in South Carolina's circuit court such that the cases are on call for trial, everyone involved also benefits from a firm trial date. The South Carolina program has evolved to meet the needs of the legal community and stands as a testament to the importance of considering what resources a jurisdiction brings to the table, as well as those that may be in scarce supply, when designing a program.

The Implementation Process

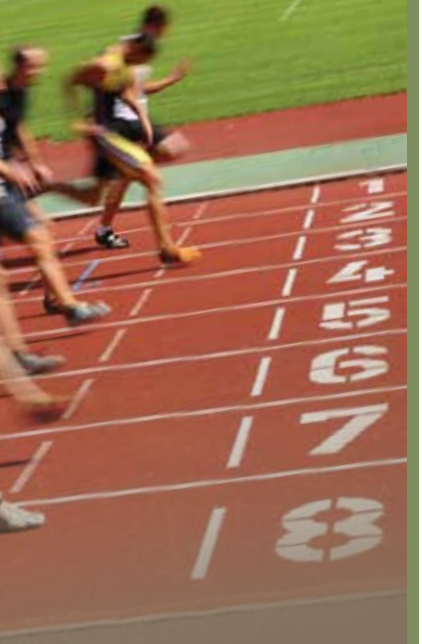
First and foremost, the program should be developed by the bench and bar—and perhaps community—in an individual jurisdiction, and it should be responsive

6 National Center for State Courts, *supra* note 2, at 35.

7 *See generally* Lucindo Suarez, *Summary Jury Trials: Coming Soon to a Courthouse Near You*, NYSBA Trial Law. Sec. Dig., Fall 2007.

8 See National Center for State Courts, *supra* note 2, at 12-25.

"There is value in uniformity where program elements have continually been successful, and we encourage anyone implementing a program to look both at what works within their own jurisdictions already and the successful elements of existing SSE programs around the country.



to the needs of that jurisdiction. There is no one-size-fits-all formula. Further, when the program is the result of local investment, it is much more likely to succeed. The first step, therefore, should be to identify the problems that the program is intended to address. The bench and the bar in a jurisdiction interested in building out an SSE program should identify a small group of individuals who can assess the problems of the jurisdiction and build the specifics of a program designed to address those problems. The group should then distribute their proposal broadly and invite input.

There must be broad judicial and administrative support for the program. It cannot just be one judge who champions it, but rather a full bench or court system. If one judge takes the lead, as is true with many other programs, when that judge rotates or leaves, the program falters. Similarly, there must be broad-based administrative support. Court staff must view the program as good for the system, and cooperate in making it work. The program should NOT be viewed as a second-class program designed for less important matters. Rather, it should be viewed as an expedited process, available to all litigants for any appropriate case.

Communications and training are essential. When the program is launched, there should be widespread communication. The program should be touted in terms of benefits that the system, the attorneys, jurors and—most importantly—litigants stand to gain. Judges, court staff, and attorneys all need training on the benefits and application of the program. Because of their length, SSE trials can also more easily be taped and used for education and promotion, for practicing attorneys and law students. In the Eighth Judicial District Court of Nevada, instruction has been an important tool in selling the program, in addition to educating participating attorneys about the process. Several short trials have been conducted at the William S. Boyd School of Law at the University of Nevada, Las Vegas, and observed by attorneys, law students, and faculty. If there is a failure in either communication or training, the program will remain dormant—few will use it. Investing in a central coordinator can be valuable in ensuring that the communication and training component has adequate planning and support.

Judges should make counsel and litigants aware of the program on a case-by-case basis, not just as an existing rule. The challenges that any jurisdiction will face are in building trust in the bench and the bar. Attorneys will inherently distrust the process because of concerns that it will limit their ability to discover and present information, and could limit their possible damages. The South Carolina model, where attorneys design every aspect of the process on a case-by-case basis, seems to enjoy greater attorney acceptance. On the other hand, it may also create an advantage for experienced, knowledgeable attorneys and a disadvantage for younger, inexperienced attorneys, which undermines one of the potential goals of the program.

As a related matter, attorneys may have malpractice concerns. For example, if they lose their case in an SSE process, will their client assert malpractice against them?

There are multiple ways to address this issue, such as in California where the client's signature is required to document informed consent. Addressing those concerns in advance would go a long way toward alleviating attorney reticence.

The most effective way to defuse distrust is through data and education. In the New York model, using data from other jurisdictions with such programs to convince attorneys of its utility is very powerful. Attorneys from those other jurisdictions are also generally very willing to share their experiences with other program users and offer advice.

Each jurisdiction should develop a system for keeping data about the program from the beginning, and should share that information with other jurisdictions around the country experimenting with similar programs. The jurisdiction should make a commitment to reexamine the program—perhaps every year for the first two or three years—to tailor and adapt it based upon the data. After at least two years of annual review, reexamination can be moved to every other or every third year.

The Importance of Data

Historically, SSE programs were developed as a creative reframing of how to reach a resolution in a civil dispute, capitalizing on the inherent strengths of a jury as the fact-finder. Successful SSE programs today both enhance access to justice for litigants and remove numerous local or state-level barriers to trials. However, for these programs to be effective, they must document not only program operations, but also measure the program's performance through sound performance management.

Brian Ostrom and Roger Hanson of the NCSC have proposed a High Performance Framework as best practices for performance measurement and performance management. Within this Framework lies the concept of perspectives, which are "how the interest and positions of different individuals and groups involved in the legal process are affected by administrative practices."[9] The four perspectives include: 1) the customer perspective; 2) the internal operating perspective; 3) the innovation perspective; and 4) the social value perspective.

Applying these principles, SSE programs are encouraged to:

- Collect data to monitor performance on an ongoing basis so as to be responsive to fluctuations in performance over time;
- Conduct analyses of the program's performance to ensure compliance with program requirements;
- Supplement performance data for use in education and training programs for participants; and
- Communicate the program's results to its partners, policy makers, and the public to promote support and buy-in.

"Successful SSE programs today both enhance access to justice for litigants and remove numerous local or state-level barriers to trials."

9 Brian Ostrom & Roger Hanson, National Center for State Courts, Achieving High Performance: A Framework for Courts v-vi (April 2010).

"While programs are most successful when they are designed to meet the particular needs of jurisdictions, similarly, the most sustainable programs are those that evolve to meet changing needs.

Unfortunately, data collection and performance management, a key component of program development, are often left to the last minute or even overlooked completely. Of the six SSE programs examined in the NCSC monograph, for example, only the New York State and the Eighth Judicial District Court of Nevada programs have implemented rigorous data collection and reporting strategies.[10] Our Committee cannot overemphasize the importance of collecting data and assessing the program regularly. Only through the use of empirical data will any jurisdiction truly be able to determine what is working to correct the problems of cost, delay, and access to jury trials. Likewise, only through empirical data will jurisdictions be able to determine what efforts have failed to achieve their goals and to understand why. Innovation is extremely important—but not blind innovation.

Appendix D contains a detailed set of recommendations about how to design and execute an effective data collection program. Any committee charged with creating an SSE program should become familiar with the data collection requirements; and any court charged with implementing an SSE program should put the data collection process in place from the beginning.

Sustaining an SSE Program

Experience from existing programs around the country proves that sustaining an SSE program is just as important, and often just as challenging, as implementing one. The same requirements for creating a solid program—including leadership by the bench and bar, training, and publicizing the benefits and data—are essential for sustaining a program long term.

While programs are most successful when they are designed to meet the particular needs of jurisdictions, similarly, the most sustainable programs are those that evolve to meet changing needs. Where the needs and circumstances change, and the program does not keep pace, the program falters. For this reason, it is essential that these programs be revisited regularly to determine whether changes need to be made. Data collection plays a key role in monitoring the success of the program and providing support for needed changes.

Finally, it is also critical to create a broad base of judicial and administrative support. Where programs have been championed by a single judge or administrator who subsequently retires, the program has waned. While such a champion can be the key to a program's success in the first instance, jurisdictions must strive for underlying support and ensure that there is someone or some group to continue the charge.

10 *See* National Center for State Courts, *supra* note 2, at 33-57.

Conclusion

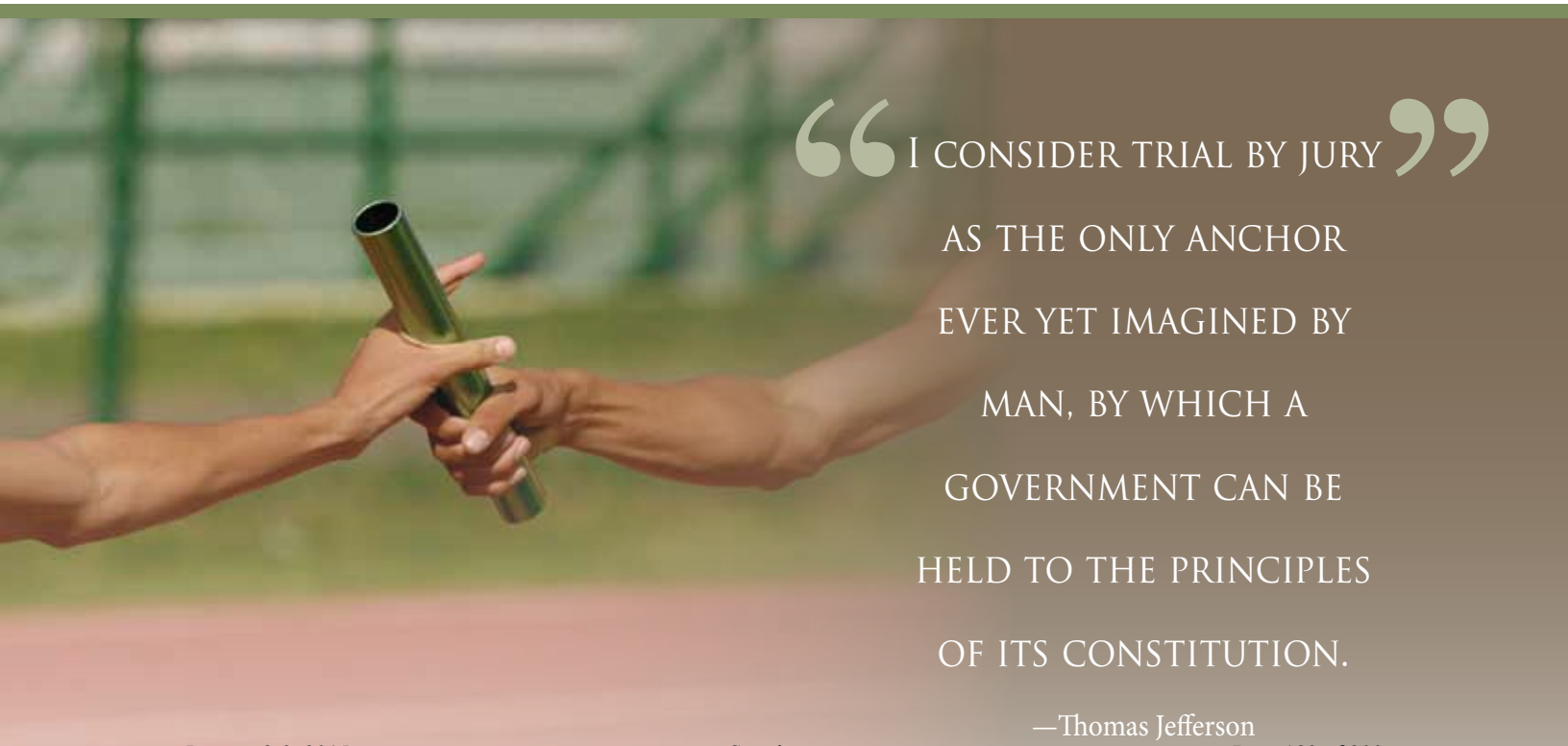
The general themes of this report have broad application across a variety of court reform efforts.

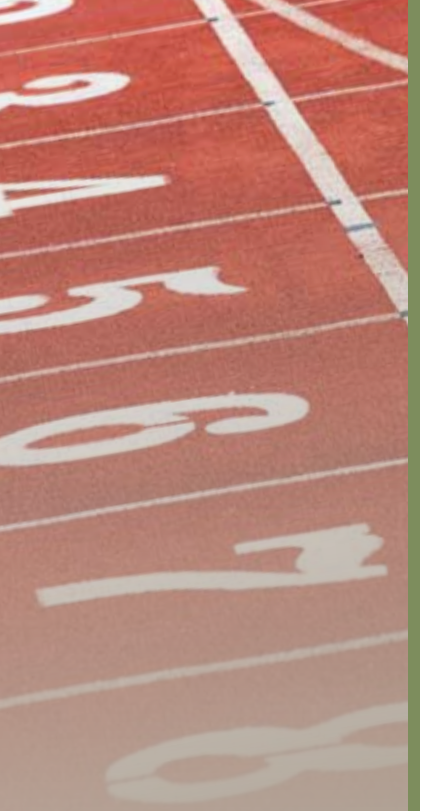
To succeed, court reform must have the following components:

- Initial and continuing judicial and court leadership;
- Buy-in from the bar;
- Responsiveness to real needs of the jurisdiction;
- Training available in advance and on an ongoing basis; and
- Data collection and assessment to ensure continuous improvement.

More specifically, jurisdictions interested in building or improving upon an SSE program can benefit from the experience of other jurisdictions as set out in this report.

Indeed, a just, speedy, and inexpensive resolution of every action is the goal, and SSE programs are one of the vehicles that may achieve that goal—both for an individual case, and perhaps, over time, in changing the culture of the legal system. The mere process of pulling together a group of judicial, bar and administrative leaders, identifying problems within a jurisdiction, coming up with proposed solutions for those problems, and experimenting with different procedures is, in and of itself, a step in the right direction.





Appendix A

SSE Committee Membership

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Eighth Judicial District Court, Nevada

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Northern District of California

Appendix B

SSE Committee Charge

The American Board of Trial Advocates, IAALS—the Institute for the Advancement of the American Legal System, and the National Center for State Courts wish to undertake a joint project. This Charge outlines the reasons for the project, the allocation of responsibilities, the goals, and the time line.

ABOTA, IAALS, and NCSC are all organizations that have, as part of their missions, a focus on access to the civil justice system in general and to jury trials in particular.

Certain jurisdictions have developed what have come to be called "Expedited" or "Summary" Jury Trial procedures that are designed to provide an alternative for certain types or sizes of cases. Some of the procedures have pretrial components; others relate exclusively to the shortened trial itself. In each instance, the intent is to increase access to the process.

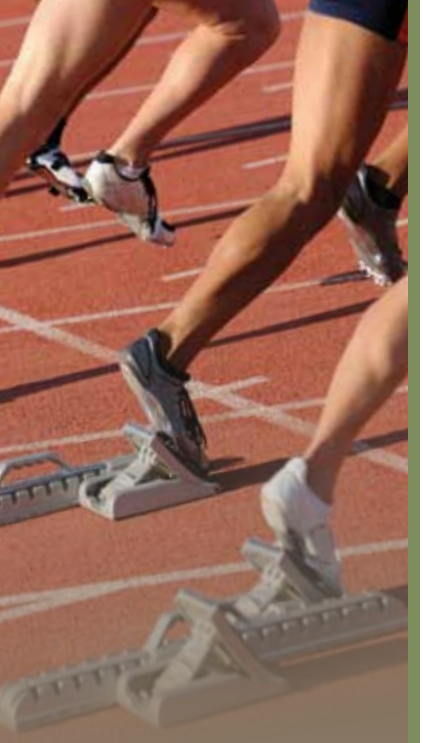
ABOTA, IAALS, and NCSC wish to compile information about the procedures and from that information develop a manual that can be distributed nationally to identify what emerge as best practices, both in developing and implementing a Short, Summary, and Expedited (SSE) procedure and in maximizing the effectiveness of such a procedure once implemented.

The joint project SSE Committee shall consist of two representatives from ABOTA, IAALS, and NCSC each and up to five additional members from around the country—judges, lawyers, researchers and academics who have experience with EJT procedures. The additional members shall be chosen by the six ABOTA, IAALS, and NCSC members.

The Committee shall convene at IAALS in Denver as soon as schedules permit. Each member of ABOTA, IAALS, or NCSC shall pay their own (or their organization shall pay) associated expenses.

IAALS shall staff the Committee, by compiling and distributing information in advance and taking the lead in drafting a manual/template/report (to be determined) that shall then be distributed among all members for comment. NCSC has already done the research about SSE procedures around the country. That information will be the starting place for the project.

The Committee shall make every possible effort to produce a product by the end of September of 2012. The product will bear the logos of all three organizations (unless one organization wishes to withdraw from the project at any time) and shall be available on all three websites.



Appendix C

Best Practices for Case Identification, Preparation, and Presentation

Assuming that the process is completely optional, the choice falls to counsel to decide which cases might be amenable for resolution through an SSE process. It may well be true that once the attorneys and litigants are familiar with the process, the list of appropriate cases can begin to expand. In reality, it is not just the small case, the low-dollar case, or the simple case that can benefit from an expedited and streamlined process. Many cases can benefit from a process that costs less and that forces litigants, their attorneys, and the fact-finders to focus on the most important issues in the case.

But, in the first instance, the cases that are most likely to be appropriate for this process are:

- Cases with single or limited issues to be resolved;
- Cases where many facts can either be stipulated or determined by the uncontested admission of reports or documents;
- Cases where the likely value doesn't warrant the expense of live expert testimony or exhaustive trial;
- Cases where it is desirable to limit exposure or guarantee recovery (high-low agreements);
- Cases that can be resolved in one or two days of testimony and deliberations;
- Cases involving limited witness testimony;
- Time sensitive cases where the usual docket wait will be prejudicial to a party's ability to present its case;
- Cases where the parties desire a certain (or almost certain) trial commencement date;
- Cases in which the parties fully understand the benefits and risks of participating in the SSE program and have consented to those risks;
- Cases with insurance coverage limit concerns where a high-low agreement is desirable;
- Cases involving insurance coverage where the carrier has consented to be bound by the proceeding.

Guidelines for Preparation and Presentation

These guidelines have been developed for participants engaged in SSE programs. If properly organized and presented, the trier of fact, be it the court or a jury, will be able to understand complex case issues and evidence in a shortened trial setting. By participating in this program, the participants agree that they have chosen to be bound by statutory or contractual obligations in presenting their cases. This guide is intended to help participants better prepare, organize, and present their cases to accommodate this shortened trial format so that the judge or jury will be able to clearly understand the case in order to make their most informed decision.

Known Limitations:
Participants should thoroughly review the statutory or contractual language to understand the time limitations and evidentiary restrictions in presenting the case. As SSE trials are conducted in such a limited fashion, each moment is precious, including that of the judge and the jury. Participants should endeavor to be timely and respectful of all the time limits.

Cooperation:
SSE trials necessitate greater agreement and cooperation between the parties. This usually means revealing more information to opposing parties prior to trial than in a traditional trial. This in no way diminishes the ability of counsel to be a zealous advocate for their client. In fact, the ability to have greater knowledge about the scope of evidence and testimony that will be presented in these trials allows the attorneys to better plan their presentations and to concentrate on the meritorious issues in the case. By necessity, attorneys for both sides in an SSE trial must exchange exhibits, including any highlighting or additional emphasis, in advance of the trial. These trial formats are not conducive to gamesmanship. And while this does not demand that counsel reveal all of their strategies regarding the way they conduct the case, they must reveal the substantive nature of their evidence. Agreed-upon evidentiary booklets also facilitate cooperation, remove surprises, and help keep the trial short, summary, and efficient.

Pretrial Hearings:
An effective pretrial hearing is essential for achieving a short, summary, and expedited trial. Many jurisdictions with SSE programs include specific requirements for the pretrial hearings, as this hearing is essential for a streamlined and efficient trial. The court and the parties should utilize this hearing to address any questions and concerns regarding all aspects of the trial, and review parameters and expectations of the trial from voir dire to verdict. The court can make rulings on previously exchanged evidentiary submissions, proposed Pattern Jury Instruction charges, and proposed verdict sheet questions. Some of these matters may involve the increase and or redistribution of peremptory challenges where more than two attorneys appear on a case, the need for an interpreter, and physical disability issues with parties.

New Information:
In preparing the case presentations, SSE participants should remember that the jury is hearing evidence for the first time. They do not have the background or familiarity with the subject matter that the attorneys, experts, and parties have. In preparing the evidence, it is important for participants to constantly evaluate the information that must be conveyed so that the jury will understand the testimony or exhibit. A commonly asked question to discern needed information for the jury would be, "If you were listening to this for the first time, what would you need to know?" If there are issues of some complexity in the case that may require time to explain in order for the jury to have context or background for the evidence, the attorneys should consider whether they would wish to draft an agreed upon tutorial to be read by the judge in the case or a glossary of terms to familiarize jurors with acronyms or terminology. This should not only address potential confusion but also potential misconceptions the jury may have about the issues in the case.

Theme:
Jurors respond best to a narrative framework or story of the case. This story helps them to organize and understand the evidence. Every case has a central theme or organizing principle. This is usually a single phrase or sentence. One of the easiest ways to develop a theme is to fill in the phrase, "This case is about . . . ." While development of a theme is important in every case, it is even more so in SSE programs, where jurors need to quickly understand the case and render a verdict.

Three to Five Points:

Once counsel has developed the theme, it is best to identify the three to five main evidentiary points that support this central principle. While this does not preclude counsel from having a different number of points, three to five main points have been shown to provide a better organizing structure to ease the comprehension level of the jury. Moreover, this will assist attorneys in narrowing the focus of their presentation so as to fit within the constraints of an SSE trial. If possible, each of these main points should be stated in a single sentence, like a headline for a news article. These single sentence headlines help jurors to retain and organize the main issues in the case. These main points should be selected because counsel believes these issues will lead the jury to an appropriate verdict in the case. This is not to exclude other important points or evidentiary issues.

Other salient issues should be examined to see if they could fit into the categories of the main points. In determining these main points, the attorneys can ask themselves several questions:

1) Why is this one of the most important points in the case?
2) What do you want the jury to conclude from this point?
3) How does this point connect to the verdict you want the jury to render in the case?

Distinguish between what the jury needs to know about the case from what the attorneys want them to know. Remember to connect all of the dots in the narrative story of the case in order to avoid leaving the jury with unanswered questions. Although pretrial rulings or time constraints may not allow the attorneys to answer all of the jury's questions in the case, they should endeavor to answer the main questions the jury will have:

Who are the parties?
What happened?
What is the dispute?
What am I supposed to decide?

While it may not be essential to script out the entire presentation of the case, it is advisable to create a detailed outline in order to ensure that each side is able to present the optimal amount of essential evidence the attorneys feel is necessary to meaningfully represent their client's case. While there is a tendency in a standard trial to repeat information in the belief that this repetition will influence the jury, one of the most common complaints of jurors is their belief in the needless redundancy of testimony or issues.

Outline for the Case:

These three to five main points can become an outline for presenting the case and they help the attorney to organize the testimony and exhibits. And while it is understandable that attorneys would want to include as much as they can about what they have learned about the case, given the time constraints of an SSE trial, it is advantageous to keep the presentation focused on these main points.

Sequence:

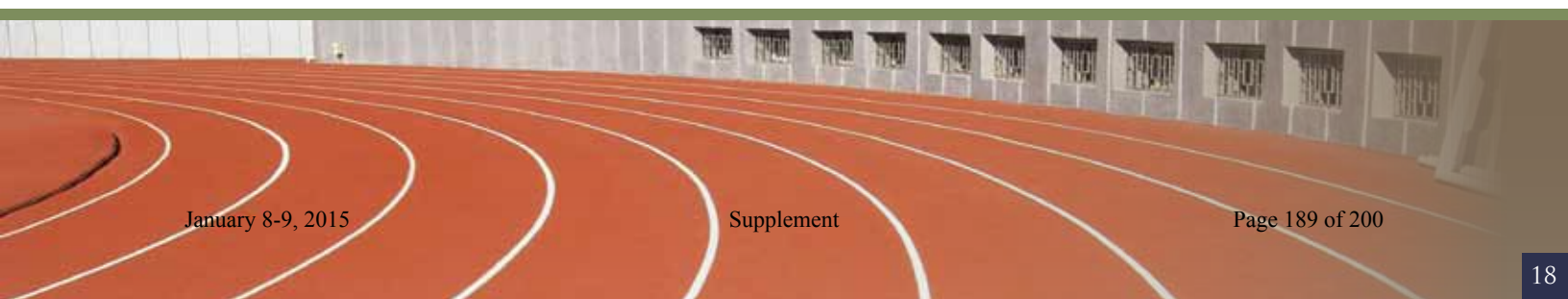
Because of the shortened time in these trials, it is also advisable to put these main points in a prioritized, sequential order that makes the best sense for the case. In other words, one point should lead to the next point, which would lead to the next point. This sequence can be organized in chronological order of the events in the case that counsel wants to describe, but can also be organized by legal issues, main conclusions of expert witnesses, or other sequential ordering.

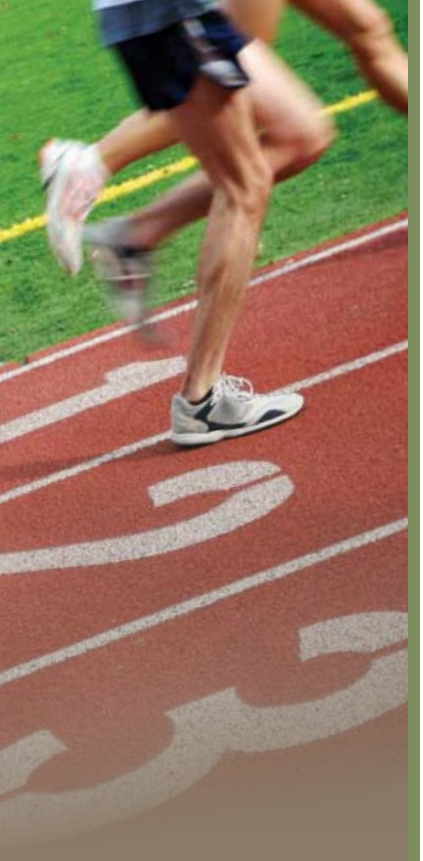
Scheduling:
Many attorneys are not used to the rigorous scheduling of an SSE trial. It is advisable, once the attorneys have agreed upon the schedule for voir dire, opening statements, and case presentations, that they consciously plan out and allocate the amount of time they need for each of their witnesses according to the priority of issues in their case. They should then confirm that the witnesses are available on the date and time of their scheduled testimony.

Witnesses:
SSE trials generally allow attorneys to present most of their case directly to the judge or jury. However, if the attorney is able or wishes to present witnesses, include only those witnesses that are most essential to the case. For this, attorneys can ask themselves which witnesses will reasonably illustrate the three to five main points outlined above. As the rules for laying foundation or qualifying experts may be relaxed in these trials, attorneys should try and focus the testimony on the most needed areas to illustrate the main issues in his or her case. In most cases, these witnesses will have prescribed or agreed upon time for their testimony.

To ensure conformance with the agreed upon testimony, in preparing both lay and expert witnesses, it is advisable to go over these few needed questions in advance. If there is agreement to have the witness testify by videoconferencing, make sure that the internet, phone or videoconferencing equipment is tested and working at the time of testimony. If there is an agreement to include recorded witness testimony, either from deposition or by mutual consent on direct and cross examination, attorneys should conform the testimony to the time limits and the agreed upon scope of the testimony, as well as the form of the testimony (recorded testimony only, recorded testimony with subtitles, recorded testimony with deposition transcript). The attorneys should decide whether the recorded testimony will be available for later review by the jury. To help focus the testimony of each witness, the attorney may ask himself or herself what they would ask the witness if they only had five questions. That way, they can prioritize the testimony of the witness into the most germane areas. Additionally, if attorneys will be presenting a witness' testimony (such as an expert's) themselves, either by reading deposition transcripts, or presenting the report of that witness, it is advisable to present the written testimony or exhibit on a document projector or electronically through an LCD projector as well as giving the jurors individual copies.

Exhibits:
Similarly, in preparing exhibits for the trial, the attorney should only include exhibits that illustrate the key points the attorneys are trying to make in their presentations or illuminate the witnesses' testimony. If there is agreement to include these in an exhibit notebook, it is important that these be clearly tabbed, marked, and limited to the information related to specific testimony. If additional exhibits are included in the document notebooks that have not been approved or have no relation to the testimony the jurors are hearing, it is counter-productive and can be misleading, causing more confusion for the jury. If the exhibit includes attorney highlighting, make sure these are pre-approved by opposing counsel before including these in the jurors' books. Pre-approval is important to ensure that there are not later disputes about the inclusion or argumentative nature of the exhibits.





Trial Presentation:

If any of the presentations and exhibits will be shown in a PowerPoint, Trial Director, or other trial presentation system, ensure that these presentations are approved by the judge and opposing counsel before trial. Additionally, it is essential that these presentation systems be tested before the trial day to ensure they are in working order. If the attorneys would like to use blowups, a flip chart, a white board, or a Smart Board for their presentations, it is advisable that they obtain agreement on their use and practice with this media prior to the actual trial. Attorneys should also strive to be consistent in how they highlight information on a document or a demonstrative exhibit to avoid juror confusion.

Juror Note-Taking and Questions:

Whenever possible, jurors should be encouraged to take notes to aid their case organization and comprehension. Although the time frame is extremely tight, if agreed, attorneys and their clients should consider allowing juror questions. This will hopefully highlight for counsel the information jurors need to better understand and make decisions in the case.

Practice:

After months or more of working on a case, there is a natural tendency when one is working from an outline to add in details from the extensive knowledge that the attorney has of the case. When this happens in an SSE trial, with the strict time constraints, attorneys may simply run out of time to present their case, perhaps even leaving essential evidence or important issues out of their presentation. One of the ways for attorneys to avoid this unfortunate situation is to practice in order to time their presentations precisely. Additionally, with practice sessions, the attorneys may hear arguments or issues that simply seem less important when they say them out loud. This also allows counsel to avoid unwanted confusion or argumentation.

Jury Instructions and Verdict Forms:

In a short, summary, and expedited trial, the jury instructions and verdict questions are decided in advance of the beginning of the trial. This should help counsel to focus their presentations, both in their openings statements and in their presentation of evidence. In submitting instructions to the court, it is advisable to focus on only the special instructions or key definitions that are the most salient to the case. If allowed, these relevant instructions and verdict questions should be introduced to jurors at the beginning of the case to allow them to become more familiar with these legal guidelines and the questions they will need to answer. Many of the pattern jury instructions do not need to be submitted to the judge. The parties and the judge should evaluate the necessary scope of the instructions, given the limited length of the trial and deliberations. In prioritizing the evidence, counsel can ask themselves which testimony and demonstrative evidence will best address the verdict questions the jury has to answer and the instructions they will have to follow. The particular wording of a pattern jury instruction charge should be stipulated to before the evidentiary hearing. If opposing counsel does not agree, the attorney should be prepared with a draft of the charge with possible case or statutory support, and the reasons for inclusion of the charge. If attorneys are allowed closing arguments, it is advisable to use the stipulated juror instructions and verdict form in the closing argument, while showing jurors the instructions and walking them through the form, illustrating how counsel feels the evidence supports particular conclusions.

Simplify:

After the attorneys have fully planned their trial presentations, it is prudent for them to re-examine them prior to the actual trial to test the presentations for comprehension. For this, they should examine whether they can state any of the evidence or issues in a simpler and more direct manner in order for the jurors to fully understand the case. It is important that they not only analyze this simplicity themselves but also discuss the case with laypeople to assure that the comprehension levels are appropriate for the jury.

Voir Dire:

The attorneys will have extremely limited voir dire in a short, summary, and expedited trial, if allowed at all. Thus, it is important to identify the central issues that may create a bias for potential jurors in the case. After these issues have been identified, counsel should write the three main questions that identify a bias, negative predisposition, or side preference that they would not want on the jury. In asking these questions of the panel, it is important to ask open-ended questions that require the jurors to speak about the experiences or attitudes that may affect their ability to be fair and impartial in the case. It is not a good use of the limited voir dire time to ask indoctrination or leading agreement or promise questions. If there are additional concerns, the attorneys may also submit these questions for the judge to ask the jurors with support as to why the particular questions address a bias. Counsel are advised to review the voir dire and jury selection rules in an SSE trial in order to better understand whether there is attorney-conducted voir dire, the length of time allotted for questioning, how cause and peremptory challenges are conducted, and how many jurors and alternates are seated, as well their seating order.

Avoid Excessive Argument:

In an SSE trial, jurors assimilate a large amount of information in a short period of time. Thus, they will respond better to a clear presentation of evidence than to a great deal of argument. If jurors hear too much argument before closing statements in the case when they have no context, they may minimize or discredit the evidence they do hear.

Appendix D

Best Practices for Data Collection

This section describes best practices for developing and implementing a data collection plan for your SSE program.

Types of Data Collection

Court-based programs typically collect two different types of information about program performance: case-level data and participant feedback. Case-level data documents objective information about the trials that take place through the program, such as the number of trials, the types of cases, trial length, and trial outcomes. Ideally, information of this type should be collected by a single person with direct knowledge or involvement in the trial, such as the trial judge or courtroom staff. Participant feedback typically focuses on the individuals who participated in the trial or have a direct investment in the trial outcome—lawyers, litigants, and jurors—to document their perceptions about program effectiveness and fairness and to solicit recommendations for program improvement. Most participant feedback methods consist of questionnaires or focus groups.

Focus of Data Collection

Some basic information should be collected about all SSE trials such as the case number, the case name, the type of case (e.g., automobile tort, premises liability, breach of contract, etc.), the trial start and end date(s), and the trial outcome. This type of basic information accomplishes three things: (1) it documents the actual volume of program activity; (2) it facilitates comparison of the SSE cases with non-SSE cases and with jury trials under similar SSE programs in other jurisdictions; and (3) provides empirical evidence of fairness by documenting plaintiff versus defendant win rates.

In addition to basic information, the program should document other aspects of the SSE program. In developing the data collection methods, the overriding philosophy should be to tailor the data collection efforts to program objectives. This approach will ensure that program developers and participants can point to solid, empirical information about program accomplishments. Table D-1 below illustrates some common objectives of SSE programs and applicable data elements to measure to assess performance.

Table D-1

If the purpose of the program is to …	Data collection should focus on …
Bring cases to trial faster	Case filing date (or date case entered program)
Reduce trial costs	Trial length Amount and form of evidence introduced at trial: • Number of witnesses • Live witness/expert testimony vs. written reports
Provide a venue for younger, less experienced lawyers to gain trial experience	Attorney characteristics: • Number of years in practice • Law firm size Assessments of the program as an educational opportunity
Continue to attract participants (growth)	Names of the participating insurance carrier Insurance policy limits Existence and range of high-low agreements Identify other repeat players

The SSE programs in New York and the Eighth Judicial District Court of Nevada offer useful illustrations of how the program managers developed their respective data collection strategies to further program objectives. See State of New York Summary Jury Trial Data Collection Form (attached as Exhibit B) and Eight Judicial District Court of Nevada Sample Data Collection Form (attached as Exhibit C). Both programs identify the case name, case number, trial date, jury verdict, and the amount of damages awarded. Because the New York State program is statewide, the NY Data Collection Form also identifies the specific type and the location of the court in which the trial took place.

The Short Trial Program in the Eighth Judicial District Court of Nevada operates under the auspices of the ADR Office. Thus, much of the detail captured on the Short Trial Information Sheet was designed to provide the ADR Commissioner with a view of Short Trial performance compared to other ADR options, including the total number of cases proceeding on the arbitration and Short Trial tracks, the number of cases scheduled for Short Trial or arbitration, and the number of completed Short Trials or arbitration decisions entered. Because many of the Short Trial cases are appeals from mandatory arbitration, the Short Trial Information Sheet also collects detailed information about the amount of damages claimed by the plaintiff and the actual damages awarded by the jury for medical expense reimbursement, pain and suffering, and lost wages, which permits a detailed comparison between jury and arbitrator decision-making in the same case. Because the decision to include previous arbitration decisions in the materials provided to the jury was somewhat contentious, the Short Trial Juror Exit

Survey largely focused on the impact that knowledge about the arbitration decision had on the jury verdict. Both the Juror Exit Survey results and the comparison of arbitration decisions with jury verdicts demonstrated that the impact was negligible, putting to rest concerns that the practice interfered with the jury's independent judgment.

The NY Data Collection Form continues to evolve over time. In addition to basic identifying information, the current version was designed to measure the efficiencies introduced by Summary Jury Trials compared to non-Summary Jury Trial cases. For example, information about the anticipated trial length for a non-Summary Jury Trial (Question 8) provides a concrete measure for the number of trial days saved using the SSE procedures. Similarly, details about the amount of time allotted for the various segments of the summary jury trial provide benchmarks for the "normal" timeframe for conducting these trials. (The forthcoming version of the data collection form will eliminate many of these questions because they revealed almost no variation in these measures across case types or among judicial districts.) A unique feature of the NY Data Collection Form is the identification of the insurance carrier representing the defendant. This information serves as a barometer to both plaintiff and defendant's bars, as do the insurance policy limits and high-low agreement parameters, of the breadth of acceptance of Summary Jury Trials as a method of case resolution. Over time, this information has documented significant growth of participating carriers, with policy limits and high-low parameters trending higher.

Exhibit A provides a template of data elements that SSE program developers may consider when designing their own data collection instruments. Ideally, comparable information about non-SSE program trials should be routinely available or easily compiled from existing sources to provide baseline information.[11]

In developing case-level data collection forms or SSE participant surveys, it is often tempting to collect extremely detailed information about the cases and trials adjudicated. Program developers should keep in mind that, as the data collection process becomes lengthier and more detailed, it also becomes more time and labor-intensive and requires more resources to support. A useful technique to keep data collection objectives from eclipsing the broader objectives of the SSE program is to review each proposed data element or survey question with the following criteria in mind.

Is/Does the data element or survey question . . .
Essential documentation of basic program operations?
Clearly measure the performance of key program objectives?
Readily available from the case management system, case files, or trial participants?
Duplicate other data elements or survey questions?

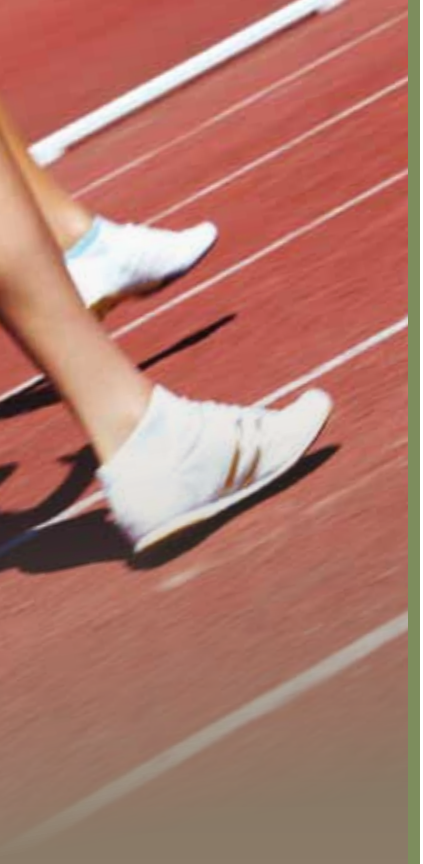
Process of Data Collection

An important part of the data collection strategy is ensuring that this task is undertaken by individuals with the appropriate skills, resources, and authority to do so.

Questions that SSE program developers should address are:

- Who is responsible for collecting the data, reviewing the data to ensure its completeness, and compiling the data for analysis?
- What authority does that individual or agency have to enforce compliance with data collection efforts?
- Is any of the information collected confidential? If so, who should have access to that information? What procedures should be implemented to ensure confidentiality?

11 For more information about effective program evaluation, see IAALS, A Roadmap for Reform: Measuring Innovation (2010).



- How frequently are the data compiled and analyzed? To whom and in what format are findings reported?
- Where are program reports and data archived?

Data collection should not be undertaken for its own sake, but rather to support program maintenance and sustainability. As such, it is important that program participants from whom or about whom information is collected understand the purpose of data collection and how the information will be used. Program developers should also consider the form of data collection. Electronic forms such as online surveys or fill-in PDF forms require more technological expertise to develop, but offer greater accuracy and legibility and are less labor-intensive to compile. In addition to streamlining the data collection process, involving individuals with technology expertise in the design process can facilitate the process of generating both routine and ad hoc reports.

Program developers should also have a plan to disseminate the findings from data collection efforts. In the Eighth Judicial District Court of Nevada, the ADR Commissioner provides reports detailing the number of cases that entered the Short Trial Program, were scheduled for trial, and were completed to the local court administration and to the Nevada Administrative Office the Courts. Because the Eighth Judicial District Court is largely funded by local taxpayers, the Short Trial Program reports are routinely shared with the local Board of Commissioners to show how the Short Trial Program helps the court use those resources more effectively. The statewide ADR reports, including Short Trial statistics, are provided to the Nevada Legislature as mandated by statute. Under the mandatory arbitration program, arbitrators are supposed to make decisions according to how a jury would decide the case. Thus, the arbitration versus Short Trial verdict comparisons provide valuable training for and feedback to the arbitrators assigned to those cases. In addition, those comparisons are also excellent tools for dispelling common myths circulating in the legal community about how juries evaluate and assign monetary values to different categories of damage awards.

In New York State, Justice Lucindo Suarez provides quarterly reports detailing the number of Summary Jury Trials held for each of the 13 judicial districts to the Chief Administrative Judge of the New York Judicial Branch and to each of the district administrative judges. He also sends copies of the reports to each of the judges who presided in a Summary Jury Trial during the preceding quarter and their judicial clerks who submitted the data collection forms. This approach provides further encouragement for the judges and clerks to submit their data and ensures that the reports accurately reflect the actual volume of Summary Jury Trials conducted in those courts. "The judges and clerks will always let me know if they think I've made a mistake by omitting any of their trials from the total counts," he explained. "I then make the corrections and resend the corrected reports with the subsequent quarterly reports." Justice Suarez also uses the data during training workshops with judges and lawyers across the state to illustrate details about these trials such as the amount of time typically allocated for various segments of the trial or the proportion of trials undertaken with high-low agreements.

Exhibit A

SAMPLE DATA COLLECTION FORM

Case name: _____ Case number: _____

Case type (check one):

☐ auto tort ☐ premises liability ☐ contract ☐ other (please specify) _____

Filing date: _____/_____/_____

Trial date(s): _____/_____/_____to _____/_____/_____

Insurance carrier: _____ ☐ Not applicable

Policy limits: _____ ☐ Not applicable

High/low agreement range: _____ to _____

Arbitration decision: _____ ☐ Not applicable

Damages claimed:

Medical expenses: $_____

Pain & suffering: $ _____

Lost wages: $ _____

Other damages: $ _____

Jury size (if variable): _____

Length of … (in minutes)

Voir dire: _____

Opening statements: _____

Plaintiff evidence: _____

Defendant evidence: _____

Closing arguments: _____

Jury deliberations: _____

Plaintiff evidence:

Number of fact witnesses: _____ Number testifying in person: _____

Number of expert witnesses: _____ Number testifying in person: _____

Defendant evidence:

Number of fact witnesses: _____ Number testifying in person: _____

Number of expert witnesses: _____ Number testifying in person: _____

Verdict:

☐ Plaintiff ☐ Defendant

Unanimous verdict:

☐ Yes ☐ No

Damages Awarded:

Medical expenses: $_____

Pain & suffering: $ _____

Lost wages: $ _____

Other damages: $ _____

STATE OF NEW YORK
UNIFIED COURT SYSTEM

SUMMARY JURY TRIAL DATA COLLECTION FORM

UCS-413 (08/11)

Please mail, fax or scan this Data Collection Form for every Summary Jury Trial. Submit to Hon. Lucindo Suarez, Supreme Court - Bronx County, 851 Grand Concourse, Bronx, NY 10451; Fax: 718-537-5076. Attention Hon. Lucindo Suarez; Scan: lsuarez@courts.state.ny.us

1. **INDEX NUMBER:** _____ 2. **CASE NAME:** _____

3. **COUNTY:** _____ 4. **COURT:** ❍ Supreme ❍ NYC Civil Court ❍ County ❍ City/District

5. **CASE TYPE:** ❍ Commercial ❍ Tort ❍ Motor Vehicle ❍ Other: _____

6. **NUMBER OF ATTORNEYS:** Plaintiff(s) ☐ Defendant(s) ☐ 7. **INSURANCE CARRIER:** _____

8. **EXPECTED NUMBER OF JUDICIALLY DETERMINED TRIAL DAYS IF NO SJT:** ☐☐

9. **DATE OF SUMMARY JURY TRIAL:** ☐☐ / ☐☐ / ☐☐☐☐ **(month / day / year)**

10. **ISSUES:** ❍ Liability only ❍ Damages only ❍ Liability and damages 11. **WAS SJT:** ❍ Binding ❍ Non-binding

12. **IF THERE WAS A HIGH/LOW AGREEMENT, PLEASE INDICATE:** $_____ High $_____ Low ❍ None

12a. **Carrier(s):** _____ _____ 12b. **Policy Limit(s)** $_____

13. **DID THE CASE SETTLE?** ❍ No ❍ Yes 13a. **When?** ❍ Before SJT ❍ During SJT ❍ After SJT

13b. **What was the settlement amount?** ❍ $_____ ❍ Don't know ❍ Not applicable

THE PROCEEDINGS

14. **WAS THE SUMMARY JURY TRIAL PRESIDED OVER BY A:** ❍ Judge ❍ JHO

15. **HOW MANY JURORS WERE ON THE PANEL CALLED FOR THE SUMMARY JURY TRIAL?** ☐☐ ❍ Don't know

16. **HOW MUCH TIME (IN MINUTES) WAS ALLOTTED FOR VOIR DIRE?**

	Judge	❍ 20	❍ 30	❍ 40	❍ more than 40
	Plaintiff(s)	❍ 5	❍ 10	❍ 15	❍ more than 15
	Defendant(s)	❍ 5	❍ 10	❍ 15	❍ more than 15

17. **HOW MUCH TIME (IN MINUTES) WAS ALLOTTED FOR...**

... opening statements?	**Judge**	❍ 20	❍ 30	❍ 40	❍ more than 40
	Plaintiff(s)	❍ 5	❍ 10	❍ 15	❍ more than 15
	Defendant(s)	❍ 5	❍ 10	❍ 15	❍ more than 15
... case presentation?	**Plaintiff(s)**	❍ 30 or less	❍ 40	❍ 50	❍ 60 or more
	Defendant(s)	❍ 30 or less	❍ 40	❍ 50	❍ 60 or more
... closing statements?	**Judge**	❍ 20	❍ 30	❍ 40	❍ more than 40
	Plaintiff(s)	❍ 5	❍ 10	❍ 15	❍ more than 15
	Defendant(s)	❍ 5	❍ 10	❍ 15	❍ more than 15

18. **HOW MANY WITNESSES TESTIFIED (LIVE OR BY VIDEO) FOR THE...**

	Plaintiff(s)	❍ 0	❍ 1	❍ 2	❍ more than 2
	Defendant(s)	❍ 0	❍ 1	❍ 2	❍ more than 2

19. **HOW MANY EXPERT REPORTS WERE SUBMITTED FOR THE...**

	Plaintiff(s)	❍ 0	❍ 1	❍ 2	❍ more than 2
	Defendant(s)	❍ 0	❍ 1	❍ 2	❍ more than 2

20. **WAS ANY DOCUMENTARY OR DEMONSTRATIVE EVIDENCE GIVEN TO THE JURY?** ❍ Yes ❍ No

THE VERDICT

21. **FOR HOW LONG (IN MINUTES) DID THE JURY DELIBERATE?** ❍ 30 or less ❍ 40 ❍ 50 ❍ 60 or more

22. **VERDICT:** ❍ Plaintiff ❍ Defendant ❍ Split ❍ Hung

23. **DAMAGES AWARDED:** $_____ ❍ Settled before deliberations

WHO COMPLETED THIS FORM?

NAME: _____

PHONE NUMBER: _____ **DATE:** _____

QUESTIONS TO THE JURY ABOUT THE SHORT TRIAL PROGRAM

EIGHTH JUDICIAL DISTRICT COURT

PLEASE MAIL WITHIN 10 DAYS OF THE COMPLETION OF THE TRIAL TO:

ADR Commissioner
c/o ADR OFFICE
330 S. Third St.
Las Vegas, NV 89155
Fax…(702) 671-4484
ATTN: STP Jury Survey

1. How did you feel this morning when you were advised that you would be participating in the Short Trial Program ("STP")?

2. How did you feel when you learned that you would be a juror for just one day?

3. How do you feel about the fact that only four jurors were chosen?

4. [If applicable] Did the jury instruction regarding the fact that an arbitrator had previously heard this case and rendered an award have any impact on your verdict today?

5. [If applicable] If so, how (i.e., did it help or hinder you reaching a verdict)?

6. [If applicable] How do you feel about being given this information?

7. What did you think about the evidentiary booklet?

8. How did you feel when you were able to reach a (unanimous?) verdict?

9. What did you like most about the STP?

10. What did you like least about the STP?

11. If summoned, would you sit as a juror in the STP again?

12. If you could recommend any change(s) be made to the program, what would it/they be?

EXHIBIT C

SHORT TRIAL INFORMATION SHEET

1. Case Name: _____.

2. Case No.: _____ **3.** Trial Date: _____.

4. **NAME of COUNSEL (@ TRIAL) for:** Plaintiff:_____.

Defendant: _____.

Other Party: _____.

5. **Nature** of Damages: (e.g., soft tissue, broken bones, contractual, etc.): _____

_____.

6. Damage **Amounts** Claimed (e.g., medical expenses incurred, property damage amount, amount of lost wages, etc.):

_____.

7. Testimony from **[please use NAMES of ALL witnesses]** Oral Written

Plaintiff(s): _____ ☐ ☐

Plaintiff's expert(s): _____ ☐ ☐

Defendant(s): _____ ☐ ☐

Defendant's expert(s): _____ ☐ ☐

Other(s): _____ ☐ ☐

Other's expert(s): _____ ☐ ☐

8. Verdict: Party Verdict Amounts (e.g., meds, P & S, LW)

_____ _____

_____ _____

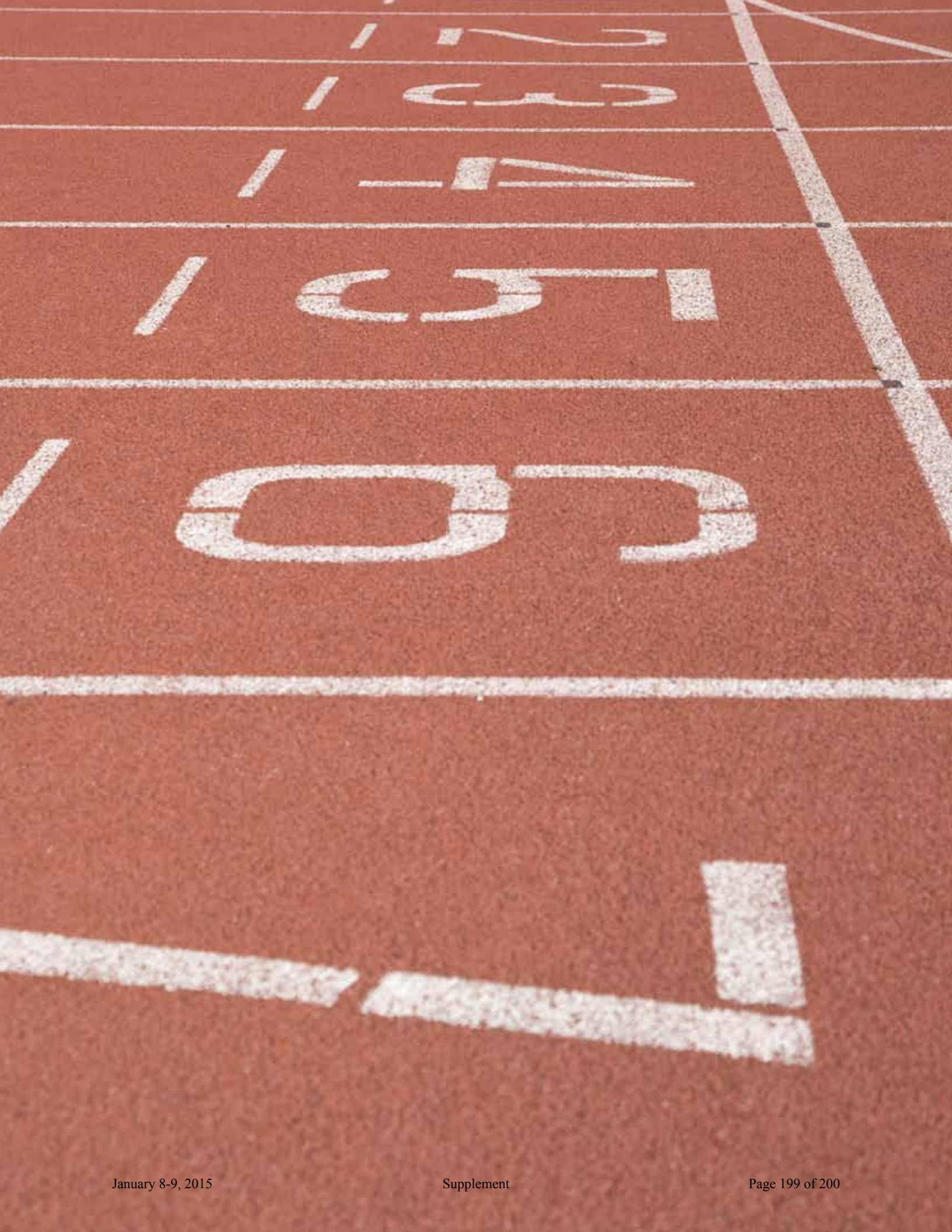
9. Verdict Unanimous: Y / N. **10.** Liability Admitted: Y / N.

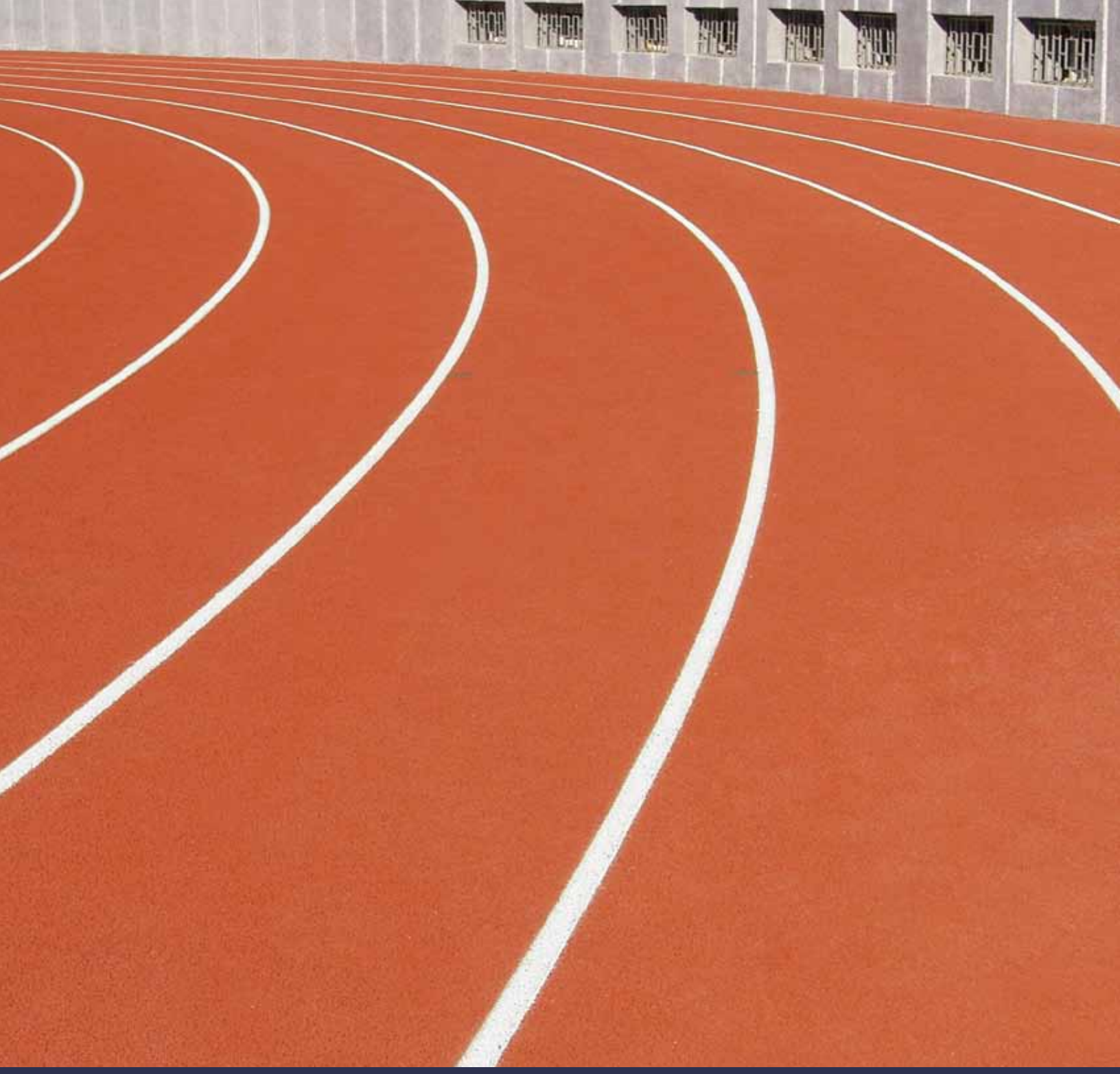
11. Length of: Trial (EXCL. lunch):_____; Jury deliberation:_____.

12. Interesting Notes: _____

_____.

PLEASE RETURN WITH FILE-STAMPED VERDICT FORM TO ADR OFFICE





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