ADVISORY COMMITTEE
ON
CIVIL RULES

Washington, DC
April 9-10, 2015

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Agenda

April 9-10, 2015

Meeting of the Advisory Committee on Civil Rules

1. Welcome by the Chair

   Standing Committee Meeting and Judicial Conference

2. **Action Item**: Minutes for October Meeting.

3. Status of Amendment Proposals Pending Before the Supreme Court

   Publicizing the amendment proposals if they take effect December 1

4. Legislative activity.

5. **Action Items: Rules Published for Comment**

   Rule 4(m)

   Rule 6(d)

   Rule 82

6. **Action Items: Rules Proposed for Publication**

   Rule 5(d)(3)

   Rule 5(b)(2)(E)

   Rule 5(d)(1)

7. Rule 68 report

8. Rule 23 Subcommittee Report

9. Discovery Subcommittee Report

10. Appellate-Civil Subcommittee Report

    Manufactured Finality

    Rule 62

11. Pilot Projects

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John M. Barkett	ESQ	Florida	2012	2017
Elizabeth J. Cabraser	ESQ	California	2010	2016
Stuart F. Delery*	DOJ	Washington, DC	----	Open
Paul S. Diamond	D	Pennsylvania (Eastern)	2009	2015
Robert Michael Dow, Jr.	D	Illinois (Northern)	2013	2016
Parker C. Folse	ESQ	Washington	2012	2015
Paul W. Grimm	D	Maryland	2009	2015
Robert Klonoff	ACAD	Oregon	2011	2017
Scott M. Matheson, Jr.	C	Tenth Circuit	2012	2015
David E. Nahmias	CJUST	Georgia	2012	2015
Solomon Oliver, Jr.	D	Ohio (Northern)	2011	2017
Gene E.K. Pratter	D	Pennsylvania (Eastern)	2010	2016
Virginia A. Seitz	ESQ	District of Columbia	2014	2017
Craig B. Shaffer	M	Colorado	2014	2017
Edward H. Cooper Reporter	ACAD	Michigan	1992	Open
Richard Marcus Assit. Reporter	ACAD	California	1996	Open

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TAB 1

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COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of January 8–9, 2015
Phoenix, Arizona

Draft Minutes

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ATTENDANCE

The winter meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Phoenix, Arizona, on January 8 and 9, 2015. The following members were present:

Judge Jeffrey S. Sutton, Chair
Dean C. Colson, Esquire
Associate Justice Brent E. Dickson
Roy T. Englert, Jr., Esquire
Gregory G. Garre, Esquire
Judge Neil M. Gorsuch
Judge Susan P. Graber
Dean David F. Levi
Judge Patrick J. Schiltz
Judge Amy J. St. Eve
Judge Richard C. Wesley
Judge Jack Zouhary

Elizabeth J. Shapiro, Esq., represented the Department of Justice in place of Deputy Attorney General James M. Cole. Larry D. Thompson, Esq., was unable to attend.

Also present were Professor Geoffrey C. Hazard, Jr., consultant to the committee; Professor R. Joseph Kimble, the committee's style consultant; and Judge Jeremy D. Fogel, director of the Federal Judicial Center. Judge Anthony J. Scirica, Judge Sidney A. Fitzwater, and Judge Eugene R. Wedoff participated in a panel discussion chaired by Judge Sutton. Associate Justice Sandra Day O'Connor attended as an observer.

The advisory committees were represented by:

Advisory Committee on Appellate Rules —
Judge Steven M. Colloton, Chair
Professor Catherine T. Struve, Reporter (tel)
Advisory Committee on Bankruptcy Rules —
Judge Sandra Segal Ikuta, Chair
Professor S. Elizabeth Gibson, Reporter
Professor Troy A. McKenzie, Associate Reporter
Advisory Committee on Civil Rules —
Judge David G. Campbell, Chair
Professor Edward H. Cooper, Reporter
Professor Richard L. Marcus, Associate Reporter
Advisory Committee on Appellate Rules —
Judge Reena Raggi, Chair
Professor Sara Sun Beale, Reporter (tel)
Advisory Committee on Evidence Rules —
Judge William K. Sessions III, Chair
Professor Daniel J. Capra, Reporter (tel)
Subcommittee on CM/ECF
Judge Michael A. Chagares, Chair

The committee's support staff consisted of:

Professor Daniel R. Coquillette	Reporter, Standing Committee
Jonathan C. Rose	Secretary, Standing Committee; Rules Committee Officer
Julie Wilson	Attorney, Rules Committee Support Staff (tel)
Scott Myers	Attorney, Rules Committee Support Staff (tel)
Bridget M. Healy	Attorney, Rules Committee Support Staff (tel)
Andrea L. Kuperman	Chief Counsel to the Rules Committee
Frances F. Skillman	Rules Office Paralegal Specialist
Toni Loftin	Rules Office Administrative Specialist
Michael Shih	Law Clerk to Judge Jeffrey S. Sutton

INTRODUCTORY REMARKS

Judge Sutton called the meeting to order by thanking the Rules Office staff and the marshals for their service. He introduced one new member of the Committee, Associate Justice Brent E. Dickson of the Indiana Supreme Court. He also introduced Judge Sandra Segal Ikuta of the Ninth Circuit, the new chair of the Bankruptcy Committee, and Judge William K. Sessions III of the District of Vermont, the new chair of the Evidence Committee. Finally, he introduced Judge Anthony Scirica of the Third Circuit, who helped coordinate the afternoon's panel discussion on pilot projects.

He then summarized the results of the September 2014 Judicial Conference, which unanimously approved both the Bankruptcy Committee's one proposal and the entire Duke Package. The proposed amendments are now before the Supreme Court of the United States.

Finally, Judge Sutton announced that, on December 1, 2014, many other proposals took effect, including Criminal Rule 12 and a multitude of changes to the Bankruptcy Rules and Forms. He thanked Judge Raggi and Judge Wedoff for their efforts in making those proposals law.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The Committee, by voice vote and without objection, approved the minutes of its previous meeting, held on May 29–30, 2014, as well as a set of technical amendments to those minutes proposed by Professor Cooper.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Colloton presented the advisory committee's report, set out in his memorandum and attachments of December 15, 2014 (Agenda Item 3). He reported that the committee has published a package of rules changes for public comment. It plans to consider those comments after the February deadline expires, and to give a complete report at the upcoming spring meeting. He then highlighted three items currently on the committee's agenda.

Informational Items

FED. R. APP. P. 41

The advisory committee is considering how to relieve the tension between two provisions of Appellate Rule 41. Rule 41(d)(2) requires a court of appeals to issue its mandate immediately after the Supreme Court denies a petition for certiorari. However, Rule 41(b) allows courts of appeals to "extend the time" for issuing mandates under certain circumstances. These provisions present two questions. May a court of appeals stay its mandate after certiorari is denied? If so, must it do so in an order, or does mere inaction suffice?

The Supreme Court has twice considered these questions. As to the first issue, it has assumed without deciding that a court of appeals has authority to delay issuing a mandate, but

only if "extraordinary circumstances" exist. As to the second, it has concluded that Rule 41(b) does not clearly foreclose delay through inaction.

Judge Colloton reported that the committee is inclined to insert the words "by order" into Rule 41(b) to clarify that a court of appeals may not delay a mandate by letting the matter lie fallow. (Those words had actually been removed from a previous version of the Rule, most likely to reduce redundancy). However, it is still working through the more fundamental question of whether such authority exists. It has considered reaffirming what Rule 41(d)(2) already appears to say: A mandate must issue immediately after certiorari is denied. But if appellate courts retain authority to recall an already-issued mandate under extraordinary circumstances, any change to Rule 41(d)(2) would serve little purpose. It thus might make more sense to codify the "extraordinary circumstances" rule. In either case, the committee will make a formal proposal to the Standing Committee, perhaps as early as the spring meeting.

DISCLOSURE RULES

The advisory committee has been considering what disclosures parties must make in briefs for a long time. Its review revealed a bevy of local disclosure requirements that augment the Appellate Rules to different degrees. Concerned that the Rules are insufficiently thorough, the committee is considering expanding their scope: for example, by extending them to intervenors, partnerships, victims in criminal cases, and amici curiae. It is also consulting the Committee on Codes of Conduct for additional guidance. Judge Colloton reported that, because the project remains ongoing, the committee may or may not be able to present a concrete proposal at the spring meeting.

One member proposed that, instead of taking the lead, the Appellate Committee should coordinate with judges at all levels of the federal judiciary. Another suggested that the Appellate Committee coordinate with its sister advisory committees, all of which have an interest in the outcome. In response, Judge Colloton noted that the project was still in a nascent stage and expressed willingness to solicit input from other committees once it had crystallized its thinking.

CM/ECF PROPOSALS

The advisory committee has been working with Judge Chagares and the CM/ECF subcommittee to resolve issues related to electronic filing. Judge Colloton deferred consideration of those issues to Judge Chagares's presentation.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Ikuta presented the advisory committee's report, set out in her memorandum and attachments of December 11, 2014 (Agenda Item 4).

Amendment for Final Approval

FED. R. BANKR. P. 1001

On behalf of the advisory committee, Judge Ikuta sought approval to amend Bankruptcy Rule 1001, the bankruptcy counterpart to Civil Rule 1. Rather than incorporate the Civil Rule by reference, the Bankruptcy Rule echoes its language. However, Rule 1001 does not reflect recent amendments—approved and pending—to Rule 1. The proposal brings Rule 1001 in line with those changes, stating that "These rules shall be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every case and proceeding."

The committee, without objection and by voice vote, approved the proposed amendment to Rule 1001 for publication.

Informational Items

PROPOSED CHAPTER 13 NATIONAL PLAN FORM

The advisory committee has been working on a national chapter 13 plan form since 2011. Currently, more than a hundred chapter 13 forms exist. Led by Judge Wedoff, the committee distilled those forms into one. It also developed amendments to the Bankruptcy Rules to bring them in line with that form. After publishing the first version of the form and amendments in 2013, the committee received many critical comments. So it went back to the drawing board and published a revised proposal in 2014. The comment period has not yet expired, but the reaction to the revisions has been mixed.

Judge Ikuta reported that, in her view, the committee can fix specific concerns about the form. The real question is whether the need for national uniformity should override local preferences. She recommends implementing the national form incrementally—for instance, by making the form optional and asking various bankruptcy districts to opt into the form.

A professor wondered whether it was possible to make the national form an alternative to local ones. Judge Ikuta confirmed that his question tracked the committee's proposed incremental approach. By making the national form optional and soliciting compliance from individual districts, the committee hoped to build support for it over time.

An appellate judge asked why a national form was necessary. Professor McKenzie gave four reasons. First, the existing forms have generated a tremendous amount of confusion. Second, bankruptcy judges have an independent duty to scrutinize proposed plans, and a national form would reduce uncertainty about where such information may be found. Third, a national form could generate data more effectively. Finally, a national form would let entrepreneurs develop cheaper software for debtors' use.

Judge Wedoff explained why the committee decided to devise a national form in the first place. One bankruptcy judge said that, in the form's absence, bankruptcy courts could not easily

discharge their duty to independently scrutinize chapter 13 plans. And a bankruptcy lawyers' association said that its members had trouble processing chapter 13 forms from different jurisdictions—and lacked the resources to obtain local counsel. Professor McKenzie added that the committee surveyed the chief judge of every bankruptcy court in the country before getting the project started. The response was overwhelmingly positive.

A district judge asked about the reaction from bankruptcy practitioners. Their comments, Professor McKenzie said, were mixed. Some lawyers liked the idea so long as this word or that word could be changed. Others opposed it. A few lawyers candidly explained that they feared the competition an easily accessible national form would create.

FORMS MODERNIZATION PROJECT

The advisory committee's forms modernization project is almost complete. Unfortunately, the Administrative Office is having trouble integrating the new forms into its new CM/ECF system and may miss its December 2015 deadline—when the forms are scheduled to take effect. The question is whether to delay rolling out the forms until all technological kinks have been ironed out.

Judge Ikuta reported that the committee will discuss the issue at its April meeting, but she recommends releasing the forms on schedule. Doing so, she said, would not disrupt operations in the vast majority of courts. True, three bankruptcy districts give pro se debtors access to forms software on court-run computer terminals. But not enough debtors use that service to justify delaying the forms' national release.

A district judge said that the AO had told her that forms integration was mutually exclusive with the CM upgrade project. As it turns out, Judge Ikuta received that same answer too, but the AO changed its mind once it realized what the forms integration project entailed.

CM/ECF PROPOSALS

The advisory committee considered three of the CM/ECF subcommittee's proposals at its fall meeting. It will defer decision on two of them until the Civil Rules Committee acts. It is independently considering whether to redefine the word "information" to include electronic documents and the word "action" to include electronic action.

REPORT OF THE INTER-COMMITTEE CM/ECF SUBCOMMITTEE

Judge Chagares presented the subcommittee's report, set out in his memorandum and attachments of November 30, 2014 (Agenda Item 8). He announced that the subcommittee had successfully completed its work.

Informational Items

ABROGATION OF THE THREE-DAY RULE AS APPLIED TO ELECTRONIC SERVICE

The subcommittee previously proposed that parties should not receive three extra days to take action after electronic service. It worked with the relevant advisory committees to draft amendments to Appellate Rule 26(c), Bankruptcy Rule 9006, Civil Rule 6, and Criminal Rule 45. These amendments, Judge Chagares reported, thus far have been well received.

ELECTRONIC SIGNATURES

The subcommittee previously proposed that Bankruptcy Rule 5005 be changed to provide for more flexible electronic signatures, but the Bankruptcy Committee withdrew that proposed amendment after public comment. After that withdrawal, the subcommittee asked the Administrative Office to figure out how local rules treated electronic signatures. Judge Chagares thanked the AO for its diligence and hard work.

The AO's exhaustive survey revealed that nearly every local rule treats filing users' login and password as an electronic signature. The various districts are not nearly so uniform when it comes to nonfilers, but the most prevalent rule requires the user to obtain and retain the signatory's ink signature. In light of these findings, Judge Chagares concluded, the Bankruptcy Committee's decision was probably correct. The local rules appeared sufficient to meet present needs, and any formal rulemaking risked being overtaken by rapid technological developments.

CIVIL AND CRIMINAL RULES REQUIRING ELECTRONIC FILING

The subcommittee previously recommended that Civil Rule 5(d)(3) and Criminal Rule 49(e) be amended to mandate electronic filing as opposed to merely permitting it. Judge Chagares reported that the advisory committees are still considering those proposals.

UNIFORM AMENDMENTS TO ACCOMMODATE ELECTRONIC FILING AND INFORMATION

The current rules do not appear to accommodate electronic filing and information. Thus, the subcommittee proposed defining "information" to include electronic documents and "action" to include electronic action. The advisory committees considered these proposals but reached different conclusions. For example, the Appellate and Civil Rules Committees have decided not to adopt them, while the Bankruptcy and Criminal Rules Committees have submitted them to subcommittees for further study. Judge Chagares reported that the proposal to redefine "information" appears to be the more viable of the two.

Dissolution of the Subcommittee

Judge Sutton thanked Judge Chagares, Professor Capra, Julie Wilson, and Bridget Healy for their hard work, and praised the subcommittee for fulfilling its mandate quickly and efficiently. Professor Capra reiterated Judge Sutton's comments and thanked his fellow reporters.

Judge Sutton and Judge Chagares have agreed that, now that the subcommittee has run its course, there is no need to keep it in place.

REPORT OF THE ADMINISTRATIVE OFFICE

Mr. Rose presented the Administrative Office's report (Agenda Item 10).

Informational Items

The Administrative Office is preparing an updated version of its 2010 *Strategic Plan for the Federal Judiciary*. Because the Long-Range Planning Committee will be meeting in March, Mr. Rose noted, the time for input is now.

Mr. Rose asked anybody corresponding with the Office to copy both the head of the Rules Office and Frances Skillman. That, he said, is the best way to ensure the message gets where it needs to go. He also summarized recent personnel arrivals and departures at the AO.

Finally, Mr. Rose announced that this meeting would be his last as head of the Rules Office. He thanked the committee for the opportunity to work with and learn from such talented people. Judge Sutton thanked Mr. Rose for his leadership and lauded his commitment to public service over a long and distinguished career. He also introduced Rebecca Womeldorf, Mr. Rose's successor, and described her impressive background.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Raggi presented the advisory committee's report, set out in her memorandum and attachments of December 11, 2014 (Agenda Item 6). She announced that the amendments to Criminal Rule 12 have now taken effect.

Informational Items

FED. R. CRIM. P. 4

The Standing Committee previously approved for comment a proposed amendment to Rule 4 that would govern service of process abroad. Judge Raggi reported that the advisory committee has received no critical feedback on that proposal.

FED. R. CRIM. P. 41

The Standing Committee previously approved for comment a proposed amendment to Rule 41 to govern venue for searches of electronic devices whose location is unknown. The advisory committee held a lengthy hearing and reviewed extensive public comments. Judge Raggi reported that the critical response has largely focused not on the amendment itself but on concerns about electronic searches more generally.

These thought-provoking comments led the committee to request a response from the U.S. Department of Justice. The Department endorsed the proposal and suggested ways for the government to satisfy the particularity requirement if the amendment takes effect. Judge Raggi noted that the Federal Judicial Center might consider educating judges about how to analyze such warrant applications down the road. But that, she concluded, is a question for later. For now, the committee is debating whether the amendment needs to be changed. Judge Raggi expects the committee to propose something at the spring meeting, although the current proposal may be tweaked.

SUGGESTED AMENDMENT TO RULE 52

A Second Circuit judge asked the advisory committee to consider amending Rule 52 to provide fresh review—as opposed to plain-error review—for defaulted sentencing errors. He reasoned that, unlike a new trial, a resentencing proceeding imposes an incidental burden on the judiciary. And it is unfortunate when a prisoner is forced to remain in jail longer than he deserves.

Judge Raggi reported that the committee decided not to proceed with this request. Professor Nancy King, the committee's associate reporter, surveyed cases in this area and discovered that the number of defaulted sentencing errors is not high—and were typically corrected on plain-error review. The committee was also concerned that the proposal would generate extensive frivolous litigation. Finally, drawing on its experience with the 2014 Rule 12 amendments, it expressed doubts that the Supreme Court would be willing to create an exception to the general rule that defaulted claims are reviewed for plain error.

One appellate judge proposed an alternative. He suggested that the rules might be amended to reflect what many circuits have already held: that a clear guidelines-calculation error presumptively satisfies the last two elements of plain-error review. The judge acknowledged, however, that his suggestion came close to the edge of the committee's rulemaking authority. Another appellate judge wondered whether a different approach might solve the problem. In his circuit, a defendant can never forfeit a substantive reasonableness challenge, so arguments that a sentence is unjustly long are always reviewed afresh. Judge Raggi responded that, in her view, no judge should ever rely on the guidelines unless that sentence also satisfies the § 3553 factors. Plain-error review is enough to fix the vast majority of problems, and loosening Rule 52's standards would open the floodgates to a host of defaulted sentencing claims. She suggested instead that circuits interested in these alternative proposals adopt them as a local rule or as circuit-specific precedent.

FED. R. CRIM. P. 11

The judges of the Northern District of California asked the advisory committee to let judges refer criminal cases to their colleagues to explore the possibility of a plea bargain. Judges in that district had routinely used this procedure until the Supreme Court held that the Criminal Rules barred it.

Judge Raggi reported that the committee decided not to proceed with this request either. 95% of criminal cases are already resolved by plea bargains nationally, and the Northern District is no exception to that norm. More, implementing this change would create a host of practical problems—and might raise separation-of-powers concerns to boot.

Judge Raggi also reported that, at around the same time, a judge from the Southern District of New York published an article advocating judicial involvement in plea bargaining to reduce the risk that someone would plead guilty to a crime he didn't commit. The committee was not persuaded by this argument either. If a district judge is not convinced that a defendant is guilty of the crime to which he pleaded guilty, the judge should reject that plea under Criminal Rule 11.

HABEAS RULE 5

A judge from the Eastern District of Pennsylvania asked the advisory committee to amend Habeas Rule 5. Currently, that Rule requires a State to give a habeas petitioner copies of all exhibits attached to its response. The judge proposed relieving the State of that obligation in the absence of a judicial order to the contrary.

Judge Raggi reported that the advisory committee unanimously rejected this proposal. Every court expects these documents to be provided, and the States themselves have not complained about the problem.

FED. R. CRIM. P. 35

The New York Council of Defense Attorneys asked the committee to grant judges authority to reduce a sentence if (1) the defendant can identify new evidence casting doubt on his conviction, (2) the defendant can show he has been fully rehabilitated, or (3) the defendant can point to medical problems justifying his release.

Judge Raggi reported that a subcommittee is still examining this proposal, but she thinks it will not ultimately succeed. Proposal 1 effectively repeals AEDPA's statutory time limits on presenting such evidence in a habeas petition. Proposal 2 would subject the courts to a flood of rehabilitation claims. And Proposal 3 is redundant, since prisoners can already be released on humanitarian grounds when appropriate.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Campbell presented the advisory committee's report, set out in his memorandum and attachments of December 2, 2014 (Agenda Item 5).

Informational Items

CM/ECF PROPOSALS

Judge Campbell reported that the advisory committee has finished considering the CM/ECF Subcommittee's proposals. It recommended that the Civil Rules mandate electronic filing and service with appropriate exceptions for good cause. It recommended against changing the Rules' approach to electronic signatures, having observed the Bankruptcy Rules Committee's experience. It also recommended against defining "information" or "action" to include "electrons" (e.g., electronic filing), although it remains open to making that change if the existing regime becomes unworkable.

FED. R. CIV. P. 68

The advisory committee considered several proposals to amend Civil Rule 68, which governs offers of judgment. The committee has studied the Rule twice in the last two decades, and it provoked a storm of controversy both times. Nevertheless, Judge Campbell reported that the committee is once again looking at the question—this time by surveying how the States implement their own offer-of-judgment procedures. The committee will consider next steps at its April meeting.

FED. R. CIV. P. 26

The advisory committee considered a proposal to add the presence of third-party litigation financing to the list of Civil Rule 26(a) disclosures. The committee agreed that the issue is important but determined that rulemaking is not yet appropriate. Litigation finance is a relatively new field. Besides, judges already have tools to obtain this information when relevant. And the absence of a mandatory-disclosure rule does not appear to hinder the resolution of cases involving litigation financiers.

FED. R. CIV. P. 23 SUBCOMMITTEE ACTIVITY

The advisory committee appointed a subcommittee to consider issues related to Civil Rule 23. Currently, it is charged with gathering facts to identify questions worth further study. So far, Judge Campbell reported, the subcommittee has spotted six primary issues. It plans to present a set of conceptual proposals to the full committee at its April meeting that may generate more concrete proposals for the fall. It is also considering convening a mini-conference in 2016 to evaluate any suggestions that might emerge.

One member asked the subcommittee to examine the procedures governing multidistrict litigation. He said that mass-tort MDLs make up half the federal courts' civil docket, and the rules regulating them may be worth reexamining. He also observed that the MDL bar is a small and tightly knit group of lawyers with links to the MDL Panel. None of this is to say that MDLs are being mishandled. But because MDLs occupy such a large part of the civil system, the subcommittee ought to ensure that the process is working.

Two members responded that, judging from their past experience with the subject, they doubted whether Rule 23—and for that matter the Rule 23 subcommittee—was the best place to address any problems MDLs might pose. Two judges who have presided over MDL cases also expressed their doubts. One reported that, in his experience, the MDL process *was* working. The other reported hearing complaints about the system, but those focused more on the process of MDL certification and counsel selection than on the process of trying MDL cases once certified. Both questioned whether a one-size-fits-all approach was possible or desirable. Finally, a practitioner pointed out that a small bar is an efficient bar. MDL trial firms get along with MDL defense firms, so MDL cases tend to run smoothly. And from most firms' perspective, the cost of entering the MDL arena is prohibitively high, making MDL cases poor investments.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Sessions presented the advisory committee's report, set out in his memorandum and attachments of November 15, 2014 (Agenda Item 7). The committee considered proposals developed from its April 2014 Symposium on the Challenges of Electronic Evidence. The *Fordham Law Review* has published the proceedings from that Symposium.

Informational Items

FED. R. EVID. 803(16)

Evidence Rule 803(16) provides a hearsay exception for authenticated documents over twenty years old. Judge Sessions reported that this Rule has almost never been used, but it may become more significant in an era of electronic evidence. The advisory committee thinks this Rule is inappropriate but is still deciding what to do about it. One option is to leave it be. Another is to abrogate it or narrow it to exclude electronically stored information. Still another is to amend it to require a showing of necessity or reliability.

RECENT PERCEPTIONS

The advisory committee considered whether to add a new hearsay exception for electronically reported recent perceptions to Evidence Rules 801(d)(1) and 804(b). This change would arguably prevent reliable statements made in texts, tweets, and Facebook posts from being excluded.

Judge Sessions reported that the committee is continuing to study whether these changes are necessary. With respect to Rule 801(d)(1), the committee has decided not to change that provision without first asking whether prior statements of testifying witnesses should even be defined as hearsay. It will begin that study at its next meeting. With respect to Rule 804(b), the committee is continuing to monitor the caselaw to see if courts have actually been excluding reliable evidence of this sort. A district judge asked the committee to study whether a witness's prior statement should be treated as hearsay when that witness is available to testify. Professor Capra responded that such a rule might open the door to all prior consistent statements.

STANDARDS FOR AUTHENTICATING ELECTRONIC EVIDENCE

The advisory committee considered whether to amend Evidence Rules 901 and 902 to provide specific grounds for authenticating electronic evidence. Judge Sessions reported that, in the committee's view, devising authentication standards against a rapidly changing technological backdrop would create more problems than they would solve. However, it unanimously decided to develop a best-practices manual to guide courts and litigants.

FED. R. EVID. 902

The advisory committee considered two proposals to make it easier for litigants to authenticate certain kinds of electronic evidence. They mirror the self-authentication procedure for business records in Evidence Rule 902(11) by shifting the burden for proving inadmissibility to the opposing party. Judge Sessions reported that the committee unanimously supports these proposals and will consider introducing them as formal amendments at its next meeting.

CONCLUDING REMARKS

Judge Sutton concluded this portion of the meeting by recognizing four departing individuals for their service: Jonathan Rose, Andrea Kuperman, Judge Sidney Fitzwater, and Judge Eugene Wedoff. He summarized their remarkable achievements and thanked them all for their tremendous work on the committee's behalf.

PROMOTING JUDICIAL EDUCATION THROUGH VIDEOS

The committee considered the Federal Judicial Center's proposal to produce videos that would educate judges and lawyers about changes to the Federal Rules. Judge Sutton explained how the proposal came to be. Education has always been a key component of the Duke Package, which was designed in part to change the culture of civil litigation. Judge Fogel came up with the idea of disseminating information through video presentations. Initially, the FJC planned to create test videos for all of the rules that took effect in December 2014. However, the committee expressed concern that such videos—if released to the public—would constitute a form of post-enactment legislative history. So it postponed a final decision on the FJC's proposal until it could review a sample video.

Judge Fogel showed a sample film featuring Judge Sessions and Professor Capra, who discussed recent amendments to Evidence Rules 801 and 803. He acknowledged concerns about post-enactment legislative history but argued that the video format was a much more dynamic way to communicate information. He also explained that the videos would reach a wide audience even if restricted to judges and judicial employees. For example, a thousand viewers watched a recent webinar on § 1983 litigation.

Many members supported the FJC proposal. The Duke Package depends on education for its success, and videos might help reach previously inaccessible constituencies. Several judges recommended presenting the videos to their law clerks and at judicial meetings both private and

public. As for the legislative-history concern, that issue can be solved with a disclaimer—or a rule that no such video could be used in court.

One appellate judge expressed reservations. He argued that the written word is superior to video in conveying this sort of information. In response, a member proposed releasing the transcript of the video with the video itself. Another member suggested that the videos might be more useful if they provided practice tips. This triggered concerns that expanding the videos beyond the text of the committee notes would stretch the bounds of proper rulemaking.

Judge Sutton recommended that the FJC proceed slowly. He asked it to work with any committee chairs and reporters willing to produce videos describing significant rule changes that took effect in December 2014. Those videos would be then placed on the private judicial intranet. The committee could then use that experience to determine whether to continue the program and whether to make the videos public. He thanked Judge Fogel, Judge Sessions, and Professor Capra for putting together the demonstration video.

PANEL DISCUSSION ON THE CREATION OF PILOT PROJECTS

Introduction

Judge Sutton presided over a panel discussion on the creation of pilot projects to facilitate civil discovery reform. When coupled with the Duke Package reforms, pilot projects offer a powerful way to change litigation norms for the better and to gather data for future reforms in the process. By convening the panel, he hoped to give the Civil Rules Committee some potential projects to consider. Judge Sutton introduced the panelists: Judge Eugene Wedoff of the Bankruptcy Court for the Northern District of Illinois, Judge Anthony Scirica of the Third Circuit, and Judge Sidney Fitzwater of the Northern District of Texas. Finally, he welcomed a special guest: Associate Justice Sandra Day O'Connor, who joined the Standing Committee for this panel discussion and for the dinner that followed.

Judge Wedoff: Improving the Speed of Case Administration

PRESENTATION

Judge Wedoff spoke about the impact of "rocket dockets" on case administration. The term was first applied to the Eastern District of Virginia, which implemented a series of procedural reforms in the 1970s. It has since been applied to several other jurisdictions that have adopted similar procedures, including the Western District of Wisconsin and the Eastern District of Texas. But their reputations sometimes do not match the data. The Eastern District of Virginia is truly one of the fastest courts in the country—but the Eastern District of Texas operates *above* the nation's median case disposition time, and the Western District of Wisconsin has fallen off substantially. Meanwhile the Southern District of Florida works with remarkable speed despite not being labeled a rocket-docket court.

Based on this study, Judge Wedoff concluded that judges affect case-disposition time more powerfully than rules. Judges who impose credible deadlines, for example, resolve cases

faster than judges who don't. At the same time, efficient districts have certain procedural rules in common. For example, the Eastern District of Virginia sets short deadlines for discovery and trial that cannot be altered without a substantial showing to the court. For its part, the Southern District of Florida places every case into one of three tranches: expedited, standard, and complex. None of these tranches allows discovery to exceed one year.

DISCUSSION

The first question is whether to encourage district courts to adopt rocket-docket procedures district-wide. Many members said yes. Competition for litigants among courts can help everyone, said one professor, pointing to the creation of an omnibus hearing as an example of a useful procedural innovation that arose from one bankruptcy district's attempt to entice debtors to file there. Other committee members observed that, even if rocket-docket procedures make things harder for lawyers and judges, such procedures are *always* good for clients. And pilot projects implementing them may well change attorneys' hearts and minds in the process.

Attendees made several suggestions about what such pilot projects might look like. One recommended setting hard and credible trial deadlines. Another recommended capping not only a party's total deposition hours but also the number of hours he has available to conduct each deposition. He also recommended creating a tranches system for document production. And everybody who spoke emphasized the importance of making the pilot project mandatory.

The committee then moved to the question of implementation. Certain rocket-docket procedures—like the Eastern District of Virginia's weekly argument day—might conflict with local rules mandating one judge per case. More fundamentally, creating a rocket docket from scratch would be much harder than studying the ones that already exist, since district courts are unlikely to change in the absence of a strong leader backing the project.

One member counseled against implementing pilot projects too quickly. He recommended letting the FJC study the existing projects first, and moving only when the committee was sure that the projects' contents would work. Judge Sutton responded that he saw no reason why pilot-project advocacy should stop—especially since such advocacy isn't designed to mandate effective procedures but to suggest potentially useful ones. Another member agreed, and pointed out that studies and pilot projects could always take place simultaneously.

Finally, members sounded a note of caution about research methodology. One stressed the importance of getting independent opinions from participants, recalling an instance where rocket-docket practitioners were asked about their views on the process in full view of rocket-docket judges. Two district judges reiterated that numbers do not tell the whole story. Sometimes a case gets delayed for wholly appropriate reasons. And sometimes statistics are skewed by background factors not immediately apparent.

Judge Scirica: Requiring Initial Disclosure of Unfavorable Material

PRESENTATION

Judge Scirica explored the feasibility of requiring parties to disclose material unfavorable to their side by rule. In the 1990s, he said, the committee tried to do just that, but the proposal triggered a firestorm. Opponents argued that most cases did not require adverse disclosures, and that aggressive discovery techniques would ferret out such information in the cases that did. They also invoked the adversarial nature of the American justice system, arguing that a "civil *Brady* regime" would disrupt the attorney-client relationship. Eventually, the committee settled on a compromise position—explored through pilot projects in the Central District of California and the Northern District of Alabama—that retained initial disclosures but eliminated the requirement to disclose unfavorable material.

Today, Judge Scirica continued, an expanded initial disclosure regime might find a warmer reception. To test the waters, he envisioned two separate types of pilot projects. One would apply a robust but general initial disclosure regime to all civil cases. Another would apply a tailored initial disclosure requirement to certain categories of cases—say, employment discrimination or civil rights. The former is best left to the Standing and Civil Rules Committee, he advised; the latter, to a committee of experienced lawyers from both sides of the podium.

DISCUSSION

Every member who spoke expressed support for an expanded initial disclosure regime. One provided an especially powerful example from Arizona. In 1991, the Arizona Supreme Court adopted a robust mandatory disclosure rule that covered favorable and unfavorable material. The same debate took place. Now, however, Arizona's local rules have overwhelming support. In fact, seventy percent of lawyers who practice in both federal and Arizona state court prefer the state disclosure system to the federal one.

Another speaker, who served on the committee during its first attempt to mandate adverse disclosures, argued that the committee should not be traumatized by that experience. The committee, he said, had been right all along. And this time, it knows what pitfalls to avoid. For example, it will not keep the bar in the dark until the very end of the process.

The committee also endorsed category-specific disclosures. Many district judges have already embraced the Federal Initial Discovery Protocols for Employment Cases. One member reported that, although the Protocols encountered initial resistance, the employment bar now loves them because they generate information that would otherwise require a six- to seven-month discovery battle to get. Another member explained that the Southern District of New York had successfully implemented similar protocols for § 1983 cases that helped clear out its cluttered docket. One district judge advised the committee to make sure it doesn't define categories too narrowly. She has used the Employment Protocols for two years, in which time only three cases have qualified under its definition of "employment." Finally, one member reiterated his belief that the committee should not endorse new pilot projects without studying the existing ones more thoroughly.

Judge Sutton concluded that the committee appears to support studying an expanded initial disclosure system. This, he said, might be the time to try again.

Judge Fitzwater: Streamlined Procedure

PRESENTATION

Judge Fitzwater surveyed the many existing pilot projects that offer litigants streamlined procedures. According to the Institute for the Advancement of the American Legal System (IAALS), successful projects have five key features:

- a short trial that limits time to present evidence,
- a credible trial date,
- an expedited and focused pretrial process,
- relaxed evidentiary standards that encourage parties to agree to admission, and
- voluntary participation.

Judge Fitzwater then summarized two examples of what such a pilot project might look like. He could not find data about how often summary procedures had been used, but the procedures themselves are well-known. He started with the short-trial regime established by the District of Nevada in 2013. Litigants who opt into that system lose their right to discovery. In return, they receive a trial within 150 days of initial assignment, with a 60-day continuance available in limited circumstances. Evidence may be admitted without authentication or foundation by a live witness, and parties are encouraged to submit expert testimony through reports and not live testimony. At the trial itself, each party receives 9 hours to allocate among all trial phases as it chooses. The litigants present their arguments before a condensed jury—and once the trial is over, their ability to file post-trial motions is limited.

He then contrasted Nevada's system with the short-trial process in the Western District of Pennsylvania. That district does not eliminate a party's right to discovery but instead puts numerical limits upon it. Each party only has three hours to present evidence to the jury, with additional time for jury selection allocated at the judge's discretion. Finally, and most critically, the system bars parties from filing motions for summary judgment or motions in limine. Other pretrial motions may be filed only with leave of court.

Judge Fitzwater placed particular emphasis on this last provision. In the mine-run civil case, dispositive motions—not discovery disputes—were the main source of delay. Ironically, the Criminal Justice Reform Act's reporting procedures reinforce the incentive to work on motions, not cases: Judges must report a motion as pending after six months, but need not report a case as pending until three years elapse.

DISCUSSION

Many committee members expressed skepticism that a voluntary program would succeed. One pointed out that the Northern District of California abandoned a similar short-trial

procedure after litigants declined to use it. Several district judges on the committee who have given litigants an expedited-trial option encountered the same problem. In light of that experience, they recommended that any pilot project in this area be mandatory, not voluntary.

Judge Sutton asked Professor Cooper why his proposal in the 1990s to apply simplified procedural rules to small-stakes cases failed to gain traction. Professor Cooper explained that the proposal failed after a district judge pronounced it "elegant on paper but of no practical use." He also pointed out two potential implementation issues: First, different lawyers define a "small-stakes case" differently; and second, how should a simplified system treat a small-stakes case with a demand for injunctive relief?

One appellate judge recommended against defining "small stakes" using a dollar amount. She cited her experience with the Class Action Fairness Act, which contains a similar dollar-amount requirement, and collateral litigation over manipulation of that requirement. Another appellate judge warned that mandating streamlined procedures for certain categories of cases, but not others, will be tricky.

* * *

Judge Sutton summed up the conversation. At a minimum, he said, everybody agrees that the committee should study the many pilot projects in existence. And nobody thinks the committee should refrain from considering the possibility of civil litigation reform; the only worry is that specific reforms might be more complicated than anticipated. As such, he asked the Civil Rules Committee to study this topic and give its thoughts at the upcoming May meeting. He also advised it to consult Judge Fogel to see what FJC resources are available, and to coordinate with IAALS and the legal academy as well.

NEXT COMMITTEE MEETING

Judge Sutton concluded the meeting by announcing that the committee will next convene on May 28–29, 2015, in Washington, D.C.

Respectfully submitted,

Judge Jeffrey S. Sutton
Chair

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Draft Minutes

Civil Rules Advisory Committee

October 30, 2014

The Civil Rules Advisory Committee met at the Administrative Office of the United States Courts in Washington, D.C., on October 30, 2014. (The meeting was scheduled to carry over to October 31, but all business was concluded by the end of the day on October 30.) Participants included Judge David G. Campbell, Committee Chair, and Committee members John M. Barkett, Esq.; Hon. Joyce Branda; Elizabeth Cabraser, Esq.; Judge Paul S. Diamond; Judge Robert Michael Dow, Jr.; Parker C. Folse, Esq.; Judge Paul W. Grimm; Dean Robert H. Klonoff; Judge Scott M. Matheson, Jr.; Justice David E. Nahmias; Judge Solomon Oliver, Jr.; Judge Gene E.K. Pratter; Virginia A. Seitz, Esq.; and Judge Craig B. Shaffer. Outgoing members Peter D. Keisler, Esq. and Judge John G. Koeltl also attended. Professor Edward H. Cooper participated as Reporter, and Professor Richard L. Marcus participated as Associate Reporter. Professor Daniel R. Coquillette, Reporter, represented the Standing Committee. Judge Arthur I. Harris participated as liaison from the Bankruptcy Rules Committee. Laura A. Briggs, Esq., the court-clerk representative, also participated. The Department of Justice was further represented by Theodore Hirt. Jonathan C. Rose and Julie Wilson represented the Administrative Office. Emery Lee attended for the Federal Judicial Center. Observers included Donald Bivens (ABA Litigation Section); Joseph D. Garrison, Esq. (National Employment Lawyers Association); Ken Lazarus, Esq. (AMA); Jerome Scanlan (EEOC); Alex Dahl, Esq. (Lawyers for Civil Justice); John Beisner, Esq.; John Vail, Esq.; Valerie M. Nannery, Esq. (Center for Constitutional Litigation); Ariana Tadler, Esq.; Henry Kelsen, Esq.; and William Butterfield, Esq.

Judge Campbell opened the meeting by noting that Judge Sutton, Chair of the Standing Committee, was unable to maintain his usual practice of attending the meeting because he is in Australia.

Judge Campbell continued by marking the "comings and goings." Both of the outgoing members, Peter Keisler and John Koeltl, have been kind enough to attend this meeting to lend their help in committee deliberations. Both will be sorely missed.

Judge Koeltl won a rare one-year extension after the conclusion of his second three-year term to enable him to carry through to conclusion in the Standing Committee and Judicial Conference the proposed rules amendments that came to be described as the "Duke package." It would be more honest to describe them as the Koeltl Package. He single-handedly brought the Duke Conference together, and then guided the Duke Conference Subcommittee through an examination of countless possible amendments before settling on the package that is now before the Supreme Court. It is difficult to imagine anyone working harder than he has worked. Judge Koeltl responded that working with the Committee "has been a wonderful

experience." The Duke Rules package "has been a true group production, in Subcommittee and Committee." "I treasure my time on the Committee."

Peter Keisler will be equally missed. "He has a unique ability to clarify complexity, to see purpose and policy beneath the details." Most recently, he has worked hard with both the Duke Conference Subcommittee and the Discovery Subcommittee as it worked through Rule 37(e) on the failure to preserve electronically stored information. The Committee was graced by his presence not only through the six years of his two terms as a member from the bar but also during his earlier years as Assistant Attorney General for the Civil Division. Peter Keisler responded that his first contact with the Rules Committees was when Judge Scirica and Judge Levi visited him at the Department of Justice to urge that the Department actively urge Congress to defer to the Rules Committees as Rule 23 amendments were being developed. At the time, he wondered why Congress should not take up such matters when it wishes. But now the advantages of the Enabling Act process are clear. The Committees are open-minded, impartial, richly experienced in the real world of procedure. "I am glad for term limits on Committee membership. But I am also glad that there are no term limits on friendship."

Two new members were welcomed.

Judge Shaffer has been a magistrate judge in Colorado for many years. "I knew him years ago from reading his opinions." His recent opinions have helped the Committee work through the proposed revisions of Rule 37(e). His earlier career included litigation in private practice, following litigation in the Department of Justice in environmental cases and civil rights cases. He also served as a lawyer in the Navy.

Virginia Seitz is a partner of Peter Keisler. She has recently served as Assistant Attorney General for the Office of Legal Counsel. She has a long-established appellate practice.

Acting Assistant Attorney General for the Civil Division, Joyce Branda, was also welcomed.

Donald Bivens was welcomed as the new liaison from the ABA Section of Litigation.

Judge Campbell reported that the Duke Package and Rule 37(e) proposals went through the Judicial Conference on the consent calendar. The next step is review by the Supreme Court. If the proposals succeed there, they will go on to Congress.

April 2014 Minutes

The draft minutes of the April 2014 Committee meeting were approved without dissent, subject to correction of typographical and similar errors.

Legislative Report

Julie Wilson provided the legislative report for the Administrative Office. It does not seem likely that the remainder of this Congress will enact laws that bear on the rules committees' work. Variations of bills made familiar from past Congresses have been introduced, including a lawsuit abuse reduction act, a sunshine in litigation act, and a job creations act. Patent legislation passed in the House, but it was pulled from the discussion calendar in the Senate. Some form of patent legislation may be introduced in the new Congress. There also have been efforts to federalize some parts of trade secret law through bills that invoke Civil Rule 65, the injunctions rule. These matters are being monitored by the Administrative Office staff.

The Committee was reminded that the recent patent litigation bills would create a lot of work for the Committee. Virtually every version directed the rules committees to write new rules; some of these provisions directed that the rules be prepared within a period of six months.

Forms

Judge Campbell reported that the Forms Working Group in the Administrative Office has already begun deliberating what response they might make if the proposed abrogation of Rule 84 and the Rule 84 Forms is approved by the Supreme Court and Congress. They have begun to think about new forms that might be created. This Committee will keep in touch with the Working Group, perhaps by means as formal as appointing a liaison member.

Rule 67

Judge Diamond reported that Rule 67(b) directs that money paid into court under Rule 67(a) "must be deposited in an interest-bearing account or invested in a court-approved, interest-bearing instrument." Most often, the money paid into court is a relatively modest sum. By statute, the clerk of the district court cannot administer the funds. There must be some other administrator. And the IRS recently decided that quarterly tax forms are required. The burdens of complying with these tax-reporting obligations led some Administrative Office staff to suggest that Rule 67(b) be amended to delete the requirement that money be deposited in an interest-bearing account. But it seemed foolish to forgo interest, whether at present low interest rates or at the rates that may prevail in the future. Working with AO staff, Judge Diamond urged a different approach. The IRS has at last agreed that it will be proper to establish a single general interest-bearing account, administered

by the Administrative Office, to receive all Rule 67 deposits. All can be reported in a single tax form. Any need to consider Rule 67 amendments seems to have passed.

Judge Campbell thanked Judge Diamond for his successful work on this project.

e-Rules

Judge Campbell introduced the e-Rules topic by observing that the Rules straddle the old world of paper and the new e-world. The Standing Committee has established a subcommittee chaired by Judge Chagares and constituted by members from each advisory committee. Judge Oliver and Laura Briggs represent this Committee.

Judge Oliver noted that the subcommittee is looking at all of the sets of rules to determine whether there are common problems that may yield to common solutions. There indeed appears to be some commonality, but it also has been agreed that there is no one-size-fits-all resolution.

All committees have published for comment rules amendments that would eliminate the allowance of "3 added days" to respond to a paper served by electronic means.

Attention has turned to e-filing and e-service.

e-filing: e-filing now is left to local rules. 92 districts have e-filing rules. 85 districts require e-filing, with various exceptions. Rule 5(b)(2)(E) provides for service of papers described by Rule 5(a) by electronic means, but only if the person served consented in writing. Despite the requirement for consent, many districts effectively force consent by requiring e-filing and making consent to e-service a condition of entering the e-filing system.

Laura Briggs noted that she, Judge Oliver, and the Reporter agree that mandatory e-filing should be adopted as a general national matter. Mandatory e-service also seems ripe for adoption. So too, it seems time to provide that a Notice of Electronic filing, automatically generated on e-filing, serves as a certificate of service on anyone served through the court's system. The question of what to do about e-signatures, on the other hand, is a mess. A proposal addressing e-signatures was published by the Bankruptcy Rules Committee in the summer of 2013 but has been withdrawn in the face of the comments it generated.

The e-filing draft Rule 5(d)(3) on page 82 of the agenda materials was presented for discussion, with a revision suggested

by Laura Briggs and also by the Appellate Rules Committee (the revision is double-underlined):

(d) Filing. * * *

(3) *Electronic Filing, Signing, or Verification*. ~~A court may, by local rule, allow papers to be filed~~ All filings must be made, signed, or verified by electronic means that are consistent with any technical standards established by the Judicial Conference of the United States. Paper filing must be allowed for good cause, and may be required, or may be allowed for other reasons, by local rule. ~~A local rule may require electronic filing only if reasonable exceptions are allowed.~~

Discussion began with the observation that the series "made, signed, or verified" should not be carried over in the disjunctive from the present rule. The question of e-signatures has continued to cause trouble. It may be useful to allow local rules that experiment with e-signatures, as the present rule seems to allow, but it is not yet time to require them. Verification is tightly tied to signatures. Alternative drafting should be found. The drafting will depend on choices yet to be made. If, for example, it is determined that courts should be allowed to experiment with electronic signing or verification, the rule could be recast: "All filings must be made by electronic means * * *. A court may, by local rule, allow papers to be signed or verified by such electronic means. Paper filing must be allowed * * *." This approach is subject to the perennial "cosmic issue" posed by local rules. Do we want 94 approaches to e-signing or verification? But it is hard to establish a uniform rule at this stage of practice. And it is at least possible that there may be geographic or demographic differences that make different approaches suitable in different areas.

Why, it was asked, do 9 districts not require electronic filing? If there are good local reasons, should we defer? Or if it seems likely they will gradually move to require e-filing, should we simply await the outcome? No one could recall any suggestions from the bar that the present rule is not working. But it was answered that a uniform rule will be useful. At the same time, exceptions must be allowed. "Good cause" may not be sufficient to capture the need for exceptions. Local conditions may vary in ways that support categorical exceptions suitable to one district but not others.

e-service: The draft in the agenda book, pages 83-84, adapts present Rule 5(b)(2)(E):

(b) Service: How made. * * *

(2) *Service in General.* A paper is served under this rule by: * * *

(E) sending it by electronic means – unless ~~if~~ the person ~~consented in writing~~ shows good cause to be exempted from such service or is exempted from electronic service by local rule – in which event service is complete upon transmission, but is not effective if the serving party learns that it did not reach the person to be served; or * * *

The first suggestion was that the long phrase set off by em dashes is too long to support easy reading. An easy fix may work by framing this subparagraph as two sentences:

(E) sending it by electronic means, unless the person shows good cause to be exempted from such service or is exempted by local rule. Electronic service is complete upon transmission, but is not effective if the serving party learns that it did not reach the person to be served; or * * *

The exemption for good cause provoked a question asking who would show good cause? A pro se litigant? A prisoner? Will it be difficult to show good cause? Laura Briggs answered that in her court she had never encountered a request to be exempt. But her court automatically excludes pro se litigants. A judge observed that his court automatically exempts pro se litigants from e-service unless a judge authorizes it. Another judge observed that a "good cause" showing is something separate from a categorical exemption – it implies that a judge will be involved. His court had some requests for exemptions in the early days of e-service.

Notice of Electronic Filing: The Committee on Court Administration and Case Management has suggested that a notice of electronic filing automatically generated by the court's filing system should count as a certificate of service. The simpler of the versions in the agenda materials, set out at pages 84-85, would add this provision at the end of Rule 5(d)(1):

(d) Filing.

(1) *Required Filings; Certificate of Service.* Any paper after the complaint that is required to be served ~~– together with a certificate of service –~~ must be filed within a reasonable time after service; a certificate of service also must be filed, but a notice of electronic filing is a certificate of service on any party served through the court's transmission facilities.

January 5, 2015

It was reported that two districts in the Seventh Circuit have local rules to this effect. The rules also provide that a certificate must be filed to show service on parties that were not served by electronic means.

The circuit clerk representative on the Appellate Rules Committee surveyed other circuit clerks. A majority of them were comfortable with allowing a notice of electronic filing to stand as a certificate of service. But a minority preferred to require a separate certificate of service because that may prompt the party making service to think about the need to make paper service on parties who are not participating in the e-filing system.

This proposal was not much discussed. The agenda materials opened a further question by asking whether there must be a certificate of service for the certificate of service; Rule 5(a)(1)(E), requiring service of "[a] written notice, appearance, demand, or offer of judgment, or any similar paper," is ambiguous. Discussion was limited to the observation that in one district lawyers include a certificate of service at the end of the document that is served, so that the certificate of service is itself served with the document. There was no interest in addressing this question by rule amendment.

Generic e=paper Rule: The Standing Committee subcommittee has prepared a template rule that in generic terms provides that electrons are equal to paper. The first part provides that a reference in a set of rules to information in written form includes electronically stored information. The second part provides that any action that can or must be completed by filing or sending paper may also be accomplished by electronic means. Each part could include an "unless otherwise provided" qualification.

The "otherwise provided" provision could be adapted to any particular set of rules by either of two approaches. One would list all of the exceptions as part of the generic rule. The other would include only the bland "otherwise provided" provision in the generic rule, but then provide exemptions — with or without a cross-reference to the generic rule — in individual rules. The subcommittee discussions have recognized that different approaches may be suitable in different sets of rules, and that any particular set of rules may raise so many questions about exceptions that it is better to avoid any generic provision.

The Appellate Rules Committee is attracted to the first part, providing that any reference to paper embraces electrons. It is more concerned about the complications of providing that electronic means can be used to effect any act that can be effected with paper.

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The questions for the Civil Rules may be distinct from the questions presented by other sets of rules. It is clear that many exceptions are likely to be desirable, beginning with several rules that provide for initiating process — not only the familiar Rule 4 provisions for serving summons and complaint, but also process under Rule 4.1, third-party complaints, warrants in admiralty proceedings, and others. A great many different words in the rules may imply paper. A simple example, complicated by evolving technology and social mores, is the references to "newspaper" for notice in condemnation proceedings, Rule 71.1(3)(B), and in limitation-of-liability proceedings, Supplemental Rule F(4). What counts as a "newspaper" today? Tomorrow? Sorting through all these words, carefully, will not only be a lengthy chore. It may tax understanding of present and evolving realities in an ever more complex network world.

Discussion began with the observation that Evidence Rule 101(b)(6) already includes a generic provision: "a reference to any kind of written material or any other medium includes electronically stored information." But the Evidence Rules deal with a totally different set of problems. The Civil Rules, for example, embody due process notions of notice. The Civil Rules, further, include a great many different words that would have to be studied as possible occasions for exceptions from the equation of electrons with paper.

The discussion turned to an open question put to the judge and lawyer members: are there actual problems in practice caused by uncertainties about what can be done by electronic means? No committee member had encountered such problems. No one knew of any local rules that address this question, apart from Local Rule 5.1 in the Northern, Eastern, and Western Districts of Oklahoma: "Any paper filed electronically constitutes a written paper for purposes of applying these rules and the Federal Rules of Civil Procedure." It would be possible to ask the Federal Judicial Center to do a study, but their research capacities are finite and may be better devoted to more important topics. It also was observed that no matter what the form of service, the common problem arises when a party protests "I did not get it."

The Committee concluded that the very complex and time-consuming task of reviewing and revising the Civil Rules to reflect modern e-developments is not warranted in the absence of actual problems. Because no one has encountered such problems and the rules seem to be working well in the modern electronic world, the Committee concluded that the time has not yet come for the Civil Rules to adopt either part of the generic template.

Other Civil Rule e-issues: The agenda materials, pages 89-93, list

a number of rules that might include specific provisions equating electrons with paper. Brief discussion narrowed the list to Rule 72(b)(1), which directs that the clerk must promptly "mail" to each party a copy of a magistrate judge's recommended disposition. "No one mails." Changing it to a direction that the clerk "serve" a copy is an easy and quite safe change. But this may be an illustration of a gradual phenomenon in which it will come to be accepted that "mail" embraces both postal and electronic delivery. This rule change might be included at a time when other e-rule changes are proposed. But there is no urgent need to bless what clerks are doing now.

A particular example was discussed briefly. Rule 7.1 requires that 2 copies of a disclosure statement be filed. The apparent purpose was to provide one copy for the court file and one copy for the judge assigned to the case. In an era of electronic court records, there is no apparent need for 2 copies. But the Appellate Rules Committee is considering possible substantive changes in their disclosure rule, Rule 26.1. Changes in one disclosure rule will require reconsideration of other disclosure rules — the rules were adopted in common, through joint deliberations. It is better to hold off on a minor amendment today when there is a real prospect of more serious amendments in the near future.

It was concluded that the "other civil rules" changes to embrace electronic practice should be deferred.

Rule 81: Signatures on Notice of Removal

The general removal provision, 28 U.S.C. § 1441(a), provides for removal "by the defendant or the defendants." Section 1446(b)(2)(A) provides that "When a civil action is removed solely under section 1441(a), all defendants who have been properly joined and served must join in or consent to the removal of the action." Several circuits have taken different approaches to a simple question: can the attorney for one party file a notice of removal on behalf of all, expressly stating that all other defendants join in or consent to the removal?

It has been suggested that it might be useful to resolve this circuit split by amending Rule 81(c)(2). Either answer could be given: each defendant must separately sign, or one could sign on behalf of all with an express statement that all others consent or join in the removal. Drafting would have to resolve a particular question. Some removal statutes clearly provide that any defendant can remove the entire action. Others are, by their terms, ambiguous. Section 1442 provides that an action against United States officers "may be removed by them." It is said that this statute, and the similar provisions in §§ 1442a and 1443, allow

removal by any one defendant. But it is not clear that it would be wise to assume this answer in drafting Rule 81. Beyond that, there is a split in the circuits with respect to removal under the § 1452 provision for claims related to bankruptcy cases — some hold that all defendants must join in removing, while others allow any one defendant to remove. If a Rule 81 provision were drafted to apply only to removals under § 1441(a), reflecting § 1446(b)(2)(A), it would at least leave the question of § 1452 removal in limbo. But it would hardly do to take sides on this question of statutory interpretation. An alternative might be to draft a rule that applies to any removal that requires joinder of all defendants who have been properly joined and served. That approach would be neutral on the questions of statutory interpretation.

Discussion began with an expression of hesitancy. Should the Committee become involved in resolving a circuit split in interpreting, not a Civil Rule, but a statute, and a statute that deals with jurisdiction at that? A parallel example is provided by an issue that has divided members of this judge's court — what to do when a defendant who has diversity of citizenship with the plaintiff removes before diversity-destroying defendants are served. Should we try to address questions like that?

A lawyer observed that when the question of consent by all arises, the practice is to make sure that everyone in fact joins in the notice.

Another observation was framed as a question whether anyone had encountered a situation in which a case was remanded because one party had attempted to sign on behalf of all, with an express statement that all had agreed? Removal tends to be approached with care to meet all requirements. Lawyers are likely to find out how the local circuit interprets the statute. This question probably does not lead to "gotcha" problems.

A further observation was that it is wise to show caution in using § 2072 to approach statutory problems. "The preemption power is precious," and should be jealously protected by sparing use.

It was agreed that this question will be tabled.

Pending Docket Matters

Judge Campbell introduced a long series of pending docket matters by noting that it is important to undertake periodic surveys of public proposals that have accumulated during periods of intense work on other matters. It is important to provide close attention to every proposal.

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Third-Party Litigation Financing: Dkt. 14-CV-B

This proposal would add automatic initial disclosure of third-party litigation financing agreements to Rule 26(a)(1)(A).

Third-party litigation financing is, or seems to be, a relatively new phenomenon. It is not clear just what forms of financial assistance to a lawyer or to a party might be included under this label, nor is it clear whether the label itself should be adopted. Many ads offering financial support to lawyers seem to involve general loans to the firm, or to be ambiguous on the relationship between possible financing terms and specific individual litigation.

The proposal seeks to exclude contingent-fee agreements from the disclosure requirement, referring to "any agreement under which any person, other than an attorney permitted to charge a contingent fee representing a party, has a right to receive compensation that is contingent on, and sourced from any proceeds of the civil action, by settlement, or otherwise." This language could include assignments. If work proceeds, the rule language will require careful attention to capturing the arrangements that seem fair subjects for mandatory disclosure, excluding others.

The proposal has been supplemented in the few days before this meeting by submissions from opponents and proponents of disclosure addressing some issues raised in the Committee’s agenda memo.

The proponents of disclosure may be concerned more with generating information to support careful examination of third-party litigation financing in general than with the impact on disclosure in any particular action.

Supporters of disclosure invoke the provision for initial disclosure of liability insurance. This disclosure provision grew out of 1970 amendments that resolved a disagreement among district courts by allowing discovery of liability insurance. The idea was that liability insurance plays an important role in the practical decisions lawyers make in determining whether to settle and in preparing to litigate. Permission for discovery was converted to initial disclosure in 1993, making it routine. But the analogy is not perfect. Long before 1970, liability insurance had come to play a central role in supporting actual effectuation of general tort principles. Litigation financing is too new, and experience with it too limited, to come squarely within the same principle. The effect on settlement negotiations, for example, may be rather different. The 1970 Committee Note recognized that discovery of insurance terms and limits might encourage settlement, but in other cases might make settlement more difficult. The role of insurers in

settlement negotiations is familiar, and in many states has led to rules of liability for bad-faith refusal to settle. What role litigation financing firms may play in settlement decisions, properly or otherwise, is a thorny question.

The settlement question is one example of a broader range of questions. Some third-party financing arrangements may, by their terms or in operation, raise questions of professional responsibility. How far may the lender intrude on the client's freedom to decide whether to accept a settlement — for example, an offer on terms that would reward the lender but leave very little for the client? How far may the lender, either in making the arrangement initially or as the action progresses, ask for disclosures that intrude on confidentiality — and what protections may there be to ensure truly informed client consent?

The proponents offer several policy reasons for disclosure.

First, it is urged that disclosure will help ensure that judges do not have conflicts of interest arising from the judge's stake in an enterprise that, directly or indirectly, is providing the litigation financing. Present Rule 7.1 does not seem to extend this far. Third-party litigation financing, further, may be provided for the first time pending appeal, when the case is no longer in the district court. Should a disclosure rule attempt to reach this far, or should the Appellate Rules be revised in parallel?

Another argument is that a defendant should know who is really on the other side of the action. This can affect settlement decisions, for example by knowing that the plaintiff has financial support to stay in the litigation for the long haul. But is it desirable to facilitate settlement at lower values when the defendant knows there is no outside support and that it may be easier to wear out the plaintiff's reserves? Third-party financing firms, moreover, assert that they are always interested in quick, sure payment through settlement.

Disclosure also is supported by arguing that it may be important in deciding motions that seek to shift the burden of litigation expenses. Even before the current pending proposals, the rules provide that a court determining the proportionality of discovery should consider the parties' resources. The pending proposals would amend Rule 26(c) to include an express reference to allocating the expense of discovery as part of a protective order, reflecting established practice. The argument is that it would be unfair, or worse, to allow a party to pretend to have no more than the party's own resources to bear the expenses of discovery. But cost-shifting does not seem to happen often, and an inquiry into

third-party financing can always be made at the time of a cost-shifting motion.

Finally, it is argued that information about third-party financing can be useful in determining sanctions. Support is found in a case from a Florida state court.

These questions are interesting. There is much to learn. DePaul Law School held a conference on third-party financing last year, generating more than 500 pages of articles. They provide a fascinating introduction, but not a complete picture.

Discussion after this introduction began with the observation that the question is not whether third-party financing agreements are discoverable. They might — or might not — be discoverable as an incident to settlement negotiations. The question whether to provide for automatic initial disclosure may be premature. Whether characterized as a range of phenomena or a broad phenomenon that includes many variations, there are too many things involved to justify adopting a disclosure requirement now. "This is too much different from insurance." These views were echoed by others.

Another member offered an analogy to Supreme Court Rule 37.6, which requires disclosures for briefs amicus curiae. The lawyer who files the brief must reveal "whether counsel for a party authored the brief in whole or in part and whether such counsel or a party made a monetary contribution intended to fund the preparation or submission of the brief," and identify contributors other than the identified friend. The Court's interest in knowing who may be masquerading as an amicus is perhaps different from third-party financing of litigation as a whole, but suppose the identified plaintiff has actually been paid off and is as much a shell as a purported amicus?

A different member stated that he deals with third-party financing in about half his cases, often in representing plaintiffs in patent cases. The cost of litigating patent actions is ever increasing. Simple out-of-pocket expenses can run into the millions of dollars. Fewer lawyers are able to take these cases on contingent-fee agreements alone. "Third-party litigation financing makes it possible to bring cases that deserve to be brought." At the same time, the ethical issues are real. Attention has been paid to these issues, and more attention will be paid to them. It is not clear that initial disclosure will advance consideration of these questions. And, although it seems clear that knowledge of third-party financing can advance decision of specific issues in an individual case — cost-shifting is an example — that is better dealt with in the case than by adopting initial disclosure. So too, the analogy to insurance disclosure is not close. It is hard to

follow the argument that disclosure will remove a deterrent to settlement. Knowing the specific terms of the financing agreement will not contribute to that. There are, moreover, many different forms of financing: it may be as simple as a loan, with contingent repayment, that leaves the lender entirely out of the conduct of the litigation. But some funders want to be involved in developing and pursuing the case, and in settlement. These arrangements bear on attorney-client privilege, and may lead to divided loyalties as between lender and client. Again, those problems do not have much to do with the disclosure proposal.

A judge expressed doubts about the need for disclosure. He routinely requires the person with settlement authority to be present at conferences; "I can get the information I need." Similarly, the information can be got if it is relevant to cost-shifting.

Another judge agreed that the proposal is premature. We do not yet know enough about the many kinds of financing arrangements to be able to make rules.

A member noted that the ABA 20/20 Commission on Ethics produced a white paper on alternative litigation funding. The paper noted that these practices are evolving. The paper expressed a hope that work would continue toward studying the impact of funding on counsel's independence, candor, confidentiality, and undivided loyalty.

A third judge thought third-party funding "is like ghost-writing; I like to know who's writing what I read." The judges on her court have not yet agreed whether they can compel disclosure of third-party financing. But this belongs in the array of things that judges should be aware of.

A fourth judge agreed with a different analogy. Professional-looking filings appear in pro se cases. It is useful to know whether the party has had professional help in order to decide whether to measure a pleading by the more forgiving standards that apply to pro se parties. "I do ask questions at status hearings; some of my colleagues are more aggressive." His court is considering a local rule to address this question. The third judge agreed — she has a standing order that requires identification of the actual author.

A fifth judge suggested that the concern about potential conflicts extends beyond judges to include opposing counsel. But this is not a study for this Committee to undertake.

And a sixth judge agreed that courts have the tools to get the

information needed to rule on discovery issues, and to order appearance by a person with settlement authority, and so on. The task of determining the author of nominally pro se papers presents a different question.

Discussion concluded with the observation that no one has argued that these questions are unimportant. Nor has it been argued that they should be ignored. But third-party financing practices are in a formative stage. They are being examined by others. They have ethical overtones. We should not act now.

Another member agreed that the question is premature. There has been a flurry of articles. "The authors are all over the place." Some, highly respected, have suggested that the concerns reflected by this proposal are premature.

The Committee decided not to act on these issues now.

Nonparty Rule 30(b)(6) Depositions: Dkt. 13-CV-E

The Committee on Federal Courts of the New York City Bar submits proposals to address problems they believe arise from notices to take Rule 30(b)(6) depositions of entities that are not parties to the underlying litigation. The central problem is that notices set the deposition at a time too early to enable the nonparty to properly educate the witnesses who will appear to provide testimony for the nonparty named as the deponent. The response to this problem takes two forms: Objections are advanced as to the scope of the subpoena, and the witnesses are prepared only on subjects within the scope accepted by the nonparty entity. The nonparty also may move for a protective order, and take the position that it need not appear for the deposition before the court rules on the objections.

The proposal rejects one possible remedy, adaptation of the Rule 45(d)(2)(B) procedure that allows an objection to a subpoena to produce and suspends the subpoena until the court orders enforcement. This approach is thought too severe for depositions, because a deposition is a discrete event and does not provide the opportunities for negotiation that occur in the course of a "rolling" response to a subpoena to produce. Instead, it is urged that the rules should require a minimum 21-day notice of the deposition. In addition, the proposal would require that a subpoena addressed to a nonparty entity for a Rule 30(b)(6) deposition state the reasons for seeking discovery of the matters identified in the notice. Finally, the suggestion would amend Rule 30, probably by adding a new subdivision, to provide that a motion for a protective order or to quash or modify the subpoena voids the time stated for the deposition.

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Reasons for caution were sketched. This proposal is the first indication of the problem it describes. Rule 30(b)(6) was explored in some depth a few years ago in response to suggestions made by a committee of the New York State Bar Association; the question of inadequate notice to a nonparty Rule 30(b)(6) deponent was not even mentioned then. Nor have there been any other suggestions of this problem.

Discussion began with a similar observation that the Committee recently engaged in an in-depth exploration of Rule 45. The work began with identification of 17 possible topics that might be addressed, and narrowed the list to the changes that became effective less than a year ago. This proposal comes as describing a surprise set of issues.

Judge Koeltl said that any suspicion that the proposal may reflect problems unique to practice in the Southern or Eastern Districts of New York should be laid to rest. "I do not see it as a problem." He expressed enormous respect for the City Bar's Federal Courts Committee. It did wonderful work for the Duke Conference, and again in its comments on the Duke Rules Package. But this should not be a problem in the Southern District. Local rules require a conference with the court before making a discovery motion. "I've never seen this as a problem."

Another judge observed that if the nonparty deponent is in another state, enforcement of the subpoena will be in the court where compliance is expected. And the party serving the subpoena is required to take steps to avoid imposing unreasonable burdens on the deponent. Rule 45(d)(3)(A) provides further protection, requiring the court to quash or modify a subpoena that fails to allow a reasonable time to comply. "The rules provide pretty good protection" now.

A third judge suggested that generally the Committee seeks to frame rules of general application. "This seems a very specific problem; a rule addressed to it could create collateral problems. If there's a problem, it arises from judges who are not tending to their cases."

A fourth judge thought that the problem reflects the kinds of concerns that underlie the pending proposal to amend Rule 1 to include the parties in the obligation to construe and administer the rules to achieve the just, speedy, and inexpensive determination of the action. The deponent's lawyer should describe the problem to the lawyer who issued the subpoena, and they should work out a suitable time for the deposition. It is in no one's interest to have an ill-prepared witness.

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Still another judge observed that in some circumstances a lawyer may have strategic reasons to hope for an ill-prepared witness testifying under Rule 30(b)(6) for an entity that is a party — that was the subject of the earlier Rule 30(b)(6) inquiry. But there is no similar potential for strategic advantage when the witness testifies for a nonparty entity. "Lawyers should be able to resolve this."

A member noted that the ABA Litigation Section Pretrial Task Force has Rule 30(b)(6) on its agenda, and may eventually bring forward proposals for revision. The question of setting the time for a nonparty Rule 30(b)(6) deposition too soon has not been on its list.

It was concluded that this proposal should be set aside.

Attorney-Client Privilege Appeals: Dkt. 10-CV-A

Professor Marcus introduced this proposal, which would amend Rule 37 to authorize a court of appeals to grant a petition for immediate interlocutory review of a ruling that grants or denies a motion to compel discovery of information claimed to be protected by attorney-client privilege. The revision would be drawn on lines that parallel permissive Rule 23(f) appeals from orders granting or denying class certification. A similar provision has been submitted to the Appellate Rules Committee, which has decided not to pursue it. Their view is that existing opportunities for review suffice, although they are not often invoked. The traditional remedy is to disobey the order to produce, be held in contempt, and appeal the contempt order — and even that approach is limited by the rule that a party can appeal only a criminal contempt order, not a civil contempt order. Another remedy is by extraordinary writ; mandamus may be somewhat more freely available to test questions of privilege and other confidentiality concerns, but still is carefully limited. Extending beyond the limits of these remedies — and recognizing the possible availability of § 1292(b) appeals by permission of both the district court and the court of appeals — will create difficult problems of drawing lines that promote desirable opportunities for appeal without stimulating many ill-founded attempts.

The question arises from the decision in Mohawk Industries, Inc. v. Carpenter, 130 S.Ct. 599 (2009). The Court ruled that the collateral-order doctrine supports "finality" only as to all cases within a described "category," or as to none of them. An order compelling production of materials found to have been initially protected by attorney-client privilege, but to have lost the protection by waiver, was in a category that did not fit the criteria for collateral-order appeal in all cases. Alternative

means of review provide adequate protection. At the same time, the Court suggested that if it is desirable to provide somewhat greater opportunities for interlocutory review, it is better that they be established through the Rules Enabling Act than by judicial elaboration of § 1291 or other judicial doctrines.

Invocation of the Rule 23(f) analogy helps to frame the question. Grant or denial of class certification can have an enormous impact on the case — denials were once held appealable as the "death knell" of actions that could not be expected to survive if only individual claims remained to be litigated (another example of collateral-order appeal doctrine rejected by the Supreme court), while grants can exert a hydraulic pressure to settle when facing the great costs of defending a class action and the risks of "bet-the-company" judgments. The stakes are high. And, although there are many class actions and no small number of requests for Rule 23(f) appeals, the occasions for potential appeals remain finite. Even if the categories of appeal were limited to attorney-client issues, these issues arise far more often, and are likely to be much less momentous.

A judge observed that the opportunities for appellate review that remain available after the Mohawk decision "are not much help." But attorney-client privilege is invoked in an overwhelming number of cases. And it often is raised without even attempting to comply with the requirements of Rule 26(b)(5)(A) to describe the nature of the matters objected to in a way that will enable other parties to assess the claim of privilege. "The potential applications are enormous."

A lawyer noted that if the problem involves waiver of the privilege, Evidence Rule 502(d) and the proposed Civil Rules amendments that provide express reminders of Rule 502(d) "reflect a big effort to reduce the occasions for waiver." Judges, moreover, generally do a really good job in ruling on privilege issues. These issues come up far more often than reported cases might suggest. The Appellate Rules Committee seems to have got it right.

Another judge noted that there are many privileges apart from the attorney-client privilege beloved by lawyers. Why should a special appeal provision be limited to just this one privilege? And what of work-product protection? We should stay away from these issues.

The Committee concluded that this subject should be removed from the agenda.

Rule 41: Dkt. 14-CV-D; 10-CV-C

January 5, 2015

Docket item 14-CV-D was the submission of a law review article by Professor Bradley Scott Shannon, "Dismissing Federal Rule of Civil Procedure 41," 52 U. of Louisville L.Rev. 265 (2014).

The article advances two basic packages of suggestions. The first identifies several well-known shortcomings in Rule 41. The second bewails the reliance of Rule 41 on the often-criticized terms "with prejudice," "without prejudice," and "on the merits."

Among the perceived shortcomings are these: (1) The unilateral right to dismiss without prejudice should be terminated by a motion to dismiss as well as by an answer or a motion for summary judgment. There is an obvious analogy to the right to amend a pleading once as a matter of course under Rule 15(a)(1)(A) — Rule 15 was recently amended to cut off this right 21 days after a motion under Rule 12(b), (e), or (f). (2) Rule 41(a)(1)(A) addresses dismissal of "an action." Provision should be made for dismissing part of an action, whether it be one of several claims or one of several parties. Dismissal of a claim might better be accomplished by Rule 15 amendment of the pleading — Rule 15 covers not only an initial period when amendment does not require court permission but also later times in the action when leave is required but is freely granted. Addressing dismissal of a "claim" without prejudice, further, might invite confusion about the various approaches that define what is a "claim" according to the context of inquiry. There is a risk of confusing what is a "claim" for the claim-preclusion aspect of res judicata with what might suitably be treated as a "claim" for voluntary abandonment. Dismissal of all claims against a party also can be accomplished through Rule 15, but Rule 41 might be amended to address this. (3) Rule 41(c) addresses voluntary dismissal of a counterclaim, crossclaim or third-party claim; other claims are not addressed. As just one example, a third-party defendant may file a claim against the original plaintiff. The suggestion is that Rule 41(c) should be amended to provide that it "applies similarly" to dismissal of any type of claim not enumerated. (4) A related possibility would be to add a motion for summary judgment (or a Rule 12 motion) to the events that cut of unilateral dismissal without prejudice of a counterclaim, crossclaim, or third-party claim under Rule 41(c). (There is a respectable view that "summary judgment" was omitted from Rule 41(c) by simple absent-mindedness.)

The difficulties that inhere in the concepts of "prejudice," "on the merits," and the like also are well known. For example, Rule 41(b) provides that a dismissal for lack of jurisdiction is not on the merits. But the dismissal in fact establishes issue preclusion on any matter necessarily decided in finding a lack of jurisdiction. The claim, on the other hand, is not precluded if a subsequent action is brought in a court that does have

jurisdiction. The proposed remedy is to amend Rule 41 to refer directly to preclusion consequences — "does not preclude," "precludes," and so on. Reasons for caution on this score begin with the proposition that the intricacies of applying present Rule 41 are well known and have been thoroughly addressed by the courts and in the literature. So there is a real prospect that abandoning the familiar and familiarly interpreted phrases in favor of open-ended invocations of general preclusion law could invite new confusions and unsettling arguments. There is little reason to believe that better preclusion results would be reached.

Discussion began by asking the Committee whether they see these problems in practice.

A judge said that these problems are easily worked out in practice. For example, a motion may be made for default judgment against one defendant when another defendant has not been properly served. To get to and through a hearing on damages, the plaintiff may amend the complaint to dismiss the defendant not served. Or on a motion to review a proposed settlement under the Fair Labor Standards Act, the parties may discover that they have unresolved issues as to attorney fees and prefer to dismiss so they can work out a full settlement.

The conclusion was that Professor Shannon has pointed to ways in which Rule 41 can be improved. But the Committee operates in the instinctive belief that it is better to resist the temptation to make abstract improvements in the rules. The risk of unintended consequences counsels caution. Amendments to address real-world problems are more important. For Rule 41, that holds for these proposals. They will be put aside.

Rule 48: Non-Unanimous Verdicts in Diversity Cases: Dkt. 13-CV-A

This proposal would amend Rule 48 to adopt state majority-verdict rules for diversity cases. The suggested reason is that defendants commonly view majority-verdict rules as something that favors plaintiffs. When an action that could be brought in federal diversity jurisdiction is brought in a state court that has a majority-verdict rule, a defendant has an incentive to remove for the purpose of invoking the federal unanimity requirement. Cases are brought to federal courts that would not come there if the federal courts adhered to the state-court majority-verdict rule.

The first issues raised by this proposal are whether majority-verdict rules are better than a unanimity requirement, and, if so, whether the Seventh Amendment permits a majority-verdict without the parties' consent. If majority verdicts are better, and if the Seventh Amendment permits — almost certainly a requisite even for

a rule limited to diversity cases — then Rule 48 should provide for majority verdicts in all cases, or at least for all diversity and supplemental jurisdiction cases. Otherwise, the question is whether it is better to defer to state practice either from a pragmatic desire to reduce removals or from an Erie-like sensitivity to the prospect that majority verdicts are sufficiently "bound up" with state substantive principles to deserve relief from the general Rule 48 command for uniformity.

The majority-verdict question may intersect the question of jury size. A couple of decades ago the Committee explored restoration of the 12-person civil jury, expressly deferring consideration of majority-verdict rules pending resolution of that issue. That attempt failed. But the underlying questions remain: how far do the dynamics of deliberation in a 12-person jury differ from those in a 6-person jury? How far are the dynamics of deliberation affected by allowing a majority verdict? How do these effects interact if a verdict can be reached by a majority of a 6-person jury?

Discussion began with the observation that many considerations affect a defendant's decision whether to remove an action, whether it is a diversity action or a federal-question action. "If we are to start addressing the reasons defendants have for removing, it will be a daunting task. The premise is troubling."

Agreement was expressed as to strategic concerns. A variety of strategic factors may lead to removal. But "this one is significant." Generally plaintiffs like majority verdicts, which may facilitate horsetrading between damages and liability. There are sound Erie-like reasons to honor state rules on jury size and unanimity. "We should not distrust state policymaking on this." There is no important federal policy to be served by deferring to defendants' strategic choices. The proposal can be drafted easily. But it will generate a lot of controversy. It is not clear whether the value of the change will be worth enduring the controversy.

The problem of supplemental jurisdiction was raised. Many cases present federal questions and state-law questions that involve many of the same issues of fact. There may be diversity jurisdiction as well as federal-question jurisdiction, or there may be only supplemental jurisdiction over the state-law questions, or — in a particularly convoluted area of jurisdiction — there may be federal-question jurisdiction over a state-created claim that centers on a federal question. Should the majority-verdict rule that would apply to the state-law questions extend to the federal questions as well, so as to avoid the grim spectacle of telling the jury it must answer common questions unanimously as to part of the case, but can answer the same questions by majority verdict as to

other parts?

Professor Coquillette recalled an article he wrote with David Shapiro on the fetish of jury trials. The majority-verdict question is a complicated one.

Another member agreed with the view that clear drafting can be achieved. She also agreed with the view that it is a good thing to reduce the strategic use of diversity jurisdiction. Courts and others are interested anew in the importance of jury trials. Any proposal will be controversial, but this is a matter of genuine interest to the present and future of jury trials. We ask juries to apply different standards of persuasion to different issues in a single trial, and expect them to perform this feat. They could likewise manage to apply majority-verdict rules to some elements, and a unanimity requirement to others. Or we could draft a compromise rule that gives the court discretion whether to apply a majority-verdict rule.

Brief discussion found no confident answer to the question of how many states permit majority verdicts.

Doubts about adopting state practice were expressed by noting that "this is not like service of process," a purely technical matter. There may be substantial federal interests involved in the unanimity requirement.

The question turned to other aspects of jury practice. Some states are beginning to follow Arizona, which has been a leader in relaxing many traditional practices. Jurors can ask questions. They can take notes. They can deliberate throughout the trial. Should a federal court follow these practices in diversity cases that would be tried in such a state, even if it would not do so in a federal-question case? Or, to take a nonjury example, cases have been removed by defendants because they like the expert-witness report requirements of Rule 26(a)(2), or because they like the Daubert approach to expert witnesses. Do we want to eliminate all federal practices that may affect the outcome?

A similar question asked whether the federal court should be required to draw the jury from the same area that would supply jurors to the state court. An example was offered of experience in criminal cases, where state authorities may cede the lead to federal prosecutors in order to draw the jury from a broader area than would supply the state-court jurors. There are areas where it is appropriate to follow federal-court jury practices; it is difficult to see why the unanimity issues should be different.

Turning back to reasons that may support the proposal, it was

noted that a defendant's hope for a unanimity requirement may be different from other strategic concerns. Majority-verdict rules reflect long-held state policies. The federal unanimity requirement can be seen as archaic, even odd.

A related phenomenon was noted. A case is removed, dismissed by the plaintiff, then filed again in state court with an added defendant that destroys diversity. If removal is attempted again, the federal court does not evaluate the plaintiff's strategic choices; it asks only whether the new party is properly joined.

A judge observed that under Rule 81(c), federal procedures apply after removal. We should adhere to that principle here.

Discussion turned to the policies that underlie the grant of diversity jurisdiction in § 1332. It would be difficult to attribute any intent to Congress with respect to jury unanimity — § 1332 goes back to the First Judiciary Act, and its perpetuation by successive Congresses in confronting periodic attempts to revise or eliminate the jurisdiction leaves too many uncertainties to support any attribution of relevant intent. Nor does it seem that the question can be usefully approached as an attempt to rebalance strategic motivations. The purpose of § 1332 "is to alleviate perceived unfairness." The change "would be a large move."

A related suggestion was that diversity jurisdiction was established "to avoid hometown advantage." This purpose is difficult to apply across the wide range of practices that can affect outcome. Maryland, for example, does not have individual judge case assignments. The District of Maryland does. That can have a strong influence on the cost and speed of bringing the case to a conclusion. Or, for a different example, the summary-judgment rules in state and federal court look the same on paper. But there are significant differences in actual practice.

The question whether to take up this proposal was put to a voice vote. A clear majority voted to remove it from the docket.

Rule 56: Summary-Judgment Standards: Dkt. 14-CV-E

Professor Suja A. Thomas submitted for the docket her article on Rule 56, "Summary Judgment and the Reasonable Jury Standard," 97 Judicature 222 (2014). The article suggests that it is not really possible for a single trial judge, nor even a panel of three appellate judges, to know or imagine what facts a reasonable jury might find with the benefit of reasoning together in the dynamic process of deliberation. That part of it ties to her earlier writing, which casts doubt on the constitutionality of summary judgment under the Seventh Amendment. The conclusion, however, is

that the standard for summary judgment "is ripe for reexamination. The rules committee, if so inclined, would be an appropriate body to engage in this study with assistance from the Federal Judicial Center, and such study would be welcome."

The suggestion for study goes beyond work of the sort the Federal Judicial Center has already done. A broad study of pretrial motions is now underway. But these studies count such things as the frequency of motions; the rate of grants, partial grants, and denials; variations along these dimensions according to categories of cases; variations among courts; and other objective matters that yield to counting. There has not been an attempt to evaluate the faithfulness of actual decisions to the announced standard. Consultation with the Federal Judicial Center staff suggests that there are good reasons for this. The only way to appraise the actual operation of the summary-judgment standard in the hands of judges would be to provide an independent redetermination of a large number of decisions. To be fully reliable, the redetermination would have to be made by judges believing they were actually resolving a real motion in a real case — a determination made without that pressure might be reached casually because it is only for research, not real life. Substituting lawyers or scholars or other researchers would lose not only the reality but also the training and experience of judges. It has not seemed possible to frame such a study.

Discussion began with a statement that Professor Thomas believes that summary judgment violates the Seventh Amendment. "The idea that judges cannot determine the limits of reasonableness is wrong." Even in a criminal case, a judge may refuse to submit a proffered defense to the jury if it lacks evidentiary support.

Another judge observed that experience with Professor Thomas while she was in practice showed her to be a wonderful lawyer. Rule 56 is a subject that has concerned the plaintiff’s bar because of the ways in which it is administered. Professor Arthur Miller is another who thinks that summary judgment is at times granted unreasonably, leading to dismissal without trial. "There are too many Rule 56 motions that should not be made." "I try to discourage some of them in pre-motion conferences, but they get made." But it is difficult to know what could be done to improve application by changing the rule language.

Still another judge suggested that "the problem is with judges, not the rule." Motions invoking qualified immunity provide an example — we regularly entrust to judges the determination of what a reasonable officer would know. No doubt judges bring their own biases to bear. "We can educate judges about this, but we cannot dehumanize judges."

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Similar observations were offered by another judge. Judges make determinations of reasonableness all the time. They decide motions for judgment as a matter of law. They decide motions for acquittal in criminal cases. They make determinations under the Evidence Rules.

A member said that the article was entertaining, but left an uncertain impression as to what the Committee should do, apart from undertaking a study.

This discussion turned to the question whether judgment as a matter of law violates the Seventh Amendment. The summary-judgment standard is anchored in judgment as a matter of law. The 1991 amendments of Rule 50, indeed, were undertaken in part to emphasize the continuity of the standard between Rules 50 and 56. But if we were to take literally the general statement that the Seventh Amendment measures the right to jury trial by practice in 1791, it would be difficult to support judgment as a matter of law. In 1794, a unanimous Supreme Court instructed a jury in an original-jurisdiction trial that although the general rule assigns responsibility for the law to the court and responsibility for the facts to the jury, still the jury has lawful authority to determine what is the law. If a jury can determine that the law is something different from what the judges think is the law, it would be nearly impossible to imagine judgment "as a matter of law." But by 1850 the Supreme Court recognized the directed verdict, and the standard has evolved ever since. Professor Coquillette added that there were many differences among the colonies-states in jury-trial practices as of 1791. A member added that it is clear a court may direct acquittal in a criminal case, a power that exists for the protection of the defendant.

The Committee unanimously agreed to remove this proposal from the agenda.

Rule 68: Dockets 13-CV-B, C, D; 10-CV-D; 06-CV-D; 04-CV-H; 03-CV-B; 02-CV-D

Rule 68, dealing with offers of judgment, has a long history of Committee deliberations followed by decisions to avoid any suggested revisions. Proposed amendments were published for comment in 1983. The force of strong public comments led to publication of a substantially revised proposal in 1984. Reaction to that proposal led the Committee to withdraw all proposed revisions. Rule 68 came back for extensive work early in the 1990s, in large part in response to suggestions made by Judge William W Schwarzer while he was Director of the Federal Judicial Center. That work concluded in 1994 without publishing any proposals for comment. The Minutes for the October 20-21 1994 meeting reflect the conclusion that the time

had not come for final decisions on Rule 68. Public suggestions that Rule 68 be restored to the agenda have been considered periodically since then, including a suggestion in a Second Circuit opinion in 2006 that the Committee should consider the standards for comparing an offer of specific relief with the relief actually granted by the judgment.

Although there are several variations, the most common feature of proposals to amend Rule 68 is that it should provide for offers by claimants. From the beginning Rule 68 has provided only for offers by parties opposing claims. Providing mutual opportunities has an obvious attraction. The snag is that the sanction for failing to better a rejected offer by judgment has been liability for statutory costs. A defendant who refuses a $80,000 offer and then suffers a $100,000 judgment would ordinarily pay statutory costs in any event. Some more forceful sanction would have to be provided to make a plaintiff's Rule 68 offer more meaningful than any other offer to settle. The most common proposal is an award of attorney fees. But that sanction would raise all of the intense sensitivities that surround the "American Rule" that each party bears its own expenses, including attorney fees, win or lose. Recognizing this problem, alternative sanctions can be imagined — double interest on the judgment, payment of the plaintiff's expert-witness fees, enhanced costs, or still other painful consequences. The weight of many of these sanctions would vary from case to case, and might be more difficult to appraise while the defendant is considering the consequences of rejecting a Rule 68 offer.

Another set of concerns is that any reconsideration of Rule 68 would at least have to decide whether to recommend departure from two Supreme Court interpretations of the present rule. Each rested on the "plain meaning" of the present rule text, so no disrespect would be implied by an independent examination. One case ruled that a successful plaintiff's right to statutory attorney fees is cut off for fees incurred after a rejected offer if the judgment falls below a rejected Rule 68 offer, but only if the fee statute describes the fee award as a matter of "costs." It is difficult to understand why, apart from the present rule text, a distinction should be based on the likely random choice of Congress whether to describe a right to fees as costs. More fundamentally, there is a serious question whether the strategic use of Rule 68 should be allowed to defeat the policies that protect some plaintiffs by departing from the "American Rule" to encourage enforcement of statutory rights by an award of attorney fees. The prospect that a Rule 68 offer may cut off the right to statutory fees, further, may generate pressures on plaintiff's counsel that might be seen as creating a conflict of interests with the plaintiff. The other ruling is that there is no sanction under Rule 68 if judgment is for the defendant. A defendant who offers $10,000, for example, is

entitled to Rule 68 sanctions if the plaintiff wins $9,000 or $1, but not if judgment is for the defendant. Rule 68 refers to "the judgment that the offeree finally obtains," and it may be read to apply only if the plaintiff "obtains" a judgment, but the result should be carefully reexamined.

The desire to put "teeth" into Rule 68, moreover, must confront concerns about the effect of Rule 68 on a plaintiff who is risk-averse, who has scant resources for pursuing the litigation, and who has a pressing need to win some relief. The Minutes for the October, 1994 meeting reflect that "[a] motion to abrogate Rule 68 was made and seconded twice. Brief discussion suggested that there was support for this view * * *." Abrogation remains an option that should be part of any serious study.

Finally, it may be asked whether it is better to leave Rule 68 where it lies. It is uniformly agreed that it is not much used, even in cases where it might cut off a statutory right to attorney fees incurred after the offer is rejected. It has become an apparently common means of attempting to defeat certification of a class action by an offer to award complete relief to the putative class representative, but those problems should not be affected by the choice to frame the offer under Rule 68 as compared to any other offer to accord full relief. Courts can work their way through these problems absent any Rule 68 amendment; whether Rule 23 might be amended to address them is a matter for another day.

Discussion began with experience in Georgia. Attorney-fee shifting was adopted for offers of judgment in 2005, as part of "tort reform" measures designed to favor defendants. "It creates enormously difficult issues. Defendants take advantage." And it is almost impossible to frame a rule that accurately implements what is intended. Already some legislators are thinking about repealing the new provisions. If Rule 68 is to be taken up, the work should begin with a study of the "enormous level of activity at the state level."

Any changes, moreover, will create enormous uncertainty, and perhaps unintended consequences.

Another member expressed fear that the credibility of the Committee will suffer if Rule 68 proposals are advanced, no matter what the proposals might be. Debates about "loser pays" shed more heat than light.

A judge expressed doubts whether anything should be done, but asked what effects would follow from a provision for plaintiff offers? One response was that the need to add "teeth" would likely lead to fee-shifting, whether for attorneys or expert witnesses.

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It was noted that California provides expert-witness fees as consequences. But expert fees are variable, not only from expert to expert but more broadly according to the needs for expert testimony in various kinds of cases.

The value of undertaking a study of state practices was repeated. "I pause about setting it aside; this has prompted several suggestions." State models might provide useful guidance.

Another member agreed — "If anything, let's look to the states." When people learn he's a Committee member, they start to offer Rule 68 suggestions. Part 36 of the English Practice Rules — set in a system that generally shifts attorney fees to the loser — deals with offers in 22 subsections; this level of complication shows the task will not be easy. There is ground to be skeptical whether we will do anything — early mediation probably is a better way to go. Still, it is worthwhile to look to state practice.

A member agreed that "studies do little harm. But I suspect a review will not do much to help us." It is difficult to measure the actual gains and losses from offers of judgment.

One value of studying offers of judgment was suggested: Arguments for this practice have receded from the theory that it increases the rate of settlement — so few cases survive to trial that it is difficult to imagine any serious gain in that dimension. Instead, the argument is that cases settle earlier. If study shows that cases do not settle earlier, that offers are made only for strategic purposes, that would undermine the case for Rule 68.

Another member suggested that in practice the effect of Rule 68 probably is to augment cost and delay. In state courts much time and energy goes into the gamesmanship of statutory offers. "Reasonable settlement discussion is unlikely. The Rule 68 timing is wrong; it's worse in state courts."

It also was observed that early settlement is not necessarily a good thing if it reflects pressure to resolve a case before there has been sufficient discovery to provide a good sense of the claim's value. This was supplemented by the observation that early mediation may be equally bad.

Another member observed that a few years ago he was struck by the quagmire aspects of Rule 68, by the gamesmanship, by the fear of unintended consequences from any revision. There is an analogy to the decision of the Patent Office a century ago when it decided to refuse to consider any further applications to patent a perpetual motion machine. "The prospect of coming up with something that will be frequently utilized to good effect is dim." There is

an unfavorable ratio between the probability of good results and the effort required for the study.

A judge responded that the effort could be worth it if the study shows such a dim picture of Rule 68 that the Committee would recommend abrogation.

The Department of Justice reported little use of Rule 68, either in making or receiving offers. When it has been used, it is at the end, when settlement negotiations fail. In two such cases, it worked in one and not the other.

A member observed that if Rule 68 is little used, is essentially inconsequential, "we don't gain much by abrogating it." He has used it twice.

The discussion closed by concluding that the time has not come to appoint a Subcommittee to study Rule 68, but that it will be useful to undertake a study of state practices in time for consideration at the next meeting.

Rule 4(c)(1): "Copy" of Complaint: Dkt. 14-CV-C

Rule 4(c)(1) directs that "[a] summons must be served with a copy of the complaint." Rule 10(c) provides that "a copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes." A federal judge has suggested that it may be useful to interpret "copy" to allow use of an electronic copy, on a CD or other computer-readable medium. The suggestion was prompted by a case brought by a pro se prisoner with a complaint and exhibits that ran 300 pages and 30 defendants. The cost of copying and service was substantial.

The suggestion is obviously attractive. But there will be defendants who do not have access to the technology required to read whatever form is chosen, no matter how basic and widespread in general use. This practice might be adopted for requests to waive service, and indeed there is no apparent reason why a plaintiff could not request waiver by attaching a CD to the request. Consent to waive would obviate concerns for the defendant's ability to use the chosen form.

A more general concern is that this proposal approaches the general question of initial service by electronic means, although it seems to contemplate physical delivery of the storage medium. These issues may be better resolved as part of the overall work on adapting the Civil Rules and all other federal rules to ever-evolving technology.

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A practical example was offered. In the Southern District of Indiana, the court has an agreement with prison officials who agree to accept e-copies on behalf of multiple defendants. It works. But it works by agreement, a simpler matter than drafting a general rule.

It was concluded that no action should be taken on this matter.

Rule 30(b)(2): Adding "ESI": 13-CV-F

Rule 30(b)(2) addresses service of a subpoena duces tecum on a deponent, and provides that the notice to a party deponent may be accompanied by a request under Rule 34 to produce "documents and tangible things at the deposition." This suggestion would add "electronically stored information" to the list of things to produce at a deposition.

This suggestion revisits a question that was deliberately addressed during the course of developing the 2006 amendments that explicitly recognized discovery of electronically stored information. It was decided then that ESI should not be folded into the definition of "document," but should be recognized as a separate category in Rule 34. At the same time, it was decided that references to ESI might profitably be added at some points where other rules refer to documents, but that other rules that refer to documents need not be supplemented by adding ESI. Rule 30(b)(2) was one of those that was not revised to refer to ESI.

Professor Marcus noted that there may be room to argue that it would have been better to add references to ESI everywhere in the rules that refer to documents, or at least to add more references to ESI than were added. But those choices were made, and it might be tricky to attempt to change them now. Rule 26(b)(3), protecting trial materials, is an example: on its face, it covers only documents and tangible things. Surely electronically generated and preserved work product deserves protection. But any proposal to amend Rule 26(b)(3) might stir undesirable complications. So for other rules.

There is no indication that the omission of "ESI" from Rule 30(b)(2) has caused any difficulties in practice.

Discussion began with the observation that the 2006 amendments have created a general recognition that "documents" includes ESI. This judge has never seen a party respond to a request to produce documents by failing to include ESI in the response. An attempt to fix Rule 30(b)(2) would start us down the path to revising all the rules that were allowed to remain on the wayside in generating the

2006 amendments. This concern was echoed by another member, who asked whether undertaking to amend Rule 30(b)(2) would require an overall effort to consider every rule that now refers to documents but not to ESI.

Another judge suggested that rather than refer to documents, ESI, and tangible things, Rule 30(b)(2) could be revised to refer simply and generally to "a request to produce under Rule 34."

A lawyer observed that the 2006 Committee Note says that a request to produce documents should be understood to include ESI. Most state courts have followed the path of defining "documents" to include ESI.

Discussion concluded with the observation that no problems have been observed. There is no need to act on this suggestion.

Rule 4(e)(1): Sewer Service: Dkt. 12-CV-A

This proposal arises from Rule 4(e)(1), which provides for service on an individual by following state law. State law may provide for leaving the summons and complaint unattended at the individual's dwelling or usual place of abode. The suggestion is that photographic evidence should be required when service is made by this means. Apparently the photograph would show the summons and complaint affixed to the place.

The proposal does not address the more general problem of deliberately falsified proofs of service. Nor does it explain how a server intent on making ineffective service would be prevented from removing the summons and complaint after taking the picture. The picture requirement might serve as an inducement to actually go to the place, alleviating faked service arising from a desire to avoid that chore, but that may not be a great advantage.

Discussion began with a suggestion that this proposal is unnecessary.

Another member agreed that the suggestion should not be taken up. But he recounted an experience representing a pro bono client who had lost a default judgment in state court and who could not remember having been served or having learned about the lawsuit by any other means. State court records were of no avail, because the state practice is to discard all records after judgment enters. The matter was eventually resolved without needing to resolve the question whether service had actually been made, but he remains doubtful whether it was.

Another member said that "the problem is very real. It bothers

me a lot. Paper service can be difficult and costly. Process servers cut corners." But it is difficult to do anything by rule that will correct these practical shirkings. What we need is a technology for cost-effective service. "I don't know that this Committee is the body to fix it." Another member agreed that advancing technology may eventually provide the answer. That is better suited to the agenda of the e-rules subcommittee.

This proposal was set aside.

Rule 15(a)(3): Any required response: Dkt 12-CV-B

Rule 15(a)(3) sets the time for "any required response" to an amended pleading. Before the Style Project, the rule directed that "a party shall plead in response" within the designated times. The question is whether an ambiguity has been introduced, and whether it should be fixed.

The earlier direction that a party "shall plead in response" relied on the tacit understanding that there is no need to plead in response to an amended pleading when the original pleading did not require a response. A plaintiff is not required to reply to an answer absent court order, and is not required to reply to an amended answer. The same understanding should inform "any required response," but that may not end the question. What of an amendment to a pleading that does require a response? If there was a response to the original pleading — the most common illustration will be an answer to a complaint — must there always be an amended responsive pleading, no matter how small the amendments to the original pleading and no matter how clearly the original responsive pleading addresses everything that remains in the amended pleading?

There is something to be said for a simple and clear rule that any amendment of a pleading that requires a responsive pleading should be followed by an amended response, even if the only effect is to maintain a tidy court file. But is this always necessary?

A judge opened the discussion by stating that the need for an amended responsive pleading depends on the nature of the amendment to the original pleading. If it is something minor, it suffices to put it on the record that the answer stands. There is no need for a rule that requires that there always be an amended answer. But generally he asks for an amended answer to provide a clear record.

Another judge noted that when lawyers are involved in the litigation, they virtually always file an amended response.

A lawyer recounted a current case with a 400-page complaint and, initially, 27 defendants. "One defendant has been let out. We

reached a deal that our 45-page answer would stand for the remaining 26 defendants. Everyone was happy."

It was agreed that no further action should be taken on this suggestion.

Rule 55(b): Partial Default Judgment: Dkt. 11-CV-A

This proposal arises from a case that included requests for declaratory, injunctive, and damages relief on a trademark. The defendant defaulted. The apparent premise is that the clerk is authorized to enter a default judgment granting injunctive and declaratory relief, while the amount of damages must be determined by the court. And the wish is for a way to make final the judgment for declaratory and injunctive relief, in the expectation that if the defendant does not take a timely appeal the plaintiff may decide to abandon the request for damages rather than attempt to prove them. The problem is that Rule 55(b)(1) allows the clerk to enter judgment only if the claim is for a sum certain or a sum that can be made certain by computation. The court must act on a request for declaratory or injunctive relief. Since it is the court that must act, the court has whatever authority is conferred by Rule 54(b) to enter a partial final judgment. Since Rule 54(b) requires finality as to at least a "claim," there may be real difficulty in arguing that the request for damages is a claim separate from the claim for specific relief. But that question is addressed by the present rule and an ample body of precedent.

It was concluded without further discussion that this suggestion should not be considered further.

New Rule 33(e): 11-CV-B

This suggestion would add a new Rule 33(e) that would embody specific language for an interrogatory that would not count against the presumptive limit of 25 interrogatories and that would ask for detailed specific information about the grounds for failing to respond to any request for admission with an "unqualified admission." The suggestion is drawn from California practice.

Brief discussion suggested that adopting specific interrogatory language in Rule 33 seems to fit poorly with the current proposal to abrogate Rule 84 and all of the official forms that depend on Rule 84. Apart from that, there are always risks in choosing any specific language.

The Committee decided to remove this proposal from the docket.

Rule 8: Pleading: Dkt. 11-CV-H

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This proposal would amend Rule 8 to establish a general format for a complaint. There should be a brief summary of the case, not to exceed 200 words; allegations of jurisdiction; the names of plaintiffs and defendants; "alleged acts and omissions of the parties, with times and places"; "alleged law regarding the facts"; and "the civil remedy or criminal relief requested."

Pleading has been on the Committee agenda since 1993. The Twombly and Iqbal cases, and reactions to them, brought it to the forefront. Active consideration has yielded to review of empirical studies, particularly those done by the Federal Judicial Center, and to anticipation of another Federal Judicial Center study that remains ongoing. There has been a growing general sense that pleading practice has evolved to a nearly mature state under the Twombly and Iqbal decisions. The time may come relatively soon to decide whether there is any role that might profitably be played by attempting to formulate rules amendments that might either embrace current practice or attempt to revise it.

The Committee concluded that the time to take up pleading standards has not yet come, and that this specific proposal does not deserve further consideration.

Rule 15(a)(1): Dkt. 10-CV-E, F

These proposals, submitted by the same person, address the time set by Rule 15(a)(1) for amending once as a matter of course a pleading to which a responsive pleading is required. The present rule allows 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier. The concern is that the time to file a motion may be extended. The nature of the concern is not entirely clear, since the time to amend runs from actual service. The initial proposal sets the cutoff at 21 days before the time to respond to any of the listed Rule 12 motions. The revised proposal sets the cutoff at 21 days after the time to respond after service of one of the Rule 12 motions.

It was agreed that no action need be taken on this proposal

Rule 12(f): Motion to strike from motion: Dkt 10-CV-F

This proposal would expand the Rule 12(f) motion to strike to reach beyond striking matters from a pleading to include striking matters from a motion.

The Committee agreed that there is no apparent need to act on this proposal. It will be removed from the docket.

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Discovery Times: Dkt. 11-CV-C

This proposal, submitted by a pro se litigant, suggests extension of a vaguely described 28-day time limit to 35 days. It touches on the continuing concerns whether the rules should be adapted to make them more accessible to pro se litigants. Those concerns are familiar, and until now have been resolved by attempting to frame rules as good as can be drawn for implementation by professional lawyers. This proposal does not seem to provide any specific occasion to rethink that general position.

The Committee agreed that there is no need to act on this proposal. It will be removed from the docket.

e-Discovery: Dkts. 11-CV D, E, G, I

All of these docket items address questions that were thoroughly examined in preparing the discovery rules amendments that are now pending in the Supreme Court. They were carefully evaluated, and were often helpful, in that process. Only one issue was raised that was put aside in that work. That issue goes to "the current lack of guidance as to reasonable preservation conduct (and standards for sanctions) in the context of cross-border discovery for U.S. based litigation." That issue was found complex, difficult, and subject to evolving standards of privacy in other countries, particularly within the European Union. The time does not seem to have come to take it up.

The Committee agreed that there is no need to act further on these proposals. They will be removed from the docket.

Rule 23 Subcommittee

Judge Dow presented the report of the Rule 23 Subcommittee. The Subcommittee is in the stage of refining the agenda for deeper study of specific issues. All Subcommittee members appeared for a panel at the ABA National Class Action Institute in Chicago on October 23 to seek input on the subjects that might be usefully concluded in ongoing work. It was emphasized at the outset that the first question is whether it is now possible to undertake changes that promise more good than harm. Many interesting suggestions were advanced and will be considered.

The Appellate Rules Committee is considering proposals to address the problems of settlement pending appeal by class-action objectors. The Subcommittee will continue working with the Appellate Rules Committee in refining those efforts.

A miniconference will be planned for some time in 2015.

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It may prove too ambitious to attempt to present draft proposals for discussion in 2015. The target is to present polished proposals for discussion in the spring meeting in 2016.

The Chicago discussions helped to give a better sense that some potential problems "are not real, or are evolving in ways that may thwart any opportunity for present improvement."

One broad category of issues surround settlement classes. Not even Arthur Miller could have predicted in 1966 what could emerge as settlement-class practices. The questions include the criteria for certifying a settlement class as compared to certification of a trial class, and whether the rule text should include specific criteria for evaluating a settlement.

Cy pres recoveries have generated a lot of interest. A conference of MDL judges this week prompted many questions on this topic.

The Chicago discussion also reflected widespread objections to objectors among lawyers who represent plaintiffs, lawyers who represent defendants, and academics.

Discussions of notice requirements regularly raise questions whether more efficient and effective notice can be accomplished by electronic means.

And there has been a lot of attention to issues classes, and the relationship between Rule 23(c)(4) and Rule 23(b)(3).

Beyond these front-burner issues, a few side-burner issues remain open. Can anything be done to address consideration of the merits at the certification stage? There has been a lot of concern about the newly emerging criterion of the "ascertainability" of class membership, focused by recent Third Circuit decisions. The use of Rule 68 offers of judgment to moot individual representatives has prompted a practice that may be specific to the Seventh Circuit's views — plaintiffs file a motion for certification with the complaint to forestall a Rule 68 offer designed to moot the representatives, and then ask that consideration of the motion be deferred. Courts in the Seventh Circuit work around the problem; perhaps it need not be addressed in the rules.

What other questions might offer promising opportunities for consideration? What is missing from this tentative set of issues?

Professor Marcus noted that the work will either desist, or will proceed down the paths that seem promising. It is important to

identify those paths now, because it becomes increasingly difficult to forge off in new directions after traveling a good way along the paths initially chosen.

The Administrative Office will establish some form of repository to gather and retain suggestions from all sources.

A Subcommittee member suggested that the ABA group showed a good bit of agreement that it will be useful to consider objectors, notice, and settlements. There is a lot of disagreement on other issues.

A Committee member suggested that settlement-class issues are difficult. We know that the standard for certification is different, but we do not know how or why.

This suggestion was followed by the observation that one set of settlement issues goes to how many criteria for reviewing a proposed settlement might be written into the rule. Another goes to certification criteria, a question addressed by advancing and then withdrawing a "Rule 26(b)(4)" settlement-class provision in 1996. A Federal Judicial Center study undertaken after the Amchem decision asked whether settlement classes had been impeded. Settlement classes seem to continue, but there may be complicated relationships to the continually growing number of MDL consolidations.

Another Subcommittee member noted that settlement-class issues had presented real challenges to the ALI Principles of Aggregate Litigation work, but that they managed to work through to unanimous agreement.

Another suggestion was that partial settlements should be part of the process. In MDL consolidations, some defendants settle on a class basis. Does that pre-decide class certification as to other defendants? Some settlements include a most-favored-nations clause that expands the definition of the class with respect to the settling defendant upon each successive settlement with another defendant.

A new issue was suggested by the observation that the 14-day time limit to seek permission for an interlocutory appeal under Rule 23(f) is not long enough for the Department of Justice. The rule should be amended to provide a longer period in cases that include the United States (etc.) as a party.

The question of cy pres settlements came on for discussion. The issues include the perception that an increasing number of cases settle on terms that provide only cy pres recovery; other

cases where cy pres recovery is a significant part of the original settlement terms; and still others where cy pres recovery is provided only for a residuum of funds that cannot be effectively distributed to class members. Another issue asks whether the recipient of a cy pres award should be closely aligned in interest with the class members. Cy pres seems a useful option. Some defendants like it because it supports a fixed dollar limit on liability, and a way to distribute the dollars.

The ALI proposal on cy pres recovery is linked to the proposal on settlement classes. The Principles collapse the criteria for reviewing a proposed settlement from the 14 or 16 factors that can be identified in the cases to a shorter, more manageable number. For certification, they establish that there is no need to consider either manageability (as recognized in the Amchem decision) or predominance. The Principles that address cy pres recovery have been more often cited and relied on by courts than any other of the Principles. They establish an order of preference: first, distribute to as many class members as possible; second, if funds remain, make a second distribution to class members who have already participated in the first distribution; and finally, when that is exhausted, try to distribute to a recipient that is closely aligned with class interests.

The ALI cy pres provisions were said to have gained traction in the early going. "But there are problems with views of what class actions are designed to do." Different states have different policies. California, with its civil-law heritage, is predisposed to embrace cy pres awards more eagerly than most states.

A related suggestion was made: it is important to seek real value through the claims process. The defendant may have an incentive to have undistributed settlement funds revert to the defendant. Cy pres recovery can address that.

California practice provides a means of avoiding review of cy pres recipients by approving distribution of unclaimed settlement funds to Legal Aid. "There is a cycle that relates cy pres to the question of undistributed funds." And this ties to settlement review: will the defendant actually wind up paying what seems to be a fair amount, or will the fair amount provided by the overall figure be diminished by reversion to the defendant. There can be a surprise surplus. But usually that is dealt with in the settlement agreement. And it can be resolved in proceedings to approve the settlement. But there may be a growing problem when, in response to increasing uneasiness about cy pres recoveries, the parties seek to avoid the issue by not addressing cy pres in the settlement terms. There may, moreover, be suits in which only a group remedy is appropriate — it may be enough that the amount is fair, reasonable,

and adequate even though none of it goes to individual class members.

Cy pres recoveries also figure in determining attorney fees. The question is whether cy pres distributions should be counted in the same way as actual distributions to class members.

It was urged that cy pres issues can be profitably addressed through rules amendments.

An observer suggested that cy pres practices depend on the jurisdiction. It is common to address cy pres recovery in general terms in the settlement, but delaying identification of the recipient until distribution to class members has been accomplished. This is appropriate because the choice of recipient may depend on how much money is left for cy pres distribution.

Turning to objectors, it was asked whether there is "a bar of objectors." If there is, the Committee should learn their views before framing rules for objections. A response was that there are objectors who seek to improve the settlement, and to gain a share of the fee in return, while other objectors act for principle — Public Citizen is an example. We do not want to discourage useful objections. It was noted again that the Appellate Rules Committee has been considering the subset of issues that arise from settlement with an objector pending appeal. That work included hearing from two professors "who had different views." No objectors appeared at that meeting. It also was noted that the 2013 ABA National Institute had a panel that featured a "repeat objector."

An observer suggested that the question of awarding damages incident to a (b)(2) class deserves consideration. Rule 23(b)(2) is a perfect vehicle for certifying low-dollar consumer claims, but it is tied to "equitable relief. There is no real reason to maintain this tie to equity. Due process is satisfied by adequate representation. We could establish a mandatory class without the cost of notice. The origins of class actions are very practically oriented."

A response noted that a professor at the recent ABA National Institute said that she would be making suggestions on other (b)(2) issues. The question of the "ascertainability" of class membership ties to this. The Carrera case in the Third Circuit is an illustration of small-stakes consumer classes. But it should be remembered that (b)(2) speaks of injunctive relief or corresponding declaratory relief, not equity. It can be invoked for traditional legal claims. A further response suggested that due process may require notice and an opportunity to opt out when money damages are at issue. But the observer rejoined that the Committee should study

this question — he believes that due process allows a no opt-out class, and that individual notice can be discarded when there is no opportunity to act on it by opting out.

A look to the past recalled that in 2001 the Committee proposed mandatory notice for (b)(1) and (b)(2) classes, but retreated in face of protests that the cost would defeat some potential civil-rights actions before they are even brought. But the ABA National Institute reflected the growing sense that due process may allow notice by social media and other internet means that work better, at lower cost, than mail or newspaper publication. "Perhaps we should remember there are a lot of balls in the air."

Judge Campbell expressed thanks to the Subcommittee for its ongoing work.

Pilot Projects

Judge Campbell opened the discussion of pilot projects by praising the panelists and papers at the Duke Conference for teaching many good lessons about current successes and failures of the Civil Rules. But these lessons were based on the experience of the participants more often than solid empirical measurement. And some empirical work that looks good still may not be complete enough to support heavy reliance. Carefully structured pilot projects may be a better means of providing information. The employment protocols are a good example. So what would a pilot project look like if it is to provide reliable information?

Emery Lee began by observing that "'Data' is a plural that we use a lot. No one uses 'datum.' A datum is a piece of information. Data are plural pieces of information." What we need to do is to organize pieces of information into useful information. That task has to be addressed during the design phase of a project. The first question is what information can be collected that will be helpful in considering reforms? What will the end product look like? What are the questions to be answered? It can be important to enlist the help of the Federal Judicial Center at this initial point. "Call me. I can get the ball rolling."

Lee further observed that he met with some of the architects of the SDNY Complex Case pilot project at its inception. That is helpful. For the Seventh Circuit e-discovery project, the FJC did two surveys. "Judges always evaluate a program higher than the attorneys do." The world is complicated. Attorneys see a lot more of the case than the judges see. And "parties have interests. Cases that go to trial are weird cases — someone does not want to settle." And a pilot project cannot address differences that arise

from the level of litigation resources available to the parties. Nor can a pilot project tamper with the law.

Surveys can be a really useful way of gathering information. But the FJC has become concerned that too many surveys from too many sources may have worn out the collective welcome, partciularly from judges. "Surveys will be dead in 10 years. No one wants to respond."

Docket-level data are available in employment cases. That may provide a secure foundation for evaluating the employment protocols.

Turning to pilot projects, the first question was whether they should be voluntary. If parties have a choice whether to participate on the experimental side of the project, is there a risk that self-selection will skew the results? But if cases are assigned on a random but mandatory basis, is the implementation invalid whenever the terms of the pilot are inconsistent with the national rules?

Emery Lee replied that opt-out programs are a problem. IAALS did a survey of a Colorado program for managed litigation and found that parties represented by attorneys tended to opt out. So a large percentage of the cases involved in the first round wound up as defaults. And the lawyers opted out because they thought the program unattractive.

Judge Dow noted that there are 35 judges in the Northern District of Illinois. Many are dead set against cameras in the court room. But they agreed to participate in a pilot program "so we could be heard, not because we like it."

Another suggestion was that it is possible to imagine pilot programs on such things as cameras in the courtroom or initial disclosure. But is it possible to have a pilot that addresses "standards"? Emery Lee replied that it is possible to do empirical work on standards, but not in the form of a pilot project. It would take the form of comparing different regimes. And there are different problems. With the survey of final pretrial conferences, for example, the FJC found only a small number of cases that actually had final pretrial conferences. That makes it difficult to draw any sustainable conclusions.

A different form of research was brought into the discussion by asking whether interviews establish data? The FJC closed-case survey of discovery relied on interviews. Is it possible to get hard data? Emery Lee replied that the question can be viewed through the prism of Rule 1. It is easy to measure speed. So for

cost, it is easy enough to measure cost, and to measure costs incurred by different parties and in different types of cases. But how do you count "just"? "We can count motions filed. We can look at discovery disputes in a broad swath of discovery cases. We can compare protocol data with cases that do not use the protocol." But for other things, we need interviews. The greater the number of sources, the better. "Interviews can shed light on the numbers." In like fashion the Committee looks at the numbers and helps the researchers understand what the numbers mean, or may mean.

Judge Koeltl described three projects.

The employment discovery protocols developed out of the Duke Conference. A group of lawyers engaged for plaintiffs or for defendants in individual employment cases worked to define core discovery that should be provided automatically in every case. The protocol directs what information plaintiffs should provide to defendants, and what defendants should provide to plaintiffs, 30 days after the defendant files a response. For this initial stage there is no need for Rule 34 requests, or initial disclosures under Rule 26(a)(1). The Southern District of New York has mandatory mediation in employment cases; lawyers say the protocols are helpful for that. Some 14 judges in the District have adopted the protocol; nationwide, some 50 judges use it. It is hard to imagine a more attractive way of beginning an employment case than by providing automatic disclosure of information that otherwise will be dragged out through costly and time-consuming discovery. Judge Koeltl implements it by a uniform order entered in each case to which the protocols apply; that seems suitable. He has never had an objection. Some judges incorporate the protocols as part of their individual rules so that parties are aware of them and use the protocols in applicable cases.

SDNY also has a pilot project for § 1983 cases that involve false arrest, unreasonable use of force, unlawful searches, and the like. Mandatory disclosure of core discovery is required. The plaintiff is required to make a settlement demand and the defendant is required to respond. The case goes automatically to mediators; this ties to settlement. Either plaintiff or defendant can opt out of the program; parties often opt out in cases that are unlikely to settle. And judges can remove a case from the program, as may be done when they think a case will settle early. This program is established by local rule. 70% of the cases in the program have settled without any intervention by the assigned judge. It is not clear whether a judge can override a party’s choice to opt out of the program. Plaintiffs may opt out if they think the process takes too long. The City opts out when it takes the position that it will not settle a particular case.

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Finally, SDNY has a complex case pilot project. After the Duke Conference the Judicial Improvements Committee put together a set of best practices for complex cases. It was adopted by the court as a whole. It was designed to last for 18 months. It was renewed for an additional 18 months. Now it has met its sunset limit. But it is on the SDNY website, and the court has a resolution encouraging attorneys and judges to consider the best practices. "It covers all steps." There is a detailed checklist for what should be discussed at the parties' conferences. There is an e-discovery checklist. And a checklist for the pretrial conference itself. It includes a limit of 25 requests to admit, not counting requests to admit the genuineness of documents. Furthermore, a request to admit can be no longer than 20 words. There are procedures for motion conferences, and encouragement for oral argument on motions. The local rules call for a "Rule 56.1 statement" and a response in similar form, like the published but then withdrawn proposal to add a "point-counterpoint" procedure to Rule 56 itself. Some SDNY lawyers think the Rule 56.1 statement is more trouble than it is worth; so the best practices provide that the parties can ask the judge to let them dispense with this procedure. It has proved hard to define what is a complex action. Class actions are included, for example, in terms that reach collective actions under the Fair Labor Standards Act, but those cases are less complex than most class actions; some judges take FLSA cases out of the project

Thirty-six months is not a long time to study complex cases. It is hard to say that there has been enough experience to evaluate the best practices. "But there is a value in generating experiences to discuss even if their actual effect cannot be measured statistically." As a small and unrelated illustration, one judge of the court came back from a conference enthusiastic about what he had heard about the "struck juror" procedure for selecting a jury. "We tried it, and most of us came to prefer it even without any empirical data."

Judge Dow reported on the Seventh Circuit e-discovery project. All districts in the Circuit are covered. It is "an enormous, ongoing project." The first year recruited a few judges and magistrate judges to attempt to identify cases that would involve extensive e-discovery. The second phase drew in many more judges. The third phase is ongoing. The web site includes a lot of reports, and orders, and protocols. "This changed the culture in our Circuit." Great expertise in e-discovery has developed, especially among the magistrate judges. The early focus on complex cases helped. Judge Dow was led to introduce proportionality, aiming to first discover the important 20% of information as a basis for planning further discovery. One particularly successful idea is to require each side to appoint a "technology liaison." These technologists work together to solve problems, not to try to spin

problems to partisan advantage as lawyers do. Getting them in to deal with the judge as problem solvers has been a great change in culture. The program has anticipated many of the provisions in the discovery rules amendments that are now pending in the Supreme Court. "Judges love it. The lawyers do the work and may not love it as much. The culture change is very valuable." The work has been sustained by volunteers: all sorts of people "wanted in." A Committee member who has participated in some parts of developing the Seventh Circuit program, although he does not practice there, agreed. The initial work of drafting principles was done by volunteer lawyers — he was one of them. No cost was involved.

Discussion turned to more general approaches that might advance the cause of more effective procedure.

A historic note was sounded by quoting from an article by Charles Clark written in 1950, appearing a 12 F.R.D. 131. He noted that the 1938 Federal Rules, drawing from many sources, established a discovery regime more detailed and sweeping than anything that had been before. But he also noted that as of 1950, there was not yet any clear picture of its actual operation, not even in all experience and with 1948 surveys and interviews in five circuits. Nothing has really changed.

The Seventh Circuit pilot project was noted as something designed to enforce cooperation, to urge lawyers to work together and to authorize sanctions when they agree to the principles. This is of a piece with the current proposals to emphasize in Rule 1 that the parties are charged with construing and administering the rules to achieve the goals of Rule 1.

It also may be useful to expand the Seventh Circuit approach to technology liaisons by establishing a position for technology experts on court staffs. These experts could come to the help of parties who need it.

Other suggestions will be submitted for Committee consideration.

It was observed that there are categories of cases that may have discrete characteristics that yield to routinized discovery. Individual employment cases seem to have these characteristics. The same may be true of police-conduct cases under § 1983. But it should be asked how many more such categories of cases can be identified. It is not clear how many will fit this paradigm. It was agreed that the issue is to get plaintiffs and defendants to work together to establish a protocol acceptable on all sides. It has been suggested that employment class actions may be suitable, but work has not started. "It takes enthusiasm and impetus to bring

them together." It was suggested that other categories of cases that would be ideal candidates include actions under the Individuals with Disabilities Education Act and actions under the Fair Credit Reporting Act.

The nationwide pilot project for patent cases was noted. It was established by Congress, and is designed to last for 10 years. Without knowing a lot about it, it can be described as relying on designating judges who are willing to do patent cases, and providing them with training packages and model local rules that can be used as orders. But patent cases are still assigned at random; the assigned judge can transfer the case to a designated patent judge, but some assigned judges do not give up their cases. The idea of identifying judges who volunteer to learn and develop best practices is intriguing.

A judge asked how do you get buy-in from lawyers for experimental programs? The employment protocol experience was described as an example. The plaintiff side was led by Joseph Garrison, a past president of the National Employment Lawyers Association. The defense side was led by Chris Kitchel, the liaison from the American College of Trial Lawyers to the Civil Rules Committee. Encouragement was provided by Judges Kravitz, Rosenthal, and Koeltl. The IAALS promoted it. "It almost fell apart." It was like a labor negotiation, in which the sides took turns at walking out of the negotiations and then returning to the table. The judges who were involved then actively promoted the protocols in their own courts.

A judge suggested that many judges revel in being generalists, and believe that they can do anything. Programs to provide special training to some judges may not work if they depend on voluntary transfer by judges who draw cases by random selection. But it was noted that one benefit of the pilot project for patent cases is that the specialized judges become a resource for other judges on the same court.

The IAALS is tracking innovative practices in the states, mostly innovations in discovery. Their report will be available for consideration at the April meeting.

Discovery problems may be affected by the observation offered by many participants at the Duke Conference. "We live in a discovery-centered world." Lawyers do not ask — indeed, too often do not know how to ask — for information that will be needed at trial. They think about, and get paid for, vast discovery. Criminal trials without discovery of this kind seem to be just as effective as civil trials, at about a tenth of the cost. "Surely there must be cases where the parties want trial." But an experiment to test

this failed. In every case this judge offered a trial within 4 months, with minimal or no discovery and no motions for summary judgment. The order directed the lawyers to discuss this option with their clients, and to provide a budget for proceeding with this option and an alternative budget for proceeding without taking it up. The experiment was abandoned after using the order in more than 1,100 cases. The option was picked up in 3 cases, and then rejected within a week in one of them. Neither of the other 2 went to trial. "How is it that we have come to depend so much on discovery"?

It was noted that the same fate had met the expedited trial project in the Northern District of California. It died for want of takers. And it was wondered whether perhaps these outcomes could be changed by getting "buy-in" from insurers who bear the costs of defending.

A judge suggested that "lawyers are trained to do discovery, and get paid for it. It has got to the point of too much."

Another judge observed that "we don't have a chance to talk to the clients. Should I require them to come to the Rule 16 conference? If not to require attendance, to invite them"?

Another observation was that most young lawyers to not get any training in trial, unlike earlier days when many were given many small trials to develop trial competence.

The comparison to criminal cases was taken up by the observation that the prosecution has "discovery" through investigators and then a grand jury. Some or all of this information makes its way to the defendant at some point. And criminal lawyers have more trial experience. Together, these phenomena may help to explain the relative success of criminal trials as compared to civil trials that follow vast civil discovery. But another judge countered that federal prosecutors on average try less than one case per year per lawyer in the office. On the state side, however, there are trials in low-dollar, low-significance cases. A young lawyer who wants trial experience can go to a district attorney's office, or a solicitor's office for misdemeanor cases, or a 2-person personal injury firm trying low-dollar cases.

A lawyer suggested that it is premature to despair of expedited trial programs. In MDL cases there are bellwether trials that are expensive and protracted, in part because they are symbolic. But the post-bellwether trials tend to be much more compact; they can be tried in a few days or even hours.

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These problems will continue to be part of the Committee agenda.

Pending Rules Amendments

Important amendments are now pending in the Supreme Court. If the Court decides to adopt them, and if Congress allows them to proceed, they will go into effect on December 1, 2015. "We as a Committee should try to spearhead an effort to get word out about what they are intended to do, and what not."

Judge Fogel has brought the Federal Judicial Center on board with efforts to educate judges in the new rules should they take effect. Experience shows that simply adopting new rules does not automatically transfer into prompt implementation in practice.

Beyond FJC programs aimed at judges, the word can be got out through conferences, articles, and related efforts. Circuit conferences seem to be reviving — they would be a good focus. Inns of Court will be another good forum. A prepared packet of materials for use by these and other groups, such as Federal Bar Associations, could be useful.

An observer noted that programs are already being offered to explore the proposed amendments. She attended one in which discovery hypotheticals were presented to magistrate judges with arguments on both sides. The judges then addressed the outcome under present rules and under the proposed rules. It was effective.

Once it becomes clear that the proposed rules will go into effect — a desirable outcome that cannot be presumed — the Administrative Office may find some role to play in getting out the word.

Subcommittee Projects

Judge Campbell noted ongoing Subcommittee work in addition to the Rule 23 Subcommittee.

The Appellate and Civil Rules Committees have formed a joint subcommittee to explore two topics. Judge Matheson and Virginia Seitz are the Civil Rules members. The Subcommittee will study manufactured finality devices that are treated differently by the circuits. It also will study a number of problems that seem to affect stays and appeal bonds under Rule 62.

The Discovery Subcommittee will begin work on a proposal that it expand the use of "requester pays" in discovery.

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Future Meetings

The next meeting will be on April 9-10, 2015, at the Administrative Office. The fall meeting will be at the University of Utah Law School.

Respectfully submitted,

Edward H. Cooper
Reporter

January 5, 2015

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Item 3 will be an oral report.

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Patent Legislation

Congress continues to study patent litigation. A reform bill passed in the House during the 113th Congress. H.R. 9, the "Innovation Act," has been introduced in the 114th Congress by Representative Goodlatte, with several cosponsors. Section 3 includes many provisions that bear on procedure in patent actions, including pleading, joinder of parties, and discovery. The discovery provisions, § 3(d), would add a new § 299A to the Patent Code, staging discovery to begin with matters relevant to claim interpretation if the court finds that construction of the claims is required. Section 4(b)requires initial disclosure to the Patent and Trademark Office, the court, and the parties of information identifying those who have authority to enforce the patent or a financial interest in the patent. Section 5 contains an elaborate provision for staying an action against a "covered customer" if the "covered manufacturer" is a party to the action or to another action involving the same patent.

Section 6 is of particular interest to the rules committees. Section 6(a)(1) directs the Judicial Conference, "using existing resources," to "develop rules and procedures to implement the issues and proposals described in paragraph (2) to address the asymmetries in discovery burdens and costs in" patent litigation. "Such rules and procedures shall include how and when payment for document discovery in addition to the discovery of core documentary evidence is to occur, and what information must be presented to demonstrate financial capacity before permitting document discovery in addition to the discovery of core documentary evidence."

Section 6(a)(2) begins: "The rules and procedures required under paragraph (1) should address each of the following issues and proposals:" What follows runs from pages 27 to 35 of the bill. The matters to be addressed in rulemaking include, among other things, providing "core documentary evidence" at the expense of the producing party (page 27); a requirement that discovery of ESI be specific and include the identies of specific custodians and search terms and be limited to 5 custodians, subject to expansion on court order or an undertaking by the requesting party to pay the costs of discovery from additional custodians, and a behest that the parties cooperate in identifying the proper custodians and time frame (page 28); a requirement that the requesting party pay the reasonable costs, including attorney fees, of document discovery beyond core documents, and that the requesting party post a bond or other security (or shows financial capacity to pay) before obtaining the additional requested documents (page 29). Unlike some earlier bills, H.R. 9 does not set a deadline for adopting these rules. But § 6(a)(4) directs "Not later than 6 months after the date on which the Judicial Conference has developed the rules and procedures required by this subsection, each United States District Court and the United States Court of Federal Claims shall revise the applicable local rules for such court to implement such rules and

procedures."

Section 6(b) directs the Judicial Conference to "develop case management procedures" for patent actions, "including initial disclosure and early case management conference practices" to identify potential dispositive issues and "focus on early summary judgment motions when resolution of issues may lead to expedited disposition of the case."

The views of Committee members on these proposals may prove helpful if the Committee is afforded an opportunity to comment on the proposed legislation. Committee study of these provisions will also be helpful in preparing to be ready to participate in the work that will become necessary if H.R. 9 or similar legislation is enacted. There is a lot in these provisions. Focus on Section 6(a) may be most important for now.

[113EH3309]

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(Original Signature of Member)

114TH CONGRESS
1ST SESSION

H. R. _____

To amend title 35, United States Code, and the Leahy-Smith America Invents Act to make improvements and technical corrections, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

Mr. GOODLATTE (for himself, Mr. DEFAZIO, Mr. ISSA, Mr. NADLER, Mr. SMITH of Texas, Ms. LOFGREN, Mr. CHABOT, Ms. ESHOO, Mr. FORBES, Mr. PIERLUISI, Mr. CHAFFETZ, Mr. JEFFRIES, Mr. MARINO, Mr. FARENTHOLD, Mr. HOLDING, Mr. JOHNSON of Ohio, Mr. HUFFMAN, Mr. HONDA, and Mr. LARSEN of Washington) introduced the following bill; which was referred to the Committee on _____

A BILL

To amend title 35, United States Code, and the Leahy-Smith America Invents Act to make improvements and technical corrections, and for other purposes.

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

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the ''Innovation Act''.

(b) TABLE OF CONTENTS.—The table of contents for this Act is as follows:

Sec. 1. Short title; table of contents.
Sec. 2. Definitions.
Sec. 3. Patent infringement actions.
Sec. 4. Transparency of patent ownership.
Sec. 5. Customer-suit exception.
Sec. 6. Procedures and practices to implement recommendations of the Judicial Conference.
Sec. 7. Small business education, outreach, and information access.
Sec. 8. Studies on patent transactions, quality, and examination.
Sec. 9. Improvements and technical corrections to the Leahy-Smith America Invents Act.
Sec. 10. Effective date.

SEC. 2. DEFINITIONS.

In this Act:

(1) DIRECTOR.—The term ''Director'' means the Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office.

(2) OFFICE.—The term ''Office'' means the United States Patent and Trademark Office.

SEC. 3. PATENT INFRINGEMENT ACTIONS.

(a) PLEADING REQUIREMENTS.—

(1) AMENDMENT.—Chapter 29 of title 35, United States Code, is amended by inserting after section 281 the following:

''§ 281A. Pleading requirements for patent infringement actions

''(a) PLEADING REQUIREMENTS.—Except as provided in subsection (b), in a civil action in which a party asserts a claim for relief arising under any Act of Con-

gress relating to patents, a party alleging infringement shall include in the initial complaint, counterclaim, or cross-claim for patent infringement, unless the information is not reasonably accessible to such party, the following:

''(1) An identification of each patent allegedly infringed.

''(2) An identification of each claim of each patent identified under paragraph (1) that is allegedly infringed.

''(3) For each claim identified under paragraph (2), an identification of each accused process, machine, manufacture, or composition of matter (referred to in this section as an 'accused instrumentality') alleged to infringe the claim.

''(4) For each accused instrumentality identified under paragraph (3), an identification with particularity, if known, of—

''(A) the name or model number of each accused instrumentality; or

''(B) if there is no name or model number, a description of each accused instrumentality.

''(5) For each accused instrumentality identified under paragraph (3), a clear and concise statement of—

"(A) where each element of each claim identified under paragraph (2) is found within the accused instrumentality; and

"(B) with detailed specificity, how each limitation of each claim identified under paragraph (2) is met by the accused instrumentality.

"(6) For each claim of indirect infringement, a description of the acts of the alleged indirect infringer that contribute to or are inducing the direct infringement.

"(7) A description of the authority of the party alleging infringement to assert each patent identified under paragraph (1) and of the grounds for the court's jurisdiction.

"(8) A clear and concise description of the principal business, if any, of the party alleging infringement.

"(9) A list of each complaint filed, of which the party alleging infringement has knowledge, that asserts or asserted any of the patents identified under paragraph (1).

"(10) For each patent identified under paragraph (1), whether a standard-setting body has specifically declared such patent to be essential, poten-

tially essential, or having potential to become essential to that standard-setting body, and whether the United States Government or a foreign government has imposed specific licensing requirements with respect to such patent.

''(b) INFORMATION NOT READILY ACCESSIBLE.—If information required to be disclosed under subsection (a) is not readily accessible to a party, that information may instead be generally described, along with an explanation of why such undisclosed information was not readily accessible, and of any efforts made by such party to access such information.

''(c) CONFIDENTIAL INFORMATION.—A party required to disclose information described under subsection (a) may file, under seal, information believed to be confidential, with a motion setting forth good cause for such sealing. If such motion is denied by the court, the party may seek to file an amended complaint.

''(d) EXEMPTION.—A civil action that includes a claim for relief arising under section 271(e)(2) shall not be subject to the requirements of subsection (a).''.

(2) CONFORMING AMENDMENT.—The table of sections for chapter 29 of title 35, United States Code, is amended by inserting after the item relating to section 281 the following new item:

''281A. Pleading requirements for patent infringement actions.''.

(b) FEES AND OTHER EXPENSES.—

(1) AMENDMENT.—Section 285 of title 35, United States Code, is amended to read as follows:

"§ 285. Fees and other expenses

''(a) AWARD.—The court shall award, to a prevailing party, reasonable fees and other expenses incurred by that party in connection with a civil action in which any party asserts a claim for relief arising under any Act of Congress relating to patents, unless the court finds that the position and conduct of the nonprevailing party or parties were reasonably justified in law and fact or that special circumstances (such as severe economic hardship to a named inventor) make an award unjust.

''(b) CERTIFICATION AND RECOVERY.—Upon motion of any party to the action, the court shall require another party to the action to certify whether or not the other party will be able to pay an award of fees and other expenses if such an award is made under subsection (a). If a nonprevailing party is unable to pay an award that is made against it under subsection (a), the court may make a party that has been joined under section 299(d) with respect to such party liable for the unsatisfied portion of the award.

''(c) COVENANT NOT TO SUE.—A party to a civil action that asserts a claim for relief arising under any Act

of Congress relating to patents against another party, and that subsequently unilaterally extends to such other party a covenant not to sue for infringement with respect to the patent or patents at issue, shall be deemed to be a nonprevailing party (and the other party the prevailing party) for purposes of this section, unless the party asserting such claim would have been entitled, at the time that such covenant was extended, to voluntarily dismiss the action or claim without a court order under Rule 41 of the Federal Rules of Civil Procedure.''.

(2) CONFORMING AMENDMENT AND AMENDMENT.—

(A) CONFORMING AMENDMENT.—The item relating to section 285 of the table of sections for chapter 29 of title 35, United States Code, is amended to read as follows:

''285. Fees and other expenses.''.

(B) AMENDMENT.—Section 273 of title 35, United States Code, is amended by striking subsections (f) and (g).

(3) EFFECTIVE DATE.—The amendments made by this subsection shall take effect on the date of the enactment of this Act and shall apply to any action for which a complaint is filed on or after the first day of the 6-month period ending on that effective date.

(c) JOINDER OF INTERESTED PARTIES.—Section 299 of title 35, United States Code, is amended by adding at the end the following new subsection:

''(d) JOINDER OF INTERESTED PARTIES.—

''(1) JOINDER.—In a civil action arising under any Act of Congress relating to patents in which fees and other expenses have been awarded under section 285 to a prevailing party defending against an allegation of infringement of a patent claim, and in which the nonprevailing party alleging infringement is unable to pay the award of fees and other expenses, the court shall grant a motion by the prevailing party to join an interested party if such prevailing party shows that the nonprevailing party has no substantial interest in the subject matter at issue other than asserting such patent claim in litigation.

''(2) LIMITATION ON JOINDER.—

''(A) DISCRETIONARY DENIAL OF MOTION.—The court may deny a motion to join an interested party under paragraph (1) if—

''(i) the interested party is not subject to service of process; or

''(ii) joinder under paragraph (1) would deprive the court of subject matter jurisdiction or make venue improper.

"(B) REQUIRED DENIAL OF MOTION.—The court shall deny a motion to join an interested party under paragraph (1) if—

"(i) the interested party did not timely receive the notice required by paragraph (3); or

"(ii) within 30 days after receiving the notice required by paragraph (3), the interested party renounces, in writing and with notice to the court and the parties to the action, any ownership, right, or direct financial interest (as described in paragraph (4)) that the interested party has in the patent or patents at issue.

"(3) NOTICE REQUIREMENT.—An interested party may not be joined under paragraph (1) unless it has been provided actual notice, within 30 days after the date on which it has been identified in the initial disclosure provided under section 290(b), that it has been so identified and that such party may therefore be an interested party subject to joinder under this subsection. Such notice shall be provided by the party who subsequently moves to join the interested party under paragraph (1), and shall include language that—

"(A) identifies the action, the parties thereto, the patent or patents at issue, and the pleading or other paper that identified the party under section 290(b); and

"(B) informs the party that it may be joined in the action and made subject to paying an award of fees and other expenses under section 285(b) if—

"(i) fees and other expenses are awarded in the action against the party alleging infringement of the patent or patents at issue under section 285(a);

"(ii) the party alleging infringement is unable to pay the award of fees and other expenses;

"(iii) the party receiving notice under this paragraph is determined by the court to be an interested party; and

"(iv) the party receiving notice under this paragraph has not, within 30 days after receiving such notice, renounced in writing, and with notice to the court and the parties to the action, any ownership, right, or direct financial interest (as described in paragraph (4)) that the inter-

ested party has in the patent or patents at issue.

"(4) INTERESTED PARTY DEFINED.—In this subsection, the term 'interested party' means a person, other than the party alleging infringement, that—

"(A) is an assignee of the patent or patents at issue;

"(B) has a right, including a contingent right, to enforce or sublicense the patent or patents at issue; or

"(C) has a direct financial interest in the patent or patents at issue, including the right to any part of an award of damages or any part of licensing revenue, except that a person with a direct financial interest does not include—

"(i) an attorney or law firm providing legal representation in the civil action described in paragraph (1) if the sole basis for the financial interest of the attorney or law firm in the patent or patents at issue arises from the attorney or law firm's receipt of compensation reasonably related to the provision of the legal representation; or

''(ii) a person whose sole financial interest in the patent or patents at issue is ownership of an equity interest in the party alleging infringement, unless such person also has the right or ability to influence, direct, or control the civil action.''.

(d) DISCOVERY LIMITS.—

(1) AMENDMENT.—Chapter 29 of title 35, United States Code, is amended by adding at the end the following new section:

''§ 299A. Discovery in patent infringement action

''(a) DISCOVERY IN PATENT INFRINGEMENT ACTION.—Except as provided in subsections (b) and (c), in a civil action arising under any Act of Congress relating to patents, if the court determines that a ruling relating to the construction of terms used in a patent claim asserted in the complaint is required, discovery shall be limited, until such ruling is issued, to information necessary for the court to determine the meaning of the terms used in the patent claim, including any interpretation of those terms used to support the claim of infringement.

''(b) DISCRETION TO EXPAND SCOPE OF DISCOVERY.—

''(1) TIMELY RESOLUTION OF ACTIONS.—In the case of an action under any provision of Federal law

(including an action that includes a claim for relief arising under section 271(e)), for which resolution within a specified period of time of a civil action arising under any Act of Congress relating to patents will necessarily affect the rights of a party with respect to the patent, the court shall permit discovery, in addition to the discovery authorized under subsection (a), before the ruling described in subsection (a) is issued as necessary to ensure timely resolution of the action.

''(2) RESOLUTION OF MOTIONS.—When necessary to resolve a motion properly raised by a party before a ruling relating to the construction of terms described in subsection (a) is issued, the court may allow limited discovery in addition to the discovery authorized under subsection (a) as necessary to resolve the motion.

''(3) SPECIAL CIRCUMSTANCES.—In special circumstances that would make denial of discovery a manifest injustice, the court may permit discovery, in addition to the discovery authorized under subsection (a), as necessary to prevent the manifest injustice.

''(4) ACTIONS SEEKING RELIEF BASED ON COMPETITIVE HARM.—The limitation on discovery pro-

vided under subsection (a) shall not apply to an action seeking a preliminary injunction to redress harm arising from the use, sale, or offer for sale of any allegedly infringing instrumentality that competes with a product sold or offered for sale, or a process used in manufacture, by a party alleging infringement.

''(c) EXCLUSION FROM DISCOVERY LIMITATION.—The parties may voluntarily consent to be excluded, in whole or in part, from the limitation on discovery provided under subsection (a) if at least one plaintiff and one defendant enter into a signed stipulation, to be filed with and signed by the court. With regard to any discovery excluded from the requirements of subsection (a) under the signed stipulation, with respect to such parties, such discovery shall proceed according to the Federal Rules of Civil Procedure.''.

(2) CONFORMING AMENDMENT.—The table of sections for chapter 29 of title 35, United States Code, is amended by adding at the end the following new item:

''299A. Discovery in patent infringement action.''.

(e) SENSE OF CONGRESS.—It is the sense of Congress that it is an abuse of the patent system and against public policy for a party to send out purposely evasive demand letters to end users alleging patent infringement.

Demand letters sent should, at the least, include basic information about the patent in question, what is being infringed, and how it is being infringed. Any actions or litigation that stem from these types of purposely evasive demand letters to end users should be considered a fraudulent or deceptive practice and an exceptional circumstance when considering whether the litigation is abusive.

(f) DEMAND LETTERS.—Section 284 of title 35, United States Code, is amended—

(1) in the first undesignated paragraph, by striking ''Upon finding'' and inserting ''(a) IN GENERAL.—Upon finding'';

(2) in the second undesignated paragraph, by striking ''When the damages'' and inserting ''(b) ASSESSMENT BY COURT; TREBLE DAMAGES.—When the damages'';

(3) by inserting after subsection (b), as designated by paragraph (2) of this subsection, the following:

''(c) WILLFUL INFRINGEMENT.—A claimant seeking to establish willful infringement may not rely on evidence of pre-suit notification of infringement unless that notification identifies with particularity the asserted patent, identifies the product or process accused, identifies the ultimate parent entity of the claimant, and explains with

particularity, to the extent possible following a reasonable investigation or inquiry, how the product or process infringes one or more claims of the patent.''; and

(4) in the last undesignated paragraph, by striking ''The court'' and inserting ''(d) EXPERT TESTIMONY.—The court''.

(g) EFFECTIVE DATE.—Except as otherwise provided in this section, the amendments made by this section shall take effect on the date of the enactment of this Act and shall apply to any action for which a complaint is filed on or after that date.

SEC. 4. TRANSPARENCY OF PATENT OWNERSHIP.

(a) AMENDMENTS.—Section 290 of title 35, United States Code, is amended—

(1) in the heading, by striking ''**suits**'' and inserting ''**suits; disclosure of interests**'';

(2) by striking ''The clerks'' and inserting ''(a) NOTICE OF PATENT SUITS.—The clerks''; and

(3) by adding at the end the following new subsections:

''(b) INITIAL DISCLOSURE.—

''(1) IN GENERAL.—Except as provided in paragraph (2), upon the filing of an initial complaint for patent infringement, the plaintiff shall disclose to the Patent and Trademark Office, the court, and

each adverse party the identity of each of the following:

"(A) The assignee of the patent or patents at issue.

"(B) Any entity with a right to sublicense or enforce the patent or patents at issue.

"(C) Any entity, other than the plaintiff, that the plaintiff knows to have a financial interest in the patent or patents at issue or the plaintiff.

"(D) The ultimate parent entity of any assignee identified under subparagraph (A) and any entity identified under subparagraph (B) or (C).

"(2) EXEMPTION.—The requirements of paragraph (1) shall not apply with respect to a civil action filed under subsection (a) that includes a cause of action described under section 271(e)(2).

"(c) DISCLOSURE COMPLIANCE.—

"(1) PUBLICLY TRADED.—For purposes of subsection (b)(1)(C), if the financial interest is held by a corporation traded on a public stock exchange, an identification of the name of the corporation and the public exchange listing shall satisfy the disclosure requirement.

''(2) NOT PUBLICLY TRADED.—For purposes of subsection (b)(1)(C), if the financial interest is not held by a publicly traded corporation, the disclosure shall satisfy the disclosure requirement if the information identifies—

''(A) in the case of a partnership, the name of the partnership and the name and correspondence address of each partner or other entity that holds more than a 5-percent share of that partnership;

''(B) in the case of a corporation, the name of the corporation, the location of incorporation, the address of the principal place of business, and the name of each officer of the corporation; and

''(C) for each individual, the name and correspondence address of that individual.

''(d) ONGOING DUTY OF DISCLOSURE TO THE PATENT AND TRADEMARK OFFICE.—

''(1) IN GENERAL.—A plaintiff required to submit information under subsection (b) or a subsequent owner of the patent or patents at issue shall, not later than 90 days after any change in the assignee of the patent or patents at issue or an entity described under subparagraph (B) or (D) of sub-

section (b)(1), submit to the Patent and Trademark Office the updated identification of such assignee or entity.

''(2) FAILURE TO COMPLY.—With respect to a patent for which the requirement of paragraph (1) has not been met—

''(A) the plaintiff or subsequent owner shall not be entitled to recover reasonable fees and other expenses under section 285 or increased damages under section 284 with respect to infringing activities taking place during any period of noncompliance with paragraph (1), unless the denial of such damages or fees would be manifestly unjust; and

''(B) the court shall award to a prevailing party accused of infringement reasonable fees and other expenses under section 285 that are incurred to discover the updated assignee or entity described under paragraph (1), unless such sanctions would be unjust.

''(e) DEFINITIONS.—In this section:

''(1) FINANCIAL INTEREST.—The term 'financial interest'—

''(A) means—

''(i) with regard to a patent or patents, the right of a person to receive proceeds related to the assertion of the patent or patents, including a fixed or variable portion of such proceeds; and

''(ii) with regard to the plaintiff, direct or indirect ownership or control by a person of more than 5 percent of such plaintiff; and

''(B) does not mean—

''(i) ownership of shares or other interests in a mutual or common investment fund, unless the owner of such interest participates in the management of such fund; or

''(ii) the proprietary interest of a policyholder in a mutual insurance company or of a depositor in a mutual savings association, or a similar proprietary interest, unless the outcome of the proceeding could substantially affect the value of such interest.

''(2) PROCEEDING.—The term 'proceeding' means all stages of a civil action, including pretrial and trial proceedings and appellate review.

''(3) ULTIMATE PARENT ENTITY.—

''(A) IN GENERAL.—Except as provided in subparagraph (B), the term 'ultimate parent entity' has the meaning given such term in section 801.1(a)(3) of title 16, Code of Federal Regulations, or any successor regulation.

''(B) MODIFICATION OF DEFINITION.—The Director may modify the definition of 'ultimate parent entity' by regulation.''.

(b) TECHNICAL AND CONFORMING AMENDMENT.—The item relating to section 290 in the table of sections for chapter 29 of title 35, United States Code, is amended to read as follows:

''290. Notice of patent suits; disclosure of interests.''.

(c) REGULATIONS.—The Director may promulgate such regulations as are necessary to establish a registration fee in an amount sufficient to recover the estimated costs of administering subsections (b) through (e) of section 290 of title 35, United States Code, as added by subsection (a), to facilitate the collection and maintenance of the information required by such subsections, and to ensure the timely disclosure of such information to the public.

(d) EFFECTIVE DATE.—The amendments made by this section shall take effect upon the expiration of the 6-month period beginning on the date of the enactment

of this Act and shall apply to any action for which a complaint is filed on or after such effective date.

SEC. 5. CUSTOMER-SUIT EXCEPTION.

(a) AMENDMENT.—Section 296 of title 35, United States Code, is amended to read as follows:

"§ 296. Stay of action against customer

''(a) STAY OF ACTION AGAINST CUSTOMER.—Except as provided in subsection (d), in any civil action arising under any Act of Congress relating to patents, the court shall grant a motion to stay at least the portion of the action against a covered customer related to infringement of a patent involving a covered product or process if the following requirements are met:

''(1) The covered manufacturer and the covered customer consent in writing to the stay.

''(2) The covered manufacturer is a party to the action or to a separate action involving the same patent or patents related to the same covered product or process.

''(3) The covered customer agrees to be bound by any issues that the covered customer has in common with the covered manufacturer and are finally decided as to the covered manufacturer in an action described in paragraph (2).

''(4) The motion is filed after the first pleading in the action but not later than the later of—

''(A) the 120th day after the date on which the first pleading in the action is served that specifically identifies the covered product or process as a basis for the covered customer's alleged infringement of the patent and that specifically identifies how the covered product or process is alleged to infringe the patent; or

''(B) the date on which the first scheduling order in the case is entered.

''(b) APPLICABILITY OF STAY.—A stay issued under subsection (a) shall apply only to the patents, products, systems, or components accused of infringement in the action.

''(c) LIFT OF STAY.—

''(1) IN GENERAL.—A stay entered under this section may be lifted upon grant of a motion based on a showing that—

''(A) the action involving the covered manufacturer will not resolve a major issue in suit against the covered customer; or

''(B) the stay unreasonably prejudices and would be manifestly unjust to the party seeking to lift the stay.

''(2) SEPARATE MANUFACTURER ACTION INVOLVED.—In the case of a stay entered based on the participation of the covered manufacturer in a separate action involving the same patent or patents related to the same covered product or process, a motion under this subsection may only be made if the court in such separate action determines the showing required under paragraph (1) has been met.

''(d) EXEMPTION.—This section shall not apply to an action that includes a cause of action described under section 271(e)(2).

''(e) CONSENT JUDGMENT.—If, following the grant of a motion to stay under this section, the covered manufacturer seeks or consents to entry of a consent judgment relating to one or more of the common issues that gave rise to the stay, or declines to prosecute through appeal a final decision as to one or more of the common issues that gave rise to the stay, the court may, upon grant of a motion, determine that such consent judgment or unappealed final decision shall not be binding on the covered customer with respect to one or more of such common issues based on a showing that such an outcome would unreasonably prejudice and be manifestly unjust to the covered customer in light of the circumstances of the case.

''(f) RULE OF CONSTRUCTION.—Nothing in this section shall be construed to limit the ability of a court to grant any stay, expand any stay granted under this section, or grant any motion to intervene, if otherwise permitted by law.

''(g) DEFINITIONS.—In this section:

''(1) COVERED CUSTOMER.—The term 'covered customer' means a party accused of infringing a patent or patents in dispute based on a covered product or process.

''(2) COVERED MANUFACTURER.—The term 'covered manufacturer' means a person that manufactures or supplies, or causes the manufacture or supply of, a covered product or process or a relevant part thereof.

''(3) COVERED PRODUCT OR PROCESS.—The term 'covered product or process' means a product, process, system, service, component, material, or apparatus, or relevant part thereof, that—

''(A) is alleged to infringe the patent or patents in dispute; or

''(B) implements a process alleged to infringe the patent or patents in dispute.''.

(b) CONFORMING AMENDMENT.—The table of sections for chapter 29 of title 35, United States Code, is

amended by striking the item relating to section 296 and inserting the following:

"296. Stay of action against customer.".

(c) EFFECTIVE DATE.—The amendments made by this section shall take effect on the date of the enactment of this Act and shall apply to any action for which a complaint is filed on or after the first day of the 30-day period that ends on that date.

SEC. 6. PROCEDURES AND PRACTICES TO IMPLEMENT RECOMMENDATIONS OF THE JUDICIAL CONFERENCE.

(a) JUDICIAL CONFERENCE RULES AND PROCEDURES ON DISCOVERY BURDENS AND COSTS.—

(1) RULES AND PROCEDURES.—The Judicial Conference of the United States, using existing resources, shall develop rules and procedures to implement the issues and proposals described in paragraph (2) to address the asymmetries in discovery burdens and costs in any civil action arising under any Act of Congress relating to patents. Such rules and procedures shall include how and when payment for document discovery in addition to the discovery of core documentary evidence is to occur, and what information must be presented to demonstrate financial capacity before permitting document discovery

in addition to the discovery of core documentary evidence.

(2) RULES AND PROCEDURES TO BE CONSIDERED.—The rules and procedures required under paragraph (1) should address each of the following issues and proposals:

(A) DISCOVERY OF CORE DOCUMENTARY EVIDENCE.—Whether and to what extent each party to the action is entitled to receive core documentary evidence and shall be responsible for the costs of producing core documentary evidence within the possession or control of each such party, and whether and to what extent each party to the action may seek non-documentary discovery as otherwise provided in the Federal Rules of Civil Procedure.

(B) ELECTRONIC COMMUNICATION.—If the parties determine that the discovery of electronic communication is appropriate, whether such discovery shall occur after the parties have exchanged initial disclosures and core documentary evidence and whether such discovery shall be in accordance with the following:

(i) Any request for the production of electronic communication shall be specific

and may not be a general request for the production of information relating to a product or business.

(ii) Each request shall identify the custodian of the information requested, the search terms, and a time frame. The parties shall cooperate to identify the proper custodians, the proper search terms, and the proper time frame.

(iii) A party may not submit production requests to more than 5 custodians, unless the parties jointly agree to modify the number of production requests without leave of the court.

(iv) The court may consider contested requests for up to 5 additional custodians per producing party, upon a showing of a distinct need based on the size, complexity, and issues of the case.

(v) If a party requests the discovery of electronic communication for additional custodians beyond the limits agreed to by the parties or granted by the court, the requesting party shall bear all reasonable costs caused by such additional discovery.

(C) ADDITIONAL DOCUMENT DISCOVERY.—Whether the following should apply:

(i) IN GENERAL.—Each party to the action may seek any additional document discovery otherwise permitted under the Federal Rules of Civil Procedure, if such party bears the reasonable costs, including reasonable attorney's fees, of the additional document discovery.

(ii) REQUIREMENTS FOR ADDITIONAL DOCUMENT DISCOVERY.—Unless the parties mutually agree otherwise, no party may be permitted additional document discovery unless such a party posts a bond, or provides other security, in an amount sufficient to cover the expected costs of such additional document discovery, or makes a showing to the court that such party has the financial capacity to pay the costs of such additional document discovery.

(iii) LIMITS ON ADDITIONAL DOCUMENT DISCOVERY.—A court, upon motion, may determine that a request for additional document discovery is excessive, irrelevant, or otherwise abusive and may set

limits on such additional document discovery.

(iv) GOOD CAUSE MODIFICATION.—A court, upon motion and for good cause shown, may modify the requirements of subparagraphs (A) and (B) and any definition under paragraph (3). Not later than 30 days after the pretrial conference under Rule 16 of the Federal Rules of Civil Procedure, the parties shall jointly submit any proposed modifications of the requirements of subparagraphs (A) and (B) and any definition under paragraph (3), unless the parties do not agree, in which case each party shall submit any proposed modification of such party and a summary of the disagreement over the modification.

(v) COMPUTER CODE.—A court, upon motion and for good cause shown, may determine that computer code should be included in the discovery of core documentary evidence. The discovery of computer code shall occur after the parties have exchanged initial disclosures and other core documentary evidence.

(D) DISCOVERY SEQUENCE AND SCOPE.—Whether the parties shall discuss and address in the written report filed pursuant to Rule 26(f) of the Federal Rules of Civil Procedure the views and proposals of each party on the following:

(i) When the discovery of core documentary evidence should be completed.

(ii) Whether additional document discovery will be sought under subparagraph (C).

(iii) Any issues about infringement, invalidity, or damages that, if resolved before the additional discovery described in subparagraph (C) commences, might simplify or streamline the case, including the identification of any terms or phrases relating to any patent claim at issue to be construed by the court and whether the early construction of any of those terms or phrases would be helpful.

(3) DEFINITIONS.—In this subsection:

(A) CORE DOCUMENTARY EVIDENCE.—The term ''core documentary evidence''—

(i) includes—

(I) documents relating to the conception of, reduction to practice of, and application for, the patent or patents at issue;

(II) documents sufficient to show the technical operation of the product or process identified in the complaint as infringing the patent or patents at issue;

(III) documents relating to potentially invalidating prior art;

(IV) documents relating to any licensing of, or other transfer of rights to, the patent or patents at issue before the date on which the complaint is filed;

(V) documents sufficient to show profit attributable to the claimed invention of the patent or patents at issue;

(VI) documents relating to any knowledge by the accused infringer of the patent or patents at issue before the date on which the complaint is filed;

(VII) documents relating to any knowledge by the patentee of infringement of the patent or patents at issue before the date on which the complaint is filed;

(VIII) documents relating to any licensing term or pricing commitment to which the patent or patents may be subject through any agency or standard-setting body; and

(IX) documents sufficient to show any marking or other notice provided of the patent or patents at issue; and

(ii) does not include computer code, except as specified in paragraph (2)(C)(v).

(B) ELECTRONIC COMMUNICATION.—The term ''electronic communication'' means any form of electronic communication, including email, text message, or instant message.

(4) IMPLEMENTATION BY THE DISTRICT COURTS.—Not later than 6 months after the date on which the Judicial Conference has developed the rules and procedures required by this subsection, each United States district court and the United

States Court of Federal Claims shall revise the applicable local rules for such court to implement such rules and procedures.

(5) AUTHORITY FOR JUDICIAL CONFERENCE TO REVIEW AND MODIFY.—

(A) STUDY OF EFFICACY OF RULES AND PROCEDURES.—The Judicial Conference shall study the efficacy of the rules and procedures required by this subsection during the 4-year period beginning on the date on which such rules and procedures by the district courts and the United States Court of Federal Claims are first implemented. The Judicial Conference may modify such rules and procedures following such 4-year period.

(B) INITIAL MODIFICATIONS.—Before the expiration of the 4-year period described in subparagraph (A), the Judicial Conference may modify the requirements under this subsection—

(i) by designating categories of ''core documentary evidence'', in addition to those designated under paragraph (3)(A), as the Judicial Conference determines to be appropriate and necessary; and

(ii) as otherwise necessary to prevent a manifest injustice, the imposition of a requirement the costs of which clearly outweigh its benefits, or a result that could not reasonably have been intended by the Congress.

(b) JUDICIAL CONFERENCE PATENT CASE MANAGEMENT.—The Judicial Conference of the United States, using existing resources, shall develop case management procedures to be implemented by the United States district courts and the United States Court of Federal Claims for any civil action arising under any Act of Congress relating to patents, including initial disclosure and early case management conference practices that—

(1) will identify any potential dispositive issues of the case; and

(2) focus on early summary judgment motions when resolution of issues may lead to expedited disposition of the case.

(c) REVISION OF FORM FOR PATENT INFRINGEMENT.—

(1) ELIMINATION OF FORM.—The Supreme Court, using existing resources, shall eliminate Form 18 in the Appendix to the Federal Rules of Civil Procedure (relating to Complaint for Patent In-

fringement), effective on the date of the enactment of this Act.

(2) REVISED FORM.—The Supreme Court may prescribe a new form or forms setting out model allegations of patent infringement that, at a minimum, notify accused infringers of the asserted claim or claims, the products or services accused of infringement, and the plaintiff's theory for how each accused product or service meets each limitation of each asserted claim. The Judicial Conference should exercise the authority under section 2073 of title 28, United States Code, to make recommendations with respect to such new form or forms.

(d) PROTECTION OF INTELLECTUAL-PROPERTY LICENSES IN BANKRUPTCY.—

(1) IN GENERAL.—Section 1522 of title 11, United States Code, is amended by adding at the end the following:

''(e) Section 365(n) shall apply to cases under this chapter. If the foreign representative rejects or repudiates a contract under which the debtor is a licensor of intellectual property, the licensee under such contract shall be entitled to make the election and exercise the rights described in section 365(n).''.

(2) TRADEMARKS.—

(A) IN GENERAL.—Section 101(35A) of title 11, United States Code, is amended—

(i) in subparagraph (E), by striking ''or'';

(ii) in subparagraph (F), by striking ''title 17;'' and inserting ''title 17; or''; and

(iii) by adding after subparagraph (F) the following new subparagraph:

''(G) a trademark, service mark, or trade name, as those terms are defined in section 45 of the Act of July 5, 1946 (commonly referred to as the 'Trademark Act of 1946') (15 U.S.C. 1127);''.

(B) CONFORMING AMENDMENT.—Section 365(n)(2) of title 11, United States Code, is amended—

(i) in subparagraph (B)—

(I) by striking ''royalty payments'' and inserting ''royalty or other payments''; and

(II) by striking ''and'' after the semicolon;

(ii) in subparagraph (C), by striking the period at the end of clause (ii) and inserting ''; and''; and

(iii) by adding at the end the following new subparagraph:

''(D) in the case of a trademark, service mark, or trade name, the trustee shall not be relieved of a contractual obligation to monitor and control the quality of a licensed product or service.''.

(3) EFFECTIVE DATE.—The amendments made by this subsection shall take effect on the date of the enactment of this Act and shall apply to any case that is pending on, or for which a petition or complaint is filed on or after, such date of enactment.

SEC. 7. SMALL BUSINESS EDUCATION, OUTREACH, AND INFORMATION ACCESS.

(a) SMALL BUSINESS EDUCATION AND OUTREACH.—

(1) RESOURCES FOR SMALL BUSINESS.—Using existing resources, the Director shall develop educational resources for small businesses to address concerns arising from patent infringement.

(2) SMALL BUSINESS PATENT OUTREACH.—The existing small business patent outreach programs of the Office, and the relevant offices at the Small Business Administration and the Minority Business Development Agency, shall provide education and awareness on abusive patent litigation practices. The

Director may give special consideration to the unique needs of small firms owned by disabled veterans, service-disabled veterans, women, and minority entrepreneurs in planning and executing the outreach efforts by the Office.

(b) IMPROVING INFORMATION TRANSPARENCY FOR SMALL BUSINESS AND THE UNITED STATES PATENT AND TRADEMARK OFFICE USERS.—

(1) WEB SITE.—Using existing resources, the Director shall create a user-friendly section on the official Web site of the Office to notify the public when a patent case is brought in Federal court and, with respect to each patent at issue in such case, the Director shall include—

(A) information disclosed under subsections (b) and (d) of section 290 of title 35, United States Code, as added by section 4(a) of this Act; and

(B) any other information the Director determines to be relevant.

(2) FORMAT.—In order to promote accessibility for the public, the information described in paragraph (1) shall be searchable by patent number, patent art area, and entity.

SEC. 8. STUDIES ON PATENT TRANSACTIONS, QUALITY, AND EXAMINATION.

(a) STUDY ON SECONDARY MARKET OVERSIGHT FOR PATENT TRANSACTIONS TO PROMOTE TRANSPARENCY AND ETHICAL BUSINESS PRACTICES.—

(1) STUDY REQUIRED.—The Director, in consultation with the Secretary of Commerce, the Secretary of the Treasury, the Chairman of the Securities and Exchange Commission, the heads of other relevant agencies, and interested parties, shall, using existing resources of the Office, conduct a study—

(A) to develop legislative recommendations to ensure greater transparency and accountability in patent transactions occurring on the secondary market;

(B) to examine the economic impact that the patent secondary market has on the United States;

(C) to examine licensing and other oversight requirements that may be placed on the patent secondary market, including on the participants in such markets, to ensure that the market is a level playing field and that brokers in the market have the requisite expertise and adhere to ethical business practices; and

(D) to examine the requirements placed on other markets.

(2) REPORT ON STUDY.—Not later than 18 months after the date of the enactment of this Act, the Director shall submit a report to the Committee on the Judiciary of the House of Representatives and the Committee on the Judiciary of the Senate on the findings and recommendations of the Director from the study required under paragraph (1).

(b) STUDY ON PATENTS OWNED BY THE UNITED STATES GOVERNMENT.—

(1) STUDY REQUIRED.—The Director, in consultation with the heads of relevant agencies and interested parties, shall, using existing resources of the Office, conduct a study on patents owned by the United States Government that—

(A) examines how such patents are licensed and sold, and any litigation relating to the licensing or sale of such patents;

(B) provides legislative and administrative recommendations on whether there should be restrictions placed on patents acquired from the United States Government;

(C) examines whether or not each relevant agency maintains adequate records on the pat-

ents owned by such agency, specifically whether such agency addresses licensing, assignment, and Government grants for technology related to such patents; and

(D) provides recommendations to ensure that each relevant agency has an adequate point of contact that is responsible for managing the patent portfolio of the agency.

(2) REPORT ON STUDY.—Not later than 1 year after the date of the enactment of this Act, the Director shall submit to the Committee on the Judiciary of the House of Representatives and the Committee on the Judiciary of the Senate a report on the findings and recommendations of the Director from the study required under paragraph (1).

(c) STUDY ON PATENT QUALITY AND ACCESS TO THE BEST INFORMATION DURING EXAMINATION.—

(1) GAO STUDY.—The Comptroller General of the United States shall, using existing resources, conduct a study on patent examination at the Office and the technologies available to improve examination and improve patent quality.

(2) CONTENTS OF THE STUDY.—The study required under paragraph (1) shall include the following:

(A) An examination of patent quality at the Office.

(B) An examination of ways to improve patent quality, specifically through technology, that shall include examining best practices at foreign patent offices and the use of existing off-the-shelf technologies to improve patent examination.

(C) A description of how patents are classified.

(D) An examination of procedures in place to prevent double patenting through filing by applicants in multiple art areas.

(E) An examination of the types of off-the-shelf prior art databases and search software used by foreign patent offices and governments, particularly in Europe and Asia, and whether those databases and search tools could be used by the Office to improve patent examination.

(F) An examination of any other areas the Comptroller General determines to be relevant.

(3) REPORT ON STUDY.—Not later than 1 year after the date of the enactment of this Act, the Comptroller General shall submit to the Committee on the Judiciary of the House of Representatives

and the Committee on the Judiciary of the Senate a report on the findings and recommendations from the study required by this subsection, including recommendations for any changes to laws and regulations that will improve the examination of patent applications and patent quality.

(d) STUDY ON PATENT SMALL CLAIMS COURT.—

(1) STUDY REQUIRED.—

(A) IN GENERAL.—The Director of the Administrative Office of the United States Courts, in consultation with the Director of the Federal Judicial Center and the United States Patent and Trademark Office, shall, using existing resources, conduct a study to examine the idea of developing a pilot program for patent small claims procedures in certain judicial districts within the existing patent pilot program mandated by Public Law 111–349.

(B) CONTENTS OF STUDY.—The study under subparagraph (A) shall examine—

(i) the necessary criteria for using small claims procedures;

(ii) the costs that would be incurred for establishing, maintaining, and operating such a pilot program; and

(iii) the steps that would be taken to ensure that the procedures used in the pilot program are not misused for abusive patent litigation.

(2) REPORT ON STUDY.—Not later than 1 year after the date of the enactment of this Act, the Director of the Administrative Office of the United States Courts shall submit a report to the Committee on the Judiciary of the House of Representatives and the Committee on the Judiciary of the Senate on the findings and recommendations of the Director of the Administrative Office from the study required under paragraph (1).

(e) STUDY ON DEMAND LETTERS.—

(1) STUDY.—The Director, in consultation with the heads of other appropriate agencies, shall, using existing resources, conduct a study of the prevalence of the practice of sending patent demand letters in bad faith and the extent to which that practice may, through fraudulent or deceptive practices, impose a negative impact on the marketplace.

(2) REPORT TO CONGRESS.—Not later than 1 year after the date of the enactment of this Act, the Director shall submit a report to the Committee on the Judiciary of the House of Representatives and

the Committee on the Judiciary of the Senate on the findings and recommendations of the Director from the study required under paragraph (1).

(3) PATENT DEMAND LETTER DEFINED.—In this subsection, the term ''patent demand letter'' means a written communication relating to a patent that states or indicates, directly or indirectly, that the recipient or anyone affiliated with the recipient is or may be infringing the patent.

(f) STUDY ON BUSINESS METHOD PATENT QUALITY.—

(1) GAO STUDY.—The Comptroller General of the United States shall, using existing resources, conduct a study on the volume and nature of litigation involving business method patents.

(2) CONTENTS OF STUDY.—The study required under paragraph (1) shall focus on examining the quality of business method patents asserted in suits alleging patent infringement, and may include an examination of any other areas that the Comptroller General determines to be relevant.

(3) REPORT TO CONGRESS.—Not later than 1 year after the date of the enactment of this Act, the Comptroller General shall submit to the Committee on the Judiciary of the House of Representatives

and the Committee on the Judiciary of the Senate a report on the findings and recommendations from the study required by this subsection, including recommendations for any changes to laws or regulations that the Comptroller General considers appropriate on the basis of the study.

(g) STUDY ON IMPACT OF LEGISLATION ON ABILITY OF INDIVIDUALS AND SMALL BUSINESSES TO PROTECT EXCLUSIVE RIGHTS TO INVENTIONS AND DISCOVERIES.—

(1) STUDY REQUIRED.—The Director, in consultation with the Secretary of Commerce, the Director of the Administrative Office of the United States Courts, the Director of the Federal Judicial Center, the heads of other relevant agencies, and interested parties, shall, using existing resources of the Office, conduct a study to examine the economic impact of sections 3, 4, and 5 of this Act, and any amendments made by such sections, on the ability of individuals and small businesses owned by women, veterans, and minorities to assert, secure, and vindicate the constitutionally guaranteed exclusive right to inventions and discoveries by such individuals and small business.

(2) REPORT ON STUDY.—Not later than 2 years after the date of the enactment of this Act, the Director shall submit to the Committee on the Judiciary of the House of Representatives and the Committee on the Judiciary of the Senate a report on the findings and recommendations of the Director from the study required under paragraph (1).

SEC. 9. IMPROVEMENTS AND TECHNICAL CORRECTIONS TO THE LEAHY-SMITH AMERICA INVENTS ACT.

(a) POST-GRANT REVIEW AMENDMENT.—Section 325(e)(2) of title 35, United States Code is amended by striking ''or reasonably could have raised''.

(b) USE OF DISTRICT-COURT CLAIM CONSTRUCTION IN POST-GRANT AND INTER PARTES REVIEWS.—

(1) INTER PARTES REVIEW.—Section 316(a) of title 35, United States Code, is amended—

(A) in paragraph (12), by striking ''; and'' and inserting a semicolon;

(B) in paragraph (13), by striking the period at the end and inserting ''; and''; and

(C) by adding at the end the following new paragraph:

''(14) providing that for all purposes under this chapter—

''(A) each claim of a patent shall be construed as such claim would be in a civil action to invalidate a patent under section 282(b), including construing each claim of the patent in accordance with the ordinary and customary meaning of such claim as understood by one of ordinary skill in the art and the prosecution history pertaining to the patent; and

''(B) if a court has previously construed the claim or a claim term in a civil action in which the patent owner was a party, the Office shall consider such claim construction.''.

(2) POST-GRANT REVIEW.—Section 326(a) of title 35, United States Code, is amended—

(A) in paragraph (11), by striking ''; and'' and inserting a semicolon;

(B) in paragraph (12), by striking the period at the end and inserting ''; and''; and

(C) by adding at the end the following new paragraph:

''(13) providing that for all purposes under this chapter—

''(A) each claim of a patent shall be construed as such claim would be in a civil action to invalidate a patent under section 282(b), in-

cluding construing each claim of the patent in accordance with the ordinary and customary meaning of such claim as understood by one of ordinary skill in the art and the prosecution history pertaining to the patent; and

''(B) if a court has previously construed the claim or a claim term in a civil action in which the patent owner was a party, the Office shall consider such claim construction.''.

(3) TECHNICAL AND CONFORMING AMENDMENT.—Section 18(a)(1)(A) of the Leahy-Smith America Invents Act (Public Law 112–29; 126 Stat. 329; 35 U.S.C. 321 note) is amended by striking ''Section 321(c)'' and inserting ''Sections 321(c) and 326(a)(13)''.

(4) EFFECTIVE DATE.—The amendments made by this subsection shall take effect upon the expiration of the 90-day period beginning on the date of the enactment of this Act, and shall apply to any proceeding under chapter 31 or 32 of title 35, United States Code, as the case may be, for which the petition for review is filed on or after such effective date.

(c) CODIFICATION OF THE DOUBLE-PATENTING DOCTRINE FOR FIRST-INVENTOR-TO-FILE PATENTS.—

(1) AMENDMENT.—Chapter 10 of title 35, United States Code, is amended by adding at the end the following new section:

"§ 106. Prior art in cases of double patenting

''A claimed invention of a patent issued under section 151 (referred to as the 'first patent') that is not prior art to a claimed invention of another patent (referred to as the 'second patent') shall be considered prior art to the claimed invention of the second patent for the purpose of determining the nonobviousness of the claimed invention of the second patent under section 103 if—

''(1) the claimed invention of the first patent was effectively filed under section 102(d) on or before the effective filing date of the claimed invention of the second patent;

''(2) either—

''(A) the first patent and second patent name the same individual or individuals as the inventor; or

''(B) the claimed invention of the first patent would constitute prior art to the claimed invention of the second patent under section 102(a)(2) if an exception under section 102(b)(2) were deemed to be inapplicable and the claimed invention of the first patent was, or

were deemed to be, effectively filed under section 102(d) before the effective filing date of the claimed invention of the second patent; and

''(3) the patentee of the second patent has not disclaimed the rights to enforce the second patent independently from, and beyond the statutory term of, the first patent.''.

(2) REGULATIONS.—The Director shall promulgate regulations setting forth the form and content of any disclaimer required for a patent to be issued in compliance with section 106 of title 35, United States Code, as added by paragraph (1). Such regulations shall apply to any disclaimer filed after a patent has issued. A disclaimer, when filed, shall be considered for the purpose of determining the validity of the patent under section 106 of title 35, United States Code.

(3) CONFORMING AMENDMENT.—The table of sections for chapter 10 of title 35, United States Code, is amended by adding at the end the following new item:

''106. Prior art in cases of double patenting.''.

(4) EXCLUSIVE RULE.—A patent subject to section 106 of title 35, United States Code, as added by paragraph (1), shall not be held invalid on any nonstatutory, double-patenting ground based on a

patent described in section 3(n)(1) of the Leahy-Smith America Invents Act (35 U.S.C. 100 note).

(5) EFFECTIVE DATE.—The amendments made by this subsection shall take effect upon the expiration of the 1-year period beginning on the date of the enactment of this Act and shall apply to a patent or patent application only if both the first and second patents described in section 106 of title 35, United States Code, as added by paragraph (1), are patents or patent applications that are described in section 3(n)(1) of the Leahy-Smith America Invents Act (35 U.S.C. 100 note).

(d) PTO PATENT REVIEWS.—

(1) CLARIFICATION.—

(A) SCOPE OF PRIOR ART.—Section 18(a)(1)(C)(i) of the Leahy-Smith America Invents Act (35 U.S.C. 321 note) is amended by striking ''section 102(a)'' and inserting ''subsection (a) or (e) of section 102''.

(B) EFFECTIVE DATE.—The amendment made by subparagraph (A) shall take effect on the date of the enactment of this Act and shall apply to any proceeding pending on, or filed on or after, such date of enactment.

(2) AUTHORITY TO WAIVE FEE.—Subject to available resources, the Director may waive payment of a filing fee for a transitional proceeding described under section 18(a) of the Leahy-Smith America Invents Act (35 U.S.C. 321 note).

(e) CLARIFICATION OF LIMITS ON PATENT TERM ADJUSTMENT.—

(1) AMENDMENTS.—Section 154(b)(1)(B) of title 35, United States Code, is amended—

(A) in the matter preceding clause (i), by striking ''not including—'' and inserting ''the term of the patent shall be extended 1 day for each day after the end of that 3-year period until the patent is issued, not including—'';

(B) in clause (i), by striking ''consumed by continued examination of the application requested by the applicant'' and inserting ''consumed after continued examination of the application is requested by the applicant'';

(C) in clause (iii), by striking the comma at the end and inserting a period; and

(D) by striking the matter following clause (iii).

(2) EFFECTIVE DATE.—The amendments made by this subsection shall take effect on the date of the

enactment of this Act and apply to any patent application that is pending on, or filed on or after, such date of enactment.

(f) CLARIFICATION OF JURISDICTION.—

(1) IN GENERAL.—The Federal interest in preventing inconsistent final judicial determinations as to the legal force or effect of the claims in a patent presents a substantial Federal issue that is important to the Federal system as a whole.

(2) APPLICABILITY.—Paragraph (1)—

(A) shall apply to all cases filed on or after, or pending on, the date of the enactment of this Act; and

(B) shall not apply to a case in which a Federal court has issued a ruling on whether the case or a claim arises under any Act of Congress relating to patents or plant variety protection before the date of the enactment of this Act.

(g) PATENT PILOT PROGRAM IN CERTAIN DISTRICT COURTS DURATION.—

(1) DURATION.—Section 1(c) of Public Law 111–349 (124 Stat. 3674; 28 U.S.C. 137 note) is amended to read as follows:

''(c) DURATION.—The program established under subsection (a) shall be maintained using existing resources, and shall terminate 20 years after the end of the 6-month period described in subsection (b).''.

(2) EFFECTIVE DATE.—The amendment made by paragraph (1) shall take effect on the date of the enactment of this Act.

(h) TECHNICAL CORRECTIONS.—

(1) NOVELTY.—

(A) AMENDMENT.—Section 102(b)(1)(A) of title 35, United States Code, is amended by striking ''the inventor or joint inventor or by another'' and inserting ''the inventor or a joint inventor or another''.

(B) EFFECTIVE DATE.—The amendment made by subparagraph (A) shall be effective as if included in the amendment made by section 3(b)(1) of the Leahy-Smith America Invents Act (Public Law 112–29).

(2) INVENTOR'S OATH OR DECLARATION.—

(A) AMENDMENT.—The second sentence of section 115(a) of title 35, United States Code, is amended by striking ''shall execute'' and inserting ''may be required to execute''.

(B) EFFECTIVE DATE.—The amendment made by subparagraph (A) shall be effective as if included in the amendment made by section 4(a)(1) of the Leahy-Smith America Invents Act (Public Law 112–29).

(3) ASSIGNEE FILERS.—

(A) BENEFIT OF EARLIER FILING DATE; RIGHT OF PRIORITY.—Section 119(e)(1) of title 35, United States Code, is amended, in the first sentence, by striking ''by an inventor or inventors named'' and inserting ''that names the inventor or a joint inventor''.

(B) BENEFIT OF EARLIER FILING DATE IN THE UNITED STATES.—Section 120 of title 35, United States Code, is amended, in the first sentence, by striking ''names an inventor or joint inventor'' and inserting ''names the inventor or a joint inventor''.

(C) EFFECTIVE DATE.—The amendments made by this paragraph shall take effect on the date of the enactment of this Act and shall apply to any patent application, and any patent issuing from such application, that is filed on or after September 16, 2012.

(4) DERIVED PATENTS.—

(A) AMENDMENT.—Section 291(b) of title 35, United States Code, is amended by striking ''or joint inventor'' and inserting ''or a joint inventor''.

(B) EFFECTIVE DATE.—The amendment made by subparagraph (A) shall be effective as if included in the amendment made by section 3(h)(1) of the Leahy-Smith America Invents Act (Public Law 112–29).

(5) SPECIFICATION.—Notwithstanding section 4(e) of the Leahy-Smith America Invents Act (Public Law 112–29; 125 Stat. 297), the amendments made by subsections (c) and (d) of section 4 of such Act shall apply to any proceeding or matter that is pending on, or filed on or after, the date of the enactment of this Act.

(6) TIME LIMIT FOR COMMENCING MISCONDUCT PROCEEDINGS.—

(A) AMENDMENT.—The fourth sentence of section 32 of title 35, United States Code, is amended by striking ''1 year'' and inserting ''18 months''.

(B) EFFECTIVE DATE.—The amendment made by this paragraph shall take effect on the date of the enactment of this Act and shall

apply to any action in which the Office files a complaint on or after such date of enactment.

(7) PATENT OWNER RESPONSE.—

(A) CONDUCT OF INTER PARTES REVIEW.—Paragraph (8) of section 316(a) of title 35, United States Code, is amended by striking ''the petition under section 313'' and inserting ''the petition under section 311''.

(B) CONDUCT OF POST-GRANT REVIEW.—Paragraph (8) of section 326(a) of title 35, United States Code, is amended by striking ''the petition under section 323'' and inserting ''the petition under section 321''.

(C) EFFECTIVE DATE.—The amendments made by this paragraph shall take effect on the date of the enactment of this Act.

(8) INTERNATIONAL APPLICATIONS.—

(A) AMENDMENTS.—Section 202(b) of the Patent Law Treaties Implementation Act of 2012 (Public Law 112–211; 126 Stat. 1536) is amended—

(i) by striking paragraph (7); and

(ii) by redesignating paragraphs (8) and (9) as paragraphs (7) and (8), respectively.

(B) EFFECTIVE DATE.—The amendments made by subparagraph (A) shall be effective as if included in title II of the Patent Law Treaties Implementation Act of 2012 (Public Law 112–21).

SEC. 10. EFFECTIVE DATE.

Except as otherwise provided in this Act, the provisions of this Act shall take effect on the date of the enactment of this Act, and shall apply to any patent issued, or any action filed, on or after that date.

TAB 4B

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Diversity Jurisdiction: Citizenship of Noncorporate Entities

The American Bar Association Section of Litigation has adopted a resolution urging amendment of 28 U.S.C. § 1332 "to provide that unincorporated business entities shall, for diversity jurisdiction purposes, be deemed citizens of their states of organization and the states where they maintain their principal places of business * * *." The proposal will be considered by the ABA House of Delegates in August, 2015.

The effect of this proposal would be to expand access to diversity jurisdiction. It is supported by looking to the difficulty of establishing the citizenship of every member, shareholder, partner, beneficiary of an unincorporated entity. The burden of discovery can be great, and the result may be defeat of subject-matter jurisdiction after substantial effort has been invested in a case.

Diversity jurisdiction is a subject primarily confided to the Federal-State Jurisdiction Committee. The Judicial Conference has often taken positions that favor proposals to restrict, not expand, the reach of diversity jurisdiction. Still, it will be useful to have the sense of the Committee whether this proposal should be supported. A copy of the current draft is attached.

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AMERICAN BAR ASSOCIATION

SECTION OF LITIGATION

RESOLUTION

RESOLVED, that the American Bar Association initiate and support an effort for Congress to amend the federal diversity statute, 28 U.S.C. § 1332, to provide that unincorporated business entities shall, for diversity jurisdiction purposes, be deemed citizens of their states of organization and the states where they maintain their principal places of business, as outlined in Appendix 1.

DRAFT AS OF MARCH 9, 2015

REPORT

Introduction

Determining the citizenship of unincorporated business litigants has turned into a complicated jurisdictional morass. More businesses are operating as unincorporated associations, such as general partnerships, limited liability companies (LLCs), limited partnerships (LPs), professional corporations (PCs), limited liability partnerships (LLPs), business trusts, and other forms of business entities. The subject matter diversity jurisdiction statute was last amended to address citizenship of business entities in 1958. At that time, as a matter of substantive law only corporations were treated as "entities" with an existence apart from that of their membership. Since that change, substantive law has changed with respect to general and other partnerships, and a host of other entities have enjoyed expanding usage. Yet, under the current subject matter jurisdiction statute, in determining whether diversity jurisdiction exists there is still a major difference between corporations and all other entities. Corporations are treated as citizens only of the states (i) where they are incorporated, and (ii) where they maintain their principal place of business. By contrast, for all business entities that are *not* organized as corporations the citizenship of every member, shareholder, or other owner of any portion of the entity must be examined to determine whether complete diversity exists.

The current diversity regime sets a potential trap for plaintiffs, defendants, and even trial court judges every time litigation involves an unincorporated business entity. For example, the existence of a single, passive member of an LLC who was not even involved in the dispute or event being litigated can destroy diversity if he or she hails from the same state as one adverse party. Unfortunately, the LLC's records may not even reveal the citizenship of every member, thus making it difficult if not impossible for any party to determine quickly whether complete diversity exists prior to discovery. Yet because subject matter jurisdiction is not waivable and because federal courts must satisfy themselves *sua sponte* that they have subject matter jurisdiction over a matter, *see* Fed. R. Civ. P. 12(h)(3), this situation may be a ticking legal time bomb.

This problem affects plaintiffs and defendants alike. The uncertainty of whether a case can be filed in or removed to a federal forum not only increases the cost and complexity of litigation, it can completely undermine a fully-litigated case when it is discovered at the appellate stage that the trial court lacked jurisdiction in the first place. Given that litigants need absolute clarity in order to avoid litigating a case in federal court only to have it remanded on jurisdictional grounds after judgment, the diversity statute needs to be streamlined and simplified in order to apply the corporate citizenship test to business entities that are functionally equivalent to corporations.

Modest revisions to the diversity jurisdiction statute, 28 U.S.C. § 1332, can eliminate these traps and correlate federal court jurisdiction with modern business entity structures. These revisions, if enacted, will bridge the "disconnect between the modern business realities" of unincorporated business entities "and the formalistic rules" for determining their citizenship, simplifying the forum selection process and avoiding the waste of judicial resources and time. Debra R. Cohen, *Limited Liability Company Citizenship: Reconsidering an Illogical and Inconsistent Choice*, 90 MARQUETTE L. REV.

269, 269 (2006).

Background

Through a judicially-created rule, federal courts sitting in diversity have long required *complete* diversity between two or more joint plaintiffs and two or more joint defendants. *See Strawbridge v. Curtis*, 7 U.S. 267 (1806). Shortly after *Strawbridge*, the Supreme Court declared that corporations were *not* citizens, "and, consequently, cannot sue or be sued in the courts of the United States, unless the rights of the members, in this respect, can be exercised in their corporate name." *Bank of the U.S. v. Deveaux*, 9 U.S. 61 (1809). Because corporations enjoyed the aggregate citizenship of their owners and members, they were able to force litigants into state court if a single shareholder was nondiverse from a single plaintiff. *See* Cohen, *supra,* p. 284 & n.95.

Although the Supreme Court later overruled *Deveaux* and declared that corporations were legal entities separate and apart from their members and owners, *see Louisville, Cincinnati & Charleston R.R. v. Letson*, 43 U.S. 497 (1844), it took Congress over a hundred years to codify this rule. In 1958, Congress amended the federal diversity statute, 28 U.S.C. § 1332, to tie corporate citizenship to the states where the entities are incorporated and where they maintain their principal places of business. *J.A. Olson Co. v. Winona*, 818 F.2d 401, 404-05 (5th Cir. 1987), abrogated on other grounds by *Hertz Corp. v. Friend*, 559 U.S. 77 (2010); *see also* Case Comment, *Seventh Circuit Holds that the Term "Corporation" is Entirely State-Defined*, Hoagland v. Sandberg, Phoenix, & von Gontard, P.C., 118 HARV. L. REV. 1347-48, 1352 (2005). The 1958 amendment also was "intended to further the original purpose of diversity jurisdiction . . . to provide to out-of-state litigants a forum free of local bias." *J.A. Olson*, 818 F.2d at 406. Indeed, "the need for diversity jurisdiction is lessened when a foreign corporation has substantial visibility in the community." *See id*. at 404, 406.

This logic made sense in 1958. At the time, the primary unincorporated business entities—partnerships—were merely contracts between individuals who both owned and controlled the business. Corporations, by contrast, were legal fictions created by their states of incorporation for the sole purpose of separating ownership from control. *See* Cohen, *supra,* p. 289. The 1958 amendment thus recognized the functional differences between corporations and partnerships as they existed at the time and "highlighted the citizenship of the true litigants." *Id.* Those states that allowed the formation of partnerships, limited partnerships, limited liability companies, and other business entities did *not* recognize those business forms as entities separate and apart from their owners and members. For example, at the time of the first Uniform Partnership Act, promulgated in 1914, partnerships were frequently treated as conglomerations of the individual partners. As explained by the drafters of the 1994 revisions to the Uniform Partnership Act ("RUPA"), "The first essential change in UPA (1994) over the 1914 Act that must be discussed as a prelude to the rest of the revision concerns the nature of a partnership. There is age-long conflict in partnership law over the nature of the organization. Should a partnership be considered merely an aggregation of individuals or should it be regarded as an entity by itself? The answer to these questions considerably affects such matters as a partner's capacity to do business for the partnership, how property is to be held and treated in the partnership, and what constitutes dissolution of

the partnership. The 1914 Act made no effort to settle the controversy by express language, and has rightly been characterized as a hybrid, encompassing aspects of both theories. . . . [the Revised Uniform Partnership Act] (1994) makes a very clear choice that settles the controversy. To quote Section 201: 'A partnership is an entity.' All outcomes in [the Revised Uniform Partnership Act] (1994) must be evaluated in light of that clearly articulated language."[1] In short, general partnerships are no longer viewed solely as aggregations of individuals. Thirty-seven states plus the District of Columbia have adopted the 1994 or 1997 version of the RUPA and its entity designation.[2] Even those states that have not adopted RUPA (1994) frequently recognize partnerships as a distinct entity for at least some purposes. In addition, while not adopting RUPA, Louisiana recognizes a partnership as a "judicial person, distinct from its partners." La. Civ. Code art. 2801. At least six other "non-RUPA (1994)" states recognize a partnership as a separate entity by statutes providing that partnerships can sue or be sued in the partnership name.[3] And some states have recognized entity status for at least some purposes, as recognized by case law. *See, e.g.*, *Hanson v. St. Luke United Methodist Church*, 704 N.E.2d 1020, 1026 (Ind. 1998) (explaining that a judgment by or against a partnership binds the partnership as if it were an entity and does not bind individual members unless they were named); *Michigan Employment Sec. Com. v. Crane*, 54 N.W.2d 616, 620 (Mich. 1952) ("The Michigan employment security act expressly recognizes that a partnership is an 'employing unit' within the meaning of the act."); *Philadelphia Tax Review Bd. v. Adams Ave. Assocs.*, 360 A.2d 817, 820 (Pa. Commw. Ct. 1976) ("[I]t does not follow that for purposes of taxation a partnership may not be taxed, or may not have a domicile for tax purposes, separate and distinct from that of the individuals who compose it. In other words, a partnership may be recognized as a legal entity for certain purposes."); *Dept. of Revenue v. Mark*, 483 N.W.2d 302, 304 (Wis. 1992) ("[T]he law recognizes a partnership as a separate legal entity for purposes of conveying real estate and for purposes of holding title." (emphasis omitted)). In short, contrary to the situation that existed in 1958, the concept of the partnership as a separate legal entity is now well established.

Much else has changed since 1958 as well. The past five decades have seen a rise in so-called "hybrid" business forms such as LLCs, LPs, MLPs, PCs, LLPs, and multi-state general partnerships. For example, the federal Internal Revenue Service reports that

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[1] Summary of 1994 revisions to Uniform Partnership Act ("RUPA"), "Uniform Partnership Act § 201 (1994), "Nature of a Partnership"; Partnership Act Summary, NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, available at http://www.nccusl.org/ActSummary.aspx?title=Partnership%20Act (last visited Apr. 30, 2014).

[2] The states (13) that have not adopted the 1994 or subsequent versions of RUPA are: LA, GA, IN, MA, MI, MO, NH, NY, NC, PA, RI, SC and WI. Enactment Status Map, Partnership Act, NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, available at http://www.nccusl.org/Act.aspx?title=Partnership%20Act (last visited Apr. 30, 2014).

[3] These "sue and be sued" as provided by statute states are Georgia (O.C.G.A. § 14-8-15.1), Indiana (Ind. R. Trial P. 17), Michigan (Mich. Comp. Laws 600.2051), New York (N.Y. C.P.L.R. § 1025), North Carolina (N.C. Gen Stat. § 1-69.1), and South Carolina (S.C. Code § 15-5-45). *Cf.* Pa. R. Civ. P. 2127; Pa. R. Civ. P. 2128 (together allowing a partnership to be sued in its firm name but requiring the partnership to bring suit as "A, B and C trading as X & Co.").

in 1993, roughly 275,000 LPs and only 17,335 LLCs filed federal tax returns; by 2008, over 534,000 LPs and over 1,898,000 LLCs filed federal tax returns.[4] Accordingly, the prospect of facing a limited partnership nearly doubled from 1993 to 2008, while the prospect of facing a limited liability company increased nearly one hundred and tenfold.

With the rise of these hybrid entities, "[e]volving organizational laws caused the distinction between business organizations to blur." Cohen, *supra*, p. 289. Many states now recognize these other entities as existing separate and apart from their owners and members. *See* Christine M. Kailus, *Diversity Jurisdiction and Unincorporated Businesses: Collapsing the Doctrinal Wall*, 2007 UNIV. OF ILL. L.R. 1543, 1545-47 (Sept. 7, 2007). Similarly, the Uniform Limited Partnership Act ("ULPA") also now recognizes that a "limited partnership is an entity distinct from its partners."[5] Eighteen (18) states plus the District of Columbia have adopted the 2001 version of the ULPA.[6] And likewise, the 2006 revisions to the Uniform Limited Liability Company Act of 1996 ("ULLCA") recognizes that an LLC "is an entity distinct from its members."[7] Nine (9) states plus the District of Columbia have adopted the 2006 version of the ULLCA.[8]

The existing law has not kept up with reality. The corporate landscape simply looks much different than it did in 1958, but Section 1332(c) has not been amended to acknowledge unincorporated entities as "citizens" for diversity purposes. Nor have courts been willing to impute citizenship status on these entities because they are "corporate-like," as courts narrowly construe statutes conferring federal jurisdiction. *See, e.g., Carden v. Arkoma Assocs.*, 494 U.S. 185 (1990); *Northbrook Nat'l Ins. v. Brewer*,

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[4] *See* Internal Revenue Service, TABLE 1: NUMBER OF RETURNS, TOTAL RECEIPTS, BUSINESS RECEIPTS, NET INCOME (LESS DEFICIT), NET INCOME, AND DEFICIT BY FORM OF BUSINESS (1980-2008), available at http://www.irs.gov/uac/SOI-Tax-Stats-Integrated-Business-Data (last visited Apr. 30, 2014) and Internal Revenue Service, TABLE 1: NUMBER OF RETURNS, TOTAL RECEIPTS, BUSINESS RECEIPTS, NET INCOME (LESS DEFICIT), NET INCOME, AND DEFICIT BY FORM OF BUSINESS (1980-2008), available at http://www.irs.gov/uac/SOI-Tax-Stats-Integrated-Business-Data (last visited Apr. 30, 2014).

[5] Uniform Limited Partnership Act § 104(a) (2001), NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, available at http://www.uniformlaws.org/shared/docs/limited%20partnership/ulpa_final_2001rev.pdf (last visited Apr. 30, 2014).

[6] These states are: AL, AR, CA, DC, FL, HI, ID, IL, IA, KY, ME, MN, MO, NV, NM, ND, OK, UT, and WA. Legislative Fact Sheet, NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, available at http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Limited%20Partnership%20Act (last visited Apr. 30, 2014).

[7] Uniform Limited Liability Company Act § 104(a) (2006), NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, available at http://www.uniformlaws.org/shared/docs/limited%20liability%20company/ullca_final_06rev.pdf (last visited Apr. 30, 2014).

[8] These states include: CA, DC, FL, ID, IA, MN, NE, NJ, UT, and WY. Legislative Fact Sheet, NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, available at http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Limited%20Liability%20Company%20(Revised) (last visited Apr. 30, 2014).

493 U.S. 6, 9 (1989) ("'We must take the intent of Congress with regard to the filing of diversity cases in Federal District Courts to be that which its language clearly sets forth.'" (quoting *Horton v. Liberty Mutual Insurance Co.*, 367 U.S. 348, 352 (1961))); *Thompson v. Gaskill*, 315 U.S. 442, 446 (1942) ("The policy of the statute conferring diversity jurisdiction upon the district courts calls for its strict construction.").

The Supreme Court has explicitly held that Section 1332(c) only applies to traditional corporations. *See Carden*, 494 U.S. at 195-96. In *Carden*, the trial court dismissed an action brought by a limited partnership on the ground that one of the plaintiff's limited partners was a citizen of the same state as the defendants. The Court "firmly resist[s]" any judicial extension of "citizenship" status to entities other than corporations, and leaves any "further adjustments" to the status of business entities for diversity purposes in the hands of Congress. *Carden*, 494 U.S. at 189, 196.

Following *Carden's* clear mandate, courts have routinely concluded that the citizenship of every member of unincorporated business entities must be diverse from all opposing parties before complete diversity of citizenship exists. In one of the earliest post-*Carden* decisions, the Seventh Circuit concluded that *Carden* "crystallized as a principle" that members of an entity are citizens for diversity purposes, at least until "Congress provides otherwise." *Cosgrove v. Bartolotta*, 150 F.3d 729, 731 (7th Cir. 1998). Given the similarities between LLC's and LP's, the court applied *Carden* to LLC's. *Id.; see also Belleville Catering Co. v. Champaign Market Place L.L.C.*, 350 F.3d 691, 692 (7th Cir. 2003) (same). It does not matter that LP's and LLCs "are functionally similar to corporations;" they are not entitled to corporate treatment for diversity purposes. *See also Hoagland v. Sandberg, Phoenix & von Gontard, P.C.*, 385 F.3d 737, 739 (7th Cir. 2004). The Supreme Court drew a "bright line" in *Carden* between entities that are technically called "corporations" and all other types of entities, *see id.* at 741, such that judges need not "entangle themselves in functional inquiries into the differences among corporations," *see id.* at 743.

Every court of appeals to address this question directly has followed the 7th Circuit in analogizing to *Carden*'s treatment of limited partnerships. *See, e.g., Johnson v. Smithkline Beecham Corp.*, 724 F.3d 337 (3d Cir. 2013); *Zambelli Fireworks Mfg. Co. v. Wood*, 592 F.3d 412 (3d Cir. 2010); *Delay v. Rosenthal Collins Group, Inc.*, 585 F.3d 1003 (6th Cir. 2009); *Harvey v. Grey Wolf Drilling Co.*, 542 F.3d 1077 (5th Cir. 2008); *Pramco LLC v. San Juan Bay Marina, Inc.*, 435 F.3d 51 (1st Cir. 2006); *Johnson v. Columbia Properties Anchorage, LP*, 437 F.3d 894 (9th Cir. 2006); *Gen. Tech. Applications, Inc. v. Extro Ltda.*, 388 F.3d 114 (4th Cir. 2004); *GMAC Commercial Credit LLC v. Dillard Dept. Stores*, 357 F.3d 827 (8th Cir. 2004); *Rolling Greens MHP, LP v. Comcast SCH Holdings LLC*, 374 F.3d 1020 (11th Cir. 2004); *Belleville Catering Co. v. Champaign Mkt. Place, LLC*, 350 F.3d 691(7th Cir. 2003); *Handelsman v. Bedford Village Associates Ltd. Partnership*, 213 F.3d 48 (2d Cir. 2000). Neither the D.C. Circuit Court of Appeals nor the 10th Circuit Court of Appeals has directly decided this issue, though both the District of D.C. and at least the District of Colorado have agreed with other circuits that the citizenship of an LLC is determined by the citizenship of each of its members. *See, e.g., Makris v. Tindall*, No. 13-00750, 2013 U.S. Dist. LEXIS 41397 (D. Colo. Mar. 25, 2013); *Jackson v. HCA-HeathOne, LLC*, No. 13-02615, 2013 U.S. Dist. LEXIS 146023 (D. Colo. Oct. 9, 2013); *Shulman v. Voyou, LLC*, 305 F. Supp. 2d 36

(D.D.C. 2004); *Johnson-Brown v. 2200 M. St. LLC*, 257 F. Supp. 2d 175 (D.D.C. 2003).

Proposed Rule Revision

Attached as Appendix 1 is a proposed revision to the diversity statute that serves primarily as a technical fix to ensure that the letter of the diversity statute mirrors its spirit. This idea is nothing new or radical. In 1965—almost fifty years ago—the American Law Institute proposed giving unincorporated business entities the same citizenship status as corporations for diversity purposes. *See Diversity Jurisdiction Over Unincorporated Business Entities: The Real Party in Interest as a Jurisdictional Rule*, 56 TEXAS L. REV. 243, 244 n.8 (1978) (citing ALI, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS, PART I, 59 (Sept. 25, 1965, Official Draft)). It is well past time that courts recognize unincorporated business entities as what they effectively are—legal fictions, like corporations, with rights and duties separate and apart from their members and owners.

Why the Federal Diversity Rule Should Be Amended

A. The current statute leads to unacceptable and readily avoidable wastes of time, money, and judicial resources.

Uncertainty as to whether a case belongs in federal court increases not only the "cost and complexity of litigation," but also "the parties will often find themselves having to start their litigation over from the beginning." *Hoagland*, 385 F.3d at 739-40. Both potential plaintiffs and defendants often have difficulty determining the non-management members of opposing party entities, particularly if such membership is not public information. As a result, they lack a good faith basis for pursuing (or challenging) the propriety of the federal forum. The resulting uncertainties have led appellate courts to criticize the efforts expended to address citizenship at the outset and on appeal. *See, e.g.*, *Smoot v. Mazda Motors of America, Inc.* 469 F.3d 675, 677-78 (2006) (and cases cited therein) (criticizing jurisdictional statements of all parties on appeal and noting "the lawyers have wasted our time as well as their own and (depending on the fee arrangements) their clients' money. We have been plagued by the carelessness of a number of the lawyers practicing before the courts of this circuit with regard to the required contents of jurisdictional statements in diversity cases.").

This uncertainty means that parties can fully litigate a case, only to have an appellate court determine that the district court lacked jurisdiction in the first instance. *GMAC Commercial Credit LLC v. Dillard Department Stores, Inc.*, 357 F.3d 827 (8th Cir. 2004), presents an example of this waste of judicial resources and the court's inability effectively to address the waste. In that case, the LLC plaintiff sued the defendant in federal court on diversity grounds. Neither party challenged subject matter jurisdiction before the district court. The defendant won partial summary judgment and a jury verdict. *Id.* at 828. After obtaining new counsel, plaintiff moved to vacate the judgment award on the ground that diversity of citizenship did not exist and thus the court lacked subject matter jurisdiction from the outset. *Id.* Unable to determine, based on the record below, whether the citizenship of the plaintiff's members in fact destroyed complete diversity,

the Eight Circuit remanded for a discovery hearing on diversity. *Id.* at 829. Defendants also moved for attorneys fees because plaintiff—who chose the federal forum—never raised the diversity issue until appeal. *Id.* The appellate court left the decision of whether to award fees to the district court on remand. *Id.*

Sometimes even the type of entity involved can be unclear. *Tuck v. United Servs. Auto. Ass'n*, 859 F.2d 842 (10th Cir. 1988), involved an uninsured motorist who had killed Johnny Tuck in a collision. Tuck's estate and parents sued United Services Automobile Association ("USAA") to recover benefits under an uninsured motorist provision of Tuck's insurance policy. *Id.* Believing that USAA was a corporation, the Tucks alleged that USAA was diverse from the Tucks, and the pretrial order incorporated the jurisdictional allegations. *Id.* at 844. The jury returned a verdict for the Tucks on all claims. *Id.* at 843. USAA filed a motion for judgment notwithstanding the verdict, or in the alternative, for a new trial. *Id.* The district court denied both motions but did reduce the Tucks' actual damage award. *Id.* USAA appealed and "revealed, for the first time, that it was not a corporation, but rather an unincorporated association organized under the insurance laws of the state of Texas." *Id.* USAA's status as an association made it a citizen of every state in which its members were citizens, and in consequence, USAA argued, the court lacked subject matter jurisdiction. *Id.* at 844. Admonishing USAA, the court stated, "[t]his is not the first time that USAA has faced this problem." *Id.* at 845 (citing *Baer v. United Servs. Auto. Ass'n*, 503 F.2d 393 (2d Cir. 1974)). To salvage the case and halt USAA's attempted jettisoning of an unfavorable verdict, the court allowed the Tucks to amend their complaint on remand by dismissing all of the Oklahoma citizens who were "members" of USAA. *Id.* at 846. However, the court noted that even this dismissal plan might not work on the case before it as USAA had been sued as an entity, and not the individual members. Still, the appellate court remanded to allow the district court to determine if a jurisdictional basis could be identified. Otherwise, the jury verdict (even as reduced) could not stand. *Id.* at 846-67.

Two problems are highlighted by *Tuck*. First, under the current regime the distinction between a corporation and any other form of business entity drives whose "citizenship" determines the entity's citizenship. Thus, mistakenly believing that an entity with a national presence and operations in multiple states is a corporation can result in plaintiffs, defendants, and trial courts failing to examine citizenship properly. Second, and perhaps more substantively disturbing, *Tuck* highlights that once the proper analysis is applied some large unincorporated associations, with members in all 50 states, simply could not be haled into federal court (or seek relief in federal court) unless a federal question was presented. There is no practical reason for closing off access to federal courts in this manner.

Because federal courts are obligated to determine whether they may exercise subject matter jurisdiction *regardless* of whether the parties ever raise the issue, *see Chapman v. Barney*, 129 U.S. 677, 681 (1889), uncertainty as to forum can be an expensive and unexpected problem to address well into litigation, possibly requiring jurisdictional discovery. For example, one court addressed the LLC defendant's citizenship *sua sponte* in order to "satisfy itself" that federal jurisdiction existed, even though neither litigant raised the question of whether any LLC members were citizens of the same state (and the complaint failed to allege facts regarding the citizenship of the

LLC's members). *See Delay v. Rosenthal Collins Group, Inc.*, 585 F.3d 1003, 1004-05 (6th Cir. 2009). The court directed the defendant "to submit a jurisdictional statement identifying the citizenship of all of its members." *Id.* at 1005.

In addition to the problems highlighted by *Tuck*, the problem of a case being reversed on appeal for lack of subject matter jurisdiction can wreak out-sized consequences upon plaintiffs. Should years pass and then a case be remanded as void ab initio due to a lack of subject matter jurisdiction, the plaintiff-litigant may discover that the statute of limitations has run during the time the matter was pending, although improperly, in federal court. Because states' tolling statutes will vary from state to state, particularly with respect to an action that was void (as opposed to voidable or subject to an affirmative defense) from the outset, further uncertainty is injected into an already uncertain process.

While the *Smoot* and *Tuck* courts, and others, have been quick to criticize attorneys for failing to investigate sufficiently deeply, the criticism can gloss over the difficulty of the investigation. It is not enough to examine who the members were of the unincorporated association at the time it came into existence; citizenship is determined as of the time of filing. Thus, an individual member who has moved from a diverse state to a non-diverse state can destroy diversity, even if the unincorporated association is not aware of the move. And as more and more communications take place via cell phones (with "traveling" area codes) and internet communications (which do not necessarily reflect physical addresses at all), the ability to unearth this information, let alone to unearth it in a timely enough manner to gather the information to file or remove a lawsuit, presents substantial practical difficulties. These difficulties are highlighted by the increased reliance upon unincorporated entities as a means of doing business that are shown in the IRS filing statistics quoted *supra*.

Given that litigants need absolute clarity in order to avoid litigating a case in federal court only to have it remanded on jurisdictional grounds after judgment, the diversity statute needs to be streamlined and simplified in order to apply the corporate citizenship test to business entities that are functionally equivalent to corporations.

B. The proposed amendment provides a workable, bright line rule that courts have been applying for decades to corporations.

Currently, counsel for plaintiffs and for defendants can find themselves guessing about citizenship at critical filing or removal stages. Plaintiffs in non-federal question cases who choose to file their lawsuits in federal court must plead that diversity jurisdiction exists. This requires pleading the citizenship of the defendant. Should the defendant be an LLC or other unincorporated association, however, the information may not be available to the plaintiff. Information regarding the ownership of unincorporated entities like LLCs frequently is not a matter of public record. While the LLCs themselves should be able to identify their members, even they may have difficulty identifying the citizenship of every member on any given date. Cohen, *supra*, p. 303. Yet plaintiffs filing or defendants trying to remove, are forced to determine and plead citizenship under tight timeframes.

Further, the current rules, which ignore the reality of where an unincorporated association actually does business, can result in diversity citizenship, and thus removal, being available where the purposes of diversity jurisdiction are not met. In *Johnson v. Smithkline Beecham Corp.*, 724 F.3d 337 (3d Cir. 2013), the Third Circuit granted interlocutory appeal after plaintiffs unsuccessfully tried to remand their personal injury lawsuit after the defendants, including two LLC's, removed the action to federal court. Plaintiffs, who are citizens of Pennsylvania, argued that one LLC defendant was headquartered and largely managed in Pennsylvania. *See id.* at 342. The defendant's sole member, however, was incorporated in and operated primarily out of Delaware. The Third Circuit concluded that, even though the LLC was based in the same state where plaintiffs were citizens, the district court properly exercised diversity jurisdiction. *Id.* at 346-48; *see also Gen. Tech. Applications, Inc. v. Exro Ltda*, 388 F.3d 114, 116 (4th Cir. 2004) (remanding case after defendants removed and won summary judgment, concluding that there was not complete diversity, and the case should proceed in state court).

C. The proposed change will bring cohesion between 28 U.S.C. § 1332(c) and the Class Action Fairness Act.

Other changes to federal law have recognized the benefit of treating all unincorporated associations in the same manner as corporations. The Class Action Fairness Act of 2005 ("CAFA") expressly defines the citizenship of "unincorporated association[s]" as limited to the state where the association has its principal place of business and the state under whose laws the association is organized. *See* 28 U.S.C. § 1332(d)(10). While the statute does not clarify what entities are considered "unincorporated associations," several courts have construed it to include any business entity that is not organized as a corporation. *See, e.g., Ferrell v. Express Check Advance of SC LLC*, 591 F.3d 698, 699 (4th Cir. 2010) (holding that a limited liability company is an "unincorporated association" for diversity purposes under CAFA); *Bond v. Veolia Water Indianapolis, LLC*, 571 F. Supp. 2d 905, 910 (S.D. Ind. 2008) (same). Indeed, Congress' express purpose in adding subsection (d)(10) was to ensure that unincorporated entities were as protected from state-court bias in class actions as were incorporated entities. *See* Christine M. Kailus, *Diversity Jurisdiction and Unincorporated Businesses: Collapsing the Doctrinal Wall*, 2007 UNIV. OF ILL. L.R. 1543, 1554 (Sept. 7, 2007).

The CAFA citizenship test for unincorporated associations literally mirrors the test for corporations under the existing 28 U.S.C. § 1332(c), but it applies only in the context of class action litigation. This disconnect means that an LLC, for example, is a legal fiction with "separate entity" status if the lawsuit is a class action; in a non-class suit, the LLC is merely the sum of its members. It begs the question whether, had the Supreme Court decided *Carden* after CAFA was passed rather than 15 years prior, the Court might have reached a different result in order to avoid interpreting the diversity statute in a manner that yields an absurd result. Regardless, the proposed revision will ensure uniform treatment of unincorporated associations regardless of whether the plaintiff sues solely on his or her own behalf or on behalf of a putative class.

D. The proposed change will not lead to additional administrative difficulties but will lessen existing administrative burdens.

The proposed change should not result in new administrative difficulties. Experience with the Class Action Fairness Act (28 U.S.C. § 1332(d)(10)) has not led to difficulties in determining either the state under which entities are organized or where they have their principal places of business. To the extent issues may arise with respect to identifying a principal place of business, the experience regarding doing so for corporations, both that cited in and applying *Hertz Corp. v. Friend*, 559 U.S. 77 (2010), is available, as well as nearly a decade of experience under the Class Action Fairness Act. Moreover, removing the requirement of examining the citizenship of every member of unincorporated business associations can greatly simplify administrative burdens upon parties both filing and removing actions on the basis of diversity of citizenship.

E. The proposed change will not greatly increase filings in federal courts or removals to federal courts.

The proposed change only deals with citizenship of entities. The "complete diversity" requirement of *Strawbridge v. Curtiss* is retained. As a result, in situations where a member of an unincorporated association is an active participant in providing the services at issue (frequently professional services for various LLCs and LLPs), that individual may still be named as a defendant. If that naming destroys diversity because that individual is a citizen of the same state as the plaintiff, then the plaintiff's choice of a state forum will remain. The only situation in which a plaintiff would lose the ability to keep a case in state court due to the proposed change would involve the fortuitous citizenship of an uninvolved member of an entity.

While it is impossible to forecast the total number of "new" federal filings (including removed actions) that would become available, and thus might result, under the new proposal the impact should be minimal. Unincorporated associations with their principal place of business where they generally perform work (and thus impact potential plaintiffs), and which have as members citizens of that same state, will still have the same citizenship. The major change involves providing clarity concerning where to look – the now well-developed "principal place of business" and state of organization sites – and where not to look – eliminating the need to examine the citizenship of every record owner at the time the suit is filed.

A presumably accurate forecast of the proposed number of new filings and removals would require knowing or estimating the total number of cases currently being filed in state courts where (i) there is a lack of diversity *solely* because of the citizenship of a member of an unincorporated association[9], and (ii) either the plaintiff would wish to file in federal court or the defendant would wish to remove (assuming that the forum state is not the defendant's principal place of business). We are not aware of research from state court dockets that would reveal this type of information.

[9] For purposes of this analysis we are assuming that the jurisdictional amount can be satisfied at a pleading stage for a Complaint or at the removal stage, if a defendant removes.

Removal experience under CAFA is instructive for some comparative purposes. From 2005 through 2008 the Federal Judicial Center published four annual interim reports on "The Impact of the Class Action Fairness Act of 2005 on the Federal Courts." The final report of a two-phase study was published in April 2008,[10] and concluded the statistical analysis of filings through June 2007 with prior years, including a year-by-year comparison with experience under CAFA and a comparison to the pre-CAFA year of 2001. This study was limited to class actions, and the authors note that while there was an increase in federal filings, "[m]uch of that increase was in federal question cases, especially labor class actions and class actions filed under federal consumer protection statutes." Lee & Willging, "Impact" (April 2008) at 1. In fact, "about 86 percent of [of the increase in federal filings and removals from the pre-CAFA to post-CAFA periods studied] was accounted for by the increase in federal question class action filings and removals." Lee & Willging, "Impact" (April 2008), at 3, n.2. This impact in federal question cases does not reflect an increase due to CAFA, and serves as a noteworthy reminder that increased federal filings pursuant to federal statutes providing federal jurisdiction will not be impacted by the current proposal to change the citizenship analysis for diversity jurisdiction. That is, increased filings under consumer protection statutes such as the Fair Debt Collection Practices Act, Fair Credit Reporting Act, and similar statutes will be unaffected.

The April 2008 "Impact" study revealed two key points. First, there was an increase in class actions filed under CAFA's expanded diversity jurisdictions. This was, of course, one of the express purposes of CAFA.[11] The April 2008 "Impact" study notes that the number of cases varied widely jurisdiction to jurisdiction.

The "Impact" study also separately examined removed actions. As shown in the tables accompanying the study, "[a]lthough diversity class action removals, like filings, increased in the immediate post-CAFA period, the prevailing trend for such cases in both the pre-CAFA and post-CAFA periods is downward. . . . [D]iversity class action

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[10] Emery G. Lee, III, & Thomas E Willging, "The Impact of the Class Action Fairness Act of 2005 on the Federal Courts: Fourth Interim Report to the Judicial Conference Advisory Committee on the Civil Rules" (April 2008) (available online at http://www.classactionlitigation.com/cafa0408.pdf).

[11] The purpose section of CAFA expressly noted that: "Abuses in class actions undermine the national judicial system, the free flow of interstate commerce, and the concept of diversity jurisdiction as intended by the framers of the United States Constitution, in that State and local courts are--

> (A) keeping cases of national importance out of Federal court;
>
> (B) sometimes acting in ways that demonstrate bias against out-of-State defendants; and
>
> (C) making judgments that impose their view of the law on other States and bind the rights of the residents of those States."

28 U.S.C. § 1711(a)(4).

removals have been initiated in federal court in the last twelve months of the study period [2006-2007] at about the same rate as they were in the pre-CAFA period. CAFA appears to have temporarily increased the number of diversity class action removals to the federal courts, especially in comparison with the immediate pre-CAFA period, when removals of such cases were few. But in both the pre-CAFA and post-CAFA periods, the trend has been for fewer class actions to be removed to federal courts on the basis of diversity of citizenship jurisdiction." Lee & Willging, "Impact" (April 2008), at 7. In short, following CAFA's passage there was a temporary uptick in removals and then removals returned to pre-CAFA levels.[12]

With the proposed change in diversity jurisdiction, one would not expect the type of increase in original filings created with CAFA. CAFA's citizenship provisions were expressly crafted to increase diversity jurisdiction in a class action context and in response to concerns that a more uniform rule was needed. The diversity changes in the current proposal are more limited. Also significantly, the current proposal will still allow "local" disputes to be adjudicated "locally," because where the unincorporated association has its principal place of business in a state and deals with others within that state, diversity jurisdiction will not exist. Similarly, if a member, shareholder, partner, or other stakeholder of an entity is non-diverse from a party on the other side of the case, and if that member or shareholder or partner or the like was sufficiently actively involved in the matter giving rise to the lawsuit, then naming the member, shareholder, partner or the like would also defeat diversity. The only change occurs when a non-involved member, shareholder, partner, or the like happens to have the same citizenship as a party on the other side of the dispute.

Removal experience under the proposed statutory change may track that of CAFA. While there may be an initial increase in removals to federal court, the ability to craft a complaint within ethical bounds to still add non-diverse defendants and the fact that truly local disputes will likely remain local should avoid a long-term increase. The structure and purpose of CAFA would likely have resulted in a more significant prospect for removal, as one of the stated goals was to move multi-state actions filed in state courts to federal courts via the removal process.

Summary of Potential Costs/Benefits

Any analysis of the impact of the proposed change must not stop at attempting to "count new cases." Under the present system, as shown by cases such as *Smoot*, *Tuck*, and *GMAC Commercial Credit LLC v. Dillard Department Stores* (all cited *supra*), the judicial resources that can be expended are huge when a case is improperly in federal court due to a misapprehension of the current jurisdictional rules. A mistake on the part of both parties can result in the appellate reversal of a case tried to a jury because lack of subject matter jurisdiction is an unwaivable defect. On the other side of the equation, one can predict that a substantial percentage of new cases that are filed or removed solely

[12] A variety of reasons may be postulated for the return to pre-CAFA levels. Plaintiffs may have begun filing cases in federal court initially, thus obviating the need for removal. Or Plaintiffs desiring to litigate in state courts may have changed the mix of defendants named.

because of the new citizenship proposal for unincorporated entities will not result in the resources of a full jury trial being expended. In short, for every case that, like *Dillard*, results in an appellate reversal, multiple cases would have to be filed and resolved before the same level of resources expended is reached. One late reversal under the current system would take the same resources as multiple new filings made possible by the proposed change in the statute.

The current difference in treatment between corporations and unincorporated entities was defensible when (i) there were far few unincorporated entities being used, (ii) partnership and other unincorporated entity rules in the majority of states did not recognize the entity as distinct from its members, and (iii) entities could reasonably be expected to keep up with the citizenship of their individual members at all times. Today, every one of these considerations has changed. Unincorporated entities are chosen as the appropriate structure for businesses at an ever-increasing rate. The rules on the entity/partnership distinction have completely reversed, with the entity being recognized as separate from its individual members and capable of suing and being sued in model statutes enacted across the country. And increased communication to non-physical locations has increased substantially the difficulty of knowing "where" individual members are "citizens" in an increasingly mobile society. In short, the time to re-examine the citizenship rules has long since arrived.

Respectfully submitted,

Appendix 1: Proposed Revision

Existing Provisions (No changes to § 1332(c)(1) and (2) are proposed except the addition of a semicolon at the end of (2) in lieu of a period.)

28 U.S.C. 1332(c)(1):

A corporation shall be deemed to be a citizen of every State and foreign state by which it has been incorporated and of the State or foreign state where it has its principal place of business, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of—

(A) every State and foreign state of which the insured is a citizen;

(B) every State and foreign state by which the insurer has been incorporated; and

(C) the State or foreign state where the insurer has its principal place of business; and

28 U.S.C. 1332(c)(2):

The legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent;

New Provisions

and

28 U.S.C. 1332(c)(3):

Any unincorporated association that has the capacity to sue or be sued as determined as set forth in Federal Rule of Civil Procedure 17(b) (including any amendments or revisions as may subsequently be made thereto), including without limitation an entity that is a general partnership, a limited partnership, a master limited partnership, a professional corporation, a limited company, a limited liability company, a professional limited liability company, a business trust, a union, or any other unincorporated association irrespective of name or designation, shall be deemed to be a citizen of every State and foreign state in or by which it has been organized and of the State or foreign state where it has its principal place of business without reference to the citizenship of each partner, shareholder, member, or beneficiary, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of—

(A) every State and foreign state of which the insured is a citizen;

(B) every State and foreign state by which the insurer has been incorporated; and

(C) the State or foreign state where the insurer has its principal place of business.

GENERAL INFORMATION FORM

Submitting Entity: Section of Litigation

Submitted By:

1. Summary of Resolution(s). The resolution requests that Congress change the definition of "citizenship" for purposes of 28 U.S.C. § 1332 to provide that all unincorporated business entities be treated in the same manner as corporations.

2. Approval by Submitting Entity. Section of Litigation

3. Has this or a similar resolution been submitted to the House or Board previously? No.

4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?

5. If this is a late report, what urgency exists which requires action at this meeting of the House? This is not a late report.

6. Status of Legislation. (If applicable) Legislation has not yet been introduced.

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.

8. Cost to the Association. (Both direct and indirect costs) None

9. Disclosure of Interest. (If applicable) None.

10. Referrals.

11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address)

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Contact Name and Address Information. (Who will present the report to the House? Please include name, address, telephone number, cell phone number and e-mail address.)

TBD

EXECUTIVE SUMMARY

1. Summary of the Resolution: The resolution requests that Congress change the definition of "citizenship" for purposes of 28 U.S.C. § 1332 to provide that all unincorporated business entities be treated in the same manner as corporations.

2. Summary of the Issue that the Resolution Addresses

Currently the definition of "citizenship" of unincorporated associations can lead to waste of judicial time and effort, needless appellate review and even reversals even following jury verdicts and judgments, and related problems with determining the citizenship of unincorporated associations. Because unincorporated associations are currently treated as citizens of every state where any of their members, shareholders, partners, beneficiaries, etc., are citizens; there can be significant problems arising when determining whether to sue in federal court in the first instance and whether a case can be removed to federal court. Because the citizenship issue impacts subject matter jurisdiction, a wrong determination mandates a dismissal from the outset, no matter how long the proceedings have been pending or what stage has been reached. Subject matter jurisdiction issues are not waivable.

3. Please Explain How the Proposed Policy Position will address the issue

The proposed amendments to the statute will treat unincorporated associations in the same manner as corporations. For diversity of citizenship purposes, the association will be deemed to be a citizen of up to two places: (i) the state of organization and (ii) the association's principal place of business.

4. Summary of Minority Views

The one potential, expected minority view is a concern that the amendment might result in more cases finding their way to federal courts. Yet, by replacing uncertainty with a more workable rule, the extreme judicial waste of cases being tried that would never have been filed in federal court can be substantially avoided. The avoidance of this waste alone may counterbalance any minimal increase in filings or removals. Moreover, the "complete diversity" rule will remain and is likely to lessen any potential, minimal increase in filings or removals.

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TAB 5

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Rule 4(m)

It is recommended that the proposed amendment of Rule 4(m) be recommended for adoption. The text of published Rule 4(m) and Committee Note follow the summary of comments.

Summary of Comments Rule 4(m)

CV-2014-0009, Federal Magistrate Judges Association: Supports the proposal. Experience shows that "significant delays can often occur in effecting service in a foreign country, and that the rules governing service should be uniform and apply equally to individuals, foreign states, corporations, partnerships, and associations."

CV-2014-0010, Association of the Bar of the City of New York: The Association had suggested this amendment in commenting on the 2013 proposal to shorten the presumptive time for service, and agrees with the proposal.

2014-CV-0011, Federal Courts Committee, New York County Lawyers Association: "[S]upports this clarification, which appears to comport with the intent of the rule as originally written." The importance of this amendment will increase if the Supreme Court adopts the proposal to shorten to 90 days the presumptive time for service set by Rule 4(m).

CV-2014-0014, Hon. Joyce R. Branda, U.S. Department of Justice: "The Department supports this proposal."

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PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE*

Rule 4. Summons

* * * * *

(m) Time Limit for Service. If a defendant is not served within 90[1] days after the complaint is filed, the court—on motion or on its own after notice to the plaintiff—must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period. This subdivision (m) does not apply to service in a foreign country under Rule 4(f), 4(h)(2), or 4(j)(1).

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* New material is underlined in red; matter to be omitted is lined through.

[1] This wording reflects the proposed amendment published in August 2013.

13 * * * * *

Committee Note

Rule 4(m) is amended to correct a possible ambiguity that appears to have generated some confusion in practice. Service in a foreign country often is accomplished by means that require more than the 120 days originally set by Rule 4(m)[, or than the 90 days set by amended Rule 4(m)]. This problem is recognized by the two clear exceptions for service on an individual in a foreign country under Rule 4(f) and for service on a foreign state under Rule 4(j)(1). The potential ambiguity arises from the lack of any explicit reference to service on a corporation, partnership, or other unincorporated association. Rule 4(h)(2) provides for service on such defendants at a place outside any judicial district of the United States "in any manner prescribed by Rule 4(f) for serving an individual, except personal delivery under (f)(2)(C)(i)." Invoking service "in the manner prescribed by Rule 4(f)" could easily be read to mean that service under Rule 4(h)(2) is also service "under" Rule 4(f). That interpretation is in keeping with the purpose to recognize the delays that often occur in effecting service in a foreign country. But it also is possible to read the words for what they seem to say—service is under Rule 4(h)(2), albeit in a manner borrowed from almost all, but not quite all, of Rule 4(f).

The amendment resolves this possible ambiguity.

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Rule 6(d)

It is recommended that the proposed amendment of Rule 6(d) be recommended for adoption. The text of published Rule 6(d) and Committee Note follow the summary of comments.

This recommendation does not address a suggestion by the Department of Justice that the Committee Note be amended by adding the following language:

> This amendment is not intended to discourage courts from providing additional time to respond in appropriate circumstances. When, for example, electronic service is effected in a manner that will shorten the time to respond, such as service after business hours or from a location in a different time zone, or an intervening weekend or holiday, that service may significantly reduce the time available to prepare a response. In those circumstances, a responding party may need to seek an extension, sometimes on short notice. The courts should accommodate those situations and provide additional response time to discourage tactical advantage or prevent prejudice to the responding party.

As noted below, initial reactions to this proposal have varied among the different advisory committees. It may prove wise to allow for accommodation if other advisory committees come to different conclusions. It will be desirable to present uniform recommendations to the Standing Committee if that proves possible. The Committee might take a position subject to reconsideration by e-mail exchanges if other committees take different positions, or else -- if the question seems closely balanced -- authorize the Committee Chair to adopt a uniform position that all advisory committees are prepared to recommend.

The comments summarized below show some opposition. One theme is that the various time periods set by the Civil Rules are too short. Nothing should be done to further shorten the time to respond after service.

Another argument is that e-filing and service facilitate gamesmanship. Filing and ECF service will be postponed to a time just before midnight, preferably on a Friday, to shorten the time practically available to respond.

A somewhat different suggestion is that the problem of late e-filing and service should be addressed by providing that anything filed or served after 6:00 p.m. be considered as served on the next day. That would make e-service equivalent to in-hand service, at least if it were elaborated to consider service as made on the next day that is not a Saturday, Sunday, or legal holiday. And it would substitute a uniform national rule for the local rules that address this question by choosing different cut-off times, e.g., 5:00 p.m.

or 6:00 p.m.

The Federal Magistrate Judges Association makes a different point. They fear that casual readers will come to the conclusion that 3 days are in fact added after service by electronic means. This will follow from the propositions that 3 days are added after service by "other means * * * consented to in writing," Rule 5(b)(2)(F), and that electronic service requires written consent, Rule 5(b)(2)(E). Amended Rule 6(d) will, to be sure, refer only to service under Rule 5(b)(2)(C) (mail), (D) (leaving with the clerk,) or F (other means consented to). But the deletion of (E) (electronic service) will not appear on the face of Rule 6(d). Apparently the hypothesis is that someone reading amended Rule 6(d) will look back to Rule 5(b)(2), read (E) as requiring consent for e-service, and read (F) "other means" to embrace (E) e-service. One suggested cure is to omit the newly added parenthetical descriptions of the modes of service that still allow 3 added days. Rule 6(d) has existed without the parenthetical descriptions for some time. But they are added as a helpful tool that will reduce the need to thumb or scroll back to Rule 5(b)(2).

On balance, it seems better to stick with the proposal as published. The magistrate judges have ample experience with the ways in which careless readers may become confused by rule text that should not be susceptible to misreading. Somewhere, some time, someone may indeed fall into the trap they suggest. It seems unlikely, however, that any serious consequences will follow. Beyond that, these agenda materials include a proposal to publish for comment an amendment of Rule 5(b)(2)(E) that will eliminate the requirement of consent for e-service. If that is adopted, the potential misreading will vanish. Retaining the parenthetical descriptions offers enough value to accept the risk for a year, or perhaps longer. (And revising the parenthetical for (F) to read "(other means consented to, except electronic service)" would have to be undone by publishing a proposal to delete these words at the same time as the Rule 5(b)(2)(E) amendment is published.)

The Department of Justice expresses concerns about eliminating the added 3-days, focusing on the risk that e-service will fail, and the problems of late-night filing, particularly on a Friday or before a legal holiday. And it recommends that "[i]f the Committee decides to proceed with the proposal," it add to the Committee Note the language quoted above. This proposed Note language has stimulated conflicting responses in early discussions among the Reporters for the several advisory committees. Some believe it would be useful to add the language. Others -- including the Civil Rules Reporter -- believe that the general principle of economy in Committee Notes should prevail because courts will readily understand and accommodate the needs of a party who has been put at a disadvantage by the circumstances of e-service. The question may be empirical: is there substantial ground for concern that some courts, busy with many matters, impatient with lawyers who cannot

reach reasonable accommodations among themselves, and anxious to keep cases moving, will fail to recognize the need for reasonable accommodations? And is there substantial reason to hope that this problem, if it exists, will be reduced by Committee Note language?

Summary of Comments Rule 6(d)

CV-2014-0003, Auden L. Grumet, Esq.: Opposes the proposal. (1) Response times throughout the Civil Rules are too restrictive. They should not be shortened further. (2) The idea that this will "simplify" time counting "is absurd and illogical." (a) The 3-added-days provision will continue to apply to some other modes of service, generating opportunities for confusion. (b) Calculating time is far less complex than "the much more convoluted aspects of being a practitioner in federal court." (c) The value of the added 3 days far outweighs any putative confusion. (d) The value of counting days in increments of 7 would be better served by adding 7 days after service.

CV-2014-0004, Deanne Upson: "Being pro se, I completely agree [with Auden L. Grumet, 0003] that more time is warranted and wise, not less."

CV-2014-0007, Jolene Gordo, Esq.: This comment focuses on Rule 5(b)(2)(A) as the place to "make it absolutely clear that using the ECF system is considered ‘personal’ service." But it ties to the concern that e-filing may be deliberately delayed to 11:59 p.m. The idea is that if e-service is treated as "personal service," it will have to be made by the standard close of business, 5:00 or 6:00 p.m.

CV-2014-0008, Bryan Neal: Disagrees with the proposal. (1) When e-service is made directly between the parties, not through the ECF system, problems still occur with incompatible systems and spam filters. (2) More importantly, filing may be deliberately delayed to as late as 11:59 p.m. There should be more time to respond than is allowed when personal service is made by hand delivery during business hours. (3) E-service may be made on weekends and holidays: If it is made on Saturday, does Sunday count as Day 1? So if filing and service are made at 11:59 p.m. on Friday, that can effectively shave 2 days off the response time. (4) Why is there any need to shorten time periods? It just makes modern litigation more difficult. (5) Discovery response times typically are set at 30 days, so the advantages of 7-day increments do not apply. It would make more sense to reset the times to 28 days, plus 7 days for anything but personal service. Or, still better, to provide a flat 35 days regardless of the method of service.

Separately, suggests that service by commercial carrier should be allowed under Rule 5 without requiring consent of the person to be served.

CV-2014-0009, Federal Magistrate Judges Association: "[G]enerally endorses" the proposal. But is concerned that the drafting creates a potential confusion that will not be dispelled by the explicit statement in the Committee Note. As published, parentheticals are used to describe the enumerated modes of service that continue to allow 3 added days: "(mail)," "(leaving with the clerk)," and "(other means consented to)." Simply looking at the new rule text will not reveal that e-service, covered by Rule 5(b)(2)(E), has been omitted. An incautious reader may look back to Rule 5(b)(2), discover that consent is required for service by electronic means, and conclude that this is "other means consented to" and continues to allow 3 added days. The confusion could be eliminated by deleting the parenthetical descriptions, or by amending the last one to read: "(F)(other means consented to except electronic service)."

2014-CV-0010, Association of the Bar of the City of New York: Agrees that advances in technology, along with greater sophistication in using electronic communication, "have substantially alleviated concerns over delays and other difficulties in receiving, opening, and reviewing electronic documents." Supports the proposal.

2014-CV-0011, Federal Courts Committee, New York County Lawyers Association: New York courts treat electronic service in the same way as in-hand service; this has not caused any problems. Generally counsel work out briefing schedules, and can address the timing of electronic service in their agreements. The dissenters in the Committee point to problems that are not serious. To be sure, it is possible to effect electronic service at 11:59 pm on Friday, and time is required to print out lengthy filings. A party who needs more time because of such practices will almost invariably get the needed time. (The dissenters believe that the prospect of gamesmanship requires that the present 3-added days provision be retained.)

CV-2014-0012, Cheryl Siler, for Aderant CompuLaw: Endorses elimination of the 3 added days. But suggests that Rule 6 should be further amended to provide that a document served electronically after 6:00 p.m. is considered served on the next day. As a practical matter, that will make e-service equivalent to in-hand service. In addition, it will establish a uniform national practice that displaces local rules that establish similar but variable provisions -- a document filed or served after 5:00 p.m., or after 6:00 p.m., is treated as filed the next day. It also would affect the many local rules that require filing and service by 11:59 p.m. in the court’s time zone.

CV-2014-0013, Pennsylvania Bar Association: Opposes the amendment. "[T]he additional three days serves a useful purpose in alleviating the burdens that can arise if a filing is electronically served at extremely inconvenient times." With one dissent, arguing that service at inconvenient times is not a problem.

CV-2014-0014, Hon. Joyce R. Branda, U.S. Department of Justice: Expresses concerns about the consequences of eliminating the 3 added days. "Unlike personal service, electronic distribution does not assure actual receipt by a party." Prejudice is particularly likely when local rules require a response within 14 or fewer days. A filing in a different time zone can mean that e-service reaches a computer in the Eastern Time zone as late as 3:00 a.m., or even later. And the service may be made on a Friday, or the day before a holiday weekend. A 10-day period could become, in effect, 5 business days. "It is foreseeable that some attorneys will try to take advantage of the elimination of the three additional days * * *." But if the Committee decides to go ahead with the proposal, the Department recommends language for the Committee Note to recognize the need for additional time to respond in appropriate cases. This language is quoted above.

(Largely similar comments have been made in response to the parallel proposals published by the Appellate, Bankruptcy, and Civil Rules Committees.)

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Rule 6. Computing and Extending Time; Time for Motion Papers

* * * * *

(d) Additional Time After Certain Kinds of Service. When a party may or must act within a specified time after being served[2] and service is made under Rule 5(b)(2)(C) (mail), (D) (leaving with the clerk), ~~(E),~~ or (F) (other means consented to), 3 days are added after the period would otherwise expire under Rule 6(a).

Committee Note

Rule 6(d) is amended to remove service by electronic means under Rule 5(b)(2)(E) from the modes of service that allow 3 added days to act after being served.

Rule 5(b)(2) was amended in 2001 to provide for service by electronic means. Although electronic transmission seemed virtually instantaneous even then, electronic service was included in the modes of service that

[2] This wording reflects the proposed amendment published in August 2013.

allow 3 added days to act after being served. There were concerns that the transmission might be delayed for some time, and particular concerns that incompatible systems might make it difficult or impossible to open attachments. Those concerns have been substantially alleviated by advances in technology and widespread skill in using electronic transmission.

A parallel reason for allowing the 3 added days was that electronic service was authorized only with the consent of the person to be served. Concerns about the reliability of electronic transmission might have led to refusals of consent; the 3 added days were calculated to alleviate these concerns.

Diminution of the concerns that prompted the decision to allow the 3 added days for electronic transmission is not the only reason for discarding this indulgence. Many rules have been changed to ease the task of computing time by adopting 7-, 14-, 21-, and 28-day periods that allow "day-of-the-week" counting. Adding 3 days at the end complicated the counting, and increased the occasions for further complication by invoking the provisions that apply when the last day is a Saturday, Sunday, or legal holiday.

Eliminating Rule 5(b) subparagraph (2)(E) from the modes of service that allow 3 added days means that the 3 added days cannot be retained by consenting to service by electronic means. Consent to electronic service in registering for electronic case filing, for example, does not count as consent to service "by any other means" of delivery under subparagraph (F).

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Rule 82

It is recommended that the proposed amendment of Rule 82 be recommended for adoption. The text of published Rule 82 and Committee Note follow the summary of comments.

Summary of Comments Rule 82

CV-2014-0009, Federal Magistrate Judges Association: Notes but does not comment on the proposal.

2014-CV-0011, Federal Courts Committee, New York County Lawyers Association: "[E]ndorses these proposed amendments."

CV-2014-0014, Hon. Joyce R. Branda, U.S. Department of Justice: "The Department supports the proposal."

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Rule 82. Jurisdiction and Venue Unaffected

These rules do not extend or limit the jurisdiction of the district courts or the venue of actions in those courts. An admiralty or maritime claim under Rule 9(h) is governed by 28 U.S.C. § 1390 ~~not a civil action for purposes of 28 U.S.C. §§ 1391-1392~~.

Committee Note

Rule 82 is amended to reflect the enactment of 28 U.S.C. § 1390 and the repeal of § 1392.

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Other Comments

Some of the comments received after the proposals to amend Rules 4, 6, and 82 were published in August go to other rules.

CV-2014-0005, Shawna Bligh: Urges that the Committee Notes to Rule 30(c)(2) regarding "form" be expanded to state that an objection to "form" is proper only if it explains the basis for the objection. The comment is supported by attaching the opinion in Security National Bank of Sioux City, Iowa v. Abbott Laboratories, 2014 WL 3704277. It may mean to address the Committee Note to Rule 32(d)(3)(B)(i).

2014-CV-0006, Stephen J. Herman, Esq.: This comment offers several suggestions for amending Civil Rule 23, including sharper distinctions between certification for trial and certification for settlement.

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Electronic Filing and Service

The Standing Committee Subcommittee on matters electronic has suspended operations. The several advisory committees, however, are cooperating in carrying forward consideration of the ways in which the several sets of rules should be revised to reflect the increasing dominance of electronic means of preserving and communicating information.

Earlier work has considered an open-ended rule that would equate electrons with paper in two ways. The first provision would state that a reference to information in written form includes electronically stored information. The second provision would state that any action that can or must be completed by filing or sending paper may also be accomplished by electronic means. Each provision would be qualified by an "unless otherwise provided" clause. Discussion of these provisions recognized that they might be suitable for some sets of rules but not for others. For the Civil Rules, many different words that seem to imply written form appear in many different rules. The working conclusion has been that at a minimum, several exceptions would have to be made. The time has not come to allow electronic service of initiating process as a general matter -- the most common example is the initial summons and complaint, but Rules 4.1, 14, and Supplemental Rules B, C, D, E(3) and G also are involved. And a blanket exception might not be quite right. Rule 4 incorporates state grounds of personal jurisdiction; if state practice recognizes e-service, should Rule 4 insist on other modes of service?

Determining what other exceptions might be desirable would be a long and uncertain task. Developing e-technology and increasingly widespread use of it are likely to change the calculations frequently. And there is no apparent sense that courts and litigants are in fact having difficulty in adjusting practice to ongoing e-reality.

The conclusion, then, has been that the time has not come to propose general provisions that equate electrons with paper for all purposes in all Civil Rules. The Evidence Rules already have a provision. It does not appear that the Appellate, Bankruptcy, or Criminal Rules Committees will move toward proposals for similar rules in the immediate future.

A related general question involves electronic signatures. Many local rules address this question now. A proposal to amend the Bankruptcy Rules to address electronic signatures was published and then withdrawn. There did not seem to be much difficulty with treating an electronic filing by an authorized user of the court e-filing system as the filer’s signature. But difficulty was encountered in dealing with papers signed by someone other than the authorized filer. Affidavits and declarations are common examples,

as are many forms of discovery responses.

It seems to have been agreed that it is too early to attempt to propose a national rule that addresses electronic signatures other than the signature of an authorized person who makes an e-filing.

The draft rules set out below do address the signature of an authorized e-filer. The alternative drafts of Rule 5(d)(3) deserve careful consideration.

The proposals set out below are advanced for consideration of a recommendation that they be published for comment in August, 2015. They cover e-filing, e-service, and recognizing a notice of electronic filing as proof of service.

e-Filing and Service; NEF as Proof of Service

INTRODUCTORY NOTES

The draft Committee Notes are new. They are designed in part to identify issues that may prompt further discussion and changes in the draft rule texts.

e-Filing

To be complete, alternative versions of this proposal have been carried forward. But as noted with Alternative 2, at least most participants favor Alternative 2. Discussion may well begin with Alternative 2 unless Alternative 1 wins new fans.

Alternative 1

Alternative 2 has become the preferred version of at least most of the reporters and the Civil Rules Committee members who have participated in the subcommittee work.

(3) *Electronic Filing~~,~~ and Signing~~, or Verification~~.* ~~A court may, by local rule, allow papers to be filed~~ All filings must be made~~, signed, or verified~~[1] by electronic means

[1] Deletion of verification by electronic means seems a conservative choice, but may be wrong. Is there any experience with local rules that might help? Verification is required for the complaint in a derivative action, Rule 23.1, a petition to perpetuate testimony, Rule 27(a), and is allowed as an alternative to an affidavit to support a motion for a temporary restraining order, Rule 65(b)(1)(A). Verification or an affidavit may be required in receivership proceedings, Rule 66. Supplemental Rule B(1)(A) requires a verified complaint to support attachment in an in personam action in admiralty. Rule C(2) requires verification of the complaint in an in rem action. Those are the only rules

that are consistent with any technical standards established by the Judicial Conference of the United States. But paper filing must be allowed for good cause, and may be required or allowed for other reasons by local rule. The act of electronic filing constitutes the signature of the person who makes the filing. A paper filed electronically ~~in accordance with a local rule~~ is a written paper for purposes of these rules.

COMMITTEE NOTE

Electronic filing has matured. Most districts have adopted local rules that require electronic filing, and allow reasonable exceptions as required by the former rule. The time has come to seize the advantages of electronic filing by making it mandatory in all districts. But exceptions continue to be available. Paper filing must be allowed for good cause. And a local rule may allow or require paper filing for other reasons. [Many courts now have local rules that provide for paper filing by pro se litigants, and may carry those rules forward.][2]

The act of electronic filing by an authorized user of the court's system counts as the filer's signature. Under current technology, the filer must log in and present a password. Those acts satisfy the purposes of requiring a signature without need for an additional electronic substitute for a physical signature. But the rule does not make it improper to include an additional "signature" by any of the various electronic means that may indicate an intent to sign.[3]

The amended rule applies directly to the filer's signature. It does not address others' signatures. Many filings include papers

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provisions that come to mind at the moment. Statutes also may require verification. There may be circumstances in which a federal court will adopt a state-law verification requirement, although that seems uncertain.

If verification is accomplished by the filer, the signature would have to be accompanied by some sort of statement that the paper is verified. Perhaps it is better, after all, to retain "verified" in rule text?

[2] Examples could be given of good cause, or other exceptions, but this may be a case where a terse Note is better.

[3] Civil Rule 11(a) provides that every pleading, written motion, and other paper must be signed. Rule 5(d)(3) already provides that a paper filed electronically in accordance with a local rule is a written paper for purposes of the Civil Rules. It seems useful to carry this provision forward in this place, not Rule 11, omitting only the reference to local rules.

signed by someone other than the filer. Examples include affidavits and declarations and, when filed, discovery materials. Provision for these signatures may be made by local rule, but if the Judicial Conference adopts standards that govern the means or form of electronic signing, they may displace local rules.

[The former provision for verification by electronic means is omitted. Verification is not often required by these rules. The special policies that justify a verification requirement suggest that it is better to defer electronic verification pending further experience. {Local rules may address verification by electronic means.**}]**

Civil Rule 5(d)(3)

(d) Filing. * * *

Alternative 2

(3) *Electronic Filing~~,~~ and Signing~~, or Verification~~.* ~~A court may, by local rule, allow papers to be filed~~ All filings must be made and~~,~~ signed~~, or verified~~ by electronic means that are consistent with any technical standards ~~or standards of form~~[4] established by the Judicial Conference of the United States. ~~A local rule may require electronic filing only if reasonable exceptions are allowed.~~ But paper filing must be allowed for good cause, and may be required or allowed for other reasons by local rule. A paper filed electronically ~~in accordance with a local rule~~ is a written paper for purposes of these rules.

COMMITTEE NOTE

Electronic filing has matured. Most districts have adopted local rules that require electronic filing, and allow reasonable exceptions as required by the former rule. The time has come to seize the advantages of electronic filing by making it mandatory in all districts. But exceptions continue to be available. Paper filing must be allowed for good cause. [Many courts now have local rules that provide for paper filing by pro se litigants, and may carry those rules forward. And a local rule may allow or require paper filing for other reasons.]

The means of electronic signing are left open; local rules can specify appropriate means. If the Judicial Conference adopts standards that govern the means or form of electronic signing, they may displace local rules.

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[4] This phrase likely should be omitted. It was included to recognize that Judicial Conference standards might go beyond the electronic technology to address such issues as whether a machine signature should be preceded by /s/ or some such (L.S.? locus sigilli?).

The amended rule applies directly to the filer's signature.[5] It does not address others' signatures. Many filings include papers signed by someone other than the filer. Examples include affidavits and declarations and, when filed, discovery materials. Provision for these signatures may be made by local rule, as many courts do now, unless the Judicial Conference adopts a preemptive national standard.[6]

[The former provision for verification by electronic means is omitted. Verification is not often required by these rules. The special policies that justify a verification requirement suggest that it is better to defer electronic verification pending further experience{; local rules may provide useful experience}.**]**[7]

e-Service

Civil Rule 5(b)(2)(E)

(b) Service: How Made. * * *

(2) Service in General. A paper is served <u>on the person to be served</u>[8] under this rule by:

(A) handing it to the person * * *

(E) sending it by electronic means ~~if the person consented in writing~~, <u>unless the person shows good cause to be exempted from such service or is exempted by local rule</u>. ~~--in which event~~ <u>Electronic</u> service is complete upon transmission, but is not effective if the

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[5] Should this proposition be asserted more directly in rule text? E.g., "must be made and signed <u>by the filer</u>"?

[6] Alternative 1 above avoids the questions raised by attempting to address non-filer signatures in a Committee Note to a rule that does not directly address the question.

[7] See footnote 1.

[8] This provision is included to address the question that arises when readers confront "the person" in (E). The stylists chose to use "the person" throughout (A), (B), (C), (D), (E), and (F). We cannot simply add "the person <u>to be served</u>" in (E) and leave the others untouched.

Adding "to be served" to all the other subparagraphs is awkward because "the person's" appears in (B)(i), (B)(ii), and (C).

But it works to add "on the person to be served" in the introduction. Do we want to second-guess the style choice?

serving party learns that it did not reach the person to be served; or * * *

COMMITTEE NOTE

Provision for electronic service was first made when electronic communication was not as widespread or as fully reliable as it is now. Consent of the person served to receive service by electronic means was required as a safeguard. Those concerns have substantially diminished. The amendment makes electronic service the standard. But it also recognizes that electronic service is not always effective. Some litigants lack access to suitable electronic devices. Exceptions are available on showing good cause in a particular case. And local rules may establish other exceptions that reflect local experience.

Notice of Filing as Proof of Service

Civil Rule 5(d)(1)

(d) Filing.

(1) Required Filings; Certificate of Service. Any paper after the complaint that is required to be served ~~--- together with a certificate of service ---~~ must be filed within a reasonable time after service; a certificate of service also must be filed, but a notice of electronic filing constitutes a certificate of service on any party served through the court's transmission facilities [unless the serving party learns that it did not reach the party to be served]. But disclosures under Rule 26(a)(1) or (2) and the following discovery requests and responses must not be filed * * *.

COMMITTEE NOTE

The amendment provides that a notice of electronic filing generated by the court's CM/ECF system is a certificate of service on any party served through the court's transmission facilities. But if the serving party learns that the paper did not reach the party to be served, there is no service under Rule 5(b)(2)(E) and there is no certificate of the (nonexistent) service.

When service is not made through the court's transmission facilities, a certificate of service must be filed and should specify the date as well as the manner of service.

Rule 5(d)(1) addresses the certificate of service only. It does not address electronic service or a failure of electronic

service.[9]

Discussion

Judge Harris has drafted a revision of this proposal that would provide uniform certificates of service across appellate, bankruptcy, and civil rules, and across the districts and circuits. He recognizes that since e-service has come to predominate in civil practice there may be less need for such provisions in the civil rules than in other sets of rules, but thinks the move toward uniformity would still be a good thing. His draft omits the underlined new material in the proposal set out above and substitutes this:

> When one or more parties are served in a manner other than through the court's transmission facilities, a certificate of service must be filed that specifies the following as to [those parties][all parties served in a manner other than through the court's transmission facilities]:
>
> (A) the date and manner of service;
>
> (B) the names of the persons served; and
>
> (C) the mail or electronic address, the fax number, or the address of the place of delivery, as appropriate for the manner of service, for each person served.

Although there may be some fine-tuned drafting work to be done if such details are to be added to the rule, the central question is the perennial one: just how much detail should be provided in the national rules? The provision requiring a certificate of service was added to Rule 5 in 1991. The Committee Note explained that local rules generally had imposed the requirement, and observed that having "such information on file may be useful for many purposes." It observed that generally the certificate would

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[9] This brief sentence seems better than any attempt to explore what the person who attempted electronic service should do on learning that service failed. Information about the failure may be provided when the person to be served asks whether it will be receiving such a paper. More often, it will be provided when the attempted service is bounced back through the system. A study in the Southern District of Indiana found that most often the "bounceback" reflected failure of service on a secondary target, an assistant to the attorney or a paralegal, at the same time as the attorney was in fact served. There may be little point in requiring a renewed effort to serve a duplicate on the assistant, along with a certificate of service.

Alternatively, this paragraph could be dropped. Rule 5(b)(2)(E) addresses failure of electronic service. Why bother to state the obvious -- that proposed Rule 5(d)(1) does not?

state the date and manner of service, but that a party employing a private delivery service might not be able to specify the date of delivery. "In the latter circumstance, a specification of the date of transmission of the paper to the delivery service may be sufficient * * *." Has the time come to provide specifics that were not attempted then? The risk is always that details will prove incomplete or incorrect, either when adopted or eventually. One example: if service is made by electronic means outside the court's transmission facilities, is it enough to provide the e-address used to send the message? Or is it then important to add a provision for the party who later learns that the message did not go through?

Judge Solomon and Clerk Briggs, delegates to the all-committees subcommittee, report that their experience shows that adequate certificates of service are filed now. And it seems likely that as e-service expands to include more pro se litigants there will be fewer occasions for separate certificates. It well may be that there is no need to add this level of detail to the rule text.

This issue arises in connection with a proposal to publish for comment. It is not as important to achieve uniformity among the advisory committees as it is to achieve uniformity on the 3-added-days question in a rule that has been published and is moving toward a recommendation on adoption. But if the contents of the certificate are to be specified in the rule, it would be good to act in a way that leaves the way open to move toward uniform recommendations to the Standing Committee.

TAB 7

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TAB 7A

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OFFER OF JUDGMENT: RULE 68

The Minutes for the October meeting reflect extensive discussion of the offer-of-judgment provisions in Rule 68. Past efforts to revise Rule 68 have collapsed. Proposals published for comment in 1983 and 1984 met bitter resistance. A proposal developed some 20 years ago eventually fell under its own weight as the draft was revised to reflect a continually growing number of complications.

A nearly constant feature of perennial suggestions for reform is to impose liability for attorney fees as a sanction for failing to improve on a rejected offer. Work to explore the theoretical consequences of this potentially significant departure from "the American Rule" has been considered, but not yet undertaken.

The conclusion last October was that it would be useful to survey the experience with state offer-of-judgment rules and parallel rules on offers to settle or on paying into court. The Administrative Office staff has been asked to undertake this work, but the competing demands on staff time during a period of transition have impeded progress. Jon Rose did some helpful preliminary research. His message describing the overall results is attached, along with an outline of state provisions and a Rule 68 bibliography.

These questions will remain on the active agenda.

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From: Jonathan Rose
To: David Campbell, coopere, marcusr
Cc: coquille
Date: 11/28/2014 02:56 PM
Subject: Interim Materials on Rule 68 and State Law Offer of Judgment Provisions

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After our meeting in October, I consulted with Emery Lee on the research project assigned at the end. Our understanding was that it would have two components: (1) what variations of Rule 68 are found in state rules, and (2) are there any studies, data or reliable analyses as to how well they are working.

(Pursuant to a request from Ed Cooper, I inquired from the National Center for State Courts whether it had undertaken or was aware of any relevant research in this field since 2000 and received a negative reply).

In the interest of refining our research request to a Supreme Court fellow, I undertook a review of state law provisions to look for any recent variations of Rule 68. Unfortunately, the work over the past month revealed no jurisdiction which appeared to have found a recent "magic bullet" solution to the problems previously identified in other versions of rule 68 likely to cause it to be more utilized or effective. Further, there appeared to be little new empirical research which either validated or even suggested the way to any such solution. (Emery checked for empirical research also. What little we found has been included below.)

Most, but not all, of the academic literature, while not as prolific as during the periods when the Committee was actively reviewing the rule, continue to suggest that some version of the rule is desirable to promote the general goal of lawsuit settlement. Some of the articles cautioned that when the prospect of significant fees loom sufficiently large, a rule like Rule 68 can have the perverse effect of promoting the continuation of a suit as opposed to settlement. Thus, whatever can be done to stimulate early stage offers is strongly preferred by most authors.

At least one author suggested the Committee might be better served starting afresh looking toward a rule directly designed to encourage settlements, with conditional fee shifting as just one of the possible approaches, as opposed to continuing to tinker with a rule originally intended in his view to penalize recalcitrant plaintiffs.

The apparently singular Michigan practice of mandatory case evaluation was said to promote settlements; however, given a choice between case evaluation and ADR mediation, the latter was said to be far more effective in achieving a higher percentage of settlements. A recurrent theme in the commentary appeared to be that any mechanism which stimulates or requires contact and communication between the litigating parties at an early stage has a tangible and positive impact upon case resolution. None of these observations appeared particularly startling.

As the committee suspected, many jurisdictions have continued to experiment with variations of Rule 68 with the presumed goal of encouraging case settlement without undue sacrifice of appropriate citizen access to the courts.

Following the format originally used by the American College of Trial Lawyers in 2004, I have attached an updated survey in similar outline form of the current Offer ofJudgment provisions in the laws of the 50 states and the District of Columbia. I have also attached a compendium of state law offer of judgment provisions compiled in 2012 by a network of private firms called the USA Law Network in the hope it may help interpret the survey chart. I am also attaching a slightly expanded bibliography on Rule 68 from that provided by the 2013 submission of the Committee on Federal Courts of the New York City Bar.

Perhaps the material below will suggest the direction further research by the Supreme Court fellow should take if the Committee would find it useful. Possibilities could include: an extensive review of current Rule 68 decisions, a summary of the recent articles in the bibliography, or more extensive research on state law approaches to case settlements:

1. The updated outline of state law provisions concerning offers of judgment (i.e. cuurent state law variants of rule 68)

2. Link to the Compendium of State Law Offer of Judgment provisions (2012) compiled by U S Law Network

http://www.uslaw.org/files/Compendiums2012/Offer%20of%20Judgment/USLAW_OfferofJudgment_2012.pdf

3. Links to Recent Empirical Research on Rule 68

A. Albert Yoon and Tom Baker, Vanderbilt Law Review, Vol. 59, No. 1, pp. 155-196, 2006, Offer-of-Judgment Rules and Civil Litigation: An Empirical Study of Automobile Insurance Litigation in the East:

http://www.utexas.edu/law/wp/wp-content/uploads/centers/clbe/yoon_offer_judgment_rules_civil_litigation.pdf

B. William P. Lynch, New Mexico Law Review, Vol. 39, Issue 2 (Spring 2009), pp. 349-374, Rule 68 Offers of Judgment: Lessons from the New Mexico Experience:

http://lawschool.unm.edu/nmlr/volumes/39/2/07_lynch_rule.pdf

4. Selected Bibliography Relevant to Rule 68 and State Law Offers of Judgment Provisions

P.S. Perhaps the most noteworthy recent use of Rule 68 occurred in *Genesis Healthcare Corp. v. Symczyk,* 133 S.Ct.1523 (2013). Last term in that case, the Supreme Court in a 5-4 decision reversed the Third Circuit and reinstated the decision of the district court that a defendant's Rule 68 offer of judgment in full satisfaction of the named plaintiff's claim rendered that claim moot under the Fair Labor Standards Act (FLSA).
Given the technical posture of the case, the majority of the Court assumed, without deciding, that the plaintiffs' claim was moot, and held that the collective-action allegations in the complaint had therefore been appropriately dismissed for lack of subject matter jurisdiction. Even though the Court expressly noted that FLSA and class actions are different, this type of effort to "pick off" a named plaintiff in a putative collective action by tendering full relief at the outset seems likely to continue until the Court resolves a current split between the seventh and four other circuits as to whether such a plaintiff can continue to maintain the class action in the presence of such an offer.

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UPDATED OUTLINE OF STATE LAW
OFFER OF JUDGMENT PROVISIONS

State	Citation	Party	Filing Deadline	Response Deadline	Consequence of Non-acceptance	Significant Difference From Federal Rule
AL	Ala. Rule Civ. Proc. 68	DEF	15 days prior to trial (14 days District Court)	10 days after service (7 days in District Court)	Same as Federal Rule; offeree must pay costs incurred after offer if judgment is not more favorable than offer	
AS	Alaska Stat. § 09.30.065	ANY	10 days prior to trial	10 days after service	If judgment is 5% (10% in case of multiple defendants) less favorable than offer, offeree shall pay all costs (including deposition expenses and travel) plus attorneys' fees on a sliding scale from 30-75% depending upon timing of offer	Costs include attorneys' fees; 5% margin of error
AK	Ark. Rule Civ. Proc. 68	DEF	10 days prior to trial	10 days after service	Similar to Federal Rule; offeree must pay costs incurred after offer if judgment is not more favorable than offer; costs include all reasonable litigation expenses, excluding attorney's fees	Expanded definition of costs, but excludes attorneys' fees
AZ	Ariz..Rule Civ. Proc. 68	ANY	30 days prior to trial	30 days after service	If judgment not more favorable than offer, offeree shall pay expert witness fees, double the taxable costs of the offeror, and prejudgment interest on unliquidated claims (with interest accruing from the date of the offer); offer may exclude attorneys' fees but must specifically so state	Expanded definition of costs; available to any party; only taxable costs and attorneys' fees found by court as "reasonably incurred" will be allowed; double costs allowed
CA	Cal. Civil Code §998	ANY	10 days prior to trial or arbitration	30 days after service or commencement of trial, whichever is first	If the defendant is the offeror and the judgment is not more favorable than offer, the plaintiff shall pay the defendant's costs from the time of the offer. If the costs awarded exceed the damages awarded to the plaintiff, the net amount is awarded to the defendant; If the Plaintiff is the offeror and the defendant fails to obtain a more favorable judgment, the court or arbitrator, in its discretion, may require the defendant to pay a reasonable sum to cover costs of expert witnesses.	Expanded definition of costs; include expert witnesses; available to any party
CO	Colo. Rev. Stat. § 13-17-202	ANY	14 days prior to trial	14 days after service	Similar to Federal Rule; If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the "actual" costs incurred after the making of the offer.	So far, "actual" costs has been interpreted similarly to FRCP 68
CT	Conn. Gen. Stat. § 52-192a	PL	30 days prior to trial	60 days after service	If judgment is equal to or greater than an offer and is filed within 18 months of the filing of the complaint, the Court shall add 8% annually on the amount of the judgment from the date of the complaint; if the offer is filed more than 18 months after the complaint, interest runs from the date of the offer. Attorneys' fees up to $350 may also be awarded.	
	Conn. Gen. Stat. § 52-193 § 52-194 § 52-195-195	DEF	30 days prior to trial	10 days after service	If judgment is less than the offer, plaintiff recovers no costs accruing after receipt of notice of the offer; defendant recovers its costs incurred after date of offer. Such costs shall include attorney's costs not exceeding $350.	
DC	D.C. Super. Ct. Rule 68	DEF	10 days prior to trial	10 days after service	Same as Federal Rule; offeree must pay costs incurred after offer if judgment is not more favorable than offer	
DE	Del. Super. Ct. C.P.R. 68	DEF	10 days prior to trial	10 days after service	Same as Federal Rule; offeree must pay costs incurred after offer if judgment is not more favorable than offer	
FL	Fla. Stat. Ann. § 768.79; Fla. Rule Civ. Proc. 1.442(a)-(j)	ANY	Any time prior to trial	30 days after service	Offeror entitled to reasonable costs and attorneys' fees if judgment is 25% less favorable than offer; If offer not in good faith, court may disallow costs and fees	Costs include attorneys' fees; court must consider discretionary factors in awarding attorneys' fees; 25% margin of error
GA	Ga. Code Ann. § 9-11-68	ANY	30 days prior to trial	30 days after service	If the defendant is the offeror and the judgment is not at least 75% of the defendant's offer, the plaintiff shall pay the defendant's costs from the time of the offer. If the plaintiff is the offeror, the plaintiff's recovery must exceed 125% of the plaintiff's offer in order to recover reasonable attorneys' fees and expenses of litigation from the date of the rejection of the offer.	Twenty five percent margin of error. Costs include reasonable attorneys' fees; provision for separate hearing on "frivolous claim or defense"
HI	Haw. Rule Civ. Proc. 68	ANY	10 days prior to trial	10 days after service	Similar to Federal Rule; If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer.	Available to any party; recovery allowed of "actual costs deemed reasonable by court," but not attorneys' fees
ID	Idaho Rule Civ. Proc. 68; Rule 54(d)(1); Rule 54(e)(1)	DEF	14 days prior to trial	14 days after service	If the "adjusted award" (i.e. the verdict, as well as the offeree's costs and attorney's fees prior to the service of the offer) is less than the offer, then the offeree must pay the offeror's costs incurred after the making of the offer, while the offeror must pay costs and attorney's fees incurred before the making of the offer; if the judgment is more than the "adjusted award", the offeror must pay the offeree its costs incurred both before and after the offer.	Costs include attorneys' fees

UPDATED OUTLINE OF STATE LAW
OFFER OF JUDGMENT PROVISIONS

State	Citation	Party	Filing Deadline	Response Deadline	Consequence of Non-acceptance	Significant Difference From Federal Rule
IL	None					No provision
IN	Ind. Rule Tr. Proc. 68.	DEF	10 days prior to trial	10 days after service	Same as Federal Rule; if judgment less favorable than offer, offeree must pay costs incurred after offer was made.	
IA	Iowa Code Ann. § 677.4 677.5 677.6.	DEF	Any time before judgment	immediate	Offer must be made "in court"; if offeree is present and refuses when offer is made or had three days' notice of its amount and fails to appear, offeree must pay costs incurred after offer if judgment is not more favorable than offer.	
	Iowa Code Ann. § 677.7, 677.8, 677.9, 677..10.	DEF	Any time before trial	5 days after service	Offeree must pay costs, not including attorney's fees, incurred after offer if judgment is not more favorable than offer; plaintiff also does not recover costs incurred after offer which would ordinarily be recoverable by prevailing party; permits offers conditional upon failure of defense.	
KS	Kan. Stat. Ann. § 60-2002(b).	DEF	21 days prior to trial	14 days after service	Same as Federal Rule except for filing deadline; offeree must pay costs incurred after offer if judgment is not more favorable than offer.	
KY	Ky. Court Rule 68; Ky. Rev. Stat. Ann. §453.160.	DEF	10 days prior to trial	10 days after service	Similar to Federal Rule; offeree must pay costs incurred after offer if judgment is not more favorable than offer; includes offer conditioned upon failure of defense; also applies to appeals.	
LA	La. Code. Civ. Proc. Ann. art. 970.	ANY	30 days prior to trial	10 days after service	Offer admits no liability; if defendant offers, plaintiff must pay costs if judgment is at least 25% less than offer; if plaintiff offers, defendant must pay costs if judgment is at least 25% greater than the offer; costs are after offer only and may include anything except attorney's fees, as fixed by the trial court.	Expanded definition of costs at discretion of court; but costs do not include attorneys' fees; available to any party; 25% margin of error
ME	Me. R. Civ. Proc. 68.	DEF	10 days prior to trial or less with court approval	10 days after service or less with court approval	Same as Federal Rule, except it allows court to approve filing deadline closer to trial and shorter response deadlines; offeree must pay costs incurred after offer if judgment is not more favorable than offer.	
MD	None					No provision – special provision for health care malpractice claim (2005)
MA	Mass. Rule Civ. Proc. 68; Mass. Gen. Laws Ann., ch. 231, § 88.	DEF	10 days prior to trial	10 days after service	Similar to Federal Rule; offeree must pay costs incurred after offer if judgment is not more favorable than offer; expressly excludes interest from amount of judgment.	
MI	Mich. Court Rule 2.403				An evaluation by 3 person panel mandatory for tort and medical malpractice cases, other money damage cases may be submitted by court.	No comparable process found in other states
	Mich. Court Rule 2.405	ANY	28 days prior to trial	21 days after service	Rule contemplates that offeree may make a counteroffer; average is used for determining consequences (if no counteroffer made, the offer is deemed the average); if an offer is rejected, the party rejecting must pay costs, including reasonable attorney's fees, incurred after the rejection if judgment is less favorable than the average offer; an offeree who does not make a counteroffer only recovers costs if the offer was made less than 42 days before trial; all costs within discretion of trial court who may refuse attorney's fees "in the interest of justice."	Costs include attorneys' fees; available to any party; costs may be awarded in cases subject to case evaluation only where evaluation was not unanimous
MN	Minn. Rule Civ. Proc. 68	ANY	10 days prior to trial	10 days after service	Similar to Federal Rule except that it contemplates an offer by any party and excludes provision regarding offers made after liability is determined; offeree must pay costs incurred after offer if judgment is not more favorable than offer.	Available to any party; fee award subject to hardship provisions; "costs" under rule exclude attorneys' fees
MS	Miss. Rule Civ. Proc. 68	DEF	15 days prior to trial	10 days after service	Same as Federal Rule except for timing; offeree must pay costs incurred after offer if judgment is not more favorable than offer.	
MO	Mo. Rule Civ. Proc. 77.04.	DEF	30 days prior to trial	10 days	Similar to Federal Rule, but excludes provision regarding offers made after liability is determined; offeree must pay costs incurred after offer if judgment is not more favorable than offer.	
MT	Mont. Rule Civ. Proc. 68	DEF	14 days prior to trial	14 days after service	Same as Federal Rule; if judgment less favorable than offer, offeree must pay costs incurred after offer was made.	

UPDATED OUTLINE OF STATE LAW
OFFER OF JUDGMENT PROVISIONS

State	Citation	Party	Filing Deadline	Response Deadline	Consequence of Non-acceptance	Significant Difference From
NE	Neb. Rev. Stat. §§ 25-901, 25-902	DEF	Any time prior to trial	5 days after service	Similar to Federal Rule; only applicable in actions for the recovery of money; if judgment less favorable than offer, offeree must pay costs incurred after offer was made.	
NV	Nev. Rule Civ. Proc. 68, Nev. Rev. Stat. §17.115	ANY	10 days prior to trial	10 days	Similar to Federal rule; allows for joint offers — joint offers to multiple parties may be conditioned on each party's acceptance; joint offers to defendants can only invoke penalties if there the theory of liability is the same for each; joint offers to plaintiffs can only invoke penalties if the damages claimed are all derivative of each other — If judgment not more favorable than offer, offeree shall not recover attorneys' fees and costs, and, if allowed, shall pay the fees and costs of offeror incurred from time of the offer.	Available to any party; costs include reasonable attorney's fees
NH	None					No provision
NJ	NJ Court Rules R. 4:58-1, 4:58-2, 4:58-3, 4:58-4	ANY	20 days prior to trial	10 days prior to trial, or 90 days after filing	(a) Plaintiff's offer. If plaintiff's offer is not accepted and judgment is as good or better for plaintiff, defendant must pay reasonable litigation expenses, attorney's fees, and 8% interest on the amount of recovery from the date the offer was made, or the discovery was completed. However if action is for un-liquidated damages, no such awards are given unless the amount of recovery is 120% of the offer. (b) Defendant's offer. If defendant's offer is not accepted and judgment is as favorable or more favorable for defendant, plaintiff must pay the cost of defendant's suit, litigation expenses, and attorney's fees. However, no such awards are given unless the amount awarded to plaintiff is less than 80% of the offer. Includes provisions for multiple parties.	Adds 8% interest to plaintiff's recovery; costs include attorneys' fees; available to any party; 20% margin of error
NM	N.M. Dist. Court Rule. Civ. Proc. 1-068	ANY	10 days prior to trial (but at least 120 days after filing of responsive pleading for plaintiff)	10 days	All penalties are barred in domestic relations actions. Acceptance of offer does not require judgment to be filed against defendant. (a) Plaintiff's offer. If plaintiff's offer is not accepted and the final judgment is more favorable to plaintiff than the offer, defendant must pay costs, excluding attorney's fees, including double the amount of costs incurred after the offer was made. (b) Defendant's offer. If defendant's offer is not accepted and the final judgment is more favorable to defendant, plaintiff must pay costs, excluding attorney's fees, incurred by defendant after the offer was made.	Available to any party; allows double costs to plaintiff
NY	N.Y. Civ. Practice Law and Rules 3219, 3220, 3221	DEF	10 days prior to trial	10 days	(a) R. 3219. This provision applies only to defendants to a contract action. Defendant must deposit tender offer to the clerk of the court. If not accepted by plaintiff within 10 days, defendant must request its return or the amount is deemed "paid into the court." If judgment is equal to or less than the amount offered, the plaintiff must pay defendant's costs from the time of the offer. (b) R. 3220. This provision applies only to defendants to a contract action. Defendant's offer is made conditional on a finding of liability — if defendant is not found liable, offer is invalid. If plaintiff does not accept, and defendant is found liable, but for less than the amount offered, plaintiff must pay defendant's expenses solely for trying the issue of damages. (c) R. 3221. This provision applies to all defendants not in a matrimonial action. If offer is not accepted, and judgment is for less than the amount offered, plaintiff must pay defendant's costs from the time of the offer.	Limited availability
NC	N.C. Gen Stat. § 1A-1, R. 68	DEF	10 days prior to trial	10 days; 20 days for conditional damage offer	Similar to Federal Rule; if judgment less favorable than offer, offeree must pay costs incurred after offer was made. Defendant may make offer conditional on a finding of liability — if defendant is not found liable, offer is invalid. If plaintiff does not accept offer, and defendant is found liable but for less than the amount offered, plaintiff must pay defendant's costs for litigating the damages issue.	
ND	N.D. Rule Civ. Proc. 68	ANY	14 days prior to trial	14 days	If judgment less favorable than offer, offeree must pay for the offeror's costs incurred after the making of the offer. Offer may be accepted without entering judgment against defendant.	Available to any party; expanded definition of costs awarded at courts' discretion, costs do not include attorneys' fees

UPDATED OUTLINE OF STATE LAW
OFFER OF JUDGMENT PROVISIONS

State	Citation	Party	Filing Deadline	Response Deadline	Consequence of Non-acceptance	Significant Difference From
OH	Ohio Rule Civ. Proc. 68				None	No provision
OK	12 Okla. Stat. Ann. §§ 1101, 1101.1	ANY	Any time for action for money damages only; 10 days prior to trial for all other actions	5 days of action for money damages only; 10 days for other actions	Only defendant can initiate procedure, but once initiated, plaintiff can make counteroffer and same rules apply to either party; different rules (and deadlines) apply to certain causes of action and claimed amounts, but in general if judgment is less favorable than offer, offeror is entitled to reasonable costs and attorneys' fees incurred after offer	Available to any party under certain conditions
OR	Or. R. Civ. P. 54(E)	DEF	14 days prior to trial	7 days	Similar to Federal Rule. If judgment not more favorable than offer, offeree shall not recover costs, prevailing party's fees, disbursements or attorney fees incurred after date of offer; and offeror shall recover costs and disbursements, not including prevailing party fees, from the time the offer was served.	Costs can include attorneys' fees
PA	None					No provision
RI	R.I. Dist. Court Rule 68	DEF	10 days prior to trial	10 days after service	Similar to Federal Rule; in addition to normal options, allows offeree to accept tender as part payment and proceed to trial solely on damages	
SC	S.C. Rule Civ. Proc. 68	ANY	20 days prior to trial	Earlier of 20 days after service or 10 days prior to trial	A plaintiff who receives a more favorable judgment is entitled to eight percent interest on the amount recovered. A defendant is entitled to a reduction of eight percent interest on the amount recovered if the plaintiff receives a less favorable judgment.	
SD	S.D. Cod. Laws § 15-6-68	ANY	10 days prior to trial	10 days after service	Similar to Federal Rule; offeree must pay costs incurred after offer if judgment is not more favorable than offer	
TN	Tenn. R. Civ. P. 68	ANY	10 days prior to trial	10 days after service	Similar to Federal Rule except for omission of provision allowing for offers of judgment prior to hearing for damages when liability has already been determined; offeree must pay costs incurred after offer if judgment is not more favorable than offer.	Available to any party
TX	E.D. Tex. Local Rules (Civil Justice Expense and Delay Reduction Plan, Art. 6 (2002))	ANY	Deadline varies	Deadline varies	If judgment is 20% or less beneficial than offer, offeree must pay the litigation costs incurred after offer was rejected; "litigation costs" are costs directly related to trial preparation and actual trial expenses. "Litigation costs" include but are not limited to attorney's fees.	Costs include attorneys' fees; available to any party; 20% margin of error
UT	Utah Rule Civ. Proc. 68(b)	DEF	10 days prior to trial	10 days	Similar to Federal Rule; Costs are defined by Utah R. Civ. P. 54 and do not include attorneys' fees.	
VT	Vt. Rule Civ. Proc. 68	DEF	10 days prior to trial unless court grants shorter time	10 days after service unless court grants shorter time	Similar to Federal Rule; offeree must pay costs incurred after offer if judgment is not more favorable than offer	
VA	None					
WA	Wash. Civ Rule 68	DEF	10 days prior to trial	10 days after service	Same as Federal Rule; offeree must pay costs incurred after offer if judgment is not more favorable than offer	
WV	W. Va. Rule Civ. Proc. 68 (a)-(d)	DEF	10 days prior to trial	10 days after service	Similar to Federal Rule; offeree must pay costs incurred after offer if judgment is not more favorable than offer; in addition to Federal Rule options, allows offeree to accept tender as payment and proceed to trial solely on damages.	

UPDATED OUTLINE OF STATE LAW
OFFER OF JUDGMENT PROVISIONS

State	Citation	Party	Filing Deadline	Response Deadline	Consequence of Non-acceptance	Significant Difference From
WI	Wis. Stat. Ann. § 807.01(1) and (2)	DEF	20 days prior to trial	10 days after service and prior to trial	Defendant can make offer for pretrial judgment or to have specified sum assessed on an adverse result at trial; If judgment less favorable than offer, plaintiff recovers no costs; defendant recovers costs	
	Wis. Stat. Ann. § 807.01(3) and (4)	PL	20 days prior to trial	10 days after service and prior to trial	If judgment greater than offer, plaintiff recovers double the amount of costs and interest on the award from the date of the offer (prejudgment interest is generally not allowed other than through the offer provision)	Plaintiff recovers double costs and interest
WY	Wyo. Rule Civ. Proc. 68	ANY	60 days after service; 30 days prior to trial	10 days after service	Similar to Federal Rule; offeree must pay cost incurred after offer if judgment is not more favorable than offer; costs do not include attorney's fees	Available to any party

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RULE 68
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Symposium

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TAB 8

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TAB 8A

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RULE 23 SUBCOMMITTEE REPORT

The Rule 23 Subcommittee has continued to work on the areas it identified before the Advisory Committee's October, 2014, meeting. This work has included conference calls on Dec. 17, 2014, Feb. 6, 2015, and Feb. 12, 2015. Notes on those calls should be included with these agenda materials.

The Subcommittee continues its efforts to become fully informed about pertinent issues regarding Rule 23 practice today. Besides generally keeping an eye out to identify pertinent developments and concerns, Subcommittee members have attended, and expect to attend a considerable number of events about class action practice that together should offer a broad range of views. These events include the following:

ABA 18th Class Action Institute (Chicago, Oct. 23-24, 2014).

Lawyers for Civil Justice Membership Meeting (New York, Dec. 4-5, 2014).

The Impact Fund 13th Annual Class Action Conference (Berkeley, CA, Feb. 26-27, 2015).

George Washington University Roundtable on Settlement Class Actions (Washington, D.C. April 8, 2015).

ALI discussion of Rule 23 issues (Washington, D.C., May 17, 2015).

ABA Litigation Section Meeting (San Francisco, June 19)

American Assoc. for Justice Annual Meeting (Montreal, Canada, July 11-14)

Civil Procedure Professors' Conference (Seattle, WA, July 17)

Duke Law Conference on Class-Action Settlement (Washington, D.C., July 23-24)

Defense Research Institute Conference on Class Actions (Washington, D.C., July 23-24)

Discovery Subcommittee Mini-Conference (DFW Airport, Sept. 11, 2015).

Association of American Law Schools Annual Meeting (New York, Jan. 6-10, 2016) [Participation in this event has not been arranged, but efforts are underway to make such arrangements.]

As should be apparent, the Subcommittee is trying to gather

information from many sources as it moves forward. Its present intention is to be in a position to present drafts for possible amendments to the full Committee at its Fall 2015 meeting. If that proves possible, it may be that a preliminary discussion of those amendment ideas can be had with the Standing Committee during its January, 2016, meeting, and a final review of amendment proposals at the Advisory Committee's Spring, 2016, meeting. That schedule would permit submission of proposed preliminary drafts to the Standing Committee at its meeting in May or June of 2016, with a recommended August, 2016, date for publication for public comment. If that occurred, rule changes could go into effect as soon as Dec. 1, 2018. But it is by no means clear that this will prove to be a realistic schedule.

For the present, the key point is that **there is no assurance that the Subcommittee will ultimately recommend any amendments. In addition, although it has identified issues that presently seem to warrant serious examination, it has not closed the door on other issues. Instead, it remains open to suggestions about other issues that might justify considering a rule change, as well as suggestions that the issues it has identified are not important or are not likely to be solved by a rule change. Even if the Subcommittee does eventually recommend that the full Committee consider changes to Rule 23, the recommendations may differ from the ideas explored in this memorandum.**

The purpose of this memorandum, therefore, is to share with the full Committee the content and fruit of the Subcommittee's recent discussions. The hope is that the discussion at the full Committee meeting will illuminate the various ideas generated so far, and also call attention to additional topics that seem to justify examination by the Subcommittee.

The time has come for moving beyond purely topical discussion, however. In order to make the discussion more concrete, this memorandum presents conceptual sketches of some possible amendments, sometimes accompanied with possible Committee Note language that can provide an idea of what a Note might actually say if rule changes along the lines presented were proposed. **These conceptual sketches are not intended as initial drafts of actual rule change proposals, and should not be taken as such. By the time the Subcommittee convenes its mini-conference in September, 2015, it may be in a position to offer preliminary ideas about such drafts. But as the array of questions in this memorandum attests, it has not reached that point yet.**

The Subcommittee's work has been greatly assisted by review of the ALI Principles of Aggregate Litigation. Those Principles embody a careful study of some of the issues covered in this memorandum, and occasionally provide a starting point in analysis

of those issues, and in drafting possible rule provisions to address them.

The topics covered in this memorandum are:

(1) Settlement Approval Criteria
(2) Settlement Class Certification
(3) Cy Pres Treatment
(4) Dealing With Objectors
(5) Rule 68 Offers and Mootness
(6) Issue Classes
(7) Notice
Appendix I: Settlement Review Factors -- 2000 Draft Note
Appendix II: Prevailing Class Action Settlement Approval Factors Circuit-By-Circuit

(1) Settlement Approval Criteria

In 2003, Rule 23(e) was amended to expand its treatment of judicial review of proposed class-action settlements. To a considerable extent, those amendments built on existing case law on settlement approval. As amended in 1966, Rule 23(e) required court approval for settlement, compromise, or voluntary dismissal of a class action, but it provided essentially no direction about what the court was to do in reviewing a proposed settlement.[1]

Left to implement the rule's requirement of court approval of settlement, the courts developed criteria. To a significant extent, that case law development occurred during the first two decades after Rule 23 was revised in 1966. It produced somewhat similar, but divergent, lists of factors to be employed in different circuits. The Subcommittee has compiled a list of the factors used in the various circuits that is attached as an Appendix to this memorandum.

Several points emerge from the lists of factors. One is that, although they are similar, they are not the same. Thus, lawyers in different circuits, even when dealing with nationwide class actions, would need to attend to the particular list employed in the particular circuit. A second point is that at least some of the factors that some courts adopted in the 1970s seem not to be very pertinent to contemporary class action practice. Yet they command obeisance in the circuits that employ them even though they probably do not facilitate the court's effort to decide whether to approve a proposed settlement. A third point is that there are other matters, not included in the courts' 1970s-era lists, that contemporary experience suggests should matter in assessing settlements.

The ALI Aggregate Litigation Principles proposed a different approach, which is partly reflected in the conceptual discussion draft below. The ALI explanation for its approach was as follows:

> The current case law on the criteria for evaluating settlements is in disarray. Courts articulate a wide range of factors to consider, but rarely discuss the significance to be given to each factor, let alone why a particular factor is probative. Factors mentioned in the cases include, among others [there follows a list of about 17 factors].

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[1] From 1966 to 2003, Rule 23(e) said, in toto: "A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal shall be given to all members of the class in such manner as the court directs."

> Many of these criteria may have questionable probative value in various circumstances. For instance, although a court might give weight to the fact that counsel for the class or the defendant favors the settlement, the court should keep in mind that the lawyers who negotiated the settlement will rarely offer anything less than a strong favorable endorsement.

ALI Aggregate Litigation Principles § 3.05 Comment (a) at 205-06.

There are two appendices at the end of the memorandum that offer further details and ideas. Appendix I is the draft Committee Note developed early in the evolution of Rule 23(e) amendments in 2000-02. It offers a list of factors that might be added to a rule revision, or to a Committee Note. The approach of the conceptual draft of the rule amendment idea below, however, trains more on reducing the focus to four specified considerations that seem to be key to approval, adding authority to decline approval based on other considerations even if positive findings can be made on these four topics.

Appendix II offers a review of the current "approval factors" in the various circuits, plus additional information about the California courts' standards for approving settlements and the ALI Principles approach.

As Committee members consider this conceptual draft and the alternative details in Appendix I and Appendix II, one way of approaching the topic is to ask whether adopting a rule like this would provide important benefits. Balanced against that prospect is the likelihood that amending the rule would also produce a period of uncertainty, particularly if it supersedes current prevailing case law in various circuits. At the same time, it may focus attention for courts, counsel, and even objectors, on matters that are more important than other topics included on some courts' lists of settlement-approval factors.

Conceptual Discussion Draft of Rule 23(e)
Amendment Idea

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

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(2) If the proposal would bind class members,

Alternative 1

(A) the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate. The court may make this finding only on finding that:

Alternative 2

(A) the court may approve it only after a hearing and on finding that: ~~it is fair, reasonable, and adequate.~~

(i) the class representatives and class counsel have been and currently are adequately representing the class;

(ii) the relief awarded to the class (taking into account any ancillary agreement that may be part of the settlement) is fair, reasonable, and adequate given the costs, risks, probability of success, and delays of trial and appeal;

(iii) class members are treated equitably (relative to each other) based on their facts and circumstances and are not disadvantaged by the settlement considered as a whole; and

(iv) the settlement was negotiated at arm's length and was not the product of collusion.

(B) The court may also consider any other matter pertinent to approval of the proposal, and may refuse to approve it on any such ground.

Conceptual Sketch of Committee Note Ideas

In 2003, Rule 23(e) was amended to direct that a court may approve a settlement proposal in a class action only on finding that it is "fair, reasonable, and adequate." This provision was based in large measure on judicial experience with settlement review. Since 2003, the courts have gained more experience in settlement review.

Before 2003, many circuits had developed lists of "factors" that bore on whether to approve proposed class-action settlements. Although the lists in various circuits were similar, they differed on various specifics and sometimes included factors of uncertain utility in evaluating proposed

settlements. The divergence among the lists adopted in various circuits could sometimes cause difficulties for counsel or courts.

This rule is designed to supersede the lists of factors adopted in various circuits with a uniform set of core factors[2] that the court must find satisfied before approving the proposal. Rule 23(e)(2)(A) makes it clear that the court must affirmatively find all four of the enumerated factors satisfied before it may approve the proposal.

But this is not a closed list; under Rule 23(e)(2)(B) the court may consider any matter pertinent to evaluating the fairness of the proposed settlement.[3] The rule makes it clear that the court may disapprove the proposal on such a ground even though it can make the four findings required by Rule 23(e)(2)(A). Some factors that have sometimes been identified as pertinent seem ordinarily not to be, however. For example, the fact that counsel for the class and the class opponent support the proposal would ordinarily not provide significant support for a court's approval of the proposal. Somewhat similarly, particularly in cases involving relatively small individual relief for class members, the fact the court has received only a small number of objections may not provide significant support for a finding the settlement is fair.[4]

[Before notice is sent to the class under Rule 23(e)(1), the court should make a preliminary evaluation of the proposal. If it is not persuaded that the proposal provides a substantial basis for possible approval, the court may decline to order notice. But a decision to order notice should not be treated as a "preliminary approval" of the proposal, for the required findings and the decision to approve a proposal must not be made until objections are evaluated and the hearing on the proposal occurs.][5]

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[2] Is this really accurate? The rule permits the court to refer to "any other matter pertinent to approval of the proposal." Should the point be to offer evaluations of factors endorsed in the past by some courts? See Appendix II regarding the factors presently employed in various circuits.

[3] It might be that a much more extensive discussion of other factors could be added here, along the lines of the material in Appendix I.

[4] Is this discussion of "suspect" factors sufficient?

[5] This paragraph attempts to introduce something endorsed by the ALI Principles -- that preliminary authorization for notice to the class not become "preliminary approval." Whether

The first factor calls for a finding that the class representatives and class counsel have provided adequate representation. This factor looks to their entire performance in relation to the action. One issue that may be important in some cases is whether, under the settlement, the class representatives are to receive additional compensation for their efforts.[6] Another may in some instances be the amount of any fee for class counsel contemplated by the proposed settlement.[7] In some instances, the court has already appointed class counsel under Rule 23(g).[8] The court would then need only review the

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saying so is desirable could be debated. Whether saying so in the Note is sufficient if saying so is desirable could also be debated. One could, for example, consider revising Rule 23(e)(1) along the following lines:

> **(1)** The court must, after finding that giving notice is warranted by the terms of the proposed settlement, direct notice in a reasonable manner to all class members who would be bound by the proposal.

[6] This factor seems worth mentioning, but perhaps it should not be singled out. It could cut either way. In a small-claim case, it might be sensible to provide reasonable additional compensation for the representative, who otherwise might have had to do considerable work for no additional compensation. The better the "bonus" corresponds to efforts expended by the representation working on the case, the stronger this factor may favor the settlement. The more the amount of compensation reflects some sort of "formula" or set amount unrelated to effort from the representative, the more it may call the fairness of the settlement into question. When the individual recovery is small and the incentive bonus for the class representatives is large, that may, standing alone, raise questions about the settlement, given that the class representatives may have much to lose if the settlement is not approved but little to gain if the case goes to trial and the class recovers many times what the settlement provides.

[7] This factor also seems worth mentioning in the Note. Presumably an agreement that says the court will set the attorney fee, and nothing more, raises fewer concerns than one that says the defendant will not oppose a fee up to $*X*. But the amount of the fee is often included in the Rule 23(e) notice of proposed settlement so that an additional notice is not mandated by Rule 23(h)(1).

[8] This would include the appointment of "interim counsel" under Rule 23(g)(3), and that fact could be mentioned in the Note if it were considered desirable to do so.

performance of counsel since that time. In making this determination about the performance of class counsel in connection with the negotiation of the proposal, the court should be as exacting as Rule 23(g) requires for appointment of class counsel.

The second factor calls for the court to assess the relief awarded to the class under the proposed settlement in light of a variety of practical matters that bear on whether it is adequate. In connection with this factor, it may often be important for counsel to provide guidance to the court about how these considerations apply to the present action. For example, the prospects for success on the merits, and the likely dimensions of that success, should be evaluated. It may also be important for the court to attend to the degree of development of the case to determine whether the existing record affords a sufficient basis for evaluation of these factors. There is no "minimum" amount of discovery, or other work, that must be done before the parties reach a proposed settlement, but the court may seek assurance that it has a firm foundation for assessing the considerations listed in the second factor.[9]

The third factor requires the court to find that the proposed method of allocating the benefits of the settlement among members of the proposed class is equitable. A pro rata distribution is not required, but the court may inquire into the proposed method for allocating the benefits of the settlement among members of the class. [It is possible that this inquiry may suggest the need for subclassing.][10]

The fourth factor partly reinforces the first factor, and may take account of any agreements identified pursuant to Rule 23(e)(3). The court should pay close attention to specifics about the manner and content of negotiation of the proposed settlement. Any "side agreements" that emerged from the negotiations deserve scrutiny. These inquiries may shed light on the second and third factors as well.

Any other factors that are pertinent to whether to approve the proposed settlement deserve attention in the settlement-

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[9] This paragraph attempts to invite appropriate judicial scrutiny of the possible risks of a cheap "early bird" settlement, but also to ward off arguments that no settlement can be approved until considerable "merits" discovery has occurred, or something of the sort.

[10] Is this bracketed language a desirable thing to include in the Note? The point seems obvious in some ways, but the consequences of subclassing may be to delay, or perhaps derail, a settlement.

review process. The variety of factors that might bear on a given proposed settlement is too large for enumeration in a rule, although some that have been mentioned by some courts -- such as support from the counsel who negotiated the settlement -- would ordinarily not be entitled to much weight.

This rule provides guidance not only for the court, but also for counsel supporting a proposed settlement and for objectors to a proposed settlement. [The burden of supporting the proposed settlement falls initially on the proponents of the proposal. As noted above, the court's initial decision that notice to the class was warranted under Rule 23(e)(1) does not itself constitute a "preliminary" approval of the proposal's terms.][11]

[As noted in Rule 23(e)(4) regarding provision of a second opt-out right, the court may decline to approve a proposed settlement unless it is modified in certain particulars. But it may not "approve" a settlement significantly different from the one proposed by the parties. Modification of the proposed settlement may make it necessary to give notice the class again pursuant to Rule 23(e)(1) to permit class members to offer any further objections they may have, or (if the modifications increase significantly the benefits to class members) for class members who opted out to opt back into the class.][12] [13]

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[11] This language about the burden of supporting the settlement seems implicit in the rule, and corresponds to language in ALI § 3.05(c).

[12] This paragraph pursues suggestions in ALI § 3.05(e). Are these ideas worthy of inclusion in the Note?

[13] The above sketch of a draft Note says little about the claims process. It may be that more should be said. ALI § 3.05 comment (f) urges that, when feasible, courts avoid the need for submission of claims, and suggests that direct distributions are usually possible when the settling party has reasonably up-to-date and accurate records. This suggestion is not obviously tied to any black letter provision.

The whole problem of claims processing may deserve attention. It is not currently the focus of any rule provisions. It may relate to the cy pres phenomenon discussed in part (3) below. If defendant gets back any residue of the settlement funds, it may have an incentive to make the claims procedure long and difficult. Keeping an eye on that sort of thing is a valid consideration for the court when it passes on the fairness of the settlement. In addition, in terms of valuing the settlement for the class as part of the attorneys' fee decision, the rate of actual claiming may be an important criterion. Cf. 28 U.S.C. § 1712(a) (requiring, in "coupon settlement" cases, that the focus

(2) Settlement Class Certification

The Committee is not writing on a blank slate in addressing this possibility. In 1996, it published a proposal to adopt a new Rule 23(b)(4) explicitly authorizing certification for settlement purposes, under Rule 23(b)(3) only, in cases that might not qualify for certification for litigation purposes. This history may be very familiar to some members of the Committee, but for some it may have receded from view. In order to provide that background, the 1996 rule proposal and accompanying Committee Note are set out. In addition, footnotes call attention to developments since then and contemporary issues that seem relevant to the matter currently before the Committee.

(b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:

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(4) the parties to a settlement request certification under subdivision (b)(3) for purposes of settlement, even though the requirements of subdivision (b)(3) might not be met for purposes of trial.

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The draft Committee Note that accompanied that proposal was as follows (with some footnotes to mention issues presented by doing the same thing as before).

Subdivision (b)(4) is new. It permits certification of

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in setting attorney fees be on "the value to class members of the coupons that are redeemed"). If there is a way to avoid the entire effort of claims submission and review, that might solve a number of problems that have plagued some cases in the past.

At the same time, a "streamlined" claims payment procedure may benefit some class members at the expense of others. A more particularized claims process might differentiate between class members in terms of their actual injuries in ways not readily achievable using only the defendant's records.

Altogether, these issues present challenges. Whether they are suitable topics for a rule provision is another matter. Up until now, they have largely been regarded as matters of judicial management rather than things to be addressed by rule. See Manual for Complex Litigation (4th) § 21.66 (regarding settlement administration).

a class under subdivision (b)(3) for settlement purposes, even though the same class might not be certified for trial. Many courts have adopted the practice reflected in this new provision. See, e.g., Weinberger v. Kendrick, 698 F.2d 61, 72-73 (2d Cir.1982); In re Beef Industry Antitrust Litigation, 607 F.2d 167, 170-71, 173-78 (5th Cir.1979). Some very recent decisions, however, have stated that a class cannot be certified for settlement purposes unless the same class would be certified for trial purposes. See Georgine v. Amchem Products, Inc., 83 F.3d 610 (3d Cir.1996); In re General Motors Corp. Pick-Up Trick Fuel Tank Litigation, 55 F.3d 768 (3d Cir. 1995). This amendment is designed to resolve this newly apparent disagreement.[14]

Although subdivision (b)(4) is formally separate, any class certified under its terms is a (b)(3) class with all the incidents of a (b)(3) class, including the subdivision (c)(2) rights to notice and to request exclusion from the class. Subdivision (b)(4) does not speak to the question whether a settlement class may be certified under subdivisions (b)(1) or (b)(2).[15] As with all parts of subdivision (b), all of the prerequisites of subdivision (a) must be satisfied to support certification of a (b)(4) settlement class.[16] In addition, the predominance and superiority requirements of subdivision (b)(3) must be

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[14] Obviously resolving that 1996 circuit conflict is no longer necessary given the Amchem decision; the issue now is whether to modify what Amchem said or implied.

[15] Deleting the limitation to (b)(3) classes would speak to that question. In speaking to it, one could urge that, at least where there really is "indivisible" relief sought, it does seem that a settlement class should be possible. Perhaps a police practices suit would be an example. Could the SDNY stop-and-frisk class action have been resolved as a settlement class action? It may be that using a class action would be essential to avoid standing issues. See City of Los Angeles v. Lyons, 461 U.S. 95 (1983) (holding that plaintiff injured by police use of choke-hold could sue for damages, but not for an injunction because he could not show it would likely be used on him again). Issues of class definition, and particularly ascertainability, may present challenges in such cases. But it may be that recognizing that settlements are available options in such cases as to future conduct is desirable. It is worth noting that Rule 23 currently has no requirement of notice of any sort to the class in (b)(2) actions unless they are settled.

[16] On this score, the application of (a)(2) in Wal-Mart Stores, Inc. v. Dukes may be of particular importance.

satisfied.[17] Subdivision (b)(4) serves only to make it clear that implementation of the factors that control certification of a (b)(3) class is affected by the many differences between settlement and litigation of class claims or defenses. Choice-of-law difficulties, for example, may force certification of many subclasses, or even defeat any class certification, if claims are to be litigated.[18] Settlement can be reached, however, on terms that surmount such difficulties. Many other elements are affected as well. A single court may be able to manage settlement when litigants would require resort to many courts. And, perhaps most important, settlement may prove far superior to litigation in devising comprehensive solutions to large-scale problems that defy ready disposition by traditional adversary litigation.[19] Important benefits may be provided for those who, knowing of the class settlement and the opportunity to opt out, prefer to participate in the class judgment and avoid the costs of individual litigation.

For all the potential benefits, settlement classes also pose special risks. The court's Rule 23(e) obligations to review and approve a class settlement commonly must surmount the information difficulties that arise when the major adversaries join forces as proponents of their settlement

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[17] This sentence was written before Amchem was decided; the Supreme Court fairly clearly said that predominance remained important, but that manageability (a factor in making both the predominance and superiority decision) did not. Whether to continue to require predominance to be established in (b)(4) class actions is open to discussion and raised by an alternative possible rule change explored below in text.

[18] Choice-of-law challenges might be precisely the sort of thing that could preclude settlement certification under a strong view of the predominance requirement. As Sullivan v. DB Investment suggests, differing state law may be accommodated in the settlement context.

[19] Arguably there is a principled tension among the courts of appeal that is pertinent to this point. The Third Circuit has said several times that class-action settlements are desirable to achieve a nationwide solution to a problem. The Seventh Circuit, on the other hand, has on one occasion at least said that "the vision of 'efficiency' underlying this class certification is the model of the central planner. * * * The central planning model -- one case, one court, one set of rules, one settlement price for all involved -- suppresses information that is vital to accurate resolution." In re Bridgestone/Firestone, 288 F.3d 1012, 1020 (7th Cir.2002).

agreement.[20] Objectors frequently appear to reduce these difficulties, but it may be difficult for objectors to obtain the information required for a fully informed challenge. The reassurance provided by official adjudication is missing. These difficulties may seem especially troubling if the class would not have been certified for litigation, or was shaped by a settlement agreement worked out even before the action was filed.

These competing forces are reconciled by recognizing the legitimacy of settlement classes but increasing the protections afforded to class members. Certification of a settlement class under (b)(4) is authorized only on request of parties who have reached a settlement. Certification is not authorized simply to assist parties who are interested in exploring settlement, not even when they represent that they are close to agreement and that clear definition of a class would facilitate final agreement.[21] Certification before settlement might exert untoward pressure to reach agreement, and might increase the risk that the certification could be transformed into certification of a

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[20] It should be noted that when this draft Note was written Rule 23(e) was relatively featureless, directing only that court approval was required for dismissal. In 2003, it was augmented with many specifics, and part (1) of this memorandum offers a proposal to refine and focus those specifics.

[21] Note that, as added in 2003, Rule 23(g)(3) authorizes appointment of interim class counsel, a measure that may enable the court to exercise some control over the cast authorized to negotiate a proposed class settlement in the pre-certification phase of the litigation. The Committee Note accompanying this rule addition in 2003 explained:

> Settlement may be discussed before certification. Ordinarily, such work is handled by the lawyer who filed the action. In some cases, however, there may be rivalry or uncertainty that makes formal designation of interim counsel appropriate. [The new rule provision] authorizes the court to designate interim counsel to act on behalf of the putative class before the certification decision is made. Failure to make the formal designation does not prevent the attorney who filed the action from proceeding in it. Whether or not formally designated interim counsel, an attorney who acts on behalf of the class before certification must act in the best interests of the class as a whole. For example, an attorney who negotiates a pre-certification settlement must seek a settlement that is fair, reasonable, and adequate for the class.

trial class without adequate reconsideration.[22] These protections cannot be circumvented by attempting to certify a settlement class directly under subdivision (b)(3) without regard to the limits imposed by (b)(4).

Notice and the right to opt out provide the central means of protecting settlement class members under subdivision (b)(3),[23] but the court also must take particular care in applying some of Rule 23's requirements. As to notice, the Federal Judicial Center study suggests that notices of settlement do not always provide the clear and succinct information that must be provided to support meaningful decisions whether to object to the settlement or -- if the class is certified under subdivision (b)(3) -- whether to request exclusion.[24] One of the most important contributions a court can make is to ensure that the notice fairly describes the litigation and the terms of the settlement. Definition of the class also must be approached with care, lest the attractions of settlement lead too easily to an over-broad definition. Particular care should be taken to ensure that there are not disabling conflicts of interests among people who are urged to form a single class. If the case presents facts or law that are unsettled and that are likely to be litigated in individual actions, it may be better to postpone any class certification until experience with individual actions yields sufficient information to support a wise settlement and effective review of the settlement.

Conceptual Draft of 23(e) Amendment Idea

The animating objective of the conceptual draft below is to place primary reliance on superiority and the invigorated settlement review (introduced in part (1) of this memorandum) to assure fairness in the settlement context, and therefore to remove emphasis on predominance when settlement certification is

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[22] This comment seems designed to make the point in ALI § 3.06(d) -- that statements made in support of settlement class certification should not be used against a party that favored such certification but later opposes litigation certification. Perhaps that asks too much of the judge.

[23] Needless to say, this comment is not applicable to (b)(1) or (b)(2) certification, if those were included in (b)(4). It could be noted that 23(e) requires notice (but not opt out) in such cases.

[24] Note that, as amended in 2003, Rule 23(c)(2)(B) responds to the sorts of concerns that were raised by the FJC study.

under consideration.

An underlying question is whether such an approach should be limited to (b)(3) class actions. There may be much reason to include (b)(2) class actions in (b)(4) but perhaps less reason to include (b)(1) cases.

Another question is whether it should be required that in any case seeking certification for purposes of settlement under (b)(4) the parties demonstrate that all requirements of Rule 23(a) are satisfied. Arguably, some of those -- typicality, for example -- don't matter much at the settlement stage. Concern that the past criminal history of the class representative might come into evidence at trial (assuming that makes the representative atypical) may not matter then. On the other hand, introducing a new set of "similar" criteria that are different could produce difficulties. This conceptual draft therefore offers an Alternative 2 that does not invoke Rule 23(a), but the discussion focuses on Alternative 1, which does invoke the existing rule. If the Alternative 2 approach is later preferred, adjustments could be made.

(b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:

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Alternative 1

(4) the parties to a settlement [in an action to be certified under subdivision (b)(3),] request certification and the court finds that the action satisfies Rule 23(a), that the proposed settlement is superior to other available methods for fairly and efficiently adjudicating the controversy, and that it should be approved under Rule 23(e).

Alternative 2

(4) the parties to a settlement [in an action to be certified under subdivision (b)(3),] request certification and the court finds that significant common issues exist, that the class is sufficiently numerous to warrant classwide treatment, and that the class definition is sufficient to ascertain who is and who is not included in the class. The court may then grant class certification if the proposed settlement is superior to other available methods for fairly and efficiently adjudicating the controversy, and that it

should be approved under Rule 23(e).[25]

This approach seems clearly contrary to Amchem, which said that Rule 23(e) review of a settlement was not a substitute for rigorous application of the criteria of 23(a) and (b). It also may appear to invite the sort of "grand compensation scheme" quasi-legislative action by courts that the Court appeared to disavow in Amchem. Particularly if this authority were extended beyond (b)(3),[26] and a right to opt out were not required, this approach seems very aggressive. Below are some thoughts about the sorts of things that might be included in a sketch of a draft Committee Note.

Sketch of Draft Committee Note ideas
[Limited to Alternative 1]

Subdivision (b)(4) is new. In 1996, a proposed new subdivision (b)(4) was published for public comment. That new subdivision would have authorized certification of a (b)(3) class for settlement in certain circumstances in which certification for full litigation would not be possible. One stimulus for that amendment proposal was the existence of a conflict among the courts of appeals about whether settlement certification could be used only in cases that could be certified for full litigation. That circuit conflict was resolved by the holding in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), that the fact of settlement is relevant to class certification. The (b)(4)

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[25] ALI § 3.06(b) says that "a court may approve a settlement class if it finds that the settlement satisfies the criteria of [Rule 23(e)], and it further finds that (1) significant common issues exist; (2) the class is sufficiently numerous to warrant classwide treatment, and (3) the class definition is sufficient to ascertain who is and who is not included in the class. The court need not conclude that common issues predominate over individual issues."

[26] On this score, note that ALI § 3.06(c) said:

> In addition to satisfying the requirements of subsection (b) of this Section [quoted in a footnote above], in cases seeking settlement certification of a mandatory class, the proponents of the settlement must also establish that the claims subject to settlement involve indivisible remedies, as defined in the Comment to § 2.04.

Needless to say, "indivisible remedies" is not a term used in the civil rules. Attempting to define them, or some alternative term, might be challenging. § 2.04 has three subsections, and is accompanied by six pages of comments and six pages of Reporters' Notes.

amendment proposal was not pursued after that decision.

Rule 23(f), also in the package of amendment proposals published for comment in 1996, was adopted and went into effect in 1998. As a consequence of that addition to the rule, a considerable body of appellate precedent on class-certification principles has developed. In 2003, Rule 23(e) was amended to clarify and fortify the standards for review of class settlements, and subdivisions (g) and (h) were added to the rule to govern the appointment of class counsel, including interim class counsel, and attorney fees for class counsel. These developments have provided added focus for the court's handling of the settlement-approval process under Rule 23(e).

Concerns have emerged about whether it might sometimes be too difficult to obtain certification solely for purposes of settlement. Some reported that alternatives such as multidistrict processing or proceeding in state courts have grown in popularity to achieve resolution of multiple claims.

This amendment is designed to respond to those concerns by clarifying and, in some instances, easing the path to certification for purposes of settlement. Like the 1996 proposal, this subdivision is available only after the parties have reached a proposed settlement and presented it to the court. Before that time, the court may, under Rule 23(g)(3), appoint interim counsel to represent the interests of the putative class.

[Subdivision (b)(4) is not limited to Rule 23(b)(3) class actions. It is likely that actions brought under subdivision (b)(3) will be the ones in which it is employed most frequently, but foreclosing pre-certification settlement in actions brought under subdivisions (b)(1) or (b)(2) seems unwarranted. At the same time, it must be recognized that approving a class-action settlement is a challenging task for a court in any class action. Amendments to Rule 23(e) clarify the task of the judge and the role of the parties in connection with review of a proposed settlement.[27]]

Like all class actions, an action certified under subdivision (b)(4) must satisfy the requirements of Rule 23(a).[28]

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[27] This treatment may be far too spare. Note that the ALI proposal limited the use of "mandatory class action" settlement to cases involving "indivisible relief," a term that is not presently included in the civil rules and that the ALI spent considerable effort defining.

[28] This is a point at which Alternative 2, modeled on the ALI approach, would produce different Committee Note language. Arguments could be made that Wal-Mart Stores, Inc. v. Dukes has

Unless these basic requirements can be satisfied, a class settlement should not be authorized.

Increasing confidence in the ability of courts to evaluate proposed settlements, and tools available to them for doing so, provide important support for the addition of subdivision (b)(4). For that reason, the subdivision makes the court's conclusion under Rule 23(e) an essential component to settlement class certification. Under amended Rule 23(e), the court can make the required findings to approve a settlement only after completion of the full Rule 23(e) settlement-review process. Given the added confidence in settlement review afforded by strengthening Rule 23(e), the Committee is comfortable with reduced emphasis on some provisions of Rule 23(a) and (b).[29]

Subdivision (b)(4) also borrows a factor from subdivision (b)(3) as a prerequisite for settlement certification -- that the court must also find that resolution through a class-action settlement is superior to other available methods for fairly and efficiently adjudicating the controversy. Unless that finding can be made, there seems no reason for the court or the parties to undertake the responsibilities involved in a class action.

Subdivision (b)(4) does not require, however, that common questions predominate in the action. To a significant extent, the predominance requirement, like manageability, focuses on difficulties that would hamper the court's ability to hold a fair trial of the action. But certification under subdivision (b)(4) assumes that there will be no trial. Subdivision (b)(4) is available only in cases that satisfy the common-question requirements of Rule 23(a)(2), which ensure commonality needed for classwide fairness. Since the Supreme Court's decision in Amchem, the courts have struggled to determine how predominance should be approached as a factor in the settlement context. This amendment recognizes that it does not have a productive role to play and removes it.[30]

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raised the bar under Rule 23(a)(2) too high. The ALI approach is to say that "significant common issues" are presented. See ALI § 3.06(b).

[29] Without exactly saying so, this sentence is meant to counter the assertion in Amchem that Rule 23(e) is an additional factor, not a superseding consideration, when settlement certification is proposed.

[30] This material attempts to address Amchem's assertion that superiority continues to be important. Is it persuasive? If so, should the Note say that it is changing what the Supreme Court said in Amchem, perhaps by citing the passage in the decision where the court discussed superiority?

Settlement certification also requires that the court conclude that the class representatives are typical and adequate under Rule 23(a)(3) and (4).[31] Under amended Rule 23(e), the court must also find that the settlement proposal was negotiated at arms length by persons who adequately represented the class interests, and that it provides fair and adequate relief to class members, treating them equitably.

In sum, together with changes to Rule 23(e), subdivision (b)(4) ensures that the court will give appropriate attention to adequacy of representation and the fair treatment of class members relative to each other and the potential value of their claims. At the same time, it avoids the risk that a desirable settlement will prove impossible due to factors that matter only to a hypothetical trial scenario that the settlement is designed to avoid.

[Should the court conclude that certification under subdivision (b)(4) is not warranted -- because the proposed settlement cannot be approved under subdivision (e) or because the requirements of Rule 23(a) or superiority are not met -- the court should not rely on the parties' statements in connection with proposed (b)(4) certification in relation to later class certification or merits litigation.][32]

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[31] As at other points, adopting Alternative 2 would change this.

[32] The ALI Principles include such a provision in the rule. This suggests a comment the Note. The ALI provision seems to have been prompted by one 2004 Seventh Circuit decision, Carnegie v. Household Int'l, Inc., 376 F.3d 656, 660 (7th Cir. 2004). Carnegie was a rather remarkable case. It first came to the Seventh Circuit in Reynolds v. Beneficial National Bank, 288 F.3d 277 (7th Cir. 2002), after the district judge granted settlement class certification and, on the strength of that, enjoined litigation in various state courts against the same defendants on behalf of statewide classes. The Court of Appeals reversed approval of the proposed settlement in the federal court, "concerned that the settlement might have been the product of collusion between the defendants, eager to minimize their liability, and the class lawyers, eager to maximize their fees." 376 F.3d at 659.

The Court of Appeals (under its Local Rule 36), then directed that the case be assigned on remand to a different judge, and the new judge approved the substitution of a new class representative (seemingly an objector the first time around) and appointed new class counsel. This new judge later certified a litigation class very similar to the settlement class originally certified. Defendants appealed that class-certification

(3) Cy pres

The development of cy pres provisions in settlements has not depended meaningfully on any precise provisions of Rule 23. The situations in which this sort of arrangement might be desired probably differ from one another. Several come to mind:

(1) Specific individual claimants cannot be identified but

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decision, objecting that the new judge had improperly directed the defendants initially to state their objections to litigation certification, thereby imposing on them the burden of proving that certification was not justified instead of making plaintiff justify certification. The Seventh Circuit rejected this argument because the new judge "was explicit that the burden of persuasion on the validity of the objections [to certification] would remain on the plaintiffs." 376 F.3d at 662.

The Court of Appeals also invoked the doctrine of judicial estoppel, which it explained involved an "antifraud policy" that precluded defendants "from challenging [the class's] adequacy, at least as a settlement class," noting that "the defendants benefitted from the temporary approval of the settlement, which they used to enjoin the other * * * litigation against them." Id. at 660. At the same time, the court acknowledged "that a class might be suitable for settlement but not for litigation." It added comments about the concern that its ruling might chill class-action settlement negotiations (id. at 663):

> The defendants tell us that anything that makes it easier for a settlement class to molt into a litigation class will discourage the settlement of class actions. * * * But the defendants in this case were perfectly free to defend against certification; they just didn't put up a persuasive defense.

Whether this decision poses a significant problem is debatable. The situation seems distinctive, if not unique. The value of a rule provision concerning the "binding" effect of defendants' support for certification for settlement, or even a comment in the Note is therefore also debatable. In any event, it might not prevent a state court from doing what it says should not be done. Recall that in the original Reynolds appeal (described above), there was an injunction against state-court litigation. Whether a federal rule can prevent a state court from giving weight to these sorts of matters is an interesting issue. As a general matter, this subject reminds us of other provisions about the preclusive effect of class-certification rulings or to decisions disapproving a proposed class settlement. That has been an intriguing prospect in the past, but one the Advisory Committee has not followed.

measures to "compensate" them can be devised. The famous California case of Daar v. Yellow Cab, 433 P.2d 732 (Cal. 1967), is the prototype of this sort of thing -- because the Yellow Cab meters had been set too high in L.A. for a period of time, the class action resolution required that the Yellow Cab meters be set a similar amount too low for a similar period, thereby conferring a relatively offsetting benefit on more or less the same group of people, people who used Yellow Cabs in L.A. (Note that competing cab companies in this pre-Uber era may not have liked the possibility that customers would favor Yellow Cab cabs because they would be cheaper.)

(2) Individual claimants could be identified, but the cost of identifying them and delivering money to them would exceed the amount of money to be delivered.

(3) A residue is left after the claims process is completed, and the settlement does not provide that the residue must be returned to the defendant. (If it does provide for return to the defendant, there may be an incentive for the defendant to introduce extremely rigorous criteria class members have to satisfy to make claims successfully.)

Whether all these kinds of situations (and others that come to mind) should be treated the same is not certain. In some places state law may actually address such things. See Cal. Code Civ. Proc. § 384, which contains specific directions to California judges about residual funds left after payments to class members.

Much concern has been expressed in several quarters about questionable use of cy pres provisions, and the courts' role in approving those arrangements under Rule 23. Most notable is the Chief Justice's statement regarding denial of certiorari in Marek v. Lane, 134 S.Ct. 8 (2013) that the Court "may need to clarify the limits on the use of such remedies." Id. at 9. That case involved challenges to provisions in a settlement of a class action against Facebook alleging privacy claims.

§3.07 of the ALI Principles directly addresses cy pres in a manner that several courts of appeals have found useful. One might argue that the courts' adoption of §3.07 makes a rule change unnecessary. On the other hand, the piecemeal adoption by courts of the ALI provision seems a dubious substitute, and it may be wise to have in mind the Chief Justice's suggestion that the Supreme Court may need to take a case to announce rules for the subject.

The ALI provision could be a model for additions to Rule 23(e):

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

* * * * *

(3) The court may approve a proposal that includes a cy pres remedy [if authorized by law][33] even if such a remedy could not be ordered in a contested case. The court must apply the following criteria in determining whether a cy pres award is appropriate:

(A) If individual class members can be identified through reasonable effort, and the distributions are sufficiently large to make individual distributions economically viable, settlement

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[33] This bracketed qualification is designed to back away from creating new authority to use cy pres measures. It is clear that some courts have been authorizing cy pres treatment. Indeed, the Eighth Circuit's recent opinion in In re BankAmerica Corp. Securities Lit., 775 F.3d 1060 (8th Cir. 2015), suggested that it is impatient with their willingness to do so. It is less clear where the authority for them to do so comes from. In some places, like California, there is statutory authority, but there are probably few statutes. It may be a form of inherent power, though that is a touchy subject. Adding a phrase of this sort is designed to make clear that the authority does not come from this rule.

On the other hand, one might say that the inclusion of cy pres provisions in the settlement agreement is entirely a matter of party agreement and not an exercise of judicial power. But one might respond that the binding effect of a settlement class action judgment is dependent on the exercise of judicial power, and that the court has a considerable responsibility to ensure the appropriateness of that arrangement before backing it up with judicial power. So the rule would guide the court in its exercise of that judicial power.

In any event, it may be that there is not need to say "if authorized by law" in the rule because -- like many other agreements included in settlements -- cy pres provisions do not depend on such legal authorization, even if their binding effect does depend on the court's entry of a judgment.

proceeds must[34] be distributed directly to individual class members;

(B) If the proposal involves individual distributions to class members and funds remain after distributions, the settlement must provide for further distributions to participating class members unless the amounts involved are too small to make individual distributions economically viable or other specific reasons exist that would make such further distributions impossible or unfair;

(C) The proposal may provide that, if the court finds that individual distributions are not viable under Rule 23(e)(3)(A) or (B), a cy pres approach may be employed if it directs payment to a recipient whose interests reasonably approximate those being pursued by the class. [The court may presume that individual distributions are not viable for sums of less than $100.][35] [If no such recipient can be identified, the court may approve payment to a recipient whose interests do not reasonably approximate the interests being pursued by the class if such payment would serve the public interest.][36]

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[34] The ALI uses "should," but "must" seems more appropriate.

[35] There have been reports that in a significant number of cases distributions of amounts less than $100 can be accomplished. This provision is borrowed from a proposed statutory class-action model prepared by the Commissioners on Uniform State Laws. It may be that technological improvements made such an exclusion from the mandatory distribution requirements of (e)(3)(A) and (B) unnecessary.

[36] This bracketed material is drawn from the ALI proposal. It might be questioned on the ground that it goes beyond what the Enabling Act allows a rule to do. But this provision is about approving what the parties have agreed, not inventing a new "remedy" to be used in litigated actions. It may be that in some litigated actions there is a substantive law basis for a court-imposed distribution measure of the sort the bracketed language describes. Claims for disgorgement, for example, might support such a measure. Though the substantive law upon which a claim is based might, therefore, support such a measure, this provision does not seek to authorize such a remedy.

(4~~3~~) The parties seeking approval * * *

As noted above, the ALI proposal has received considerable support from courts. A recent example is In re BankAmerica Securities Litigation, 775 F.3d 1060 (8th Cir. 2015), in which the majority vigorously embraced ALI § 3.07, in part due to "the substantial history of district courts ignoring and resisting circuit court cy pres concerns and rulings in class action cases." It also resisted the conclusion that the fact those class members who had submitted claims had received everything they were entitled to receive under the settlement is the same as saying they were fully compensated, which might respond to arguments against proposed (3)(B) above that further distributions to class members who made claims should not occur if they already received the maximum they could receive pursuant to the settlement.

The possibility of Enabling Act issues should be noted, but the solution may be that this is an agreement subject to court approval under Rule 23(e), not a new "remedy" provided by the rules for litigated actions. The situation in California may be illustrative.

Cal. Code Civ. Proc. § 384 directs a California state court to direct left-over funds to groups furthering the proposes sought in the class action or to certain public interest purposes. In a federal court in California, one might confront arguments that §384 dictates how such things must be handled. Reports indicate that the federal courts in California do not regard the statute as directly applicable to cases in federal court, but that they do find it instructive as they apply Rule 23.

An argument in favor of Enabling Act authority could invoke the Supreme Court's Shady Grove decision and say that Rule 23 occupies this territory and the state law provision on cy pres treatment cannot be applied in federal court as a result. If that argument is right, it seems to provide some support for a rule that more explicitly deals with the sort of thing addressed

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Note that the Class Action Fairness Act itself has a small provision that authorizes something along this line. Thus, 28 U.S.C. § 1712(e) provides: "The court, in its discretion, may also require that a proposed settlement agreement provide for the distribution of a portion of the value of unclaimed coupons to 1 or more charitable or governmental organizations, as agreed to by the parties." This section of the statute deals with coupon settlements more generally, and not in a manner that encourages parties to use them. It is not certain whether resort to the cy pres aspect of CAFA has been attempted with any frequency.

above. But the bracketed sentence at the end of (C) might raise Enabling Act concerns. The bracketed "if authorized by law" suggestion in the draft rule above is a first cut at a way to sidestep these issues.

It may be said that the bracketed language is not necessary because this provision is only about settlement agreements. Settlement agreements can include provisions that the court could not order as a remedy in a litigated case. So there is latitude to give serious attention to adding references to cy pres treatment in the settlement-approval rule. But it can also be emphasized that the real bite behind the agreement comes from the court's judgment, not the agreement itself.

If the rule can provide such authority, should it so provide? Already quite a few federal judges have approved cy pres arrangements. Already some federal courts have approved the principles in the ALI's § 3.07, from which the first sketch above is drawn.

Despite all those unresolved issues, it may nonetheless be useful to reflect on what sorts of things a Committee Note might say:

Sketch of Draft Committee Note ideas

When a class action settlement for a payment of a specified amount is approved by the court under Rule 23(e), there is often a claims process by which class members seek their shares of the fund. In reviewing a proposed settlement, the court should focus on whether the claims process might be too demanding, deterring or leading to denial of valid claims.[37] Ideally, the entire fund provided will be used (minus reasonable administrative costs) to compensate class members in accord with the provisions of the settlement.

On occasion, however, funds are left over after all initial claims have been paid. Courts faced with such circumstances have resorted on occasion to a practice invoking principles of *cy pres* to support distribution of at least some portion of the settlement proceeds to persons or entities not included in the class. In some instances, these measures have raised legitimate

[37] It might be attractive to be more forceful (and probably negative) somewhere about reversionary provisions. For example, the Note might say that if there is a reverter clause the court should look at the claims process very carefully to make sure that it does not impose high barriers to claiming. Probably that belongs in the general Rule 23(e) Committee Note about approving settlement proposals. It seems somewhat out of place here, even though it logically relates to the topic at hand.

concerns.

Subdivision (e)(3) recognizes and regularizes this activity. The starting point is that the settlement funds belong to the class members and do not serve as a resource for general "public interest" activities overseen or endorsed by the court.[38] Nonetheless, the possibility that there will be a residue after the settlement distribution program is completed makes provision for this possibility appropriate. Unless there is no prospect of a residue after initial payment of claims, the issue should be included in the initial settlement and evaluated by the court along with the other provisions of that proposal.[39] [If no such provision is included in the initial proposal but a residue exists after initial distribution to the class, the court may address the question at that point, but then should consider whether a further notice to the class should be ordered regarding the proposed disposition of the residue.[40]]

Subdivision (e)(3) does not create a new "remedy" for class actions. Such a remedy may be available for some sorts of claims, such as disgorgement of ill-gotten funds, but this rule does not authorize such a remedy for a litigated class action. The cy pres provision is something the parties have included in their proposal to the court, and the court is therefore called upon to decide whether to approve what the parties have agreed upon to resolve the case.

Subdivision (e)(3) provides rules that must be applied in deciding whether to approve cy pres provisions. Paragraph (A) requires that settlement funds be distributed to class members if they can be identified through reasonable effort when the

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[38] Is this too strongly worded, or too much a bit of "political" justification?

[39] Is this too strong? It seems that addressing these issues up front is desirable, and giving notice to the class about the provision for a residue is also valuable. That ties in with the idea that this is about the court's general settlement review authority, and it may prompt attention to whether the claims process is too demanding.

[40] Note that the Eighth Circuit raised the question whether, in the latter situation, there would be a need to notice the class a second time about this change in circumstances and the cy pres treatment under consideration. It seems that the better thing is to get the matter on the table at the outset, although that might make it seem that the parties expect the claims process to have faults. Probably devising a "perfect" claims process is very difficult, so a residue is not proof that the claims process was seriously flawed.

distributions are large enough to be to make distribution economically viable. It is not up to the court to determine whether the class members are "deserving," or other recipients might be more deserving.[41] Thus, paragraph (A) makes it clear that cy pres distributions are a last resort, not a first resort.

Paragraph (B) follows up on the point in paragraph (A), and provides that even after the first distribution is completed there must be a further distribution to class members of any residue if a further distribution is economically viable. This provision applies even though class members have been paid "in full" in accordance with the settlement agreement. Settlement agreements are compromises, and a court may properly approve one that does not provide the entire relief sought by the class members through the action. Unless it is clear that class members have no plausible legal right to receive additional money, they should receive additional distributions.[42]

Paragraph (C), therefore, deals only with the rare case in which individual distributions are not viable. The court should not assume that the cost of distribution is prohibitive unless presented with evidence firmly supporting that conclusion.[43] It should take account of the possibility that electronic means may make identifying class members and distributing proceeds to them inexpensive in some cases.[44] [The rule does provide that the court may so assume for distributions of less than $100.[45]] When the court finds that individual distributions would be

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[41] This responds to an argument made in the Eight Circuit case -- that the funds distributed would be to institutional investors, who were less deserving than the legal services agencies that would benefit from the cy pres distributions.

[42] This is an effort to deal with the "paid in full" or "overcompensation" point.

[43] If we are to authorize the "only cy pres" method, what can we say about the predicate for using it? The Note language addresses cost. How about cases in which there simply is no way to identify class members? Should those fall outside this provision?

[44] This assertion is based on a hunch.

[45] Should we include such a provision? As noted above, smaller distributions are reportedly done now. Suppose a bank fee case in which the bank improperly charged thousands of account holders amounts less than $100. Assuming the bank could easily identify those account holders and the amount of improperly charged fees, why not direct that their accounts be credited?

economically infeasible, it may approve an alternative use of the settlement funds if the substitute recipient's interests "reasonably approximate those being pursued by the class." In general, that determination should be made with reference to the nature of the claim being asserted in the case. [Only if no such recipient can be identified may the court authorize distribution to another recipient, and then only if such distribution would serve the public interest.[46]]

[46] This is in brackets in the rule and the Note because, even if the parties agree and the class receives notice of the agreement, it seems a striking use of judicial power. Perhaps, as indicated above in the Note, it is mainly the result of the parties' agreement, not the court's power, which is limited to reviewing and deciding whether to approve the parties' agreement.

(4) Objectors

The behavior of some objectors has aroused considerable ire among class-action practitioners. But it is clear that objectors play a key role in the settlement-approval process. Rule 23(e)(5) says that class members may object to the proposed settlement, and Rule 23(h)(2) says they may object to the proposed attorney fee award to class counsel. Judges may come to rely on them. CAFA requires that state attorneys general (or those occupying a comparable state office) receive notice of proposed settlements, and they may be a source of useful information to the judge called upon to approve or disapprove a proposed settlement.

The current rules place some limits on objections. Rule 23(e)(5) also says that objections may be withdrawn only with the court's permission. That requirement of obtaining the court's permission was added in 2003 in hopes that it would constrain "hold ups" that some objectors allegedly used to extract tribute from the settling parties.

Proposals have been made to the Appellate Rules Committee to adopt something like the approval requirement under rule 23(e)(5) for withdrawing an appeal from district-court approval of a settlement. Since the delay occasioned by an appeal is usually longer than the period needed to review a proposed settlement at the district-court level, that sort of rule change might produce salutary results. But it might be that the district judge would be better positioned to decide whether to permit withdrawal of the appeal than the court of appeals. The Rule 23 Subcommittee intends to remain in touch with the Appellate Rules Committee on these issues as it proceeds with its attention to the civil rules.

Another set of ideas relates to requiring objectors to post a bond to appeal. In Tennille v. Western Union Co., 774 F.3d 1249 (10th Cir. 2014), the district court, relying on Fed. R. App. P. 7, entered an order requiring objectors who appealed approval of a class-action settlement to post a bond of over $1 million to cover (1) the anticipated cost of giving notice to the class a second time, (2) the cost of maintaining the settlement pending resolution of the appeals, and (3) the cost of printing and copying the supplemental record in the case (estimated at $25,000). The court of appeals ruled that the only costs for which a bond could be required under Appellate Rule 7 were those that could be imposed under a statute or rule, so the first two categories were entirely out, and the third category was possible, but that the maximum amount the appellate court could uphold would be $5,000. Other courts have occasionally imposed bond requirements. But the Subcommittee is not presently suggesting any civil rule changes on this subject.

Regarding the civil rules, it is not certain whether the adoption of the approval requirement in Rule 23(e)(5) in 2003 had a good effect in district court proceedings, although some reports indicate that it has. Two sets of ideas are under consideration. One slightly amplifies the Rule 23(e)(5) process by borrowing an idea from Rule 23(3)(2) -- that the party seeking to withdraw an objection advise the court of any "side agreements" that influenced the decision to withdraw. The other follows a suggestion in the ALI Aggregate Litigation principles for imposition of sanctions on those who make objections for improper purposes.

Adding a reporting obligation to (e)(5)

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

* * * * *

Alternative 1

(5) Any class member may object to the proposal if it requires court approval under this subdivision (e); the objection may be withdrawn only with the court's approval, and the parties must file a statement identifying any agreement made in connection with the withdrawal.

Alternative 2

(5) Any class member may object to the proposal if it requires court approval under this subdivision (e); the objection may be withdrawn only after the filing of a statement identifying any agreement made in connection with the withdrawal, and court approval of the request to withdraw the objection ~~with the court's approval~~.

If it is true that the current provision requiring court approval for withdrawing an objection does the needed job, there may be no reason to add this reporting obligation. There is at least some reason to suspect that class counsel may take the position that there is already some sort of implicit reporting obligation. Experience with the efficacy of the existing reporting provision in (e)(3) may also shed light whether adding one to (e)(5) would be desirable.

Objector sanctions

§ 3.08(d) of the ALI Principles says:

> If the court concludes that objectors have lodged objections that are insubstantial and not reasonably advanced for the purpose of rejecting or improving the settlement, the court should consider imposing sanctions against objectors or their counsel under applicable law.

Comment c to this section says that it "envisions that sanctions will be invoked based upon existing law (e.g., Fed. R. Civ. P. 11, 28 U.S.C. § 1927)."

This proposal raises a number of questions. One idea might be to say explicitly that any objection is subject to Rule 11. That may seem a little heavy handed with lay objectors, and a statement in the class settlement notice appearing to threaten sanctions might do more harm than good. Another idea might be to indicate in a rule that § 1927 is a source of authority to impose sanctions. But that would be a peculiar rule, since it would not provide any authority but only remind the court of its statutory authority. The ALI proposal's "should consider" formulation seems along that line. It does not say the court should do it, but only that the court should think about imposing sanctions.

It seems that a provision along these lines could serve a valuable purpose. In the 2000-02 period, when the 2003 amendments were under consideration, there was much anguish about how to distinguish "good" from "bad" objectors. There is no doubt whatsoever that there are good ones, whose points assist the court and improve the settlement in many instances. But it seems very widely agreed that there are also some bad objectors who seek to profit by delaying final consummation of the deal.

Defining who is a "good" or a "bad" objector in a rule is an impossible task. But there is reason to think that judges can tell in the specific context of a given case and objection. So the goal here would be to rely on the judge's assessment of the behavior of the objector rather than attempt in a rule to specify. Discussion on this topic has only begun in the Subcommittee, but for purposes of broader airing of the issues the following conceptual draft ideas might be informative:

Alternative 1

(5) Any class member may<u>, subject to Rule 11,</u> object to the proposal if it requires court approval under this subdivision (3); the objection may be withdrawn only with the court's approval.

Alternative 2

(5) Any class member may object to the proposal if it requires court approval under this subdivision (e); the objection may be withdrawn only with the court's approval. If the court finds that an objector has made objections that are insubstantial [and] {or} not reasonably advanced for the purpose of rejecting or improving the settlement, the court [should] {may} impose sanctions on objectors or their counsel {under applicable law}.

Simply invoking Rule 11 (Alternative 1) may be simplest. But as noted above, it may also deter potential objectors too forcefully. One might debate whether the certifications of Rule 11(b) are properly applied here. Invoking Rule 11(c) in this rule might be simpler than trying to design parallel features here. On the other hand, (e)(5) says that the objector may withdraw the objection only with the court's approval while Rule 11's safe harbor provision seems not to require any court approval but instead to permit (perhaps to prompt) a unilateral withdrawal. Rule 11(c) also requires that the party who seeks Rule 11 sanctions first prepare and serve (but not file) a motion for sanctions, which might be a somewhat wasteful requirement.

Alternative 2 is more along the lines of the ALI proposal. But perhaps a provision like this one should create authority for imposing sanctions. The ALI approach seems to rely on authority from somewhere else. If the rule does not create such authority, it sounds more like an exhortation than a rule. The choice between possible verbs -- "should" or "may" -- seems to bear somewhat on this issue. To say "may" is really saying only that courts are permitted to do what the rules already say they may do; it's like a reminder. To say "should" is an exhortation. Does it supplant the "may" that appears in Rule 11? Perhaps judges are to be quicker on the draw with objectors than original parties. One could also consider saying "must," but since that was rejected for Rule 11 it would seem odd here. In any event, if the rule creates authority to impose sanctions, perhaps it should say what sanctions are authorized.

The description in Alternative 2 of the finding that the court must make to proceed to sanctions on the objector deserves attention. There is a choice between "and" and "or" regarding whether objections that are "insubstantial" were also not advanced for a legitimate purpose. Probably a judge would not distinguish between these things; if the objection is substantial, maybe it is nonetheless advanced for improper reasons. But would a judge ever think so? Does the fact of proposed withdrawal show that an objection was insubstantial? Seemingly not. Objectors often abandon objections when they get a full explanation of the details of the proposed settlement. So for them the use of "and" seems important; they withdraw the

objections when they learn more about the deal, and that shows that they were not interposing the objections for an improper purpose. Could an objector who raises substantial objections but also has an improper purpose be sanctioned? The ALI proposal does not condition sanctions on a finding that the objection is meritless. Maybe the judge will act on the objection even though the objector has tried to withdraw it.

It seems worthwhile to mention another question that might arise if sanctions on objectors were considered -- should the court consider sanctions on the parties submitting a flawed proposal to settle? If it is really a "reverse auction" type of situation -- odious to the core -- should the court be reminded that Rule 11 surely does apply to the submissions in support of the proposal? Should it at least be advised to consider replacing class counsel or the class representative or both to give effect to the adequate representation requirements of Rule 23(a)(4)?

It is obvious that much further attention will be needed to sort through the various issues raised by the sanctions possibility. For the present, the main question is whether it is worthwhile to sort through those difficult questions. The sketches above are offered only to provide a concrete focus for that discussion.

(5) Rule 68 Offers and Mootness

The problem of settlement offers made to the proposed class representative that fully satisfy the representative's claim and thereby "pick off" and moot the class action seems to exist principally in the Seventh Circuit. Outside the 7th Circuit there is little enthusiasm for "picking off" the class action with a Rule 68 offer or other sort of settlement offer. Below are three different (perhaps coordinated) ways of dealing with this problem. The first is Ed Cooper's sketch circulated on Dec. 2.

First Sketch: Rule 23 Moot
(Cooper approach)

(x) (1) When a person sues [or is sued] as a class representative, the action can be terminated by a tender of relief only if
  (A) the court has denied class certification and
  (B) the court finds that the tender affords complete relief on the representative's personal claim and dismisses the claim.
(2) A dismissal under Rule 23(x)(1) does not defeat the class representative's standing to appeal the order denying class certification.

Committee Note

A defendant may attempt to moot a class action before a certification ruling is made by offering full relief on the individual claims of the class representative. This ploy should not be allowed to defeat the opportunity for class relief before the court has had an opportunity to rule on class certification.

If a class is certified, it cannot be mooted by an offer that purports to be for complete class relief. The offer must be treated as an offer to settle, and settlement requires acceptance by the class representative and approval by the court under Rule 23(e).

Rule 23(x)(1) gives the court discretion to allow a tender of complete relief on the representative's claim to moot the action after a first ruling that denies class certification. The tender must be made on terms that ensure actual payment. The court may choose instead to hold the way open for certification of a class different than the one it has refused to certify, or for reconsideration of the certification decision. The court also may treat the tender of complete relief as mooting the representative's claim, but, to protect the possibility that a new representative may come forward, refuse to dismiss the action.

If the court chooses to dismiss the action, the would-be class representative retains standing to appeal the denial of certification. [say something to explain this?]

[If we revise Rule 23(e) to require court approval of a settlement, voluntary dismissal, or compromise of the representative's personal claim, we could cross-refer to that.]

Rule 68 approach

Rule 68. Offer of Judgment

* * * * *

(e) Inapplicable in Class and Derivative Actions. This rule does not apply to class or derivative actions under Rules 23, 23.1, or 23.2.

This addition is drawn from the 1984 amendment proposal for Rule 68. See 102 F.R.D. at 433.

This might solve a substantial portion of the problem, but does not seem to get directly at the problem in the manner that the Cooper approach does. By its terms, Rule 68 does not moot anything. It may be that an offer of judgment strengthens an argument that the case is moot, because what plaintiffs seek are judgments, not promises of payment, the usual stuff of settlement offers. Those judgments do not guarantee actual payment, as the Cooper approach above seems intended to do with its tender provisions. But a Committee Note to such a rule might be a way to support the conclusion that we have accomplished the goal we want to accomplish. Here is what the 1984 Committee Note said:

> The last sentence makes it clear that the amended rule does not apply to class or derivative actions. They are excluded for the reason that acceptance of any offer would be subject to court approval, see Rules 23(e) and 23.1, and the offeree's rejection would burden a named representative-offeree with the risk of exposure to potentially heavy liability that could not be recouped from unnamed class members. The latter prospect, moreover, could lead to a conflict of interest between the named representative and other members of the class. See, Gay v.Waiters & Dairy Lunchmen's Union, Local 30, 86 F.R.D. 500 (N.D. Cal. 1980).

Alternative Approach in Rule 23

Before 2003, there was a considerable body of law that treated a case filed as a class action as subject to Rule 23(e) at least until class certification was denied. A proposed individual settlement therefore had to be submitted to the judge

for approval before the case could be dismissed. Judges then would try to determine whether the proposed settlement seemed to involve exploiting the class-action process for the individual enrichment of the named plaintiff who was getting a sweet deal for her "individual" claim. If not, the judge would approve it. If there seemed to have been an abuse of the class-action device, the judge might order notice to the class of the proposed dismissal, so that other class members could come in and take up the litigation cudgel if they chose to do so. Failing that, the court might permit dismissal.

The requirement of Rule 23(e) review for "individual" settlements was retained in the published preliminary draft in 2003. But concerns arose after the public comment period about how the court should approach situations in which the class representative did seem to be attempting to profit personally from filing a class action. How could the court force the plaintiff to proceed if the plaintiff wanted to settle? One answer might be that plaintiff could abandon the suit, but note that "voluntary dismissal" is covered by the rule's approval requirement. Another might be that the court could sponsor or encourage some sort of recruitment effort to find another class representative. In light of these difficulties, the amendments were rewritten to apply only to claims of certified classes.

(e) Settlement, Voluntary Dismissal, or Compromise.

(1) **Before certification.** An action filed as a class action may be settled, voluntarily dismissed, or compromised before the court decides whether to grant class-action certification only with the court's approval. The [parties] {proposed class representative} must file a statement identifying any agreement made in connection with the proposed settlement, voluntary dismissal, or compromise.

(2) **Certified class.** The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(A~~1~~) The court must direct notice in a reasonable manner * * * * *

(3) **Settlement after denial of certification.** If the court denies class-action certification, the plaintiff may settle an individual claim without prejudice to seeking appellate review of the court's denial of certification.

The Committee Note could point out that there is no required notice under proposed (e)(1). It could also note that prevailing rule before 2003 that the court should review proposed "individual" settlements. The ALI Principles endorsed such an approach:

> This Section favors the approach of requiring limited judicial oversight. The potential risks of precertification settlements or voluntary dismissals that occur without judicial scrutiny warrant a rule requiring that such settlements take effect only with prior judicial approval, after the court has had the opportunity to review the terms of the settlement, including fees paid to counsel. Indeed the very requirement of court approval may deter parties from entering into problematic precertification settlements.

ALI Principles § 3.02 comment (b).

Proposed (e)(3) seeks to do something included also in the Cooper approach above -- ensure that the proposed class representative can appeal denial of certification even after settling the individual claim. Whether something of the sort is needed is uncertain. The issues involved were the subject of considerable litigation in the semi-distant past. See, e.g., United States Parole Comm'n v. Geraghty, 445 U.S. 388 (1980); Deposit Guaranty Nat. Bank v. Roper, 445 U.S. 326 (1980); United Airlines, Inc. v. McDonald, 432 U.S. 385 (1977). It is not presently clear whether this old law is still good law. It might also be debated whether the class representative should be allowed to appeal denial of certification. Alternatively, should class members be given notification that they can appeal? In the distant past, there were suggestions that class members should be notified when the proposed class representative entered into an individual settlement, so that they could seek to pursue the class action.

(6) Issue Classes

A major reason for considering possible rule amendments to deal with issue classes is that there has seemed to be a split in the circuits about whether they can only be allowed if (b)(3) predominance is established. At a point in time, it appeared that the Fifth and Second Circuits were at odds on this subject. But recent reports suggest that all the circuits are coming into relative agreement that in appropriate cases Rule 23(c)(4) can be used even though full Rule 23(b)(3) certification is not possible due to the predominance requirement. If agreement has arrived, it may be that a rule amendment is not in order. But even if agreement has arrived, an amendment might be in order to permit immediate appellate review of the district court's decision of the issue on which the class was certified, before the potentially arduous task of determination of class members' entitlement to relief begins.

Clarifying that predominance is not a prerequisite to 23(c)(4) certification

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members<u>, subject to Rule 23(c)(4),</u> and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include: * * * *

The goal of placement here is to say that predominance, but not superiority, is subject to Rule 23(c)(4). A Committee Note could amplify this point. It might also say that a court trying to decide whether issue certification is "appropriate" (as (c)(4) says it should decide) could consider the factors listed in (A) through (D) of (b)(3). It does not seem there would be a need to consider changing (A) through (D) in (b)(3). In 1996, draft amendments to those factors were published for public comment and, after a very large amount of public comment, not pursued further. The relation between (b)(3) and (c)(4) does not seem to warrant considering changes to the factors.

Allowing courts of appeals to review decision of the common issues immediately rather than only after final judgment

Because the resolution of the common issue in a class action certified under Rule 23(c)(4) is often a very important landmark in the action, and one that may lead to a great deal more effort to determine individual class members' entitlement to relief, it seems desirable to offer an avenue of immediate review. Requiring that all that additional effort be made before finding

out whether the basic ruling will be reversed may in many instances be a strong reason for granting such immediate review. But there may be a significant number of cases in which this concern is not of considerable importance.

§ 2.09(a) of the ALI Principles endorses this objective: "An opportunity for interlocutory appeal should be available with respect to * * * (2) any class-wide determination of a common issue on the merits * * * ." The ALI links this interlocutory review opportunity to review of class certification decisions (covered in ALI § 2.09(a)(1)). It seems that the logical place to insert such a provision is into Rule 23(f), building on the existing mechanism for interlocutory review of class-certification orders:

> **(f) Appeals.** A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule, or from an order deciding an issue with respect to which [certification was granted under Rule 23(c)(4)] {a class action was allowed to be maintained under Rule 23(c)(4)} [if the district court expressly determines that there is no just reason for delay], if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered. * * *

The Subcommittee has only recently turned its attention to these issues; as a result the above conceptual sketch is particularly preliminary. Several choices are suggested by the use of brackets or braces around language in the draft above.

One is whether to say "certification was granted under Rule 23(c)(4)" or to stick closer to the precise language of (c)(4) -- "was allowed to be maintained under Rule 23(c)(4)." It may be that referring to "class certification" would be preferred because it ties in with the term used in the current provisions of the rule. Rule 23(b) says "may be maintained" but that terminology is not repeated in current 23(f) when addressing the decision that it may be maintained. On the other hand, it is not that decision that would be subject to review under the added provision of the rule. Instead, it is the later resolution of that issue by further proceedings in the district court.

Another choice is suggested by the bracketed language referring to district-court certification that there is no just reason for delay. That is modeled on Rule 54(b). It might be useful to intercept premature or repeated efforts to obtain appellate review with regard to issues as to which (c)(4) certification was granted. For example, could a defendant that moved for summary judgment on the common issue contend that the denial of the summary-judgment motion "decided" the issue?

Perhaps it would be desirable to endow the district court with some latitude in triggering the opportunity to seek appellate review, since a significant reason for allowing it is to avoid wasted time resolving individual claims of class members in the wake of the decision of the individual issue.

On the other hand, if the goal of the amendment is to ensure the losing party of prompt review of the decision of the common issue, it might be worrisome if the district judge's permission were required. It is not required with regard to class-certification decisions, and there may be instances in which parties contend that the district court has delayed resolution of class certification, thereby defeating their right to obtain appellate review of certification.

Lying in the background is the question whether this additional provision in Rule 23(f) would serve an actual need. As noted above, it appears that use of issue classes has become widespread. What is the experience with the "mop up" features of those cases after that common issue is resolved? Does that "mop up" activity often consume such substantial time and energy that an interlocutory appeal should be allowed to protect against waste? Are those issues straightened out relatively easily, leading to entry of a final judgment from which appeal can be taken in the normal course? Is there a risk that even a discretionary opportunity for interlocutory appeal would invite abuse? Are there cases in which the court declines to proceed with resolution of all the individual issues, preferring to allow class members to pursue them in individual litigation? If so, how is a final appealable judgment entered in such cases? If that route is taken, what notice is given to class members of the need to initiate further proceedings?

So there are many questions to be addressed in relation to this possible addition to the rules. Another might be whether it should be considered only if the amendment to Rule 23(b)(3) went forward. If it seems that amendment is not really needed because the courts have reached a consensus on whether issue classes can be certified even when (b)(3) would not permit certification with regard to the entire claim, there could still be a need for a revision to Rule 23(f) along the lines above. Answers to the questions in the previous paragraph about what happens now might inform that background question about the importance of proceeding on the 23(f) possibility.

(7) Notice

Changing the notice requirement
in (b)(3) cases

In Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974), the Court observed (id. at 173-71, emphasis in original):

> Rule 23(c)(2) provides that, in any class action maintained under subdivision (b)(3), each class member shall be advised that he has the right to exclude himself from the action on request or to enter an appearance through counsel, and further that the judgment, whether favorable or not, will bind all class members who not requesting exclusion. To this end, the court is required to direct to class members "the best notice practicable under the circumstances *including individual notice to all members who can be identified through reasonable effort*." We think the import of this language is unmistakable. Individual notice must be sent to all class members whose names and addresses may be ascertained through reasonable effort.
>
> The Advisory Committee's Note to Rule 23 reinforces this conclusion. The Advisory Committee described subdivision (e)(2) as "not merely discretionary" and added that the "mandatory notice pursuant to subdivision (c)(2) . . . is designed to fulfill requirements of due process to which the class procedure is of course subject." [The Court discussed Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950), and Schroeder v. City of New York, 371 U.S. 208 (1962), emphasizing due process roots of this notice requirement and stating that "notice by publication is not enough with respect to a person whose name and address are known or very easily ascertainable."]
>
> Viewed in this context, the express language and intent of Rule 23(c)(2) leave no doubt that individual notice must be provided to those class members who are identifiable through reasonable effort.

Research would likely shed light on the extent to which more recent cases regard means other than U.S. mail as sufficient to give "individual notice." The reality of 21st century life is that other means often suffice. The question is whether or how to alter Rule 23(c)(2) to make it operate more sensibly. Here are alternatives:

(2) Notice

* * * * *

(B) *For (b)(3) Classes.* For any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice by electronic or other means to all members who can be identified through reasonable effort. * * * * *

It is an understatement to say that much has changed since Eisen was decided. Perhaps it is even correct to say that a communications revolution has occurred. Certainly most Americans are accustomed today to communicating in ways that were not possible (or even imagined) in 1974. Requiring mailed notice of class certification seems an anachronism, and some reports indicate that judges are not really insisting on it.

Indeed, the current ease of communicating with class members has already arisen with regard to the cy pres discussion, topic (3) above. There, the possibility of excusing payouts to class members for amounts smaller than $100 is raised as a possibility, but it is also suggested that much smaller payouts can now be made efficiently using refined electronic means. More generally, it appears that enterprises that specialize in class action administration have gained much expertise in communicating with class members. Particularly in an era of "big data," lists of potential class members may be relatively easy to generate and use for inexpensive electronic communications.

For the present, the main question is whether there is reason not to focus on some relaxation of the current rule that would support a Committee Note saying that first class mail is no longer required by the rule. Such a Note could presumably offer some observations about the variety of alternative methods of communicating with class members, and the likelihood that those methods will continue to evolve. The likely suggestion will be that courts should not (as Eisen seemed to do) embrace one method as required over the long term.

Notice in Rule 23(b)(1) or (b)(2) actions

Another question that could be raised is whether these developments in electronic communications also support reconsideration of something that was considered but not done in 2001-02.

The package of proposed amendments published for comment in 2001 included a provision for reasonable notice (not individual notice, and surely not mandatory mailed notice) in (b)(1) and (b)(2) class actions. Presently, the rule contains no requirement of any notice at all in those cases, although Rule 23(c)(2)(A) notes that the court "may direct appropriate notice to the class." In addition, Rule 23(d)(1)(B) invites the court

to give "appropriate notice to some or all class members" whenever that seems wise. And if a settlement is proposed, the notice requirement of Rule 23(e)(1) applies and "notice in a reasonable manner" is required. But if a (b)(1) or (b)(2) case is fully litigated rather than settled, the rule does not require any notice at any time.

It is thus theoretically possible that class members in a (b)(1) or (b)(2) class action might find out only after the fact that their claims are foreclosed by a judgment in a class action that they knew nothing about.

In 2001-02, there was much forceful opposition to the proposed additional rule requirement of some reasonable effort at notice of class certification on the ground that it was already difficult enough to persuade lawyers to take such cases, and that this added cost would make an already difficult job of getting lawyers to take cases even more difficult, and perhaps impossible. The idea was shelved.

Is it time to take the idea off the shelf again? One question is whether the hypothetical problem of lack of notice is not real. It is said that (b)(2) classes exhibit more "cohesiveness," so that they may learn of a class action by informal means, making a rule change unnecessary. It may also be that there is almost always a settlement in such cases, so that the Rule 23(e) notice requirement does the needed job. (Of course, that may occur at a point when notice is less valuable than it would have been earlier in the case.) And it may be that the cost problems that were raised 15 years ago have not abated, or have not abated enough, for the vulnerable populations that are sometimes the classes in (b)(2) actions.

The Subcommittee has not devoted substantial attention to these issues. For present purposes, this invitation is only to discuss the possibility of returning to the issues not pursued in 2002. If one wanted to think about how a rule change might be made, one could consider replacing the word "may" in Rule 23(c)(2)(A) with "must." A Committee Note might explore the delicate issues that courts should have in mind in order to avoid unduly burdening the public interest lawyers often called upon to bring these cases, and the public interest organizations that often provide support to counsel, particularly when the actions may not provide substantial attorney fee or cost awards.

Appendix I

Settlement Review Factors: 2000 Draft Note

As an alternative approach to factors, particularly not on the list of four the conceptual draft rule endorses as mandatory findings for settlement approval, the following is an interim draft of possible Committee Note language considered during the drafting of current Rule 23(e).

Reviewing a proposed class-action settlement often will not be easy. Many settlements can be evaluated only after considering a host of factors that reflect the substance of the terms agreed upon, the knowledge base available to the parties and to the court to appraise the strength of the class's position, and the structure and nature of the negotiation process. A helpful review of many factors that may deserve consideration is provided by *In re: Prudential Ins. Co. America Sales Practice Litigation Agent Actions*, 148 F.3d 283, 316-324 (3d Cir.1998). Any list of these factors must be incomplete. The examples provided here are only examples of factors that may be important in some cases but irrelevant in others. Matters excluded from the examples may, in a particular case, be more important than any matter offered as an example. The examples are meant to inspire reflection, no more.

Many of the factors reflect practices that are not fully described in Rule 23 itself, but that often affect the fairness of a settlement and the court's ability to detect substantive or procedural problems that may make approval inappropriate. Application of these factors will be influenced by variables that are not listed. One dimension involves the nature of the substantive class claims, issues, or defenses. Another involves the nature of the class, whether mandatory or opt-out. Another involves the mix of individual claims — a class involving only small claims may be the only opportunity for relief, and also pose less risk that the settlement terms will cause sacrifice of recoveries that are important to individual class members; a class involving a mix of large and small individual claims may involve conflicting interests; a class involving many claims that are individually important, as for example a mass-torts personal-injury class, may require special care. Still other dimensions of difference will emerge. Here, as elsewhere, it is important to remember that class actions span a wide range of heterogeneous characteristics that are important in appraising the fairness of a proposed settlement as well as for other purposes.

Recognizing that this list of examples is incomplete, and includes some factors that have not been much developed in reported decisions, among the factors that bear on review of a settlement are these:

(A) a comparison of the proposed settlement with the probable outcome of a trial on the merits of liability and damages as to the claims, issues, or defenses of the class and individual class members;

(B) the probable time, duration, and cost of trial;

(C) the probability that the [class] claims, issues, or defenses could be maintained through trial on a class basis;

(D) the maturity of the underlying substantive issues, as measured by the information and experience gained through adjudicating individual actions, the development of scientific knowledge, and other facts that bear on the ability to assess the probable outcome of a trial and appeal on the merits of liability and individual damages as to the claims, issues, or defenses of the class and individual class members;

(E) the extent of participation in the settlement negotiations by class members or class representatives, a judge, a magistrate judge, or a special master;

(F) the number and force of objections by class members;

(G) the probable resources and ability of the parties to pay, collect, or enforce the settlement compared with enforcement of the probable judgment predicted under Rule 23(e)(5)(A);

(H) the existence and probable outcome of claims by other classes and subclasses;

(I) the comparison between the results achieved for individual class or subclass members by the settlement or compromise and the results achieved – or likely to be achieved – for other claimants;

(J) whether class or subclass members are accorded the right to opt out of the settlement;

(K) the reasonableness of any provisions for attorney fees, including agreements with respect to the division of fees among attorneys and the terms of any agreements affecting the fees to be charged for representing individual claimants or objectors;

(L) whether the procedure for processing individual claims under the settlement is fair and reasonable;

(M) whether another court has rejected a substantially similar settlement for a similar class; and

(N) the apparent intrinsic fairness of the settlement terms.

Apart from these factors, settlement review also may provide an occasion to review the cogency of the initial class definition. The terms of the settlement themselves, or objections, may reveal an effort to homogenize conflicting interests of class members and with that demonstrate the need to redefine the class or to designate subclasses. Redefinition of the class or the recognition of subclasses is likely to require renewed settlement negotiations, but that prospect should not deter recognition of the need for adequate representation of conflicting interests. This lesson is entrenched by the decisions in *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), and *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997).

Appendix II

Prevailing Class Action Settlement Approval Factors Circuit-By-Circuit

First Circuit

No "single test." See: In re Compact Disc Minimum Advertised Price Antitrust Litigation, 216 F.R.D. 197-206-207 (D. Me. 2003) (Hornby, J.):

> "There is no single test in the First Circuit for determining the fairness, reasonableness and adequacy of a proposed class action settlement. In making this assessment, other circuits generally consider the negotiating process by which the settlement was reached and the substantive fairness of the terms of the settlement compared to the result likely to be reached at trial. See, e.g., Weinberger v. Kendrick, 698 F.2d 61, 73-74 (2d Cir. 1982). Specifically, the appellate courts consider some or all of the following factors: (1) comparison of the proposed settlement with the likely result of litigation; (2) reaction of the class to the settlement; (3) stage of the litigation and the amount of discovery completed; (4) quality of counsel; (5) conduct of the negotiations; and (6) prospects of the case, including risk, complexity, expense and duration. [citing cases.] Finally, the case law tells me that a settlement following sufficient discovery and genuine arm's-length negotiation is presumed fair." [citing cases.]

Second Circuit

"*Grinnell* Factors"

City of Detroit v. Grinnell, 495 F.2d 448, 463 (2d Cir. 1974):

> ". . (1) the complexity, expense and likely duration of the litigation . . .; (2) the reaction of the class to the settlement . . .; (3) the stage of the proceedings and the amount of discovery completed . . .; (4) the risks of establishing liability . . .; (5) the risks of establishing damages . . .; (6) the risks of maintaining the class action through the trial . . .; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery . . .; (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation. . . ."

Third Circuit

"*Girsh* Factors" (adopts *Grinnell* factors)

Girsh v. Jepson, 521 F.2d 153, 157 (3rd Cir. 1975)

Fourth Circuit

"*Jiffy Lube* Factors"

In re Jiffy Lube Securities Litigation, 927 F.2d 155, 158-159 (4th Cir. 1991):

> "In examining the proposed . . . settlement for fairness and adequacy under Rule 23(e), the district court properly followed the fairness factors listed in Maryland federal district cases which have interpreted the Rule 23(e) standard for settlement approval. See In re Montgomery County Real Estate Antitrust Litigation, 83 F.R.D. 305 (D. Md. 1979).) The court determined that the settlement was reached as a result of good-faith bargaining at arm's length, without collusion, on the basis of (1) the posture of the case at the time settlement was proposed, (2) the extent of discovery that had been conducted, (3) the circumstances surrounding the negotiations, and (4) the experience of counsel in the area of securities class action litigation. . . .
>
> The district court's assessment of the adequacy of the settlement was likewise based on factors enumerated in Montgomery: (1) the relative strength of the plaintiffs' case on the merits, (2) the existence of any difficulties of proof or strong defenses the plaintiffs are likely to encounter if the case goes to trial, (3) the anticipated duration and expense of additional litigation, (4) the solvency of the defendants and the likelihood of recovery on a litigated judgment, and (5) the degree of opposition to the settlement."

Fifth Circuit

"*Reed* Factors"

Reed v. General Motors Corp., 703 F.2d 170, 172 (5th Cir. 1983):

> "(There are six focal facets: (1) the existence of fraud or collusion behind the settlement; (2) the complexity, expense, and likely duration of the litigation; (3) the stage of the proceedings and the amount of discovery completed; (4) the probability of plaintiffs' success on the merits; (5) the range of possible recovery; and (6) the opinions of the class counsel, class representatives, and absent members."

Sixth Circuit

"*UAW* Factors"

Int'l Union, United Auto. Workers, etc. v. General Motors Corp., 497 F.3d 615 (Sixth Cir. 2007):

> "Several factors guide the inquiry: (1) the risk of fraud or collusion; (2) the complexity, expense and likely duration of the litigation; (3) the amount of discovery engaged in by the parties; (4) the likelihood of success on the merits; (5) the opinions of class counsel and class representatives; (6) the reaction of absent class members; and (7) the public interest. See Granada Invs., Inc. v. DWG Corp., 962 F.2d 1203, 1205 (6th Cir. 1992); Williams v. Vukovich, 720 F.2d 909, 922-23 (6th Cir. 1983).

Seventh Circuit

"*Armstrong* Factors"

Armstrong v. Jackson, 616 F.2d 305, 315 (7th Cir. 1980):

> "Although review of class action settlements necessarily proceeds on a case-by-case basis, certain factors have been consistently identified as relevant to the fairness determination. The district court's opinion approving the settlement now before us listed these factors:
>
> > Among the factors which the Court should consider in judging the fairness of the proposal are the following:
> >
> > "(1) " * * * the strength of the case for plaintiffs on the merits, balanced against the amount offered in settlement';
> >
> > "(2) "(T)he defendant's ability to pay';
> >
> > "(3) "(T)he complexity, length and expense of further litigation';
> >
> > "(4) "(T)he amount of opposition to the settlement';"
> >
> > Professor Moore notes in addition the factors of:
> >
> > "(1) * * *
> >
> > "(2) Presence of collusion in reaching a settlement;
> >
> > "(3) The reaction of members of the (class to the settlement;

"(4) The opinion of competent counsel;

"(5) The stage of the proceedings and the amount of discovery completed."

3B Moore's Federal Practice P 23.80(4) at 23-521 (2d ed. 1978)"

Eighth Circuit
"*Grunin* Factors"

Grunin v. International House of Pancakes, 513 F.2d 114, 124 (8th Cir. 1975):

"The district court must consider a number of factors in determining whether a settlement is fair, reasonable, and adequate: the merits of the plaintiff's case, weighed against the terms of the settlement; the defendant's financial condition; the complexity and expense of further litigation; and the amount of opposition to the settlement. Grunin, 513 F.2d at 124. . . .; Van Horn v. Trickey, 840 F.2d 604, 607 (8th Cir. 1988)."

Ninth Circuit

"*Hanlon* Factors"

Hanlon v. Chrysler Corp., 150 F.3d 1011, 1026 (9th Cir. 1998):

"Assessing a settlement proposal requires the district court to balance a number of factors: the strength of the plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement."

Tenth Circuit

"*Jones* Factors"

Jones v. Nuclear Pharmacy, 741 F.2d 322 (10th Cir. 1984):

"In exercising its discretion, the trial court must approve a settlement if it is fair, reasonable and adequate. In assessing whether the settlement is fair, reasonable and adequate the trial court should consider:

(1) whether the proposed settlement was fairly and honestly negotiated;

> (2) whether serious questions of law and fact exist, placing the ultimate outcome of the litigation in doubt;
>
> (3) whether the value of an immediate recovery outweighs the mere possibility of future relief after protracted and expensive litigation; and
>
> (4) the judgment of the parties that the settlement is fair and reasonable."

Eleventh Circuit

"*Bennett* Factors"

Bennett v. Behring Corp., 737 F.2d 982, 986 (11th Cir. 1984) (quoting Cotton v. Hinton, 559 F.2d at 1330-31 (5th Cir. 1977):

> "Our review of the district court's order reveals that in approving the subject settlement, the court carefully identified the guidelines established by this court governing approval of class action settlements. Specifically, the court made findings of fact that there was no fraud or collusion in arriving at the settlement and that the settlement was fair, adequate and reasonable, considering (1) the likelihood of success at trial; (2) the range of possible recovery; (3) the point on or below the range of possible recovery at which a settlement is fair, adequate and reasonable; (4) the complexity, expense and duration of litigation; (5) the substance and amount of opposition to the settlement; and (6) the stage of proceedings at which the settlement was achieved."

D.C. Circuit

No "single test." Courts consider factors from other jurisdictions.

See *In re Livingsocial Marketing and Sales Practice Litigation*, 298 F.R.D. 1, 11 (D.R.C. 2013):

> "There is "no single test" for settlement approval in this jurisdiction; rather, courts have considered a variety of factors, including: "(a) whether the settlement is the result of arms-length negotiations; (b) the terms of the settlement in relation to the strengths of plaintiffs' case; (c) the status of the litigation proceedings at the time of settlement; (d) the reaction of the class; and (e) the opinion of experienced counsel." In re Lorazepam & Clorazepate Antitrust Litig., 205 F. R. D. 369, 375 (D.D.C. 2002) ("Lorazect") (collecting cases)."

Federal Circuit

Dauphin Island Property Owners Assoc. v. United States, 90 Fed. Cl. 95 (2009):

> "The case law and rules of this court do not provide definitive factors for evaluating the fairness of a proposed settlement. Many courts have, however, considered the following factors in determining the fairness of a class settlement:
>
> > (1) The relative strengths of plaintiffs' case in comparison to the proposed settlement, which necessarily takes into account:
> >
> > > (a) The complexity, expense and likely duration of the litigation; (b) the risks of establishing liability; (c) the risks of establishing damages; (d) the risks of maintaining the class action through trial; (e) the reasonableness of the settlement fund in light of the best possible recovery; (f) the reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation; (g) the stage of the proceedings and the amount of discovery completed; (h) the risks of maintaining the class action through trial;
> >
> > (2) The recommendation of the counsel for the class regarding the proposed settlement, taking into account the adequacy of class counsels' representation of the class;
> >
> > (3) The reaction of the class members to the proposed settlement, taking into account the adequacy of notice to the class members of the settlement terms;
> >
> > (4) The fairness of the settlement to the entire class;
> >
> > (5) The fairness of the provision for attorney fees;
> >
> > (6) The ability of the defendants to withstand a greater judgment, taking into account whether the defendant is a governmental actor or a private entity.
> >
> > . . .
>
> Most importantly, this court must compare the terms of the settlement agreement with the potential rewards of litigation and consider the negotiation process through which agreement was reached."

California

Kullar v. Foot Locker Retail Inc., 168 Cal. App. 4th 116, 128

(Cal. App. 2008) (quoting *Dunk v. Ford Motor Co.*, 48 Cal. App. 4th 1794, 1801 (Cal. App. 1996):

> "The well-recognized factors that the trial court should consider in evaluating the reasonableness of a class action settlement agreement include "the strength of plaintiffs' case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed and the stage of the proceedings, the experience and views of counsel, the presence of a governmental participant, and the reaction of the class members to the proposed settlement."

Principles of Aggregate Litigation (ALI 2010)

§ 3.05 Judicial Review of the Fairness of a Class Settlement

(a) Before approving or rejecting any classwide settlement, a court must conduct a fairness hearing. A court reviewing the fairness of a proposed class-action settlement must address, in on-the-record findings and conclusions, whether:

> (1) the class representatives and class counsel have been and currently are adequately representing the class;
>
> (2) the relief afforded to the class (taking into account any ancillary agreement that may be part of the settlement) is fair and reasonable given the costs, risks, probability of success, and delays of trial and appeal;
>
> (3) class members are treated equitably (relative to each other) based on their facts and circumstances and are not disadvantaged by the settlement considered as a whole; and
>
> (4) the settlement was negotiated at arm's length and was not the product of collusion.

(b) The court may approve a settlement only if it finds, based on the criteria in subsection (a), that the settlement would be fair to the class and to every substantial segment of the class. A negative finding on any of the criteria specified in subsections (a)(1)-(a)(4) renders the settlement unfair. A settlement may also be found to be unfair for any other significant reason that may arise from the facts and circumstances of the particular case.

(c) The burden is on the proponents of a settlement to establish that the settlement is fair and reasonable to the absent class members who are to be bound by that settlement. In reviewing a proposed settlement, a court should not apply any

presumption that the settlement is fair and reasonable.

(d) A court may approve or disapprove a class settlement but may not of its own accord amend the settlement to add, delete, or modify any term. The court may, however, inform the parties that it will not approve a settlement unless the parties amend the agreement in a manner specified by the court. This subsection does not limit the court's authority to set fair and reasonable attorneys' fees.

(e) If, before or as a result of a fairness hearing, the parties agree to modify the terms of a settlement in any material way, new notice must be provided to any class members who may be substantially adversely affected by the change. In particular:

(1) For opt-out classes, a new opportunity for class members to opt out must be granted to all class members substantially adversely affected by the changes to the settlement.

(2) When a settlement is modified to increase significantly the benefits to the class, class members who opted out before such modifications must be given notice and a reasonable opportunity to opt back into the class.

(f) For class members who did not opt out of the class, new notice and opt-out rights are not required when, as a result of a fairness hearing, a settlement is revised and the new terms would entitle such class members to benefits not substantially less than those proposed in the original settlement.

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Notes of Conference Call
Feb. 12, 2015
Rule 23 Subcommittee
Advisory Committee on Civil Rules

On Feb. 12, 2015, the Rule 23 Subcommittee of the Advisory Committee on Civil Rules held a conference call. Participants included Hon. Robert Dow (Chair, Rule 23 Subcommittee), Hon. David Campbell (Chair, Advisory Committee), Elizabeth Cabraser, Robert Klonoff, Prof. Edward Cooper (Reporter of the Advisory Committee), and Prof. Richard Marcus (Reporter of the Rule 23 Subcommittee).

Settlement Approval Criteria

Since the last call, Prof. Marcus had drafted alternative language to address issues raised during the call and circulated the redraft, which (as slightly modified to add "adequate" into factor (ii)) has two alternative lead-ins before the four criteria are listed:

Alternative 1

(2) If the proposal would bind class members,

(A) the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate. The court may make this finding only on finding that:

Alternative 2

(2) If the proposal would bind class members,

(A) the court may approve it only after a hearing and on finding that ~~it is fair, reasonable, and adequate.~~ :

(i) the class representatives and class counsel have been and currently are adequately representing the class;

(ii) the relief awarded to the class (taking into account any ancillary agreement that may be part of the proposal) is fair, reasonable, and adequate given the costs, risks, probability of success, and delays of trial and appeal;

(iii) class members are treated equitably (relative to each other) based on their facts and circumstances and are not disadvantaged by the proposal considered as a whole; and

(iv) the proposal was negotiated at arm's length and was not the product of collusion.

(B) The court may also consider any other matter pertinent to approval of the proposal, and may refuse to approve it on any such ground.

It was noted that this revision of the draft discussed on Feb. 6 was designed to put into the rule (1) an explicit requirement that the court find all four requirements satisfied to approve the proposal, and (2) an explicit recognition that the court may disapprove the proposal on other grounds even if all four listed findings can be made. There was no further discussion of this topic.

Settlement Class Certification

The call began by returning to the settlement class certification (b)(4) subject on which the Feb. 6 call had focused at the end. The question was whether further discussion was needed. One abiding concern is the extent to which (b)(4) treatment should be available for classes certified under (b)(1) or (b)(2). A suggestion was that this should be kept open, as it is with the brackets around the phrase "in an action under subdivision (b)(3)."

A reaction was that, upon reflection, it seems wise to leave this issue open for further consideration. People with experience in employment law litigation would be useful resources about whether settlements of (b)(2) class actions would be assisted by inclusion of those cases within (b)(4). With (b)(1) settlements, there is usually a monetary fund created.

That prompted the question whether one could really compromise on the question whether there is actually a limited fund. The answer was that usually settlements like this involve a discrete fund (such as insurance coverage), as in an interpleader situation. Sometimes there may be a company on the brink of bankruptcy that does not want to file a bankruptcy proceeding. It might be that there are situations in which it is legitimate and important to have a (b)(4) option for (b)(1) type cases.

But it was affirmed that the chief concern underlying this discussion was the (b)(3) class action and particularly the role of superiority in that setting. For present purposes, it seems wisest to go forward with essentially the sort of draft that we

have discussed. That would need some further attention on topics the subcommittee has discussed, but should be suitable for wider examination and discussion.

Cy Pres Treatment

This topic was introduced as involving several issues. One is whether any rule amendment is really needed. Several courts of appeals have endorsed, or even adopted, directions very much like (sometimes explicitly based upon) ALI § 3.07. So one might say that this judicial action is rapidly solving any problem that existed. Another and potentially challenging issue is suggested by the bracketed phrase "if authorized by law." The question has two aspects. One is whether a civil rule could create such a new "remedy." Another is to ask where authority to approve such provisions comes from unless provided by civil rule. Yet another set of issues is whether the provision should have to be inserted into the settlement for the court to be able to approve it. The reason that might not happen is that the parties may not appreciate that the settlement claims procedure will end up leaving a residue, and therefore fail to take account of that possibility. Another question has to do with the possible permission to skip distributions of less than $100. There seem to have been effective distribution programs that involved payouts considerably lower than $100. Is that really a level at which we can assume it costs too much to distribute the funds?

An initial response focused on the last point. It's become much more cost-effective to send checks to class members, at least if defendant has a list of most of them. Some in the claims distribution business say that if it's more than one dollar they can do it at reasonable cost if they have an address list. The goal really should be to dispense with a time-consuming or burdensome claims submission process. So things seem to be improving. At the same time, it seems clear that we need a rule to address these issues. Chief Justice Roberts' statement in the Facebook case makes it clear that something should be done. And the ALI guidelines are cited fairly often by courts, so they offer an initial roadmap for rulemaking. Having guidance in the rules will assist judges. It will also provide some focus and guidance for objectors by indicating what sorts of provisions are subject to challenge. Including cy pres provisions in a settlement agreement is almost certain to draw objections in today's climate. Having a rule would probably channel, and might reduce, that objector activity.

Attention was drawn to (e)(3)(iii) of the draft, which says that when distributions to the class are not economically reasonable it is permissible to distribute instead to someone else "whose interest reasonably approximate those being pursued by the class." Can a civil rule do that?

The reaction was that this is a difficult topic. The "if authorized by law" clause partly addresses that question, by indicating that the rule itself does not purport to create authority to order such a remedy. On the other hand state law or some federal source may do so. For example, in California Cal. Civ. Pro. Code § 384 essentially forbids reversion provisions in class-action settlements and also directs that any residue after distribution to the class should be to an entity pursuing the goals of the class action and, if that is not possible, to an entity providing legal representation to the needy.

It might be an interesting question whether one could seek to have a California federal court enforce the California provision in a class action based on state law. One response would be that the state statute cannot be enforced because Rule 23 applies in federal court and it governs. That is something like the view the Supreme Court adopted in its Shady Grove case, where the majority said that a New York limitation on use of class actions did not apply in federal court -- even though the claim being asserted was based on New York law -- because Rule 23 defines when class actions may be brought in federal court. So if the California statute is held not to apply to federal-court class actions based on California law because that's governed by Rule 23, that may imply that Rule 23 can affirmatively deal with the problem. On the other hand, another aspect of the substance/procedure distinction in the Rules Enabling Act is to guard Congress's right to make substantive federal rules, and a lot of the cases are based on federal claims rather than state law.

An initial reaction to these problems was that the California statute is treated as "procedural" by the California federal courts. Perhaps that is on the notion that it was not intended to be applied by other courts (including federal courts), but perhaps it reflects a view that Rule 23 already covers the subject. On the other hand, it is true that California federal judges have seemed to find § 384 to provide useful guidance in deciding how to handle similar problems. There are more complications if one discusses claims created by Congress. But over all there is a saving grace here -- this is created by settlement, not a "remedy" created by the court.

Another reaction was that the ALI Principles handle cy pres in exactly that way -- something that parties may include in a settlement.

Another thought was that cy pres has equity origins. The sort of judicial authority we are talking about when we address cy pres is something that has been recognized for a long time.

This discussion prompted a question: Shouldn't the Committee Note make it clear that the rule provision does not

purport to create a remedy for a litigated case, but only to provide guidance for a court in evaluating a provision the parties have included in a settlement agreement? So the court authority that is involved here is not in designing "remedies," but the authority that's always been in the rule for reviewing and evaluating settlements. That is what Rule 23(e) is all about, and this is consistent with that longstanding authority.

That raised a question: In how many cases in which cy pres provisions were included in settlement agreements could the court have included a similar provision in a litigated judgment? A response was that probably there would usually have to be a reversionary feature of a litigated judgment. That drew the response that cy pres is probably necessarily confined to the settlement context, and therefore that a rule about that context would not "create a remedy."

At the same time it was also observed that there are legal grounds for disgorgement in some circumstances, and a reversion is inconsistent with the remedy. Thus, it would probably be wise to note that the underlying substantive law of remedies might provide a justification for use of something like a cy pres solution. That remedy would not be created by Rule 23, however. Sometimes, when there is a residue in such circumstances the result is escheat to the state. In Texas, that is the view of state officials.

Another view of the issue was offered: In a way this gets at what the goal of such litigation is. Often, perhaps usually, it is designed for compensation purposes. But sometimes it is a form of public enforcement of legal protections, somewhat like qui tam proceedings.

Another reaction was that "if authorized by law" should be retained for present. However much one might find some instances hard to categorize, there surely are instances (and are surely some cases) in which the parties propose measures that cannot be justified by any sensible cy pres notions. And from the perspective of judges, there is not a lot of law on this subject. That may be something the Chief Justice had in mind in his Facebook statement, when he suggested the Court may need to take up the topic. Even if there may be cases in which the right outcome is debatable, judges would benefit from having rules that exclude lots of improper things.

That view was supported on the ground that such a rule would also provide guidance and ground rules for objections. In recent years, cy pres provisions have been a magnet for objections. It may even happen that settling parties will put a reversion clause into the settlement agreement rather than a cy pres provision just to avoid having the cy pres provision draw objections. Right now, if there is a cy pres provision, the courts have to

figure out on a case-by-case basis what should be allowed. And objectors have no direction about what is and is not a questionable provision or use of cy pres. Both would benefit from sensible rules. Unless cy pres is addressed in the rules, it will continue to generate litigation and burdens for the courts. That might in some instances prompt statutory regulation of the subject. California § 384 was a product of a political compromise. A nationwide statute might be very difficult to design. A rule is a better way to go.

That drew a question: Should a rule say that any cy pres provision must be included in a settlement agreement so it can be approved as part of a settlement agreement? One issue might be a need to re-notice the class after it was determined that there was a residue. Another is that it seems to draw objections (although that might be less of a problem if there were a rule providing guidance). Should the rule require it to be in the settlement agreement?

The response was that including the provision in the settlement agreement is o.k. The judge should know that it's there. The agreement is posted online, and anyone can read it. Relating particularly to what the rule is about, that provision is one of the things approved by the court under Rule 23(e). And putting it in the agreement means there is a way to avoid a reverter provision. Having a reverter provision provides an incentive for the defendant to try to design an arduous claims process.

The resolution was to proceed with a revised version of the draft before the Subcommittee to provide a focus for discussion during the April Advisory Committee meeting. One thing in particular would be to include in the Committee Note the point that this is a rule about provisions of the parties' settlement, not a freestanding "remedy" for the court to use in a litigated case.

Dealing With Objectors

The question was introduced with the drafts before the subcommittee that addressed two general topics -- whether to forbid withdrawal of objections (Alternative 1) and whether to direct the parties to file a statement when seeking permission to withdraw an objection that identifies any agreement made in connection with that objection (Alternative 2). In addition there was a draft of an amendment idea to focus on "standing to object." There was also discussion about the possibility of requiring a bond from the objector who seeks to appeal, and finding a spot in the rules (probably at least partly in the Appellate Rules) for approval of withdrawal of an appeal. The current reality seems to be that Rule 23(e)(5) may solve the problem of objectors who hold the settlement hostage at the

district court level, when the delay is necessarily rather limited, but that there is presently no remedy for the much longer delay taking an appeal can produce. So perhaps the overall reality is that the only real problem is with appeals.

A first reaction was that this is an area where we need to hear from the specialty bars -- employment discrimination litigation, consumer litigation, securities fraud litigation, etc. The bonding technique has been employed by many courts, although the 10th Circuit has recently disapproved it or significantly limited its use. Requiring a bond may be effective in dealing with serial objectors, but not if they are well-funded. In fact, it seems that there is a growing "objector industry," and a significant number of objectors are well funded.

A question was raised: How can a court refuse to permit an objection to be withdrawn? That is what Alternative 1 calls for, and it is also implicit in Alternative 2, augmented by information about side agreements. The response was that this is, in a way, a quandary under the current rule. Rule 23(e)(5) already says that an objection may be withdrawn only with the court's permission. Perhaps an objection can be "abandoned" without invoking this rule provision, and perhaps class counsel and the objector could reach a "side agreement" that the objector would abandon the objection. So the possible amendments don't create this basic problem, which is a feature of the current rule. On the other hand, it is not certain how well the present rule is working. It seems that the current problems relate to appeals, not objections in the district court, so that the current rule is not producing this sort of problems. Maybe (hopefully) it has actually solved problems.

Another reaction was that the current rule is valuable. Having that rule means that class counsel can tell objectors who are trying to extract tribute that they can't go along because the court must approve withdrawal of an objection and the court must now be informed of the terms for that withdrawal. That goes some distance toward solving the hostage problem that can result from an objection, but the basic purpose of all this is to help the court evaluate the settlement. For that purpose, we actually almost want to encourage objectors; as has sometimes been said, there are "good" objectors and "bad" objectors.

Regarding the "bad" objectors, it was asked whether judges sometimes impose sanctions on objectors. An immediate reaction was that the bond requirements imposed on occasion seem somewhat like that, though they are different. On at least one occasion, a court became impatient enough with an objector to bar that person from making further objections in that district.

On the same subject, it was noted that the development of the ALI Principles included consideration of urging punishment

for "bad" objectors. But one concern was that those provisions might also deter "good" objectors.

Another reaction was that it is likely some judges calibrate their handling of the bond requirement in part by asking whether this is one of those notorious serial objectors.

But it was asked whether this is basically a problem with the appeal, not at the district court. That is before the Appellate Rules Committee. That drew agreement: If the only delay issue were in the district court, nobody would care. It's the time required to dispose of an appeal that is the major club "bad" objectors can wield.

That drew attention to § 3.08(d) of the ALI Principles, which was an effort to calibrate an appropriate sanctions regime for abusive objectors. Looking at that might offer ideas for possible rule provisions. Whether any of those would be useful is unclear, but probably they deserve some consideration at this stage.

It was noted that § 3.08(d) resulted from intense consideration of the two-edged potential of sanctions provisions in this area. There is a good chance that some of the most prominent "good" objectors would support something along those lines. They think that judges can differentiate on a case-by-case basis between "good" and "bad" objectors. A rule probably cannot do so in an all-purpose manner, or using specified criteria, but judges can react to it when they see it.

The resolution was that Prof. Marcus should look at § 3.08(d) and consider how or where some provisions along those lines might fit into the civil rules. If a way can be found, Prof. Marcus should circulate ideas to the Subcommittee. More generally, the topic of dealing with objectors should go forward as outlined during the call.

Another question was whether to focus also on "standing to object," as had been suggested in one comment received by the Committee. But the question was raised how a court should react to a very valid objection when offered by a class member whose "standing" is challenged. The court's obligation, after all, is to decide whether the proposal is fair, reasonable, and adequate. If it is not, should it matter that the objection is raised by somebody without standing? Don't we want to encourage good-faith objections? Indeed, some of the objectors who are most likely to be helpful, such as Public Citizen, are not themselves class members.

A reaction was that outfits like Public Citizen almost always present objections on behalf of class members, so standing is not likely to be an impediment for them. On the other hand,

CAFA requires that state attorneys general or comparable officials be given notice of proposed settlements when the class includes citizens of their states. Perhaps the CAFA notice provision implicitly gives these officials "standing" to object. 28 U.S.C. § 1715(d) says that the court may not approve the proposal until 90 days after notice is given to the appropriate officials. Presumably they can *do* something during that 90-day period, and objecting seems like what they would do if they saw problems with the proposal. Maybe their objections are "on behalf of" their citizens and therefore supported by standing, but it seems not to be useful to introduce this issue.

One way of looking at these issues was: "What do we gain by adding the issue of standing?" The real question is whether to approve the proposal, and spending energy scrutinizing the impact of various provisions on specific class members who object seems a distraction. The consensus emerged that this idea had dubious utility and was not worth the effort. Courts surely will listen to arguments that a given objector is just a spoiler looking for a payoff, particularly when supported with convincing proof that the objection is actually contrary to the objector's interest.

Therefore, going forward, the agenda materials will (1) not raise the standing issue; (2) present only what was Alternative 2, not the complete prohibition on withdrawing objections; and (3) explore the possibility of some sanctions provision along the line of ALI § 3.08.

More generally, it would be important for the Rule 23 Subcommittee to maintain contacts with the Appellate Rules Committee to coordinate work on possible methods of addressing the withdrawal of objections or appeals after a notice of appeal is filed. It would be important to contact the Chair and the Reporter of that committee about where we are. Probably it would be preferable to have approval done by the district court if that can be worked out.

Rule 68 and "Picking Off" the Class Rep.

In the 7th Circuit, the "pick off" technique of promptly offering the class rep. the maximum amount he or she could individually recover and thereby mooting the case has evidently had some success. The "solution" to that problem is an "out of the chute" class certification motion before the defendant makes an offer. But it is a rare case in which plaintiff is ready to litigate class certification this early in the litigation. So in some places plaintiffs who make such early motions also move to stay decision on them pending discovery and briefing of the class certification issue. Judges in other parts of the country sometimes seem to be impatient with this tactic, and some have stricken such early motions with comments like "This is not the Seventh Circuit." At least the 11th Circuit seems impatient with

the whole set of issues.

The materials present a variety of methods of dealing with these problems. Whether this is a serious problem anywhere but the 7th Circuit could be debated. The general subject is a focus of a panel at the Impact Fund class-action conference on Feb. 27 that Elizabeth Cabraser and Prof. Marcus intend to attend. For present purposes, the matter should be kept on the Subcommittee's agenda and carried forward using the existing materials to the full Committee in April.

Issues Classes

The materials for the call included two possible approaches to this set of concerns. The first sought to build into Rule 23(b)(3) a recognition that at least predominance should be viewed differently when it is appropriate to use (c)(4). The second went the other way, and would amend Rule 23(c)(4) to provide that issues certification may only be used in cases that independently satisfy Rules 23(a) and (b).

These issues were introduced as raising a somewhat basic question about whether such a rule change is needed. The main opponent to use of issues classes -- and therefore in favor of something like the second approach -- seems to have been the Fifth Circuit, in particular in a footnote in its Castano decision nearly 20 years ago. Since then, panels of that court have seemed more receptive to issues class treatment in some cases. So if one reason for adopting this approach is to reconcile or resolve a circuit split, that reason may be disappearing.

At the same time, a number of what might be called subsidiary issues could be important. Many of them revolve around what should be done once the central issue that supported issue certification is resolved. It does not seem the resolution of that issue leads to entry of judgment on behalf of the class members. Should notice then be sent to them that they must take action to prove their individual entitlement to relief? Can the court award attorney fees to class counsel at that time? If the common fund principle is the basis for an attorney fee award, it does not seem that there is yet a fund to draw upon. Should major efforts be made to determine the amount of individual relief if there is a prospect that the ruling on the issue so resolved will be altered or reversed on appeal?

A slightly different set of questions addressed whether issues classes should apply outside the (b)(3) format. In a (b)(2) case, it may be that there is really nothing more to resolve, or at least no individual issues to resolve, in determining the nature and extent of relief. The class members need not "prove up" their claims in that situation. Given the

Supreme Court's treatment of "incidental" monetary relief in (b)(2) class actions in Wal-Mart v. Dukes, the prospect of time-consuming individual determinations seems to have vanished.

One idea might be to ensure the availability an immediate appeal from the resolution of the common issue. That would at least deal with the risk that the initial district court ruling would be significantly altered after much work had been done on determining individual claim amounts. The ALI spent a great deal of time evaluating this problem, and it was among the most controversial in its Aggregation Principles. It may be that some sort of avenue for discretionary review along the lines of Rule 23(f) is the most suitable course. That might achieve finality with respect to that issue.

The Rule 23(f) model drew support. Another analogy is to Rule 54(b), which calls for an initial certification by the district court. Prof. Marcus should try to develop a possible amendment to enable immediate review.

Discussion returned to the set of problems surrounding how courts actually handle the "mop up" that follows resolution of the common issue, assuming that can be done in a way to achieve adequate finality. What actually happens? The response was that the court retains jurisdiction to resolve the merits of individual claims for relief. This happens in employment cases, and is starting to happen in consumer cases. The damages determination is made under the court's auspices, using either written or oral proof. Practical solutions can be found.

The reaction was that most of the issues raised -- notice to the class, entry of a "final judgment," etc. -- seem to have been resolved by practical lawyers and practical judges. The "big issue" is appellate review. The rulemaking issues should be carried forward, largely in the format already developed. One additional possible question is whether issues classes should be limited to (b)(3) cases. Nothing in the current rule says they are, and the proposed change to (b)(3) does not say that they cannot be used in (b)(1) or (b)(2) cases, so perhaps that change to (b)(3) can go forward with a Committee Note recognizing that this change made no change in the use of issues classes under (b)(1) or (b)(2). That does not say we are affirmatively authorizing such use, but only that we are not trying to alter it.

Notice

This issue was introduced as also seeking a pragmatic solution that takes account of modern realities. Eisen's insistence on notice by first class mail to all class members who can be identified seems truly antique.

The drafts before the Subcommittee included one alternative that would simply remove the current requirement of individual notice in (b)(3) cases, and another that would add "by electronic or other means" to the notice requirement in (c)(2)(B).

An initial reaction was that giving individual notice in many cases, particular certain kinds of consumer cases, has become vastly easier. There are enterprises that specialize in managing claims and distribution in class actions, and the people who run those enterprises know how to do this job. The reality is that they can identify, contact, and even pay class members at a modest cost per capita. That is a reason why the $100 exclusion from individual distributions in the cy pres proposal seems unnecessary. Smaller distributions can often be made fairly readily.

Against this background, the consensus was that Alternative 1 -- removing the requirement of individual notice -- seems like overkill. Something like Alternative 2 -- explicitly recognizing in the rule that electronic means may be used -- is a better way to go. That should be the approach presented to the full Committee in April.

Notes of Conference Call
Feb. 6, 2015
Rule 23 Subcommittee
Advisory Committee on Civil Rules

On Feb. 6, 2015, the Rule 23 Subcommittee of the Advisory Committee on Civil Rules held a conference call. Participants included Hon. Robert Dow (Chair, Rule 23 Subcommittee), Hon. David Campbell (Chair, Advisory Committee), Elizabeth Cabraser, Robert Klonoff, John Barkett, Prof. Edward Cooper (Reporter of the Advisory Committee), and Prof. Richard Marcus (Reporter of the Rule 23 Subcommittee).

Logistics

Judge Dow called attention to the list of upcoming events that might involve some or all Subcommittee members:

Impact Fund Class Action Conference (Feb. 26-27, Berkeley): Elizabeth Cabraser is on a panel and Rick Marcus intends to attend.

George Washington University Roundtable on Settlement Class Actions (April 8): All members intend to attend.

ALI May 17 discussion: All Subcommittee members except Judge Dow intend to attend.

AAJ meeting in Montreal (July 11-14): It is uncertain whether there will be events specifically about class actions. Elizabeth Cabraser will inquire. Several members could attend if there were pertinent events.

Civ. Pro. Professors' Conference in Seattle (July 17): Subcommittee participants from the West Coast (Cabraser, Klonoff, and Marcus) will attend if possible. The second day of this event is supposed to focus on aggregate litigation.

Duke Conference (in July?): Plans are not certain about this event. Judge Dow has been in touch with John Rabiej about it.

Subcommittee mini-conference: After discussion, the date for the conference was selected -- Sept. 11, 2015. The tentative location is the Dallas Fort Worth Airport. Subcommittee members should plan to remain until Sept. 12 so that the Subcommittee can have a follow-up discussion of the points made by conferees.

Advisory Committee meeting in Salt Lake City (Nov. 5-6): Assuming that the Subcommittee can convene at DFW on Sept. 12, it does not seem useful to try to schedule a Subcommittee get-together on Nov. 4. It may be useful to

schedule such a meeting on Nov. 7, but that is not certain yet.

AALS Annual Meeting (January, 2016): It would be desirable to be on the agenda for this meeting, perhaps as one of the "hot topics" items for the meeting. There may be a scheduling conflict with the Standing Committee meeting on Jan. 7-8 in Phoenix, but that would not affect most of the Subcommittee. Judge Dow will make contact with Dean Daniel Rodriguez (President of the AALS) about whether and when a time can be found during the annual meeting, which is in New York beginning on Jan. 6, 2016. If something can be set up, it would be useful to suggest including mention of it in newsletters for several sections of the AALS, including civil procedure, litigation, and federal courts. It might also be desirable to mention this event on the Civil Procedure listserv that includes many civil procedure professors.

(1) Settlement approval criteria

Discussion turned to the first of the seven potential amendment topics. It was introduced as presenting the question what should be carried forward now for further discussion with the full Advisory Committee during the April meeting and also for reactions from the roundtable panelists at the GW event on April 8. One approach is the ALI version -- identifying a relatively short list of mandatory topics and leaving open any others that are relevant to a given proposed settlement. Another approach, illustrated by Appendix I to Ed Cooper's circulation, would enumerate a rather long list. That longer list resembled the list that Elizabeth Cabraser developed of current factors articulated in the various circuits, but it also includes some subjects that are not on any court's list, and does not include some things that are on some courts' lists.

Another introductory comment stressed that one way of looking at the present choices is between leaving the rule as it is now and changing it. Any change is likely to cause some difficulties early on, simply because it is different. Adding new factors might be more destabilizing. But adding (or changing) factors might also identify important considerations. An example is to suggest that the court give particular attention to whether public officials have expressed a view on the desirability of the proposed settlement. CAFA invites them to do so, and they may be important sources of independent reactions to a settlement proposal. Several of the factors on the Cooper list are not on the Cabraser list, and vice versa. To the extent any new list is open-ended, and permits reference to other factors, adopting a list might not be worth doing. But if it is important to get courts to think about things they are not currently considering, having a longer list might be preferred.

An initial reaction was that "the factors lists are old." One might even say some are fossilized. Most of these factors come from cases from the 1970s and 1980s. Very few were formulated after Amchem was decided in 1997. And they antedate the current trend to backload the certification decision. Now is a good time to look at all of the factors. The current long lists contribute to settlement reviews that consist of "duly checking off" the circuit's various factors, often with a conclusory one-sentence reference to the factor -- "This does not apply" or "This is satisfied." In addition, the lists are things that objectors focus upon. Shortening the list will narrow the range of things that objectors can bring up. Eliminating unimportant items can be a value then, and can also focus objectors on what really matters.

Attention focused on the additional factors on the Cooper list from 2000 that seemed not to be on the actual existing list. These included:

> Factor (D) -- the maturity of the underlying substantive issues.
>
> Factor (E) -- the participation in the negotiation of the settlement proposal by class members or representatives.
>
> Factor (H) -- the existence and prospects of other pending class actions.
>
> Factor (L) -- the claims processing procedure in the settlement.
>
> Factor (M) -- whether another court has rejected a substantially similar settlement.

Some of these seem to be connected to topics addressed in the 1996 package, such as maturity of claims as a Rule 23(b)(3) factor on certification. Others seem related to the concern considered at length in 2000-01 -- addressing the binding effect of federal-court decisions on whether to approve a given settlement and whether state court could be required to respect those decisions.

A reaction was that maturity might also look to some things that courts do now consider, such as the amount of discovery done in this case. The suitability of the claims process is very important but did not seem to get onto the courts' lists of 30 or 40 years ago. Now there is an FJC Class Action Notice And Claims Checklist, which has detailed advice about how to evaluate such a claims process. Judges use it, and it is very good. It tells judges (and lawyers) what such processes should look like.

Another reaction to the list from 15 years ago is that it

was partly addressed to concerns in mass tort class actions. It is not clear that current concerns are exactly the same.

A different question was about how the court is to employ the list of criteria. That list was drawn from the ALI Principles. That is a sensible beginning. The ALI project involved much consideration of the various lists that had emerged from court decisions, and was an attempt to distill them and leave out some that seemed unhelpful. But the draft does not say in the rule (v. the Note) that a court may not approve a settlement unless it can make those findings. It also does not say that the court may refuse to approve a settlement even though the four findings are satisfied. The ALI Principles also say that there should be no presumption that a proposed settlement is reasonable just because it has been proposed by the lawyers.

One focus for these concerns was on alternative rule language at lines 14-15 of the discussion draft of the rule -- whether the court must "consider whether" or "find that" the four conditions specified in the draft are satisfied. Saying "find that" seems pretty clearly to say that the court may not approve the settlement unless it so finds. Saying that the court "may consider" any other matters seems implicitly to mean that it can refuse to approve even if it can make the findings that are required.

Another participant emphasized that it would be important to be crystal clear about these matters in the text. At least some Supreme Court decisions indicate that Committee Notes don't count for much when rules are applied. Leaving important things only in the Note is risky.

Consensus: A recapitulation was that the consensus of the call seemed to be that (1) the rule should require findings on the four matters; (2) the rule should make clear that a settlement may not be approved if those findings cannot be made; and (3) the court may disapprove a settlement even if it can make those findings.

The third point drew support: "Don't create arguments that somebody is entitled to approval." It should always depend ultimately on the court's informed discretion.

A suggestion was that one way to do it would be "must find and may consider." Reference might be had to § 3.05(b) of the ALI Principles.

Another reaction was that this sort of enumeration would be useful to judges and helpful to practitioners.

Attention was drawn to the draft Note, which says that the rule is designed to "supersede" the lists adopted in the various

circuits, but it then says that other factors may be considered. Is that consistent? One reaction was that the goal is to make clear that the court has authority to refuse approval on grounds that, in a given case, counsel against approval, but that a court may not approve unless the four main criteria are satisfied.

That approach drew support. The goal is to capture the essential point -- the four factors must be established in every case, but in given cases there may well be additional factors specific to the case that matter in that case. A goal is to force lawyers and enable judges to focus on the things that really matter. Although the composite of the current circuit factor lists looks long, it really is not so long; to a significant extent, the various courts use different language to describe essentially the same thing. The basic objective should be to identify the subjects on which the judge must feel comfortable making a finding.

That effort received support emphasizing the use of "just" in Rule 1: The handling of class actions should be consistent around the country. Having a relatively short list will contribute to that outcome.

It was asked why the ALI's formulation had not been much cited by the courts. The cy pres section of the Principles has received much attention, but the settlement approval provisions have not. Does this suggest that the courts do not accept the settlement criteria formulation? A response was the many judges probably feel that they have circuit precedent that tells them they must adhere to and discuss that circuit's list of factors.

That explanation drew agreement. "People address things that don't matter because they are on the circuit's list." People are afraid to deviate from the approved list, and therefore try to shoehorn what matters into the list rather than isolate and emphasize those things that matter. Both sides of the v. will favor having this clarified.

At the same time, the question of having a different list should be kept alive. The solution there would be to include the Cooper factors as an Appendix to this segment of the evolving draft of amendment ideas.

(2) Settlement Class Certification

This subject was introduced as involving at least two major issues: (1) whether to extend beyond (b)(3) classes, and (2) whether to countermand things that Amchem held, and if so whether to say so.

An initial question was whether the Committee can change what the Supreme Court ruled. The answer is that changing the

rule can alter the outcome the Court reached under the rule as it was at the time the Court decided. Probably it would be desirable to make it clear that is the objective, if it is indeed the objective.

One aspect of Amchem that has drawn much attention is the Court's insistence there that predominance be satisfied even for settlement certification. How has that worked out? The answer was that there is a fair amount of jurisprudence about what predominance means in the settlement context, as opposed in a litigation class situation.

The "central question" was put: Is there something in current practice that should be liberated by a rule amendment? The response was that, for the most part, people are plugging along. But the issues presented by Amchem can distract courts from the things that really should matter. For one thing, objectors sometimes seize on the predominance issue. Resolving that question will be helpful. It will probably receive more support from defense lawyers than plaintiff lawyers, but it will help both sides of the bar.

Another issue was whether it would be useful to say that a case can be a settlement class only if it "satisfies Rule 23(a)." The ALI Principles put this differently, by making settlement certification contingent on whether there are significant common issues a sufficiently numerous class. Would that be better?

A reaction was that invoking Rule 23(a) seems simpler, but may raise difficulties. For example, typicality may not matter in the settlement context. Whether or not the named plaintiff would be subject to embarrassing examination at trial due to a criminal record, etc., that does not matter in the settlement context.

Another problem is that Wal-Mart v. Dukes has heightened concerns about involving the common question requirement of 23(a)(2). It may be better to substitute a reference to commonality as in the ALI version. More generally, the ALI approach was to introduce selective reference to matters identified in Rule 23(a), rather than invoking that rule provision wholesale.

Another response was that the real goal should be to put the emphasis on whether the class is cohesive.

A question was raised: How can the defendant support a settlement when approval depends on finding that 23(a) is satisfied and simultaneously oppose certification for litigation purposes on the ground 23(a) is not satisfied?

The response was that "parties don't toss away their

arguments." Defendants make it clear that they are reserving all arguments about litigation certification when they agree to support certification for purposes of settlement.

But, it was asked, isn't there a law of the case problem if the court declines to approve the settlement? That drew the response that this is kind of like an "escrow" situation; the concessions for settlement review are only good if that goes through, and if it does not go through they are all retracted.

The bottom line was that a draft should offer an alternative to invoking and relying on satisfying 23(a). This might be based in part on the approach adopted by the ALI Principles.

Discussion returned to whether a new (b)(4) should be limited to (b)(3) certification. An immediate response was that there are lots of (b)(2) cases that settle. The courts have recognized settlement outside the (b)(3) context.

Another question was whether Amchem has had an impact on settlement of cases brought under (b)(2), to which the answer was that it has.

But that raised the question whether opting out should be a feature of (b)(1) or (b)(2) cases. How can the injunction forbid the defendant from using certain practices with class members but permit it to continue to use challenged practices with those who opted out? Another response was that allowing opting out would completely defeat the purposes of (b)(1) certification.

A further response was that the courts can still permit opting out for equitable reasons in specific cases.

The time for this call had expired; the discussion will resume on Feb. 12.

Notes of Conference Call
Dec. 17, 2014
Rule 23 Subcommittee
Advisory Committee on Civil Rules

On Dec. 17, 2014, the Rule 23 Subcommittee of the Advisory Committee on Civil Rules held a conference call. Participants included Hon. Robert Dow (Chair, Rule 23 Subcommittee), Elizabeth Cabraser, Robert Klonoff, John Barkett, Prof. Edward Cooper (Reporter of the Advisory Committee), and Prof. Richard Marcus (Reporter to the Rule 23 Subcommittee).

Judge Dow introduced the call by explaining that discussions after the October Advisory Committee meeting suggested that the Rule 23 amendment possibilities might move forward somewhat more rapidly than had previously been discussed. A plausible goal would be to have an amendment package ready for consideration by the Standing Committee and publication in June, 2016, which would mean approval by the Advisory Committee at its Spring, 2016, meeting. That, in turn, would probably call for relatively advanced drafts to be discussed during the Fall 2015 meeting, and some sort of initial discussion drafts circulated for discussion during the April, 2015, meeting.

This revised timetable depends on the Subcommittee's comfort with the list of possible amendment ideas it has identified. Certainly nothing is entirely off the table even if not on that list, but it does seem that various sources identify these topics, and therefore that this is the right list. For this conference call, then, the goal is to march through the list circulated for the call and see if some should be removed from the list. In addition, it would be important to determine whether there are other topics that should be added to the list.

(1) Settlement Approval Criteria

This topic was introduced as frequently of concern to judges, who probably have to review proposed settlements much more frequently than they certify classes (at least for litigation purposes -- certification for settlement is considered under the next heading). The judges (and the lawyers) may confront very long lists of criteria under the precedent in various circuits. The same sort of message emerged during the ALI work on the Aggregate Litigation project -- that the range of criteria was too large.

The ideas for approaching this set of concerns build from the ALI work. One tension is whether to limit the factors that can be considered. The ALI reported considerable unhappiness with the variety of factors that crop up in the lists used in various circuits. Keeping track of all the various lists may be a concern mainly for lawyers who practice across the country. But having identified the particular ones for a given circuit often does not assist the court or the lawyers much in making the

settlement-approval judgment.

One model for an approach to Rule 23(e) might be the approach of Rule 23(g) to appointment of class counsel. Rule 23(g) says that there are four factors that must be considered whenever the court makes a class-counsel appointment, and that any other pertinent factor may also be considered. A rule might have a closed list, or a mandatory list with authority to consider any other pertinent factor. The 2000 draft of Rule 23(e) possibilities took a somewhat different approach, identifying a very large number of possible factors.

A reaction to these possibilities was that courts would benefit from having a touchstone for making decisions about whether to approve proposed settlements. It was agreed that identifying a few things that the court must consider is useful, but not trying to shut the door on a variety of other considerations that might be important in given cases. On the other hand, some things courts have cited should be removed from consideration. A prime candidate for removal is the opinion of counsel; they have negotiated the deal and are supporting it. That is a make-weight reason for judicial approval, but does show up on some lists of factors. The number of opt-outs, any possible conflict of interest, etc., are all things that may be important in some cases.

Another participant agreed that the variety of factors included on one circuit's list or another is quite daunting. The goal of a rule should be to list the "core factors." It should not try to be a closed list; it would never be possible to list all the factors that could ever matter. A rule cannot disable courts from exercising their discretion about what is a fair settlement, and it should not try to do so. Moreover, it is not really true that the various lists are hugely different; instead, it seems that they vary somewhat in terms of terminology and also in terms of emphasis. At the same time, at least some might best come out, and the opinion of proposing counsel heads the list of those that do not make sense.

It was remarked that the Subcommittee would benefit by having a "spreadsheet" or something like that listing the factors included in the various tests like the Grinnell factors (2d Circuit) and Gerst factors (3d Circuit). An effort could be made to put together such a listing; lawyers who practice in the area have to develop their own, so it should not be too difficult to compile one.

Another idea was that a Committee Note to such a "core factors" rule could say that it supersedes the various items on circuits' lists to the extent that may have been regarded as mandatory "checkoffs" in those circuits. That is not to say they may not be pertinent in given cases, but the "checklist" could be

confined to the ones in Rule 23, not all the others that found their way onto a given circuit's list.

At the same time, it was noted that the circuits' lists are not particularly diverse. Indeed, it seems that circuits have been borrowing from one another. Certainly adopting the core factors of the sort identified by the ALI would not involve overruling the decision of any circuit. To the contrary, it would probably be more like adopting the common features of various lists and including them in the national rule. That idea drew support -- "I like the idea of collecting the law of the land on settlement review."

A caution was noted: It will be important to keep in mind how such a listing of factors ties in with the possibility of certification for settlement only. In addition, it would be useful to keep in mind the possibility of mentioning factors (at least in a Committee Note) that have not been included on any circuit's list.

It was also noted that borrowing directly from the ALI principles could cause difficulties because it was an integrated document that used its own terms. One example is the idea of "indivisible relief" as the sort of thing that at least Rule 23(b)(2) addresses.

A concluding comment was that there is virtually a unanimous desire in the bar for sensible and consistent settlement approval criteria, and also for criteria for settlement class certification.

(2) Settlement Class Certification

This topic was introduced with the 1996 draft (b)(4), which sought to undo a Third Circuit line of cases that permitted settlement certification only if litigation certification would be warranted. After the Supreme Court made its Amchem decision in 1997, this proposal was shelved. It might be time to bring it out again. And one possibility would be to do something that is out of step with Amchem's interpretation of the current rule. Amchem said that 23(e) settlement review is no substitute for rigorous application of the criteria of 23(a) and (b) (except for manageability). A prime sticking point has been the role for predominance in this analysis. So one possibility sketched in the materials for the call was to say (at least with regard to (b)(3) certification) that settlement class certification is permitted if the court approves the settlement under 23(e).

One reaction was that there are a few decisions in which the lower courts have tried to work through what predominance means in the settlement certification setting. One example is Hanlon v. Chrylser, a Ninth Circuit decision. Another might be at least

some parts (particularly Judge Scirica's concurring opinion) in Sullivan v. DeBeers.

This discussion led to a question: Do we want to limit this to (b)(3) classes? Predominance is only required in those class actions. Should mandatory class actions be included also? That would open the prospect of a "stand alone" (b)(4). A reaction to this idea was that it seems "more practical." True, most settled class actions are (b)(3) cases. But the (b)(1) and (b)(2) examples are "remedy driven." They are not, however, cases in which settlement class certification is never a possibility.

One idea that was expressed was that it would be good to have a compilation of the factors used in various courts for settlement class certification. One reaction was that it is likely the various settlement approval criteria are delineated more clearly under current case law than the handling of predominance in settlement class certification.

Another question was to look at the factors for settlement approval and settlement certification to see whether the courts actually are using them or just intoning them because they are "on the list." An example is the approval of counsel factor that was noted before Amchem was decided; now it gets "backhanded." It may be that other factors have really fallen out of use.

(3) Cy Pres

This topic was introduced as getting a lot of attention. Some have very strong views that such methods are simply improper. Among judges, the focus is likely more practical than theoretical. Using that mindset, the ALI approach makes sense. And one thing that seems widely agreed is that in settlement fund situations allowing a reversion to the defendant is not a good idea, leaving the question what to do with amounts left over after claims have been paid. The ALI proposal offers ways to address those questions.

At the same time, there are some Enabling Act concerns that should be kept in mind. On the one hand, to the extent a rule explicitly authorizes this new "remedy," it might be challenged as going beyond the sorts of things that a rule should do. On the other hand, under the law of some jurisdictions, such measures have been a part of practice for a long time, so a rule that disallows them in federal court could be challenged on Enabling Act grounds as well as one that explicitly authorizes them. At least on some occasions, situations like the old California case of Daar v. Yellow Cab really do call for creative solutions. The vitamins antitrust case was probably one of those.

But in most cases, the main concern is the residue after

claims processing. The ALI's proposal is "becoming the standard in the courts." It would be helpful for the rule to provide the factors that should be considered. In the Seventh Circuit, it seems that the courts may approve cy pres arrangements as the sole remedy in some consumer cases.

It was observed that, for some reason, the prominence of cy pres became more significant after 2010, just after the ALI proposal was adopted. Putting something modeled on the ALI's work into the rule would be helpful, and a lot better than "going back to square one." It was suggested that judges probably would favor that approach as simplifying and clarifying their work. These factors are not absolutes, but can focus the controversy.

Again, it was suggested that it would be helpful for the Subcommittee to arrange for cases to be gathered on current practices. A reaction to this suggestion was that the ALI itself is assiduous about keeping track of adoption in the courts of its proposals; it probably can provide a reasonably complete report on cases addressing the cy pres provision in the Aggregate Litigation principles.

The consensus was that the ALI proposal's orientation seems to be where the bulk of people find the law should go, and the topic therefore should not be too controversial to take on. Whether it should include some general "good works" fallback, or escheat to the state, is not certain. Indeed, at least some of the more fervent commentary on the general subject seems ideological, suggesting that it reflects a substantive rather than procedural concern.

(4) Handling Objectors

The set of issues was introduced with the observation that it seems that the present provisions of Rule 23(e)(5), added in 2003, adequately police the withdrawal of objections in the trial court. The problem appears to happen after an appeal is filed, when Rule 23 arguably no longer applies. The Appellate Rules Committee has been looking at those problems. Another issue was raised by Stephen Herman, who urged that the rule limit objections to matters the objector has "standing" to raise. A possible analogy for that would be Rule 23(h)(2), which permits objections to an attorney's fee award by a class member or a party from whom payment is sought, but not by others. Perhaps something like that could serve to screen objecting class members.

A reaction was that the Herman letter identifies a familiar problem. An example was in the DeBeers litigation, where the objection to payment to those from states that had not adopted Illinois Brick repealers was made by somebody who seemed to come from such a state. Thus, the objector's point was, in essence,

that she should not be paid anything and more should be paid to others resident in states with Illinois Brick repealers. This sounded like an objection this person should not be allowed to make.

But, it was responded, if the objector points up something that "really stinks," does that mean the judge can't consider it because it seems that this repellent part of the deal does not adversely affect this particular class member? It was agreed that would probably be going too far, but that it points up the relationship between this factor and the settlement approval criteria.

Regarding the problem on appeal, the suggestion was that the solution was for the court of appeals to send the matter back to the district court. Even now, sometimes those perturbed by bad faith objectors approach the district court and ask that a high bond be set. On the other hand, "we can't make objecting a felony." It may be that nothing need be done.

But it was noted that the Appellate Rules Committee may be receptive to adjustments that facilitate the handling of ill-intentioned appeals. It would be important to keep a way open for the Rule 23 Subcommittee to play a role in that process, perhaps even a lead role. This subject should be pursued with that committee.

(5) Rule 68 Mootness Issues

A starting point was that the Seventh Circuit approach has produced "out-of-the-chute" certification motions in that circuit that make little sense. This "creates makework for all," but is necessary to guard against inappropriate outcomes in the Seventh Circuit. But whether a rule-based solution would be wise is not clear. Perhaps the simplest way would be to add a sentence to Rule 68 saying that it does not apply in class actions and derivative actions. Something like that is already in Rule 41.

That raised the possibility that it may be that additional changes to Rule 68 seem worth pursuing for unrelated reasons that were discussed during the last Advisory Committee meeting.

A further point was that Rule 68 is not really about mooting cases, and that cases can be mooted without a Rule 68 offer. If a small change to Rule 68 were made to deal with this problem there, it might be possible in a Committee Note to say something about the impropriety of seeking to "pick off" class actions with individual settlement proffers to the class representatives (at least before the district court rules on class certification).

The consensus was to carry forward this topic, but without confidence about what should be the resolution.

(6) Issue Classes

The introduction stressed that there are basically two approaches. The first would permit (c)(4) certification without regard to the predominance requirement of (b)(3). That would recognize what seems to be the view of the majority of the circuits. The other would be to implement the Castano 5th Circuit view that (c)(4) is not an end run around predominance by specifying in (c)(4) that it may be used only in cases that satisfy 23(a) and (b).

The discussion focused on whether there really is a split in the circuits on this issue. Some 5th Circuit decisions appear to accept (c)(4) solutions to (b)(3) problems. Most circuits never took the Castano view.

If that's so, the question was whether the rule should be changed. As things now stand, the two rule provisions don't easily fit together. Excusing the predominance requirement when appropriate measures can be taken using (c)(4) could clarify the present confusion. That would largely recognize the majority view among the courts.

Alternatively, (c)(4) could be changed to give teeth to the Castano view. But that would seem to go against the view of most or all the other circuits, and also might be out of step with some 5th Circuit decisions.

This matter would be carried forward.

(7) Notice

The consensus was that this set of issues should be carried forward. Presently, notice is partly "buried" in Rule 23(d). Rule 23(c) notice in (b)(3) cases, meanwhile, can be a major cost but not a major value to class members. The meaning of "individual" notice in the Digital Age might need to be reconsidered. The centrality of first class mail to achieve that notice surely seems ripe for reexamination. Finding practical solutions should be the goal, and finding rule language that would permit or facilitate practical solutions should be the rulemaking goal.

It was suggested that it would be good to collect best practices from around the country. This sort of thing "should not be the subject of argument" once the experience of the courts is on the table.

Another limitation that might be considered is to dispense with individual notice in low-value claims (perhaps those worth less than $100, the amount suggested in the 1976 Uniform Act, an amount whose current value would be nearly $500).

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Good progress was made toward developing discussion drafts. The Subcommittee should reconvene by conference call in January, 2015.

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DISCOVERY SUBCOMMITTEE REPORT
"REQUESTER PAYS" ISSUES

During its November, 2013, meeting, the Committee had an initial discussion of whether the rules ought to include some additional "requester pays" provisions regarding the cost of responding to discovery. That meeting occurred the day after the first hearing on the package of proposed amendments published for public comment in August, 2013. The Committee was thereafter focused largely on addressing the large volume of public commentary it received regarding that package. The package was eventually revised and is now before the Supreme Court awaiting its possible adoption.

The Discovery Subcommittee presents this topic for further general discussion because it has been raised by several sources (including some communications to the Committee from Congress) and seems to present basic issues. In addition, aspects of "requester pays" are included in some legislative proposals dealing with "patent trolls" that have been introduced in Congress. If legislation passes, it may be that requester pays issues will be included, and the legislation may direct rulemaking in relatively short order. That, of course, depends on developments in Congress.

The Discovery Subcommittee is not recommending any further rulemaking at this time. Indeed, as addressed in somewhat greater detail below, the current package of amendments pending before the Supreme Court may affect the utility and nature of any requester pays rule provisions that might emerge in the future.

Instead, the Subcommittee is responding to expressions of support for serious consideration of such rulemaking. Whether further rule amendments should be seriously considered before there is a basis for evaluating the effect of the amendment package currently before the Supreme Court, should it be adopted, is a matter for consideration. The goal of the discussion at this Committee meeting is to solicit the full Committee's views on how best to prepare for addressing these issues in the future.

Besides this memo, the agenda book should also include several additional items bearing on this topic:

Notes from the Discovery Subcommittee's March 13, 2015, conference call;

Notes from the Discovery Subcommittee's Feb. 13, 2015, conference call;

An excerpt from the minutes of the full Committee's Nov., 2013, meeting, dealing with these issues;

Notes from the Discovery Subcommittee's Sept. 16, 2013, conference call discussing these issues;

Introduction to Proposals for Cost-Bearing Provisions in the Rules, a memorandum prepared by Prof. Marcus to provide background for the Sept. 16 conference call.

The idea behind considering some sort of explicit requester pays provision, as expressed by those who have asked the Committee to consider such a provision, is that there is a significant number of instances in which discovery requests are pressed even though the likely importance of the information being sought is dwarfed by the cost of complying with the discovery request. Indeed, there are even assertions that some litigants may deploy broad discovery requests precisely to impose costs on adversaries.

But it is not at all clear that "cost infliction" happens with significant frequency, even though there probably are instances in which one might say it has occurred. And (particularly in the Digital Age, during which huge amounts of data may be requested through discovery) self interest could prompt those seeking discovery to try to avoid asking for too much. In addition, it is surely true that those seeking discovery must be concerned about narrowing their requests so much that critical information can be withheld on the ground it was not requested. Modulating the use of cost-bearing in this environment is accordingly a challenging task.

As already noted, one starting point is to focus on the current amendment package, which includes provisions that may assist the court and parties in performing that task. Since 1983, Rule 26(b)(2) has directed judges to limit discovery that is disproportionate, and a reminder of that directive was included in Rule 26(b)(1) in 2000. The current amendment package imports the proportionality provision directly into the scope definition. It might be said that the presence of a proportionality provision in the rules since 1983 has not sufficiently solved the problem so as to justify confidence that the relocation of that provision will now solve the problem. So it remains possible that, if adopted, the current amendment package will leave important problems unsolved.

At the same time, as the Committee learned during the public hearing process concerning the amendment package currently before the Supreme Court, at least a significant number of observers foresee that these amendments will produce significant changes and curtail discovery in some cases. That possibility might be a reason to defer serious consideration of additional or more aggressive measures, and also to think now about ways to try to determine the actual impact of the current package if it is adopted.

Another starting point is to recognize "the presumption is that the responding party must bear the expense of complying with the discovery requests." Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 358 (1978). This starting point seems implicit in several current rules:

> Rule 26(g)(1)(B) says that the signature of a lawyer on a discovery request certifies that the request has not been made for an improper purpose such as increasing the cost of litigation and that the request is not unduly burdensome or expensive.
>
> Rule 26(b)(2)(C)(iii) requires the court to limit or prohibit discovery that would disproportionately burden the responding party. [This is the provision that the current amendment package would move up into Rule 26(b)(1), and also revise a bit.]
>
> Rule 26(c) now authorizes a protective order to protect a party from "undue burden or expense." In *Oppenheimer Fund*, the Supreme Court recognized that Rule 26(c) provided authority for "orders conditioning discovery on the requesting party's payment of the costs of discovery."
>
> Rule 26(b)(2)(B) explicitly authorizes the court to condition discovery from sources of electronically stored information that are not reasonably accessible due to burden or expense, and the Committee Note confirms that cost-bearing is one such condition.

A third starting point is to recognize that past rulemaking efforts present background for the current consideration of these issues. That background (including the summary of commentary during the public comment period in 1998-99 on one such proposal) is presented in Prof. Marcus's memo that should be included in this agenda book. It is clear that the public comment in 1998-99 showed that there are strong views on these subjects in some sectors of the bar.

It is critical that any approach to these issues include close attention to access-to-justice concerns. Discovery is an important source of evidence for litigants. At the same time, it may sometimes be an important cost for litigants that could actually impede access to justice by deterring some potential litigants from seeking relief in court due to the cost of the discovery that effort would entail. Already, significant numbers of litigants seem to be priced out of hiring lawyers, so the prospect that lawyers would have to bear additional discovery costs might compound that concern. As noted in connection with pending legislative initiatives, recent concern about patent "trolls" could illustrate this concern.

At the same time, the recent development of protocols for discovery in individual employment discrimination cases could indicate that it may be possible in other significant categories of litigation to develop an idea of what constitutes "core" discovery. If so, one could perhaps consider cost bearing for discovery beyond that "core" information. Alternatively, even without developing protocols for other whole categories of litigation, it may be that judicial case management could facilitate the handling of cost-bearing possibilities in individual cases.

As it was during the November, 2013, meeting, the goal of raising these issues during this meeting is to canvas the Committee's views on how further exploration should be pursued. Disciplined examination of these issues would depend on developing a substantial information base, and that in turn depends partly on identifying the issues that should be pursued. There should be no assumption that this effort will lead to actual rule-change proposals; drafting any such proposals would involve many tough questions. But at the same time it seems important for the Committee to examine these issues seriously; even if it concludes that no further changes to the rules are indicated, it will be important that it have a solid information base for its conclusion.

A problem in addressing any of these concerns is that discussion often seems to be dominated by what some call "anecdata" -- horror stories that, however accurate they may be about individual cases, do not suitably portray the broad realities of most litigation. So one aspect of this discussion should be to identify methods to develop better information than we currently have. Preliminary discussions with Emery Lee of the FJC have begun to explore these issues. And ideas about how to involve bar groups and others who may be able to shed light on these issues using a solid data-base rather than anecdotes would be welcomed.

Similarly, ideas about which issues seem most important and promising would be welcome. Examples of local rules, practices, standing orders, or guidelines that have seemed to yield good results would be helpful and might provide a basis for further inquiry.

From presently available information, it seems that some case management efforts (like Judge Grimm's standard order, which was included in the agenda book for the November, 2013, meeting) have been effective in avoiding wasteful discovery. Work done to date by the FJC indicates that most cases in federal court are resolved with a modest amount of discovery. Though hardly the predominant form of litigation today, it seems that large cases between two large entities probably would not benefit from a requester-pays system, which might be more likely to complicate

the litigation.

More generally, particularly regarding discovery of electronically stored information, there may be inherent constraints on over-discovery due to the cost of reviewing vast amounts of ESI. Perhaps some sort of requester-pays rule would be sensible if it could be tailored to large cases with asymmetrical discovery, but such a rule would likely depend on judicial discretion and oversight that might be exactly the sort of judicial activity encouraged by the package of amendments now before the Supreme Court.

If the Subcommittee decides to move forward, a likely step would be to convene some sort of mini-conference, but that seems premature now. For one thing, the Committee has other issues (such as class actions) that may be time-consuming in the immediate future. For another, it could conclude that it is necessary to learn how the current package of amendments works (assuming it is adopted) before venturing to propose further significant changes to the discovery rules.

So in the spirit of getting discussion going, rather than suggesting any conclusion, here are some thoughts that have received attention in Subcommittee discussions:

(1) Is there a serious problem of over-discovery that might be solved by some form of requester pays rule? We know that in much litigation it seems that the discovery is roughly proportional to the stakes. We know also that in a significant number of cases high discovery costs are reported. How should one try to identify over-discovery? How can one evaluate the potential utility of requester pays approaches to dealing with those problem cases?

(2) Should any rules along this line focus mainly on certain kinds of cases, or on certain kinds of discovery?

(a) In general, the rules are to be "transsubstantive," applying to all cases with relative equality. But there are rules that are keyed to specific types of cases, such as Rule 9(b), with its specific pleading requirements for fraud. Is there a workable way for a rule to identify "problem" or "contentious" cases? [Note that, as mentioned above, "patent troll" legislation may call for rules specific to some or all patent cases.]

(b) Since discovery regarding electronically stored information has assumed such great importance, should a "requester pays" idea be considered only for that sort of discovery? The current Rule 37(e) proposed amendment is similarly limited, as is current Rule

37(e). Even more pertinent, current Rule 26(b)(2)(B), with its cost-bearing possibility, is also only about electronically stored information.

(3) Should cost-bearing ever be mandatory? All models of possible rule changes that have been actively considered so far have essentially been discretionary. That means that the court must become involved before cost-bearing is a possibility. Perhaps cost bearing could be presumed in certain situations unless the court directed otherwise. But if so, how would one define those situations? Defining them could be quite difficult, and disputes about whether given discovery fell on one side or the other side of such a line could themselves impose significant costs on the litigants and burdens on judges.

(4) Would it be useful to consider broadening initial disclosure if requester pays changes are actively studied? As amended in 2000, Rule 26(a)(1) only requires disclosure of information the disclosing party may use to prove its claims or defenses. Some question the utility of the current rule. It could be that broadening initial disclosure would be a useful adjunct to adding requester pays provisions.

(5) Could introduction or emphasis on these issues itself justify substantial discovery? If the question is whether providing requested discovery will be highly burdensome, or would not provide useful evidence, it may be that some parties will seek to explore these issues using discovery. One method for making Rule 26(b)(2)(B) determinations about whether to order discovery from "inaccessible" sources of electronically stored information is to see what can be found in a sample of those sources, and at what cost. Perhaps that is a model that would be useful, but it might also suggest "discovery about discovery," something that may be unnerving.

(6) Would requester pays provisions have a significant effect on judicial workload? It is likely such provisions would focus on something like "reasonable expenses." Determining what is "reasonable" could be an effort for the court. But perhaps that inquiry is sufficiently implicated in the basic proportionality analysis -- balancing the cost of proposed discovery against its apparent value -- so that there would not be significant added effort for the court.

In sum, there are many things that might profitably be pursued, and the Subcommittee invites suggestions about how best to proceed. Hopefully this brief introduction adequately highlights some of the considerations.

TAB 9B

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Notes of Conference Call
March 13, 2015
Discovery Subcommittee
Advisory Committee on Civil Rules

On Feb. 13, 2015, the Discovery Subcommittee of the Advisory Committee on Civil Rules held a conference call. Participants included Hon. Paul Grimm (Chair, Discovery Subcommittee), Hon. Craig Shaffer, Hon. David Nahmias, John Barkett, Emery Lee (FJC), Prof. Edward Cooper (Reporter of the Advisory Committee), and Prof. Richard Marcus (Reporter of the Discovery Subcommittee).

The call began with a summary of the current work on the subject. There was an initial discussion during the full Committee's November 2013 meeting, but from that time forward the Committee was occupied by the public comment on the proposed amendment package that was published for comment in August, 2013. Meanwhile, "patent troll" legislation had been introduced in Congress that included some "requester pays" aspects. Hearings in Congress about discovery more generally had addressed similar issues, and some in Congress had been in touch with the Committee about those issues.

The current work is designed to re-introduce the issues to the full Committee, and this call is particularly concerned with what information might be generated to inform decisions about whether to proposed further requester pays rule provisions.

The reference to patent troll legislation suggested a focus in part on patent litigation. Many districts have patent pilot projects that involve tailored practices and procedures for those cases.

In addition, there may be other types of identifiable sets of litigations that raise similar cases, such as MDL cases.

A different set of issues deals with the difference between requester pays and loser pays. In the UK, the loser pays approach calls for assessment of "reasonable costs" after the termination of the litigation (when the "loser" can be identified).

Meanwhile, there seem to be quite a few existing federal rules and statutes, and many more state rules and statutes, that involve something like requester pays.

Against that broad background, the immediate focus is not on presently proposing rule changes or solutions of another kind, but on what sorts of information might be obtained and how much effort might be involved in obtaining that information. It seems well accepted that discovery costs are relatively moderate in most cases, but also that there are cases in which discovery sometimes costs a huge amount. There may be an inherent limit on voracious discovery in the era of E-Discovery -- who wants to try

to deal with five terabytes of data? And the current package of proposed amendments before the Supreme Court may affect the handling of these issues in the future.

This drew the initial reaction that a considerable amount of data has been developed (mainly by CACM) on the patent pilot projects. It should not be difficult to see what light that data-collection effort could shed on this set of issues.

At the same time, it does not seem that existing studies include much detailed empirical information. In May, 2014, IAALS issued a study with a brief reference to some FJC research and some work by the 7th Circuit E-Discovery project on cost bearing sorts of issues.

The question of existing rules and statutes prompted the observation that there is a lot of existing law, but not much (if any) existing empirical evaluation of what those existing rules do. One idea (suggested by Prof. Spencer's article) is that judicial pre-screening of discovery might be more promising than some post hoc cost bearing. But that sort of screening likely would impose very significant burdens on the courts, and might not make sense in many cases, given that in most cases there is not a problem with disproportionate discovery.

A different approach would be to try to identify types of cases with frequent overdiscovery. Patents, MDL cases, cases with heavy ESI discovery all come to mind. Perhaps the right focus is on "asymmetrical" big cases, or high stakes cases. But there is both a problem of identifying the cases and determining what tools might be used to identify the cases.

On asymmetrical cases, one category might be pro se litigation. But general experience suggests that plaintiffs in those cases usually do not know how to make discovery demands, much less disproportionate ones.

Another way to approach the issues was suggested -- Is there a way to determine when courts have been asked to allocate discovery costs? Could that be obtained from databases available to the FJC?

There seems no easy way to do this. We know how to do Westlaw research to find cases on that database that involve use of certain terms. But Westlaw is not a representative collection of cases. There may be ways to search the entire CM/ECF replication database to identify cases of interest. But that effort would be considerable, and the utility of the results cannot presently be known. Moreover, under current A.O. policy (since May, 2014), it is necessary that there be a formal request from a rules committee before even exploratory investigation can be done to determine what might be learned with what level of

effort.

The subject was pursued -- Could we search for all cost-shifting orders, or all motions seeking cost-shifting? Alternatively, could we search for all cases involving motions under Rule 26(b)(2)(B), which authorizes conditioning retrieval from inaccessible electronic sources on payment of some or all of the cost? Can we find out how often that is done?

It would be possible to search docket text for notations indicating such motions, but what appears in the docket depends on what the docketing clerk decided to put there. It may not be as reliable as we would prefer. A text search could probably be done using the replication database, searching district by district.

That prompted a question -- could we use certain representative districts rather than all districts? The answer is that one certainly can do that, and reduce the burden of doing the search. Indeed, it is almost a given that such searches are done district by district. It may be that a relatively limited collection of districts could be identified to do at least a "test bore." And then one could determine, perhaps, whether this is a "dry hole."

This discussion prompted the observation that what we are talking about is "proportionality" in terms of gathering information for the Committee's use. The idea is to come up with four or five districts whose information might be investigated, and to see what information from those districts shows can be gleaned from the replication database.

But to do that would first require some formal request from the Committee.

Turning from data-gathering, the discussion focused on whether anything more would be needed to make a presentation to the full Committee during its April meeting. The reaction was that the biggest unknown is what Congress will do about patent troll legislation. If it directs rulemaking to proceed rapidly, much of the information gathering that was discussed cannot occur because the information would take too long to obtain.

So this is a two-track process before us: A "fast track" if Congress directs fast action, and a "deliberate track" if it does not. It seems that H.R. 9 is one piece of legislation, and some effort should be made to find out what it would direct the Committee to do. (A check after the call showed that the proposed legislation does not now seem to have a rigid time limit for rulemaking activity.) But even a full answer to that question does not tell us what, if anything, Congress will actually enact.

Under these circumstances, it seems that we have the most we can present presently, and that we may have some additional information about empirical data to be presented orally at the April meeting.

Notes of Conference Call
Feb. 13, 2015
Discovery Subcommittee
Advisory Committee on Civil Rules

On Feb. 13, 2015, the Discovery Subcommittee of the Advisory Committee on Civil Rules held a conference call. Participants included Hon. Paul Grimm (Chair, Discovery Subcommittee), Hon. David Campbell (Chair, Advisory Committee), Hon. David Nahmias, John Barkett, Parker Folse, Prof. Edward Cooper (Reporter of the Advisory Committee), and Prof. Richard Marcus (Reporter of the Discovery Subcommittee).

The call began with a summary of prior discussions of the general subject of requester pays rules or measures. The Subcommittee discussed this subject in a conference call on September 16, 2013, and the full Committee considered it during its meeting on Nov. 8, 2013. Copies of the notes of that conference call and the minutes of the discussion at the Committee meeting were circulated before this call. In addition, a recent article by Prof. Spencer of the University of Virginia and a piece by IAALS from last Fall have been circulated to the Subcommittee. The IAALS study looked not only at U.S. federal courts, but also state courts in the U.S. and courts in Canada and the U.K.

Introductory thoughts recognized that there have been strong views on both sides of these issues. Some believe that the absence of requester pays principles is an unfortunate feature of our legal system, particularly given the broad discovery it affords. It has even been urged that the American principle that the producing party must produce without recompense even if it wins the case violates due process. At the same time, many strongly believe that American discovery is essential for access to justice.

Under these circumstances, as this Committee considers these issues it must be careful to be transparent and solicit input from all stakeholders. It also probably should take account of the package of proposed amendments now before the Supreme Court, for that package includes many provisions that may address some of the concerns that seem to be animating the push for changing the producer pays rule that has been true in U.S. litigation.

But it is also important to appreciate the extent to which legal provisions already exist to undo the American rule that the producer pays. The Spencer article is quite thorough in showing that there is already a wide variety of rule provisions and statutory provisions that permit a court in appropriate circumstances to shift the cost of responding to the requesting party. In some states (such as California, see Toshiba America Elec. Components, Inc. v. Superior Court, 21 Cal.Rptr.2d 532 (Cal.Ct.App. 2004) -- holding that a California statute imposes the cost of restoring backup tapes on the party seeking

discovery) there are provisions that are more focused on requester pays solutions. According to the IAALS study, there are more than 200 statutes that might authorize something like requester pays. So one question might be: Why is that not enough?

Another thing that the IAALS study shows is that our assumptions about how things operate in other countries may not be right. In the U.K., for example, we may assume that the virtually automatic rule is that the loser pays. But that does not seem to be what really happens most of the time now. Instead, the amount paid is often scaled back, and in general in civil cases only a modest amount is shifted. In addition, particularly since the Jackson Report reforms in 2009 or so, there is a strong judicial push to do budgeting for the litigation up front.

In addition, the U.K. has a strong form of initial disclosure, including unfavorable information, which is probably a central explanation for the limited discovery available after that. In this country, there was strong resistance to such a disclosure provision when one was published for public comment in 1991, and the optional weaker version actually adopted in 1993 was replaced by amendments in 2000 that limited disclosure to information and witnesses the disclosing party might use for its case. That is often significant, but it is a good deal less significant (as a substitute for formal discovery) than what's normal in the U.K. That baseline in the U.K. probably explains the frugal attitude about further information exchange thereafter.

A first reaction to these points was to invite reflection on the types of cases that make up the federal civil docket today. Perhaps 25% to 30% involve some sort of employment dispute. Many social security appeals occur. Prisoner petitions of various sorts are very numerous. In many of these sorts of litigation there is a fee-shifting statute that may be interpreted, even if it is not explicitly written, in a pro-plaintiff manner. Other kinds of cases are less numerous, but may be the sort that prompt interest in a requester pays regime, such as securities fraud, antitrust, and RICO. In addition, in the U.K. there is a strong form of offer of judgment that has implications for cost recovery. There is also insurance against such costs.

Another reaction was that those expressing interest in requester pays are primarily what we might call defense interests. For them, probably attorney fees are a major part of the actual costs. Screening of potentially discoverable material for responsiveness and privilege takes a large amount of time, and the time is expensive.

There is presently a further factor -- patent litigation

legislation under consideration in Congress. Both the House and the Senate have bills moving forward. Some members of Congress are making statements about possibly producing legislation by March. There was a hearing in the House yesterday about whether recent Supreme Court and lower court decisions in patent cases eliminate the need for legislation, and it seemed that the theme was that, though desirable, these developments do not solve the problem. Several of the draft bills direct our Committee to draft rules to achieve goals spelled out in the bills. The general thrust of those goals includes allowing cost-free production of a "core" set of documents, and then making discovery beyond that core set of documents proceed on a requester pays basis. There seems at least a considerable chance some such directive will come our way.

An attorney addressed these issues by noting that his experience is with a narrow slice of cases, those involving one successful business suing another one. So "mutually assured destruction" through over-discovery is likely to be a concern to both sides. At the same time, this sort of litigation is sometimes the poster child for discovery abuse tales. In this business v. business world of litigation, there are deterrents to discovery abuse without regard to rules. There is much wrangling about how to search electronically stored information, and a lot of labor to sort through what you eventually get from the other side. There is also an aspect of mutually assured destruction for the litigant that is obdurate.

A related problem is that there is little real communication about what the resolution of these discovery disputes really means for the other side. A lawyer observed: "I have been horrified to find how much my opponents did to respond to my Rule 34 requests. That was not what we wanted." Parties may not be candid enough about what they really need and how much it will really cost to respond to discovery requests. This sort of face off may often lead to overcharges and satellite litigation about those charges.

Owing to the reported patent legislation proposals in Congress, the question was raised about how discovery works in those cases. The answer was that they seem distinctive in that often the first step is claim construction -- "how the program or device works." That involves a finite amount of information. The huge discovery volume is more likely at the damages stage, when the question is what the royalty base will look like. Up to that point, the issues are not particularly factually complicated in the sense that one must sort through mounds of material to find the pertinent evidence.

That prompted the reaction that there must be some reason why the Federal Circuit adopted guidelines for E-Discovery. The reaction to that was that it may be that litigation about

computer and software patents is different from other kinds.

A suggestion was made about patent litigation: There are a number of districts with patent pilot projects. It seems they have staged discovery, starting with infringement issues, and then validity issues. That could be a source of guidance about what holds promise if we need to move quickly on patent discovery. Another suggestion was that bifurcating the trial between infringement/validity and damages could in some instances avoid (or at least defer) the heaviest discovery.

Another question arose: If one wants to design rules only for patent cases, how often does one find that there are also other claims in patent infringement cases? Antitrust claims, unfair competition claims, and others may be coupled with (or asserted as counterclaims in) patent infringement litigation. Do we have one set of rules for one claim and another for another claim, all in the same case?

Yet another wrinkle came up -- the PTO now has its own process to reexamine an issued patent. What happens when that is initiated while litigation is ongoing? The answer to that was that usually the court will stay the litigation pending the completion of the reexamination proceedings.

Regarding fees and costs, it was observed also that there is lots of case law about attorney fee awards, including recent cases on recovery of E-Discovery costs under amended 28 U.S.C. § 1920. But that's a statute; what can a rule do about that?

This prompted the observation that there seem to be two distinct sets of issues or problems. One has to do with what Congress does about patent litigation, if it does something. That could have a temporal element that would call for fast action. The other has to do with a long-term examination of the basic questions of requester pays in the array of rules and statutes already in place. And related to that is the additional set of rule provisions that may go into effect on Dec. 1. On that score, it seems that all we can be doing now is gathering information for future use.

That said, there seem to be several things that might suitably be on the agenda for exploration now: (1) a literature search; (2) a statutory and rule search to find out what exists presently; (3) exploration of regimes that are "pay as you go" v. "collect at the end of the case"; (4) more detailed information about the case type breakdown of the federal courts' contemporary caseload; and (5) exploring what the FJC could provide in the way of insights on these subjects.

A related question arose about judicial experience with either phasing of discovery more generally or hard limits on

discovery activities. The answer is that judges involved have found that it almost never happens that litigants come back and ask for more than what the judge allows initially. That sort of regime depends on active attention from the judge at the outset of the case, and a tailored discovery regime. Retaining flexibility is critical. But the basic point is that the flexibility is almost never actually used. Another technique that can help is a mandatory pre-motion conference, for that can intercept a dispute before it gets out of hand. These results have emerged even from standard orders that have hard limits on Rule 34 and Rule 36 requests.

In the same vein, it seems undeniable that the vast majority of cases get resolved with a modest and appropriate amount of discovery. Those litigants are not the ones who feel the desire for introducing requester pays into the rules. So any rules we might develop are really not for most cases. What we need is a rule for "problem cases."

That drew agreement. The IAALS study shows that the key thing to keep in sight is proportionality. That's also the solution endorsed by Prof. Spencer of the U. Va. And it depends on more, and more active, judicial management.

These realities create challenges for transsubstantive rules. We need to keep in mind that rules designed for problem cases may create problems in cases that would not be problems but for the rules. That would be a bad thing. But defining "problem cases" in the rules is very difficult and may be impossible. A judge has to make the assessment in an individual case.

One reaction was that a review of cases citing proportionality since it was first introduced in 1983 suggests that a limited number of red flags typify the cases that caused problems. In a real sense, this is a judicial education problem. For one thing, hands-on management does work. For another, experience does show where the problems lie, and what red flags to look out for.

Another participant summed up: This does not seem to be a trans-substantive problem. Congress can direct us to look specifically at a certain type of case, but there may not be a good way for us to determine how rules should segregate the cases.

That drew a suggestion: How about a rule for all cases in which more than $1 million is at stake? Those cases would seem not to involve the access to justice problems that are most unnerving. On the other hand, whatever the stakes, a requester pays system makes no sense when both sides are of the same size and have similar assets and relatively symmetrical discovery needs and demands. Mutually assured destruction should work

there.

One specific was suggested, however: Under CAFA, for a state-law class action to be in federal court, it must involve aggregate claims exceeding $5 million. So focusing on whether more than $1 million is in issues may mean that requester pays applies to all cases in federal court due to CAFA.

A question was raised about possible amendments: Are we talking about changing Rule 26 or adding something to it. This drew the response that we are not at a point of devising even discussion drafts of rule changes.

There are, however, lots of ideas worthy of investigation. How can we delegate responsibility to do that investigation? The goal is to determine whether there is a problem, and what it is. Another goal is to find out what we can about solutions that have been tried in the past.

In addition, it really seems that we are on two tracks. One is long term -- to build an information base for handling the general problem of requester pays and cost bearing. The other is out of our hands, and depends on what Congress does.

It was resolved that all participants would reflect on these issues and convene another conference call in the next two weeks or so.

MINUTES

CIVIL RULES ADVISORY COMMITTEE

NOVEMBER 7-8, 2013

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[The following is an excerpt from the Nov., 2013, minutes of the Advisory Committee meeting, containing the discussion of "Requester Pays" during that meeting.]

Requester Pays For Discovery

Judge Campbell opened discussion of "requester pays" discovery issues by noting that various groups, including members of Congress, have asked the Committee to explore expansion of the circumstances in which a party requesting discovery can have discovery only by paying the costs incurred by the responding party. The suggestions are understood to stop short of a general rule that the requesting party must always bear the cost of responding to any discovery request. Instead they look for more modest ways of shifting discovery costs among the parties.

Judge Grimm outlined the materials included in the agenda book. There is an opening memorandum describing the issues; a copy of his own general order directing discovery in stages and contemplating discussion of cost-shifting after core discovery is completed; notes of the September 16 conference-call meeting of the Discovery Subcommittee; and Professor Marcus' summary of a cost-shifting proposal that the Standing Committee approved for adoption in 1998, only to face rejection by the Judicial Conference.

Several sources have recommended further consideration of cost-shifting. Congress has held a hearing. Patent-litigation reform bills provide for it. Suggestions were made at the Duke Conference. The proposed amendments published for comment this August include a revision of Rule 26(c) to confirm in explicit rule text the established understanding that a protective order can direct discovery on condition that the requester pay part or all of the costs of responding. That builds on the recently added provisions in Rule 26(b)(2)(B).

The Subcommittee has approached these questions by asking first whether it is possible to get beyond the "anecdata" to find whether there are such problems as to justify rules amendments. Are such problems as may be found peculiar to ESI? to particular categories of actions? What are the countervailing risks of limiting access to justice? How do we get information that carries beyond the battle cries uttered on both sides of the debate?

The 1998 experience with a cost-bearing proposal that ultimately failed in the Judicial Conference is informative. The

Committee began by focusing on Rule 34 requests to produce as a major source of expense. Document review has been said to be 75% of discovery costs. Technology assisted review is being touted as a way to save costs, but it is limited to ESI. The 1998 Committee concluded that a cost-bearing provision would better be placed as a general limit on discovery in Rule 26(b), as a lead-in sentence to the proportionality factors.

Discussions since 1998 have suggested that a line should be drawn between "core" discovery that can be requested without paying the costs of responding and further discovery that is available only if the requester pays.

Emery Lee is considering the question whether there is a way to think about getting some sense of pervasiveness and types of cases from the data gathered for the 2009 case study. Andrea Kuperman will undertake to survey the literature on cost shifting. Other sources also will be considered. There may be standing orders. Another example is the Federal Circuit e-mail discovery protocol, which among other provisions would start with presumptive limits on the number of custodians whose records need be searched and on the number of key words to be used in the search.

One of the empirical questions that is important but perhaps elusive is framed by the distinction between "recall" and "precision." Perfect recall would retrieve every responsive and relevant document; it can be assured only if every document is reviewed. Perfect precision would produce every responsive and relevant document, and no others. Often there is a trade-off. Total recall is totally imprecise. There is no reason to believe that responses to discovery requests for documents, for example, ever achieve perfect precision. But such measures as limiting requests to 5 key words are likely to backfire — one of the requests will use a word so broad as to yield total recall, and no precision.

Judge Grimm continued by describing his standard discovery order as designed to focus discovery on the information the parties most need. It notes that a party who wants to pursue discovery further after completing the core discovery must be prepared to discuss the possibility of allocating costs. This approach has not created any problems. Case-specific orders work. For example, it might be ordered that a party can impose 40 hours of search costs for free, and then must be prepared to discuss cost allocation if it wants more.

Although this approach works on a case-by-case basis, "drafting a transsubstantive rule that defines core discovery would be a real challenge."

The question is how vigorously the Subcommittee should continue to pursue these questions.

Professor Marcus suggested that the "important policy issues have not changed. Other things have changed." It will be important to learn whether we can gather reliable data to illuminate the issues.

Emery Lee sketched empirical research possibilities. Simply asking lawyers and judges for their opinions is not likely to help with a topic like this. It might be possible to search the CM/ECF system for discovery disputes to identify the subjects of the disputes and the kinds of cases involved. That would be pretty easy to do. Beyond that, William Hubbard has pointed out that discovery costs are probably distributed with a "very long tail of very expensive cases." The 2009 Report provided information on the costs of discovery. Extrapolating from the responses, it could be said that the costs of discovery force settlement in about 6,000 cases a year. That is a beginning, but no more. Interviewing lawyers to get more refined explanations "presents a lot of issues." One illustration is that we have had little success in attempts to survey general counsel — they do not respond well, perhaps because as a group they are frequently the subjects of surveys. A different possibility would be to create a set of hypothetical cases and ask lawyers what types of discovery they would request to compare to the assumptions about core and non-core discovery made in developing the cases. The questions could ask whether requester-pays rules would make a difference in the types of discovery pursued.

Discussion began with a Subcommittee member who has reflected on these questions since the conference call and since the testimony at the November 6 congressional hearing. Any proposal to advance cost-bearing beyond the modest current proposal to amend Rule 26(c) would draw stronger reactions than have been drawn by the comments on the "Duke Package" proposals. "So we need data. But what kind? What *is* the problem?" Simply learning how much discovery costs does not tell us much. E-discovery is a large part of costs. But expert witnesses also are a large part of costs. So is hourly billing. But if the problems go beyond the cost of discovery, what do we seek? Whether cost is in some sense disproportionate, whether the same result could be achieved at lower cost? How do we measure that? Would it be enough to find — if we can find it — whether costs have increased over time? Then let us suppose that we might find cost is a problem. Can rulemaking solve it? And will a rule that addresses costs by some form of requester pays impede access to the courts? There is a risk that if we do not do it, Congress will do it for us. But it is so difficult to grapple with these questions that we should wait a while to see what may be the results of the current proposed amendments.

Another member said that these questions are very important. "The time needed to consider, and to decide whether to advance a proposal, is enormous." It took two years to plan the Duke Conference, which was held in 2010. It took three years more to

advance the proposed amendments that were published this summer. That is a lot of preparation. It is, however, not too early to start now. Among the questions are these: Does discovery cost "too much"? How would that be defined? Requester-pays rules could reduce the incidence of settlements reached to avoid the costs of discovery; in some cases that would unnecessarily discourage trial, but there also are cases that probably should settle. A different measure of excess cost is more direct — does discovery cost more than necessary to resolve the case, resulting in wasted resources? What data sources are available? We have not yet mined a lot of the empirical information provided for the Duke Conference. The RAND report reviewed corporate general counsel, assuring anonymity; its results can be considered. We might enlist the FJC to interview people who have experience with the protocol developed for individual employment cases under the leadership of NELA — it would be good to know what information they got by exchanges under the protocol, and how much further information they gathered by subsequent discovery. All of these things take time. The pilot project for patent cases is designed for ten years. FJC study can begin, but will take a long time to complete. And other pilot projects will help, remembering that they depend on finding lawyers who are willing to participate. All of this shows that it is important to keep working on these questions, without expecting to generate proposed rules amendments in the short-term future.

A member expressed great support for case management, but asked how far it is feasible to approach these problems by general national rules. "What is our jurisdiction"?

A partial response was provided by another member who agreed that this is a very ambitious project. "Apart from 'jurisdiction,' what is our capacity to do this?" Forty-one witnesses at the hearing yesterday divided in describing the current proposals — some found them modest, others found them a sea-change in discovery as we know it. Requester-pays proposals are far more sensitive. A literature search may be the best starting point. What is already out there? And we can canvass and inventory the pilot projects. That much work will provide a better foundation for deciding whether to go further. If the current proposals are adopted — no earlier than December 1, 2015 — they may work some real changes that will affect any decisions about requester-pays proposals.

A lawyer member observed that Rule 26(b)(2)(B) provides for cost shifting in ordering discovery of ESI that is difficult to access. "There have been a number of orders. We could follow up with experience." One anecdote: in one case a plaintiff seeking discovery of 94 backup tapes, confronted by an order to pay 25% of the search costs, reacted by reducing the request to 4 tapes. Beyond that, Texas Rule 196.4 has long provided for requester payment of extraordinary costs of retrieving ESI. We might learn from experience. So, reacting to the Federal Circuit model order for discovery in patent actions, the Eastern District of Texas has

raised the initial limit from 5 custodians to 8, and has omitted the provision for cost-shifting if the limit is exceeded; it prefers to address cost-shifting on a case-by-case basis. And we should remember that "cloud" storage may have an impact on discovery costs.

The Committee was reminded that if the proposed Rule 26(c) amendment is adopted, experience in using it could provide a source of data to support further study.

The discussion concluded by determining to keep this topic on the agenda. The Duke data can be mined further. We can look for cases that follow in the wake of the Supreme Court's recognition that the presumption is that the responding party bears the expense of response, *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 358 (1978).

Notes on Conference Call
Discovery Subcommittee
Advisory Committee on Civil Rules
Sept. 16, 2013

The Discovery Subcommittee of the Advisory Committee on Civil Rules held a conference call on Sept. 16, 2013. Participating were Judge Paul Grimm (Chair, Discovery Subcommittee), Judge David Campbell (Chair, Advisory Committee), Judge John Koeltl (Chair, Duke Subcommittee), Elizabeth Cabraser, Peter Keisler, John Barkett, Parker Folse, Andrea Kuperman (Chief Counsel, Rules Committees), Prof. Edward Cooper (Reporter, Advisory Committee), and Prof. Richard Marcus (Assoc. Reporter, Advisory Committee).

Judge Grimm introduced the call as focused on an initial consideration of a set of issues often raised in recent years that are separate from the current package of amendment proposals. The current package contains a small change to Rule 26(c) explicitly authorizing the court to enter a protective order addressing allocation of discovery expenses. That explicit authorization really adds little to already recognized judicial authority in the area. Indeed, when the Supreme Court recognized that the cost of responding to discovery is customarily borne by the responding party in Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340 (1978), it also recognized that a protective order could alter that customary arrangement.

Prof. Marcus circulated a memorandum before the call sketching the Committee's past activity on cost-bearing issues. Most recently, in 1998-99, it published alternative proposals for adding explicit cost-bearing authority to Rule 34 or to Rule 26(b)(2). The proposals elicited much vigorous commentary, highlighting the sensitivity of the subject. One argument made often was that everyone agreed that the court already had this authority, so there seemed no value in saying so. Another point was that amending the rules might be taken to encourage increased use of the existing authority, a move that many who commented thought ill-advised.

Though this background is important, the main focus of today's discussion is on how or whether to proceed to serious consideration of further amendment possibilities. Many issues are on the table, and many possible ways to approach these issues in the rules exist.

Initially, it is worth appreciating that one school of thought is that parties will approach discovery in a more responsible manner if they know that they have to pay part of the resulting cost of production. On the other hand, there are important access to justice issues to be kept constantly in mind.

Therefore, one set of issues would be the extent to which one could properly identify types of cases that might be exempted

from rule provisions authorizing cost-bearing. Of course, doing something like that cuts against the grain of the Civil Rules, which are supposed to be the same for all kinds of cases. Another sort of question is like an issue raised in 1998-99 -- whether any such provision should be limited to Rule 34 discovery or applicable to all discovery. In 1998-99, there was concern that a provision limited to Rule 34 might seem to favor defendants, or at least those litigants with large quantities of discoverable information, while other types of discovery (notably depositions) might impose more costs on other litigants. Whether these concerns remain the same in the Digital Age, and with the introduction of numerical and time limits for depositions, remains to be explored.

Another set of concerns emerges from the summary of the comments and testimony submitted on the 1998-99 proposals. Much of that commentary was premised on empirical assumptions about the consequences of any cost-bearing rule that few could illuminate with real data. Instead, anecdotes or hyperbole seemed to predominate. The Committee's more recent experience has suggested that this sort of advocacy my reappear. It would be very useful to have more informative data to address these issues.

With all that in mind, the participants were invited to offer initial reactions. This discussion is just that -- initial -- and the only issue now is to develop a plan for proceeding in a methodical manner to evaluate the issues raised.

An attorney offered the view that "I'm still mulling this over." A good deal of reading on the history of the adoption of the Federal Rules has brought home the fact that the Framers of the Rules were very concerned about "fishing expeditions" using discovery. So that concern has been with us from the beginning. On the other hand, we do not want to interfere with the ability of litigants to obtain needed information. If the pending amendment proposals are adopted, it may be that they will make a significant difference and that these changes alone could be sufficient to redress the balance, to the extent it has gotten out of balance. In data rich cases, the problem is that parties will seek huge amounts of information. But rules are blunt instruments to deal with the challenges of such cases. Instead, we need an order like the one Judge Grimm uses in his cases. The real problem in some other cases is disproportionate costs, and it's not clear that cost shifting is a solution to the real problem. Again, informed judicial management seems a better way than revised rules. With leadership provided (as by Judge Grimm), the pending proposed rule changes may do as much as should be done.

A second attorney agreed. All U.S. lawsuits impose nonrecoverable costs. That is the American way of handling these

things. Discovery can, however, create a unique problem of strategic imposition of costs. This risk means that the discovery process requires some degree of policing. Judge Grimm's order is very interesting in this context. It means that core information is produced at the cost of the producing party, but further discovery may be reviewed with some cost-bearing in mind. Nonetheless, it is not clear that putting something of this sort into the rules will produce desirable results, and there might be a risk of undesirable consequences from adding some such provision to the rules. For one thing, there could be very energetic disputes about what is "core" or collateral information. The real emphasis should on proportionality, and that's already in the rules, with a boost in its profile if the current proposed amendments are adopted. Translating these concerns into more focused rule language would be very difficult.

A judge reacted that it would be quite tough to draft a rule with presumptions that could be applied across the full range of cases in federal court. This may best be handled as a practice subject, not by a rule provision.

Another attorney reacted along the same general lines. Given the history (partly outlined in Prof. Marcus's memorandum), the reactions a proposal might prompt are fairly predictable. "This will be opposed on a very profound level." It would be best to see if there are other ways to go about it. And it should not be forgotten that the party seeking discovery bears costs when enormous amounts of information are forthcoming. This attorney has never seen an instance where some lawyer thought "I'll ask for a lot to impose expenses on the other side." People seek information to prove their cases, not to impose expenses on the other side. It's not surprising that some may seek a magic method of limiting discovery to what's really needed. But that may be a chimera, at least if sought by rule. Moreover, cost allocation probably won't do much to deter the really bad actors, to the extent they exist. And cost allocation would be a new and significant additional burden for the courts; it would not save them time or energy.

Another attorney agreed that the review of past rulemaking experiences on this subject is a good reminder that many people will react strongly based on their perceived advantage or disadvantage. "It all depends on where you are sitting." The real challenge is whether the existence or extent of this problem can be objectively identified. We will need to focus on whether a rule change can provide needed focus. One size fits all won't serve here. An effort to try to draw baselines on costs presents very tough policy issues. Perhaps a rule that distinguishes some types of cases (or exempts them) would raise even tougher policy issues. It will be important to keep in mind that excessive discovery (or responses) impose costs on both sides. At the same time, the commentary during the 1998-99 public comment period

suggests that any change will prompt comments fueled by perceived self-interest. Right now, the realities compel lawyers on both sides of the "v." to think long and hard about how much to seek through discovery. This attorney's inclination is to let the present proposed changes have time to sink in before giving serious thought to something more aggressive on cost-bearing.

These thoughts prompted a question: Had the careful calibration of amount of discovery this attorney reported resulted from rules or from orders like the one used by Judge Grimm, or from other factors such as the simple cost of getting too much information? The answer is that it is not prompted by rules or orders, but rather by the dynamics of contemporary litigation. That leads to voluntary discovery parameters, such as limiting the number of custodians whose materials must be reviewed, and/or limiting the search terms to be used.

Another attorney agreed. "The notion of an asymmetry -- of one-way discovery -- is misleading." Being data-poor is also a cost factor, because one has to rely on discovery and wants only an amount that makes sense and is tailored to the case. "You don't want to be the dog that catches the pick-up truck." Lawyers are acutely aware of this risk in today's environment, but it is very difficult to quantify this concern even on a case-by-case basis. Putting it into a rule would be even more difficult.

Another attorney reacted: Actually, the place where the cost disparity looms largest nowadays is not on cost of production but cost of preservation. That cost can be enormous, but it's not what we are discussing here.

Another attorney agreed that in larger cases this is a fair description of the current situation. But there are a significant number of other cases where fishing expeditions occur often. Mega-cases may actually not be the model we should have in mind.

A judge commented that he agreed with much the attorneys had said. He was not optimistic that a rule could be devised that would be appropriate for the broad range of litigation in federal courts today. It remains unclear where, or how frequently, there are real abuses. And the current amendment package has features that ideally will facilitate identifying and dealing with those cases. It would be important to find out whether the current package can do what it is designed to do. At the same time, cost allocation is something the Committee should examine. And it would be wisest to do this with data instead of anecdotes. It will be important to talk to the FJC about developing data that go beyond anecdotes. Although rule changes in the near term would be premature, careful study would take time and could be initiated soon. True, some may be distressed to see the

Committee even examining this subject, but it is an important one that deserves careful evaluation. In somewhat the same vein, the British experience with costs bears looking at.

A reaction was that the U.K. experience may be significantly different. For example, lawyers there have pushed back against the most recent reforms, seeking to exempt all cases involving claims of more than £1 million. And the U.K. experience is heavily affected by the availability of insurance against the cost of paying the other side's cost bill, and by the success incentive fees allowed there, which are paid by the other side but negotiated between the client and lawyer (who know that the only one who will actually have to pay this fee is the other side).

Another judge noted that there has been very strong support for expanded cost-bearing from some who have commented, and that a hearing was held in Congress on this general subject in December, 2011. The chair of a Subcommittee of the House Judiciary Committee that held this hearing supported inquiry into cost-bearing in a letter to the Committee. It is important for the Committee to be responsive to such interest. The hearing in Congress signifies the breadth of interest in this subject. The suggestion that the Committee should look seriously at the issues is what the Rules Enabling Act contemplates it should do. It may be that we begin with some skepticism about whether or how a useful rule change could be identified, but inaction would be quite difficult to justify. Instead, there seem to be several avenues that offer promise:

(1) It would be good to do a literature search to identify what has been written about the effects of cost-bearing provisions.

(2) It would be good to look carefully at Lord Jackson's study of costs in the U.K. That look should take account, however, of the very significant differences between the U.K. system and ours. It has a "full indemnity" system, very different from the American Rule that each litigant bears its own costs. It consequently has a fairly elaborate and longstanding system of cost masters who apportion costs after the case is over. And (as noted above) the entire handling of these issues has recently been affected by the availability of insurance.

(3) The FJC should be approached. Like other governmental units, it is operating under significant fiscal constraints. We must be cautious about asking for help that would overstretch FJC Research. But perhaps the data from the 2009 closed case survey can be mined to provide some insights, and it would be valuable to try to determine now if there are cost-effective ways to gather data more closely

calibrated to these specific issues.

(4) It might be good to solicit input from outside groups. If we were to proceed with a rule proposal, we could expect those groups to offer their views then. It may be best to try to involve them now, both in terms of what they can offer in the way of data, and (perhaps) in terms of ways to generate more data.

This would not be a wasted effort; even if the result is that the Committee concludes that the current package of amendments sufficiently addresses these concerns, it may be very important for us to have a full explanation of why we reached this conclusion. Without a firm basis in data, we cannot assume that everyone will accept our conclusion.

Another judge asked how we could get beyond the anecdotal. Certainly the 2009 and 1997 closed case studies by the FJC did not show a widespread problem of over-discovery. In the Digital Age in which we now operate, would those results still obtain? It was particularly striking how varied the bar group responses to the 1998-99 proposal proved to be. Two sections of the ABA even came out on different sides of the issue. It would be ideal if there were a way to get input from bar groups and the like on the design of a research effort. We need not follow all proposals, but it is probably more useful to find out about them in advance than only later, when the same sort of thing might be an objection to the data-gathering method actually adopted. On the other hand, it could be that inviting suggestions now about how to design a research effort would prompt more objections later from all those whose suggestions were not followed.

It is not yet time to consider a mini-conference, even though such an event might be extremely helpful if this effort moves forward. For the present, the main issue is what to tell the full Committee at the November meeting. It will be useful then to have a full discussion along the lines of this conference call with the full Committee. It may be useful some time to try to arrange a conference call with U.K. judges experienced in dealing with the issues presented there. Though the institutional attributes of the U.K. system are significantly different from ours, it is likely that proportionality will be the first word out of their mouths. That was the byword of the Lord Woolf reforms in the U.K. in the late 1990s.

Another judge agreed. We should defer serious work on any amendment ideas a reasonable way into the future, in large part to find out how our current package works. And before doing a mini-conference we will need to think about concrete possible amendment ideas. It will be important to make clear then that any such proposals are only intended to be a focus for discussion, and that they are not on their way to inevitable

adoption. In order to have the broadest possible views, it will be important to include those unlikely to embrace the general idea of cost-bearing.

A reaction from an attorney was that reliance on the U.K. system could become a "flash point." To shift to something like that could even rise to the level of requiring a constitutional change. At some point, the intensity of debate might deter clear thought. "Don't issue a call to arms any time soon."

It was noted that Texas has had a rule that appears to embrace cost-bearing for some time; perhaps data could be gathered on the results of that rule. In addition, IAALS has been gathering data on related topics; maybe it has data of the sort we are seeking.

A further caution about avoiding anything that could become a flash point was emphasized. The goal now is to obtain the broadest sort of real data. For the November meeting, the necessary ingredients in the agenda book probably include Prof. Marcus's background memo, the notes on this conference call, and a short memo introducing the issues. There should be sufficient time in November for a full discussion with the full Committee. And before that, perhaps a week or two before the meeting, it would be good for the Subcommittee to confer by phone again to touch bases on where things stand.

INTRODUCTION TO PROPOSALS FOR COST-BEARING PROVISIONS IN THE RULES

Rick Marcus
(Sept. 6, 2013)

The purpose of this memorandum is to provide some additional background for the Sept. 16 exploratory conference call about addressing cost-bearing in the rules. Judge Grimm has already introduced the issues. The goal of this memorandum is to provide some additional background about the way the rules have addressed (or not addressed) these issues, and the reaction in 1998-99 to a proposal then to add a cost-bearing provision regarding disproportionate discovery requests. As an Appendix, the memo includes the public comments on that 1998 proposal.

As things develop on the cost-bearing front, the inquiry into past experience may expand. But as an introduction, some information may be helpful.

1980 amendments -- cost-bearing aspect to discovery conference

In 1978, a proposed set of amendments to the rules was published for public comment. Probably the most prominent among those proposals was a change to Rule 26(b)(1) that was later withdrawn. Also included was a new Rule 26(f), regarding a discovery conference. The Committee Note said that "[i]t is not contemplated that requests for discovery conferences will be made routinely." Instead, counsel were to try to confer among themselves to avoid the need for such a meeting with the judge, and the Note suggested that "[s]anctions may be imposed upon counsel who initiates a request without good cause as well as upon counsel who fails to cooperate with counsel who seeks agreement." It added:

> The Committee is extremely reluctant even to appear to suggest additional burdens for the district court. It proposes the discovery conference for the exceptional case in which counsel are unable to discharge their responsibility for conducting discovery without intervention by the court. In such a case, early intervention by the court appears preferable to a series of motions to compel or to limit discovery.

So this was a very different creature from the Rule 26(f) conference we know today, which is to occur in most cases and be followed by entry of the scheduling order. Indeed, neither the proportionality provisions nor the requirement of more active judicial management (both added in 1983) were yet in the rules.

The 1980 version of Rule 26(f) included the following provisions:

> Following the discovery conference, the court shall enter an order identifying the issues for discovery purposes, establishing a plan and schedule of discovery, setting limitations upon discovery if any, and determining such other matters, including the allocation of expenses, as are necessary for the proper management of discovery in the case.
>
> The court may exercise powers under Title 28 U.S.C. § 1927 and Rule 37(e) to impose sanctions for the failure of a party or counsel without good cause to have cooperated in the framing of an appropriate discovery plan by agreement.

These particular features did not receive attention in the Committee Note, but it should be apparent that the thrust was that the entire discovery conference apparatus was to apply only to exceptional cases. See Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, 77 F.R.D. 613, 624-25 (1978).

The initial public reaction to the Rule 26(b)(1) scope proposal was quite vigorous, and the Advisory Committee published a revised package in 1979 that omitted that amendment but retained the new Rule 26(f). See Revised Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, 80 F.R.D. 323 (1979). For more general background, see Marcus, Discovery Containment Redux, 39 Bos. Col. L. Rev. 747, 756-60 (1998).

The 1979 Committee Note still said that "[i]t is not contemplated that requests for discovery conferences will be made routinely," and it added the following (which may indicate that feedback from the first round of public comment suggested greater receptivity on the bench to the idea of supervising discovery):

> A number of courts routinely consider discovery matters in preliminary pretrial conferences held shortly after the pleadings are closed. This subdivision does not interfere with such a practice. It authorizes the court to combine a discovery conference with a pretrial conference under Rule 16 if a pretrial conference is held sufficiently early to secure judicial intervention to prevent or curb abuse.

The 1979 Rule 26(f) proposal was adopted as published. See Amendments to the Federal Rules of Civil Procedure, 80 F.R.D. 521 (1980). Justice Powell, joined by Justices Stewart and Rehnquist, dissented from the adoption of the amendment package, not because there was anything wrong with these "modest amendments," id. at 523, but rather because they did not do enough. Justice Powell argued that "the changes embodied in the amendments fall short of those needed to accomplish reforms in civil litigation that are long overdue." Id. at 521. He added

(id. at 523):

> Lawyers devote an enormous number of "chargeable hours" to the practice of discovery. We may assume that discovery usually is conducted in good faith. Yet all too often, discovery practices enable the party with greater financial resources to prevail by exhausting the resources of a weaker opponent. The mere threat of delay or unbearable expense denies justice to many actual or prospective litigants. Persons or businesses of comparatively limited means settle unjust claims and relinquish just claims simply because they cannot afford to litigate. Litigation costs have become intolerable, and they cast a lengthening shadow over the basic fairness of our legal system.

So far as I am aware, the 1980 discovery conference was not much used, and the cost-allocation provisions even less used. So this is a cost-bearing model that was intended for the exceptional case and was not much used in such cases.

1983 -- Proportionality and case management

In 1983, further amendments implemented much of what we find now in the rules regarding case management; the Rule 16 changes that continue to this day (with revisions) were installed then. In addition, the 1983 amendments introduced into Rule 26 the concept of proportionality.

Not too long after the new rules became effective, Magistrate Judge Wayne Brazil (soon to become a member of the Advisory Committee) gave voice to the goal of proportionality in In re Convergent Technologies, 108 F.R.D. 328, 331 (N.D. Cal. 1985):

> Discovery is not now and never was free. Discovery is expensive. The drafters of the 1983 amendments to sections (b) and (g) of Rule 26 formally recognized that fact by superimposing the concept of proportionality on all behavior in the discovery arena. It is no longer sufficient, as a precondition for conducting discovery, to show that the information sought "appears reasonably calculated to lead to the discovery of admissible evidence." After satisfying this threshold requirement counsel also *must* make a common sense determination, taking into account all the circumstances, that the information sought is of sufficient potential significance to justify the burden the discovery probe imposes, that the discovery tool selected is the most efficacious of the means that might be used to acquire the desired information (taking into account cost effectiveness and the nature of the information being sought), and that the timing of the probe is sensible, i.e., that there is no

other juncture in the pretrial period when there would be a clearly happier balance between the benefit derived from and the burdens imposed by the particular discovery effort.

This articulation of the responsibilities counsel must assume in conducting or responding to discovery may make it appear that the 1983 amendments require counsel to conduct complex analyses each time they take action in the discovery arena. Not so. What the 1983 amendments require is, at heart, very simple: good faith and common sense.

1993 amendments
Initial disclosure and routine
Rule 26(f) conferences

In 1991, the Advisory Committee published another package of amendment proposals. Included were a proposed initial disclosure requirement and a new Rule 26(f) (replacing the 1980 version) that directed the parties to meet and confer in most cases to formulate a discovery plan that they would then submit to the court as part of the Rule 16 case management effort. As most are likely to recall, the initial disclosure proposal provoked a strong reaction. For discussion, see Marcus, Of Babies and Bathwater: The Prospects for Procedural Progress, 59 Brook. L. Rev. 761, 805-12 (1993) (describing the initial disclosure controversy).

1998 cost-bearing proposal

In 1996, the Advisory Committee inaugurated its Discovery Project, which was intended to undertake a comprehensive review of discovery issues. After considerable study (including a mini-conference at Hastings in January, 1997, and a two-day conference at Boston College in September, 1977, and based on an extensive study of recently closed cases by FJC Research), the Advisory Committee produced a package of amendment proposals that was published for public comment in 1998. Among those proposals was the revision of Rule 26(b)(1) into essentially its present form (now proposed to be changed again in the package of proposed amendments published in August).

The published package included a proposal to add the following provision to Rule 34(b):

> On motion under Rule 37(a) or Rule 26(c), or on its own motion, the court shall -- if appropriate to implement the limitations of Rule 26(b)(2)((i), (ii), or (iii) [current Rule 26(b)(2)(C)(i), (ii), and (iii)] -- limit the discovery or require the party seeking discovery to pay part or all of the reasonable expenses incurred by the responding party.

Preliminary Draft of Proposed Amendments to the Federal Rules of

Civil Procedure and Evidence, 181 F.R.D. 18, 65-66 (1998).

The Committee Note accompanying this proposal provided (id. at 89-91):

> The amendment makes explicit the court's authority to condition document production on payment by the party seeking discovery of part or all of the reasonable costs of that document production if the request exceeds the limitations of Rule 26(b)(1)(i), (ii), or (iii). This authority was implicit in the 1983 adoption of Rule 26(b)(2), which states that in implementing its limitations the court may act on its own initiative or pursuant to a motion under Rule 26(c). The court continues to have such authority with regard to all discovery devices. If the court concludes that a proposed deposition, interrogatory, or request for admission exceeds the limitations of Rule 26(b)(2)(i), (ii), or (iii), it may, under authority of that rule and Rule 26(c), deny discovery or allow it only if the party seeking it pays part or all of the reasonable costs.
>
> This authority to condition discovery on cost-bearing is made explicit with regard to document discovery because the Committee has been informed that in some cases document discovery poses particularly significant problems of disproportionate cost. Cf. Rule 45(c)(2)(B) (directing the court to protect a nonparty against "significant expense" in connection with document production required by a subpoena). The Federal Judicial Center's 1997 survey of lawyers found that "[o]f all the discovery devices we examined, document production stands out as the most problem-laden." T. Willging, J. Shapard, D. Stienstra & D. Miletich, Discovery and Disclosure Practice, Problems, and Proposals for Change, at 36 (1997). These problems were "far more likely to be reported by attorneys whose cases involved high stakes, but even in low-to-medium stakes cases . . . 36% of the attorneys reported problems with document production." *Id* at 35. Yet it appears that the limitations of Rule 26(b)(2) have not been much implemented by courts, even in connection with document discovery. See 8 Federal Practice & Procedure § 2008.1 at 121. Accordingly, it appears worthwhile to make the authority for a cost-bearing order explicit in regard to document discovery.
>
> Cost-bearing might most often be employed in connection with limitation (iii), but it could be used as well for proposed discovery exceeding limitation (i) or (ii). It is not expected that this cost-bearing would be used routinely; such an order is only authorized when proposed discovery exceeds the limitations of subdivision (b)(2). But it cannot be said that such excesses might occur only in certain types of cases; even in "ordinary" litigation it is

possible that a given document request would be disproportionate or otherwise unwarranted.

The court may employ this authority if doing so would be "appropriate to implement the provisions of Rule 26(b)(2)(i), (ii), or (iii." In any situation in which a document request exceeds these limitations, the court may fashion an appropriate order including cost-bearing. When appropriate it could, for example, order that some requests be fully satisfied because they are not disproportionate, excuse compliance with certain requests altogether, and condition production in response to other requests on payment by the party seeking the discovery of part or all of the costs of complying with the request. In making the determination whether to order cost-bearing, the court should ensure that only reasonable costs are included, and (as suggested by Rule 26(b)(2)(iii)) it may take account of the parties' relative resources in determining whether it is appropriate for the party seeking discovery to shoulder part or all of the cost of responding to the discovery.

The court may enter such a cost-bearing order in connection with a Rule 37(a) motion by the party seeking discovery, or on a Rule 26(c) motion by the party opposing discovery. The responding party may raise the limits of Rule 26(b)(2) in its objection to the document request or in a Rule 26(c) motion. Alternatively, as under Rule 26(b)(2), the court may act on its own initiative, either in a Rule 16(b) scheduling order or otherwise.

The invitation for public comment offered an alternative provision to be inserted directly into Rule 26(b)(2) (id. at 37):

The court shall limit the frequency or extent of use of the discovery methods otherwise permitted under these rules and by any local rule ~~shall be limited by the court~~, or require a party seeking discovery to pay part or all of the reasonable expenses incurred by the responding party, 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 burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.

The invitation for comment also offered the following explanation for this alternative to the Rule 34(b) proposal (id.

at 38):

> There are two arguments for inclusion of this cost-bearing provision in Rule 26(b)(2). First, as a policy matter it is more evenhanded and complete to include the provision there. Treatment in Rule 34(b) may be seen as primarily benefitting defendants, who are usually the parties with large repositories of documentary information. Depositions, on the other hand, may be exceedingly burdensome to plaintiffs, and the placement of the provision in Rule 26(b)(2) would make explicit its application to other forms of discovery, including depositions.
>
> Second, as a matter of drafting, the cost-bearing provision fits better in Rule 26(b)(2). Including it in Rule 34(b) creates the possibility of a negative implication about the power of the court to enter a similar order with regard to other types of discovery. The draft Committee Note to Rule 34(b) tries to defuse that implication, but this risk remains. Moreover, there is a dissonance between Rule 26(b)(2), which says that if there is a violation of (i), (ii), or (iii) the discovery shall be limited, and Rule 34(b), which says it does not have to be limited if the party seeking discovery will pay. It is true that, in a way, this dissonance points up the apparent authority to enter such an order under the current provision with regard to other types of discovery, but that is also another way of recognizing the tension that dealing with the problem in Rule 34(b) creates.

As noted above, the summaries of the resulting public commentary are included as an Appendix.

After the public comment period, the Advisory Committee decided to include the cost-bearing provision in Rule 26(b)(2) rather than Rule 34(b), and the Standing Committee approved it for submission to the Judicial Conference, but the Judicial Conference removed it from the package of amendments that went into effect in 2000. See the Communication from the Chief Justice to Congress transmitting the 2000 amendments to the rules, 192 F.R.D. 340 (2000), including the Memorandum from Judge Paul Niemeyer to Judge Anthony Scirica, 192 F.R.D. 354, 360 n.* (2000) ("At its September 15, 1999, session the Judicial Conference of the United States did not approve the proposed cost-bearing provision").

Rule 26(b)(2)(B) in 2006

In 2006, Rule 26(b)(2)(B) was added to address discovery of sources of electronically stored information that are not reasonably accessible due to burden or cost. Even if the showing is made that the sources are not reasonably accessible, the party

seeking discovery may ask the court to order production by showing good cause. The rule adds that: "The court may specify conditions for the discovery." The Committee Note explains:

> The good-cause inquiry and consideration of the Rule 26(b)(2)(C) limitations are coupled with the authority to set conditions for discovery. The conditions may take the form of limits on the amount, type, or sources of information required to be accessed and produced. The conditions may also include payment by the requesting party of part or all of the reasonable costs of obtaining information from sources that are not reasonably accessible. A requesting party's willingness to share or bear the access costs may be weighed by the court in determining whether there is good cause. But the producing party's burdens in reviewing the information for relevance and privilege may weigh against permitting the requested discovery.

Current Rule 26(c) proposal

It seems worth noting that our current proposed amendment package includes an amendment to Rule 26(c)(1)(B) to authorize that a protective order issued for good cause could include a provision "specifying terms, including time and place or the allocation of expenses, for the disclosure or discovery." The draft Committee Note observes:

> Rule 26(c)(1)(B) is amended to include an express recognition of protective orders that specify terms allocating expenses for disclosure or discovery. Authority to enter such orders is included in the present rule, and courts are coming to exercise this authority. Explicit recognition will forestall the temptation some parties may feel to contest this authority.

* * * * *

Going forward, we will address new issues as well as enduring ones. But familiarity with prior experience, at least in general terms, seems useful.

APPENDIX

Summary of public comments on proposed
cost-bearing amendment to Rule 34(b)
1998-99

8. Rule 34(b)

(a) General desirability

Comments

Alfred W. Cortese, 98-CV-001: (See Rule 26(a)(1) for list of organizations represented) Supports the addition of explicit cost-bearing provisions.

N.Y. St. Bar Assoc. Comm. & Fed. Lit. Sec, 98-CV-012: This change is unnecessary and misleading. The authority to shift costs already exists under Rule 26(b)(2). Thus, there is no real change. The Section disagrees with the assertion that Rule 26(b)(2) has rarely been applied, citing four cases. The FJC Study found that document requests generated the largest number of discovery problems, but these were not generally in the overproduction area. Thus, if there were a change it would not address the problems identified. The FJC Survey does not show that the cost of document production is a problem; even in the high-stakes cases in which such costs are relatively high, they are commensurate with the stakes involved. Moreover, the proposed amendment is unclear on what costs may be shifted. If attorneys' fees, client overhead and the like are included, the proposal involves funding an adversary's case.

Maryland Defense Counsel, Inc., 98-CV-018: Supports the proposed amendment. Document production is not only the most expensive, but also the most institutionally disruptive aspect of discovery for the clients represented by this organization's lawyers. Suggests that the Note stress that an outright bar on proposed discovery often may be preferable to simply shifting its overtly quantifiable costs.

J. Ric Gass, 98-CV-031: (individually and as President of Fed. of Ins. & Corp. Counsel) "The burden of the cost of production of documents should be on the party initiating the request. That burden will make 'discovery initiators' think before making abusive document requests."

Assoc. of the Bar of the City of N.Y., 98-CV-039: Endorses the change, so long as either the rule itself or the Committee Note makes it clear that the power granted should be applied only in the unusual or exceptional case. This is consistent with the general trend of making discovery more efficient. It would give the party requesting discovery an incentive to limit requests and

lessen the financial burden on the producing party. But the provision should be used only in the unusual or exceptional case. Liberal application of the proposed rule would unfairly tilt the playing field in favor of litigants with larger financial resources.

James A. Grutz, 98-CV-040: Opposes the change. If costs become onerous, a litigant can request the court's aid. The provision is unnecessary.

Thomas J. Conlin, 98-CV-041: Opposes the change. If a document request is excessive, it should be limited in accordance with the current rules. The court already can protect parties against excessive expenses, and it should not be permitting or requiring a response to excessive requests even if the requesting party has to pay some of the cost.

John Borman, 98-CV-043: Opposes the change. It deters parties seeking discovery from being aggressive in pursuing information, and it will encourage responding parties to employ this new device to resist. It places the burden of proving that the benefit of the discovery sought outweighs its burden or expense on the party who does not even know what is in the material.

Michael J. Miller, 98-CV-047: This proposal will be used as a weapon by corporations who seek to prevent the discovery of relevant information under the guise of cost.

ABA Section of Litigation, 98-CV-050: Supports the proposal because it encourages courts to overcome their reluctance to apply existing limitations on excessive discovery, and it offers courts an alternative when they view a complete denial of excessive discovery as too harsh. The cost-bearing proposal will not deter legitimate discovery because, by definition, it applies only when a document demand exceeds the limitations of Rule 26. The court's power to shift these costs is already implicit in Rule 26(c). The Antitrust Section opposes this proposal because it believes that it could create a new standard for discovery that is dependent an a party's financial ability to pay for discovery as opposed to the current standard based on relevance, etc. Because of this important concern, the Litigation Section suggests that the Note urge that the courts be particularly sensitive to this issue.

Richard L. Duncan, 98-CV-053: Opposes this proposal. It will create more litigation.

Charles F. Preuss, 98-CV-060: Supports this explicit authorization to impose part or all of the costs of document discovery that exceeds the limits of Rule 26(b)(2).

Lawyers' Club of San Francisco, 98-CV-061: The probable impact

of the proposed amendment would be to increase the prevalence of cost-bearing orders. Doing so would increase financial disincentives for individuals to conduct litigation against corporate and institutional defendants. As such, it would impede and restrict discovery unnecessarily by individual claimants.

Jay H. Tressler, 98-CV-076: Applauds this proposal.

E.D.N.Y. Comm. on Civil Lit, 98-CV-077: Opposes the proposal. The provision is unnecessary, because the courts already have the power to do this. At the same time, cost-bearing is not to be applied routinely. Given these two propositions, the Committee can't comprehend the benefit of the amendment. More generally, the Committee would favor a direct limitation on discovery as opposed to cost-shifting, which may favor deep-pocket litigants. It might even further use of discovery to harass.

Michael S. Allred, 98-CV-081: Opposes the change. This is biased in favor of not making discovery, but gives no remedy if discovery is unjustifiably refused.

Amer. Coll. of Trial Lawyers Fed. Cts. Comm., 98-CV-090: Supports the change. Document production is where the most serious problems currently are found. It is appropriate that if a party wishes to pursue broad and unlimited forms of document production, it should pay the reasonable expenses that result.

National Assoc. of Consumer Advocates, 98-CV-120: Opposes the change. It will lead to additional delay, ancillary litigation, and increased costs. Objections by defendants that document production costs too much are full of sound and fury but not based on valid concerns. Usually the parties can reach an equitable solution to the costs of document production. If that doesn't happen, the current rules provide adequate tools for the problem. Since this is a power the courts already have under Rule 26(c) and 26(b)(2), the change is not needed. It may cause judges to cast an especially jaundiced eye on requests for documents, above and beyond the limits that already exist. Because defendants have most of the documents in the cases handled by N.A.C.A. members, this change will have a disparate impact on plaintiffs.

National Assoc. of Railroad Trial Counsel, 98-CV-155: Supports the changes. They will assist the trial court in controlling discovery abuses in document production.

Chicago Chapter, Fed. Bar Ass'n, 98-CV-156: Endorses the change. Courts already have the power to do this, but there is no harm in saying so expressly.

Federal Practice Section, Conn. Bar Ass'n, 98-CV-157: Endorses the rule, understanding it to say that everything beyond the

"claims and defenses" scope would be allowed only on payment of costs.

Penn. Trial Lawyers Ass'n, 98-CV-159: Supports the amendment as written because it permits the court to reasonably limit discovery and gives the judge discretion to extend the limits on a good cause showing, providing that the cost is to be borne by the party seeking discovery.

Richard C. Miller, 98-CV-162: Opposes the change. It "strikes at the heart of our juridical system by eliminating access to justice." Defendants already have an incentive to draw things out and increase expense to defeat claims. This change will magnify that tendency.

William C. Hopkins, 98-CV-165: The cost shifting proposal means that plaintiffs will face a price tag on the first discovery request. This is not desirable.

Timothy W. Monsees, 98-CV-165: He is afraid this will extend to more than simple copying costs, which no one has a problem with paying. He envisions getting a bill for a couple of thousand dollars for defendants to hire people to search their records. Why should a party have to pay for production of relevant material?

Mary Beth Clune, 98-CV-165: This change would be very unfair to plaintiffs. In employment cases, the defendant has all the documents, and such defendants often produce files of meaningless documents in an effort to bury the relevant documents. Requiring the plaintiff to finance the "reasonable expenses" of discovery will likely lead to abuse by defendants.

Frederick C. Kentz, III, 98-CV-173: (Gen. Counsel, and on behalf of, Roche) Supports the change. In pharmaceutical litigation, plaintiffs routinely seek discovery of all reported adverse events, clinical trials and other documents not relevant to the core issues in the case. It would be preferable if the discovery of these materials were not permitted. The company strongly opposes cost shifting with respect to depositions. The appropriate cost control measure there is to limit the duration of the deposition.

Gary M. Berne, 98-CV-175: The change is unnecessary, for courts already have the authority to take needed measures. The FJC report shows that the main problem is not overproduction, but failure to produce, which the amendments don't address.

Public Citizen Litigation Group, 98-CV-181: Does not support. The rule provision is not needed, and may lead to the incorrect negative inference that cost-bearing is only authorized in connection with document discovery.

Association of Trial Lawyers of America, 98-CV-183: Opposes the change. ATLA generally opposes proposals to institute cost-shifting measures as leading to abrogation of the American Rule that parties bear their own costs of litigation. Even if the proposal only makes explicit authority that was already in the rules, it appears a move in the wrong direction.

James B. Ragan, 98-CV-188: Concerned about the proposed change. It purports to shift the burden to the party seeking discovery in some instances. In fact, this should be a situation that never occurs. Rule 26(b)(2) directs the court to limit excessive discovery, so the circumstance identified in the proposed amendment should not happen.

Ohio Academy of Trial Lawyers, 98-CV-189: Opposed. This is not needed, since the court already has the power under Rule 37 to impose this sanction.

Hon. Carl J. Barbier (E.D. La.), 98-CV-190: Although the Committee Note says that this cost-shifting should not be a routine matter, this will certainly result in additional motions to determine in any particular case whether or not the costs should be shifted to the requesting party.

Philadelphia Bar Assoc., 98-CV-193: Supports the amendment. Placing an explicit cost-bearing provision in Rule 34 might clarify and reinforce the judge's ability to condition discovery on payment of costs. This might encourage more negotiation and cooperation in cases where large document productions are involved.

James C. Sturdevant, 98-CV-194: The Committee does not say that this authority is only to be used in "extraordinary" cases or "massive discovery cases." There is a very real potential that it will be invoked in many cases to support cost-bearing, which would be undesirable. The courts already have adequate authority to deal with abuse.

Maryland Trial Lawyers Assoc., 98-CV-195: Urges rejection. Often the injured party is at an economic disadvantage to the opposing entity, which is usually insured. Coupled with the limitation of disclosure to supporting information, this change will work a harsh result. It is unnecessary and unduly restrictive.

James B. McIver, 98-CV-196: (98-CV-203 is exactly the same as no. 196 and is not separately summarized) This will have the effect of harming victims, consumers, and other plaintiffs.

Lawyers' Committee for Civil Rights Under Law, 98-CV-198: Opposes the change. This will establish what some judges will view as a presumption that documents should only be produced on payment of

the other party's costs of production. It would also establish a two-track system of justice based on wealth.

Trial Lawyers for Public Justice, 98-CV-201: Courts already have this power, and the proposal is therefore redundant. But the signal to judges is obviously that they should impose sanctions more frequently against parties who ask for too much information, and that they have not imposed such sanctions with sufficient regularity in the past. This will strengthen the hands of defendants and encourage stonewalling.

Minn. State Bar Assoc. Court Rules and Admin. Comm. Subcommittee on Federal Rules, 98-CV-202: Supports the change.

Sharon J. Arkin, 98-CV-204: Opposes the change. The defense deliberately engages in dump truck tactics. If this change is adopted, the rules will impose on the consumer the obligation to pay for the costs of such productions, and they will be further victimized by corporate defendants.

Nicholas J. Wittner, 98-CV-205: (on behalf of Nissan North America) Supports the proposal. It will reduce needless discovery requests and related expense.

F.B.I., 98-CV-214: Supports the change.

Michigan Trial Lawyers Assoc., 98-CV-217: Opposes the proposal. Courts already have the power to impose this sanction. But making it explicit in the rules will send a signal to judges to impose sanctions more frequently. This will encourage responding parties to stonewall.

Stuart A. Ollanik, 98-CV-226: A general rule promoting cost-shifting is an invitation to evidence suppression. It will be in the responding party's best interests to exaggerate the cost of production, in order to make access to relevant information prohibitively expensive. It will be one more tool for hiding the facts.

Jon B. Comstok, 98-CV-228: This is an excellent idea. He realizes it is somewhat redundant because the authority already exists in Rule 26. But it is laudable to make modifications that will somehow get the judge to become more involved in discovery.

Edward D. Robertson, 98-CV-230: Opposes the proposal. It is a first, and ill-advised, step by the representatives of corporate America toward the English system that requires losers to pay. Defendants are the primary violators of reasonable discovery and the chief advocates of discovery limitation. If the proposed rule is adopted defendants will file for costs to pay for their excessive responses to reasonable discovery requests.

Martha K. Wivell, 98-CV-236: The rule is unnecessary because there is already authority to do this. Nonetheless, defendants will seek to shift costs in almost every products liability case, for they always say the costs are too high. Then the proof of the benefit of discovery is placed on the party who does not even know what there is to be discovered.

Jeffrey P. Foote, 98-CV-237: Opposes the change. This will simply lead to further litigation.

Eastman Chem. Corp., 98-CV-244: Strongly favors the amendment. It notes, however, that a better course would be forbidding discovery altogether.

Anthony Tarricone, 98-CV-255: Opposes the change. There is no need to revise the rule in this manner.

New Mexico Trial Lawyers Ass'n, 98-CV-261: Finds the change troublesome. It appears to be an invitation to increased litigation about what constitutes an excessive request.

Robert A. Boardman, 98-CV-262: (Gen. Counsel, Navistar Int'l Corp.) The cost-bearing provision will hopefully encourage a litigant to think twice before requesting every conceivable document, no matter how attenuated its relevancy. Navistar has been an easy target for burdensome discovery about information remote in time from the events in suit.

U.S. Dep't of Justice, 98-CV-266: Because this proposal reinforces the proposed amendment to Rule 26(b)(1) limiting access to information relevant to the "subject matter of the litigation," it is subject to the same concerns the Department presented about that change. The Department would be less concerned about the proposed change to Rule 34 if the "subject matter" standard of current Rule 26(b)(1) were retained. Thus, if the current Rule 26(b)(1) is retained, and if the proposed amendment retains its reference to Rule 26(b)(2)(i)-(iii), the Department supports this proposal.

Courts, Lawyers and Administration of Justice Section, Dist. of Columbia Bar, 98-CV-267: The Section agrees with this proposal. The Committee should make it clear, however, that the change is not intended to change the standard that judges should apply in deciding whether to condition discovery on payment of reasonable expenses.

Federal Magistrate Judges Ass'n Rules Committee, 98-CV-268: The Committee supports the amendment. It is apparent that the court already has this power, but the amendment makes the authority clear. Perhaps even more beneficial is the Committee Note, which provides considerable guidance to everyone as to when and how these costs may be assessed.

Thomas E. Willging (Fed. Jud. Ctr.), 98-CV-270: Based on a further review of the data collected in the FJC survey, prompted by concerns about the potential impact of cost-bearing on civil rights and employment discrimination litigation, this comment reports the results of the further examination of the FJC survey data. It includes tables providing the relevant data in more detail, and generally provides more detail than can easily be included in a summary of this sort. The study found "few meaningful differences between civil rights cases and non-civil rights cases" that might bear on the operation of proposed Rule 34(b). Discovery problems and expenses related to those problems differed little between the two groups of cases, and the percentage of document production expenses deemed unnecessary, and document production expenses as a proportion of stakes, were comparable in both sets of cases (civil rights and non-civil rights). The differences that were observed included that defendants in non-employment civil rights cases were more likely to attribute discovery problems to pursuit of discovery disproportionate to the needs of the case; civil rights cases had a modestly higher proportion of litigation expenses devoted to discovery; nonmonetary stakes were more likely to be of concern to clients in civil rights cases; and total litigation expenses were a higher proportion of stakes in civil rights cases (but stakes were considerably lower in such cases). Complex cases have higher expenses than non-complex cases, but for complex civil rights cases the dollar amounts of discovery expenses, especially for document production, were far lower than in complex non-civil rights cases. Overall, the report offers the following observations: "First, because discovery and particularly document production expenses are relatively low in complex civil rights cases, defendants would have less room to argue that a judge should impose cost-bearing or cost-sharing remedies on the plaintiff. Second, our finding that total litigaton expenses were a higher proportion of litigation stakes in civil rights cases may give defendants some basis for arguing that discovery requests are disproportionate to the stakes in the case and that cost-bearing or cost-sharing should be ordered. On the other hand, our finding that nonmonetary stakes are more likely to be of concern in civil rights cases may give plaintiffs a counterargument in some cases. Third, one might read our finding that defendants are more likely to attribute discovery problems to pursuit of disproportionate discovery as suggesting that defendants' attorneys will look for opportunitites to act on that attribution by moving for cost-bearing remedies."

Testimony

Baltimore Hearing

Robert E. Scott, Jr., prepared stmt. and Tr. 4-18: (president of Defense Research Institute and representing it) This is a

positive step, giving litigants the opportunity to obtain items to which they are not entitled by right under Rule 26(b)(2) by paying the costs of production. This will not shift the costs of document discovery related to the core allegations of the case, but recognizes that the court should not allow expansive discover on tangential matters without consideration of reallocating the costs and burdens involved in ordering production.

Allen D. Black, prepared stmt. and Tr. 18-30: Opposes the change. This will favor well-heeled litigants, whether plaintiffs or defendants. It thus runs against the basic democratic underpinnings of the American judicial system. It will also add a new layer of litigation to a substantial number of cases--to determine who should pay what portion of the costs of document production. Yet the proposal provides no standards whatsoever to guide the court's decision about whether and how to shift these discovery costs. The invocation of Rule 26(b)(2) aggravates the problem because it contains no objective standard and instead asks the court to make an impossible prediction concerning the potential value of the proposed discovery. Virtually every producing party will argue vehemently that the burdens and costs outweigh the possible benefit of the proposed discovery. Should the court take evidence on the likely cost of discovery to decide these disputes? Even if it could do that, how could it determine the "likely benefit" of proposed discovery? This will produce a whole new layer of litigation about who will pay and how much. (Tr. 25-26)

Robert Klein (Tr. 45-58): (on behalf of Maryland Defense Counsel) Supports the change. The policy of proportionality has been overlooked, and this should re-awaken the parties to the existence of this limitation on discovery. Notes that document discovery is the only type of discovery that cannot have numerical limitations. Interrogatories and depositions do in the national rules, and requests for admissions can be limited by local rule, but not document requests.

F. Paul Bland, Tr. 89-106: (on behalf of Trial Lawyers for Public Justice) Opposes the proposal. The authority already exists without the change. The goal, then, is again to send a signal that the problem judges should address is over-discovery even though the evidence does not support that concern.

Prof. Edward D. Cavanaugh, prepared stmt. and Tr. 116-26: Opposes the change. Courts already have this power, and the Committee Note acknowledges that the power is not to be used routinely. He would favor a direct limitation on discovery as opposed to a cost-shifting limitation.

Stephen G. Morrison, prepared stmt. and Tr. 126-42: Supports the proposal. Believes that emphasis on the proportionality provisions is essential since they have been overlooked or

misapplied in the past. Believes that the impecunious plaintiff argument is specious. In his entire career as a defendant's lawyer, he has never encountered a case in which a plaintiff in a personal injury case reimbursed counsel for costs in an unsuccessful case. The real issue is that this is an investment decision for counsel for plaintiffs, and this is not a violation of professional responsibility rules. This might be different in other sorts of cases -- employment discrimination, for example, with pro se plaintiffs. But in those cases the proposed change allows the judge to take the ability of the plaintiff's side to bear the expense into account. His own experience, however, has been limited to cases involving plaintiffs with lawyers who took the case on a contingency fee basis.

San Francisco Hearing

Maxwell M. Blecher, prepared stmt. and Tr. 5-14: Together with the proposed change to Rule 26(b)(1), this is pernicious and gives a collective message that there should be less discovery to plaintiff at increased cost. The standards set forth in Rule 26(b)(2) are so vague that the court can't sensibly apply them. Moreover, if costs are shifted and the documents contain a "silver bullet" there should be another hearing to seek reimbursement. This is not worth it. The basic message is that even if plaintiff manages to persuade the judge to expand discovery to the subject matter scope, plaintiff must pay for the additional discovery to that point. He has nothing against making plaintiff pay if the specific discovery foray is unduly expensive. For example, if defendant usually has e-mail messages deleted upon receipt and plaintiff wants to require a hugely expensive effort to locate these deleted messages, there is nothing wrong with presenting plaintiff with the option of paying for that material. But that is different from institutionalizing the process of shifting costs every time plaintiff goes beyond a claim or defense. This is how he reads the current proposal. He feels that the judge could both find that there is good cause and that the plaintiff has to pay for the added discovery. In the real world, judges will be likely to link the two and think that as soon as plaintiff gets beyond claims and defenses it's pay as you go. At present, the limitations of Rule 26(b)(2) are only applied in the most exceptional cases, where a party does a huge and marginal search, such as reconstructing electronic data. But the rule will encourage the same sort of thing in many cases. This will institutionalize a process that is already available today. It will up the stakes in antitrust litigation, which is already very expensive. (Tr. 7-10)

Kevin J. Dunne, prepared stmt. and Tr. 14-23: (President of Lawyers for Civil Justice) This change can work in tandem with the revision of Rule 26(b)(1), and the court could shift costs if it found good cause to allow discovery to the subject matter limit. But courts should be admonished not to assume that a

party is automatically entitled to discovery it will pay for. There are now plaintiffs' law firms which are as wealthy as small corporations, and their willingness to pay should not control whether irrelevant discovery is allowed. The rich plaintiffs' lawyers won't hesitate to put up the money for such discovery forays, so their willingness to pay should not be determinative. They will continue going after the same stuff whether or not they have to pay.

G. Edward Pickle, prepared stmt and Tr. 36-47: (Gen. counsel, Shell Oil Co.) Shell emphatically endorses the proposed change. Document production abuses are at the core of most discovery problems, particularly in larger or more complex matters. Shell strongly urges that the rule or the Note state that "court-managed" discovery on a good cause showing under Rule 26(b)(1) presumptively be subject to cost shifting, absent a showing of bad faith on the part of the responding party.

H. Thomas Wells, prepared stmt. and Tr. 47-60: This change is more of a clarification of the existing rule's intent than a new rule change. The authority has always been present in the existing rule, and the problem is that it was rarely invoked in the manner originally intended. The proposed change adequately recognizes the original intent of the provisions.

Hon. Owen Panner (D. Ore.), prepared stmt. and Tr. 74-87: In every speech he makes to young lawyers or bars, he talks about Rule 26(b)(2) and seldom gets anyone to bring such concerns to him. He likes this change to encourage attention to this. Notes that he had Shell in his court and did not hear from it on this score. (See testimony of G. Edward Pickle, above.)

Larry R. Veselka, Tr. 99-108: Does not see this change as a particular problem. That's the way to solve problems about costs. (Tr. 107-08)

Mark A. Chavez, prepared stmt. and Tr. 108-17: Opposes the change. It would encourage further resistance to discovery, result in extensive litigation over cost-bearing issues, and inhibit plaintiffs from adequately investigating their claims.

Weldon S. Wood, Tr. 140-46: Supports the change. Document production is where the problems are found. Most discovery is reasonable. It is the exceptional case that causes the problems.

Alfred W. Cortese, Jr., prepared stmt. and Tr. 174-82: Because of the enormous cost that litigants can impose on adversaries, it is essential that the rules recognize the power to require a party seeking non-essential, discretionary discovery to bear the cost of it. At the same time, there should be a limit on a party's ability to impose discovery on an adversary just because it is willing to pay the cost of the discovery.

Chicago Hearing

Elizabeth Cabraser, Tr. 4-16: She fears that this change may lead to a repeat of the kind of collateral litigation that occurred under Rule 11, where every motion was accompanied with a motion for sanctions. The courts already have authority to shift costs in cases where it's truly necessary. She believes there is not a large volume of unnecessary discovery, so that this "solution" may be more of a problem than the problem it seeks to solve. She doesn't think that what we now know about discovery of electronic materials shows that some power like this is needed for that sort of discovery. The problem is that too often what's permissive becomes mandatory.

James J. Johnson, Tr. 47-63: (Gen. Counsel, Procter & Gamble) To date he has not found the existing cost-bearing possibilities helpful to Procter because when judges find out that it is a multi-billion dollar company they don't have any interest in shifting any of its substantial costs of document preparation. (For details on these, see supra section 3(a).) This is at the heart of the unevenness of cost between the discovering party and the producing party. This sort of activity takes place even when both sides are large entities with considerable documents to produce. (Tr. 57-58) He suggests that the Note to this rule suggest cost-bearing as an effective tool for discovery management.

Robert T. Biskup, prepared stmt. and Tr. 73-84: (Ford Motor Co.) This is integrally linked with the proposed Rule 26 scope change because it calls for an ex ante determination about the proper allocation of costs. This would avoid the risk of a new brand of satellite litigation, as with Rule 11. If it works the way Ford thinks it should, the fee shifting issue would be before the court at the time that the issue of expanding to the subject matter limit is also before the court.

John Mulgrew, Jr., prepared stmt. and Tr. 98-101: He agrees with the cost-bearing provision. Documentary discovery requests are among the most costly and time-consuming efforts for defendants. For peripheral materials, courts should have explicit authority to condition discovery on cost-bearing.

David C. Wise, Tr. 113-19: There is already a mechanism in place to deal with these problems when they arise. What this change would do would be to send a message to the defendants to make plaintiffs pay for their discovery. And plaintiffs simply can't pay. Companies like Ford aren't paying anything for their document production; they are simply passing the cost along to the consumer. If there were no link to expanding discovery beyond the claims and defenses, suggesting that if expansion occurs the plaintiff must pay, his opposition to the proposed amendment would be less vigorous.

John M. Beal, prepared stmt. and Tr. 119-26: (Chair, Chi. Bar Assoc. Fed. Civ. Pro. Comm.) The CBA has no objections to this amendment.

Bruce R. Pfaff, prepared stmt. and Tr. 126-34: Opposes the change. This will result in motion practice and satellite litigation. The court already has sufficient authority to deal with problems.

Todd Smith, Tr. 134-47: (on behalf of Assoc. of Tr. Lawyers of America) Opposes the change. This is another proposal to impose costs on individuals, and ATLA is opposed to that.

John H. Beisner, prepared stmt. and Tr. 147-54: Without doubt, this is a positive change. But the Note does not go far enough in stressing that there may be circumstances in which a court should say "no" to proposed discovery. The Note should stress that there should be no presumption that the court should authorize discovery that the propounding party wants, even if it will pay for it.

Jonathan W. Cuneo, prepared stmt. and Tr. 160-65: This change will disadvantage plaintiffs and could restrict the types of cases lawyers in small firms like his could undertake. The existing rules provide adequate protections for defendants. There is no reason to provide more.

Lloyd H. Milliken, prepared stmt. and Tr. 211-17: (president-elect of Defense Res. Inst.) Favors the change. This will not be a sword to be held over the plaintiffs' heads or a shield for defendants. The Note is perfectly clear that this is to happen only in extreme cases, where the discovery is essentially tenuous.

Michael J. Freed, prepared stmt. and Tr. 226-35: The proposal will favor litigants, whether plaintiffs or defendants, that have significant financial resources, over other litigants. It will create a new layer of litigation in a significant number of cases. The reference to the standards in Rule 26(b)(2) really provides no guidance on when this authority should be used.

Douglas S. Grandstaff, prepared stmt. and Tr. 245-51: (Senior Lit. Counsel, Caterpillar, Inc.) Although Caterpillar believes that use of Rule 26(b)(2) to bar excessive discovery altogether would be preferable, this change should give judges a tool to put a quick end to incrementally escalating discovery abuses. However, the Note's statement that the court should take account of the parties' relative resources is at odds with the goal of limiting unnecessary and irrelevant discovery. This comment suggests that a party with few resources is entitled to demand discovery beyond the limitations set by Rule 26 at no cost.

Kevin E. Condron, Tr. 259-67: This may be the most meritorious of the proposals. Document discovery is where the cost is, and it should be curtailed if there is no reason for it.

Robert A. Clifford, prepared stmt.: Opposes the change. The court already has powers to deal with abuse, and it is unnecessary to amend the rule in this way.

Thomas Demetrio, prepared stmt.: This is nothing more than a surreptitious attempt to push the cost of litigation so high that individual citizens will not be able to exercise their rights or seek redress for wrongdoing. "Business builds the 'cost' of legal defense into the 'cost of doing business.' That cost is passed on to the consumer. We already bear our share of the burden of defense costs. By requiring individual litigants to bear the cost again, industry gets not only a free ride but a windfall."

John G. Scriven, prepared stmt.: (Gen. Counsel, Dow Chem. Co.) This change is well worth making, but it is important to recognize that many plaintiffs will only be able to pay a fraction, if any,of the attendant financial costs in any event. Accordingly, the Note should stress that the primary goal should be for the judge to carefully scrutinize any discovery beyond the initial disclosure, and that the presumption should be toward barring that discovery.

(b) Placement of provision

Comments

ABA Section of Litigation, 98-CV-050: The Litigation Section favors including the cost-bearing proposal in Rule 26(b)(2) rather than Rule 34. This would avoid the negative implication that cost shifting is not available for all forms of discovery. It would also avoid an otherwise seeming inconsistency with Rule 26(b)(2), which merely permits courts to "limit" discovery, without mentioning the court's power to shift the cost of discovery.

Philip A. Lacovara, 98-CV-163: Supports the change, but would go further. He believes that the change should be in Rule 26 because document discovery is not the only place where problems exist that should be remedied by this method. Even though the Note says that inclusion in Rule 34 does not take away the power to make such an order in relation to other sorts of discovery, there is a significant risk that it will be so read. But he thinks it should be in Rule 26(b)(1), not Rule 26(b)(2), and that it should go hand in hand with decisions to expand to the "subject matter" limit. As the proposals presently read, it would not seem that a court could find good cause to expand, but then conclude that Rule 26(b)(2) is violated. He would therefore add the following to Rule 26(b)(1):

> If the court finds good cause for ordering discovery of information relevant to the subject matter of the action, the court may require the party seeking this discovery to pay part or all of the reasonable expenses incurred by the responding party.

This kind of provision would protect plaintiffs as well as defendants, for plaintiffs are often burdened by excessive depositions. Unless there is some further provision on recovery of these costs, it would seem that some of them might be taxable under 28 U.S.C. § 1920; in that sense, the discovering party's willingness to press forward is a measure of that party's confidence in the merits of its case as well as the value of the discovery.

Prof. Ettie Ward, 98-CV-172: For the reasons expressed in Judge Niemeyer's transmittal memorandum, suggests that any reference to cost-bearing should be in Rule 26(b)(2) rather than Rule 34(b). That placement is more evenhanded, and it fits better as a drafting matter. Including it in Rule 34 appears to favor defendants and deep-pocket litigants. In addition, the standards for shifting costs are not as clear as they would be if the provision were in Rule 26(b)(2).

Public Citizen Litigation Group, 98-CV-181: Does not support.

But if additional language is to be added, favors the alternative proposal to amend Rule 26(b)(2).

Federal Magistrate Judges Ass'n Rules Committee, 98-CV-268: The Committee recommends that the cost-bearing provision be included in Rule 26(b)(2) rather than in Rule 34(b). This would make it explicit that the authority applies to all types of discovery, including depositions. Additionally, placement in Rule 26(b)(2) eliminates the possibility of a negative implicaton about the power of a court to enter a similar order with regard to other types of discovery, notwithtanding the Committee Note that tries to defuse that implication.

Testimony

Baltimore Hearing

F. Paul Bland, Tr. 89-106: (on behalf of Trial Lawyers for Public Justice) Moving the provision to Rule 26(b)(2) would not be desirable, because that would stress the same message. If that would make the message even broader, it would be worse.

Stephen G. Morrison, prepared stmt. and Tr. 126-42: This provision should be in Rule 34 because that's the only type of discovery that creates the serious problem of disproportionate costs. Both sides do depositions, roughly in equal numbers, and so also with interrogatories. But in personal injury cases, one side has documents and the other does not. That's the way it is.

San Francisco Hearing

G. Edward Pickle, prepared stmt and Tr. 36-47: (Gen. counsel, Shell Oil Co.) Placing the cost-shifting provision in Rule 34 rather than Rule 26 places the emphasis where it belongs.

H. Thomas Wells, prepared stmt. and Tr. 47-60: Regarding placement of the provision, in his experience a provision limited to document production would reach the most abusive and expensive discovery problems, and that the rule should be so limited.

Alfred W. Cortese, Jr., prepared stmt. and Tr. 174-82: The placement of this provision in Rule 34 is correct, as opposed to Rule 26. The real need for the provision is in Rule 34.

Chicago Hearing

Robert T. Biskup, prepared stmt. and Tr. 73-84: Rule 34 is the right place for this sort of provision to be, rather than Rule 26. This would avoid the risk of a new brand of satellite litigation, as with Rule 11.

Todd Smith, Tr. 134-47: (on behalf of Assoc. of Tr. Lawyers of America) Because ATLA is adamantly opposed to cost shifting, there was no discussion about whether it might be preferable to put such a provision in Rule 26(b)(2) rather than in Rule 34.

Lorna Schofield, Tr. 193-202: (speaking for ABA Section of Litigation) The Section of Litigation favors that the cost-bearing provision be included in Rule 26 rather than Rule 34. There is already implicit power to make such an order, and if the provision is only explicit in Rule 34 that might support the argument that it can't be used for other types of discovery.

Rex K. Linder, prepared stmt.: Suggests that the provision should be included in Rule 26(b)(2), for it should be readily applicable to all discovery and will correspond to the concept of proportionality. It implicitly exists already under Rule 26(b)(2), and there seems no logical reason not to make it express.

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APPELLATE-CIVIL SUBCOMMITTEE REPORT: MANUFACTURED FINALITY

The two projects of the Appellate-Civil Subcommittee reported here began in the Appellate Rules Committee. As often happens, potential solutions to problems identified by the Appellate Rules Committee seem to lie as much in the Civil Rules as in the Appellate Rules. Joint subcommittees have proved invaluable in focusing the work of both committees.

Both of the present topics have lingered for some time. Manufactured finality was considered in some depth by an earlier Subcommittee. The provisions of Rule 62 addressing stays of execution pending post-judgment motions and appeal have been considered in the Appellate Rules Committee and then transferred to the Subcommittee. Manufactured finality is discussed here. Rule 62 comes next.

"Manufactured finality" refers to attempts to accelerate the time when an appeal can be taken following an interlocutory ruling that is not independently appealable under any other elaboration of the final decision requirement of 28 U.S.C. § 1291 or under the statutes that permit interlocutory appeals.

Many circumstances may lead a party to prefer an immediate appeal to test an interlocutory order that is not appealable without more. A few common illustrations set the stage. A plaintiff may have several demands for relief. An order dismissing some of them may leave only fragments that, standing alone, do not seem to warrant the costs and uncertainties of continuing litigation. Even if the plaintiff can afford to litigate the rest of the way to a final judgment, banking on the prospect that the interlocutory order will be reversed, the cost may be high, and can easily be wasted whether the result on appeal is reversal or affirmance. And delay is an inevitable cost. So too, the court may dismiss some theories that support a single claim, leaving only theories that the plaintiff thinks weaker either as a matter of law or as a matter of available evidence. Or the court may enter an in limine order excluding the most important -- and perhaps indispensable -- parts of the plaintiff’s evidence.

Faced with these, and often enough more complicated circumstances, an attempt may be made to "manufacture" finality by arranging voluntary or stipulated dismissal of all, or substantial parts, of what otherwise remains to be done in the trial court.

Three rough categories of manufactured finality can be identified. Most decisions agree that most of the time a final judgment cannot be manufactured by dismissing without prejudice everything that remains unfinished in the action. Most decisions agree that most of the time a dismissal with prejudice of all

unfinished parts of an action does establish finality. And most circuits reject the approach of "conditional finality" that has been accepted in the Second Circuit and apparently the Federal Circuit. This tactic dismisses all unfinished parts of the action with prejudice, subject to the condition that they can be revived -- the prejudice dissolves -- if the interlocutory orders thus made final are reversed on appeal.

The question whether to propose rules provisions addressing manufactured finality is beset by two major concerns.

One major concern is that the cases have recognized circumstances in which a dismissal without prejudice does achieve appealable finality. A rule that rejects finality for all dismissals without prejudice might come at significant cost. These concerns are reflected in the memorandum attached below.

A related concern is that a rule recognizing that a dismissal with prejudice can achieve finality accomplishes nothing useful. Courts understand that now. A rule that states that only a dismissal with prejudice can achieve finality, on the other hand, runs into the same problems as a rule that rejects finality for all dismissals without prejudice.

Discussions of conditional prejudice have tended to divide practicing lawyers from judges. It may be that the division is more accurately described as between practicing lawyers and trial judges on one side and appellate judges on the other. Practicing lawyers believe that a dismissal with conditional prejudice can be a valuable means of achieving finality. Since most appeals lead to affirmance, the opportunity to revive the parts of the action that were dismissed with conditional prejudice will not cause as much risk of repeated appeals in the same action as might be feared. The party who is willing to risk all that remains in the action on the opportunity to win reversal of the interlocutory orders made before the dismissal will be able to continue only if there is reversible error. If the alternative is to persist in litigating to a true final judgment the parts that would be dismissed with conditional prejudice, both the trial court and the opposing party pay a price that is not redeemed even if the eventual appeal leads to affirmance. And those proceedings are likely to become pure waste on reversal of the interlocutory orders that would have been reviewed on a conditional-finality appeal.

Judges (at least appellate judges), on the other hand, fear that dismissals with conditional prejudice will threaten the core values of the final-judgment rule. As with an avowedly interlocutory appeal, the result may be added cost and delay and a risk that the appellate court will have to revisit familiar terrain on a subsequent appeal.

One way of viewing the conditional prejudice issue is to ask whether there is a real need to address it by rules amendments.

There is no indication that the Second Circuit regrets its approach. Apart from the Federal Circuit, the other circuits that have confronted the question refuse to allow manufactured finality on these terms. Is there a need to adopt a rule that prohibits reliance on conditional prejudice by the courts that find it a useful adjustment of the final-judgment rule?

The Subcommittee, building on work by an earlier subcommittee, has discussed these issues at length. The competing arguments on all sides continue to defy confident resolution. Four alternatives are presented for Committee consideration. The Subcommittee does not recommend a choice among them.

The first alternative is to do nothing. The reasons for doing nothing are easily summarized. Most situations are governed by two clear rules that are generally recognized. A voluntary dismissal without prejudice, even if it sweeps away an entire action, does not achieve finality. A voluntary dismissal with prejudice that sweeps away an entire action does achieve finality. Little would be accomplished by adopting a rule that states either or both of these points. And so simple a rule would create a risk of undoing decisions that now recognize finality in circumstances that would not seem to fit within the new rule. The most obvious example is conditional prejudice, discussed further below. Other examples are described in the attached memorandum discussing the choices between simple rules, complex rules, or no rules.

The argument for going ahead with simple rules is direct. It is important to have clear rules of appeal jurisdiction. And uniformity across the circuits is an important component of clarity -- no matter how clear the rules may seem within any particular circuit, disuniformity will encourage attempts to manufacture finality that backfire against sloppy or risk-taking lawyers. This argument, however, is subject to challenge on the ground that no rule text will be so perfect as to exclude all opportunities for interpretation and thus for disuniform interpretation.

The second alternative is to adopt a rule that says only that a plaintiff -- or perhaps any party asserting a claim for relief -- can achieve appeal finality by dismissing with prejudice all claims and parties that remain the action. Although this rule is accepted as a general matter now, recognition in rule text would provide guidance for lawyers who are not expert in the complexities of the final-judgment rule. It also would provide reassurance for lawyers who are familiar with the idea, but feel pressure to confirm their understanding by expensive research.

This simple rule would leave ambiguities at the margin. The clearest example is a dismissal with conditional prejudice. Is that with prejudice or without prejudice? Other examples occur in cases that, on one theory or another, recognize de facto prejudice. One illustration is a dismissal without prejudice in circumstances that seem to preclude any new action because the applicable limitations

period has run. Litigants and lawyers would face new uncertainties in the attempt to reconcile existing decisions with the new rule text.

The third alternative is to adopt a rule that says that only a dismissal with prejudice achieves finality. This rule would actually do something, as compared to a rule that recognizes finality on a dismissal with prejudice but that does not expressly foreclose other means of manufacturing finality. But the ambiguities would remain, and expressly foreclosing all but dismissals with prejudice would raise the stakes of uncertainty.

A fourth alternative is to adopt a rule that recognizes or requires that a voluntary dismissal be with prejudice and that also expressly addresses conditional prejudice. Either answer could be given. Conditional prejudice could be recognized as a valid path to finality. This answer might be adopted in a form that would defer to courts that recognize conditional prejudice now, and leave the choice open for courts that have not expressly rejected it, without requiring other circuits to change their views. That path would leave disuniformity. Instead, the rule might require all courts to recognize conditional prejudice. That path likely would stir significant opposition. Or conditional prejudice could be rejected, not so much because of any sense that it has proved undesirable when recognized as because of a desire to achieve national uniformity. A clear majority of the decisions that address the question reject conditional prejudice. There is no indication that it is frequently used in circuits that do recognize it. Uniformity, on this view, would be achieved at little cost, and indeed would be an added benefit if conditional prejudice is in fact a bad means of achieving finality.

A choice among these alternatives will be influenced by a more general sense of the need to prevent further erosion of the final-judgment rule. The rule is far more complicated than the initial statement that finality requires complete disposition of an entire case, leaving nothing to be done in the trial court apart from execution of a judgment that provides relief. Expansions, exceptions, and occasional evasions are familiar in practice. The complication reflects case-specific, or at times more general, rebalancing of the competing needs that allocate jurisdiction between trial courts and appellate courts. An openly ad hoc approach that allows a court of appeals to assert jurisdiction whenever a present appeal seems a good idea would destroy the balance achieved by a general requirement of finality. But many more restricted qualifications are recognized by statute, court rule, and interpretation of 28 U.S.C. § 1291 itself. The choices are seldom easy. But it may be difficult to identify any general practical losses incurred by ongoing and somewhat divergent approaches to manufactured finality. If so, the more abstract desire for more precise rules in this particular corner of appeal jurisdiction may not be enough to justify the potential costs of more precise rules.

The attachments include several things. Initial sketches of simple rules that ignore all potential complications come first. Next is a memorandum addressing some of the complications of manufactured finality. Notes on three Subcommittee conference calls addressing manufactured finality are set out with Notes on two conference calls addressing stays of execution following the discussion of Rule 62.

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MANUFACTURED FINALITY DRAFTS

These drafts illustrate the narrowed range of approaches that have emerged from Subcommittee discussions. They do not attempt to capture in rule text the subtle distinctions that may be found in some cases. Something might be said in a Committee Note to suggest that flexibility is possible at the margins, but more than a hint of qualifications could derail the project.

One potential approach has been put aside. There is no current enthusiasm for adopting a simple rule stating that a voluntary dismissal without prejudice does not establish an appealable final judgment. That proposition is broadly accepted as a general matter, leaving little to be accomplished by adopting an Enabling Act Rule. A simple rule, moreover, might thwart appeals that have been allowed and that perhaps should remain available. "Constructive" or "de facto" prejudice may be found when other circumstances will prevent a new action, or at least a new action in the federal courts.

A simple rule could recognize that a voluntary dismissal with prejudice establishes an appealable final judgment. That proposition is accepted in many cases, but it could be useful to establish it by a formal rule for the benefit of those who want reassurance or who, absent guidance by rule, would devote substantial effort to determining what the cases say. This approach could be expanded to state that finality can be achieved by a voluntary dismissal only if it is with prejudice. The rule can be kept simple by requiring dismissal of everything -- all claims and all parties -- that remain in the action after the order or series of orders a claimant wishes to appeal. The Committee Note would be simple to write if the rule is intended to close off every variation of manufactured finality that has emerged here or there in the cases. Writing the Note could be more difficult if it seems better to leave some reason for departures.

Conditional prejudice also can be addressed in rule text. If the choice is to prohibit this means of achieving finality, it may be important to add the prohibition to rule text. Otherwise a court that likes the idea could interpret "with prejudice" to include conditional prejudice, perhaps even in defiance of a Committee Note that attempts to insist on unconditional prejudice. And if the choice is to recognize conditional prejudice, rule text is necessary to overcome the cases that reject it.

[Only] With Prejudice

Rule 41. Dismissal of Actions

(a) VOLUNTARY DISMISSAL.

(1) *By the Plaintiff.* * * *

(C) *Appealable Finality*. A [plaintiff][party asserting a

868 claim for relief][10] may establish a final decision
869 [for purposes of appeal] by a voluntary dismissal
870 [only] if the dismissal is with prejudice to all
871 claims and parties remaining in the action.[11]

872
873 COMMITTEE NOTE

[10] There may be three choices. Limiting the rule to dismissal by a plaintiff would capture many of the cases, and seems easier to put into effect. Often a plaintiff can dismiss all claims against all parties without further confusion. If the case is complicated by counterclaims, crossclaims, third-party claims, or whatever, it still may be possible to arrange a stipulation of all parties.

If the rule applies to any party asserting a claim, it may be more difficult to work out. A defendant whose counterclaim has been hamstrung but not dismissed, for example, may have a hard time of it in attempting to arrange dismissal of all other claims and parties. And attempting to develop a rule that allows a defendant to manufacture finality on less complete terms is likely to prove more complicated than it is worth. Addressing other sorts of claims would be still more complicated.

All of the discussion has focused on parties asserting a claim for relief. That seems to reflect the cases. It remains to decide whether comparable provisions should be adopted for a defending party who is not asserting any claim. A defendant, for example, might believe that an order striking a defense, or partial summary judgment, or even just an order excluding important evidence, leaves so little hope of prevailing that it is better to submit to an adverse judgment and appeal the adverse rulings. The answer may be that a judgment against a defendant is inherently "with prejudice" and final, no matter whether entered on a stipulation that reserves the right to appeal or on a partial default. If that works, this potential wrinkle can be passed by.

[11] The rule text would look better if it read "may establish a final judgment [only] by voluntarily dismissing with prejudice * * *." But if we keep "only," the rule might seem to exclude means of achieving finality other than voluntary dismissal. A stipulated judgment reserving the right to appeal interlocutory orders would be an example.

As drafted, this provision reaches both unilateral dismissal by notice and dismissal by stipulation signed by all parties who have appeared, Rule 41(a)(1)(A)(ii). Should we distinguish, so that a stipulation of all parties can achieve finality? That could be seen as an end-run around Rule 54(b) if the dismissal is without prejudice. But if all parties prefer to shift the forum to the court of appeals, should the rules stand in the way?

28 U.S.C. § 1291 establishes jurisdiction of appeals from "final decisions." A final decision is traditionally reached when the district court has completed everything it intends to do in an action. This traditional concept of finality has been relaxed in some circumstances; the "collateral-order" doctrine is a clear example. Rule 54(b) authorizes entry of a partial final judgment before the district court has disposed of all parts of a multi-claim or multi-party action. Avowedly interlocutory appeals are permitted by some statutes, most notably 28 U.S.C. § 1292. And outside of appeals, review occasionally can be had by extraordinary writ, see 28 U.S.C. § 1651.

A party who has lost an important interlocutory ruling may wish to appeal even though none of these established alternatives is available. The final decision rule represents a balance of competing considerations that usually serves the interests of the judicial system and the parties. But it may lead to prolonged, expensive, and unnecessarily duplicated proceedings. It is not surprising that a party may seek to establish an appealable final decision by means within the party’s control. Voluntary dismissals have been a common ploy.

If it could establish finality, a voluntary dismissal without prejudice would impose relatively low costs on a party who wishes to manufacture a final decision. Unless a statute of limitations bars a new action, affirmance of the disputed interlocutory ruling imposes delay and the costs of initiating a new action, but the effect may be not much different from an explicitly interlocutory appeal. And so many cases reject most attempts to achieve appealability by a voluntary dismissal without prejudice.

A voluntary dismissal with prejudice is quite different. An interlocutory order, or a series of interlocutory orders, may leave little reason to continue the litigation. An in limine ruling excluding evidence may defeat any likely chance of success. An order dismissing some theories or claims, or partial summary judgment, may reduce the stakes to a level not worth litigating alone. The interests that are balanced by the final-decision requirement can be served, indeed advanced, if a claimant is prepared to surrender all claims and parties that survive the interlocutory orders. Allowing the interlocutory orders to merge into the final decision accomplished by the dismissal means only that if the orders are reversed, the case can continue on remand only as to the subjects caught up in those orders. There is no reviving the other matters or parties that have been dismissed with prejudice. Although many cases recognize this means of achieving finality, clear notice in rule text will provide guidance and reassurance, and reduce unnecessary research costs.

[Recognizing finality only upon dismissal with prejudice of all claims and all parties that remain in the action means that dismissal with prejudice as to less than all claims and parties, and dismissal without prejudice, do not establish a final decision.

{Nor can finality be established by showing that other constraints give a dismissal without prejudice the practical effect of a dismissal with prejudice. As one example, courts should not be forced to struggle with what may be difficult fact-bound arguments to determine whether a statute of limitations would bar a new action. As another example, the interests of opposing parties are served by denying finality if a dismissal attempts to support a federal appeal by barring any new action in the federal courts while being without prejudice to a new action in a state court.[12]}]

[A dismissal "with prejudice" is not accomplished by attempting to reserve the right to revive the matters dismissed with prejudice if the interlocutory order challenged by the appeal is reversed. Such "conditional prejudice" exposes the courts and adversary parties to the same risks that would flow from staying district-court proceedings pending an avowedly interlocutory appeal. Worse, the apparent dismissal with prejudice would defeat any occasion for the district court to continue its own proceedings when that seems the wise course pending what is, in effect, an interlocutory appeal.]

Court Control

This draft addresses a voluntary dismissal with prejudice by adding a new Rule 41(a)(1)(C). That makes it necessary to consider the question of court control. The issue is most likely to arise when all parties join in a stipulation of dismissal, see Rule 41(a)(1)(A)(ii). Should the court be able to reject an attempt by all parties to manufacture finality? This concern is most important if conditional prejudice is recognized. Allowing the parties to short-circuit continuing trial-court proceedings could be contrary to the interests of the judicial system.

One approach would be to add a requirement of court approval: "may establish a final decision [for purposes of appeal] by a voluntary dismissal [only] if the dismissal is with prejudice to all claims and parties remaining in the action and is approved by the court."

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[12] This is particularly difficult. One illustration: The federal plaintiff has a federal claim and either diversity or supplemental jurisdiction over parallel state claims. The defendant has a parallel action pending in state court. After partial summary judgment rejecting the federal claim, all parties may prefer to dismiss the balance of the federal action without prejudice to joining the federal plaintiff's claims as counterclaims in the state action. If they are astute enough to manage this task by stipulating to a judgment that preserves the opportunity to appeal the partial summary judgment in federal court, while leaving the way to advance the state-law claims only in the state court, there are strong reasons to allow them to do so. This is one of the several illustrations that test the "only with prejudice" approach.

Another approach would be more indirect, working through Rule 41(a)(2):

> **(2)** *By Court Order: Effect*. Except as provided in Rule 41(a)(1)(A) and (B), an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper.

Dismissal under Rule 41(a)(1)(C) then would require approval, and the provision for proper terms would be explicit.

CONDITIONAL PREJUDICE

Conditional Prejudice Denied

If a Committee Note to a rule that recognizes finality only on a voluntary dismissal with prejudice does not seem protection enough, conditional prejudice could be expressly rejected in rule text:

> (C) *Appealable Finality*. A party asserting a claim for relief may establish a final decision [for purposes of appeal] by a voluntary dismissal [only] if the dismissal is with prejudice to all claims and parties remaining in the action. The dismissal may not be subject to revocation if an appeal results in vacatur or reversal of any order entered before the dismissal.[13]

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[13] At least on the first go-round, it is difficult to capture "conditional prejudice" in rule language. "conditioned" leads to a choice of what the dismissal is conditioned on. Is it affirmance -- affirmance perfects the prejudice? Or is it reversal -- reversal dissolves the prejudice? Still, the rule text would be simpler if the attempt made in this sentence is abandoned in favor of a simpler statement: "only if the dismissal is with unconditional prejudice * * *."

Probably it would not be enough to refer only to "reversal." The appellate court may vacate without reversing. "Vacatur" has an antique air about it, but the world may not be ready for "vacation or reversal." Even that phrase leaves an ambiguity. A court of appeals may remand without actually vacating or reversing, and in some circumstances may even retain jurisdiction pending further action in the district court. "Remand" might be added to the list, although that raises nice questions whether the conditional prejudice should be undone simply because of a remand that does not vacate or reverse.

COMMITTEE NOTE

Some opinions have allowed a party to establish finality, supporting review of interlocutory orders, by a dismissal with prejudice that is conditioned on the decision on appeal. If the orders are affirmed, the prejudice remains. But if one or more orders are reversed, the prejudice dissolves and the appellant is allowed to revive everything that had been dismissed. This tactic exposes the courts and adversary parties to the same risks that would flow from staying district-court proceedings pending an avowedly interlocutory appeal. Worse, the apparent dismissal with prejudice would defeat any occasion for the district court to continue its own proceedings when that seems the wise course pending what is, in effect, an interlocutory appeal. The amended rule rejects "conditional prejudice."

Conditional Prejudice Recognized

(C) *Appealable Finality*. A party asserting a claim for relief may establish a final decision [for purposes of appeal] by a voluntary dismissal [only] if the dismissal is with prejudice to all claims and parties remaining in the action. But a notice or stipulation of dismissal may provide that the dismissal will be vacated if an appeal results in vacatur or reversal of any order entered before the dismissal.[14]

COMMITTEE NOTE

Some opinions have allowed a party to establish finality, supporting review of interlocutory orders, by a dismissal with

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These questions may be related. There is no difficulty if the orders are affirmed, even though the case is remanded for entry of final judgment. Prejudice remains prejudice, no further condition about it. So "remand" alone will not do it.

[14] This version does not expressly address the question whether the dismissal should distinguish between elements that are dismissed with real prejudice and elements that are dismissed with conditional prejudice. An appellant may intend to abandon some claims -- or perhaps more likely some parties -- for good. Do we need that level of refinement, either in rule text or Committee Note?

A freestanding conditional prejudice rule could be drafted without adding the general provision for dismissal with prejudice, and without the "only with prejudice" provision.

prejudice that is conditioned on the decision on appeal. If the orders are affirmed, the prejudice remains. But if one or more orders are reversed, the prejudice dissolves and the appellant is allowed to revive everything that had been conditionally dismissed. Many other opinions have rejected this form of conditional prejudice. The amended rule accepts it. An interlocutory order that does not completely dispose of an action may leave a party in a position that barely supports the cost of further litigation, or does not support the cost except for the purpose of persisting to a conventional final decision that will afford an opportunity to appeal the order. A party confronting this dilemma may be willing to stake the entire litigation on its belief that the order is reversibly wrong. If the order is affirmed -- and most orders are affirmed -- the district court and the parties are spared the burdens of further litigation, and the court of appeals has not had to face repetitive appeals. If the order is reversed, litigation on remand can be shaped in ways that are more efficient and effective than whatever might have been done in the interval between the order and a traditional final judgment. And the dead loss of those intervening proceedings is avoided.

[The rule text and this much of a Committee Note do not address the question whether a dismissal with conditional prejudice should specify the order or orders to be appealed. If that seems a good idea, it seems likely better to add it to the Civil Rule than to amend Appellate Rule 3 to shift the specificity requirement to the notice of appeal. If explicit rule text is not adopted, it may be better to avoid the question in the Committee Note. But perhaps a bit of practice advice would be helpful?]

Manufactured Finality: Simple, Complex, or No Rules?

PREFACE

These notes are designed to frame the central choices that might be made in considering possible rules to address "manufactured finality."

One choice is to adopt clear, simple rules. Another is to adopt complex rules that respond to the nuances that may be found in the cases admirably recounted in Professor Struve's memorandums. And the third is to do nothing. Doing nothing would reflect a judgment that simple rules might defeat appeals that fit well within the purposes of the final-judgment rule, but that unacceptable uncertainties would hobble any attempt to craft complex rules.

"Manufactured finality" may embrace a variety of strategies adopted to achieve appellate review of an interlocutory ruling that, without more, is not yet appealable. The common element is an attempt to create a final judgment that can be appealed under § 1291. The appeal invokes the rule that once there is a final judgment, interlocutory orders "merge" into it and become reviewable. The strategies may depend on unilateral acts by a single party, or may depend on joint action of two or more parties.

Many issues arise from manufactured finality. Some are clearly resolved in the cases, at least for the most part, by general rules. There may be room for refinements, but these rules seem to work predictably and to achieve reasonable results. For these issues, the question is whether the modest gains in clarity that might be achieved by adopting explicit Enabling Act Rules would come at the risk of undue rigidity. Other issues are not so clearly resolved. In some areas, it may be fair to say that the cases are messy. For these issues the central question is whether it is possible to identify sound general approaches and to implement them effectively in Enabling Act Rules.

The argument that supports forgoing reliance on Enabling Act Rules to channel manufactured finality is essentially an argument for the virtues of the common-law process. Nuanced results can be better achieved by confronting specific cases than by general rules. The argument for adopting new rules is that rules of appellate jurisdiction should be clear, simple, and categorical. There are true advantages to such rules. Earlier drafts of illustrative rules may support the choice. They are attached.

CLEAR RULES

The clearest rule is that voluntary actions by the parties that resolve "with prejudice" all the claims among all parties that remain after an interlocutory order establish a final judgment and support review of the interlocutory order. Professor Struve's case-

law memorandums are clear.

The view may be found in some cases that a party who has voluntarily dismissed a claim with prejudice in order to establish finality, even if by court order, lacks "standing" to challenge a judgment that the party sought. Judge Tjoflat has expressed this view, urging that a party is not injured by an order that it invited. OFS Fitel, LLC v. Epstein, Becker and Green, P.C., 549 F.3d 1344, 1370-1371 (11th Cir.2008)(dissenting opinion). Most courts reject this view. But if indeed Article III defeats appeal standing, revision by court rule would require careful explanation. The task would begin with 28 U.S.C. § 2072(c), the source of authority for the current inquiry into manufactured finality. Section 2072(c) authorizes Enabling Act Rules that "define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title." So long as there is an underlying dispute, standing is assured -- the OFS Fitel case, for example, involved an invited dismissal based on a disputed order that, as a discovery sanction, excluded expert testimony essential to establish the plaintiff’s claim. Once finality is achieved, having had to ask for the order that established finality to support an appeal is not a waiver of the right to appeal, and does not moot the dispute.

Voluntary actions that dismiss parts of an action "without prejudice" often encounter an offsetting general rule that a dismissal without prejudice cannot achieve appealable finality. Here too, Professor Struve’s memorandums provide a generous array of authority. Opinions often say that this tactic is no more than an attempt to "end-run" the final-judgment rule. But there are many variations on dispositions without prejudice, and some of them have succeeded in achieving appealable finality. Several of these variations are explored below.

It would be possible to supersede the opinions that have introduced some flexibility in dealing with the finality of judgments reached by party acts that leave the way open for future litigation. Either of two mirror-image approaches could be taken. One would be to adopt a flat rule that one or more parties can manufacture finality only by with-prejudice dismissal of all claims among all parties. The other would adopt a flat rule that a voluntary dismissal without prejudice does not support review of adverse interlocutory orders entered before the dismissal. Support for either approach could be found by analogy to the evolution of collateral-order finality toward a "categorical" approach designed to defeat case-specific determinations that immediate appeal is a good idea for a particular situation, whether or not it would be desirable in other but similar cases.

Another possibility is to craft rules that preserve some elements of a flexible approach. That task may not be easy.

And a third approach is to do nothing in the rules process. The potential advantage of doing nothing depends on a judgment about the value of preserving the process by which courts have struggled to accommodate the strong desire to preserve the values of a clear final-judgment rule with situations in which allowing "manufactured" finality seems to enhance the efficient allocation of authority between trial and appellate courts. If the cases are messy in some areas, there may be good reasons for the mess.

The next sections begin by describing established practices that should be protected against the potential unintended consequences of adopting clear but simple rules on appeals after dismissals with, or without, prejudice. The following section explores a number of circumstances that have prompted some courts to accept manufactured finality despite the prospect that a party may remain free to pursue further litigation after the appellate decision. The questions that pervade all of these examples are whether they might support specific rules that support manufactured finality, or whether they provide persuasive reasons for leaving courts free to carry forward a case-specific process that allows an occasional exception to a categorical approach.

Reactions to these multiple examples will be influenced by the value placed on the availability of appellate review, the costs that may be imposed on access to it, and the role of alternatives that enable astute counsel to achieve what others may not. One illustration is provided by Palmieri v. Defaria, 88 F.3d 136 (2d Cir.1996). Three days before trial the court entered an in limine order excluding many items of the plaintiff’s intended evidence. At trial the plaintiff repeatedly stated that the evidence not excluded was insufficient. The court repeatedly invited the plaintiff to proceed to trial. Eventually the action was dismissed because the plaintiff refused to go to trial. The court of appeals was uncertain whether the order represented a voluntary dismissal without prejudice -- if so, appeal jurisdiction would be denied because that would be an end-run around the requirement of finality. In the alternative, the order might be a dismissal for failure to prosecute. In that event, the in limine ruling could not be reviewed because it did not merge in the dismissal, as it might have if there had been no possibility that the in limine ruling would be reconsidered during the course of trial. Rule 54(b) is not available in such circumstances because there was no disposition of a separate claim. Disobedience and contempt were not available. But review might have been had by proceeding to trial, offering no evidence, and inviting an adverse judgment as a matter of law. And review would have been had if the plaintiff had gone to trial, offered some evidence, and then rested, to be dismissed on judgment as a matter of law. The value of forcing this seeming waste effort would depend on the prospect that the evidence produced at trial would persuade the trial judge to reconsider the in limine ruling. It may be fairly debated whether that prospect was sufficient to deny any review.

ESTABLISHED PRACTICES TO BE PRESERVED

The topics noted in this section actually involve approaches that are likely to be accepted by most courts. They are included here because they must be kept in mind when drafting a rule designed to enshrine a "with prejudice" mandate for manufactured finality.

Functionally with Prejudice: An example is provided by Campbell v. Altec Indus., Inc., 605 F.3d 839, 841 n. 1 (1st Cir.2010). The plaintiff won an order allowing amendment of the complaint to withdraw the only claim that remained after summary judgment for the defendant. The plaintiff stated on the record that he would not renew the withdrawn claim. The order granting leave to amend did not say that the resulting dismissal was with prejudice. Finality was found in "the functional equivalent of a dismissal with prejudice of this claim." Another example is Fairley v. Andrews, 578 F.3d 518, 521-522 (7th Cir.2009), certiorari denied, 130 S.Ct. 3320. After a pretrial order excluding evidence, the plaintiffs acknowledged that they could not prove their case without the excluded evidence. The district court responded by entering judgment for the defendants so the plaintiffs could appeal. "The rule is simple: if plaintiff loses on A and abandons B in order to make the judgment final and thus obtain immediate review, the court will consider A, but B is lost forever." (This passage reflects a common rule that a choice to appeal is a binding election. An example from the same court is International Marketing, Ltd. v. Archer-Daniels-Midland Co., 192 F.3d 724, 727, 733 (7th Cir.1999): The plaintiff chose not to amend the complaint following dismissal with leave to amend as to some claims, instead dismissing all claims with prejudice. There was a final judgment, but the court would not allow the plaintiff to seek remand to take up the leave to amend.)

The concept of functional prejudice may become elusive. Professor Struve's memorandums trace cases that rely on the running of the statute of limitations as a bar that effectively establishes the equivalent of "with prejudice" for a "without prejudice" dismissal. But a cogent caution was expressed in Cochran v. Herring, 61 F.3d 20, 21-22 & n. 6 (11th Cir.1995), certiorari denied 516 U.S. 1073: "Statute of limitations matters often need much thought. And, an appellate court, such as this one, is poorly situated to litigate and decide, in the first instance, whether a statute of limitations has run to the point of barring an action." There may be tolling events not reflected in the record.

"High-Low" Agreements: A high-low agreement may be reached after a truly final judgment. A judgment for $1,000,000 faces appeals by both plaintiff, seeking more, and defendant, seeking to pay nothing. They might agree that on affirmance the defendant will pay $1,500,000, or on reversal will pay $500,000. A similar agreement might be reached after a trial on liability alone. Manufactured finality of this sort should be kept secure. Further trial

proceedings are avoided, both before appeal and after decision on appeal.

Failure to Prosecute: The cases are not entirely uniform, but the general rule seems to be that a party who feels aggrieved by an interlocutory order should not be able to obtain appellate review by withdrawing from all further proceedings and appealing a dismissal for failure to prosecute. The adverse judgment is as final as a dismissal with prejudice -- Rule 41(b) provides it is an adjudication on the merits unless the court orders otherwise. But a sullen refusal to participate creates unnecessary burdens for the court and adversary parties. It is better to insist that the offended party explicitly seek dismissal with prejudice. A rule that recognizes manufactured finality by a voluntary dismissal with prejudice should not upset the general practice. (And it also might be useful to distinguish the practice accepted in U.S. v. Procter & Gamble, 356 U.S. 677, 680-681 (1958): Facing an order to produce a grand-jury transcript in a civil action, the government asked that the order be amended to provide that failure to produce would lead to dismissal of the action. The Court accepted the amended order and dismissal as a means of establishing both finality and reviewability.)

Dispute About Authority To Dismiss: There should be no question about this one. In University of South Alabama v. American Tobacco Co., 168 F.3d 405, 408 n. 1 (11th Cir.1999), the university brought suit without asking the state attorney general to participate. The attorney general appeared and dismissed the action without prejudice. The university was allowed to appeal to challenge the attorney general's authority to effect the dismissal. Any rule that denies finality upon dismissal without prejudice will have to reflect this risk.

Dismissal Not by Appellant CSX Transp., Inc. v. City of Garden City, 235 F.3d 1325, 1327-1329 (11th Cir.2000) found finality. After summary judgment against the plaintiff, the defendant voluntarily dismissed without prejudice its third-party complaint. To deny finality here would deprive the plaintiff of any opportunity for appeal. Horn v. Berdon, Inc., Defined Benefit Pension Plan, 938 F.3d 125, 126-127 n. 1 (9th Cir.1991), is similar. After summary judgment for the defendants a counterclaim for indemnification was dismissed without prejudice by stipulation. Appeal jurisdiction was accepted: "[T]he revivable claim was solely for indemnification * * *. It could not have been heard by the district court after the court granted summary judgment."

Administrative Closing A court's response to an attempt to dismiss without prejudice may be found to be an administrative closing that in effect denies dismissal, leaving the way open to revive the pending action. It may be difficult to make this diagnosis with confidence, but it can avoid any need to struggle with variations on the approach to a dismissal without prejudice. See Morton Internat. Inc. v. A.E. Staley Mfg. Co., 460 F.3d 170, 176-483 (3d

Cir.2006); Richards v. Firestone Tire & Rubber Co., 928 F.3d 241 (7th Cir.1991).

AREAS OF UNCERTAINTY

District Court Connivance: The district court may agree that an interlocutory appeal is desirable and cooperate in manufacturing finality. This cooperation should alleviate concerns that immediate appeal will interfere with the court's authority to manage the litigation. It may also represent a determination, informed by the district court's understanding of the case, that immediate appeal will serve the interests of the appellate court. (Rule 54(b) is not a perfect instrument.) But the perspective of the court of appeals may be different.

A tolerant approach is reflected in James v. Price Stern Sloan, Inc., 283 F.3d 1064 (9th Cir.2002). The district court approved a stipulation to dismiss the claims that remained after dismissal of most claims. The court accepted the appeal, finding that the district court's approval "is usually sufficient to ensure that everything is kosher," and "is an additional factor alleviating concerns about a possible manipulation of the appellate process." (Several Ninth Circuit opinions look to "manipulation" as a criterion in approaching manufactured finality. See the next paragraph.) PSN Illinois, LLC v. Ivoclar Vivadent, Inc., 525 F.3d 1159, 1164 & n.2 (Fed.Cir.2008), certiorari denied 129 S.Ct. 647, found a final judgment on entry of a stipulated judgment that dismissed counterclaims without prejudice. Golan v. Pingel Enterprise, Inc., 310 F.3d 1360, 1366 n. 3 (Fed.Cir.2002), applying Ninth Circuit law, found finality in an order based on the parties' stipulation to dismiss the remaining claims without prejudice. And Robinson-Reeder v. American Council on Educ., 571 F.3d 1333 (D.C.Cir. 2009), suggests that jurisdiction would have been established if the court had entered an order on the parties' stipulation dismissing the remaining claim without prejudice; the stipulation alone was not enough.

Many other decisions are less tolerant. American States Ins. Co. v. Dastar corp., 318 F.3d 881 (9th Cir.2003), dismissed the appeal after the district court approved a stipulation dismissing without prejudice the claim and counterclaim that remained alive. Although this device was "not as patently manipulative" as some other attempts to manufacture finality, it did not satisfy Rule 54(b) and created a danger of piecemeal litigation. (There was a dissent.) Rabbi Jacob Joseph School v. Province of Mendoza, 425 F.3d 207, 210-211 (2d Cir.2005), adopts a firmer view. The plaintiff sought to dismiss the remaining claim without prejudice and without leave to replead in the instant action. The court entered an order striking the language about repleading and ordering dismissal. This was not a final judgment, which can be achieved only by dismissing the whole action with prejudice. This is not a matter of prudence, but of appeal jurisdiction. Horwitz v. Alloy Auto Co., 957 F.2d 1431, 1435-1437 (7th Cir. 1992), is

similar: "Were it only a matter of our discretion we might have been willing to help them out, but there are good reasons the rules are the way they are."

Collaboration of the Parties: Many cases involve a stipulation by the parties that attempts to establish finality by dismissing without prejudice parts of the action that remain after a disputed interlocutory order. It might be urged that considerable respect should be given to the view of all parties that immediate appeal is desirable. But that view encounters difficulty not only with the settled rule that the parties' consent cannot establish jurisdiction but also with the underlying reasons for the rule. The rules of jurisdiction that allocate authority between trial courts and appellate courts are not as fundamental as the rules of subject-matter jurisdiction that limit the authority of all federal courts, but they reflect interests of the federal judicial system that often may be independent of the parties' interests.

So it is no surprise that most cases reject the joint attempts of all parties to manufacture finality by dismissals without prejudice. In Federal Home Loan Mort. Corp. v. Scottsdale Ins. Co., 316 F.3d 431, 437-442 (3d Cir.2003), appeal jurisdiction was saved only by converting the dismissal to one with prejudice after oral argument on appeal.

Adonican v. City of Los Angeles, 297 F.3d 1106 (9th Cir.2002), is representative of Ninth Circuit cases denying jurisdiction.

But note the cases summarized above in which finality was found on entry of a court order adopting the parties' stipulation to dismiss without prejudice.

Party Collaboration: Winner Helps Loser: The approach to collaborative finality may be mollified if the court chooses to focus on the fact that the party who won an interlocutory order is willing to cooperate in achieving finality by dismissing the winner's own claims without prejudice.

Local Motion, Inc. v. Niescher, 105 F.3d 1278, 1279 (9th Cir.1997), found a final judgment when the plaintiff dismissed its remaining claims without prejudice and the defendant appealed. The court observed that a party who has lost on an interlocutory order cannot manufacture finality by dismissing remaining claims without prejudice, but dismissal without prejudice by a victorious party does not "use similar manipulation to thwart an appeal." (Remember the Ninth Circuit cases often use an open-ended approach that asks whether there is an attempt to manipulate jurisdiction.) A similar ruling was made in United Nat. Ins. Co. v. R & D Latex Corp., 141 F.3d 916, 918 n. 1 (9th Cir.1998), finding that a prevailing plaintiff's dismissal of a remaining claim without prejudice to facilitate appeal by the losing defendant is not manipulation of the appellate process. U.S. ex rel. Shutt v. Community Home & Health Care Services, Inc., 550 F.3d 764, 766 (9th Cir.2008) seems

similar. After the government won summary judgment on the False Claims Act claims it dismissed the common-law claims without prejudice. "A prevailing party's decision to dismiss its remaining claims without prejudice generally renders a partial grant of summary judgment final."

Less explicit reflections of this approach may be found in other cases. Equity Investment Partners, LP v. Lenz, 594 F.3d 1338, 1341-1342 n. 2 (11th Cir. 2010), accepted jurisdiction of the appeal -- after the court denied a motion by the IRS to add a new party to a crossclaim and counterclaim, the parties stipulated to dismiss the crossclaim and counterclaim without prejudice. The court found this was not an improper attempt to manufacture a final judgment, noting that the stipulation was prompted by the refusal to permit joinder of an indispensable party. The result was review and reversal only of the earlier order granting partial summary judgment to the IRS.

Other decisions seem contrary. In Heimann v. Snead, 133 F.3d 767 (10th Cir.1998), six of the plaintiff's seven counts were dismissed. The plaintiff and defendant agreed to dismiss the seventh count with prejudice and to dismiss the defendants' counterclaims without prejudice. Not final. In Best Buy Stores, L.P. v. Benderson-Wainberg Associates, L.P., 668 F.3d 1019, 1032-1033 (8th Cir.2012), the plaintiff won on contract claims and moved to dismiss its fraud claims without prejudice on condition that they could be revived if the defendants were successful on appeal. The district court refused and dismissed the fraud claims with prejudice. The court of appeals ruled that dismissal with prejudice was not an abuse of discretion. (The case seems an attempt at "conditional prejudice," but undertaken by the party who prevailed on the interlocutory ruling.)

Relaxed View of Without Prejudice: Hope v. Klabal, 457 F.3d 784 (8th Cir.2006), accepted jurisdiction when, after summary judgment for both defendants on all but one claim against one defendant, the plaintiff dismissed the remaining claim without prejudice. "Admittedly, this circuit has been less than clear" about these matters. But this case resembled others in which jurisdiction was accepted. The dismissal without prejudice left nothing for the district court to resolve. Earlier Eighth Circuit decisions are similar. See Helm Fin. Corp. v. MNVA R.R., 212 F.3d 1076, 1079-1080 (8th Cir.2000); and Great Rivers Co-op v. Farmland Indus., Inc., 198 F.3d 685, 688-690 (8th Cir.1999)(finding "the question is one of discretion, not jurisdiction"). Later cases, however, express remorse, see Fairbrook Leasing, Inc. v. Mesaba Aviation, Inc., 519 F.3d 421, 425 n. 4, and the earlier relaxed approach may have been abandoned outright, see Ruppert v. Principal Life Ins. Co., 705 F.3d 839, 842-843 (8th Cir.2013)(finality is achieved only if the appellant's claims "are unequivocally dismissed without prejudice").

Rubin v. Schottenstein, Zox & Dunn, 110 F.3d 1247, 1250-1253 (6th Cir.1997), on rehearing en banc 143 F.3d 263 (6th Cir.1998)

also seems to take a relaxed view, but it is difficult to make much of it.

"Unjoinder" Some cases take the view that dismissal without prejudice as to one defendant suffices to establish the finality of rulings as to another defendant. The explanation is that since the plaintiff did not have to join the later-dismissed defendant, "unjoinder" is a suitable step to finality.

A relatively early statement was provided in Missouri ex rel. Nixon v. Coeur D'Alene Tribe, 164 F.3d 1102, 1105-1107 (8th Cir.1999), certiorari denied 527 U.S. 1039. The plaintiff sued the Tribe and a contractor. The Tribe was dismissed for immunity reasons. Voluntary dismissal without prejudice as to the contractor established finality. The court relied on the policy against splitting claims to explain that dismissal without prejudice of some claims against a single defendant does not establish finality as to other claims defeated by court order. It found this policy does not apply to "unjoining" a defendant the plaintiff need not have joined in the first place. The same approach was taken in Willkinson v. Shackelford, 478 F.3d 957, 962 (8th Cir.2007), allowing appeal when the plaintiff, after the district court dismissed the diversity-destroying defendant and refused to remand, voluntarily dismissed without prejudice as to the diverse defendant. The "unjoin" approach was also applied in Duke Energy Trading & Marketing, L.L.C. v. Davis, 267 F.3d 1042, 1048-1050 (9th Cir.2001).

Special Circumstances for Without Prejudice Finality There may be some identifiable circumstances that warrant acceptance of finality achieved by voluntary dismissal without prejudice of whatever remains after an adverse ruling. Finality is recognized in some of the cases noted here, but not others.

Gannon Intern., Ltd. v. Blocker, 684 F.3d 785, 791-792 (8th Cir.2012), involved a motion to dismiss an entire action without prejudice to enable refiling in an action the defendants had brought against the plaintiff in a state court. The motion was made after the defendant moved for partial summary judgment but before the court ruled on the motion. The court granted the partial summary judgment and then granted the motion to dismiss without prejudice the parts of the action that remained. The court of appeals accepted jurisdiction. The motion to dismiss was made before the summary-judgment ruling, so it was not an attempt to evade the finality requirement. The plaintiff, moreover, asserted to the court it had no intent to refile the action in federal court.

In Dearth v. Mukasey, 516 F.3d 413, 415, 416 (6th Cir.2008), the defendants moved to dismiss for lack of venue or to transfer under § 1406. The plaintiff requested that the court dismiss without prejudice rather than transfer if it were otherwise inclined to transfer. The court declined to decide whether venue

was proper, concluded that it would transfer if venue were proper, and granted both motions. The appeal was dismissed because the plaintiffs were left in the same position as if they had never filed suit. But that left the plaintiffs without an opportunity to appeal the question whether venue was proper. A dismissal for improper venue is not on the merits, but is appealable. The result could be questioned.

Hood v. Plantation General Medical Center, 251 F.3d 932 (11th Cir.2001) began with one plaintiff who asserted two claims. One claim was dismissed for lack of standing. A second plaintiff was joined. The original plaintiff dismissed his remaining claim with prejudice. The second plaintiff dismissed its claims without prejudice. The appeal by the original plaintiff was dismissed. Because the second plaintiff remained free to refile, "the litigation is not finally over for all parties on all claims." Although dismissal for lack of standing ordinarily is not "on the merits" of the claim, it should preclude relitigation of the standing issue. The original plaintiff thus seems to have been caught in a finality trap -- the attempt to manufacture finality likely defeated any opportunity for appellate review of the standing ruling, in this action or any other. The decisions that allow a plaintiff to achieve finality by "unjoining" a defendant might be extended to allow the later, second plaintiff, to create finality for the original plaintiff by unjoining itself.

Great Rivers Co-op v. Farmland Indus., Inc., 198 F.3d 685, 688-690 (8th Cir.1999), raises the question whether a special approach may be appropriate in class actions. Rule 23(f) addresses appeals from an order granting or denying class-action certification. It seems to be working. But suppose the court dismisses some claims before deciding on certification, leaving only claims that do not seem worth pursuing even on a class basis? Or dismisses most claims after granting certification? Might it be appropriate to allow the class representatives to achieve finality by dismissing without prejudice what remains? Or, in a nice twist, by allowing dismissal without prejudice to other class members but with prejudice as to the class representatives? (This could be an attractive occasion for "conditional" prejudice -- if the dismissals are reversed, the class representatives who have proved the adequacy of their representation by the successful appeal might well be allowed to revive the dismissed claims on remand rather than search out new representatives.)

Prejudice only in Federal Court Erie Cty. Retirees Assn. v. County of Erie, 220 F.3d 193, 201-202 (3d Cir.2000), reflects a desire to protect the court of appeals rather than the adversaries. After summary judgment against part of their federal claim, the plaintiffs withdrew the remaining part without prejudice. The district court then declined supplemental jurisdiction over the state-law claims and dismissed them without prejudice. On appeal the plaintiffs responded to the court’s question about appeal jurisdiction by withdrawing with prejudice the part of the federal

claim they had dismissed without prejudice. The plaintiffs also undertook to pursue the state-law claims only in state court. This established finality to review the summary judgment against the other part of the federal claim. Dismissal of the state-law claims without prejudice did not defeat finality because they could be pursued further only in a state court.

A like result was reached in Sneller v. City of Bainbridge Island, 606 F.3d 636, 638 (9th Cir.2010). Finality was achieved by dismissal of the remaining federal claims with prejudice and dismissal of the state-law claims without prejudice. The reason for dismissal, that any future suit on the remaining state-law claims would be brought in state court, "appears legitimate." (A dismissal without prejudice for the purpose of consolidating all remaining claims in a state-court action is not likely to establish finality if there is no assurance the claims cannot be brought again in a federal court. See Chappelle v. Beacon Communications Corp., 84 F.3d 652 (2d Cir.1996).)

Conditional Prejudice This topic provoked a split in the earlier subcommittee. A party seeking to appeal may seek to dismiss surviving claims with "conditional prejudice." Summary judgment is granted against the plaintiff's most important claims, for example, leaving only relatively minor claims that will not alone justify the burden of further litigation. The plaintiff prefers to stake all on its belief that the summary judgment is reversible error. It dismisses the surviving claims with prejudice, subject to the condition that they can be revived if -- and only if -- the summary judgment is reversed.

Conditional prejudice has an undeniable charm. It protects the trial court and the parties against the burden of litigating minor claims in order to achieve a final judgment and review of the major claims. Often it will protect the appellate court against the burden of repeated appeals in the same case because the trial court did not commit reversible error. If the summary judgment is affirmed, that is the end of the case and of the dispute.

The offsetting view is that a dismissal with conditional prejudice may lead to reversal, further proceedings on all claims on remand, and a later appeal that will force the court of appeals to renew its acquaintance with the case. The opportunity to review the whole case all at once, on the first appeal, is highly prized.

The Second Circuit accepts conditional finality. SEC v. Gabelli, 653 F.3d 49, 56-57 (2d Cir.2011), reversed on the merits, 133 S.Ct. 1216 (2013)(Professor Struve's case-law update explains why the Supreme Court's action does not count as approving finality through conditional prejudice); Purdy v. Zeldes, 337 F.3d 253, 257-258 (2d Cir.2003). The Federal Circuit also seems to have accepted it. Jang v. Boston Scientific Corp., 532 F.3d 1330, 1334 (Fed.Cir.2008); Doe v. U.S., 513 F.3d 1348, 1352-2354 (Fed.Cir.2008). Romoland School Dist. v. Inland Empire Energy

Center, LLC, 548 F.3d 738,747-751 (9th Cir.2008), employing the Ninth Circuit "manipulation" approach to manufactured finality, might be read to leave the question open.

Many other decisions reject attempts to manufacture finality through a dismissal with conditional prejudice. Professor Struve's memorandums establish the point.

CRIMINAL CASES

If any rules amendments are confined to the Civil Rules, there is no need to worry about finality in criminal prosecutions.

But if amendments are made in the Appellate Rules, care should be taken either to exclude criminal prosecutions or to address them after separate consideration. One example: U.S. v. Kaufmann, 985 F.2d 884, 890-891 (7th Cir.1993). The jury convicted on one count, but failed to agree on two others. The court of appeals dismissed an appeal by the defendant even though the government informed the trial court that it would not proceed on the two remaining counts if the one conviction were affirmed. On remand the government dismissed the two remaining counts without prejudice. The court of appeals accepted this basis for finality, rejecting as "imperfect" the analogy to a dismissal without prejudice in a civil action, and observing that many other courts of appeals would have accepted the initial appeal even without dismissal of the remaining counts.

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TAB 10B

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APPELLATE-CIVIL SUBCOMMITTEE REPORT: RULE 62 (STAY OF EXECUTION)

Discussion of Rule 62 stays of execution began in the Appellate Rules Committee. The initial focus was on the fit of Rule 62 with a convenient practice adopted by some appellate lawyers. Rather than arrange separate bonds to secure a stay pending post-judgment proceedings and then to secure a stay pending appeal, they arrange a single bond designed to secure a stay until completion of all appeal proceedings. It has not been clear how this strategy fits Rule 62.

A particular twist on the single-bond question arises from the fit between the 14-day automatic stay provided by Rule 62(a) and the Rule 62(b) provision for a stay "pending disposition of" post-judgment motions that may be made up to 28 days after entry of judgment. Before the Time Calculation Project the Rule 62(a) automatic stay lasted for 10 days, and 10 days also was the period for making the post-judgment motions. The automatic stay was redefined as 14 days (the prior conventions for counting meant that a 10-day period was always at least 14 days, and might run longer). The times for the post-judgment motions, however, were extended to 28 days because experience had shown that more time was needed in many complex cases. The result is an apparent "gap." A district judge wrote to the Civil Rules Committee that the gap creates uncertainty whether the court can order a stay after expiration of the automatic stay but before a post-judgment motion is made. The Committee concluded that a court has inherent power to stay its own judgment, and that there was no need to revise Rule 62(b) unless practice should show persistent confusion.

Consideration of these initial questions has led to other questions. Successive sketches of possible Rule 62 revisions have taken on ever more possible changes. Should the court be able to dissolve the automatic stay before it expires of its own force? Should it be able to require that the judgment creditor post security as a condition of dissolving a stay or refusing to grant one? Should it be able to recognize security other than a bond? To set the amount of security less than the judgment? And is it wise to carry forward the supersedeas bond provision of Rule 62(d) that many understand to create a right to a stay pending appeal? And, to return to the questions that launched the inquiry, why not recognize that a single security may be accepted for a stay that continues from expiration (or dissolution) of the automatic stay through issuance of the appellate mandate and disposition of proceedings on a petition for certiorari?

Subcommittee consideration of these questions is in mid-stream. It has been supported by detailed memoranda prepared by Professor Struve, Reporter for the Appellate Rules Committee. These memoranda reach beyond the questions that have been actively considered. The Subcommittee has yet to determine whether to recommend that consideration of Rule 62 extend beyond subdivisions (a) through (d).

The Subcommittee invites discussion of all of the issues it has identified, and any others that may deserve consideration.

One simple starting point is to ask whether Committee members have encountered difficulty as a result of the "gap" between expiration of the automatic Rule 62(a) stay and the time allowed to make the motions that support a stay under Rule 62(b). Rule 62(b) speaks of a stay "pending disposition" of these post-judgment motions. Are courts receptive to ordering a stay before a motion is filed under Rules 50, 52, 59, or 60, either in general or after an express representation that a motion will be, or is quite likely to be, filed? Would problems arise from extending the automatic stay to 28 or 30 days? Would the problems be reduced if Rule 62 is amended to make clear the court's authority to modify or dissolve the automatic stay?

How often do problems arise in agreeing on the form of security, whether a bond or something else? Are there practical difficulties in arranging a convenient and seamless form of security that runs from expiration of the automatic stay through final disposition of an appeal?

More generally, would it be desirable to amend Rule 62 to provide more explicit recognition of the district court's authority to modify, dissolve, or deny any stay? And its authority to set appropriate terms both for the form and amount of security? And to exact security as a condition of allowing immediate execution of part or all of a judgment?

These questions are set against the background of Appellate Rule 8(a)(1), which directs that a party must ordinarily move first in the district court for a stay pending appeal or approval of a supersedeas bond. When the court of appeals does act, Rule 8(a)(2)(E) says blandly that it "may condition relief on a party's filing a bond or other appropriate security in the district court." The combination of district-court primacy and appellate court flexibility suggest the possible value of recognizing a full range of district-court discretion in Rule 62.

The materials attached below are presented to stimulate initial discussion of experience with Rule 62 stays. The Subcommittee solicits advice and guidance on the need for revision, and the most profitable areas for continuing work.

The attachments include a pair of Rule 62 drafts that would replace present Rule 62(a), (b), (c), and (d). The second is a more ambitious approach than the first. Many other possibilities could be considered. Review of the drafts will be helpful.

The other attachments are notes on Subcommittee discussions. They show that the work is in progress, without having reached even tentative views on what recommendations may be made.

Rule 62. Stay of Proceedings to Enforce a Judgment.

(a) Automatic Stay of Judgment to Pay Money.[15] Unless the court orders otherwise,[16] no execution may issue on a judgment to pay money, nor may proceedings be taken to enforce it, until 14 [X][17] days have passed after its entry.[18]

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[15] "judgment to pay money" is not an established term of art. The idea is to work clear of any association with "money judgment," see Rules 67, 69. There is a further complication — Rule 54(a) defines "judgment" to include "any order from which an appeal lies." It does not purport to exclude an order that cannot be appealed. But there may be some confusion.

One alternative would be to refer to "an order to pay money." Or "an immediately enforceable order to pay money."

The choice of language may be affected by the question of contempt sanctions, see footnote 18.

[16] I'm not sure whether this authority to order immediate execution is provided in present Rule 62. But there may be circumstances where it is a good idea.

[17] The new rule text allows a motion for a stay immediately upon entry of judgment. This draft also omits any reference to post-judgment motions, so there is no apparent "gap" between this 14-day period and the 28-day period for motions under Rules 50, 52, and 59. [If we restore that part of present 62(b), we might think about the open-ended reference to Rule 60 -- should it be limited to a Rule 60 motion made within 28 days from entry of judgment?]

It remains an open question whether 14 days is the proper length for the automatic stay. Judgment debtors, particularly the slippery ones that we worry about, can do a lot to hide or dissipate assets even within 14 days. The longer the automatic stay, the greater the danger. On the other hand, 14 days may not suffice, as a practical matter, to arrange security. For that matter, the reasons for extending the time for post-judgment motions to 28 days may apply here as well: if a party needs that much time to prepare a good motion, it may need that much time to prepare a persuasive showing as to the need for security and the form and amount of security.

If the period is to be extended, 30 days might make sense. That would allow 2 days after expiration of the period for post-judgment motions to decide what to do next and, if appropriate, to arrange security.

[18] Should there be an automatic stay of a contempt order to pay money? A civil contempt order may order payment as compensation

(b) FURTHER STAY OF JUDGMENT TO PAY MONEY.[19]

(1) *By Court Order:* On appropriate terms for the opposing party's security,[20] the court may [at any time] stay the execution of a judgment to pay money -- or any proceedings to enforce it -- from expiration of[21] the automatic stay under Rule 62(a)[22] and until [the][a] time

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for injury caused by violating a specific decree. Or it may order payment to make good on a provision designed to coerce compliance -- "$1,000 a day until * * *."

An automatic stay under (a), or by supersedeas bond under (c), might impede effective exercise of the court's authority.

Present Rule 62 does not clearly address the question whether a money judgment for contempt is embraced by 62(a)(1), which provides that an interlocutory or final judgment in an action for an injunction is not stayed unless the court orders a stay. 11 Wright, Miller & Kane, F P & P 3d, § 2902, notes that some courts have ruled that a commitment for contempt is not covered by the automatic stay because a contempt proceeding is by its nature sui generis. The authors suggest that this may be desirable, but should be accomplished by revising the rule.

[19] The rule is cleaner if money judgments are separated from other forms of relief. "[A] judgment to pay money" should include any order to pay money, whether characterized as "damages," "disgorgement," or something else. That can be asserted in a Committee Note. The question of contempt remains open; see footnote 18. Some direction may be given in the Committee Note.

[20] This allows security other than a bond. And it allows the court to dispense with any security. When the stay extends through appeal, this provision confirms the authority courts have found in present Rule 62(d) to waive any bond for a supersedeas pending appeal.

[21] "from expiration of" is intended to begin with the time the Rule 62(a) stay ends. Ordinarily that will be 14 days after the judgment is entered. But the court might shorten the period. If the period is shortened for the purpose of permitting immediate execution, the court is not likely to issue a stay. Then a stay will depend on a prompt appeal and a supersedeas bond (see note 27 below on the question whether the court has discretion to set aside a supersedeas). But the automatic stay may be shortened for the purpose of allowing a stay on providing appropriate security.

[22] This provision supersedes the present provisions that address only stays pending disposition of post-judgment motions.

designated by the court[, which may be as late as issuance of the mandate on appeal].[23] The stay takes effect when the court approves any required security. [The court may{, for good cause,} dissolve the stay or modify the terms for security.][24]

(2) *By Supersedeas Bond.*[25] If an appeal is taken, the

The apparent "gap" between expiration of the automatic 14-day stay and the 28-day period allowed for motions under Rules 50, 52, and 59 is closed even if proposed 62(a) continues to limit the automatic stay to 14 days.

[23] This structure supports approval of a stay, and security, for the entire period between expiration of the automatic stay in Rule 62(a) and completion of all proceedings, including appeal.

The Committee Note would state that the court may set the time to run until issuance of the mandate resolving any appeal. (It may not be worth the complications to address what happens when the mandate does not simply affirm the judgment.)

The rule or Committee Note could suggest that the stay terminates if only an untimely appeal is filed. But that would multiply the opportunities to contest timeliness -- it seems better to leave resolution of timeliness to the court of appeals for the most part, although the district court should have discretion to terminate the stay if it finds immediate execution important and concludes that the appeal is untimely.

One advantage of the open-ended reliance on a time set by the court is that the time could include disposition of a petition for certiorari or lapse of the time for filing a petition. That could be pointed out in describing the time for issuing the appellate mandate.

[24] Present Rule 62 does not provide for dissolving a stay. If we make express provisions for entering a stay that can endure as late as issuance of the appellate mandate, it may be useful to recognize authority to modify or dissolve the stay. It seems appropriate to lodge this authority in the district court even if an appeal is pending.

[25] Although (1) authorizes the court to order a stay that endures through completion of all proceedings on appeal, present 62(d) provides that an appellant "may obtain a stay by supersedeas bond." Carrying that language forward absorbs whatever measure of right to a stay exists under the present rule. The discussion of integrating the provisions of Rule 62 has not yet suggested any need to reconsider this point, but further consideration should remain open.

appellant may obtain a stay of a judgment to pay money by supersedeas bond or other security [in an amount equal to one hundred and twenty-five percent of the amount of the money judgment].[26] The bond [or other security] may be given upon or after filing the notice of appeal or after obtaining the order allowing the appeal. The stay takes effect when the court approves the bond or other security.

(c) STAY OF INJUNCTION, RECEIVERSHIP, AND PATENT ACCOUNTING ORDERS.

(1) Unless the court orders otherwise, the following are not stayed after being entered, even if an appeal is taken:

(A) an interlocutory or final judgment in an action for an injunction or a receivership; or

(B) a judgment or order that directs an accounting in an action for patent infringement.

(2) While an appeal is pending from an interlocutory order or final judgment that grants,[27] dissolves, or denies an injunction, the court may suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party's rights. If the judgment appealed from is rendered by a statutory three-judge district court, the order must be made either:

(A) by that court sitting in open session; or

(B) by the assent of all its judges, as evidenced by their signatures.

"Other security" allows forms other than a bond, as in (1).

[26] This could be complicated further by allowing a bond or other security for a lesser amount; present Rule 62(d) has been read to allow the court to dispense with any bond at all, see note 20 above. A possible complication would be to recognize a partial stay, leaving the way open to execute for the difference between the amount of the judgment and the amount of the bond or other security.

[27] Should this list include the other categories in § 1292(a)(1): orders that modify or continue an injunction? That refuse to dissolve or modify an injunction? For that matter, should "denies" become "refuses" to parallel § 1292(a)(1)?

Alternative, More Efficient Drafting[28]

Rule 62. Stay of Proceedings to Enforce a Judgment.

(a) STAY OF JUDGMENT TO PAY MONEY. Execution on a judgment to pay money, and proceedings to enforce it, are stayed as follows:

(1) *Automatic Stay.* Unless the court orders otherwise, for 30 days after the judgment is entered.[29]

(2) *By Court Order.* The court may at any time order a stay until a time designated by the court[, which may be as late as issuance of the mandate on appeal].

(3) *By Supersedeas Bond.*[30] If an appeal is taken, the appellant may obtain a stay by supersedeas bond or other security [in an amount equal to one hundred and twenty-five percent of the amount of the money judgment]. The bond [or other security] may be given upon or after filing the notice of appeal or after obtaining the order allowing the appeal. The stay takes effect when the court

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[28] This version picks up on suggestions made during the February 4 conference call, and may go further than intended in departing from present Rule 62 language. If we intend to do anything like this, it is better to get started now.

Being this bold for the first part of Rule 62 need not imply a need to go through the rest of the rule with a fine-toothed comb. But there is no apparent rush to get these first parts out for comment. We can go further if it appears we can do good without running much risk.

[29] The 30-day period allows only 2 days after expiration of the 28-day period for post-judgment motions under Rules 50, 52, and 59. A longer period could be adopted. Or separate provision could be made for cases in which a timely motion is made under Rules 50, 52, or 59, or a motion is made under Rule 60 within the time allowed to move under Rules 50, 52, or 59.

[30] This is carried forward for the moment, without attempting to answer the question whether a stay should require a court order, compare the injunction provisions carried forward here as subdivision (c).

11 Wright, Miller & Kane, Federal Practice & Procedure: Civil 3d, § 2905, states flatly that a stay on posting a supersedeas bond is a matter of right. It also asserts that the courts have inherent power to dispense with any security, to set the amount at less than the judgment, and to specify a form of security other than a bond.

approves the bond or other security.

(b) TERMS [OF STAY].

(1) *Terms.* The court may set appropriate terms for the opposing party's security[31] for any[32] stay or on denying or terminating a stay.[33]

(2) *Dissolving or Modifying a Stay*. The court may[, for good cause,] dissolve the stay or modify [the terms set under Rule 62(b)(1)] [its terms].

(c) STAY OF INJUNCTION, RECEIVERSHIP, AND PATENT ACCOUNTING ORDERS.

(1) Unless the court orders otherwise, the following are not stayed after being entered, even if an appeal is taken:

(A) an interlocutory or final judgment in an action for an injunction or a receivership; or

(B) a judgment or order that directs an accounting in an action for patent infringement.

(2) While an appeal is pending from an interlocutory order or final judgment that grants,[34] dissolves, or denies an injunction, the court may suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party's rights. If the judgment appealed from is rendered by a statutory three-judge district court, the order must be made either:

(A) by that court sitting in open session; or

(B) by the assent of all its judges, as evidenced by their signatures.

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[31] Is this clear enough to support discretion to deny any security, and discretion as to the form and amount of security?

[32] "any" rather than "a" to emphasize that the court can terminate the automatic stay.

[33] This is new, but seems to make sense: Execution cannot always be undone. It may be useful to allow execution only if there is security for the judgment debtor.

[34] Should this list include the other categories in § 1292(a)(1): orders that modify or continue an injunction? That refuse to dissolve or modify an injunction? For that matter, should "denies" become "refuses" to parallel § 1292(a)(1)?

TAB 10C

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Appellate-Civil Subcommittee
Manufactured Finality Notes, Conference Call 12 December 2014

The Appellate-Civil Rules Subcommittee met by conference call on December 12, 2014. Participants included Hon. Scott Matheson, Subcommittee Chair; Hon. Peter Fay; Douglas Letter, Esq.; Kevin Newsom, Esq.; and Virginia Seitz, Esq. Professors-Reporters Catherine Struve and Edward Cooper also participated.

Judge Matheson welcomed the members to the work of the newly reconstituted Subcommittee. Two topics were to be considered: apparent gaps in the Civil Rule 62 provisions for staying execution of a judgment and the array of questions that arise from efforts to "manufacture" a final judgment in order to win appellate review of an interlocutory order that otherwise is not subject to immediate appeal. Separate notes describe the discussions of these topics.

Discussion began by summarizing the alternatives that were discussed in an earlier joint subcommittee that eventually suspended consideration of manufactured finality. Relatively simple rules might be adopted to reflect points that have generated substantial agreement among the circuits. Or more complex rules might be adopted in an attempt to capture the nuances that have generated differences of opinion. One particular illustration would be a rule recognizing "conditional prejudice"-- dismissal of parts of a case with prejudice, subject to revival if the judgment on another point is reversed. Yet another possibility is to do nothing.

One simple rule would be to adopt a rule recognizing the general agreement that a party aggrieved by an unappealable interlocutory order can achieve appealable finality by dismissing everything that remains in the action with prejudice. This would require dismissal of all claims that remain among all parties. It should be possible to draft such a rule in clear terms. But it may not be possible to avoid undesirable implications for situations where it may be desirable to recognize finality manufactured by means that fall short of this absolute.

A similar simple rule would provide that finality cannot be achieved by dismissing without prejudice whatever remains after the contested ruling. Drafting might not be as simple. And the risk of intruding on desirable uses of manufactured finality seems greater. Examples are provided in the materials supplied for this call.

Beyond these starting points, a variety of complications can be found. Identifying them, describing them clearly in rule text, and sorting out the potentially useful exceptions from those that

should be prohibited will be a difficult task. It would be easy to wind up doing more mischief than good.

One specific situation is presented by "conditional prejudice." This concept is clearly recognized in the Second Circuit, and apparently in the Federal Circuit as well. Several circuits have rejected it. The practice is easily described. An in limine ruling excluding crucial evidence, a grant of important parts of a motion to dismiss, a grant of summary judgment against the most important claims, may leave so little in the case that the costs and risks of proceeding to final judgment on the remaining elements seem undue. The party who lost such a ruling may be willing to stake all on the belief that the ruling is reversibly erroneous. At the same time, the parts that remain may have potential value that easily justifies the cost of continued litigation if the adverse ruling is in fact reversed. Dismissal of what remains with prejudice, subject to revival only if reversal is won on appeal, may protect both the parties and the district court against the costs of litigating the parts that remain for the primary purpose of reaching a final judgment that can be appealed. And there is no cost to the court of appeals unless it determines that indeed there is reversible error as to an important -- usually the most important -- component of the case.

Compared to these possibilities, it might prove wise to do nothing. The law is generally clear as to dismissals with prejudice and also as to dismissals without prejudice. The complications that generate differences among the circuits do not seem to arise often, and in at least some circuits reasonably confident answers can be found on the questions most likely to arise. Allowing further development in the common-law process might be better than attempting to generate clear and easily accessible rules that, for all their clarity and accessibility, impose undesirable costs.

One nuance in the cases was offered as an example. Some decisions find that a dismissal of parts of a case without prejudice establishes a final judgment if a statute of limitations bars any further litigation on the dismissed parts. The idea is that this circumstance shows a "practical finality" that is equivalent to a dismissal with prejudice. But one court of appeals has observed that this is a tricky concept. It may be difficult to know what statute governs, both as a matter of the applicable source of limitations law and as a matter of determining which statutory period applies. Determining the time when a claim arose may be difficult, and may turn on questions of fact that a court of appeals cannot readily resolve. So too for "tolling" events. For that matter, applicable limitations law might allow revival of the dismissed claims as part of continuing proceedings in the same action on reversal of the final judgment achieved by the dismissal. That would become the equivalent of conditional prejudice. It could be tricky either to preserve or end this approach in a rule that generally rejects dismissal without prejudice as a means of manufacturing finality.

A somewhat similar difficulty might arise from a rule that recognizes dismissal with prejudice as a means of achieving finality. There has been a strain of concern that a party who invites a dismissal with prejudice lacks Article III standing to appeal -- invited injury is no injury. This view seems to have been abandoned in the Eleventh Circuit, the source of recent concern, but it might revive.

Discussion recognized that it may be difficult to draft a good rule. No rule will be perfect. But it is worth some effort to determine whether some of the issues can be made clear. Even things that experts know to be settled are not always accessible to other practitioners. A specific rule, or rules, would help. It is undesirable to forfeit legitimate appellate issues because a practitioner has been unable to frame an appealable judgment.

The role of the Rules Enabling Act in determining finality also was discussed. Section 2072(c) authorizes rules that "define when a ruling of a district court is final for the purposes of appeal under section 1291." The Supreme Court regularly shows an interest in drawing the lines of appealable finality. Often it acts to rein in attempts to inject more flexibility than it thinks wise, despite the implicit views of the courts of appeals that more effective relationships with the district courts can be structured by recognizing some measure of flexibility. The collateral-order version of finality, for example, is moving more and more toward a "categorical" approach that recognizes finality only when all orders in a more or less clearly defined category should be treated as final. Thus attempts to allow collateral-order appeal from some orders that reject claims of attorney-client privilege were repudiated by a ruling that none are appealable under collateral-order theory. At the same time, the Court recognized the Enabling Act provision and suggested that the rulemaking process is a better means of elaborating finality concepts than the decisional process. There is ample room for the rules committees to work toward rules on manufactured finality if good rules can be drafted.

The risk that clear rules might thwart desirable exceptions must be taken into account. Clear rules, or not-so-clear rules, may prove desirable only if the way is left open for courts to continue to struggle with some of the nuances that are not ripe for resolution by court rule. One good beginning would be to study one or more draft provisions recognizing that finality can be achieved by dismissing with prejudice all that remains of an action.

So too, it was agreed that further work should be done on the concept of conditional prejudice.

The next step will be to review a number of alternative drafts of rules language that were prepared for work by the earlier subcommittee.

Appellate-Civil Subcommittee

The Appellate-Civil Rules Subcommittee met by conference call on January 23, 2015. Participants included Hon Scott Matheson, Subcommittee Chair; Hon. Steven Colloton; Hon. Peter Fay; Douglas Letter, Esq.; Kevin Newsom, Esq.; and Virginia Seitz, Esq. Professors-Reporters Catherine Struve and Edward Cooper also participated.

Judge Matheson opened the meeting by noting that sketches of possible rule language prepared a few years ago had been circulated to help focus discussion of the general alternatives being considered. One pair of alternatives is to recommend a simple rule -- one version would provide simply that a final decision can be achieved by a voluntary dismissal with prejudice that encompasses all claims and all parties. A more restrictive version of this simple rule would provide that this is the only way to achieve finality by voluntary dismissal. More complex rules also can be imagined. One would expressly prohibit, and another would expressly recognize, the opportunity to achieve finality by dismissing with "conditional prejudice" so that the dismissal remains with prejudice if the rulings challenged on appeal are affirmed, but becomes a dismissal without prejudice if the rulings are reversed. None of these approaches would attempt to capture in rule text the more complex situations in which voluntary action by a party has been found to establish finality for appeal. Whether those complex alternatives would be foreclosed by any of the simpler rules would remain uncertain, although a Committee Note might provide some guidance. Yet another alternative is to abandon the attempt to adopt an Enabling Act rule. Most courts agree that most of the time finality is achieved by a voluntary dismissal with prejudice that completely disposes of an action. Most courts also agree that most of the time finality is not achieved by a voluntary dismissal without prejudice. Conditional finality is clearly recognized in one circuit, and perhaps in another, and it might be concluded that there is no need to act on that front.

Discussion began by asking whether anything would be lost by adopting a simple rule that states that a party can establish a final judgment by voluntarily dismissing with prejudice all claims and parties remaining in the action. Some possible difficulties were suggested. If the rule is that simple, it would leave open any alternative approach to manufactured finality that proves acceptable to an appellate court. Many cases now have recognized finality by means that do not fit within this simple rule. At least some of the results may be desirable. Perhaps more importantly, leaving the way open to alternative means of manufacturing finality would leave the law as uncertain at the margins as it is now. And the rule text would not speak clearly to "conditional prejudice," a question that has continued to provoke divided opinions within the Subcommittee. A Committee Note might address conditional prejudice, one way or the other, but it seems unwise to attempt to resolve this question by a Committee Note that interprets

potentially ambiguous rule text.

Collective memory produced only a vague recollection of an inquiry about conditional prejudice that was addressed a few years ago to United States Attorneys in the Second Circuit. The clear sense was that they were not aware of any difficulties created by the Circuit's acceptance of conditional prejudice, but no details were recalled.

Support was expressed for a simple rule. The rule would "cover plenty of cases" and provide guidance for lawyers and courts. It would spare them the need to look for lots of cases to confirm the general practice and understanding. Unclear cases would remain, but there would be less uncertainty than we have now. "A basic proposition could cover a lot of cases." And many Enabling Act Rules leave uncertainty at the margins. One example is Criminal Rule 6(e) on grand jury confidentiality.

This member suggested that it also would be good to address conditional prejudice. It would be useful to accept a dismissal with conditional prejudice to support appeal on an important issue without having to continue to litigate less important issues through to final judgment. The cost to the court system would be low, since most appeals result in affirmance. The conditional prejudice then would become final prejudice. "I have seen lots of cases where litigants gamble on persisting to a traditional final judgment by litigating less important issues, believing that when the opportunity to appeal does arise they will win reversal on the earlier interlocutory orders and be able to reopen the entire case on remand."

A response noted that there are different views on conditional prejudice. In earlier discussions judges generally have opposed this means of establishing finality. Lawyers, on the other hand, are attracted to it. Conditional prejudice seems part way between unconditional prejudice, which does establish finality, and dismissal without prejudice, which does not.

This observation continued by suggesting that if the recommendation is to adopt a simple rule stating only that finality is achieved by a dismissal with prejudice of everything that remains in the case, "I would take my chances" as to the possible ambiguities. This text would not clearly address conditional prejudice. Nor would it clearly address such concepts as "de facto prejudice," as accepted in an occasional ruling that a dismissal without prejudice counts as a dismissal with prejudice because a new action would be barred by the statute of limitations.

Extending these observations, the same member recalled that the Appellate Rules Committee was uncertain about whether to recognize conditional prejudice. It favored a rule recognizing that a dismissal with prejudice establishes finality, but recognized that the most likely location for such a rule is in the Civil

Rules.

A variation was suggested by asking whether conditional prejudice would be more acceptable if it were subject to control by the district judge, or if it required agreement of the parties.

Another question asked why there is any need to supplement the opportunities for avowedly interlocutory review under § 1292(b), by mandamus, or by a Rule 54(b) partial final judgment. "What is the open space that should be filled"?

Section 1292(b) raises several high thresholds, and it requires both certification by the district court and permission from the court of appeals. Mandamus continues to be a genuinely extraordinary remedy -- it does not issue simply to correct reversible error. Rule 54(b) includes its own limits. There must be final disposition of at least a single "claim," or all claims among at least a pair of opposing parties. Two examples were offered of important rulings that would not fit within Rule 54(b). One, illustrated by some of the cases summarized for the Subcommittee, is an in limine ruling that excludes vitally important evidence. There may be no point in proceeding to trial without the evidence, but the ruling does not finally decide any claim. Another, which arises regularly, arises from the uncertainty surrounding the concept of a "claim." There is an analogy to the concept invoked by the claim-preclusion aspects of res judicata, but the analogy is not perfect. A plaintiff, for example, may claim a fraud worked by five misrepresentations. A ruling that three of them will not be considered is not a formal final decision on that claim, but may have the same effect.

Further discussion noted the occasionally conflicting interests of district courts and courts of appeals. There are circumstances in which the district court believes its own work will proceed more efficiently if one of its important rulings can be subjected to immediate review. The court of appeals may believe in the same case that its own work will proceed more efficiently if the district court completes all action in the case before there is any appeal. This difference of views at times leads to a determination that even though the technical requirements of Rule 54(b) are met, it was an abuse of discretion to enter a partial final judgment. And, in parallel, there may be other circumstances in which the district court is unreasonably unwilling to let the case go up for immediate appeal.

These considerations led back to the question whether control by the district court is better than control by the parties.

These concerns led one member to suggest that it will be safe to adopt a simple rule recognizing finality on unconditional dismissal with prejudice. Anything beyond that will present "real problems."

This observation led to the question whether it is appropriate to take an incremental approach when the committees are uncertain about some of the issues. Is it better to go forward with a simple rule that addresses only part of a problem, reserving more complex issues for development in the cases and possible future rulemaking? Or is it better to defer any rulemaking? The rules committees often do engage in incremental rulemaking. Civil Rule 23, for example, has been amended in some important respects, but without attempting to reexamine the most fundamental questions that surround class actions.

If an incremental approach is taken, the materials suggest a choice between two simple rules on dismissal with prejudice. One would say simply that a dismissal with prejudice of all remaining claims and parties establishes a final decision. It would not say that this is the only way to achieve a final decision. The alternative is a rule that says that such a dismissal is the "only" way to establish a final decision. The more modest incremental approach would be the first, omitting the exclusionary "only."

The first reaction is that a rule simply saying that finality can be achieved by voluntarily dismissing with prejudice everything that remains in the case would be "surplusage. All courts recognize" this means of establishing finality. If we mean to do something to clarify present practice, the incremental approach would be the rule that defines dismissal with prejudice as the only means of establishing finality. On this view, the "only" rule would defeat attempts to assert conditional prejudice. And it might also supersede the decisions that find what might be called "constructive prejudice," as in the cases that conclude a dismissal without prejudice is final because a statute of limitations would bar a new action. The same might happen with the occasional cases that have found finality on a dismissal without prejudice to bringing a new action in a state court, but on terms that foreclose bringing a new action in any federal court. The "only" rule could establish a bright line, and establish an incremental move beyond some present decisions.

The prospect of a bright line was greeted with enthusiasm. "I like bright lines. This helps the occasional practitioner" who does not regularly deal with appeal jurisdiction in the federal courts.

The Subcommittee then considered the question whether it should seek to present only a single proposal to the advisory committees, or whether it would be better to present a set of alternatives with the reasons that led the Subcommittee to prefer one of them. The Subcommittee agreed that it will be better to present at least the more prominent alternatives, with the full range of Subcommittee reasoning, to enable full debate in the Appellate and Civil Rules Committees.

That led to discussing the range of options that might be presented. The view was expressed that two or three choices might

be advanced, falling far short of the full range illustrated by the initial rules sketches.

The next suggestion was that the recommendation might be for the simplest rule, saying that finality can be achieved by dismissal with prejudice. The alternative saying that a party can achieve finality "only" by dismissing with prejudice all that remains in the case would be advanced for discussion, but not as a recommendation. Another member offered support for this view.

It was pointed out that "with prejudice" might be found ambiguous as to conditional prejudice. If the decision is that the Second Circuit should be told that it cannot any longer recognize finality achieved by a dismissal with conditional prejudice, it would be better to recommend rule text that clearly says that.

A recommendation to supersede conditional finality was supported by urging that the purpose of exploring manufactured finality has been to achieve uniformity across all circuits.

More generally, it was suggested that the important choice lies between a simple "may establish finality" rule and a more limiting "may establish finality only by" rule. A rule saying only that dismissal with prejudice suffices to establish finality may seem too trivial to warrant adoption. To be sure, this restatement of a proposition that is accepted by all the circuits might be helpful to lawyers who appear infrequently in federal court, but expanding the rules to guide neophytes to clearly established propositions may not be a desirable use of the Enabling Act.

This discussion was summarized by the suggestion that the Subcommittee should be ready to go to the advisory committees with a recommendation and a discussion of the most prominent alternatives. The questions would be whether to adopt any rule; whether the rule should be simple recognition of finality by dismissing with prejudice or should limit finality to dismissing with prejudice; whether conditional prejudice should be addressed, and in what way; and perhaps whether something should be said about the means of attributing "constructive" or "de facto" finality to a dismissal that formally is made without prejudice.

It was concluded that it will be useful to allow these issues to ferment for a few days, looking toward a Subcommittee recommendation of a recommended rule. Alternative rules will be described, and the policy considerations underlying the recommendation and alternatives will be described. One sensitive issue will relate to conditional finality. If the Subcommittee decides that dismissal with conditional finality is an undesirable means of establishing a basis for appeal, it will remain to decide whether the interest of uniformity -- and perhaps a fear that lawyers in other circuits will come to grief by looking to the Second Circuit, only to have conditional prejudice rejected in their circuit -- justifies telling the Second Circuit that it can

no longer adhere to its practice. The fact that this is an issue that tends to provoke differences of view between practicing appellate lawyers and judges may bear on this decision.

Appellate-Civil Subcommittee

The Appellate-Civil Rules Subcommittee met by conference call on February 13, 2015. Participants included Hon Scott Matheson, Subcommittee Chair; Hon. Steven Colloton; Hon. Peter Fay; Hon. David Campbell; Douglas Letter, Esq.; and Kevin Newsom, Esq. Professors-Reporters Catherine Struve and Edward Cooper also participated.

Discussion addressed drafts that illustrated several alternative approaches to manufactured finality. The drafts deliberately bypass the potential complexities that are reflected in the cases at the margins of manufactured finality.

The drafts also omit one alternative that has been considered in earlier deliberations. No draft says simply that finality cannot be achieved by dismissing without prejudice all that remains in an action. Two reasons underlie the choice to bypass this possibility. One is that this proposition is well recognized for most circumstances; little would be accomplished by casting it in rule text. The other is that a simple rule like this could have undesirable collateral effects. Some cases now recognize that a voluntary dismissal without prejudice has indeed achieved finality, and some of them may reach desirable results. And, although strained, there is a risk that such a rule would generate implications for dismissals with prejudice. The Subcommittee agreed unanimously that there is no need to continue to consider this alternative.

All the drafts address manufactured finality through a new Rule 41(a)(1)(C). The first draft presents a choice between two quite different approaches. One is to say simply that a party asserting a claim for relief may establish a final decision for purposes of appeal by a voluntary dismissal if the dismissal is with prejudice to all claims and parties remaining in the action. This simple approach recognizes a proposition that is readily recognized in case law. The reason to state it in explicit rule text would be to provide information for lawyers who do not often have reason to attempt to manufacture finality, and to provide reassurance for those who want to make quite sure what they are doing. The most likely source of uncertainty has been a minority view that a party who voluntarily dismisses lacks standing to appeal because the dismissal is what the party asked for. That view seems to have disappeared from the cases, but providing a clear rule will avoid the risk of resurgence. Clear jurisdictional rules are intrinsically desirable.

(Discussion did not reach a potential issue that was not reflected in the drafts. It may prove desirable to recognize district court authority to defeat manufactured finality. This could be accomplished by a slight revision of Rule 41(a)(2): "Except as provided in Rule 41(a)(1)(A) and (B), an action may be dismissed at the plaintiff’s request only by court order, on terms

that the court considers proper.")

The first draft Rule 41(a)(1)(C) includes an optional word that substantially changes its effect. Under this version, a voluntary dismissal establishes finality "only" if the dismissal is with prejudice. This approach would reject the decisions that, in various circumstances, have found finality in a voluntary dismissal without prejudice. But it might not do so completely; some of the decisions rely on finding de facto prejudice in a dismissal that purports to be without prejudice. The draft Committee Note includes an illustration of language that might be used to reject a "practical prejudice" approach. Whether it is desirable to reject the cases that support this approach is an open question.

The "only with prejudice" text also may be ambiguous on the question of conditional prejudice. In form, the dismissal is with prejudice, but on condition that the prejudice dissolves if the pre-dismissal orders challenged on appeal are reversed. It seems difficult to characterize such a dismissal as "without prejudice," but it also may not seem to be "with prejudice." Addressing this question only in the Committee Note will open the recurring question whether the Note would become an attempt to legislate by Note, not by Rule.

The final two drafts are mirror provisions for explicit rule text addressing conditional prejudice. The first rejects conditional prejudice as a means of establishing finality: "The dismissal may not be subject to revocation if an appeal results in reversal of any order entered before the dismissal." The second accepts conditional prejudice: "But a notice or stipulation of dismissal may provide that the dismissal will be vacated if an appeal results in reversal of any order entered before the dismissal."

Discussion began by suggesting that some good might be gained by a rule saying simply that a dismissal with prejudice of all that remains in an action establishes finality. This simple rule would not insist that "only" a dismissal with prejudice will do; that question would be left to continuing development in the courts, and the Committee Note could say so. And some good would be accomplished in providing guidance for practitioners who do not often encounter these problems, and in providing reassurance for those who otherwise would invest resources in confirming that this potentially risky step will cut off everything that is dismissed but not the right to review of the pre-dismissal orders.

The next question asked why conditional prejudice would remain in limbo if the rule text says that only dismissal with prejudice establishes finality. Why might conditional prejudice count as real prejudice? The response was that it likewise does not count as without prejudice. It was suggested that this ambiguity could be readily fixed: "only if the dismissal is with <u>unconditional</u> prejudice * * *."

The arguments for and against recognizing conditional prejudice as a means of establishing finality were rehearsed. Opinions seem to divide between judges and lawyers, or perhaps more accurately between appellate judges who disfavor conditional prejudice and lawyers -- perhaps with trial judges as allies -- who favor conditional prejudice. The arguments for conditional prejudice have become familiar. Interlocutory orders may dramatically reduce the potential value of a case. If there is no opportunity for present appeal, the parties may be forced to litigate the way through to a final judgment on relatively minor theories or claims solely for the purpose of achieving a final judgment that supports review of the interlocutory orders. Recognizing finality by a dismissal with conditional prejudice may spare the parties and the trial court the burden of these continuing proceedings. If appeal leads to affirmance of the interlocutory orders, the parties and both courts have gained. And affirmance is more likely than reversal on most appeals, although the experience may be rather different when a party is so firmly convinced as to wager all on a dismissal with conditional prejudice. And if appeal leads to reversal, the proceedings on remand may come earlier, and be more efficient, than if the appeal and reversal were delayed while proceedings were exhausted on the matters that would have been dismissed with conditional prejudice.

The argument against conditional prejudice comes from the appellate perspective. There are at least enough complications and exceptions in the final-judgment rule as it is. We do not need any more risks that the same case will come before the appellate court twice, forcing inefficient refamiliarization with the record. Ample means exist to serve whatever genuine needs for interlocutory review may exist. Collateral-order doctrine, partial final judgments under Civil Rule 54(b), and openly interlocutory appeals by permission under § 1292(b) are the chief resources. Why do we need more?

Rule 54(b) was used as an illustration of possible needs for some alternative. It avowedly relies on the district judge as "dispatcher," responsible for determining whether efficient management of a particular case will be advanced or impeded by an immediate appeal as to some part. But it has conceptual limits. The district judge may focus too much on the value of uninterrupted trial proceedings, at the expense of the parties and at its own expense when an erroneous order is eventually reversed for further proceedings. More importantly, Rule 54(b) requires final disposition of all of a "claim," or of all claims between at least one identified pair of opposing parties. What is a "claim" for this purpose is not always clear. If it approaches the definition of "claim" for res judicata purposes, it reaches circumstances where a dismissal with conditional prejudice may make sense. A plaintiff, for example, may seek unitary relief on any of seven legal theories. An order that dismisses two of the theories leaves open the same request for relief, but those two theories may have been the strongest in relation to the ease and cost of proof. Or, and

more clearly, a critically important interlocutory order may not dispose of all of a single claim. Cases explored in earlier Subcommittee discussions provide illustrations. An in limine ruling may exclude important evidence, leaving only much weaker evidence to support a claim that still remains alive. Rule 54(b) cannot be used to enter a partial final judgment.

The next comment was that recognizing dismissal with conditional prejudice will, overall, save resources for the system. It will not often be risked. When it is used, affirmance will end the matter sooner, at lower cost. And reversal still may achieve a faster and less costly disposition than would result from dragging out trial court proceedings before the first appeal. It can be important to the litigants.

An analogy was offered to support further thought. As much as they honor the final-judgment rule, the courts of appeals have repeatedly collaborated in developing expansions, exceptions, and occasional evasions. The temptation to reach out to respond to particular and particularly attractive requests for appellate justice runs strong. Collateral-order reasoning has often been used to succumb to this temptation. But the Supreme Court has undertaken to discourage open-ended reliance on collateral-order theory. It has come to insist that collateral-order appeals can be allowed only when immediate appeal is justified in all of the cases that fall within the particular "category" of challenged orders. There is an implicit message that courts should be astute to protect against erosion of the final-judgment rule. Perhaps the same is true of manufactured finality -- if not the Supreme Court, the rulemaking committees should advance the cause of true finality.

The analogy to Rule 54(b) was pursued further. Rule 54(b) assigns primary responsibility to the district judge to weigh the values of the final judgment rule in determining, on a case-specific basis, the most efficient allocation of responsibilities between the trial court and the court of appeals. Should there be some similar safeguard in approaching manufactured finality by voluntary dismissal? If dismissal terminates with unconditional prejudice every claim and all parties that remain, there may be no need to invoke review by the judge. Still, it would be good to know what the orders of dismissal actually provide and whether, after the opportunities to dismiss under Rule 41(a)(1) without court action have been exhausted, judges at times refuse to allow a dismissal with prejudice. And if dismissal is attempted with conditional prejudice, absent stipulation by the parties, the same questions may be even more important.

This discussion was summarized by suggesting that a competition seems to exist between efficiency in the district court and efficiency in the court of appeals. "Without a rule, the courts of appeals win the debate." But if there is a circuit that is willing to recognize conditional-prejudice finality -- to risk some appellate efficiency for the sake of the district court and the

parties -- should we pursue a rule that tells them they cannot do that?

Discussions in the earlier joint subcommittee were recalled. There was almost a consensus of the judges and lawyers that it is important to have certainty as to appellate jurisdiction. Certainty is advanced by a uniform rule. Different practices in different circuits may confuse lawyers, generating uncertainty. Still, it can be argued that so long as each circuit has a clear rule, there is not much cost to the system simply because the clear rules differ.

It was suggested that some measure of certainty on manufactured finality could be achieved by a simple rule saying that dismissal with prejudice establishes finality. The Committee Note could say that most circuits do not recognize conditional prejudice. One or two do. The rule does not attempt to resolve that issue. The Subcommittee itself seems to hold divided views; the simple approach may be the most we can agree on. This approach was seconded by noting that this simple rule would not say that dismissal with prejudice is the "only" voluntary means to achieve finality.

A practical thought was ventured. A rule that recognizes conditional prejudice would encounter strong resistance in the Judicial Conference. A majority of the chief circuit judges come from circuits that do not recognize conditional prejudice. A rule that rejects conditional finality would have some clarity, but likely would not win unanimous support. Members of the Appellate and Civil Rules Committee, as well the Standing Committee, could easily divide on the question. And even in the Judicial Conference, a few chief circuit judges, and some district judges, might be attracted to conditional prejudice. Perhaps the simple rule, without "only" with prejudice, is the best approach.

The rejoinder asked whether it is worth the effort to adopt the simple rule without "only." It does no more than confirm what most lawyers and judges know and do now. And it might stir debate. It also might create confusion about conditional prejudice. If we are prepared to reject conditional prejudice, it is likely to be for the sake of uniformity more than because of a broadly based conclusion that it is a bad idea. And uniformity will be better achieved by a rule that says "only" by dismissal with prejudice, perhaps adding "unconditional prejudice" to make the point clear in rule text.

Discussion turned to the report that should be made to the April meetings of the Appellate and Civil Rules Committees. Discussion so far has suggested that it is valuable to have a uniform national rule, but has not shown agreement on what the uniform rule should be. Nor does it seem likely that further Subcommittee deliberations will generate greater certainty. The issues have been extensively studied for some time. Division continues as to conditional prejudice. One identifiable issue is

the importance of uniformity across the circuits on conditional prejudice. If uniformity does not seem so important as to justify telling the Second Circuit, and apparently the Federal Circuit, that they cannot do as they have been doing, we could decide it is better to propose no new rule. Or if uniformity seems more important, we could propose a rule that rejects conditional prejudice and see how it fares in the advisory committees, Standing Committee, and Judicial Conference.

This approach was seconded. "The Subcommittee has talked it out. There are nuances and complications, but we have the decision points." There is some support for a simple rule, without "only." That rule may not accomplish very much.

Further discussion examined the importance of uniform rules of appeal jurisdiction. Practicing lawyer members of the Subcommittees past and present, have been attracted to the virtues of dismissals with conditional prejudice, but have been attracted even more strongly to the values of uniform rules. Even when a rule that seems clear leaves some uncertainties -- and any of the simple rules drafts will leave some uncertainties -- it is important to advance toward greater clarity. This is true even if, as experience seems to be in the Second Circuit, conditional prejudice dismissals remain uncommon. And it is true even if clear rules on conditional prejudice can be found in the decisions of many circuits. Many lawyers will spend time looking for them. Some lawyers may find the Second Circuit rule that recognizes conditional prejudice and rely on it even though their appeals are in a circuit that has rejected it, or has not spoken to it. A clear rule will protect against such misadventures, and will reduce the amount of time devoted to trying to figure out just what opportunities there are.

Once again, doubt was expressed whether any rule should be pursued. Conditional prejudice is the central problem that continues to thread through these discussions. The variety of other complications that have attended voluntary dismissals undertaken to manufacture finality do not seem susceptible to rule-based solutions. Any simple rule may do more harm than good. And expressly rejecting conditional prejudice for the sake of advancing uniformity may not accomplish much in uniformity, given the remaining areas of uncertainty.

The outcome of this discussion was agreement to report several alternative models to the Appellate and Civil Rules Committees. One will be to do nothing. The second will be the simple rule that recognizes finality by voluntary dismissal with prejudice. The third will be the expanded rule that recognizes finality only by voluntary dismissal with prejudice. And the fourth will be a rule that explicitly rejects conditional prejudice: "[only] if the dismissal is with unconditional prejudice * * *." The Civil Rules Committee meets two weeks before the Appellate Rules Committee meets in April, and will report the results of its deliberations to the Appellate Rules Committee.

Appellate-Civil Subcommittee
Civil Rule 62 Notes, Conference Call 12 December 2014

The Appellate-Civil Rules Subcommittee met by conference call on December 12, 2014. Participants included Hon. Scott Matheson, Subcommittee Chair; Hon. Peter Fay; Douglas Letter, Esq.; Kevin Newsom, Esq.; and Virginia Seitz, Esq. Professors-Reporters Catherine Struve and Edward Cooper also participated.

Judge Matheson welcomed the members to the work of the newly reconstituted Subcommittee. Two topics were to be considered: apparent gaps in the Civil Rule 62 provisions for staying execution of a judgment and the array of questions that arise from efforts to "manufacture" a final judgment in order to win appellate review of an interlocutory order that otherwise is not subject to immediate appeal. Separate notes describe the discussions of these topics.

The stay provisions in Civil Rule 62 begin with Rule 62(a), which provides an automatic stay of execution and other enforcement proceedings for 14 days after entry. This period was set at 10 days until the Time Counting Project amendments took effect in 2009. The Project converted most 10-day periods to 14 days and eliminated the complex rules that disregarded Saturdays, Sundays, and legal holidays in calculating time periods shorter than 11 days. So it was done for the automatic stay.

One set of 10-day periods, however, was reset to 28 days -- the periods to move for judgment as a matter of law under Rule 50, for amended or additional findings under Rule 52, or for a new trial or amended judgment under Rule 59. The 28-day period was chosen to allow enough time to prepare careful motions, but also to end before expiration of the 30-day period that governs most notices of appeal. Rule 62(b) provides that on appropriate terms for security, the court must stay execution and enforcement proceedings, pending disposition of any of these motions. The result is a period of as much as 14 days between expiration of the automatic stay and the time allowed to file a motion that will require a stay.

Two obvious questions are posed by this "gap." One is whether the court has authority to stay the judgment after expiration of the 14-day automatic stay and before any post-judgment motion is filed. The Civil Rules Committee believes that inherent authority is fully equal to the job, but it may prove useful to adopt an explicit provision to make this clear. The related question is whether it would be better to extend the automatic stay to 28 days, restoring the earlier practice that avoided any need to involve the court during this period.

Extending the automatic Rule 62(a) stay to 28 days would not be an entirely neat cure. Rule 62(b) also authorizes the court to stay execution pending disposition of a motion under Rule 60 for relief from a judgment or order. A Rule 60 motion can be made more

than 28 days after judgment, and indeed it is common to rule that if a motion is made within 28 days it often should be framed under Rule 59, or perhaps Rule 52 or even Rule 50. True Rule 60 motions would continue to be available after expiration of a 28-day automatic stay, but there seems little harm in that. An amended rule can be drafted in terms that allow the court to order a stay whenever one of these motions is pending.

The draft Rule 62(b) presented for discussion did not address the question whether the automatic stay under Rule 62(a) should be extended to 28 days. It did provide that the court may stay execution until the time to appeal has expired without any appeal, or until an appeal has been filed and a determination has been made whether to approve a supersedeas bond under Rule 62(d).

A different sort of gap may be found in the provisions for a stay before an appeal is filed and for a stay by supersedeas bond under Rule 62(d) pending appeal. The stay by supersedeas takes effect when the court approves the bond. What happens between "disposition of" a motion listed in Rule 62(b) and the filing of an appeal and approval of the bond? Experienced appellate practitioners may seek a single bond that will hold for the entire period between expiration of the automatic Rule 62(a) stay and final disposition of the appeal. The draft Rule 62(b) presented for discussion addressed this question by providing that the Rule 62(b) stay may last until the court has determined whether to approve a supersedeas bond under Rule 62(d). That process could include initial approval of a bond framed to endure until conclusion of the appeal, but need not.

Discussion began with an accounting of the reasons that prompted adding Rule 62 to the Appellate Rules Committee’s agenda. The bond and stay process is "totally mysterious," even to regular appellate practitioners. "Most of it is done off the books." "There are horror stories," and there is reason to fear that lawyers who do not regularly take appeals may need help. It is useful to seek a single bond for the entire process. But this approach comes at a cost. A Rule 62(b) stay calls for "appropriate terms for the opposing party’s security." Often it is possible to provide security by means less expensive and cumbersome than a bond. A letter of credit is one example. Other undertakings might do as well. Rule 62(d), on the other hand, requires a supersedeas bond pending appeal. At least it seems to. One participant noted that he had got permission to post a letter of credit as security under Rule 62(d).

A distinct question was raised: Should Rule 62 include provisions addressing the amount of the security or bond? Many local district rules, and many state rules, do so. One common provision is to set the amount at the face of the judgment, or the face of the judgment plus interest. Some provisions set an automatic increase -- for example, 125% of the judgment. It was agreed that if such a provision is included, there should be

discretion to set a different amount. The traditional example is the inability of Texaco to post bond, as required by Texas law, for the full amount of the multi-billion-dollar judgment in the Pennzoil litigation, leaving it vulnerable to immediate execution. Even with this discretion, setting a presumptive amount in rule text could "stave off satellite litigation" and make the procedure easier for the inexperienced.

Further work was encouraged by observing that real advantages can be gained by providing greater detail and clarity in Rule 62 text. Practitioners would not need to spend as much time with the treatises and cases.

The gap between the 14-day automatic stay and the time to make post-judgment motions was questioned. Why not extend the automatic stay to 28 days? This seems a pragmatic question. Because of time-counting conventions, the 10-day stay provided before 2009 was automatically at least 14 days, and in some combinations of holidays could run a few days longer. There are obvious risks that opportunities for effective execution will diminish even during this period, whether assets subject to execution suffer natural diminution or are concealed. Expanding the automatic stay without security expands these risks. This question deserves further inquiry.

The form of security also deserves attention. The participants in the call noted that they were seldom required to post security after expiration of the automatic stay. One reason is that the costs of a bond are recoverable, a prospect that encourages responsible behavior by parties who hold a judgment for the time being -- a party who is confident that it will be able to execute its judgment if the judgment survives may prefer to avoid exposure to this cost in case the judgment does not survive. More generally, it will be desirable to consider the requirement that security pending appeal be in the form of a bond -- other forms of security may be more flexible, and more appropriate. This thought was repeated -- it is important to allow different forms of security. Rule 62(d) might well be revised to parallel present Rule 62(b), calling for "appropriate terms for the opposing party’s security." This discussion led to a further suggestion: There is no apparent advantage in separating the provisions for stays pending conclusion of proceedings in the district court and pending appeal. The two provisions should be structured to flow naturally from district-court proceedings to appeal. This might be accomplished by rearranging Rule 62, or by combining (b) and (d) in a single subdivision. One practitioner supported this approach by noting that in his experience, 80% of judgments are headed for post-judgment motions and appeal. Merger should be attempted.

This discussion carried on with the observation that it is important to allow different forms of security.

It was agreed that there should be discretion as to the form of security both while proceedings continue in the district court and pending appeal. This led to a recommendation to attempt a merger of these provisions into a single subdivision.

Technical questions also were addressed. The discussion draft of Rule 62(b) separated proceedings in the trial court from proceedings on appeal by referring to the time when "a notice of appeal has been filed and become effective." This provision addresses the questions that might arise when the effect of a notice of appeal is suspended by post-judgment motions, questions that are addressed in Appellate Rule 4. The formula is borrowed from Civil Rule 58(e), where it was adopted in a deliberate plan to integrate with Appellate Rule 4. It was agreed that this is the proper phrase to express the thought.

A second question raised by the draft will be addressed in different terms if it proves possible to create a single subdivision for stays pending district-court proceedings and pending appeal. The draft extends the stay pending district-court proceedings to the point where the court has determined whether to approve a supersedeas bond. A fully integrated procedure will take care of this.

A third question was raised for the first time. Stays and bonds ordinarily are framed in terms of an "appeal." What does this mean after a court of appeals has concluded its proceedings but before expiration of the time to petition for certiorari or disposition of a petition? This question can be addressed in the terms of the bond. But it seems likely that not everyone will think to do so. Would it be useful to adopt a provision in the rules?

Other Rule 62 issues may deserve consideration if this project proceeds to fairly significant amendments. The role of state law under Rule 62(f) is one example.

The immediate tasks, then, are these: To consider extension of the automatic stay in Rule 62(a) to 28 days; to attempt to integrate the provisions for stays pending district-court proceedings and stays pending appeal into a single subdivision, or at least into a more natural flow without the interruption of Rule 62(c) addressing stays pending appeal of orders regarding injunctions; to adopt more flexible forms of security for stays pending appeal; and to consider adding a formula setting a presumptive amount for security.

Notes, Appellate-Civil Subcommittee February 4, 2015

The Appellate-Civil Subcommittee met by conference call on February 4, 2015. Participants included Hon. Scott Matheson, Subcommittee Chair; Hon. David G. Campbell, Civil Rules Committee Chair; Hon. Peter Fay; Douglas Letter, Esq.; and Virginia Seitz, Esq. Reporters Catherine Struve and Edward Cooper also participated.

The meeting focused on a draft of a revised Rule 62 that was designed to frame the issues discussed in an earlier meeting. These issues have not addressed all of the questions that might be addressed in a complete overhaul of Rule 62. Instead, they are framed around the questions that initially inspired the Appellate Rules Committee to believe that there is work to be done, and the related questions that grew out of that beginning. These issues look toward a better integration of the automatic stay provisions of Rule 62(a); the provisions in Rule 62(b) for a stay pending disposition of post-judgment motions under Rules 50, 52, 59, and 60; and the supersedeas bond provisions of Rule 62(d). In addition, it may be valuable to add express provisions recognizing that security may take a form other than a bond, and that there is discretion in setting the amount of security.

The issue that sparked the initial interest in Rule 62 arose from the practice of experienced appellate lawyers that looks to provide a single bond (or other form of security) that will cover all stages of the case after expiration of the automatic stay provided by Rule 62(a). This security will cover post-judgment proceedings in the district court and any appeal that may be taken. It was thought useful to recognize this practice in rule text.

The "single bond" question led naturally to the apparent "gap" that exists between Rule 62(a) and 62(b). The automatic stay under Rule 62(a) expires 14 days after judgment is entered. Rule 62(b) recognizes that the court may order a stay pending disposition of motions made under Rules 50, 52, 59, and 60. These two provisions dovetailed nicely when the time to move under Rules 50, 52, and 59 was 10 days. (Ten days always meant at least 14 days under the time-counting conventions established by Rule 6). But the "Time Project" changed the time for Rule 50, 52, and 59 motions to 28 days. The change was prompted by the sense that many cases present such complicated issues that 14 days (or a few more, depending on intervening legal holidays) is not enough to prepare an effective motion. The period was set at 28 days -- unique in the Civil Rules -- to allow the parties a brief grace period to decide whether to file a notice of appeal within the 30 days allowed by Appellate Rule 4 for most civil appeals. Knowing whether the time to appeal has been suspended by a timely motion under any of these rules, or a Rule 60 motion filed within 28 days, can be important in deciding whether and when to file a notice of appeal.

The gap between expiration of the automatic stay under Rule 62(a) and the provision in Rule 62(b) for a stay pending disposition of a post-judgment motion led a district judge to suggest that the Civil Rules Committee should consider amending Rule 62(b). The Committee considered the question and concluded that the court has inherent power to stay its own judgment. It determined that revision of Rule 62(b) should be considered only if ongoing practice did not settle this question.

If Rule 62 is to be considered for other reasons, it seems wise to reconsider the fit between Rules 62(a) and 62(b).

Reconsideration does not lead to an obvious answer. There are good reasons to keep a tight rein on the automatic stay. It is possible to dissipate or conceal assets promptly after an adverse judgment, and the greater the time available the greater the prospect that the judgment debtor can choose means that resist undoing. On the other hand, the value of the post-judgment motions may be defeated if the judgment creditor is allowed to execute on the judgment. Just as a judgment debtor may avoid payment, so a judgment creditor may be able to avoid repayment. (If a rule is drafted that recognizes the court's authority to terminate the automatic stay, it may be desirable to include a provision that recognizes authority to require security by the judgment creditor as a condition of allowing immediate execution.)

One possible resolution is to extend the automatic stay to 30 days, but to recognize the court's authority to terminate the automatic stay. Termination of the automatic stay could easily be integrated with a provision that allows the court to order a stay on appropriate terms for security: the risk presented by the automatic stay, and the risk presented by the absence of a stay, could be counterbalanced. Security need not be ordered, whether in the form of a bond or some other form (a certificate of deposit, other security, the manifest ability of the judgment debtor to make good on the judgment). But security could be ordered on terms that are calculated to eliminate any risk to the judgment creditor or, if immediate execution is allowed, the judgment debtor.

Express authority to order a stay at any time, on appropriate terms for security, would address the desire to have a single bond that endures for the life of the case, at least through appeal.

It also may be desirable to include in the rule text express recognition of authority to dissolve a stay or modify the terms for security. Circumstances change, and may be particularly likely to change if security is ordered before decision of any post-judgment motions.

Present Rule 62(d) provides what seems to be a right to a stay upon posting a supersedeas bond. The illustrative draft carries subdivision (d) forward, although relocated within the rule. The only change is to recognize that security may take a form other

than a bond. One important question that needs to be addressed is whether Rule 62(d) now establishes at least a very strong presumption for -- and perhaps something approaching a right to -- a stay on posting a bond approved by the court. At least some courts have recognized that the requirement of a bond may be excused. Research needs to be done to determine whether a stay may be denied even though a satisfactory bond (or other satisfactory security) has been tendered.

The central features of the draft rule, then, emphasize the value of establishing court authority to control stays of execution. The automatic stay may be terminated. A stay may be ordered at any time, beginning with entry of the judgment. It may be subject to appropriate terms for security, establishing discretion whether to demand any security and as to the form of any security and the amount. The stay may be ordered for any period, up through issuance of the appellate mandate. (This feature can be integrated through the Appellate Rules on issuing the mandate to cover the period for petitioning for certiorari, possibly before but ordinarily after judgment in the court of appeals.)

Discussion began by focusing on the "gap" between expiration of the automatic stay after 14 days and the 28-day period for filing post-judgment motions under Rules 50, 52, and 59.

The most elemental question is why there should be an automatic stay at all. Why not put the burden on the judgment debtor to justify a stay? And perhaps to provide security? The need for some automatic stay may flow from the need to recognize the entry of judgment, to prepare a motion, and to arrange security. Some judgment debtors may be able to anticipate the need and act almost instantly on receiving e-notice of judgment. But others may not. Immediate execution by an aggressive judgment creditor is a possibility. The rule has long provided for an automatic stay, and there has not been any evident sense that this has been a mistake.

The more direct question about the "gap" was addressed by suggesting there is a need to protect the opportunities for correction of the judgment by a post-judgment motion. As the rule stands now, there is a risk that an inexperienced lawyer may not recognize the need to ask for an extension of the automatic stay -- or a stay issued on the court’s inherent authority, and on such terms as the court may impose in exercising its authority -- and expose the judgment debtor to the serious risks of immediate execution. Recovery of the amounts seized in execution may not provide much protection for a judgment debtor who cannot function without those assets. The judgment creditor can oppose the stay; authority to grant a stay is not an automatic entitlement. If there are strong reasons to deny a stay, the stay will be denied.

The draft submitted for discussion was intended to address this question by one or the other of two alternatives. One was to extend the automatic stay to 30 days. That would leave the burden

on the judgment creditor to seek to dissolve the stay. The other was to retain the automatic stay at 14 days, but allow the judgment debtor to move at any time, including the moment judgment is entered or perhaps even before judgment is entered, to win a stay on "appropriate terms for security."

One important question, then, is which party should have the burden with respect to security after -- or perhaps during -- an automatic stay.

A related question asked about the burden on the court of addressing these questions. The greater the court's responsibility, the greater the prospect that disputes about stays and security will eat into scarce judicial resources. The first response was that these problems do not seem to arise in practice. Once judgment is entered, "the parties talk and work it out." Motions to extend the automatic stay do not arise. (This may indicate one value in the automatic stay -- it provides shelter for these discussions.)

Discussion turned to the question whether it is useful to carry forward the present provision for obtaining a stay by posting a supersedeas bond. Perhaps the supersedeas should be superseded by a procedure that makes the court responsible for all stays, at least after an automatic stay expires. Discussion recalled the question whether present Rule 62(d) establishes something like a "right" to a stay on posting bond approved by the court. Approval by the court seems to allow delegation of approval authority to the court clerk. Some courts have local rules that expressly authorize the clerk to approve a supersedeas bond, at least if the bond satisfies criteria set out in the rule. But why allow this opportunity for a second bite at the apple? If the court has denied a stay sought on motion under the open-ended provision of draft Rule 62(b)(1), why should that not end the matter?

One value of carrying forward the present supersedeas provision may be that it allows a party to forgo any motion. Judgment is entered. An appeal is taken, perhaps without any post-judgment motions. An appeal bond is posted. End of story. Or, at least, end of story if the present rule establishes something that at least approaches a right to a stay on posting bond.

Another way of asking the question was whether there is a need to provide for a discretionary stay ordered by the court if the automatic stay is extended to 30 days. To be sure, there is a need if a timely post-judgment motion is filed; the court ordinarily will need more time to dispose of the motion, or perhaps several motions.

One possibility to avoid a "second bite" would be to draft terms that allow a party to secure a stay by posting a supersedeas bond only if that party has not sought a court-ordered stay. It was noted that this approach would generate strategic behavior by discouraging an application for a court-ordered stay, which may be

important in the period before any appeal is filed, so as to preserve the automatic stay that seems available under the supersedeas procedure.

Discussion turned to the question whether Rule 62 should provide more detailed terms governing the form of security. The national rules once had such provisions. They were abandoned. Brief discussion suggested that it would be a mistake to attempt to address such issues, which often call for a pragmatic exercise of discretion, in national rule text. Local rules can address some parts of these issues, but the time has not come for national-rule provisions.

A different structure was suggested. Rule 62(a) could have three paragraphs. (1) would address the automatic stay. (2) would address stays pending disposition of post-judgment motions, perhaps restoring explicit reference to Rules 50, 52, 59, and 60. It might, or might not, address more general authority to order a stay that persists from expiration (or termination) of the automatic stay through appeal. (3) would address stays pending appeal. This structure might reduce the potential overlap between subdivisions (a) and (b) in the illustrative draft. It would provide for a stay for the benefit of a party who needs this protection pending preparation and disposition of post-judgment motions.

It was suggested that whatever structure is adopted, it will be important to recognize the opportunity to secure a stay that persists from the end of the automatic stay through appeal, with a single security (unless the terms of security are modified by the court to address changing circumstances, such as actual decision of the post-judgment motions).

It was noted that the Subcommittee has not yet considered other possible questions raised by Rule 62. They will continue on the Subcommittee agenda.

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PILOT PROJECTS

Introduction

Rulemaking has long relied heavily on the knowledge, experience, wisdom, and judgment of leaders of the bench, bar, and academy. Starting at least 50 years ago, however, interest has grown in using the methods of the social sciences to establish more rigorous measures of actual experience. Reliance on "anecdotes" is challenged, often forcefully. Surveys have been used, often successfully, to multiply the numbers of those whose experience can be brought to bear. The continually growing volume of data to be found in court files -- particularly electronic files -- has supported large-scale studies that correlate many different factors and subject them to sophisticated statistical analysis. Powerful associations between procedures and outcomes may be revealed. But shortcomings remain.

The next step is the rulemaking equivalent of controlled experiments. In broad outline, the ideal is to identify a set of cases that are as nearly identical as possible in every characteristic that can be identified as potentially relevant to the inquiry. That in itself is no small matter. Among the more obvious variations are substantive subject matter; amount in controversy; experience of the lawyers (including years at the bar; frequency of litigation; typical patterns of representing plaintiffs, defendants, or both; firm structure); the basis for calculating attorney fees; court; judge; time of filing; pre-litigation negotiations; liability insurance coverage; third-party financing; and no doubt other things as well.

Once the set of cases is identified, the ideal is to allocate them at random to two (or more) different sets. One set is litigated under prevailing procedure. The other set is litigated under the prevailing procedure in general, but the new procedure that is to be tested is substituted for the counterpart in prevailing procedure. A structure is established at the beginning to gather information on all the points that may distinguish the tested procedure from the prevailing procedure. The structure is followed. The study should endure for some significant period after the court and parties have learned how to work the new procedure. Then the data are collected and analyzed. Often it will be important to survey or interview the participants to gather their explanations and understandings of how the new procedure worked.

None of that is easy. And it depends on making a binding and random assignment of cases. If participants are allowed to opt out of the new procedure that is being tested, there is a great risk that the results will be skewed. Those who are skeptical of whatever results are reported will argue, often with good reason, that the effects depend on self-selection of the cases where the

lawyers thought the new procedure would be helpful to their cause. And what is helpful may depend not on a disinterested desire for a just, speedy, and inexpensive determination, a hope to reduce cost and delay, but quite the opposite.

State Court Laboratories

The 1938 Federal Rules were created against the background of the Equity Rules and, in actions at law, the practices of all the states as absorbed through the Conformity Act. Many state courts have returned the favor by shaping their procedures to reflect, and often to absorb, federal procedure. Many states, however, have procedures that differ from federal procedure, often substantially.

State practices remain a potentially valuable source of information in considering revisions of federal procedure. One recent example is the effort to survey state rules that parallel the offer-of-judgment procedure established by Civil Rule 68. But it may be at least as difficult, and often likely is more difficult, to gather rigorous information about the rules in actual operation.

State practices may provide more useful information when state courts establish pilot projects, or adopt new procedures and undertake to assess the effects of the new procedures. The Institute for the Advancement of the American Legal System has become a leader in efforts to study state procedures, seeking information that can be used by other states and by federal courts as well. We have already learned a lot from their work, and expect to continue to learn still more.

There always will be reasons to be cautious about transporting successful procedures from state courts to federal courts. The mix of cases may be different. Local "legal culture" may be important -- a procedure that works well in the courts of one state, and will work equally well in federal courts in that state, may not work as well in all courts across the country. But caution should not obscure the valuable lessons that can be learned.

Rules Committee Projects

The questions for the rules committees are whether to become involved in supporting pilot projects for small-scale testing of ideas that do not yet seem ripe for adoption nationwide. Both conceptual and practical concerns will shape the answer.

The conceptual questions begin with the role of the advisory committees and the Standing Committee in the Enabling Act process. The committees work for and through the Judicial Conference. The Judicial Conference makes recommendations for action by the Supreme Court to adopt "general rules of practice and procedure" under § 2072. Ad hoc directions to be implemented as an experiment in no more than a few courts may not seem to be "general rules." But the

Judicial Conference's authority to recommend "changes in and additions to" the general rules is stated in a single paragraph of § 331 that charges the Conference with "carry[ing] on a continuous study of the operation and effect of the general rules of practice and procedure * * * as prescribed by the Supreme Court for the other courts of the United States." "Continuous study" may well include pilot projects. And the Standing Committee and advisory committees are the natural bodies to assist the Conference in discharging this function.

A second conceptual question arises from the means chosen to implement a pilot project. One natural approach would be to adopt a local district rule that embodies the project. A potential difficulty arises from § 2071(a), which directs that a local court rule "shall be consistent with * * * rules of practice and procedure prescribed under section 2072 * * *." Rule 83(a)(1) mirrors this direction: "A local rule must be consistent with -- but not duplicate -- federal statutes and rules adopted under 28 U.S.C. §§ 2072 and 2075 * * *." A practice to be evaluated through a pilot project may well be subject to the objection that it is inconsistent with a national rule. Much will depend on the test used to measure inconsistency. A narrow test would allow wide latitude to experiment. A local rule that does not allow or require what a national rule forbids, nor forbid what a national rule allows or requires, would pass muster. But even on that approach, uneasiness will remain. One proposal that drew considerable support in recent work was to shorten the presumptive duration of an oral deposition to 4 hours. Is that inconsistent with Rule 30(d)(1), which sets it at one day of 7 hours? Or not inconsistent, because a court has authority under Rule 30(d)(1) to "otherwise * * * order"?

One response to the possibility of inconsistency with the national rules may be to revise Rule 83 to allow experimental local rules. That approach has been considered. Appendix A provides materials that describe the most recent exploration of this area. The proposal was eventually abandoned, at least in part because of uncertainty about the effect of § 2071(a) on a national rule that purports to authorize local rules inconsistent with the national rules.

A different response may be to promote pilot projects by means other than local rules. It will always be important to have support -- preferably unanimous and enthusiastic support -- from a district's judges. Such devices as standing orders might substitute for local rules, although it is important to remember the uncertain foundations for a "standing order" that looks like a local rule and acts like a local rule.

The local rule question is important because it ties to the question of mandatory participation. Questions of inconsistency with the national rules subside -- although they may not disappear entirely -- if litigants are allowed to opt out of a pilot project.

But, as noted, that may substantially undermine the value of the project.

One example of local rules that might become a subject for pilot-project study is provided by rules that set expeditious time schedules. The well-known "rocket docket" in the Eastern District of Virginia was the subject of a panel presentation to the Committee a while ago, and the somewhat similar practices in the Western District of Wisconsin have been explored in a presentation to the Standing Committee. The Southern District of Florida, which has a 3-track system, also has achieved speedy disposition of cases. Several districts have local rules for patent cases that seem to expedite disposition. Judge Wedoff presented a valuable set of statistics on experience under these programs to the Standing Committee last January. These beginnings might be elaborated into a more rigorous effort to evaluate their operation and to determine whether they depend on local cultures that could be grafted onto litigation cultures in other districts. One important question will be whether it is better to study the established programs than to attempt to launch new programs in other courts. But care must be taken in evaluating existing programs. Judges must cooperate willingly. It may be difficult to get frank evaluations from lawyers, and an attempt must be made to determine whether things that may seem undesirable to lawyers seem attractive to their clients.

Pragmatic and conceptual concerns blend in another direction. On a practical level, it must be asked how far the rules committees are able to promote effective pilot projects. The actual structuring of the project so as to support effective evaluation will require the assistance of experts in social science methodology. The Federal Judicial Center is the obvious source of assistance, but its capacities are finite. Help might be found in other sources. The IAALS is a prominent example. But great care must be taken in working with any nongovernmental entity.

Practical questions blend with more conceptual questions at the point of identifying particular proposals that could be tested through pilot projects. The rules committees should be good at identifying promising rules changes that would benefit from controlled empirical testing. They may even be good at designing a rule they would like to study for potential adoption through the Enabling Act. But framing a model for testing that comes close to the rule that might be proposed for publication after arduous work, and even close to the rule that might be recommended for adoption in light of public comments, may be more difficult. A pilot project rule that is conceived in a less exhaustive fashion may provide only uncertain light. Better light than abstract guessing, but still uncertain. Whether it is wise to set out down such roads deserves attention.

These concerns can be focused by offering one example of a possible pilot project. Rule 26(a)(1)(A), mandating initial

disclosures, was first adopted in 1993. It required all parties to identify witnesses and documents bearing on "disputed facts alleged with particularity in the pleadings." One purpose was to jump-start the inevitable first wave of discovery. Disclosure extended to information adverse to the disclosing party, sometimes called "heartburn" disclosure. A second purpose was to encourage particularized pleading that would expand an adversary's disclosure responsibilities. The rule was vigorously opposed during the public comment period. One concession was to allow districts to opt out of the rule by local rule. The result was a patchwork of disclosure practices across the country. Many districts opted out entirely. Some opted out in part. And many, at least at the district level, adhered to the national rule. The rule was amended seven years later, however, in the culmination of a process that began before there was much experience with the national rule in the courts that adhered to it. The amendment did not reflect a judgment by the rules committees that the 1993 version was too ambitious. The amendment reflected a judgment that national uniformity was more important than relatively broad disclosure, and a further prediction that it would be difficult to win approval for an amendment that simply deleted the local option. So the 2000 version scaled initial disclosure back to witnesses and documents that the disclosing party may use to support its claims or defenses.

The workings of Rule 26(a)(1)(A) have been touched on in various projects on discovery. An example was the Duke Conference in 2010. The reactions of lawyers tend to fall into one of three categories. One category finds that initial disclosures are sometimes useful. A second finds that initial disclosures are useless because the limit to information a party may use in its own case means that full-scale discovery must be pursued without regard to the disclosures. And a third finds that initial disclosure is not of much use now, but suggests that it could become useful if it were restored to something like the 1993 rule.

There are many possible ways to expand initial disclosures. One is indirect. The protocols for automatic initial discovery created for individual employment cases provide a good example. They call for automatic exchanges of information that correspond to the discovery routinely and properly undertaken in cases of this type. Initial experience suggests that they are working well in the courts that have adopted them. Enthusiasm for this approach has led to suggestions that attempts should be made to create similar protocols for other specific litigation subjects that commonly come to federal courts. The next steps might well focus on subjects that tend to be litigated by a relatively specialized bar populated by lawyers who frequently litigate with each other. They will know what discovery is routine, and will know how to frame the first wave in ways that will reduce delay, contentiousness, and cost. One example may be police conduct cases under § 1983; the Southern District of New York has had a pilot project for such cases, and is on the brink of adopting a local rule 83.10 for cases against the City of New York. Other subjects that have been proposed include

actions under the Individuals with Disabilities Education Act and actions under the Fair Credit Reporting Act.

Another way is to examine experience under state rules. Arizona Rule 26.1 provides sweeping initial disclosures. Appendix B includes extensive materials on experience with the Arizona rule. This experience could be helpful in crafting a rule to be tested by a pilot project. It might even provide sufficient experience to justify treating the Arizona outcome as a successful pilot project in itself.

Pilot projects, in short, offer significant promise of advancing empirical research that will support effective rulemaking. But they also present questions about the most effective role to be played by the rules committees. These questions may prove to be addressed most successfully in the context of one or more specific proposals. Initial disclosure may be a promising example. Other tests may be provided by thinking about topics on the current agenda. Pilot projects on class actions may be difficult to launch, given the sensitivity of these procedures. Projects on stays of execution pending post-judgment proceedings and appeals may be difficult for rather different reasons. Perhaps something could be managed for offers of judgment -- as, for example, a revised offer-to-settle rule -- but that too would require a deliberate approach.

APPENDIX A

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THE UNIVERSITY OF MICHIGAN
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ANN ARBOR, MICHIGAN 48109

ASSOCIATE DEAN

October 20, 1992

Dean Daniel R. Coquillette
Boston College Law School
885 Centre Street
Newton Centre
Massachusetts 02159

FAXED
10-20-92

Dear Dean Coquillette:

I have reviewed the rule drafts on local rules and technical changes from the advisory committees on Appellate, Bankruptcy, and Civil rules. To the extent that there are differences, I tend to prefer the form submitted by the Civil Rules committee. The one change that the Civil Rules committee might embrace is to expand Civil Rule 84 to allow technical rule amendments of form and style to conform to statutory changes. I enclose a copy of the May, 1992 draft for your convenience, marked with the possible revision of Rule 84.

Two comments about draft Bankruptcy Rule 9037. It does not provide for amendment of "the explanatory notes" as well as the rules. I think it is better to retain Judicial Conference power to amend the explanatory notes. Changing the text of a rule without corresponding changes in the notes could produce a source of arcane knowledge and satisfaction for a few, but confusion for many. The minutes of the bankruptcy rules committee meeting suggest a concern to preserve the committee role. I suppose the committee role will be preserved in the same way it is preserved with respect to the text of the rules--and that the committee role is more important with respect to the text.

The other comment on Bankruptcy Rule 9037 addresses the possible revision of Civil Rule 84. The February, 1992 draft of Rule 84 provided for amendments "to conform to statutory changes." Committee discussion of this draft led to deletion of this phrase for fear that it might justify inappropriately broad changes in the rules. The minutes of the Bankruptcy Rules committee reflect a similar process. The initial draft provided for amendments to make the rules "consistent in form and style with statutory changes." There was a motion to strike this phrase. Judge Keeton suggested substitution of the phrase actually adopted, allowing amendments to make the rules "consistent in form and style with statutory changes." The limitation to matters of form and style addresses the concern of the Civil Rules committee and may well be satisfactory to it. I will report any discussion of this question at the November meeting of the committee.

The differences in the local rules provisions seem matters of style. Civil Rule 83(a) requires local rules to "conform to any uniform numbering system"; that seems more graceful than such alternatives as "shall be numbered or identified in conformity with any uniform system," but such matters are in your hands.

I enjoyed talking with you last week and look forward to working with you.

Best regards,

Edward H. Cooper

EHC/lm
encl.
xc: Judge Pointer

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE AND THE FEDERAL RULES OF EVIDENCE

SUBMITTED TO

STANDING COMMITTEE
ON
RULES OF PRACTICE AND PROCEDURE

BY

ADVISORY COMMITTEE
ON
CIVIL RULES

MAY 1992

Rule 83. Rules by District Courts; *Orders*

(a) Local Rules. Each district court by action of a majority of the judges thereof may from time to time, after giving appropriate public notice and an opportunity to comment, make and amend rules governing its practice ~~not in~~consistent with *Acts of Congress and consistent with, but not duplicative of,* ~~these~~ rules *adopted under 28 U.S.C. §§ 2072 and 2075*. A local rule so adopted shall *conform to any uniform numbering system prescribed by the Judicial Conference of the United States and shall* take effect upon the date specified by the district court and shall remain in effect unless amended by the district court or abrogated by the judicial council of the circuit in which the district is located. Copies of rules and amendments so made by any district court shall upon their promulgation be furnished to the judicial council and the Administrative Office of the United States Courts and be made available to the public.

(b) Experimental Rules. With the approval of the Judicial Conference of the United States, a district court may adopt an experimental local rule inconsistent with rules adopted under 28 U.S.C. §§ 2072 and 2075 if it is otherwise consistent with Acts of Congress and is limited in its period of effectiveness to five years or less.

(c) Orders. In all cases not provided for by rule, the district judges and magistrates *judges* may regulate their practice in any manner ~~not in~~consistent with *Acts of Congress, with* ~~these~~ rules ~~or~~ *adopted under 28 U.S.C. §§ 2072 and 2075, and with local rules* ~~those~~ of the district in which they act.

(d) Enforcement. Rules and orders pursuant to this rule shall be enforced in a manner that protects all parties against forfeiture of rights as a result of negligent failure to comply with a requirement of form imposed by such a local rule or order.

COMMITTEE NOTES

SPECIAL NOTE: Mindful of the constraints of the Rules Enabling Act, the Committee calls the attention of the Supreme Court and Congress to new subdivision (b). Should this limited authorization for adoption of rules inconsistent with national rules without Supreme Court and Congressional approval be rejected, the Committee nevertheless recommends adoption of the balance of the rule, with subdivisions (c) and (d) being renumbered. The Committee Notes would be revised to eliminate references to experimental rules.

Purpose of Revision. A major goal of the Rules Enabling Act was to achieve national uniformity in the procedures employed in federal courts. The primary purpose of this revision is to encourage district courts to consider with special care the possibility of conflict between their local rules and practices and the nationally-promulgated rules. At various places within these rules (e.g., Rule 16), district courts are specifically authorized, if not encouraged, to adopt local rules to implement the purposes of Rule 1 in the light of local conditions. The omission of a similar explicit authorization in other rules should not be viewed as precluding by implication the adoption of other local rules subject to the constraints of this Rule 83.

Subdivision (a). The revision conforms the language of the rule to that contained in 28 U.S.C. § 2071 and also provides that local district court rules should not conflict with the national Bankruptcy Rules adopted under 28 U.S.C. § 2075. Particularly in light of statutory and rules changes that may encourage experimentation through local rules as to such matters as disclosure requirements and limitations on discovery, it is important that, to facilitate awareness within a bar that is increasingly national in scope, these rules be numbered or identified in conformity with any uniform system for such rules that may be prescribed from time to time by the Judicial Conference. Revised Rule 83(a) prohibits local rules that are merely duplicative or a restatement of national rules; this restriction is designed to prevent possible conflicting interpretations arising from minor inconsistencies between the wording of national and local rules, as well as to lessen the risk that significant local practices may be overlooked by inclusion in local rules that are unnecessarily long.

Subdivision (b). This subdivision is new. Its aim is to enable experimentation by district courts with variants on these rules to better achieve the objectives expressed in Rule 1. District courts in recent years have experimented usefully with court-annexed arbitration and are now encouraged by the Judicial Improvements Act of 1990 to find new methods of resolving disputes with dispatch and reduced costs. These rules need not be an impediment to the search for new methods provided that the experimentation is suitably monitored as a learning opportunity.

Experimentation with local rules inconsistent with the national rules should be permitted only with approval of the Judicial Conference of the United States, and then only

for a limited period of time and if not contrary to applicable statutes. It is anticipated that any request would be accompanied by a plan for evaluation of the experiment and that the requests for approval of experimental rules would be reviewed by the Standing Committee on Rules of Practice and Procedure before submission to the Judicial Conference.

Subdivision (c). The revision conforms the language of the rule to that contained in 28 U.S.C. § 2071, and also provides that a judge's orders should not conflict with the national Bankruptcy Rules adopted under 28 U.S.C. § 2075. The rule continues to authorize--without encouraging--individual judges to enter orders that establish standard procedures in cases assigned to them (e.g., through a "standing order") if the procedures are consistent with these rules and with any local rules. In such circumstances, however, it is important to assure that litigants are adequately informed about any such requirements or expectations, as by providing them with a copy of the procedures.

Subdivision (d). This provision is new. Its aim is to protect against loss of rights in the enforcement of local rules and standing orders against by who may be unfamiliar with their provisions.

Local rules and standing orders have become quite voluminous in some courts. Even diligent counsel can on occasion fail to learn of an applicable rule or order. In such circumstances, the court must be careful to protect the interests of the parties. Elaborate local rules enforced so rigorously as to sacrifice the merits of the claims and defenses of litigants may be unjust.

Moreover, the Federal Rules of Civil Procedure are often forgiving of inadvertent lapses of counsel. In part, this reflects the policy of the Rules Enabling Act, 28 U.S.C. § 2071, which aims to establish a uniform national procedure familiar to attorneys in all districts. That policy might be endangered by proliferation of local rules and standing orders enforced so rigorously that attorneys might be reluctant to hazard an appearance or parties might be reluctant to proceed without local counsel fully familiar with the intricacies of local practice. Cf. Kinder v. Carson, 127 F.R.D. 543 (S.D. Fla. 1989).

This constraint on the enforcement of local directives poses no problem for court administration, for useful and effective local rules and standing orders can be enforced with appropriate caution to counsel or by means that do not impair the rights of the parties.

Rule 84. Forms; *Technical Amendments*

(a) Forms. The forms contained in the Appendix of Forms are sufficient under the rules and are intended to indicate the simplicity and brevity of statement which the rules contemplate. *The Judicial Conference of the United States may authorize additional forms and may revise or delete forms.*

(b) Technical Amendments. The Judicial Conference of the United States may amend these rules or the explanatory notes to correct errors in grammar, spelling, cross-references, or typography, and to make other similar technical changes of form or style.

to make them consistent in form and style with statutory changes

COMMITTEE NOTES

SPECIAL NOTE: Mindful of the constraints of the Rules Enabling Act, the Committee calls the attention of the Supreme Court and Congress to these changes, which would eliminate the requirement of Supreme Court and Congressional approval in the limited circumstances indicated. The changes in subdivisions (a) and (b) are severable from each other, and from other proposed amendments to the rules.

The revision contained in subdivision (a) is intended to relieve the Supreme Court and Congress from the burden of reviewing changes in the forms prescribed for use in civil cases, which, by the terms of the rule, are merely illustrative and not mandatory. Rule 9009 of the Federal Rules of Bankruptcy Procedure similarly permits the adoption and revision of bankruptcy forms without need for review by the Supreme Court and Congress.

Similarly, the addition of subdivision (b) will enable the Judicial Conference, acting through its established procedures and after consideration by the appropriate Committees, to make technical amendments to these rules without having to burden the Supreme Court and Congress with such changes. This delegation of authority, not unlike that given to Code Commissions with respect to legislation, will lessen the delay and administrative burdens that can unnecessarily encumber the rule-making process on non-controversial non-substantive matters, at the risk of diverting attention from items meriting more detailed study and consideration. As examples of situations where this authority would have been useful, one might cite the numerous amendments that were required to make the rules "gender-neutral," section 11(a) of P.L. 102-198 (correcting a cross-reference contained in the 1991 revision of Rule 15), and the various changes contained in the current proposals in recognition of the new title of "Magistrate Judge" pursuant to a statutory change.

1992

DRAFT

MINUTES

Advisory Committee on Civil Rules

November 1992

The Advisory Committee on Civil Rules met on November 12, 13, and 14, 1992, at the Westin Hotel, Denver, Colorado. The meeting was attended by Judge Sam C. Pointer, Chairman, and committee members Judge Wayne D. Brazil; Carol J. Hansen Fines, Esq; Chief Justice Richard W. Holmes; Dennis G. Linder, Esq.; Dean Mark A. Nordenberg; and Judge Joseph E. Stevens, Jr. Judge William O. Bertelsman, Liaison Member from the Standing Committee on Rules of Practice and Procedure, and Judge Robert E. Keeton, Chairman of the Standing Committee, also attended. Also present were Peter McCabe, Joseph A. Spaniol, and John K. Rabiej of the Administrative Office of the United States Courts; Joe Cecil of the Federal Judicial Center; Ted Hurt of the Department of Justice; Bryan Garner, Esq., of LawProse, consultant to the Standing Committee Style Subcommittee; and Edward H. Cooper, Reporter. Observers included Tripp Baltz, Alfred W. Cortese, Jr., and Joseph Womack.

The meeting began with a report on the progress of the recommendations that were submitted by the Advisory Committee to the Standing Committee at its June, 1992, meeting. The Standing Committee determined to hold Evidence Rule 702 for review by the reconstituted Advisory Committee on Evidence Rules, and made changes to Civil Rule 11 and some portions of Civil Rule 26. Civil Rules 83 and 84 were held back to provide an opportunity to achieve uniformity in the parallel submissions by several advisory committees. With these modifications, the recommendations of the Advisory Committee were submitted to the Judicial Conference. The Judicial Conference made changes in the Civil Rule 4 provisions affecting waiver of service by foreign defendants and determined not to send Civil Rule 56 to the Supreme Court. With these changes, the recommendations have been submitted to the Supreme Court.

Civil Rules 83, 84

Rules 83 and 84 were held back by the Standing Committee at its June meeting to seek uniform language for the parallel rules submitted by different advisory committees.

Rule 84 was discussed first. It was agreed that the draft, with changes in style to conform to the style system being developed by the Style Subcommittee of the Standing Committee, was in proper form for submission to the Standing Committee. The Chairman and Reporter were authorized to negotiate changes in language if appropriate to conform with the versions reported by other committees.

Discussion of Rule 83 focused first on subdivision (d).

Subdivision (d) of the draft rule would authorize district courts to adopt experimental local rules inconsistent with national rules adopted under 28 U.S.C. §§ 2072 or 2075. The experimental rules must be approved by the Judicial Conference and be limited to a maximum life of five years. Some concern was expressed about the length of time that might be required to secure approval by the Judicial Conference. It was suggested that the process would require review by the Advisory Committee and Standing Committee, leading to submission to the Judicial Conference. At the same time, it was believed that this process could be made to work rapidly. It was pointed out that the time required to secure approval need not diminish the five-year length of an experimental rule, since the rule could be made effective upon approval.

Discussion of the draft focused primarily on the tension between the local experimentation encouraged by the Civil Justice Reform Act and the provisions of the Rules Enabling Act, including the goal of national rule uniformity. Local plans adopted under the Civil Justice Reform Act are generating a wide variety of local practices that must soon be evaluated. That process will take some years yet, and it was recognized that national uniformity will not be attainable until that process is worked through. Discussion of the difficulty of fitting the experimental rules process proposed for Rule 83(d) with current local plans led to the conclusion that it would be better to defer consideration of the proposal to 1994 or 1995. A motion to defer consideration passed unanimously.

Attention then turned to proposed Rule 83(c), which protects against "forfeiture of rights as a result of negligent failure to comply with a requirement of form" imposed by a local rule. The discussion in part emphasized the narrowness of the "form" concept. As examples, a local rule specifying a particular place on a pleading for a jury demand would be a matter of form; a requirement that a witness list include a summary of testimony would be a matter of substance. The forfeiture of rights concept also was discussed, noting that imposition of financial sanctions on a party does not involve a forfeiture of rights. Other points made were that the rule is limited to negligent violations--the problem of deliberate flouting of local rules by counsel from other places is outside the rule; and that sanctions may be imposed on counsel for negligent violations.

With amendments of the Committee Note to reflect the discussion, a motion to send forward Rule 83 was adopted by vote of six to one.

Rule 43

The proposed amendment of Rule 43(a) would do two things. The first change would establish the power of the court to permit or require written presentation of part or all of the direct examination of a witness in a nonjury trial. This proposal reflects the fact that a number of courts have adopted this practice, particularly in bankruptcy proceedings. Some courts

regulatory agencies cannot demand production of information they do not know about; they are not adequately staffed to follow all litigation all around the country. There is a need to scrutinize carefully the extent of the possible problems with protective orders. There is a view that they are desirable because they facilitate discovery. More often than not, however, "good cause" is not shown — the parties stipulate, or the judge simply orders protection. Even if the primary purpose of litigation is to resolve private disputes, it is wrong to conclude that courts have no role in protecting the public interest. There is only anecdotal information about harms to public interests, much of it arising from automobile crash litigation including such matters as the risks of rear-seat lapbelts, sidesaddle gas tanks, and crash-testing. Perhaps courts should not be required to inquire into every stipulated protective order, but at least the parties should be required to stipulate that there is no public interest involved. The bill now pending in fact would require the court to make findings in each case. And courts will be able to administer a "public health or safety" standard.

Stephen Yagman, Esq., testified on Rule 83. He would oppose any action that might weaken the requirement that orders by individual judges be consistent with the Federal Rules and local rules. His own experience litigating 42 U.S.C.A. § 1983 actions in a small firm shows that there are far too many standing orders, as set out in his written statement. It is very difficult to achieve effective review of standing orders by an appellate court. The rule should be further amended to provide effective means of enforcement. It is not clear what authority the Judicial Council of a Circuit has to review standing orders under 28 U.S.C. §§ 332 and 2071. Perhaps a committee of judges should be established in each district to review the standing orders of that district on an ongoing basis. He also urged that Rule 30 should be amended to allow the attorney taking a deposition to administer the oath or affirmation, saving the cost of having a court reporter attend. Finally, he urged that Rule 45 should be amended so that attendance of a party at trial could be compelled by notice, without need to resort to a subpoena.

MEETING

The meeting began after the hearing concluded. Judge Higginbotham welcomed Judge Stotler and noted that the press of other duties has led Chief Justice Holmes to resign as a member of the Committee.

The draft minutes of the October, 1993, and February, 1994 meetings were approved with corrections.

Comments on Proposed Rules

Discussion of the proposed amendments to Rules 50, 52, and 59 focused in part on the history of the proposal. Each rule now sets 10 days as the period for these post-trial motions, but the period is allowed variously to "serve" the motion, to "file and serve" the motion, or to "make" the motion. The Bankruptcy Rules Committee suggested that the rules be changed so that each allows 10 days from entry of judgment to file the motion. This suggestion drew from the desire to further integrate bankruptcy practice with practice under the Civil Rules. A parallel change has been proposed for Appellate Rule 4. Filing was chosen as the requirement because ordinarily it is an objective phenomenon that can be easily verified at the clerk's office. Some concern was expressed with the difficulty of accomplishing timely filing by lawyers located in remote areas.

It was urged on behalf of the Bankruptcy Rules Committee that the Note to Rule 59 should be revised by adding the information that Bankruptcy Rule 9006(a) treats "intervening Saturdays, Sundays, and legal holidays" differently than Civil Rule 6(a). This request was adopted.

A motion to send Rules 50, 52, and 59 to the Standing Committee for approval, with the addition to the Rule 59 note, was adopted.

Rule 83

The Bankruptcy Rules Committee recommended that the proposed Rule 83(a)(2) reference to "negligent" failure to comply with a local rule requirement of form be changed to "nonwillful." The change reflects the prospect that read literally, the proposal would not reach an unavoidable failure to comply. The Committee accepted this recommendation without dissent.

The discussion of proposed Rule 83(b) focused on the question whether it might be possible to do something more effective to restrict or eliminate standing orders. Several Committee members thought it would be desirable to reduce drastically the use of standing orders. It was noted, however, that past efforts to reduce even the use of local rules have proved difficult; efforts to reduce the use of individual judge standing orders seem all the more likely to prove difficult.

A motion to send Rule 83 to the Standing Committee for approval was adopted.

Rule 84

Discussion began with the proposal to add a new Rule 84(b). It was suggested that the proposal is ultra vires. The Rules

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December 17, 1999

Honorable Paul Niemeyer
U.S. Court of Appeals for the Fourth Circuit
101 West Lombard Street
Baltimore, Maryland 21201

Re: Report on Local Rules

Dear Judge Niemeyer:

For your information, I have enclosed a copy of the report and recommendation on local rules prepared by the ABA Section of Litigation. The Recommendation has been modified somewhat and has now been endorsed by a number of ABA entities, including the Judicial Division.

The ABA House of Delegates will consider this proposal at its meeting in Dallas in February. Unless and until the House of Delegates approves the proposal, it is not the official policy of the ABA.

I wanted you to see the latest version, which is slightly different from a version that I provided John Rabiej a month or two ago.

Once again, the assistance of Ed Cooper, Lee Rosenthal, Rick Marcus, and Mary Squiers was invaluable.

Very truly yours,

Scott J. Atlas

Scott J. Atlas

Enclosures

cc: Mr. John Rabiej *(w/Enclosures)*
Hon. Lee Rosenthal *(w/Enclosures)*
Prof. Edward H. Cooper *(w/Enclosures)*
Ms. Mary Squiers *(w/Enclosures)*

AMERICAN BAR ASSOCIATION

SECTION OF LITIGATION
JUDICIAL DIVISION
SECTION OF INTELLECTUAL PROPERTY LAW
SECTION OF LABOR AND EMPLOYMENT LAW
TORT AND INSURANCE PRACTICE SECTION
STANDING COMMITTEE ON FEDERAL JUDICIAL IMPROVEMENTS

REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

RESOLVED THAT the ABA urges compliance with the following principles in connection with the adoption or modification of any of the Federal Rules of Civil Procedure (the "Civil Rules"), local rules adopted or modified in any federal district applicable to all cases in all the courts of that district ("local rules"), and rules or standing orders of general applicability adopted or modified by an individual federal district judge to regulate practice in that judge's court ("individual court rules"):

1. The local rules of every federal district and the individual court rules of every federal district court should be conveniently and fully accessible to the public in both written and electronic format in a single national location. In addition, the clerk of each district should maintain and make readily available to the public that district's local rules and the individual court rules adopted by each judge in that district.

2. The uniform numbering system required by Rule 83 of the Civil Rules should be universally implemented.

3. Variations on procedures prescribed by the Civil Rules or by local rules should be accomplished by issuance of case-specific orders that are tailored to each case, rather than by adoption of additional local rules or individual court rules.

4. In general, a Civil Rule should authorize a federal district to opt out of the Civil Rule only under very limited circumstances when there is a clear need for a local exception, and a similar limit should apply to a local rule that authorizes an individual judge to opt out of the local rule.

December 17, 1999
Word - Houston:29806.1

REPORT

Federal courts have had rulemaking power from their inception.[1] The exercise of that power, however, was severely limited by the Conformity Act, which compelled federal district courts to follow the procedures of the states in which they sat.[2]

Modern authority to adopt local rules dates to 1938, with the adoption of Rule 83 of the Federal Rules of Civil Procedure (the "Civil Rules"), which authorized each federal district, acting by a majority of its judges, to make and amend rules ("local rules") regulating that district's practice in any manner "not inconsistent with" the Civil Rules.[3] The premise of Rule 83 was to permit courts to deal with local docket control matters and gaps in the national rules.[4]

This report provides a chronology of events affecting the process of adopting local rules, demonstrates the benefits and pitfalls of local rules, and recommends improvements for courts' local rules practices.

1. Overview of Positives and Negatives of Local Rules

Since 1938, local rules generally have proven very useful. They have addressed issues that were not covered by the Civil Rules and helped keep the Civil Rules relatively brief. They have standardized routine court tasks and added predictability by communicating standard court practices to the bar. They have provided flexibility to accommodate local docket circumstances and professional habits that derived from local state practice. They have facilitated experimentation with new procedural ideas. Compared to the lengthy and complex Enabling Act process for amending a Civil Rule,[5] changing a local rule has been easy and quick.

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1 Note, *Rule 83 and the Local Federal Rules*, 67 COLUM. L. REV. 1251, 1253-54 & nn. 8-9 (1967) (citing statutes dating back to 1792); *see* JACK B. WEINSTEIN, REFORM OF COURT RULE-MAKING PROCEDURES 117 (1977).

2 Note, *supra* note 1, 67 COLUM. L. REV. at 1253.

3 Rule 83, *in* 1 F.R.D. cxlviii (1940). *See also* Act of June 25, 1948, c. 646, 62 Stat. 961 (codified at 28 U.S.C. § 2071); Historical and Statutory Notes, 28 U.S.C.A. § 2071, at 523 (West 1994) (section 2071 consolidates several statutes); Note, *supra* note 1, 67 COLUM. L. REV. at 1253-55 & nn.10-11 (quoting pre-1938 laws).

4 12 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE § 3151, at 494, 496 (2d. ed. 1997) [hereinafter "WRIGHT, MILLER & MARCUS"].

5 *See, e.g., id.* § 3152, at 497-98. The process is described in detail in *Procedures for the Conduct of Business by the Judicial Conference Committee on Rules of Practice and Procedure, in* 181 F.R.D. 162-69 (1999); and Paul D. Carrington, *Making Rules to Dispose of Manifestly Unfounded Assentions: An Exorcism of the Bogy of Non-Transsubstantive Rules of Civil Procedure*, 137 U. PA. L. REV. 2067, 2119-24 (1989).

But the use of local rules has not been devoid of problems and controversy. Some local rules have been ill-advised. Many have been duplicative of — and others inconsistent with — the Civil Rules. The sheer volume of local rules and individual court rules in some districts combined with an inadequate reporting system have deprived many litigators of effective access to these rules. In some districts, a current set of local rules has been difficult to locate. Even easy accessibility and universal compliance with the uniform numbering system mandated by Rule 83, however, could not avoid significant burdens on practitioners who appear infrequently in a particular federal district court.

2. *1940 Study by Special Committee of U.S. Judicial Conference*

In 1940, a committee of federal district judges appointed by the Judicial Conference of the United States (the "Judicial Conference") to examine local rules and "make recommendations so that the greatest practicable degree of uniformity throughout the country should be secured," reported finding that many new local rules adopted pursuant to Rule 83 were "not in complete harmony" with the Civil Rules and "strongly recommend[ed] that no additional local rules be promulgated except when experience has shown that a pressing need for them exists."[6] At the same time, the Committee acknowledged that local rules were needed to deal with certain matters and could prove a useful source of suggestions for future rules revisions.[7]

3. *Problems Identified by Studies in the 1960's*

Two student law review articles in the mid-1960's described studies demonstrating that many local rules were inconsistent with the Civil Rules.[8] Moreover, some courts recognized that lawyers from other districts who were unaware of local rules—and even more oblivious to standing orders adopted by individual district judges to regulate practice in their own courtrooms ("individual court rules")—occasionally found the rules becoming "a series of traps."[9]

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[6] *Report on Local District Court Rules*, 4 Fed. R. Serv. 969-70 (Callaghan 1941).

[7] 12 WRIGHT, MILLER & MARCUS, *supra* note 4, § 3152, at 496; Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. PA. L. REV. 1999, 2016-17 (1989).

[8] *See* Note, *supra* note 1, 67 COLUM. L. REV. at 1259-63; *id.* at 1251-52 ("the majority of district courts have, in promulgating rules, ignored the principles of simplicity, scarcity, and uniformity which guided the formulation of the [Civil] Rules"); Note, *The Local Rules of Civil Procedure in the Federal District Courts—A Survey*, 1966 DUKE L.J. 1011, 1012 (local federal rules are a "maze of decentralized directives, encumbered by trivia and often devoid of explanation").

[9] *See, e.g., Woodham v. American Cystoscope Co.*, 335 F.2d 551, 552 (5th Cir. 1964) (quoted in 12 WRIGHT, MILLER & MARCUS, *supra* note 4, § 3152, at 497).

4. *1977 Criticisms and Recommendations by Judge Jack Weinstein*

In 1977, a leading commentator on the rulemaking process, Judge Jack Weinstein, described the explosion of topics covered by local rules,[10] including areas more appropriately left to either congressional legislation or the Civil Rules.[11] He criticized the lack of public notice and debate in the local rules adoption process.[12] He urged that local rules be adopted only after public notice and hearing, and become effective only after being approved by the Judicial Conference or its Committee on Rules of Practice and Procedure (the "Standing Committee on Rules").[13] He recommended elimination of most individual court rules.[14] He also insisted that all local rules and individual court rules "should be made available in a readily usable and up-to-date form to the bench, bar, and public."[15]

5. *1985 Amendments to Rule 83*

A 1985 House Judiciary Committee Report noted the benefits of local rules, including tailoring federal practice to the local state court practice, providing guidance in areas that are not covered by the Civil Rules, and standardizing routine court tasks.[16] The Report acknowledged, however, that local rules have been criticized for their sheer numbers as well as their potential conflict with the letter and spirit of the Civil Rules and with a number of federal statutes.[17]

Rule 83 was amended in 1985 to (1) mandate public notice and an opportunity to comment before local rules are adopted, (2) require that a copy of each newly adopted rule be provided to the circuit judicial council and the Administrative Office of the U.S. Courts (the "AO"), and (3) authorize a circuit council to modify or abrogate local rules within a circuit.[18] The Advisory Committee expressed the "expectation" that judicial councils would actively review all local rules, new and

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[10] *See* WEINSTEIN, *supra* note 1, at 118-20.

[11] *See, e.g., id.* at 130-33 (use of depositions in admiralty cases; six-person juries; restrictions on public comments by attorneys).

[12] *Id.* at 133-37.

[13] *Id.* at 150-51.

[14] *Id.* at 151-52.

[15] *Id.* at 152.

[16] H.R. Rep. No. 422, 99th Cong., 1st Sess. 14 (1985).

[17] *Id.* at 14-17; *see also* David M. Roberts, *The Myth of Uniformity in Federal Civil Procedure: Federal Civil Rule 83 and District Court Local Rulemaking Powers*, 8 U. PUGET SOUND L. REV. 537, 540-45 (1985) (citing numerous examples of such conflicts).

[18] *See Court Rules*, 105 F.R.D. 179, 202, 226-27 (1985).

preexisting, for validity and consistency with the Civil Rules and that each district would adopt procedures for reviewing individual court rules.[19] The amendment also added the requirement that individual court rules should be "not inconsistent with" local rules or the Civil Rules.[20] The amendment did not, however, articulate a clear, workable standard against which local rules could be evaluated.[21] Nor did the amendment make compliance with any of Rule 83's requirements a prerequisite to enforcing either a local rule or an individual court rule.

6. *Local Rules Project Study and Recommendations, Late 1980's*

In 1984, the Judicial Conference had authorized the Standing Committee on Rules to review the many local rules governing civil cases that had been adopted. The Standing Committee on Rules, in turn, established a Local Rules Project to review the local rules of the 94 federal districts.

In 1986, the Local Rules Project collected approximately 5,000 local rules, not counting subparts, from the 94 federal districts — excluding other general orders and internal operating procedures.[22] The rules addressed the entire spectrum of federal practice, such as attorney admissions and discipline, the various stages of trial, including pleading and filing requirements, discovery procedures, and how costs are taxed.[23] The Project categorized the rules into 103 separate topics.[24]

Some districts had adopted only one or two local rules, while others had hundreds.[25] The Local Rules Project found that some local rules supplemented or expanded the existing Civil Rules—*e.g.*, by defining the content and scope of the pretrial conferences and scheduling requirements outlined in Rule 16, or providing greater detail on motion practice than in Rule 7(b); while others appeared to expand federal statutory mandates—*e.g.*, in habeas corpus proceedings and in the authority given to magistrates.[26] Other local rules dealt with procedures that were purely administrative and were not adequately covered elsewhere—*e.g.*, courtroom security and the custody of exhibits.

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[19] Advisory Committee Note, *id.* at 227.

[20] *See id.* at 226, 228.

[21] Roberts, *supra* note 17, 8 U. PUGET SOUND L. REV. at 554 (the standard of "inconsistency" with the Civil Rules is inadequate).

[22] *See* Committee on Rules of Practice and Procedure, Judicial Conference of the United States, Local Rules Project, pt. I, at 1 (Apr. 1989) [hereinafter "Local Rules Project"].

[23] *Id.*

[24] Subrin, *supra* note 7, 137 U. PA. L. REV. at 2021. For a list of those topics, see 12 WRIGHT, MILLER & MARCUS, *supra* note 4, § 3154, at 537-39 n.12.

[25] Subrin, *supra* note 7, 137 U. PA. L. REV. at 2020.

[26] 1989 Local Rules Project, *supra* note 22, pt. I, at 2.

The Local Rules Project also found that the numbering systems for local rules varied greatly among districts, complicating a practitioner's ability to find rules concerning a certain topic.[27]

In November 1987, Boston College Law School hosted a conference for a number of leading experts on federal rulemaking for the purpose of "examining and fully discussing the tentative proposals and findings of the Local Rules Project to date."[28] The conferees urged adoption of a uniform numbering system and structure for local rules to make it easier for attorneys to locate them and for legal publishing companies and computer services to index the local rules and cases under them.[29]

The conferees also suggested ways that the courts could draft more effective rules and recommended that outdated or redundant ones be eliminated — including rules that were inconsistent with each other or other federal law, that merely repeated existing federal law, that restated the law only partially or incorrectly, or that unnecessarily added to the number of court directives that must be considered by counsel.[30]

The Boston College conferees disagreed about how diverse local rules among the individual federal districts should be. Some argued that the federal system should be as uniform as possible, so that local rules should be standardized, with the best ones incorporated into the Civil Rules as an appendix. Others believed that decentralization is desirable (by permitting adjustment to local conditions, facilitating experimentation, and creating efficiencies) and that the individual federal district courts should merely be encouraged to eliminate obviously inconsistent or unnecessary rules.[31]

All seemed to agree, however, that voluntary implementation would be the most successful way to proceed, at least initially. They recommended that the Project send to each federal district a list of questionable rules in that district so that the district could decide whether to rescind any repetitive or otherwise inappropriate local rules.[32]

After the conference, the Local Rules Project analyzed every local rule to determine whether it (1) repeated existing law (*i.e.*, the Civil Rules and other federal law), (2) conflicted with existing law, (3) should form the basis of a Model Local Rule for consideration by each federal district court,

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[27] *Id.* pt. II, at 1.

[28] *Id.* pt. I, at 5-6.

[29] *Id.* at 6.

[30] *Id.* at 7.

[31] *Id.* at 7-8.

[32] *Id.* at 8.

(4) should remain subject to local variation, or (5) should be reviewed by the Standing Committee on Rules' Civil Rules Advisory Committee for possible inclusion in the Civil Rules themselves.[33]

The Project developed an outline using the structure of the Civil Rules, with other topics added that were covered by local rule.[34] This outline was then used to identify those federal districts with rules falling within the above-noted five categories (*e.g.*, whether it repeated existing law, *etc.*). The Project found 809 instances of possible repetition of existing law and 837 instances of possible inconsistences.[35]

7. ***1988 Statutory Revisions to Local Rules Adoption Process***

In 1988 hearings, the House Judiciary Committee "found a proliferation of local rules, many of which conflict with national rules of general applicability."[36] One widely cited example was an individual court rule adopted by several federal district judges in the Second Circuit that prohibited attorneys from making a motion without the judge's permission. Despite frequent and outspoken complaints from members of the private bar, the barrier to interlocutory appeal[37] made effective appellate review of such rules impossible in many cases and left such rules intact for years.[38] The Second Circuit ultimately invalidated such rules.[39]

In response to these problems, Congress enacted 28 U.S.C. § 332(d)(4), effective December 1, 1988, explicitly requiring periodic review by each circuit judicial council of all local rules to ensure that they are consistent with the Civil Rules.[40] The same law also codified, in 28 U.S.C. § 2071(b), the 1985 changes to Rule 83 requiring that appropriate public notice and an opportunity for comment

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[33] *Id.* at 9.

[34] For a full list of topics, see 12 WRIGHT, MILLER & MARCUS, *supra* note 4, § 3154, at 540-42.

[35] *Id.* § 3152, at 502; Subrin, *supra* note 7, 137 U. PA. L. REV. at 2021.

[36] H.R. Rep. No. 100-889, at 27, U.S. CODE CONG. & ADMIN. NEWS 1988, at 5988 (1988); *accord*, H.R. Rep. No. 99-422, at 16 (1985).

[37] *See* 28 U.S.C. §§ 1291-92 (1993).

[38] David Siegel, *Commentary on 1988 Revision, in* 28 U.S.C.A. § 332, at 553 (West 1993).

[39] *See Richardson Greenshields Securities, Inc. v. Lau*, 825 F.2d 647, 649, 652-53 (2d Cir. 1987). *See also Rodgers v. U.S. Steel Corp.*, 508 F.2d 152 (3d Cir. 1975) (invalidating local rule that was outside district court's statutory authority and "raise[d] serious first amendment concerns").

[40] Judicial Improvement and Access to Justice Act, Pub. L. No. 100-702, tit. IV, § 403(a)(2), 102 Stat. 4651 (codified at 28 U.S.C. § 332(d)(4) (1993)).

be provided for all local rules and that copies of all newly prescribed local rules be furnished to the judicial council and the AO.[41] The test for inconsistency articulated in the House Report was "whether the local rule can co-exist with the general rule without negating the purpose of the general rule."[42] While requiring judicial councils to review local rules, the new law did not provide for suspending enforcement of a local rule until the judicial council actually acts.[43]

8. *Enactment of CJRA in 1991 and of Amendments to Civil Rule 26 in 1993*

The enactment in 1990 of the Civil Justice Reform Act ("CJRA") encouraged each district to adopt a plan designed to reduce the cost and delay of civil litigation. The result was the adoption of even more local rules and a diminished focus on maintaining a uniform numbering system and avoiding repetitive rules.[44]

In 1991, in response to the CJRA, the Civil Rules Advisory Committee proposed amending Rule 83 to explicitly permit a district, subject to Judicial Conference approval, to adopt experimental local rules inconsistent with the Civil Rules, provided they were consistent with applicable federal statutes and limited in duration to five years or less.[45] During the public comment period, the Civil Rules Advisory Committee received some criticisms of this proposal but recommended adoption of the revision largely unchanged.[46] Several months later, the Standing Committee on Rules recommitted this proposed change to the Civil Rules Advisory Committee for further study.[47] The proposed amendment never resurfaced.

After many years of public debate, in 1993 the Judicial Conference included in amendments to the Civil Rules a revised Rule 26 that included a procedure requiring the disclosure of the identity

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[41] *Id.* § 403(a)(1), 102 Stat. 4650 (codified at 28 U.S.C. § 2071(b) (1994)).

[42] H.R. Rep. No. 99-422, at 27 (1985).

[43] *See also* David Siegel, *Changes in Federal Jurisdiction and Practice Under the New Judicial Improvements and Access to Justice Act, in* 123 F.R.D. 399, 410 (1988) (arguing that individual court rules exhibit many of the same problems as local rules, so they should be subject to the same rulemaking requirements as local rules).

[44] *See* 12 WRIGHT, MILLER & MARCUS, *supra* note 4, § 3152, at 505-08.

[45] *Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure and the Federal Rules of Evidence, in* 137 F.R.D. 53, 63, 72, 152-54 (1991).

[46] *See* Letter from Hon. Sam C. Pointer, Jr., Chairman, Advisory Committee on Civil Rules, to Hon. Robert E. Keeton, Chairman, Standing Committee on Rules, dated May 1, 1992, Ex. B, *in* 146 F.R.D. 519, 533 (1993).

[47] *See* Excerpt from the Report of the Standing Committee on Rules, Sept. 1992, *in* 146 F.R.D. 515, 517 (1993).

of certain witnesses and documents, with each district permitted to opt out of the disclosure procedure.[48] The amendments also added local rule options to other Rule 26 requirements.[49]

9. *1995 Amendment to Rule 83: Numbering System for Local Rules*

Concerned about the difficulty of finding pertinent local rules, the Local Rules Project had proposed that uniform numbering be used to standardize all local rules in parallel with the Civil Rules.[50] In 1995, Civil Rule 83(a)(1) was amended to require that local rules conform to any numbering system prescribed by the Judicial Conference.[51] In March 1996, the Judicial Conference adopted a numbering system for local rules corresponding to the relevant Civil Rules.[52] For example, the designation "LR26.1" would indicate that a given local rule ("LR") is related to Rule 26 and is the first local rule that deals with Rule 26; the second local rule related to Rule 26 would be designated "LR26.2."

The 1995 amendment to Rule 83 also prohibited local rules from duplicating a Civil Rule or an Act of Congress and prohibited individual court rules from contradicting federal law.[53] In addition, the amendment prohibited a loss of rights for either (1) a "nonwillful" failure to comply with a local rule or (2) a failure to follow an individual court rule by someone lacking actual notice of the rule.[54]

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[48] *See* Fed. R. Civ. P. 26(a)(1); *Amendments to Federal Rules of Civil Procedure*, 146 F.R.D. 401, 404, 431-36 (1993); *Notice Concerning Amendments to Federal Rules, in* 151 F.R.D. 145 (1994); *compare Amendments to Federal Rules of Civil Procedures, in* 146 F.R.D. 401, 519, 527 (1993).

[49] *See* Fed. R. Civ. P. 26(a)(4) (requirement of prompt service and filing of initial, expert, and pretrial disclosures); *id.* 26(b)(2) (presumptive limit on number and length of depositions and number of interrogatories); *id.* 26(f) (requirement that parties meet in person and plan for discovery); *id.* 26(d) (prohibition on formal discovery before complying with meet-and-confer requirement of Rule 26(f)). For an overview of the history of the adoption of this provision, see Richard L. Marcus, *Discovery Containment Redux*, 39 B.C.L. REV. 747, 764-68 (1998), and ABA Section of Litigation, Report in Support of Proposed Amendments to the Federal Rules of Civil Procedure Concerning Discovery 1-3 (Jan. 8, 1999) (supporting *Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure and Evidence, in* 181 F.R.D. 18 (1999)).

[50] 1989 Local Rules Project, *supra* note 22, pt. I, at 6.

[51] *Amendments to Federal Rules of Civil Procedure, in* 161 F.R.D., 149, 149-50, 152, 161 (1995); *Notice Concerning Federal Rules, in* 163 F.R.D. 367 (1995).

[52] 12 WRIGHT, MILLER & MARCUS, *supra* note 4, § 3152, at 503 n.36.

[53] Fed R. Civ. P. 83(a)(1).

[54] *Id.* 83(a)(2) & (b).

Many district courts (approximately 70% at last count) have adopted the uniform numbering system mandated by Rule 83; eliminated repetitive and inconsistent local rules; and adopted some of the proposed Model Local Rules. The remaining districts, however, never adopted a uniform numbering system, and many of them have not revised their rules along the lines suggested by the Project.

10. Late 1990's: Practitioner Dissatisfaction with Rule 26 Opt-Out Provision

During the last few years, the opt-out provision in the mandatory disclosure section of Rule 26 has come under increasing criticism by commentators in the face of studies reflecting dissatisfaction by practitioners, who have found troublesome the "riotous blooming" of [discovery] rules creating divergent practices in the district courts" that resulted from the opt-out provision.[55]

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[55] Letter from Judge Paul V. Niemeyer, Chair, Advisory Committee on Civil Rules, to The Chief Justice of the United States and Members of the Judicial Conference of the United States 2(Sept. 1, 1999); *see, e.g.*, ABA Section of Litigation, Report in Support of Proposed Amendments to the Federal Rules of Civil Procedure Concerning Discovery 6 (accompanying letter from Lorna G. Schofield, Co-Chair, Discovery Task Force, ABA Section of Litigation, to Secretary of the Standing Committee on Rules, Jan. 8, 1999) (urging nationwide uniformity of discovery rules except as provided in Rule 83's provisions allowing local rules); Thomas E. Willging *et al.*, *An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments*, 39 B.C.L. REV. 525, 526, 541-43, 582-83 (1998) (Federal Judicial Center survey on discovery sent to 2,000 lawyers in mid-1997 revealed that 60% of attorneys with opinions on the topic responded that nonuniformity in the disclosure rules across districts creates moderate or serious problems and that 68% wanted a national rule on initial disclosure); Paul V. Niemeyer, *Here We Go Again: Are the Federal Discovery Rules Really in Need of Amendment?*, 39 B.C.L. REV. 517, 518-23 (1998) (suggesting that the local district court management plans required by the CJRA in 1990 and the opt-out provision adopted in the 1993 Civil Rules amendments have given rise to the question of whether the federal rules for discovery should be made uniform nationally and noting that most lawyers responding to the 1997 FJC survey wanted greater uniformity of discovery rules); Judicial Conference of the United States, *Final Report on the Civil Justice Reform Act of 1990*, at 45 (May 1997), *in* 175 F.R.D. 62, 107 (1998) (the CJRA opt-out process created by the 1993 amendments "raises serious questions about the relative balance between national uniformity and local option in development of litigation procedure"); *cf.* Statement of ABA on the Federal Court Rulemaking Process to the Subcommittee on Long Range Planning of the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States 6 (Mar. 1994) (criticizing likely impact of 1993 amendments' opt-out provision on goal of having uniform national rules of procedure); *id.* at 8 (urging rules drafters to assess further the possibility of conflicts between local rules and the Civil Rules and to explicitly state which rules govern in case of conflict).

11. *1999 Elimination of Local Rule Options in Rule 26*

In response to these concerns, in 1998 the Civil Rules Advisory Committee proposed to restore national uniformity to discovery by deleting most of the local rule options from Rule 26.[56] In September 1999, the Judicial Conference approved these changes.[57]

12. *The Difficulty of Policing Local Rules*

Despite the increased review of local rules prescribed by Rule 83 and by Congress, policing inconsistencies between local and national rules has proved difficult for several reasons. Lawyers lack the opportunity and incentive to challenge local rules, while judicial council review has varied in thoroughness and can be problematic, and the standard for invalidating a local rule has not been entirely clear.[58]

13. *Current Views of Standing Committee on Rules Concerning Reform of Local Rules Process*

The increasing proliferation of inconsistent local rules and the failure of many districts to comply with Rule 83's numbering requirement have become the subjects of increasing interest for the Standing Committee on Rules and its Civil Rules Advisory Committee.[59]

For a description of the variety of responses to the 1993 amendments among the various districts, see Donna Stienstra, *Implementation of Disclosure in the United States District Courts, with Specific Attention to Courts' Responses to Selected Amendments to Federal Rule of Civil Procedure 26* (Mar. 30, 1998), *in* 182 F.R.D. 305 (1999).

[56] *See, e.g., Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure and Evidence*, *in* 181 F.R.D. 18, 72-81 (1999).

[57] *See* AO, *News Release* (Sept. 28, 1999) <http://www.uscourts.gov/Press_Releases/judconf091599.htm>.

[58] *See* 12 WRIGHT, MILLER & MARCUS, *supra* note 4, § 3153, at 511-35; Note, *supra* note 1, 67 COLUM. L. REV. at 1263-65 ("only a foolhardy lawyer" would defy a local rule, hoping for a favorable appellate ruling); WEINSTEIN, *supra* note 1, at 121 (lawyers and local bar associations are "reluctant to cross swords" with local judges by contesting local rules in litigation).

[59] *See, e.g.,* Minutes of Standing Committee on Rules 9-10 (Jan. 7-8, 1999) (describing several changes to Rule 83 being given preliminary consideration by the Advisory Committee on Civil Rules, including conditioning a rule's enforceability on its availability for public comment and its approval by the judicial council of the circuit; noting that the Advisory Committee on Civil Rules "would like to see greater national procedural uniformity and fewer local rules"); Minutes of Civil Rules Advisory Committee 30 (Nov.

In response to the failure of many judicial councils to periodically review the local rules for consistency with the Civil Rules as required by 28 U.S.C. § 332(d)(4) and out of continuing concern about the difficulty of finding many districts' local rules, the Civil Rules Advisory Committee is considering more drastic action.[60] At its November 1998 meeting, the Advisory Committee reviewed several versions of a proposed amendment to Rule 83(a)(1). One version would require the AO to publish local rules electronically by means that provide convenient public access and to review all new local rules for conformity with federal statutes and the Civil Rules. No local rule could be enforced until 60 days after the district had given the required notice to the judicial council and the AO and until the rule had been made available to the public by convenient means, including electronic means "where feasible."[61] If the AO were to conclude that a local rule did not conform, it must report that finding to both the district and the judicial council; no court could enforce any reported rule until it had been approved by the judicial council.[62]

14. Approval of New Local Rules Project, 1999

At the June 1998 meeting of the Standing Committee on Rules, the Committee Chairman asked the Director of the Local Rules Project to consider preparing and submitting a proposal requesting funding for a new national survey of local rules.[63] At its January 1999 meeting, the Standing Committee on Rules approved such a proposal for a two-year (and if needed, three-year) project. The Director of the Local Rules Project intends to follow the same general approach in the new study as that used in the previous study.[64]

15. Study by ABA Section of Litigation Task Force, 1998-1999

In 1998-99, the Federal Practice Task Force of the Section of Litigation conducted an abbreviated review of the local rules in a number of predominantly urban districts. The Task Force found that the quantity of local rules has continued to grow, that the topics they cover continue to

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11-12, 1998) (explaining that the Standing Committee on Rules is "attempting to encourage hold-out districts to conform to the uniform numbering system as required by Rule 83(@).

[60] *See* Minutes of Civil Rules Advisory Committee 32-33 (Nov. 11-12, 1998).

[61] *Id.* at 33.

[62] *Id.* at 31.

[63] *See* Minutes of Standing Committee on Rules 42 (June 18-19, 1998). *See generally* Minutes of Standing Committee on Rules 23-24 (Jan. 7-8, 1999) (citing policy issues that should be decided before beginning a new study of local rules).

[64] *See* Minutes of Standing Committee on Rules 37 (June 14-15, 1999).

be remarkably diverse, and that the local rules in many districts remain difficult to find, especially for lawyers who do not regularly practice there.

The Task Force also identified problems with individual court rules. For example, after years of study and debate, the Southern District of New York recently proposed a set of "model individual rules," but these were adopted in their entirety by only 18 of the court's judges (split almost equally between active and senior judges). Another 15 judges adopted some variant of them, while 10 judges retained their existing rules. The result, while an improvement, still leaves largely uncorrected the principal problem with the old system, as described by one lawyer: "Practitioners were forced to look at the Federal Rules, the Local Rules and then the individual judge's rules. Then they had to reconcile the three to make sense of the mess."[65]

The Task Force noted that the Commonwealth of Virginia recently enacted a law providing that local court rules "shall be strictly limited to only those rules absolutely necessary to promote proper order and decorum and the efficient use of courthouse facilities and clerks' offices."[66] The implementing paragraph of the legislation provides that "[i]t is the clear intent of the General Assembly that there be no local rules and that any docket control procedures not affect the substantive rights of the litigants."[67]

16. Need for Accessibility of Local Rules

Members of the Civil Rules Advisory Committee have expressed the view that "[t]he most important single thing to ensure is that all litigants can have assured access to all local rules for their district in a single, central place."[68] At minimum, local rules and individual court rules should be available electronically in one central location on the Internet (in addition to any separate home pages for districts that maintain a web site), perhaps as an adjunct to the Federal Judiciary's website, using the AO's expertise. For districts that have a home page on which their local rules are posted and timely updated, the Federal Judiciary's home page could simply include a hyperlink to each such district's local rules. In addition, each such district could easily include on its home page a hyperlink to the Federal Judiciary's home page, so that each practitioner seeking the local rules of several courts need remember only a single address.

There are several realistic options available to maximize compliance with such a rule. For example, the proposed changes to Rule 83(a)(1) currently being considered by the Civil Rules Advisory Committee have much to commend them, in particular the prohibition on any local rule becoming effective until 60 days after it has been made available in electronic format to the AO,

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[65] Deborah Pines, *Federal Judges Adopt New Individual Rules*, N.Y.L.J., July 20, 1998, at 1, 5.

[66] VA. CODE ANN. § 8.01-4 (Michie 1999).

[67] Dawn Chase, *A Challenge to 'Local Rules,'* VA. LAW. WEEKLY, Apr. 26, 1999, at B-1.

[68] Minutes of Civil Rules Advisory Committee 32 (Nov. 12-13, 1998).

which would be responsible for operating and regularly updating the rules section of the web site. Individual court rules could be included in this procedure. A number of districts (*e.g.*, Central District of Illinois, Southern District of New York, Central District of California) already post their local rules and individual court rules on a home page.[69]

17. Possible Need for Future Changes

Anecdotal evidence and a cursory review of selected districts strongly suggest that the problem of too many local rules being inconsistent with or duplicative of the Civil Rules and too many individual court rules conflicting with or duplicating pertinent local rules or the Civil Rules, persists. If the new Local Rules Project confirms a widespread problem with local rules, then a more far-reaching revision of Rule 83(a)(1) — such as the proposal currently being discussed by the Civil Rules Advisory Committee that would impose an AO review-and-report requirement and judicial council action as preconditions to enforcement of all new local rules — will likely become even more attractive.

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[69] For a hyperlink to the home page of dozens of trial and appellate courts, by circuit, see <http://www.uscourts.gov/links.html>.

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APPENDIX B

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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~~*T*he 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.

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

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

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

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."

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.

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.

Possible Responses to the ACTL/IAALS Report: The Arizona Experience

Andrew D. Hurwitz*

The primary goal of the framers of the 1938 Federal Rules of Civil Procedure ("FRCP") is neatly described in Rule 1 -- "to secure the just, speedy, and inexpensive determination of every action and proceeding." At least two of the more notable proponents of the federal rules, however, also had an ambitious secondary agenda, hoping that the FRCP would also "properly be a model to all the states."[1]

Although much analysis has been devoted to whether and to what extent this secondary objective has been achieved,[2] there is little doubt that the original enactment of the FRCP and over seventy years of the amendment process have had a powerful influence on state rulemaking.[3] The effect has been particularly profound in Arizona. Arizona adopted the 1938 federal model in its 1939 Code,[4] and the Arizona Rules of Civil Procedure ("ARCP") have been amended regularly

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1 CHARLES E. CLARK & JAMES WM. MOORE, *A New Federal Civil Procedure*, 44 YALE L.J. 387, 387 (1935); *see also* CHARLES E. CLARK, *The Handmaid of Justice*, 23 WASH. U. L.Q. 297, 307 (1938) ("The new federal reform is likely . . . to have an important effect, beyond the direct and immediate changes it makes in federal practice, in setting the standard and tone of procedural reform throughout the country generally.")

2 *See, e.g.*, JOHN B. OAKLEY & ARTHUR F. COON, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 WASH. L. REV. 1367 (1986); JOHN B. OAKLEY, *A Fresh Look at the Federal Rules in State Courts*, 3 NEV. L.J. 354 (2003).

3 CHARLES E. CLARK, *Two Decades of the Federal Civil Rules*, 58 COLUM. L. REV. 435, 435 & n.2 (1958) ("[H]ardly a local jurisdiction remains unaffected"). Recognizing the important influence of the various federal rules on the states, the Advisory Committees for the federal civil, evidence, appellate, and criminal rules, as well as the Standing Committee, have long included state supreme court justices among their membership. E-mail from Heather Williams, Offices of Judges Program, Administrative Office of the United States Courts, to author, (Aug. 3, 2009, 10:34 PST) (on file with author).

4 ARIZ. CODE § 21-201 (1939) (effective January 1, 1940); *see* ARIZ. R. CIV. P. 1, Hist. Note (2009)

during the succeeding seventy years to reflect changes in their federal counterparts.[5]

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 ("Final Report") persuasively questions whether the core objectives of FRCP 1 are still being effectively served by the federal rules.[6] Similar concerns were raised in Arizona over twenty years ago. In response, the Arizona Supreme Court in 1990 appointed a committee, headed by Tucson trial lawyer (and later Chief Justice) Thomas A. Zlaket, to address discovery abuse, excessive cost, and delay in civil litigation.[7] The result was the "Zlaket Rules," a thorough revision of the ARCP adopted by the Supreme Court effective July 1, 1992. Those rules enacted a discovery regime that, in some respects, is still not reflected in the FRCP. In addition to the Zlaket Rules, Arizona has adopted a number of other procedural mechanisms worth considering as the Advisory Committee on the Federal Rules of Civil Procedure ponders the appropriate response to the Final Report. This paper reviews several of the more significant Arizona undertakings, in the hope of provoking discussion on the utility of such state procedural reforms.

I.
The Zlaket Rules

A. Disclosure

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[5] For example, ARCP 34(b) was amended on September 5, 2007 to track the 2006 changes to FRCP 34(b) concerning electronically stored information.

[6] AMERICAN COLLEGE OF TRIAL LAWYERS & INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, 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 3 (March 11, 2009), *available at* http://www.du.edu/legalinstitute/form-ACTL-Final-Report.html [hereinafter *Final Report*]. The Final Report was preceded by an Interim Report which set forth the results of the 2008 Litigation Survey of the Fellows of the American College of Trial Lawyers. *See* AMERICAN COLLEGE OF TRIAL LAWYERS & INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, INTERIM REPORT & 2008 LITIGATION SURVEY OF THE FELLOWS OF THE AMERICAN COLLEGE OF TRIAL LAWYERS (Sept. 9, 2008) [hereinafter *Interim Report*].

[7] THOMAS A. ZLAKET, *Encouraging Litigators to Be Lawyers: Arizona's New Civil Rules*, 25 ARIZ. ST. L.J. 1, 1-3 (1993).

In one of its more sweeping suggestions, the Final Report urges that "[n]otice pleading should be replaced by fact-based pleading."[8] The Supreme Court's *Twombly* and *Iqbal* decisions, which require a claim for relief to demonstrate "plausibility," have of course already signaled a significant change in the previous general understanding of the pleading requirements of FRCP 8(a).[9] The Final Report takes somewhat different tack, arguing that pleadings should set forth "*all* material facts that are known to the pleading party to support the elements of a claim for relief or an affirmative defense."[10]

Although more precise than the *Twombly*/*Iqbal* "plausibility" standard, the Final Report's approach could lead to increased Rule 12(b)(6) motion practice, in which the parties argue about whether the initial pleading -- and any amended pleading permitted thereafter under the liberal standard in FRCP 15(a) -- disclosed sufficient material facts.[11] It was precisely this kind of extended dilatory motion practice – and concern over the length of pleadings -- that prompted the adoption of the "short and plain statement of the claim" standard in FRCP 8(a)(2) in the first place.[12]

The Arizona rules take a different approach, mandating disclosure of more information than the Final Reportat a very early stage of the case, but outside the pleading process. This requirement is contained in the centerpiece of the Zlaket Rules, ARCP 26.1, entitled "Prompt Disclosure of Information." The rule requires

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8 *Final Report*, *supra* note 6, at 5.

9 *See Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009); *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1965-66 (2007).

10 *Final Report*, *supra* note 6, at 6 (emphasis added).

11 *But cf.* INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, CIVIL CASE PROCESSING IN THE OREGON COURTS: AN ANALYSIS OF MULTNOMAH COUNTY 2, 20-24 (2010), *available at* http://www.du.edu/legalinstitute/pubs/civil_case.pdf (noting that, for specified case types, proportionately fewer motions to dismiss were filed in one Oregon state court under rules requiring pleading of "ultimate facts" than in cases governed by FRCP 8 filed in the United States District Court for the District of Oregon).

12 *See, e.g.*, *Knox v. First Sec. Bank*, 196 F.2d 112, 117 (10th Cir. 1952) (stating that the purpose of Rule 8(a)(2) was to dispense with "prolixity in pleading and to achieve brevity, simplicity, and clarity").

a broad set of initial disclosures by all parties within forty days after a responsive pleading is filed to a complaint, counterclaim, cross-claim, or third party complaint.[13] The duty of disclosure is continuing; each party must make additional or amended disclosures "whenever new or different information is revealed."[14] Each disclosure must be "under oath, signed by the party making the disclosure."[15]

The scope of disclosure required under ARCP 26.1 is much broader than that provided under the later enacted (and subsequently amended) FRCP 26(a).[16] ARCP 26.1 requires disclosure not only of "[t]he factual basis of the claim or defense,"[17] but also "[t]he 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."[18] There are no counterparts to these requirements in the initial disclosure requirements of FRCP 26(a). The potential sanction for failure to disclose is severe – absent a showing of good cause, the offending party "shall not, unless such failure is harmless, be permitted to use as evidence at trial, at a hearing, or on a motion, the information or witness not disclosed."[19]

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13 ARIZ. R. CIV. P. 26.1 (b)(1).

14 *Id.* at (b)(2)

15 *Id.* at (d)

16 The 1993 version of FRCP 26(a) contained a local "opt out" provision to mandatory disclosure. The 2000 amendments to FRCP 26(a) eliminated the opt out provision, but narrowed the scope of disclosure. *See* FED. R. CIV. P. 26, Advisory Comm. Notes, 2000 Amendment, Note to Subdivision (a) (2007).

17 ARIZ. R. CIV. P. 26.1(a)(1).

18 *Id.* at 26.1(a)(2).

19 *Id.* at 37(c)(1); *see also id.*, State Bar Comm. Note to 1996 Amendment (stating that the amendment was intended to codify the holding of *Allstate Ins. Co. v. O'Toole*, 896 P.2d 254 (Ariz. 1995), which exempted harmless non-disclosure from the sanction of exclusion). Before the 1996 amendment, ARCP 26.1(c) provided that the trial court "shall exclude" non-disclosed evidence, except for "good cause shown." *Id*. at 256. Some courts had interpreted this language as mandating exclusion in the absence of a showing of good cause for the non-disclosure, even if the opposing party was not prejudiced. *Id*. at 256-57.

Under the Arizona approach, trial courts are not required to adjudicate a series of Rule 12(b)(6) motions in which differing versions of the complaint are measured against an indefinite "plausibility" standard.[20] Neither are Arizona courts required to determine whether a pleading seeking relief discloses all "material" facts, nor speculate as to the legal theory asserted. Each party is provided with disclosures made under oath, and the disclosure can thus serve as a basis for a summary judgment motion if either the disclosed facts or the legal theory asserted is insufficient to support a claim or defense as a matter of law. The disclosure can also inform the court in considering a motion under ARCP 56(f) (the counterpart of FRCP 56(f)) to continue consideration of a summary judgment motion pending specified further discovery.

The Supreme Court's recent FRCP 8 jurisprudence has been prompted in part by dissatisfaction with the notion that a bare bones complaint can force the parties to engage in expensive discovery to learn the relevant facts and legal theories.[21] The Final Report reflects similar concerns. Even assuming the merits and longevity of the *Twombly* doctrine,[22] broadened mandatory disclosure under FRCP 26(a) could alleviate the concerns expressed in the Final Report without returning us to the problems that originally led to the adoption of FRCP 8.

B. Depositions

The Final Report urges that "[p]roportionality should be the most important principle applied to all discovery," and that only "limited additional discovery should be permitted" after initial disclosures.[23] Both the FRCP and the ARCP contain limits on the length of depositions; these differ in time, but not in

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[20] Perhaps in part informed by the requirements of ARCP 26.1, the Arizona Supreme Court recently declined to adopt the *Twombly* doctrine. *See Cullen v. Auto-Owners Ins. Co*., 189 P.3d 344, 347 (Ariz. 2008).

[21] *See Iqbal*, 129 S. Ct. at 1950 ("Rule 8 . . . does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions").

[22] Sen. Specter has introduced the "Notice Pleading Restoration Act of 2009," which would abrogate *Twombly* and *Iqbal*, and mandate application of the standards in *Conley v. Gibson*, 355 U.S. 41 (1957), to all motions under FRCP 12(b)(6). *See* S. Res. 1504, 111th Cong. (2009).

[23] *Final Report*, *supra* note 6, at 7, 9.

principle.[24] Both sets of rules limit the number of depositions, and here the difference is more substantive.

Under FRCP 30(a)(1), a party may "depose any person, including a party, without leave of court." Absent stipulation or leave of court, however, the party is limited to no more than ten depositions.[25] Under ARCP 30, in contrast, only depositions of parties, expert witnesses, and document custodians may be taken without stipulation or court permission.

In less complicated cases, the Arizona approach forces the parties to agree upon whether a deposition is truly needed,[26] or, in the alternative, to convince the trial judge of the need. In such cases, the presumptive limit of ten depositions per side in the FRCP creates the need for judicial intervention when a party believes that fewer depositions would suffice. Although a protective order under the federal regime could produce the same result as the ARCP, the burden on the moving party – and the absence of a presumption that non-party, non-expert depositions must be justified – has the potential of unnecessarily increasing discovery costs.

C. Document Production

The Final Report suggests that "[s]hortly after the commencement of litigation, each party should produce all reasonably available nonprivileged, non-work product documents and things that may be used to support that party's claims, counterclaims or defenses."[27]

ARCP 26.1(a)(9) responds to these concerns. It requires identification in the disclosure not only of documents and electronically stored information, "whether or not in the party's possession, custody or control," that "may be relevant to the subject matter of the action," but also of "all documents which appear reasonably

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[24] *See* FED. R. CIV. P. 30(d)(1) (presumptive limit of one day of seven hours); Ariz. R. Civ. P. 30(d) (presumptive limit of 4 hours).

[25] *Id.* at (a)(2).

[26] "Refusal to agree to the taking of a reasonable and necessary deposition should subject counsel to sanctions under Rule 26(f)." ARIZ. R. CIV. P. 30(a), Comm. Comment to 1991 Amendment.

[27] *Final Report*, *supra* note 6, at 7.

calculated to lead to the discovery of admissible evidence." Those documents must be produced with the disclosure, absent good cause; if production is not made, the party must indicate the name and address of the custodian. The scope of disclosure is thus broader than FRCP 26(a), which only requires identification of documents supportive of the disclosing party's position.

D. Witnesses

FRCP 26(a)(1)(A)(i) mandates initial disclosure of all persons "likely to have discoverable information," and FRCP 26(e) imposes a duty of supplementing such disclosures. The names of trial witnesses, however, are not required in the initial disclosure. Rather, they are treated under FRCP 26(a)(1)(D) as "Pretrial Disclosures," to be made at least thirty days before trial absent contrary order of the court. The Final Report urges early identification of trial witnesses, subject to a continuing duty to update.[28]

The ARCP directly respond to the Final Report's recommendation. ARCP 26.1(a)(3) mandates initial disclosure of all witnesses "whom the disclosing party expects to call at trial," along "with a fair description of each witness' expected testimony." In conjunction, ARCP 26.1(b)(2) imposes a continuing duty to make "additional or amended disclosures" within thirty days of the party learning about new or different information." Thus, the Zlaket Rules ensure that the opposing party is provided with an up-to-date witness list well before trial. That duty is reinforced by the provision in ARCP 26.1(b)(2) preventing use of information disclosed within sixty days of trial without leave of court.

E. Expert Witnesses

The Final Report recommends that "[e]xcept in extraordinary cases, only one expert witness per party should be permitted for any given issue."[29]

ARCP 26(b)(4)(D) addresses this issue and goes further, providing that "each side shall be presumptively entitled to only one independent expert on an issue, except on a showing of good cause." This rule also allows the trial court, if

[28] *Id.* at 9.

[29] *Id.* at 17.

multiple parties on a side cannot agree as to which independent expert will be called on an issue, to designate the expert to testify.[30]

F. Reaction of the Bar and Bench to the Zlaket Rules

1. Early reactions.

The proposed Zlaket Rules received extensive public comment and were "test-driven" in four divisions of the Maricopa County Superior Court before adoption.[31] In 1997, while serving as Chief Justice of the Arizona Supreme Court, their namesake admitted that he was "not sure I can get very good read on how the Rules are working," noting that most of his information was anecdotal.[32] He stated, however, that trial judges reported no problems with the disclosure rules, and the "restrictions we placed on discovery draw nothing but praise."[33] An early article by an experienced Arizona civil litigator found results of the first five years of experience under the new regime "mixed," noting the process worked well "when the parties and their counsel comply with the letter and spirit of the disclosure rules," but lamenting that some counsel did not comply and some judges were less than strict in enforcing the rules.[34]

2. The 2008 survey of the ACTL Fellows.

The survey of ACTL Fellows conducted in 2008 by the Institute for the Advancement of the American Legal System ("IAALS") and the ACTL Task Force on Discovery, the results of which were presented in the Interim Report, suggests that, after some fifteen years of experience with the Zlaket Rules,

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30 ARIZ. R. CIV. P. 26(b)(4)(D).

31 *See* ZLAKET, *supra* note 7, at 8; ROBERT D. MYERS, *MAD Track: An Experiment in Terror*, 25 ARIZ. ST. L. J. 11 (1993).

32 *Zlaket Takes Over as Chief Justice*, ARIZ. ATTORNEY, March 1997, at 37.

33 *Id.* at 38.

34 ANTHONY R. LUCIA, *The Creation and Evolution of Discovery in Arizona*, 16 REV. LITIG. 255, 268 (1997). In 2006, then retired Justice Zlaket reportedly expressed disappointment in the way the disclosure rules "have been implemented by lawyers." Thomas A. Zlaket, 2006 Goldwater Lecture Series: Common Misperceptions about Judges and the Justice System in Arizona (July 30, 2006).

experienced Arizona trial lawyers prefer the state court procedural regime to the FRCP.[35] Seventy-eight percent of the Arizona respondents indicated that when they had a choice, they preferred litigating in state court to federal court.[36] In contrast, only forty-three percent of the national respondents to the ACTL survey preferred litigation in state court over federal court.[37]

Sixty-seven percent of the Arizona respondents indicated that cases were disposed of more quickly in state court; fifty-six percent believed that processing cases was less expensive in the state forum.[38] Almost half (forty-eight percent) cited the ARCP as an advantage to state court litigation; only four percent of the Arizona respondents cited the FRCP as an advantage of federal litigation.[39]

3. The 2009 IAALS Arizona Rules Survey

In 2009, the IAALS conducted a comprehensive Arizona Rules Survey, to explore the opinions of the Arizona bench and bar about civil procedure in the State's superior courts.[40] The Survey was created by IAALS and the Butler Institute, an independent social science research organization at the University of Denver.[41] The State Bar of Arizona (a mandatory membership organization) distributed the survey to its membership.[42]

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35 The survey was sent to 3812 Fellows of the American College of Trial Lawyers ("ACTL"); the response rate was forty-two percent. *Interim Report*, *supra* note 6, at 2. Twenty-seven of the respondents identified Arizona as the state where their primary practice was located. INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, BREAKDOWN OF RESPONSES TO ACTL SURVEY – ARIZONA ATTORNEYS 1 (Mar. 11, 2009) (on file with author) [hereinafter *2009 Memorandum*].

36 *Id.* at 2.

37 *Id.*

38 *Id.* at 3.

39 *Id.*

40 INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, SURVEY OF THE ARIZONA BENCH AND BAR ON THE ARIZONA RULES OF CIVIL PROCEDURE 1 (2010) [hereinafter *2009 Arizona Rules Survey*].

41 *Id.* at 6.

42 *Id.* at 6-7.

The survey produced 767 valid responses, a statistically valid sample.[43] Survey respondents had practiced law in Arizona for nineteen years on average.[44] Respondents were virtually evenly divided between those routinely representing plaintiffs and defendants in civil litigation.[45] Typical respondents had significant trial court experience.[46]

The Survey showed significant preference among the Arizona Bar for litigating in state court.[47] Over seventy percent of respondents reported litigation experience in the United States District Court for the District of Arizona; those respondents preferred litigating in state court over federal court by a two-to-one ratio.[48] Respondents favoring the state court forum cited the applicable rules and procedures, particularly the state disclosure and discovery rules.[49] Respondents favoring the state forum indicated that state court is faster and less costly.[50]

In the aggregate, the Survey demonstrated that the Arizona Bar overwhelmingly believes that the innovative aspects of the ARCP are beneficial.[51] Over half of the respondents reported superior court experience before the adoption of the Zlaket Rules.[52] Those with pre-1992 experience favored state over federal court at a higher rate (fifty-five percent) than those with no such experience (forty

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43 *Id.* at 7.

44 *Id.* at 8.

45 *Id.* at 8-9.

46 *Id.* at 9.

47 *Id.* at 12.

48 *Id.*

49 *Id.* at 13.

50 *Id.*

51 *Id.* at 14.

52 *Id.*

percent).[53] Among the group with pre-1992 experience, only a small minority viewed the 1992 amendments as a negative development.[54]

a. ARCP 26.1 disclosures

There was strong consensus among Survey respondents that ARCP 26.1 disclosures "reveal the pertinent facts early in the case" (seventy-six percent) and "help narrow the issues early in the case" (seventy percent).[55] A majority (fifty-four percent) of respondents also believed that the disclosures facilitate agreement on the scope and timing of discovery.[56] Plaintiffs' and defense counsel responded in the same way on these issues.[57] Similarly, respondents overwhelmingly disagreed with the notion that the Arizona disclosure rules either add to the cost of litigation (fifty-eight percent) or unduly front-load investment in a case (seventy-one percent).[58]

Respondents also preferred the timing of ARCP 26.1 disclosures, which must occur within forty days after the pleadings are closed, to disclosure under FRCP 26(a), which does not occur until after an initial FRCP 26(f) conference.[59] A substantial majority (fifty-six percent) also preferred the content and scope of ARCP 26.1 disclosures to those under FRCP 26(a)—twenty-five percent expressed no preference.[60]

Most criticisms centered on behavior of counsel and failure of trial judges to enforce the disclosure rules vigorously.[61] A significant number of respondents also

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53 *Id.* at 15.

54 *Id.* at 14.

55 *Id.* at 19.

56 *Id.*

57 *Id.*

58 *Id.* at 19-20.

59 *Id.* at 21.

60 *Id.*

61 *Id.* at 23, 26.

questioned whether the disclosures themselves ultimately reduce the volume of discovery or the total time required to conduct discovery.[62]

b. Presumptive Limits on Discovery.

The 2009 IAALS Arizona Rules Survey also demonstrated a favorable opinion among the Arizona bench and bar about the ARCP's presumptive limits on discovery. Over sixty percent of the respondents would not change the presumptive limit on depositions.[63] Among the most experienced lawyers (those with pre-1992 experience) who expressed an opinion, the percentage of those who would make no change increased to over sixty-five percent.[64] Similarly, some seventy-two percent of respondents would make no change in the four-hour presumptive deposition time limit.[65] That number increased to seventy-five percent among those with pre-1992 experience who expressed an opinion.[66] Among those expressing a preference, over fifty-five percent of respondents preferred the ARCP limitations on deposition discovery to those in the FRCP; that percentage increased to over sixty percent among the lawyers with most experience in civil litigation.[67]

Almost two-thirds of respondents (sixty-four percent) would not change the presumptive limits on interrogatories; six percent would make the limits even lower.[68] The Survey produced similar responses with respect to requests for admission; some sixty-two percent of respondents would not modify the presumptive limits, and seven percent would lower the limits.[69]

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62 *Id.* at 19.

63 *Id.* at 29

64 *Id.*

65 *Id.* at 31-32.

66 *Id.*

67 *Id.* at 32.

68 *Id.* at 32-33.

69 *Id.* at 35.

The Arizona Rules Survey found less consensus regarding production requests. A narrow plurality of surveyed attorneys (forty-seven percent) would either maintain or lower the current limits.[70] Forty-six percent, however, favored making the limit higher.[71] Among those with pre-1992 experience who expressed an opinion, the percentage of those favoring retention of current limits increased to fifty-three percent.[72]

c. Number of Expert Witnesses.

Over three-quarters of respondents to the 2009 Survey (seventy-seven percent) approved of the presumptive limit on expert witnesses.[73] The small minority of those who would raise the limits (twelve percent) were relatively equally divided between the plaintiffs' and defense bar. [74] By a three-to-one ratio, respondents with federal experience prefer the ARCP over the FRCP regarding the number of expert witnesses.[75] Of respondents who expressed a preference, over seventy percent with pre-1992 experience prefer the ARCP.[76]

d. The Presumptive Discovery Limits as a Whole

The 2009 Survey showed broad consensus that presumptive discovery limits force parties to "focus their discovery efforts to the disputed issues" (sixty-four percent) and reduce the total volume of discovery (fifty-eight percent agreed).[77] Over seventy percent of respondents reported frequent adherence to the limits on

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70 *Id.* at 34.

71 *Id.*

72 *Id.*

73 *Id.* at 27.

74 *Id.* at 28.

75 *Id.*

76 *Id.* at 29.

77 *Id.* at 37.

deposition time, number of requests for admission, and number of interrogatories.[78] Nearly sixty-five percent reported frequent adherence to the limitations on the number of expert witnesses.[79] A large majority (seventy-eight percent) disagreed with the notion that the presumptive limits force parties to go to trial with insufficient information.[80]

The 2009 Survey did disclose, however, some areas of concern. Only a bare majority (fifty-two percent) reported frequent adherence to the limits on requests for production.[81] When asked whether the limits reduce the total time for litigation, make costs more predictable, or reduce the use of discovery as a tool to force settlement, at least fifty-three percent of respondents answered in the negative.[82] Respondents also reported that courts did not enforce presumptive discovery limits in many cases,[83] and at least seventy percent of respondents reported that sanctions for misconduct related to discovery and disclosure were either "almost never" or "occasionally" imposed by the trial bench. [84]

II.
"Different Strokes for Different Folks"[85]

The Final Report argues against the "'one size fits all' approach of the current federal and most state rules," suggesting "different sets of rules for certain types of cases."[86] The existing FRCP largely rely on judicial management to

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78 *Id.* at 39.

79 *Id.*

80 *Id.*

81 *Id.* at 39-40.

82 *Id*. at 37.

83 *Id.* at 41.

84 *Id.* at 43.

85 Sly and the Family Stone, *Everyday People, on* Stand! (Epic Records 1969).

86 *Final Report, supra* note 6, at 4. The notion that the same procedural rules should apply regardless of the substance of the case has been referred to as the "trans-substantivity principle." *See, e.g.,* DAVID MARCUS, *The Past, Present and Future of Trans-Substantivity in Federal Civil*

differentiate cases, although FRCP 26(a)(1)(B) does exempt a small class of cases from initial disclosure requirements.

The ARCP, in contrast, set up distinct procedural regimes for medical malpractice litigation, claims involving less than $65,000, and complex litigation.

A. Medical Malpractice

ARCP 26.2 was adopted in 1989 as a result of the report of a committee appointed by the Arizona Supreme Court to study malpractice procedure.[87] Together with ARCP 16(c), which governs comprehensive pretrial conferences in medical malpractice cases, ARCP 26.2 sets up a distinct procedural approach to such litigation, and adds subject matter-specific disclosure requirements to the general ones imposed by ARCP 26.1(a).

Within five days after all defendants have filed answers or motions responding to the complaint, the plaintiff must notify the court so that a comprehensive pretrial conference can be scheduled.[88] Within five days after this notice, the plaintiff must serve on all defendants "copies of all of plaintiff's available medical records relevant to the condition which is the subject matter of the action."[89] All defendants must do the same within ten days thereafter.[90] Before the comprehensive pretrial conference, the only interrogatory discovery permitted is the service of uniform interrogatories and ten additional non-uniform interrogatories.[91] An appendix to the ARCP contains three sets of court-approved comprehensive uniform medical malpractice interrogatories, one designed for service by a plaintiff on an individual health care provider, another for plaintiff to

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Procedure 59 DEPAUL L. REV. (forthcoming 2010), *available at* http://ssrn.com/abstract=1428992.

87 The Rule was originally adopted as part of the Uniform Rules of Practice for Medical Malpractice Cases, and incorporated into the ARCP in 2000. ARIZ. R. CIV. P. 26.2, State Bar Comm. Note, 2000 Amendment.

88 ARIZ. R. CIV. P. 16(c).

89 *Id.* at 26.2(a)(1).

90 *Id.* at 26.2(a)(2).

91 *Id.* at 26(b).

serve on an institutional health care provider, and third to be directed by defendants to the plaintiff.[92] Document discovery prior to the comprehensive pretrial conference is sharply limited, and depositions are limited to the parties and experts.[93]

At the comprehensive pretrial conference, which must be held within sixty days after the plaintiff's ARCP 16(c) notice, the court determines the scope and scheduling of future discovery and sets up a schedule for disclosure of witnesses.[94] No motion for summary judgment for lack of expert testimony can be filed by the defendant before the time for disclosure of experts has passed.[95] In addition to the general presumption in ARCP 26(b)(4)(D) limiting each side to one expert per issue, the ARCP specifically deal with a frequent occurrence in medical malpractice cases -- the decision of a physician-defendant to present testimony in addition to that of an independent expert on the standard of care applicable to his conduct. Under such circumstances, absent court permission, the plaintiff is not entitled to call a second expert on that issue.[96]

At the pretrial conference, the trial court also discusses alternative dispute resolution, sets a time for a mandatory settlement conference, sets a date for filing the final joint pretrial statement, and sets a trial date.[97] Thus, the ARCP contemplate not only specialized disclosure and discovery procedures in medical

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92 *Id.* at 84, Form 4. In addition, the ARCP contain uniform personal injury, and contract interrogatories. *Id.* at 84, Forms 5 & 6. Absent stipulation or leave of court, plaintiffs in non-medical malpractice litigation are limited to serving forty interrogatories on any other party. *Id.* at 33.1(a). Each uniform interrogatory and its various subparts are counted as one interrogatory; in contrast, subparts to a non-uniform interrogatory are counted as separate interrogatories. *Id.* Uniform interrogatories need not be reproduced for service; they can be served by reference to number alone. *Id.* at 33.1(f); *see also* ARIZ. R. FAM. LAW P. 61, 97 Form 7 (governing interrogatories in family law cases).

93 ARIZ. R. CIV. P. 26.2(b).

94 *Id.* at 16(c) (1) – (3), (5).

95 *Id.* at 16(c)(2). As to each expert, ARCP 26.1(a)(6) requires comprehensive disclosure of the facts and opinions to which the expert is expected to testify, a summary of the grounds for each opinion, and a listing of the expert's qualifications.

96 *Id.* at 26(b)(4)(D).

97 *Id.* at 16(b)(14)-(16).

malpractice actions, but also mandate an early timetable toward a specific trial date.[98]

B. Mandatory Arbitration

Since 1971, Arizona courts may require arbitration of claims in which the amount in controversy does not exceed a specified jurisdictional limit;[99] the current statute allows the trial court to set a jurisdictional limit not to exceed $65,000.[100] Virtually every county has adopted such a program.[101] ARCP 72 through 77 implement the compulsory arbitration program.

The program is triggered when the trial court judges in a county "provide for arbitration of claims and establish[] jurisdictional limits."[102] The court can mandate arbitration in cases falling under the chosen amount in controversy, which cannot exceed $65,000.[103] At the time the complaint is filed, the plaintiff must file a separate certificate on compulsory arbitration; if the defendant disagrees as to arbitrability, the issue is determined by the court.[104] Unless the parties stipulate otherwise, the trial court assigns the arbitrator from a list of active members of the State Bar.[105] The arbitrator must set a hearing within sixty to one hundred and twenty days of appointment.[106] The arbitrator may not grant a motion to dismiss or

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98 There do not appear to have been any empirical studies of lawyer or judge satisfaction with the medical malpractice rules. One early article by a medical malpractice specialist, however, indicated satisfaction with the rules. JOJENE MILLS, *Practical Implications of the Zlaket Rules from a Plaintiff's Lawyer's Perspective*, 25 ARIZ. ST. L. J. 149, 149 (1993).

99 1971 Ariz. Sess. Laws., ch. 142, § 1 (codified at ARIZ. REV. STAT. § 12-133).

100 ARIZ. REV. STAT. ANN. § 12-133(A)(1) (Supp. 2008-09).

101 *See* ROSELLE L. WISSLER & ROBERT DAUBER, *Court-Connected Arbitration in the Superior Court of Arizona: A Study of its Performance and Proposed Rules Changes*, 2007 J. DISP. RES. 65, 68-9, n. 18-22.

102 ARIZ. R. CIV. P. 72(a).

103 ARIZ. REV. STAT. ANN. § 12-133 (A) (Supp. 2008-09).

104 ARIZ. R. CIV. P. 72(e)(2)-(3).

105 *Id.* at 73(b).

106 *Id.* at 74(b).

rule on a case-dispositive motion for summary judgment,[107] but is otherwise authorized to make most interlocutory legal decisions, including rulings on discovery disputes.[108] Because "the purpose of compulsory arbitration is to provide for the efficient and inexpensive handling of small claims," the arbitrator is directed to limit discovery "whenever appropriate."[109]

In cases subject to mandatory arbitration, ARCP 26.1(a) initial disclosures must be made within thirty days of the filing of the answer.[110] The parties must file a pre-hearing statement, in which they are encouraged to agree on facts and issues.[111] In general, the Arizona Rules of Evidence apply to arbitration hearings,[112] but foundational requirements are waived for a number of documents, and sworn statements of any witness other than an expert are admissible.[113] The arbitrator must issue a decision within ten days of the hearing.[114]

In the absence of an appeal to the court of the arbitrator's decision, any party may obtain judgment on the award.[115] If an appeal is filed, a trial de novo is held in trial court; any party entitled to a jury may demand one.[116] An appeal is not

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[107] If a motion for summary judgment is filed, it is assigned to the trial judge, who may impose sanctions if the filing was frivolous or for purposes of delaying the arbitration hearing. *Id.* at 74(d).

[108] *Id.* at 74(c)(1).

[109] *Id.* at 74(c)(3). Any discovery ruling requiring disclosure of documents alleged to be privileged is subject to prompt interlocutory review by the assigned superior court judge. *Id.* at 74(c)(4).

[110] *Id.* at 75(b).

[111] *Id.* at 75(c).

[112] *Id.* at 75(d).

[113] *Id.* at 75(e)(7).

[114] *Id.* at 76(a).

[115] *Id.* at 76(c).

[116] *Id.* at 77(a), (c).

without risk, however. If the appellant fails to recover a judgment on appeal at least twenty-three percent more favorable than the arbitration result, the appellant is assessed not only normal taxable costs, but also the compensation paid to the arbitrator, attorneys' fees incurred by the opposing party on the appeal, and expert fees incurred during the appeal.[117]

1. Previous Empirical Research on the Arbitration System.

In 2004, the Arizona Supreme Court commissioned a study to examine the efficiency and effectiveness of compulsory arbitration, as well as user satisfaction.[118] The findings were considered by the Arizona Supreme Court Committee on Compulsory Arbitration, and adjustments were made to the governing rules in 2007 in light of the report. The study revealed some criticisms of the system (most often regarding the speed of adjudication or expertise of the arbitrator), and the amendments attempted to address those concerns.[119] The study also revealed, however, that most lawyers who had recently represented a client in mandatory arbitration had "highly favorable assessments" of both the hearing and the eventual decision.[120] Sixty-four percent of lawyers with caseloads subject to arbitration favored continuation of the system.[121] And, it is clear that the system reduced trial court workload. In most counties, an award was filed in less than half the cases assigned to arbitration, and a trial de novo was sought in less than a third of all cases in which an award was filed.[122] This suggests that most cases assigned to the program either settled or produced a result satisfactory to the parties after the arbitration hearing. Moreover, most appealed cases never proceeded to trial.[123] These initial reviews of the Arizona experiment strongly suggest that if small

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117 *Id.* at 77(f).

118 WISSLER & DAUBER, *supra* note 100.

119 These amendments expanded the types of motions on which the arbitrator may not rule and allowed the clerk of the court to deliver the record to the arbitrator in electronic format. *See* ARIZ. R. CIV. P. 74(c), (e), State Bar Comm. Note, 2007 Amendments (2009).

120 WISSLER & DAUBER, *supra* note 100, at 86.

121 *Id*. at 90.

122 *Id*. at 75.

123 *Id*. at 76.

claims are subject to mandatory court-annexed arbitration, even if it is non-binding, a great majority of those claims can be diverted from the trial judge's docket.

2. The 2009 IAALS Arizona Rules Survey

Over sixty-five percent of all respondents to the 2009 Survey had a case in superior trial court qualifying for compulsory arbitration.[124] Approximately ninety percent of respondents with a qualifying case had a case proceed through the system.[125] In Maricopa County, sixty-eight percent of the respondents either would maintain or increase the number of cases that qualified for compulsory arbitration.[126] In comparing compulsory arbitration to litigation, large majorities of respondents agreed that arbitration reduces the time to disposition (sixty-two percent) and reduces costs (fifty-eight percent).[127] And, most respondents (sixty-five percent) either found the compulsory arbitration process at least as fair (fifty-seven percent), or more fair (eight percent), than conventional litigation.[128]

Most criticism of the arbitration system centered on the appointment process, which selects arbitrators randomly among members of the Maricopa County bar, some of whom lack litigation experience or familiarity with the substantive subject matter at issue.[129] A majority of respondents also indicated that arbitrators infrequently limited discovery during the arbitration process.[130]

C. Complex Case Courts

In 2001, the Arizona Supreme Court appointed a Committee to Study Complex Litigation, with membership drawn not only from the bar and bench, but

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124 *2009 Arizona Rules Survey*, *supra* note 39, at 46.

125 *Id.* at 49.

126 *Id.*

127 *Id.* at 49-50.

128 *Id.*

129 *Id.* at 50.

130 *Id.*

also including policy experts, a court clerk, court administrators, and a state senator.[131] The Committee issued its report in the following year, after studying complex and commercial case programs in other states.[132] After receiving the report, the Arizona Supreme Court established a pilot program for complex litigation in the Maricopa County Superior Court.[133] The Arizona Supreme Court thereafter adopted, and has since amended, several rules of civil procedure to govern the program.[134]

The Maricopa County program involves three judges with substantial experience in complex civil litigation.[135] Cases are eligible for assignment to the complex litigation court based on a number of factors, including the prospect of substantial pre-trial motion practice, the number of parties, the need for extensive discovery, the complexity of legal issues, and whether "[t]he case would benefit from permanent assignment to a judge who would have acquired a substantial body of knowledge in [the] specific area of the law."[136] When filing a complaint, a plaintiff must identify the action as complex if it meets the stated criteria.[137] A defendant may also designate a case as complex or contest the plaintiff's designation; the presiding superior court judge, or a designee, then determines whether the case qualifies for the program.[138]

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131 *See* ARIZONA SUPREME COURT, COMMITTEE TO STUDY COMPLEX LITIGATION, FINAL REPORT 2-3 (September, 2002).

132 *Id*. at 3.

133 Admin. Order No. 2002-107. The program has been extended several times since 2002. *See* Admin. Order No. 2004-27; Admin. Order No. 2006-123; Admin. Order No. 2009-11 (amended by Admin. Order No. 2009-30).

134 *See* ARIZ. R. CIV. P. 8(h), 8(i), 16.3, 39.1.

135 MARICOPA COUNTY SUPERIOR COURT, COMPLEX CIVIL LITIGATION COMMITTEE, JOINT REPORT TO THE ARIZONA SUPREME COURT 2 (December 2006), *available at* http://www.supreme.state.az.us/courtserv/ComplexLit/JointRptFinal.pdf [hereinafter *2006 Report*].

136 ARIZ. R. CIV. P. 8(i)(2)(A)-(I).

137 *Id.* at 8(h)(3).

138 *Id.* at 8(i)(3) – (6).

The complex litigation court judges are assigned an experienced staff attorney, provided courtrooms equipped with up-to-date electronic technology, and are able to mandate e-filing well in advance of other civil trial court divisions.[139] A complex litigation case is governed by a separate set of pre-trial rules. An initial case management conference is scheduled at the "earliest practical date," and a comprehensive case management order is issued after that conference.[140] That order establishes and schedules particular disclosure requirements; the general requirements in ARCP 26.1 do not apply, and no disclosure or discovery takes place before issuance of the order.[141] The complex litigation court is authorized to segment the case into phases and to establish time limits for the completion of each phase.[142]

As of 2006, more than 560 attorneys had experience with cases in complex litigation court.[143] A survey of this group revealed that ninety-six percent of respondents favored continuation of the pilot program.[144] The respondents gave high marks both to the quality of the judges assigned and their ability to devote more attention than usual to the assigned cases.[145]

The program remains a pilot, in part because of funding constraints, and in part because counties with substantially smaller case volumes and numbers of complex cases than Maricopa have not yet seen the need for expansion.[146] Nonetheless, the program suggests that specially-designated judges and special rules for the most complex cases is an approach worth considering in response to the concerns raised in the Final Report.

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139 *2006 Report*, *supra* note 134, at 2-3. Virtually all Maricopa Superior Court civil divisions now have access to e-filing.

140 ARIZ. R. CIV. P. 16.3(a).

141 *Id.* at 16.3(a)(12), (e).

142 *Id.* at 16.3(d).

143 *2006 Report*, *supra* note 134, at 4.

144 *Id*. at 5. Eighty-three attorneys responded to the survey. *Id.*

145 *Id*.

146 *Id*. at 6.

III.
Conclusion

Arizona's willingness to deviate from the federal model is not unique. For example, Oregon's Rules of Civil Procedure differ substantially from the federal model both with respect to pleading and discovery.[147] It is not my purpose today to argue that Arizona – or any other state – has necessarily created a better mousetrap or that the FRCP should blindly adopt a particular approach. Rather, I suggest only that the states – even those whose civil rules are modeled on the FRCP – have long been engaged in experimentation and modification of existing rules in order to respond to the very concerns raised in the Final Report. The 2009 IAALS Arizona Rules Survey demonstrates that those rules experiments have garnered widespread support among the Arizona bench and bar. The Civil Rules Advisory Committee and Standing Committee should consider these state initiatives when considering the appropriate response to the Final Report. The FRCP can properly be a "model" to the nation not only through original innovation, but also by adopting proven mechanisms from the various states.

[147] INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, A SUMMARY OF COMPARATIVE APPROACHES TO CIVIL PROCEDURE 1-2, 9, 21, 23-24, 27, 42, 44 (2009), *available at* http://www.du.edu/legalinstitute/pubs/Synthesis%20FINAL.pdf.



SURVEY *of the* ARIZONA BENCH & BAR

ON THE ARIZONA RULES OF CIVIL PROCEDURE

INSTITUTE *for the* ADVANCEMENT *of the* AMERICAN LEGAL SYSTEM

UNIVERSITY OF DENVER

INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM

The Institute for the Advancement of the American Legal System (IAALS) is a national, non-partisan organization dedicated to improving the process and culture of the civil justice system. Executive Director and former Colorado Supreme Court Justice Rebecca Love Kourlis leads a staff distinguished not only by their expertise but also by their diversity of ideas, backgrounds and beliefs.

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This Report sets forth the results of the Institute for the Advancement of the American Legal System's Survey of the Arizona Bench and Bar on the Arizona Rules of Civil Procedure ("Arizona Rules Survey").

EXECUTIVE SUMMARY

The Arizona Rules Survey explored the views of members of the State Bar of Arizona concerning civil procedure in Arizona Superior Court ("Superior Court"), the state court of general jurisdiction. There are significant differences between the current Arizona Rules of Civil Procedure ("ARCP") and those used prior to 1992, as well as differences between the current ARCP and the Federal Rules of Civil Procedure ("FRCP"). This survey was developed to examine the practical impact of these rules variations, and to contribute additional information to the dialogue on civil procedure reform.

The survey was completed by a diverse group of Arizona practitioners, representing a mix of newer and more experienced attorneys. Nearly 30% of respondents have 10 or fewer years of experience practicing law in Arizona, and over 30% have more than 25 years of experience. Respondents include both plaintiffs' and defense attorneys in fairly equal measure, as well as attorneys in private, government, and in-house practice. Judges also responded. Highlights of the survey appear below.

Arizona practitioners prefer the current Arizona Superior Court civil justice system to both the federal system and to the state system prior to the 1992 rules amendments.

A majority of survey respondents have relevant comparative experience. Over 70% of all survey respondents have litigated in the U.S. District Court for the District of Arizona, and over 50% litigated in Arizona Superior Court prior to the 1992 amendments to the state rules (which increased disclosure obligations and set lower presumptive limits on discovery).

Respondents with experience litigating in the U.S. District Court for the District of Arizona prefer litigation in Superior Court by a two-to-one ratio. These respondents frequently cited the state rules and procedures, particularly disclosure and discovery rules, as the basis for that preference. They stated that state court is faster, less costly, and more accessible. In addition, the vast majority of respondents with experience litigating in Superior Court prior to the 1992 amendments to the ARCP indicated that the amendments were a positive or neutral development for stakeholders (litigants, lawyers, judges, and the public).

Arizona practitioners find comprehensive pretrial conferences to be beneficial.

A majority of respondents indicated that ARCP 16(b) comprehensive pretrial conferences establish early judicial management of cases, improve trial preparation, and expedite case dispositions. Further, over 60% of respondents find the conferences to be "cost-effective," and exactly 60% believe that this conference should be mandated in every case. Respondents commented that, in order to fulfill their purposes, the conferences must be taken seriously and treated as more than an administrative formality. Further, the conferences must occur early enough to make a difference, but not so early as to preclude a good understanding of the case.

Arizona practitioners find the state system's liberal disclosure standard to be beneficial.

In Superior Court, the parties are required to make full, mutual, and simultaneous disclosure of all relevant information known by or available to them at the outset of a case, and to supplement as new information is obtained. There is a consensus among respondents that disclosures reveal the pertinent facts early in the case, help to narrow the issues early in the case, and facilitate agreement on the scope and timing of discovery. Further, there is consensus that disclosures do not require excessive investment early in a case, do not substantially increase satellite litigation, and do not raise litigation costs. Respondents commented that the disclosure rule leads to more effective communication and decreases litigation tactics that detract from the merits. However, it was also noted that the standard imposes a greater burden on conscientious parties and counsel, as proper disclosures involve higher costs than simply providing useless generalizations or a flood of documents. Nevertheless, respondents with federal experience tend to prefer the state disclosure standard with respect to both the timing of initial disclosures and the substance of mandatory disclosures.

Arizona practitioners find the state system's presumptive limits on expert witnesses and discovery to be beneficial.

In Superior Court, the number of independent expert witnesses is presumptively limited to one per side per issue. Given the opportunity to modify the presumptive expert witness limit, nearly 80% of respondents would either maintain or lower this limit. Moreover, respondents with federal experience prefer the Arizona rule on the number of expert witnesses by a three-to-one ratio.

Depositions in Superior Court are presumptively limited to four hours, and only certain individuals may be deposed automatically (parties, expert witnesses, and document custodians). Given the opportunity to modify the presumptive limit on deposition length, over three-quarters of respondents would either maintain or lower the limit. Given the opportunity to modify the presumptive limit on who may be deposed, over two-thirds of respondents would either maintain or lower the limit. Moreover, respondents with federal experience prefer the Arizona rules on the extent of deposition discovery by a two-to-one ratio.

There are also presumptive limits in Superior Court on the number of interrogatories, requests for admission, and requests for production. Given the opportunity to modify the presumptive limit of 40 interrogatories that may be served upon another party, exactly 70% of respondents would either maintain or lower the limit, while fewer than one-quarter would allow for more interrogatories. Given the opportunity to modify the presumptive limit of 25 requests for admission per case, nearly 70% of respondents would either maintain or lower the limit. Given the opportunity to modify the presumptive limit on requests for production to 10 distinct items or categories of items, a narrow plurality would either maintain or lower the limit, but a significant portion (46%) would allow for more requests.

A majority of respondents indicated that the presumptive discovery limits – considered collectively – require parties to focus their discovery efforts on the disputed issues and ultimately reduce the total volume of discovery. A plurality indicated that the limits reduce the total cost of litigation. Further, there is a general consensus that the limits do not favor defendants over plaintiffs, do not increase satellite litigation over whether to depart from the limits, and do not result in insufficient information at trial.

Arizona practitioners would generally like to see stronger rule enforcement.

The opinion that practitioners deviate from the letter and spirit of the rules was fairly widespread in the written comments. One respondent wrote: "If everyone does what they should, it is a good system." Many respondents expressed a desire for more consistent rule enforcement, including more frequent sanctions for misconduct.

Respondents reported that sanctions are rarely requested or imposed, though they are utilized more often for discovery misconduct than for pretrial conference misconduct. Moreover, only about 20% of respondents reported that the sanctions rules consistently deter misconduct, while over 60% reported that the rules "almost never" or only "occasionally" serve as a deterrent.

Arizona practitioners believe there is room for improvement in the state civil justice system.

While acknowledging that many aspects of the Superior Court system reduce litigation time and costs in comparison to other systems, exactly 70% of respondents still indicated that the system takes too long and nearly 85% indicated that it is too expensive.

A majority of respondents agreed that "the system of hourly billing for attorneys contributes disproportionately to litigation costs." With respect to access, a majority of respondents in private practice belong to firms that will not refuse a case based on the amount in controversy. However, one-third stated that, as a general matter, their firm will not file or defend a case unless the amount in controversy exceeds a certain dollar amount (with a median of $25,000).

While most respondents do not believe that notice pleading prevents early identification of issues, nearly one-third find that it does. More than one respondent commented on the relationship between the pleading standard and disclosures, as related to the need to narrow issues. Specifically, notice pleading can diminish the effectiveness of disclosures, as they are required before the legal theories and factual claims have sufficient definition.

Arizona practitioners find that the Superior Court compulsory arbitration program has some benefits but also some significant drawbacks.

In Superior Court, monetary actions with claims below a certain amount (set at the county level) are subject to compulsory arbitration. Three-quarters of respondents have had most of their qualifying cases filed in Maricopa County, which has a $50,000 jurisdictional threshold.

A majority of respondents indicated that the arbitration process has a faster time to disposition and a lower cost than litigation. A majority of respondents also indicated that there is no difference in procedural fairness between arbitration and litigation. Significantly, however, 35% of respondents indicated that the arbitration process is less fair.

The written comments concerning compulsory arbitration were generally negative. Appeal of an arbitration award results in the case being tried *de novo*, which means increased delay and costs. Commenting respondents were also critical of the system for appointing arbitrators, stating that forcing unsuspecting, inexperienced, and untrained members of the bar to arbitrate leads to resentment and a poor process.

I. INTRODUCTION

The Institute for the Advancement of the American Legal System at the University of Denver ("IAALS") is a national, non-partisan organization dedicated to improving the process and culture of the civil justice system. Focusing on the needs of those who use the system, IAALS conducts research to identify problems and develop innovative, practical solutions.

In September 2009, IAALS conducted the Arizona Rules Survey to examine the innovative aspects of the Arizona Rules of Civil Procedure ("ARCP"). This survey was completed by judges and attorneys with civil litigation experience in Arizona Superior Court ("Superior Court"), the state trial court of general jurisdiction governed by the ARCP.[1]

Originally modeled after the FRCP,[2] the ARCP "shall be construed to secure the just, speedy, and inexpensive determination of every action."[3] However, a 1988 citizen review of Arizona's civil justice system concluded that it was becoming unaffordable, wasteful, and uncivilized.[4] In early 1990, the Arizona Supreme Court and the State Bar of Arizona appointed a committee to consider and recommend amendments to the ARCP.[5] The resulting amendments became effective on July 1, 1992.[6] Intended to address a legal culture of "abusive, obstructive, and contentious behavior by members of the bar,"[7] these changes introduced comprehensive pretrial conferences, extensive disclosures, and presumptive limits on discovery.

Given the intent of the 1992 amendments and the significant differences between the ARCP and the FRCP, IAALS determined that a survey of the Arizona Bench and Bar would make a valuable empirical contribution to the current national dialogue on civil procedure reform. Although such evaluative surveys are necessarily subjective, IAALS believes that attorneys and judges can speak to the successes and failures of procedural rules – and should have a stage on which to do so. In addition to their meaningful contact with litigants, they have a technical understanding of the civil justice system, possess intimate knowledge of its governing rules, and play a significant role in how it operates. Indeed, as then-Chief Justice Thomas Zlaket wrote shortly after the new Arizona rules became effective:

> If the bench and bar are willing to give them a good faith try, the rules can succeed. Otherwise, they will likely fail. In any event, the rules surely will need some fine tuning as we gain experience and discover the mistakes that inevitably accompany such an effort.[8]

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[1] ARIZ. CONST. art. VI, §14.
[2] In 1940, the Arizona Supreme Court became the first state to promulgate a procedural system replicating the Federal Rules. John B. Oakley & Arthur F. Coons, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 WASH. L. REV. 1367, 1381 (1986); *see also* Daniel J. McAuliffe & Shirley J. Wahl, ARIZONA PRACTICE SERIES: CIVIL TRIAL PRACTICE §§ 2.4, 2.5 (2d ed. 2009)
[3] ARIZ. R. CIV. P. 1.
[4] Thomas A. Zlaket, *Encouraging Litigators to Be Lawyers: Arizona's New Civil Rules*, 25 ARIZ. ST. L.R. 1, 1 (1993).
[5] *Id.* at 2-3.
[6] Supreme Court of Arizona, Order Amending Rules 4, 6, 16, 26.1, 30, 32, 33, 33.1, 34, 36, 43, Rules of Civil Procedure, and Rule VI, Uniform Rules of Practice of the Superior Court, 168 ARIZ. LXXXI (Dec. 20, 1991).
[7] Zlaket, *supra* note 4, at 9.
[8] *Id.*

The Arizona Rules Survey explored the opinions of the Arizona Bench and Bar concerning civil procedure in Superior Court, focusing on the distinctive state rules and how they operate. The global research questions included:

- Do comprehensive pretrial conferences lead to more effective case management?
- Does mandatory disclosure of all relevant information advance the goals of efficiency, affordability, and procedural fairness?
- Do presumptive limits on discovery and expert witnesses advance the goals of efficiency and affordability, without sacrificing procedural fairness?
- To what extent are the ARCP followed, respected, and enforced?
- Does compulsory arbitration provide a satisfactory alternative to litigation?
- How could Arizona's system be further improved?

II. METHODOLOGY

The Arizona Rules Survey was created by IAALS, with the input of Arizona Supreme Court Justice Andrew Hurwitz and the help of the Butler Institute ("Butler"), an independent social science research organization at the University of Denver. The State Bar of Arizona ("SBA"), a mandatory organization established by the Arizona Supreme Court to govern the legal profession in the state,[9] agreed to support the effort and distribute the survey to its membership.[10]

A. SURVEY DEVELOPMENT

The survey development process began with a series of hypotheses and research questions concerning the ARCP and practice in Superior Court. The survey instrument was then shaped over the course of several months in an iterative process of review and revisions, informed by a previous survey of the American College of Trial Lawyers.[11] IAALS created two versions of the Arizona Rules Survey, which were identical in content. A computerized version was produced using Qualtrics online survey software, while a paper version was produced using Adobe PDF.

Once completed, the survey instrument was pilot-tested by three diverse Arizona civil practitioners.[12] The volunteer pilot participants were first informed that their responses would not be eligible for inclusion in the final survey population, and were then given access to both the online and hard-copy versions and instructed to complete the survey. Thereafter, an IAALS research analyst conducted a telephone interview with each participant, using a standard set of questions. Through the interviews, IAALS obtained invaluable feedback on the presentation and substance of the survey questions. IAALS also received feedback from an Arizona state court administrator.

Upon conclusion of the pilot process, IAALS and Butler finalized the survey instrument and obtained approval for its administration from the University of Denver's Institutional Review Board.

B. SURVEY DISTRIBUTION

The survey was designed for all attorneys and judges with past or present civil litigation experience in Arizona Superior Court, regardless of status, position, or specialty. Accordingly, IAALS decided to cast a wide net within the SBA membership. Every active and inactive member with an e-mail address on file with the state bar received an e-mail invitation to participate, with the exclusion of attorneys categorized as "ineligible to practice" (deceased or disbarred). There were 17,779 e-mail addresses on file.[13]

The SBA sent three survey-related e-mails through its listserv. On August 31, 2009, an e-mail signed by SBA President Ray Hanna informed potential participants of the upcoming study.

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[9] *See* ARIZ. SUP. CT. R. 32; State Bar of Arizona, http://www.azbar.org.

[10] This decision was made under the leadership of SBA President Ray Hanna and SBA Chief Executive Officer/Executive Director John Phelps.

[11] Joint Project of the American College of Trial Lawyers Task Force on Discovery and the Institute for the Advancement of the American Legal System, *Interim Report & Litigation Survey of the Fellows of the American College of Trial Lawyers* (Sept. 9, 2008).

[12] The pilot group consisted of: a seasoned plaintiffs' personal injury lawyer with experience as a Superior Court judge; a seasoned director of a non-profit constitutional litigation center; and a fifth-year associate at a national firm.

[13] One day after the survey was launched, a rule requiring all members to provide the state bar office with a current e-mail address went into effect. Arizona Supreme Court, Order 23 (effective Sept. 3, 2009).

On September 2, 2009, an e-mail signed by Mr. Hanna and Justice Hurwitz explained the importance of the study and provided a universal link to the online version.[14] This e-mail was distributed to a total of 16,438 addresses (1,341 were "undeliverable"). On the evening of September 15, 2009, an e-mail signed by Mr. Hanna reminded potential participants to complete the survey and again provided the survey link. This e-mail was distributed to a total of 16,332 addresses (1,447 were "undeliverable"). All three e-mails encouraged participation and contained instructions for requesting a hard-copy version of the survey. The survey was officially in the field for three weeks, from September 2, 2009 until September 23, 2009. However, responses were accepted for six weeks, until October 14, 2009.

C. SURVEY ADMINISTRATION

Butler administered the survey. In order to preserve the confidentiality of responses, a Butler researcher served as the point of contact for survey participants. While the survey was in the field, Butler monitored operation of the online version, responded to requests for hard-copy versions, and collected the data in a password-protected environment. Upon conclusion of the survey period, Butler exported the data into an analytical software program in a password-protected file. Thereafter, Butler conducted a data verification process, eliminating respondents who did not provide an answer to any of the substantive questions and running descriptive statistics to detect and eliminate clear errors (such as answers outside the permissible ranges). Butler then provided the data to IAALS, removed of all identifiers.

D. SURVEY RESPONSES

Survey emails were sent to all active and inactive Arizona attorneys with an e-mail address on the SBA roster, regardless of experience. The survey e-mails explicitly informed SBA members that this was a study of civil litigation in Superior Court. In addition, a threshold question asked whether the respondent had the requisite civil litigation experience in Superior Court. Due to the application of a different set of procedural rules for family law actions,[15] "civil litigation" was defined to exclude domestic relations or family law.

The morning after the survey closed on October 14, 2009, the online link had been accessed 1,031 times, 947 individuals had given consent to participate in the study, and 834 had answered "yes" to the threshold question on the requisite experience. Although three individuals requested and received hard-copy versions, none were returned within the applicable time frame. After the data verification process, there were a total of 767 valid responses to the survey. At a 95% confidence level, the overall results are within +/– 3.54% of the reported percentages.

Due to the voluntary nature of the study, respondents were not required to answer all survey questions. Further, certain questions were inapplicable to some respondents, based on previous answers given. As a result of these permitted omissions and skip patterns, the precise number of respondents varies from question to question.

Due to the unknown composition of the target population, sample weights could not be used to better approximate the responses of that population. As a result of rounding, the sum of reported percentages may not equal exactly 100%.

[14] It was not possible to provide a unique link to each potential participant due to distribution through the SBA's listserv rather than the online survey software.

[15] *See* ARIZ. R. FAMILY LAW P. 1.

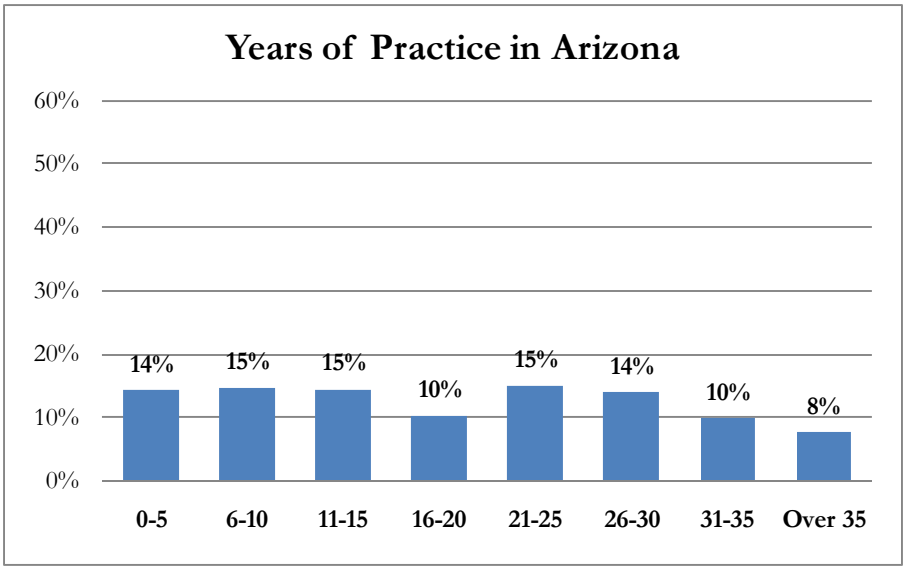
III. RESPONDENT DEMOGRAPHICS

The survey contained a number of background questions, for the purpose of putting the responses into a context. The survey was completed by a diverse group of individuals.

A. LEGAL EXPERIENCE

Survey respondents have practiced law in Arizona for an average of 19 years. Figure 1 shows the relatively even distribution of respondents by years of legal experience in the state. Nearly 30% of respondents have 10 or fewer years of Arizona experience, and over 30% have more than 25 years of experience.

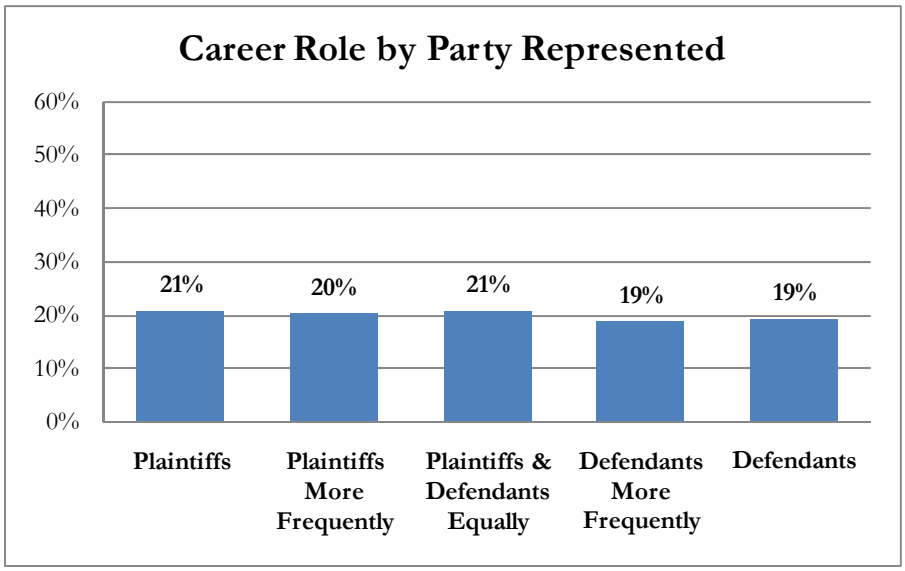
Figure 1 (Survey Question 1)



To obtain their overall perspective on civil litigation, respondents were asked to categorize their role over the course of their career, according to the type of party they have most frequently represented.[16] Respondents could also indicate "neutral decision-maker," a selection allowed in addition to any other response. Excluding those who selected neutral decision-maker as their *only* career role (2% of respondents), the distribution between plaintiffs' and defense attorneys was uniform, as seen in Figure 2.

[16] The response options were: represent plaintiffs in all or nearly all cases; represent plaintiffs and defendants, but plaintiffs more frequently; represent plaintiffs and defendants equally; represent plaintiffs and defendants, but defendants more frequently; represent defendants in all or nearly all cases; neutral decision-maker.

Figure 2 (Survey Question 5)



In total, 8% of respondents selected "neutral decision-maker." Of those, 76% selected a second primary career role: 33% have primarily represented plaintiffs, 19% have represented both equally, and 48% have primarily represented defendants.

B. Arizona Superior Court Experience

Respondents were asked to indicate up to three case types with which they have had the most experience in Superior Court. Respondents reported having the most experience litigating contract disputes (selected by 42%) and personal injury cases (selected by 33%). Complex commercial and real property litigation were both reported by 17% of respondents, while construction and general tort cases were both reported by 16% of respondents.

Figure 3 shows the distribution of respondents by number of Superior Court civil cases in the last five years. Over 60% of respondents have been an attorney of record or a judge in more than 20 cases.

Figure 3 (Survey Question 2)

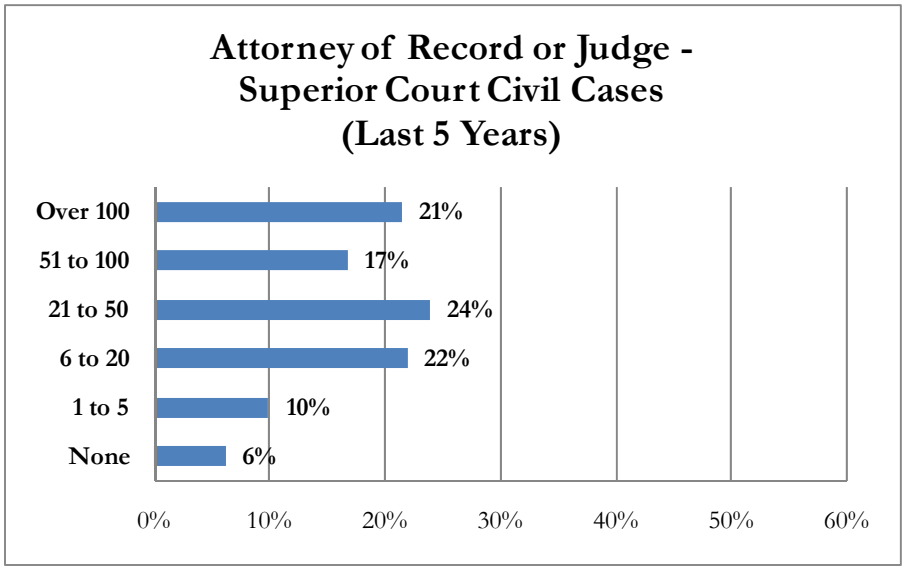
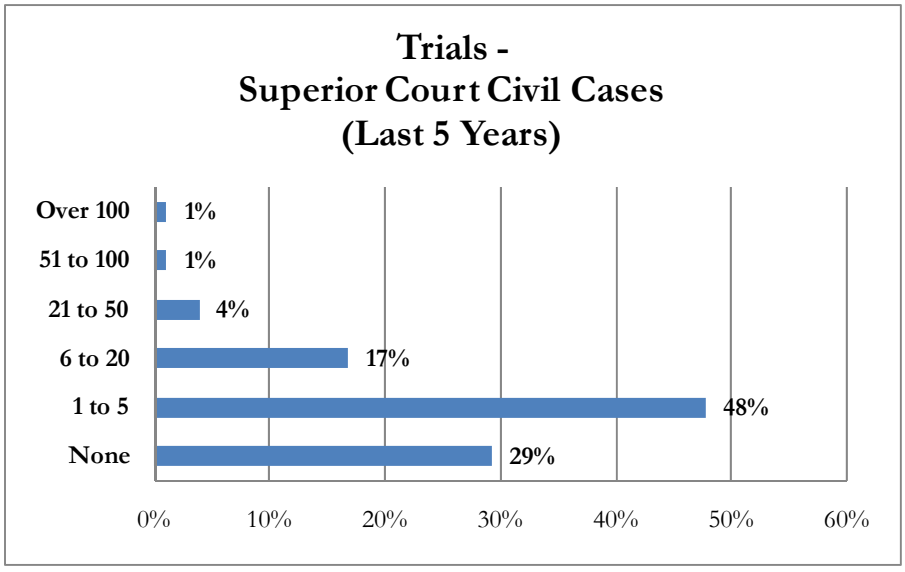


Figure 4 shows the distribution of respondents by number of Superior Court trials in the last five years. About three-quarters averaged less than one Superior Court civil trial per year, while about one-quarter averaged more than one trial per year.

Figure 4 (Survey Question 3)

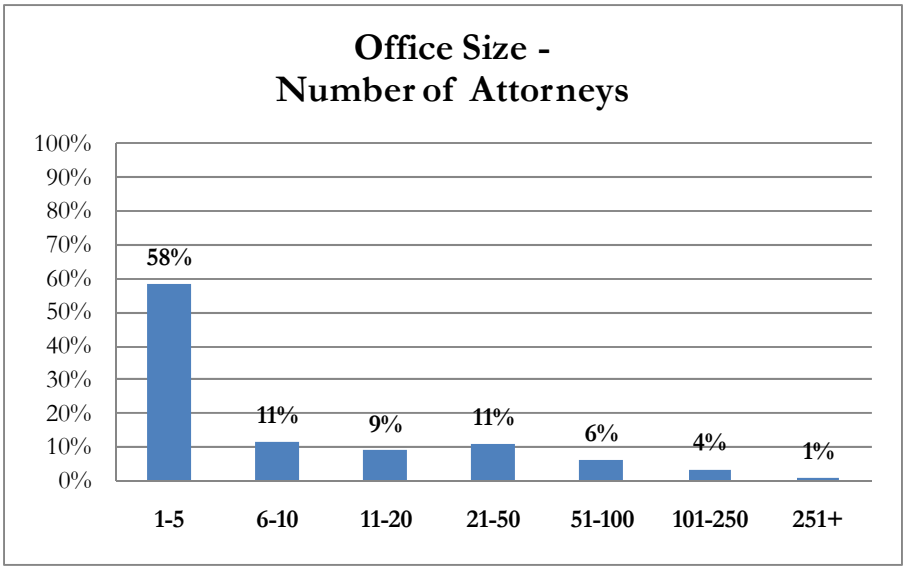


C. CURRENT POSITION

Three-quarters of respondents indicated that they are currently in private practice as a law firm attorney or solo practitioner. One respondent in ten indicated a current position as government counsel, while 4% indicated a current position as in-house counsel. Over 3% of respondents are currently judges. Less than 2% of respondents indicated retired status, and the same number reported inactive status.

Private practice, in-house, and government attorneys (89% of respondents) were asked the number of full- and part-time attorneys working for their organization in their office location. A majority work in offices with five or fewer attorneys, while only 5% work in offices with over 100 attorneys. Figure 5 shows the distribution of respondents by office size.

Figure 5 (Survey Question 7)



IV. THE SURVEY RESULTS

This survey asked general questions about practice in Arizona Superior Court, as well as more specific questions about the ARCP.

Respondents were not required to answer every question. Moreover, certain questions were not asked of respondents for whom the question would be inapplicable. Accordingly, the number of responses to a particular question may not equal the total number of survey respondents. Unless otherwise indicated, percentages reported are the portion of total responses to the particular question, not the portion of total respondents to the survey. For each figure, the number of responses to the question is noted, labeled as "*n*".

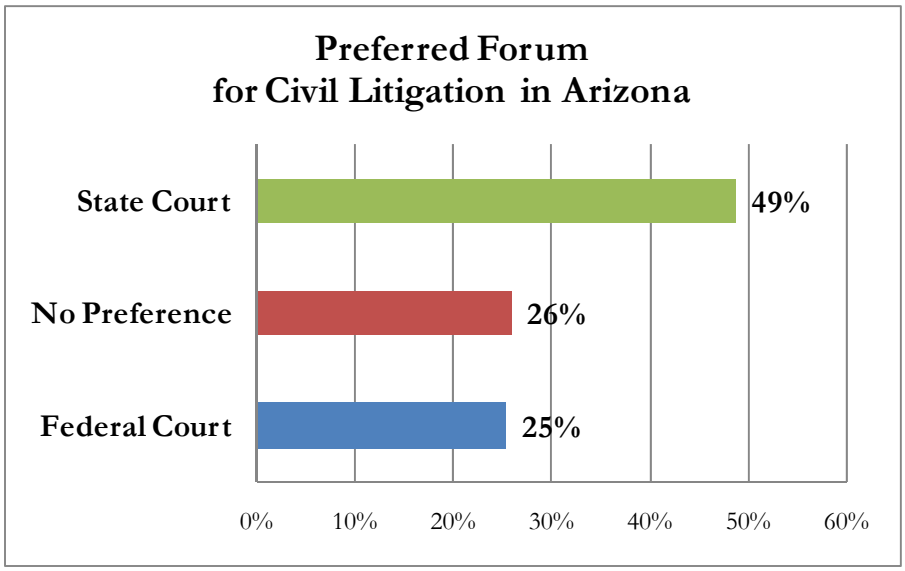
A. ARIZONA ATTORNEYS AND JUDGES ARE GENERALLY POSITIVE ABOUT THE ARIZONA STATE SYSTEM

Arizona practitioners generally prefer state court to federal court, and prefer the current state procedural rules to those of the past. First, this section will discuss respondents' preferred forum for civil litigation in Arizona and the reasons therefor. Second, this section will discuss respondent opinions on the 1992 amendments, which implemented many of Arizona's innovative rules.

1. STATE COURT V. FEDERAL COURT

Over 70% of all survey respondents reported experience litigating in the U.S. District Court for the District of Arizona. Those with federal experience prefer litigating in Arizona Superior Court over the federal court at a two-to-one ratio. In fact, nearly three-quarters of respondents either prefer the state forum or have no preference. Figure 6 shows the level of preference for each Arizona forum.

Figure 6 (Survey Question 12)
n = 548



Respondents who prefer Superior Court over the U.S. District of Arizona often cited the applicable rules and procedures, particularly the state disclosure and discovery rules. In terms of quantity, respondents indicated that state court is faster, less costly, and more accessible (for both litigants and small firm attorneys). In terms of quality, respondents indicated that state court is more relaxed, collegial, and user-friendly. According to these respondents, state court does not emphasize form over substance, which results in fewer technical dismissals and a greater likelihood of a decision on the merits. Other reasons given for preferring state court: partiality for state judges; court dedication to either civil or criminal cases; one decision-maker at a time (*i.e.*, no magistrate judge); the automatic right to a change of judge; less paperwork; non-unanimous verdicts; and more familiarity with state court.

Respondents who prefer the U.S. District of Arizona over Superior Court also cited the applicable rules and procedures, but there was a more specific focus on the consistent application and enforcement of the rules in federal court. For example, one respondent stated that federal judges are "far more willing to deal with counsel who will not comply with the rules."[17] Another wrote: "the timelines are clearer and adhered-to." In terms of quantity, respondents indicated that the federal court has more resources in comparison to its caseload (including time, staff, facilities, and technology), which leads to improved preparation and better decisions. In terms of quality, respondents indicated that the federal court has higher levels of professionalism, decorum, and formality. Further, according to these respondents, judges are more proactive in managing and progressing cases, and are more available to resolve discovery disputes. Other reasons given for preferring federal court: partiality for federal judges; the fact that one judge generally handles a case from start to finish; unanimous verdicts; and higher quality juries.

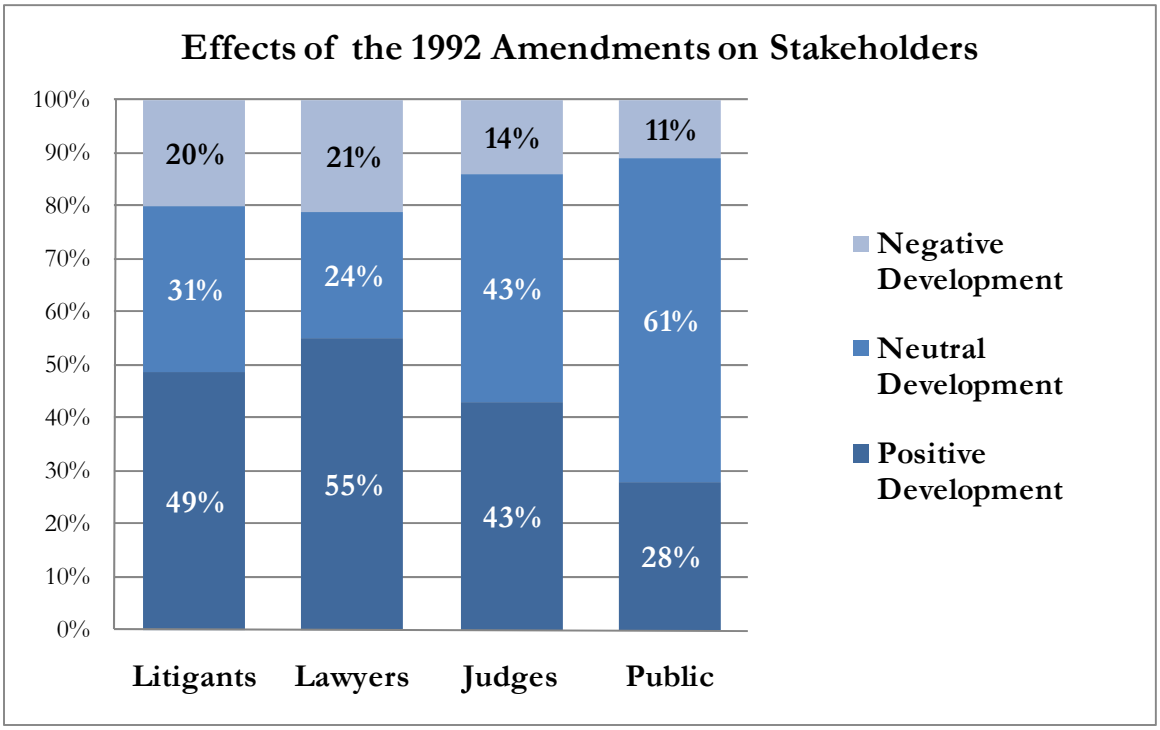
Many respondents who indicated "no preference" for either state or federal court cited the advantages (or disadvantages) of each forum, as described above. Some respondents indicated that the answer depends on the judge or the case, while others found both courts to be equally good or equally bad. One respondent wrote: "Good attorneys with good facts get good results in either forum." Another wrote: "Both [courts] have their applicable rules, and so long as they are applied uniformly to all parties and [followed], I have no preference." Other reasons given: being comfortable in both courts and enjoying the variety of two different systems.

[17] Where quotation marks are utilized without a cited source, the language has been pulled directly from the written comments submitted by survey respondents.

2. THE EFFECTS OF THE 1992 AMENDMENTS

Over 50% of all survey respondents reported Superior Court experience prior to the 1992 amendments to the ARCP. As is apparent from Figure 7, the vast majority of respondents with pre-1992 experience indicated that the amendments were a positive or neutral development for stakeholders – litigants, lawyers, judges, and the public – rather than a negative development.

Figure 7 (Survey Question 14)
n = 398; 388; 372; 372



By and large, those who view the 1992 amendments positively and those who view them negatively came to different conclusions with respect to the following questions: Are the rules a tool for the effective management of the pretrial process, or are they another hurdle to clear? Do the rules focus energy on the merits, or do they detract from the merits? Do the rules decrease discovery disputes, or do they create additional issues to fight over? Do the rules ultimately make the process more or less efficient? Do the rules ultimately decrease or increase litigation costs?

Positive comments focused on the fact that the rules get to the heart of the case and require those involved to "face facts" sooner rather than later. Essentially, the rules require a beneficial evaluation of the case before the burden of discovery must be incurred. Moreover, less information is withheld due to discovery "wordsmithing," resulting in a reduction of "trial by ambush."

Generally, negative comments related to the implementation, rather than the substance, of the rules. As one respondent stated: "If everyone does what they should[,] it is a good system. That is a big 'IF'." The opinion that lawyers and judges do not follow the letter and spirit of the rules was fairly widespread in the written comments. Although no one admitted to personally contributing to problems,[18] the Arizona Bar was particularly hard on itself.

[18] One respondent did go so far as to say: "Everybody fudges, but everybody fudges to a different degree."

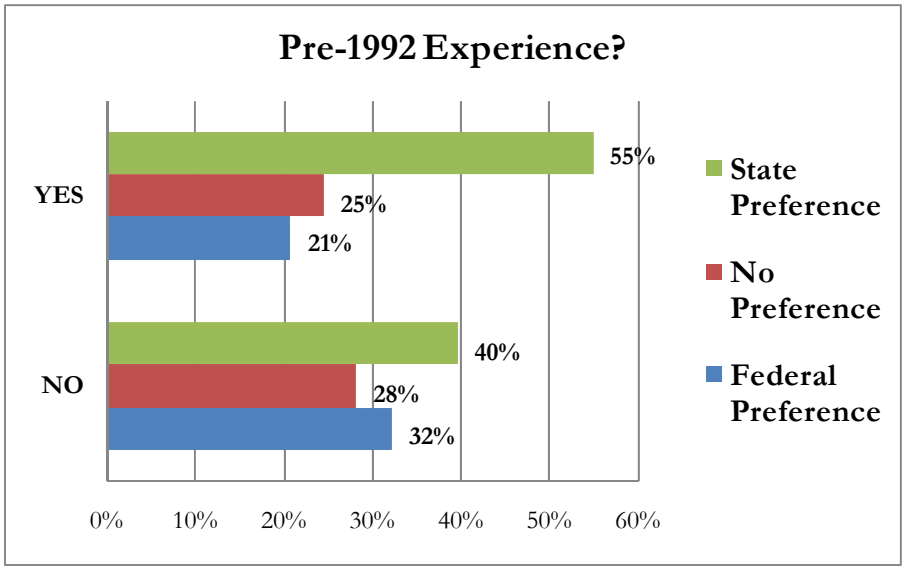
Respondents indicated that attorneys misuse the rules for "gamesmanship" purposes, fail to cooperate, and are suspicious that opposing counsel may be "hiding the ball." One respondent stated that the 1992 amendments did not change the "culture of lying" among lawyers. Moreover, respondents indicated that judges do not enforce the rules effectively or consistently. Judges are also too reluctant to get involved in and resolve discovery disputes. The following comment is illustrative of the general sentiment contained in the written comments:

> Where the "Zlaket" rules are followed in good faith, they provide a clearer exposition of the legal issues and the nature of the dispute that helps reach a more expeditious result, and one that is based more on the law than individual tactics. However, lawyers who choose to use obfuscation as a tactical weapon can do so with the "Zlaket" rules just as they could with the old discovery rules. Control over abuses of the rules, under either set, ultimately comes down to the level of supervision by judges, which is notoriously lacking.

There were an equal number of comments maintaining that the 1992 amendments favor plaintiffs, as there were comments maintaining that the amendments favor defendants. In addition, one respondent wrote that, when enforced, the "rules allow everyone to be on a somewhat level playing field."

Those who have pre-1992 experience tend to prefer state court at a higher rate than those who do not have such experience, as shown in Figure 8.

Figure 8 (Questions 12, 13)
n = 319; 227



B. THE INNOVATIVE ASPECTS OF THE ARIZONA RULES AND THE GOALS OF EFFICIENCY, AFFORDABILITY, AND PROCEDURAL FAIRNESS

In the aggregate, Arizona practitioners overwhelmingly believe that the innovative aspects of the ARCP are beneficial. This section will discuss respondent reactions to those rules, including comprehensive pretrial conferences, extensive disclosures, and presumptive limits on expert witnesses and discovery.

1. RULE 16(b) COMPREHENSIVE PRETRIAL CONFERENCES

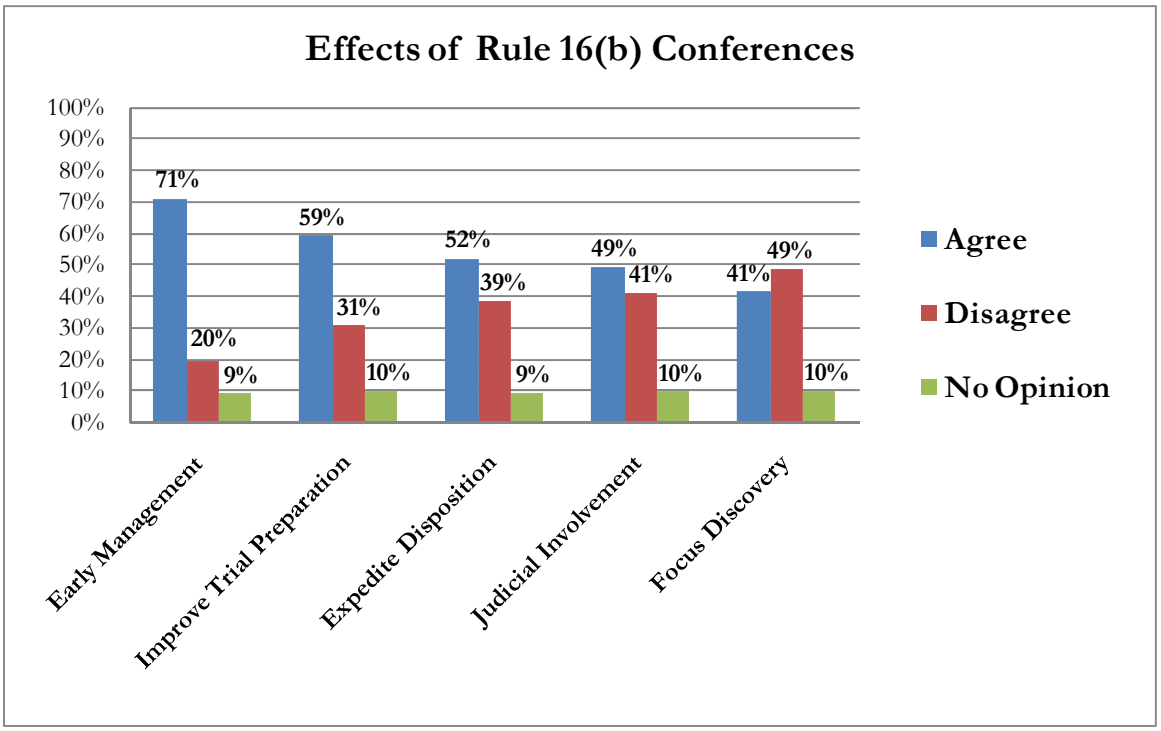
ARCP 16(b) provides that, "upon written request of any party the court shall, or upon its own motion the court may, schedule a comprehensive pretrial conference."[19] The rule then enumerates 19 (non-exclusive) topics that may be addressed by the court at the conference. This portion of the survey sought to determine the effects of Rule 16 conferences and the frequency with which they are employed.

Figure 9 shows what Arizona practitioners perceive to be the effects of Rule 16(b) conferences when they occur.[20] The most profound effect is the establishment of early judicial management of cases (indicated by 71%). The conferences also improve trial preparation for most respondents (59%), and expedite case dispositions for the majority (52%). However, practitioners are more evenly split on whether the conferences encourage judges to stay involved throughout the case (49% agreed; 41% disagreed) and whether Rule 16(b) conferences "focus discovery to the disputed issues" (41% agreed; 49% disagreed). These figures do not add up to 100% because of the "no opinion" response option.

[19] Medical malpractice cases are specifically excluded from this provision.

[20] The categories "strongly disagree" and "disagree" are collapsed into one category unless otherwise noted. The same is true for the "strongly agree" and "agree" categories.

Figure 9 (Survey Questions 15a-15e)
n = 728; 726; 727; 728; 727



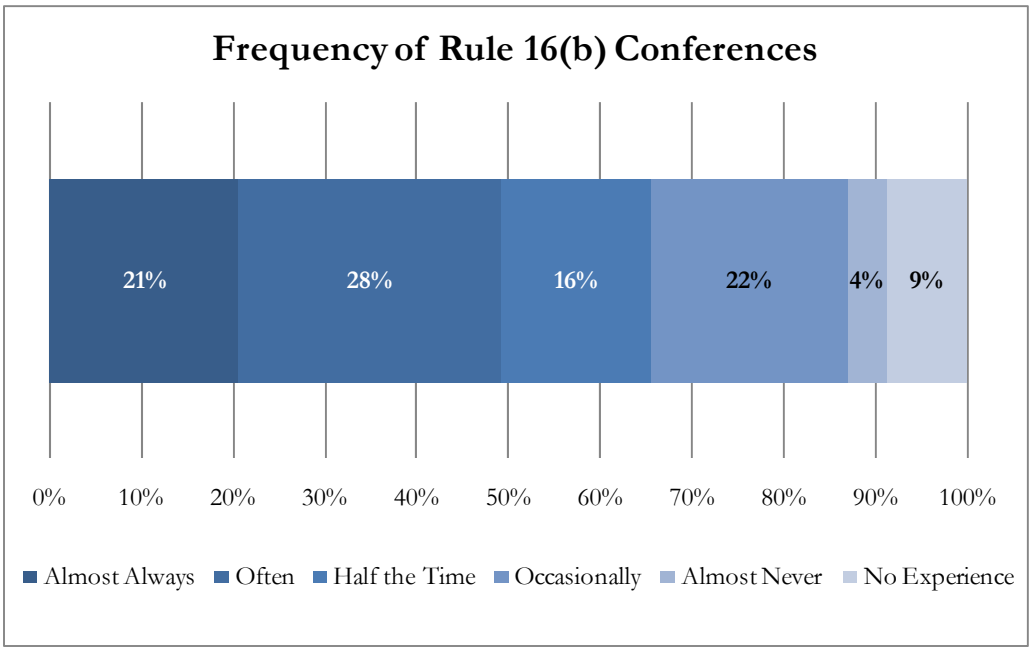
The less than clear ability to focus discovery on the disputed issues is surprising, as the rule explicitly encourages use of the conferences to set disclosure and discovery parameters, eliminate non-meritorious claims or defenses, permit amendment of the pleadings, assist in identifying disputed issues of fact, and obtain stipulations on the admissibility of evidence.[21] Considering *only* respondents who expressed an opinion on the issue, those who primarily represent plaintiffs were more evenly split (51% agreed; 49% disagreed) than those who primarily represent defendants (40% agreed; 60% disagreed) and those who represent both equally (43% agreed; 57% disagreed).[22] However, no more than 13% of any respondent group felt strongly about the issue either way.

Regardless of the specific effects, the Arizona Bar generally believes that "Rule 16(b) conferences are cost-effective" (62% agreed; 24% disagreed).

As Rule 16(b) conferences are not mandatory unless requested by a party or sought by the court, the survey asked the extent to which the conferences are actually held in Superior Court, in the experience of respondents. Nearly 50% of respondents indicated that they occur "often" or "almost always," and nearly two-thirds of respondents indicated that these conferences take place at least half of the time. However, about one-quarter indicated only infrequent experience with the conferences. See Figure 10.

[21] ARIZ. R. CIV. P. 16(b)(1)-(9).
[22] The category "primarily represent plaintiffs" is an aggregate of the responses given by those who "represent plaintiffs in all or nearly all cases" and those who "represent plaintiffs and defendants, but plaintiffs more frequently." The same applies to the category "primarily represent defendants."

Figure 10 (Survey Question 16a)
n = 729



A majority (60%) of respondents believe that a Rule 16(b) conference should be mandated in every case. These respondents cited the fact that the conferences set reasonable ground rules, expectations, deadlines, and benchmarks for efficient case resolution, while preventing languish and inadvertent dismissal. Respondents also indicated that the conferences force both the judge and counsel to become familiar with the case, engage in a realistic evaluation, communicate with one another, and reach agreements. However, many comments were qualified. The timing appears to be crucial, as it was indicated that the conferences must occur early enough to make a difference, but not so early as to preclude a good understanding of the case and an appropriate timeline. Further, one respondent wrote: "I think the courts need to do more than simply tell the parties to discuss and submit a proposed form of order." Finally, another respondent stated that judges have to be "willing to enforce the discovery orders and police discovery disputes."

Respondents who favor discretionary Rule 16(b) conferences indicated that, depending on the case, the circumstances, and the attorneys, this additional court appearance may not be necessary and may simply add an unnecessary step for counsel, increase costs for the parties, and further congest the court's calendar. Many of these respondents described the conferences as an administrative formality that does not truly accomplish its goals, due to arbitrary deadlines, inappropriate conduct of counsel, or inapt enforcement by the court. Some respondents indicated that attorneys should be trusted and empowered to manage cases, with dispute resolution by the court only as required. Others believe that Rule 26.1 disclosures (discussed below) render these conferences superfluous. It was also noted that such conferences should not be mandatory for cases diverted to compulsory arbitration.

2. EXTENSIVE DISCLOSURES

ARCP 26.1 "basically states that at the outset of a case the parties must make a full, mutual and simultaneous disclosure of all relevant information known by or available to them and their lawyers."[23] This portion of the survey sought to determine the effects and operation of Rule 26.1 disclosures.

Figure 11 shows what Arizona practitioners perceive to be the effects of Rule 26.1 disclosures on discovery, when made as provided in the rule. There is a strong consensus that disclosures "reveal the pertinent facts early in the case" (76% agreed; 23% disagreed) and "help narrow the issues early in the case" (70% agreed; 28% disagreed). In addition, a majority of the Bar believes that disclosures facilitate agreement on the scope and timing of discovery (54% agreed; 41% disagreed). For all three of these statements, the responses were similar among plaintiffs' and defense attorneys. Despite the positive effects of disclosures noted by respondents, however, there is no consensus within the Arizona Bar concerning whether disclosures ultimately reduce the total volume of discovery (49% agreed; 48% disagreed) or reduce the total time required to conduct discovery (46% agreed; 50% disagreed).

Figure 11 (Survey Questions 20a – 20e)
n = 692; 690; 690; 689; 689

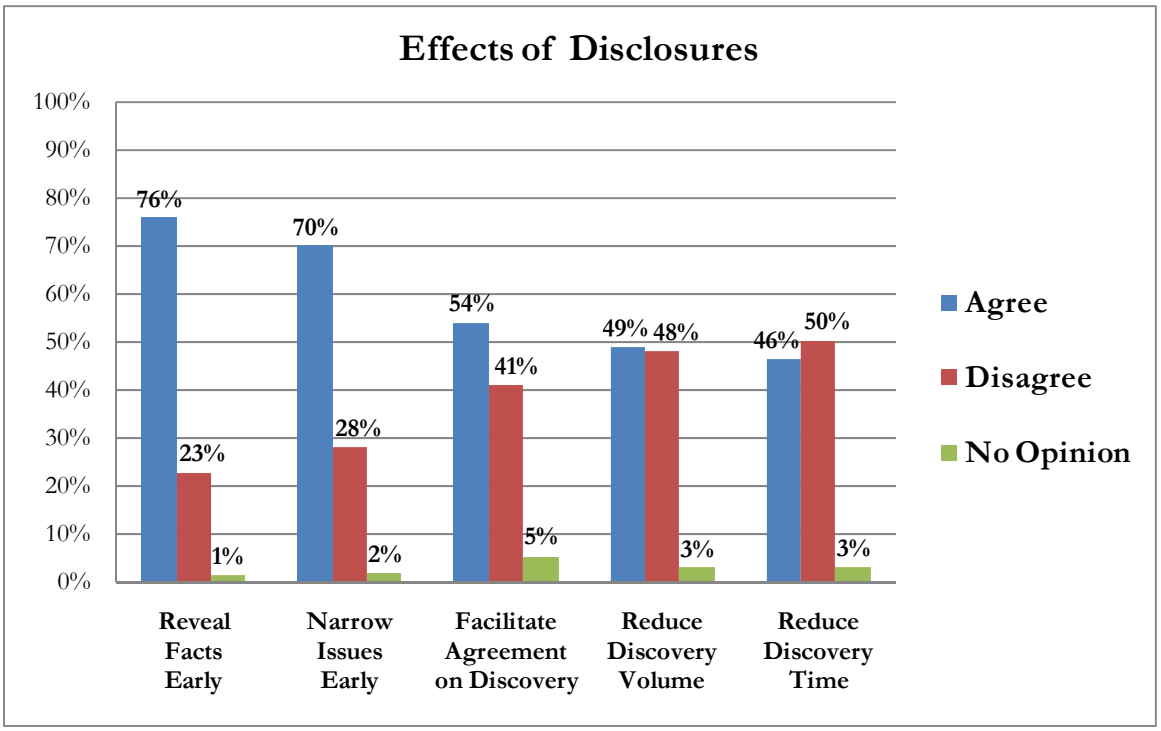
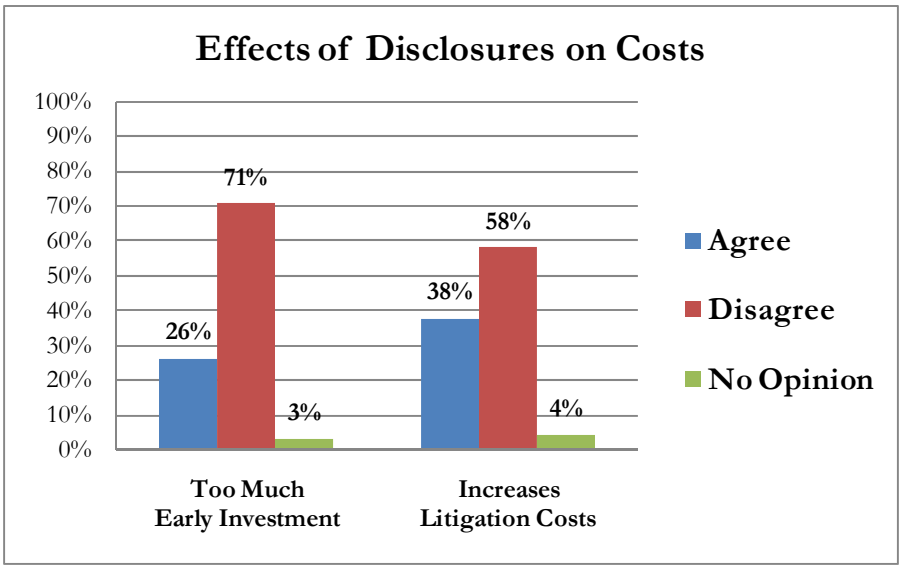


Figure 12 shows Arizona practitioners' perception of whether Rule 26.1 disclosures have negative effects when made as provided in the rule, by either front-loading or increasing costs. The Bar generally does not believe that disclosures "require too much investment early in the case" (26% agreed; 71% disagreed) or that disclosures increase the cost of litigation (38% agreed; 58% disagreed). On both issues, the most frequent answer among both plaintiffs' and defense attorneys was "disagree."

[23] Zlaket, *supra* note 4, at 5.

Figure 12 (Survey Questions 20f, 20g)
n = 688; 690



Moreover, disclosures do not appear to substantially increase satellite litigation, as 64% of respondents indicated that parties litigate the scope and adequacy of disclosures only "occasionally" or "almost never." This data challenges the belief that the 1992 amendments have increased the number of pretrial disputes.

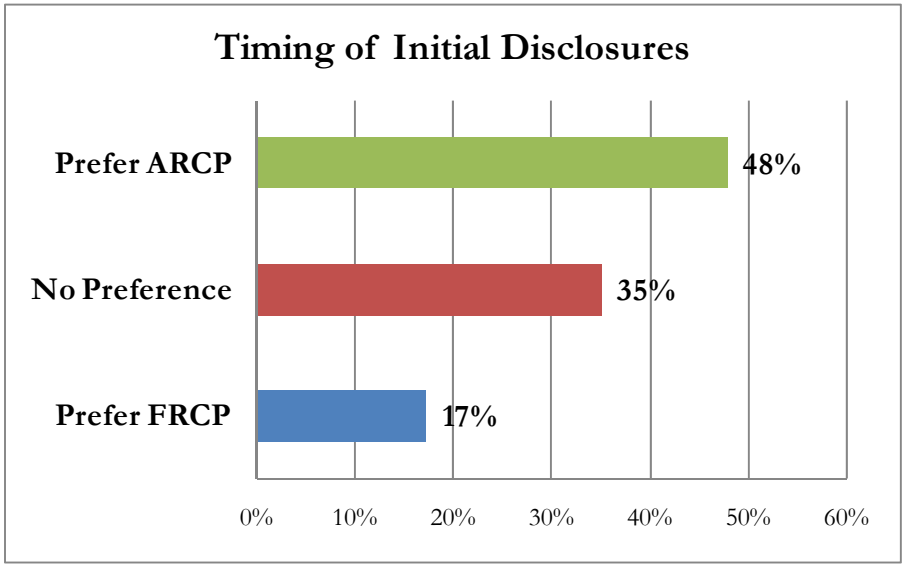
In describing their preference for Superior Court generally, respondents cited the state rule on disclosures more than any other specific rule. One respondent described the system of disclosures as "superior." Other comments include:

- "The disclosure rules permit early identification of issues and facts."
- "Rule 26.1 prevents a lot of gamesmanship and trial by ambush."
- "Superior Court rules require parties to disclose early and often in an attempt to do away with trial by fire and other litigation tactics that are not conducive to reaching a decision on the merits."
- "Arizona's disclosure rules are stronger and lead to more effective communication between parties and support settlement."

One concern expressed was that Rule 26.1 imposes a greater burden on conscientious attorneys. Respondents stated that proper disclosures involve higher costs (for the client if the fee is hourly and for the attorney if the fee is contingent) than simply providing "simplistic generalizations" or flooding the other party with disorganized and mostly irrelevant documents. In addition, one respondent indicated that clients lose faith in counsel when forced to reveal information voluntarily. Nevertheless, by and large, Arizona practitioners prefer the Arizona rules to the federal rules on both the timing of initial disclosures under ARCP 26.1(b) and the substance of mandatory disclosures under ARCP 26.1(a).

The Arizona rules provide that initial disclosures shall occur "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."[24] As seen in Figure 13, about two in three respondents either prefer the ARCP or have no preference concerning the timing of initial disclosures.

Figure 13 (Survey Question 25a)
n = 494



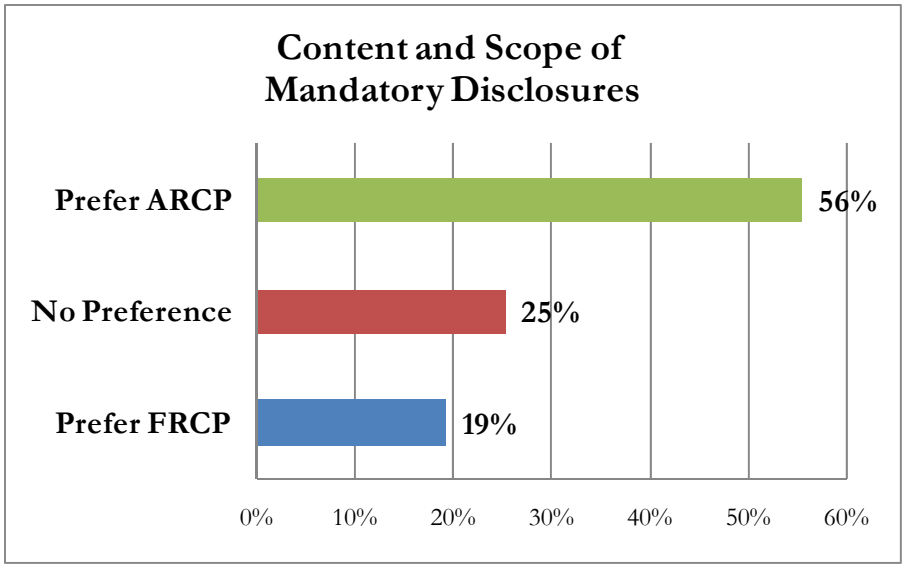
Considering *only* those who expressed a preference between the state and federal rules, the ARCP standard for the timing of initial disclosures received majority support from all respondent groups. When broken out by party represented, at least 72% of all groups prefer the ARCP, with the exception of those who represent defendants in all or nearly all cases. However, even that group expressed majority support for the state rule (56%). When broken out by those who have pre-1992 experience and those who do not have such experience, more than two-thirds of each group prefers the ARCP.

The written comments reflect a belief that the timing of disclosures is important to their efficacy, although there is disagreement concerning the most beneficial time. Some respondents are in favor of providing initial disclosures along with the pleadings, in order to have the fullest information concerning the dispute as soon as possible. Others expressed concern that disclosures can be a wasted effort if they occur before the real issues have been identified. Further, disputes often "cool down" with time, so it is not always beneficial to incur costs during the early stages. One respondent suggested: "Change the disclosures to be 40 days after the *first* responsive pleading. How do you ever get to disclosures if the pleadings never end because not all the parties are ever served, etc.?" Another respondent suggested that disclosures should be made before the Rule 16 pretrial conference is held.

[24] ARIZ. R. CIV. P. 26.1(b)(1).

As seen in Figure 14, fully 75% of respondents either prefer the ARCP or have no preference concerning the content and scope of mandatory disclosures.

Figure 14 (Survey Question 25b)
n = 494



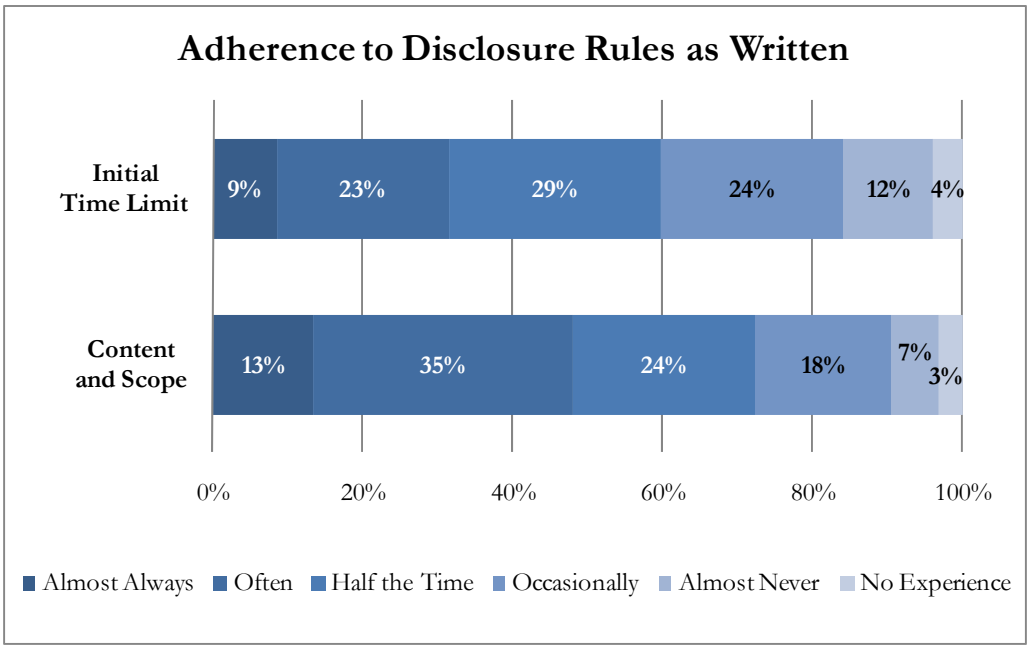
Considering *only* those who expressed a preference between the state and federal rules, the ARCP standard for the substance of mandatory disclosures received majority support from all respondent groups. Separated by party represented, more than 60% of all respondent groups prefer the ARCP. Separated by whether the respondent has pre-1992 experience or not, more than 70% of each group prefers the ARCP.

One respondent who also practices in New Mexico (where such disclosure is lacking outside of the domestic relations context),[25] contrasted the two systems and stated that New Mexico defendants consider early negotiations a sign of weakness. "It appears that they perceive a willingness to assess the facts facing all parties honestly (pseudo disclosure), to come to a mutually acceptable resolution, indicates that I know something devastatingly damaging about my case and don't want to enter discovery."

Respondents were asked the extent to which, in their experience, Arizona litigants adhere to the rules on the timing and substance of disclosures. As seen in Figure 15, parties diverge from the rules regarding the timing of initial disclosures more frequently than the rules on the substance of disclosures. Regarding the time limit, a majority of respondents indicated that the parties follow the rule at least half the time, with about one-third indicating adherence to the rule "often" or "almost always." Significantly, however, more than one in three respondents indicated infrequent adherence to the time limit. Regarding the content and scope of disclosures, nearly three-quarters of respondents indicated that parties follow the rule at least half of the time, with a plurality (48%) indicating adherence to the rule "often" or "almost always." Nevertheless, one in four respondents indicated infrequent adherence on the substance of disclosures.

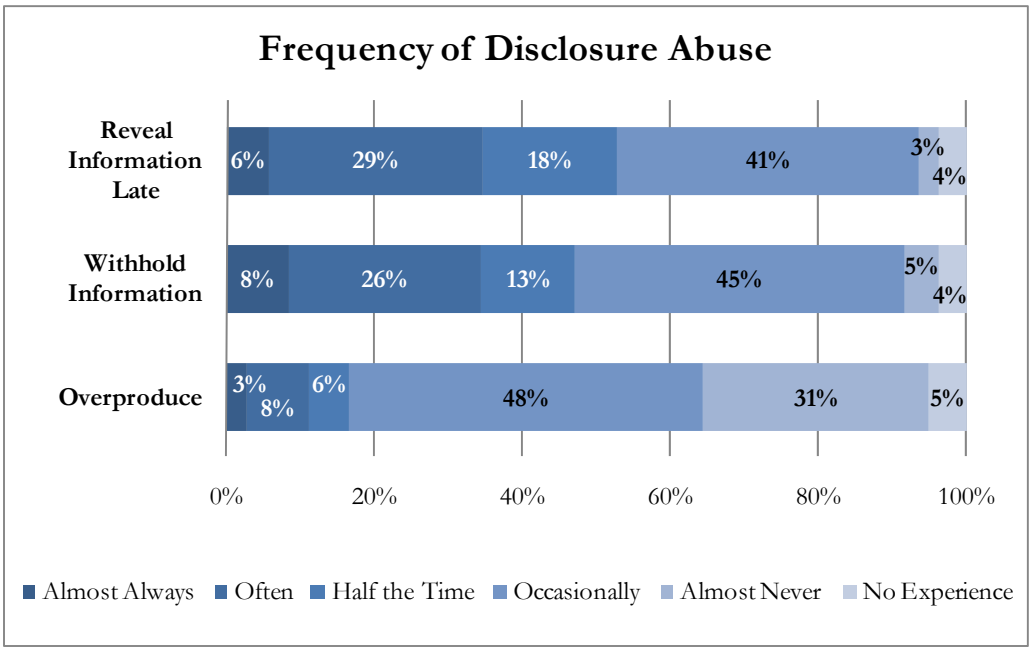
[25] *See* N.M. R. CIV. P. FOR DIST. CT. 1-123.

Figure 15 (Survey Questions 18a, 18b)
n = 708; 709



Respondents were also asked about the frequency of certain types of disclosure "abuse." The responses are shown in Figure 16. The most commonly reported type of abuse was "revealing information late," as over 50% of respondents reported that abusive late disclosures occur at least half of the time, with over one in three reporting this behavior "often" or "almost always." The second most commonly reported type of abuse was "withholding information," as over 45% of respondents reported that information is abusively withheld at least half of the time, with approximately one in three reporting this behavior "often" or "almost always." Abusive "overproduction" seems to be less common, as nearly 80% of respondents reported that it only "occasionally" or "almost never" occurs.

Figure 16 (Survey Questions 21a, 21b, 21c)
n = 692; 690; 690



Of those who expressed an opinion on the frequency of disclosure abuse, the most popular response was "occasionally," regardless of the party represented. Figures 17, 18, and 19 compare the respondent groups for the three types of disclosure abuse.

Figure 17 (Survey Question 21c)
n = 124; 141; 134; 124; 129

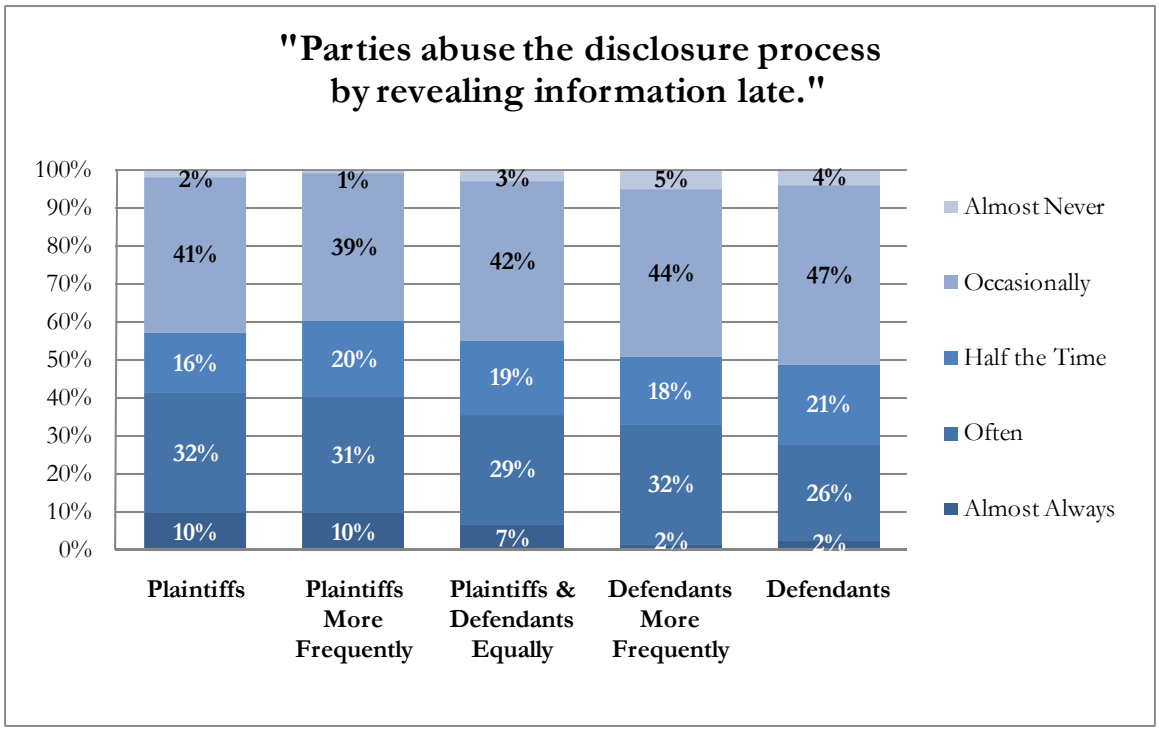


Figure 18 (Survey Question 21b)
n = 124; 143; 133; 125; 128

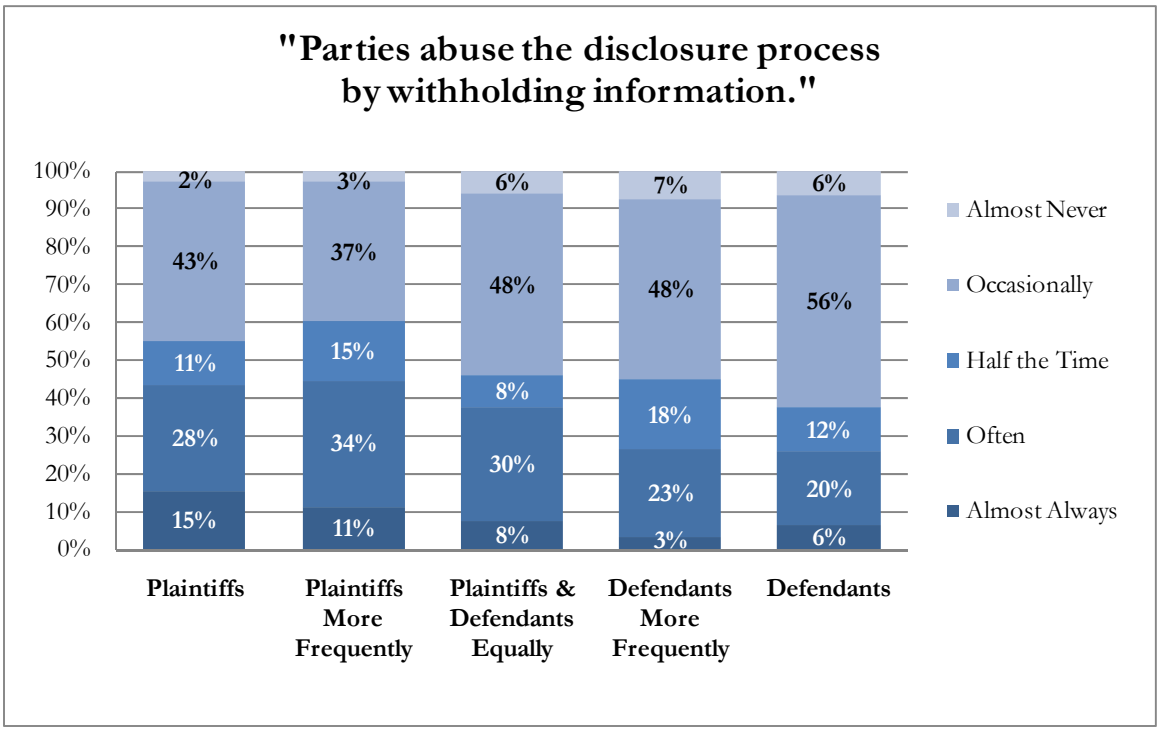
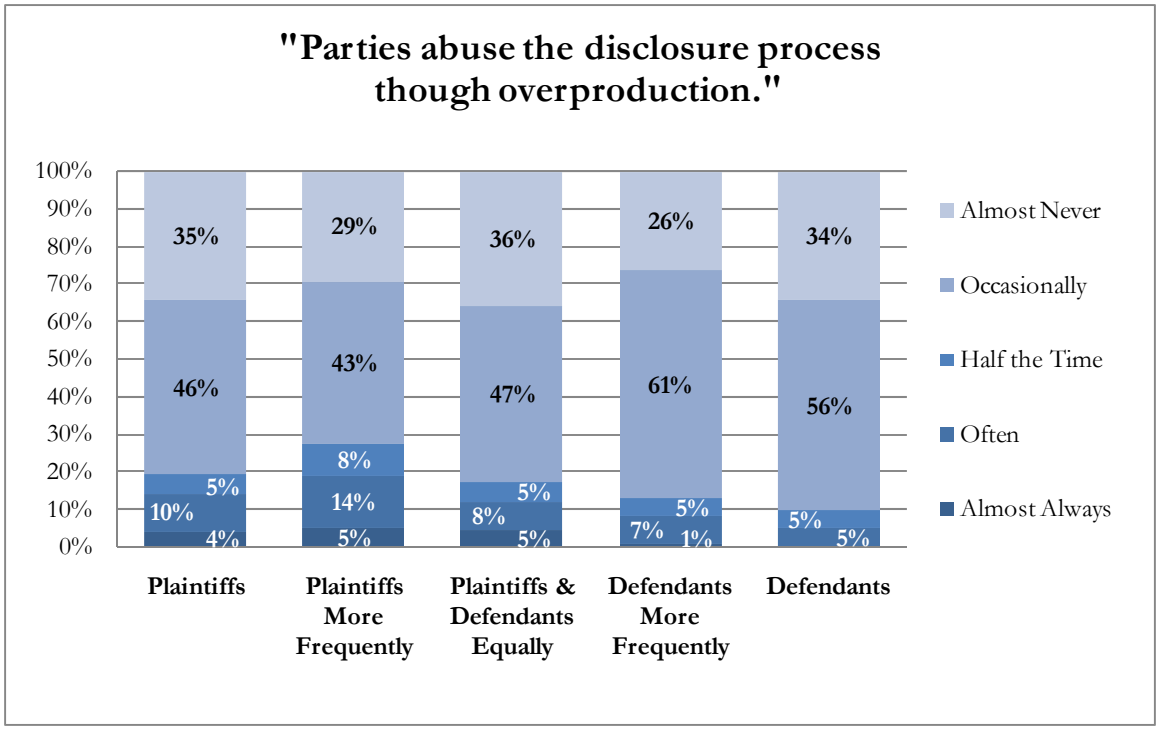
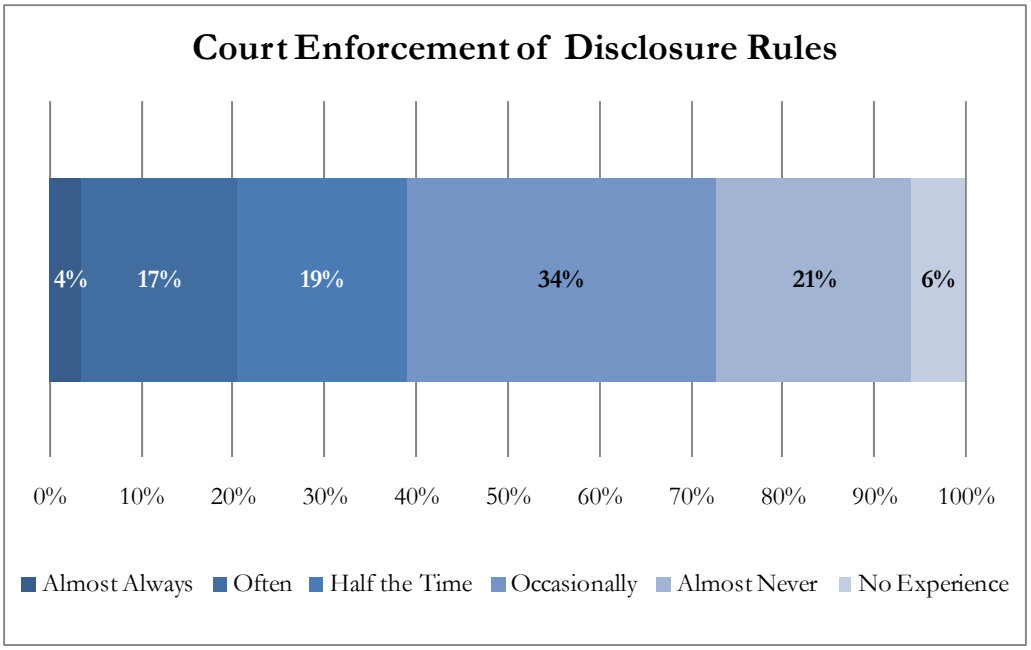


Figure 19 (Survey Question 21a)
n = 119; 143; 134; 125; 125



According to Arizona practitioners, courts do not routinely enforce disclosure rules. Almost three-quarters of respondents indicated that courts enforce disclosure requirements only half the time or less. Figure 20 shows the distribution of responses.

Figure 20 (Survey Question 21d)
n = 691



It appears that Arizona practitioners would welcome more strict enforcement of the most common offense – revealing information late. Fully 80% of respondents agreed that parties "should be prevented from introducing supporting evidence that was not timely disclosed," and nearly 40% expressed strong agreement with the statement.

The written comments also show a desire for stronger judicial enforcement of the disclosure rules. As one respondent wrote:

> I wouldn't change any rule; I would enforce [Rule 26.1] to require parties that have information or experts to disclose them within 60 days of receiving the information and that failing to do so . . . would result in exclusion. I would get rid of the "hold everything until the last day" philosophy.

Another respondent stated: "Trial judges are too lenient with parties who wrongfully withhold damning information. I have never had the experience where the judge would exclude certain evidence for failure to timely disclose."

3. PRESUMPTIVE LIMITS

Overall, the Arizona Bar has a favorable opinion of the ARCP's presumptive limits on expert witnesses and discovery. This section includes discussion of: the limit on the number of expert witnesses; the limits on deposition discovery (who may be deposed and the time limits for doing so); the limit on interrogatories; the limit on requests for production; and the limit on requests

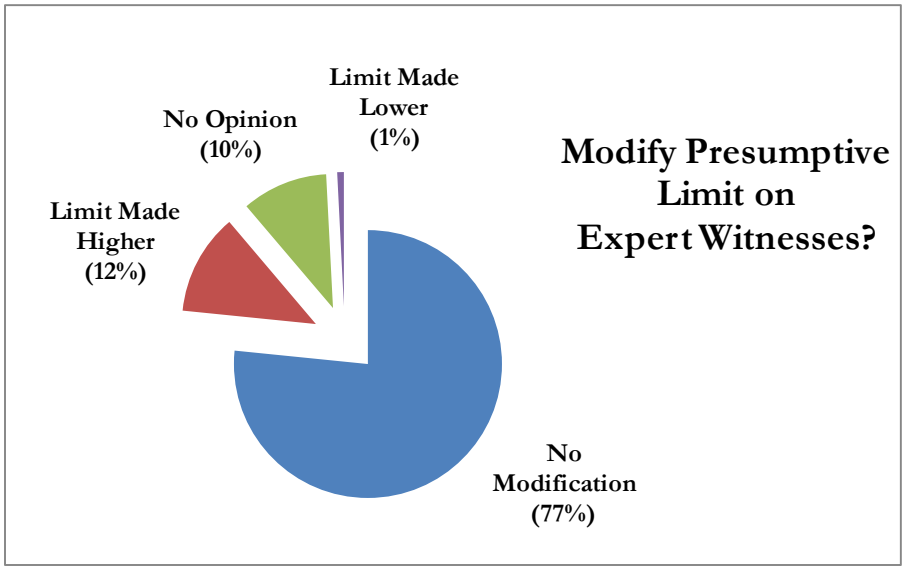
for admission. This section also discusses the collective effects of the presumptive discovery limits, as well as the extent to which the limits are followed.

a. The Limit on the Number of Expert Witnesses

Under ARCP 26(b)(4)(D), each side is entitled to only one independent expert witness per issue. Multiple parties on the same side must agree on the expert, or the court will designate the witness. Additional experts require a court order.

As demonstrated in Figure 21, over 75% of respondents would maintain the presumptive limit, while fewer than 15% of respondents would raise the limit to allow for more expert witnesses.

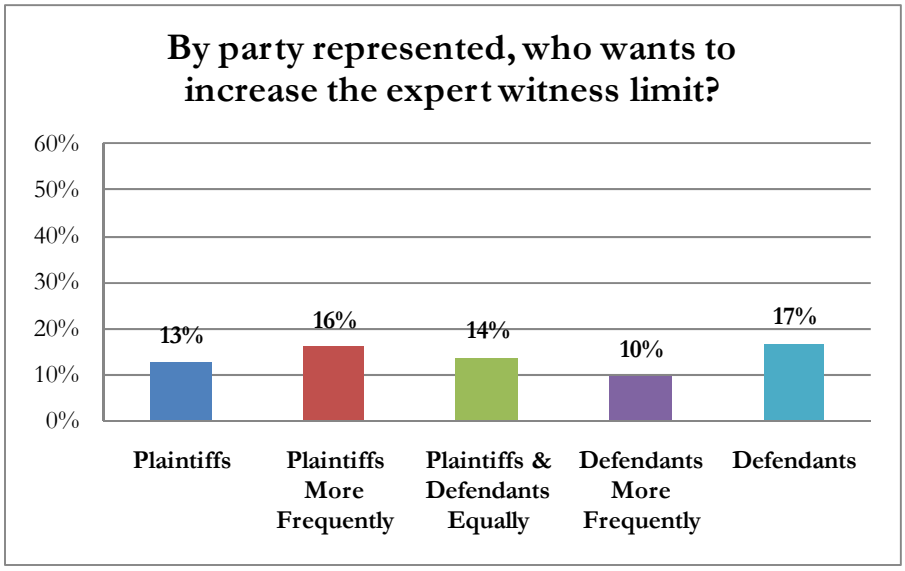
Figure 21 (Survey Question 24a)
n = 663



Considering *only* those who expressed an opinion on the issue, a majority of all respondent groups would like to see no modification to the expert witness limit. Whether divided by party represented or by experience, over 80% of all groups believe the current limit should be maintained.

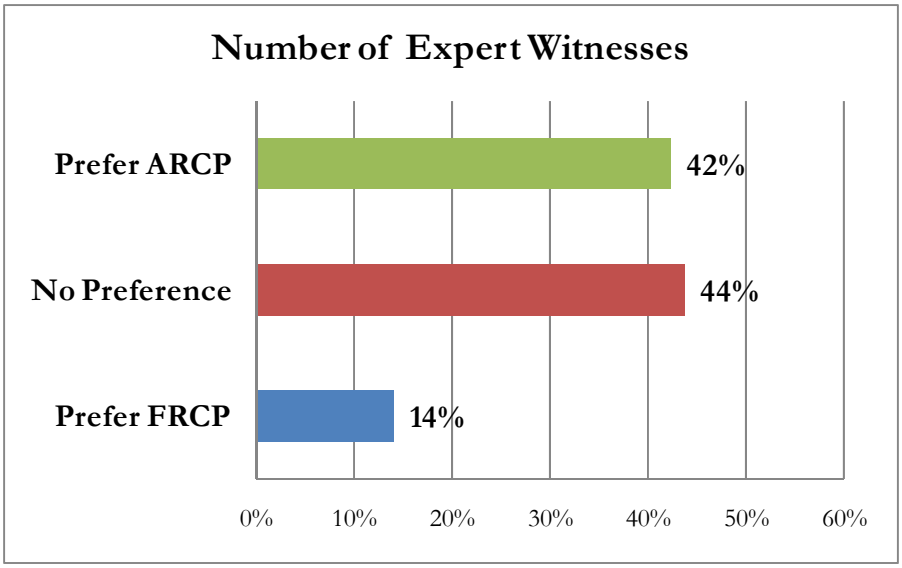
One interesting question is whether respondents who primarily represent plaintiffs or defendants would like to raise the limit more than those who represent the other party. Considering *all* respondents who indicated a party most frequently represented, the desire to raise the limit does not differ across parties, as seen in Figure 22.

Figure 22 (Survey Questions 5, 24a)
n = 155; 151; 155; 140; 143



By a three-to-one ratio, respondents with federal experience prefer the ARCP over the FRCP on the number of expert witnesses. In fact, over 85% either prefer the state rule or have no preference. See Figure 23.

Figure 23 (Survey Question 25c)
n = 494



Considering *only* those who expressed a preference between the state and federal rules, the ARCP standard on the number of experts received majority support from all respondent groups. Separated by party represented, over 60% of all groups prefer the ARCP. Separated by whether the respondent has pre-1992 experience or not, over 70% of each group prefers the ARCP.

One respondent commented: "The 'one expert rule' is generally a reasonable limitation, but there has to be some ability to define an 'issue' in a way that makes this more flexible in some types of complex litigation cases."

b. The Limits on the Extent of Deposition Discovery

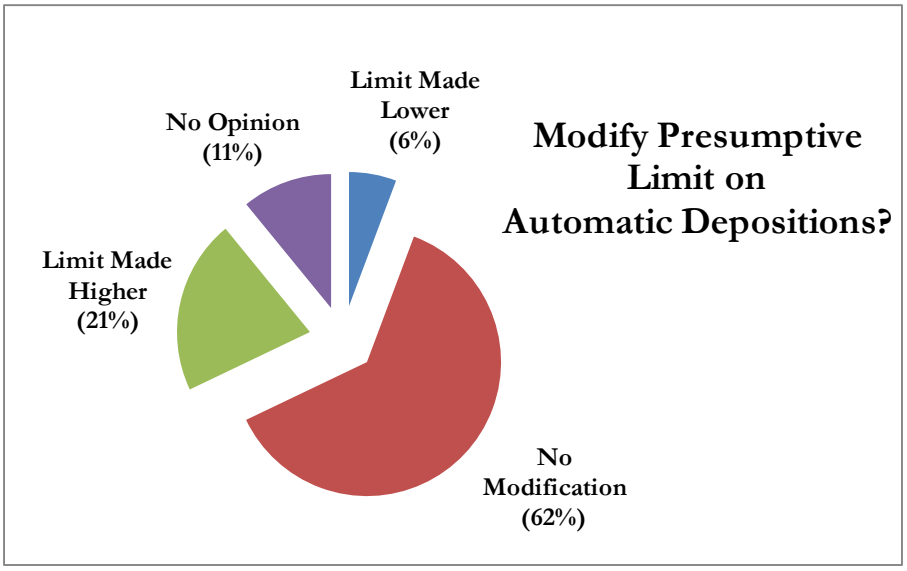
Arizona practitioners strongly support the ARCP's limits on deposition discovery, including who may be deposed and the time limit for doing so.

i. *Deposing Only Certain Individuals*

Under ARCP 30(a), only parties, expert witnesses, and document custodians may be deposed automatically. The deposition of other individuals requires either a stipulation or a court order.

As demonstrated in Figure 24, over two-thirds of respondents would either maintain or lower the presumptive limit, while only one in five respondents would raise the limit to allow for more automatic depositions.

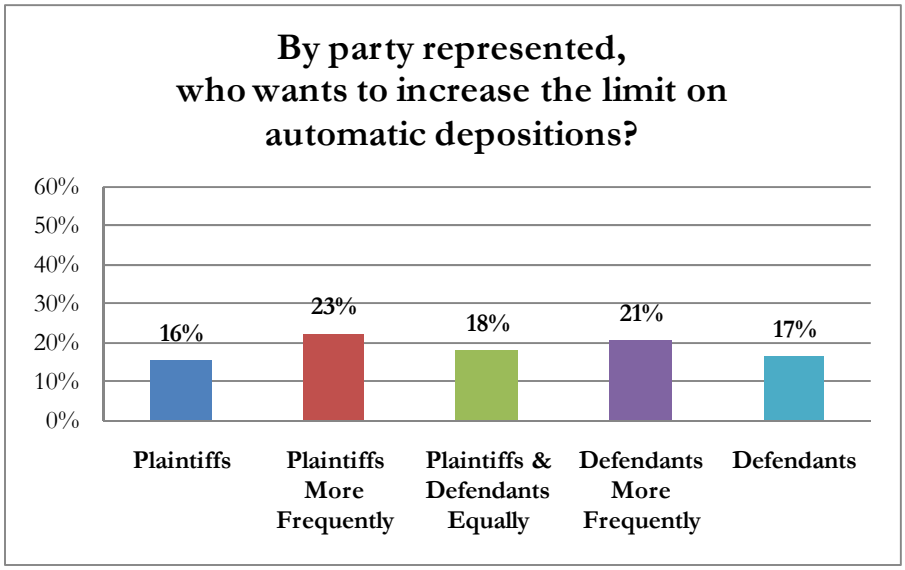
Figure 24 (Survey Question 24b)
n = 661



Considering *only* those who expressed an opinion on the issue, a majority of all respondent groups would like to see no modification to the presumptive limits on automatic depositions. Separated by party represented, over 60% of all groups believe the current limit should be maintained. Separated by whether the respondent has pre-1992 experience or not, over 65% of each group believes the current limit should be maintained.

Considering *all* respondents who indicated a party most frequently represented, the extent of the desire to raise the limit does not correspond with the party represented, as seen in Figure 25.

Figure 25 (Survey Questions 5, 24b)
n = 155; 151; 155; 151; 140

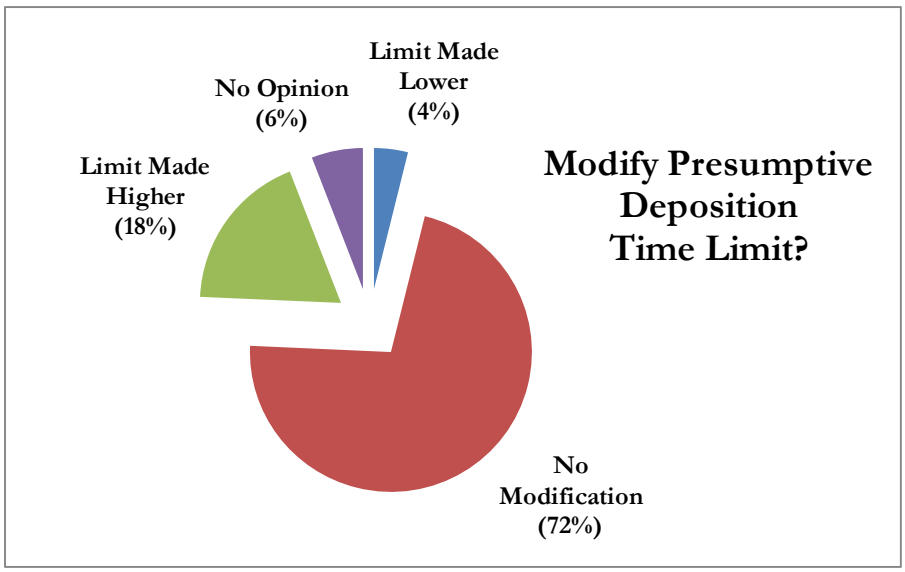


ii. *Deposition Time Limit*

Under ARCP 30(d), depositions must be reasonable in length and shall not exceed four hours. Longer depositions require either a stipulation or a court order.

As demonstrated in Figure 26, over three-quarters of respondents would either maintain or lower the presumptive time limit, while fewer than one in five respondents would raise the limit to allow for longer depositions.

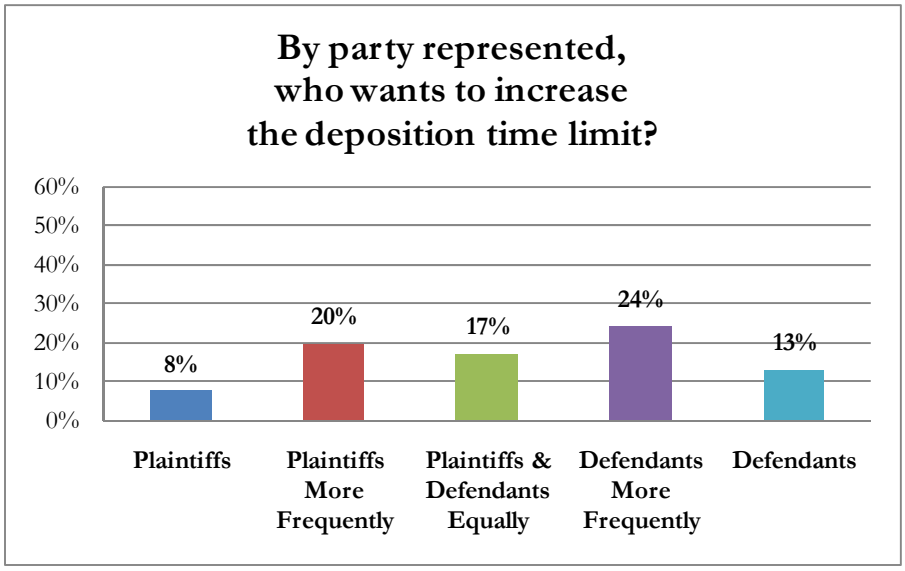
Figure 26 (Survey Question 24c)
n = 662



Considering *only* those who expressed an opinion on the issue, a majority of all respondent groups would like to see no modification to the deposition time limit. Separated by party represented, over 60% of all groups believe the current limit should be maintained. Separated by whether the respondent has pre-1992 experience or not, at least 75% of each group believes the current limit should be maintained.

Considering *all* respondents who indicated a party most frequently represented, the desire to raise the limit does not necessarily differ across parties, as seen in Figure 27.

Figure 27 (Survey Questions 5, 24c)
n = 155; 151; 155; 140; 143

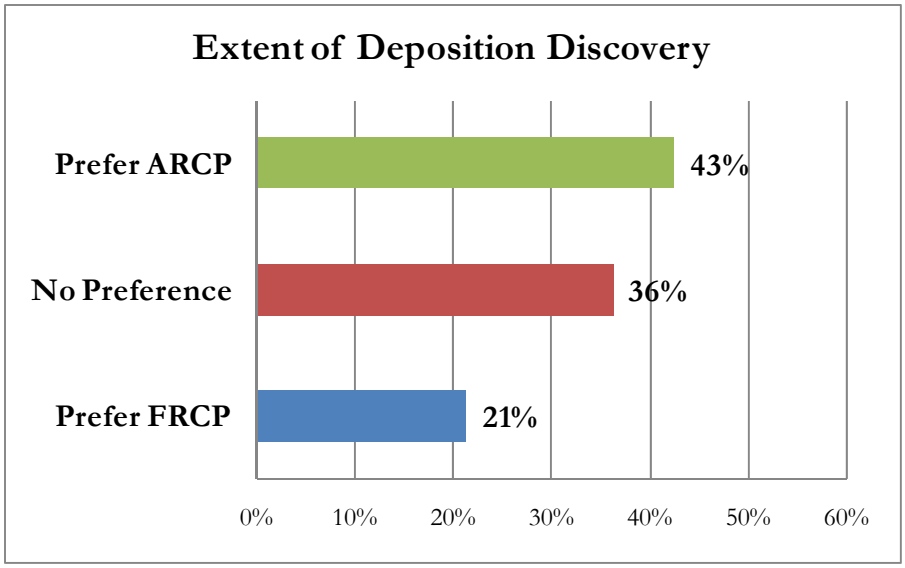


One respondent commented: "I believe that any deposition worth taking can be finished in four hours, and I am grateful for that rule because it has saved my clients considerable expense over the years since it was adopted."

iii. *Deposition Discovery Generally*

By a two-to-one ratio, respondents with federal experience prefer the ARCP over the FRCP on the extent of deposition discovery. In fact, close to 80% either prefer the state rules or have no preference. See Figure 28.

Figure 28 (Survey Question 25d)
n = 492



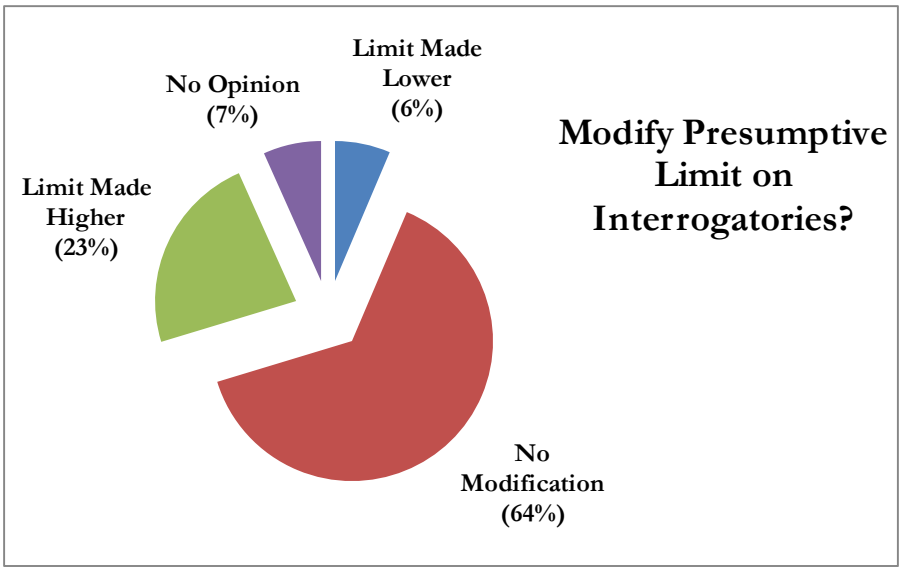
Considering *only* those who expressed a preference between the state and federal rules, the ARCP standards for deposition discovery received majority support from all respondent groups. Separated by party represented, over 55% of all groups prefer the ARCP. Separated by whether the respondent has pre-1992 experience or not, at least 60% of each group prefers the ARCP.

c. The Limit on Interrogatories

Under ARCP 33.1(a), a party shall not serve more than 40 interrogatories (uniform or non-uniform) upon any other party. Additional interrogatories require either a stipulation or a court order.

As demonstrated in Figure 29, 70% of respondents would either maintain or lower the presumptive limit, while fewer than one in four respondents would raise the limit to allow for more interrogatories.

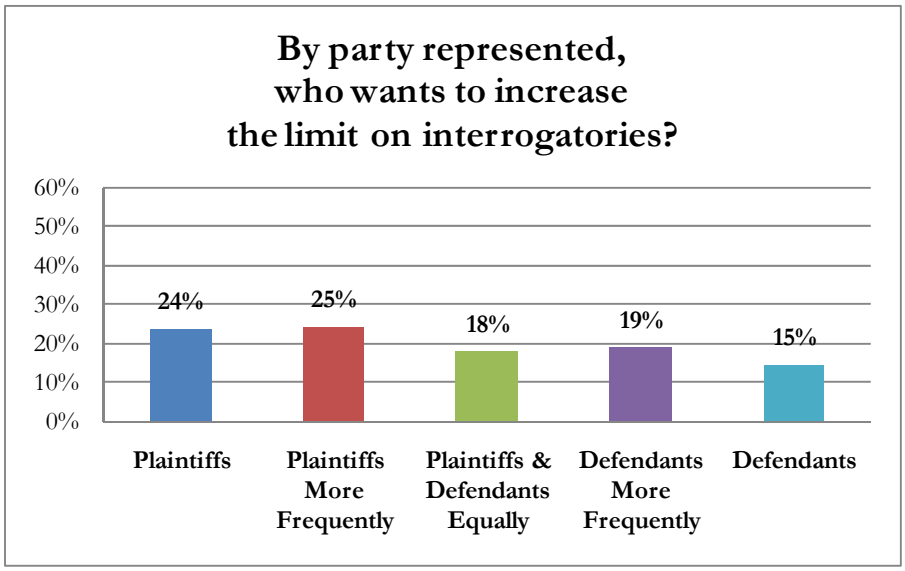
Figure 29 (Survey Question 24d)
n = 661



Considering *only* those who expressed an opinion on the issue, a majority of all respondent groups would like to see no modification of the interrogatory limit. Whether divided by party represented or by experience, over 65% of all groups believe the current limit should be maintained.

Considering *all* respondents who indicated a party most frequently represented, the desire to raise the limit tends to be slightly higher for those who primarily represent plaintiffs, as seen in Figure 30.

Figure 30 (Survey Questions 5, 24d)
n = 155; 151; 155; 140; 143



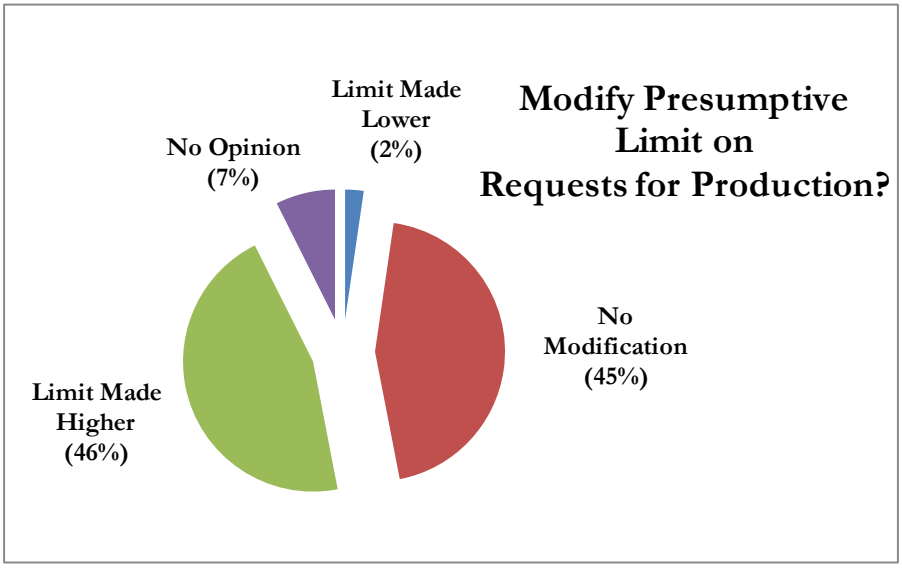
One respondent suggested that answers to all uniform interrogatories (as well as initial disclosures) be produced simultaneously with the pleadings.

d. The Limit on Requests for Production

ARCP 34 limits requests for production to 10 distinct items or categories of items. Items include "documents, electronically stored information, and things and entry upon land for inspection and other purposes." Additional requests require a stipulation or a court order.

As demonstrated in Figure 31, a narrow plurality (47%) of respondents would either maintain or lower the presumptive limit. However, nearly that number (46%) would raise the limit to allow for more requests for production.

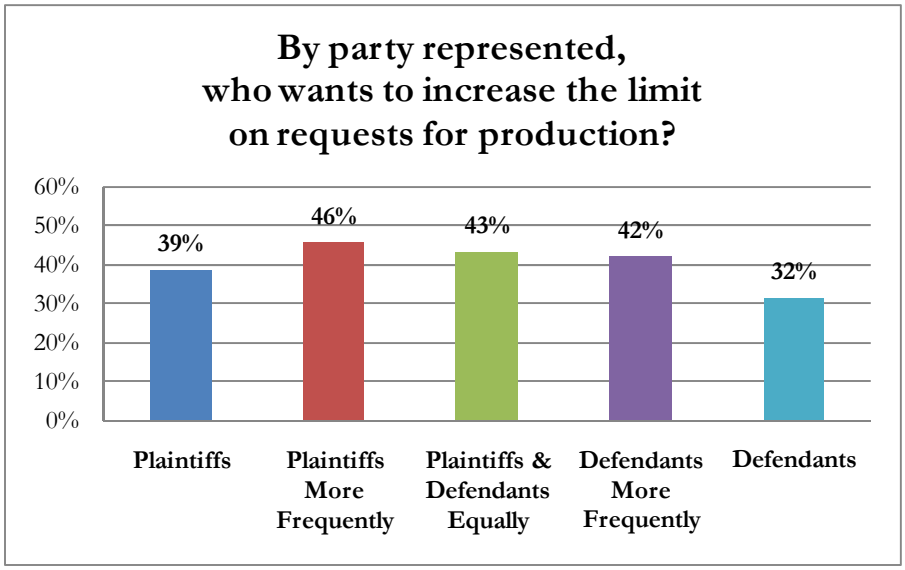
Figure 31 (Survey Question 24e)
n = 665



Considering *only* those who expressed an opinion on the issue, all respondent groups were split. Separated by party represented, all groups had a slightly higher percentage of respondents who believe that the limit should be raised, with the exception of those who represent defendants in all or nearly all cases. Separated by experience, those with pre-1992 experience were more likely to believe the current limit should be maintained (53% for no modification; 45% for raising the limit), while those without pre-1992 experience were more likely to believe that the limit should be raised (43% for no modification; 54% for raising the limit).

Considering *all* respondents who indicated a party most frequently represented, the desire to raise the limit does not necessarily differ across parties, as seen in Figure 32.

Figure 32 (Survey Questions 5, 24e)
n = 155; 151; 155; 140; 143

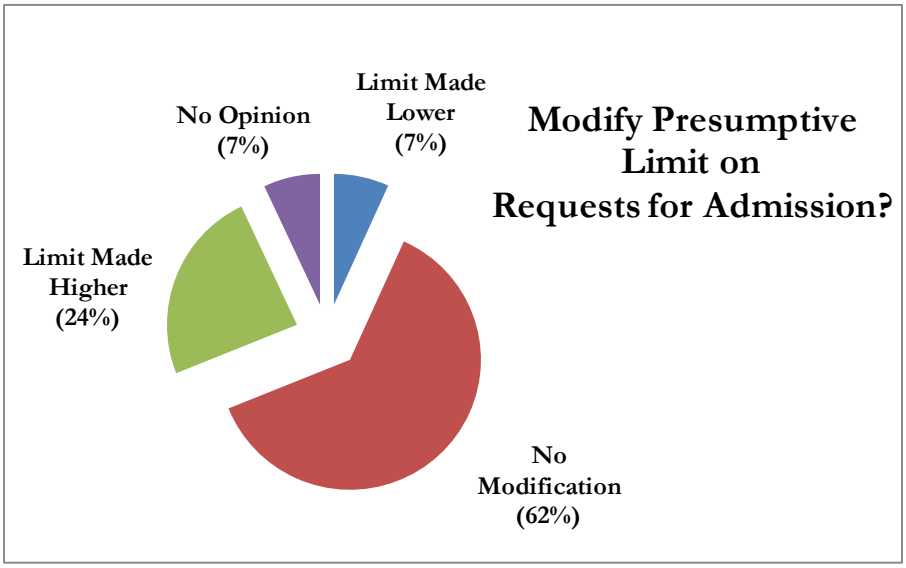


e. The Limit on Requests for Admission

Under ARCP 36(b), each party can issue up to 25 requests for admission per case. Additional requests require a stipulation or a court order.

As demonstrated in Figure 33, nearly 70% of respondents would either maintain or lower the presumptive limit, while fewer than one in four respondents would raise the limit to allow for more requests for admission.

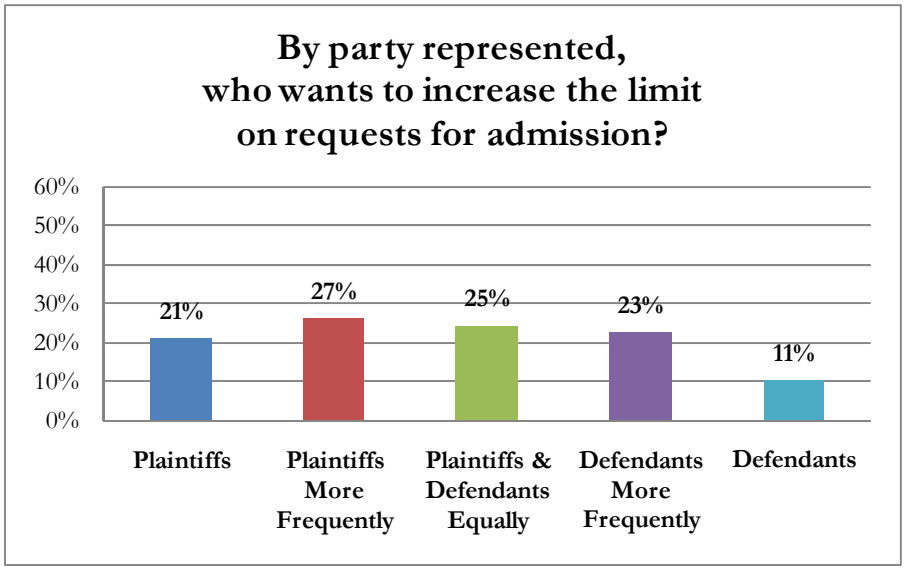
Figure 33 (Survey Question 24f)
n = 661



Considering *only* those who expressed an opinion on the issue, a majority of all respondent groups would like to see no modification of the limit on requests for admission. Whether divided by party represented or by experience, over 60% of each group believes the current limit should be maintained.

Considering *all* respondents who indicated a party most frequently represented, the desire to raise the limit is lower for those who represent defendants in all or nearly all cases, but otherwise does not differ much across parties, as seen in Figure 34.

Figure 34 (Survey Questions 5, 24f)
n = 155; 151; 155; 140; 143

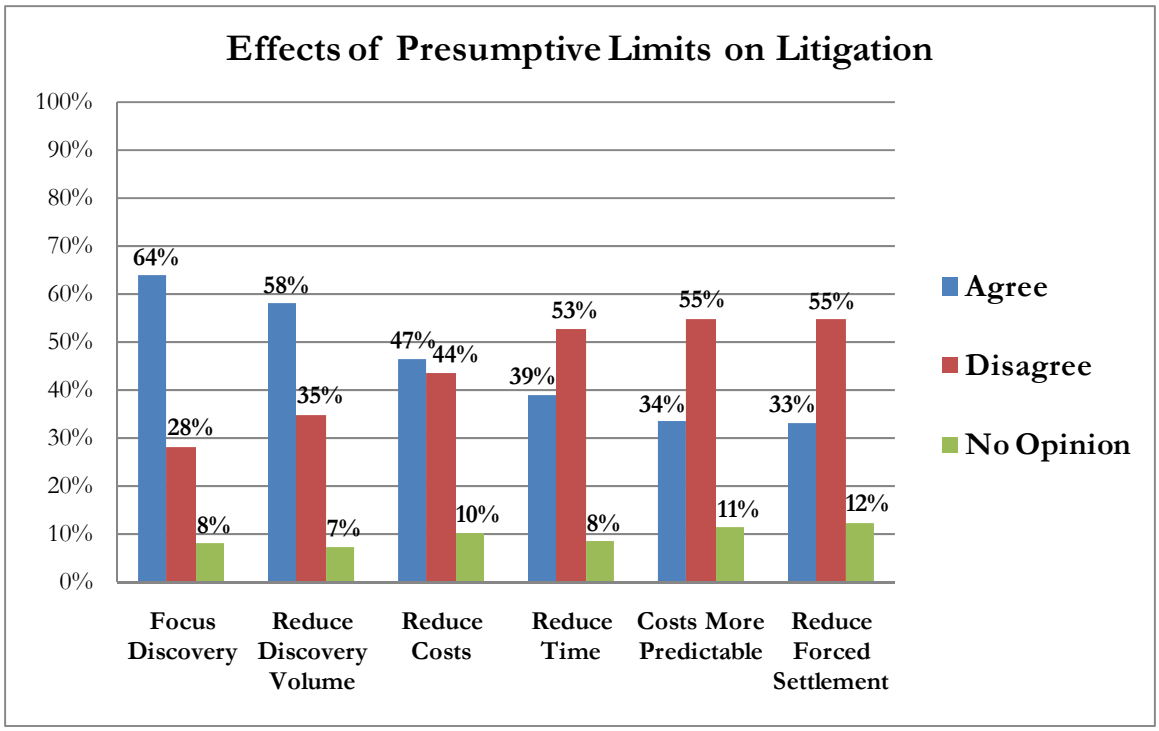


However, in the written comments, two respondents pointed out that requests for admission are designed to focus the issues and streamline the litigation process, so there is no "legitimate" need to limit them.

f. The Presumptive Discovery Limits as a Whole

Figure 35 shows what Arizona practitioners perceive to be the effects of the presumptive discovery limits, collectively, on litigation. There is a consensus that the limits require parties to "focus their discovery efforts to the disputed issues" (64% agreed; 28% disagreed) and reduce the total volume of discovery (58% agreed; 35% disagreed). In addition, a plurality of the Bar believes that the limits reduce the total cost of litigation (47% agreed; 44% disagreed). Overall, however, the Bar indicated that the presumptive limits do not reduce the total time required for litigation (39% agreed; 53% disagreed), do not make litigation costs "more predicable" (34% agreed; 55% disagreed), and do not "reduce the use of discovery as a tool to force settlement" (33% agreed; 55% disagreed).

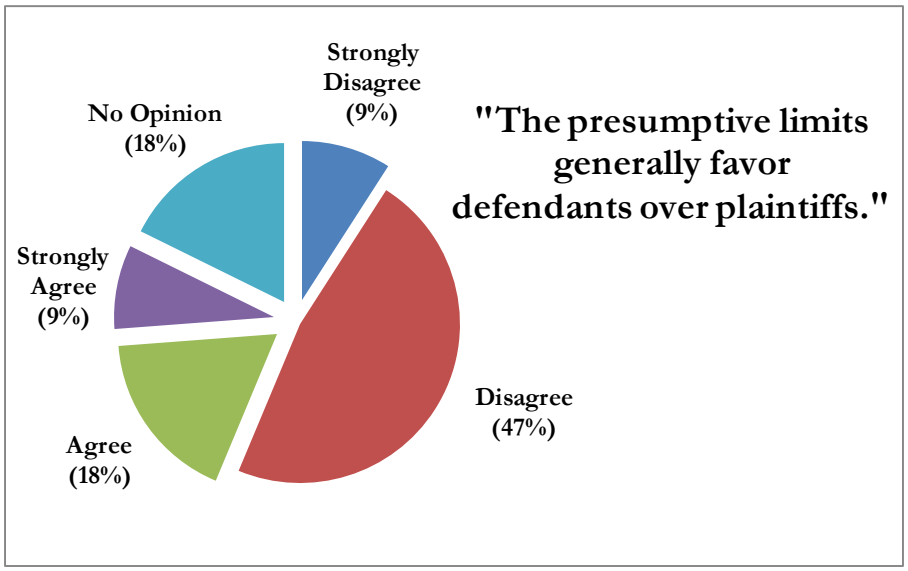
Figure 35 (Survey Questions 22a-22f)
n = 665; 665; 665; 665; 664; 661



Considering *only* those who expressed an opinion on the effects of the presumptive limits, all respondent groups tended to answer in the same way, regardless of party represented. The majority of all groups expressed agreement that the limits focus discovery and reduce the volume of discovery. Every group was split on the issue of whether the limits reduce litigation costs, but a notable majority of those who primarily represent plaintiffs agreed that the limits reduce costs. Between 55% and 60% of every group disagreed that the limits reduce litigation time, while between 40% and 45% of every group agreed. A majority of all groups also disagreed that the limits increase the predictability of costs, with approximately one in ten in each group expressing strong disagreement. On whether the limits reduce the use of discovery to force settlement, the most common choice of all respondent groups was "disagree," the second most common choice was "agree," and the third most common choice was "strongly disagree."

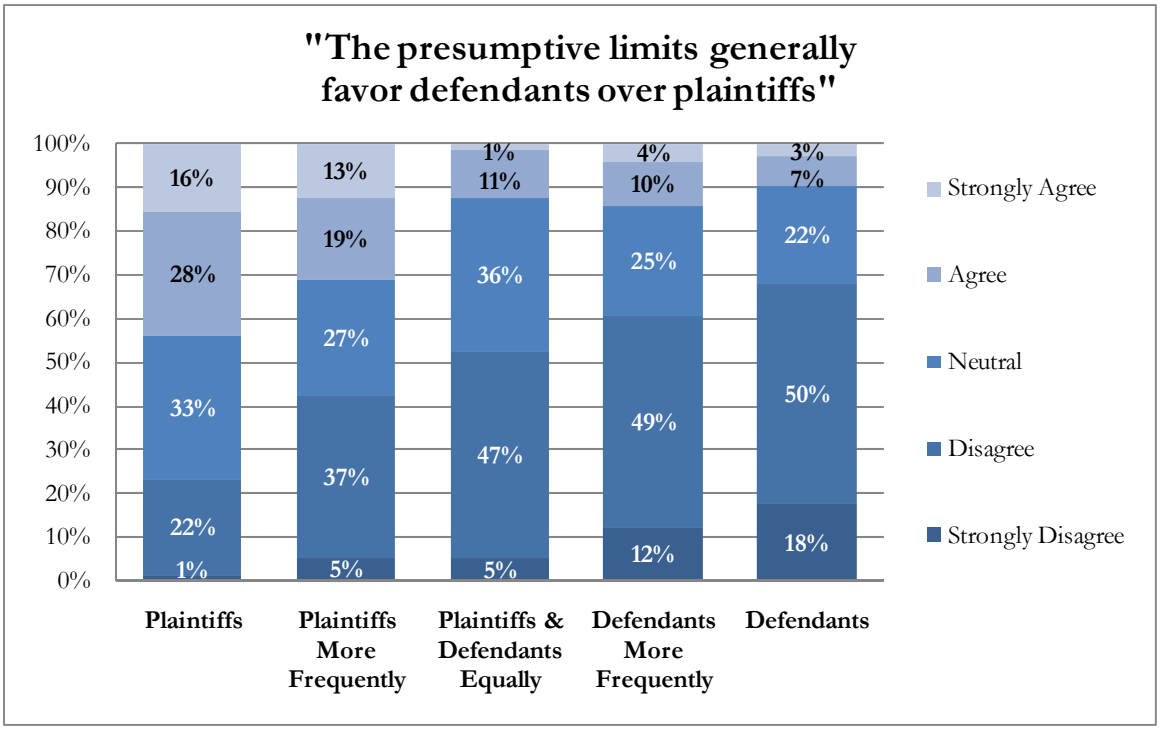
When faced with the statement that "presumptive limits favor defendants over plaintiffs," a majority (56%) of those who provided a response disagreed or strongly disagreed with the statement. See Figure 36.

Figure 36 (Survey Question 22g)
n = 657



Considering *all* respondents who indicated a party most frequently represented, Figure 37 shows the differences across parties. Although those who primarily represent plaintiffs were more likely to agree that the presumptive limits favor defendants, a majority of all groups disagreed or were neutral on the issue.[26]

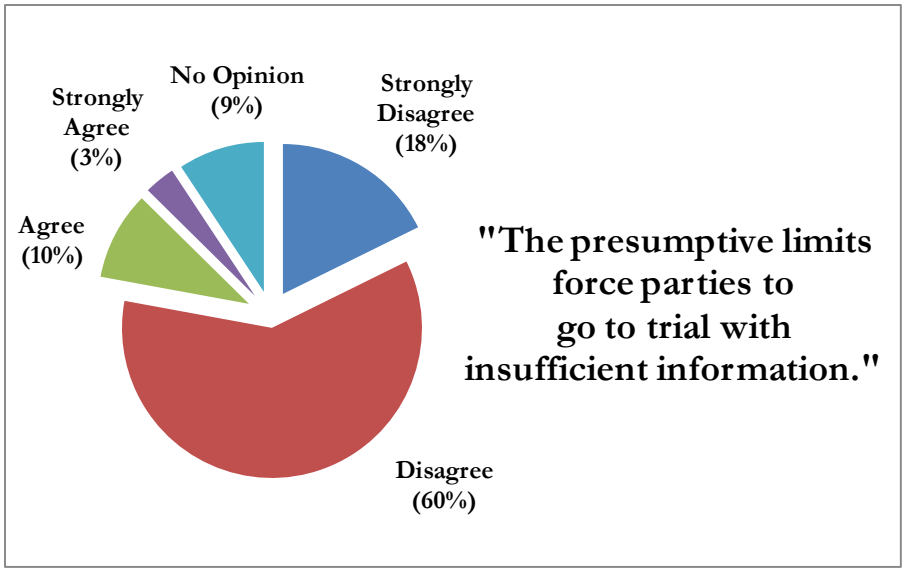
Figure 37 (Survey Questions 5, 22g)
n = 155; 151; 155; 140; 143



[26] In Figure 37, the "neutral" category includes both those who selected "no opinion" and those who declined to answer the question.

When faced with the statement that "presumptive limits force parties to go to trial with insufficient information," more than three out of four respondents (78%) expressed some level of disagreement with the statement. See Figure 38 for the distribution of answers.

Figure 38 (Survey Question 22h)
n = 665



Moreover, a majority of all respondent groups do not find that the presumptive limits result in insufficient information at trial. Whether divided by party represented or by experience, about 60% or more of all groups disagree that the presumptive limits result in insufficient information at trial.

g. Adherence to the Presumptive Limits

The survey asked the extent to which litigants actually adhere to the ARCP's presumptive limits on the amount of and time for discovery, in the experience of respondents. Whether divided by party represented or by experience, all respondent groups were quite consistent.

Figure 39 shows the frequency of adherence to the presumptive limits on the amount of discovery conducted. Litigants are most likely to follow the four-hour deposition rule, and least likely to follow the rule on the types of individuals that may be deposed. Approximately 70% of respondents reported frequent adherence to the deposition time limit, the limit on requests for admission, and the limit on interrogatories. In addition, nearly 65% of respondents reported frequent adherence to the number of expert witnesses. Given that respondents are split on whether to increase the limit on requests for production, it is not surprising that there is less frequent adherence to that rule. However, the level of divergence from the rule on which individuals may be automatically deposed is surprising, given that a strong majority believes the current rule is appropriate.

Figure 39 (Survey Questions 18c-18e, 18g, 18i, 18k)
n = 708; 701; 706; 705; 703; 708

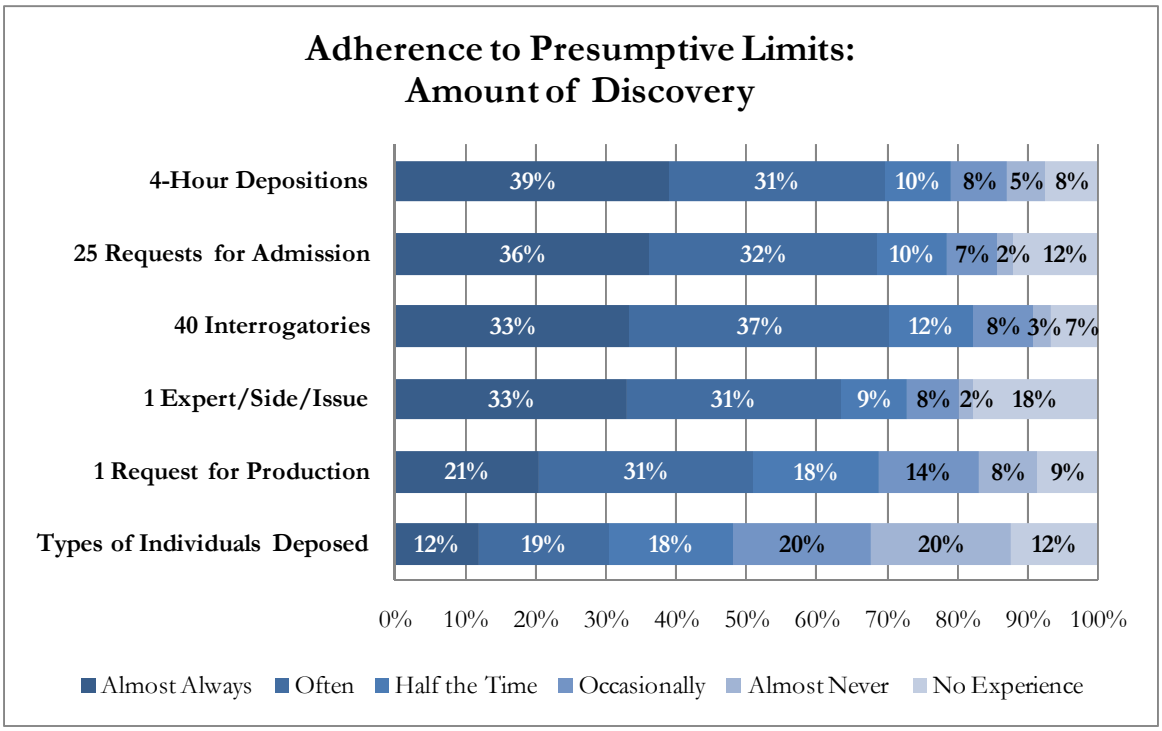
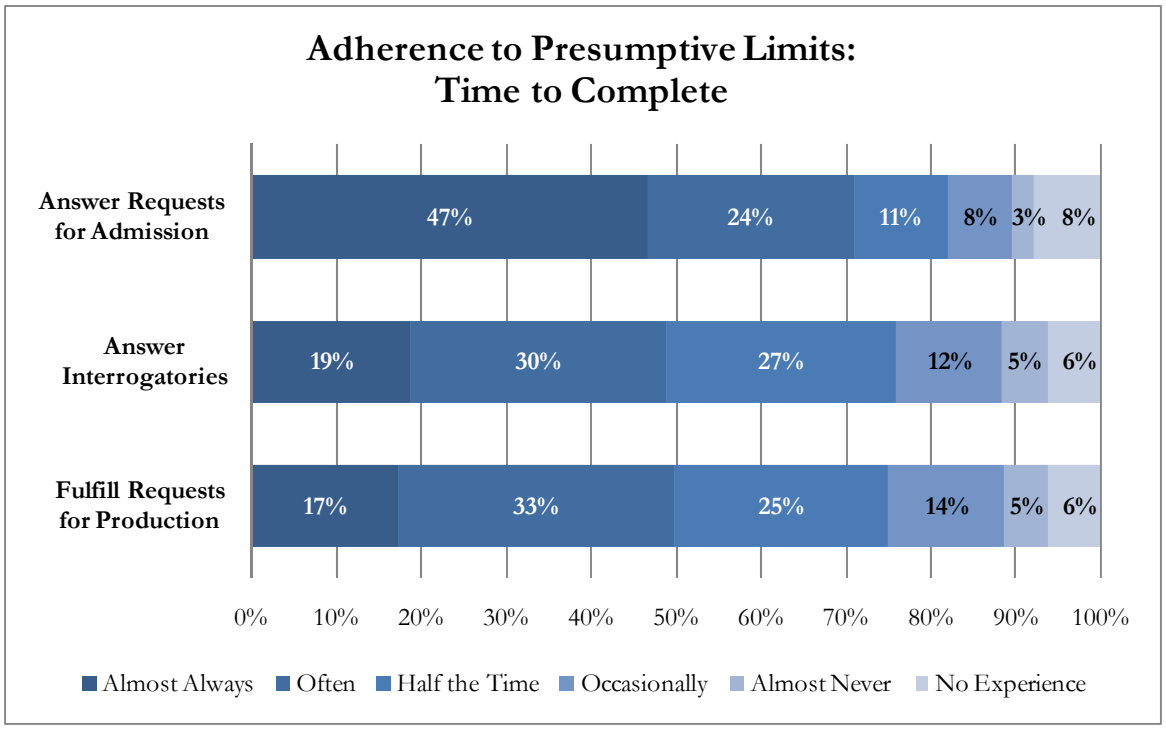


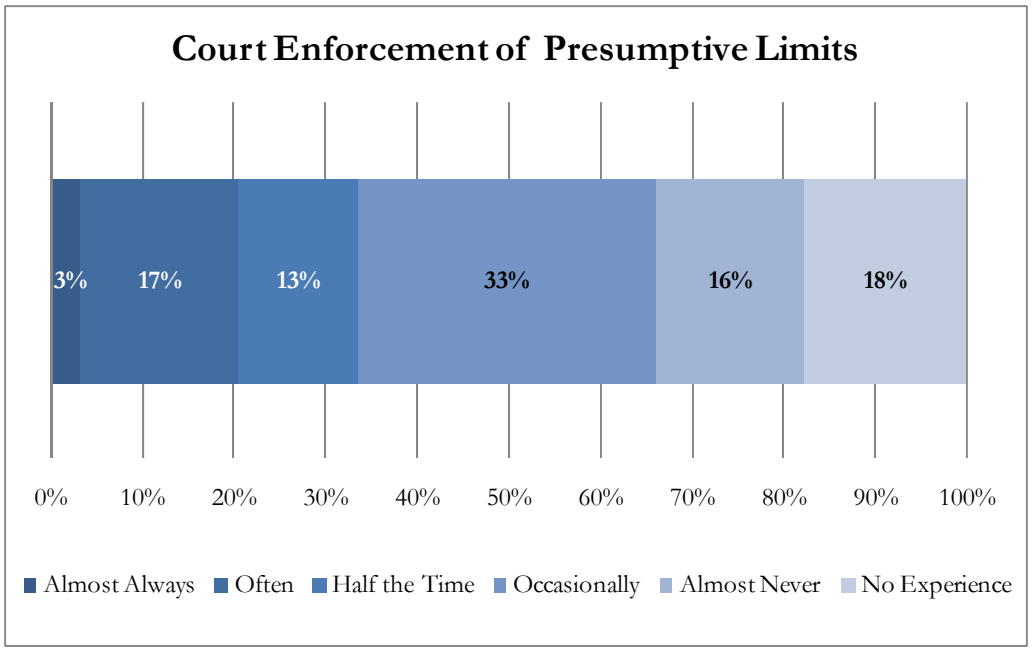
Figure 40 shows the frequency of adherence to the presumptive 40- and 60-day time limits for completing certain discovery. Litigants are most likely to follow the time for answering requests for admission under ARCP 36(a), as about 70% of respondents indicated that this occurs "almost always" or "often." Litigants are equally likely to follow the time for answering interrogatories and fulfilling requests for admission, as about 50% of respondents selected "almost always" or "often."

Figure 40 (Survey Questions 18f, 18h, 18j)
n = 703; 703; 705



Only one-third of respondents reported that the court enforces presumptive discovery limits half the time or more, while nearly half of respondents reported infrequent enforcement of the limits. Notably, approximately 18% selected "no experience." See Figure 41.

Figure 41 (Survey Question 23a):
n = 662



Arizona practitioners are evenly split on the issue of whether the courts should have more control over the discovery process. About the same portion of respondents were in favor of more court control (44.3%) as against it (44.6%). Further, separated by party represented, none of the respondent groups expressed strong sentiment either way.

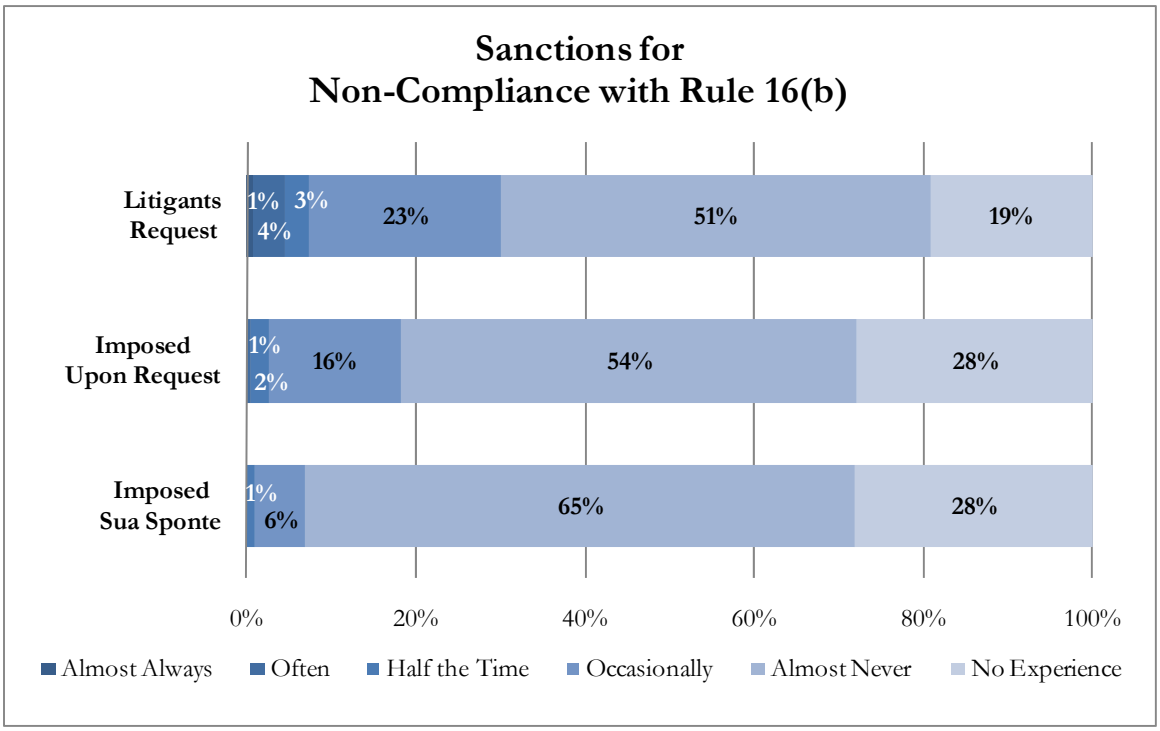
The presumptive limits do not appear to increase satellite litigation, as about 30% of respondents indicated that parties "almost never" litigate whether to depart from the limits and over 40% indicated that parties do so only "occasionally." An additional 17% indicated "no experience" with the issue.

C. THE ROLE OF SANCTIONS

ARCP 16(f) gives judges the power to sanction parties for non-compliance with Rule 16, including ordering the payment of "reasonable expenses incurred."[27] Non-compliance encompasses failure to prepare for or participate in the pretrial conference, as well as failure to obey a scheduling or pretrial order.

As shown in Figure 42, in the experience of a significant majority of respondents, sanctions for non-compliance with the letter and spirit of Rule 16(b) are only rarely requested or imposed. In fact, a majority indicated that they are "almost never" requested or imposed. Notably, between 19% and 28% of respondents have "no experience" with a failure to comply with Rule 16(b).

Figure 42 (Survey Questions 16b-16d)
n = 731; 730; 730

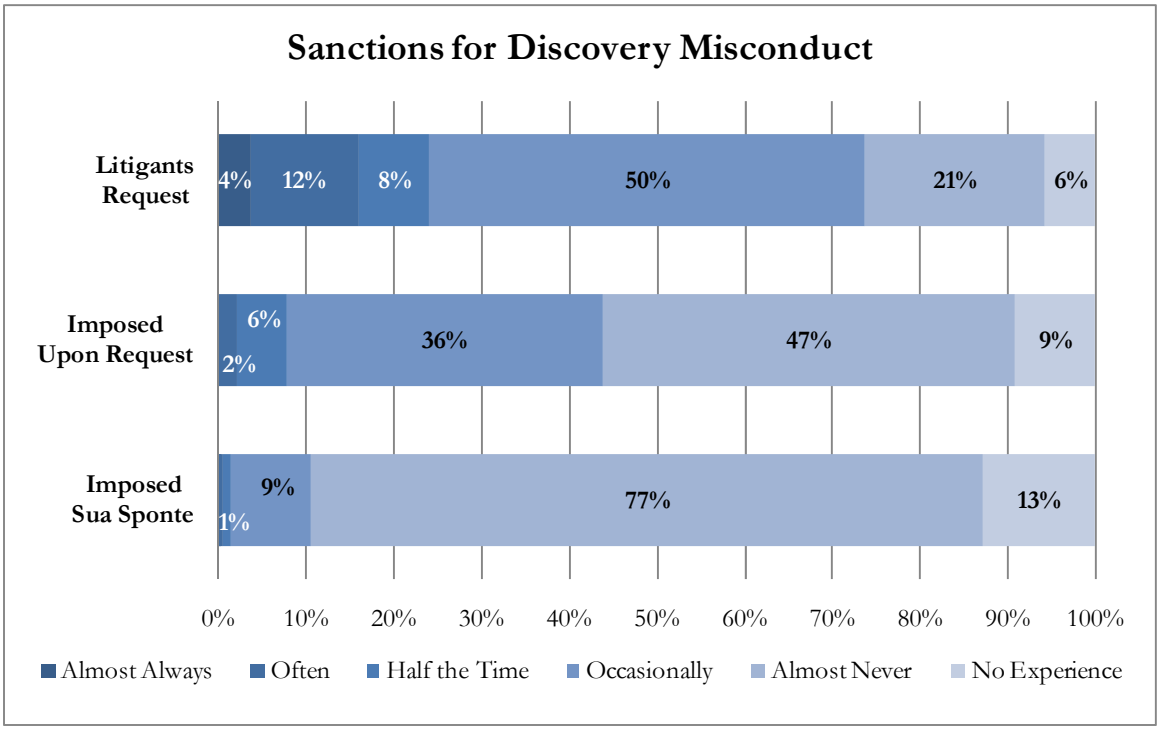


ARCP 37 specifically provides for sanctions for misconduct related to disclosure and discovery. As shown in Figure 43, sanctions are more often imposed for discovery misconduct than

[27] Such expenses include attorneys' fees and/or an assessment by the court clerk.

for pretrial conference misconduct, although it is still quite rare for the majority of respondents. In fact, at least 70% of respondents indicated that sanctions are "almost never" or only "occasionally" requested or imposed. One respondent commented: "[A]lmost never will a judge impose sanctions against a party for failing to comply with discovery rules and enforce the payment when the violation occurs." Notably, only between 6% and 13% of respondents have "no experience" with discovery misconduct.

Figure 43 (Survey Questions 19a-19c)
n = 696; 698; 696



According to over 60% of respondents, the sanctions rules "almost never" (30%) or only "occasionally" (31%) deter discovery misconduct. Only about 20% of respondents reported that the rules consistently deter misconduct.

Many respondents expressed a desire for the imposition of sanctions with greater consistency and frequency. For example:

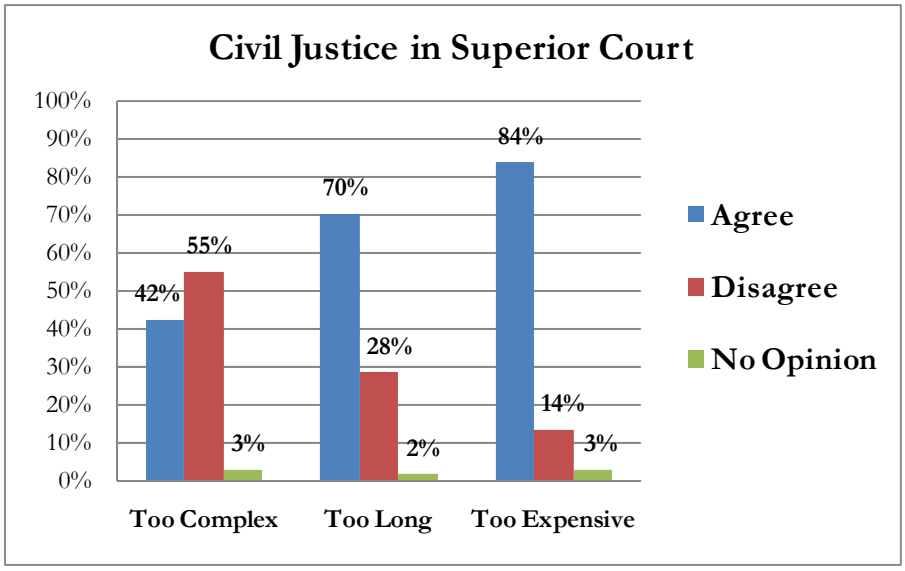
- "Make sanctions for non-compliance tougher and apply them more often."
- "Why have sanctions when judges never enforce them?"
- "Courts are too reluctant to sanction, in a meaningful way, the nonsense that sometimes occurs when people violate the rules for no good reason or unduly complicate the case and play lawyer games."
- "[O]bstructionist attorneys and judges' unwillingness to impose meaningful sanctions on them for discovery, particularly deposition, abuses were the most frustrating part of litigation."

D. Sources and Causes of Discontent With the System

The survey asked the extent to which "common complaints" about the American civil justice system apply to litigation in Superior Court.

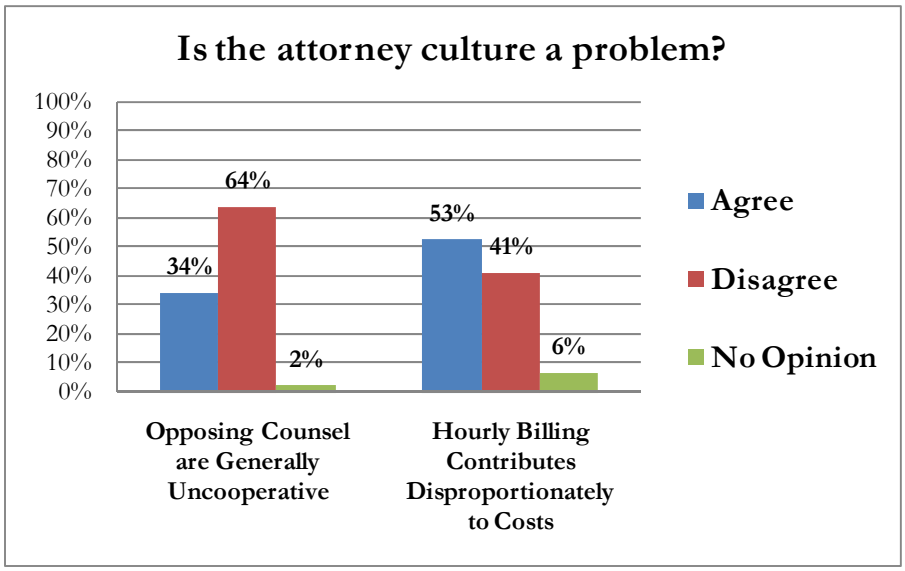
A majority (55%) of respondents disagreed that the Superior Court civil justice system is "too complex," though a significant portion (42%) agreed with the statement. Moreover, a strong majority (70%) agreed that the system takes "too long," with over one-quarter (28%) expressing strong agreement. In addition, Arizona practitioners overwhelmingly (84%) responded that the Superior Court system is "too expensive," with a plurality (44%) expressing strong agreement. Figure 44 shows the distribution of Arizona responses for these three issues.

Figure 44 (Survey Questions 9a-9c)
n = 756; 755; 756



On the extent to which the attorney culture contributes to problems, Arizona practitioners do not generally find lack of cooperation by opposing counsel to be an issue. Almost two-thirds of respondents disagreed that "opposing counsel are generally uncooperative." However, the practice of hourly billing was identified as a problem. A majority of respondents agreed that "the system of hourly billing for attorneys contributes disproportionately to litigation costs," with nearly one-quarter (24%) expressing strong agreement. Figure 45 shows the distribution of Arizona responses.

Figure 45 (Survey Questions 9d, 9f)
n = 755; 754



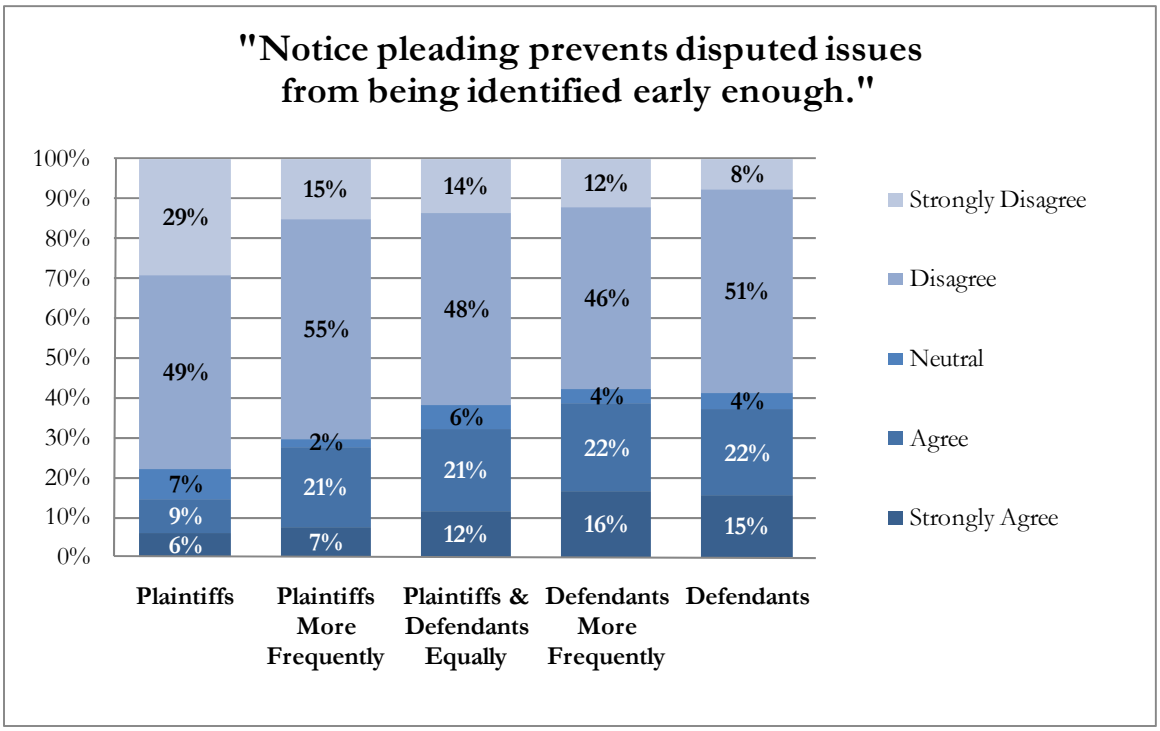
The written comments reflect significant concerns about the legal culture and contain a call for increased civility and reduced gamesmanship. There was a sentiment expressed by those who commented that attorneys "know they can get away with practically anything, and some do." One respondent stated: "Litigation is difficult enough and I would appreciate dealing with more professional attorneys."

With respect to access, a slim majority (52%) of Arizona attorneys in private practice reported belonging to a firm that will not refuse a case based on the amount in controversy. However, one-third (33%) stated that, as a general matter, their firm will not file or defend a case unless the amount in controversy exceeds a certain dollar amount. The dollar limits ranged from $250 to $20 million, with a median of $25,000 and a mean of $296,640.

While most do not view notice pleading as preventing the early identification of issues, nearly one-third agreed that "notice pleading prevents disputed issues from being identified early enough" (30% agreed; 66% disagreed). Considering *all* respondents who indicated a party most frequently represented, Figure 46 shows the differences across parties. "Disagree" was the most common answer, regardless of the party represented. However, those who represent plaintiffs in almost all cases were more likely to "strongly disagree."[28]

[28] In Figure 46, the "neutral" category includes both those who selected "no opinion" and those who declined to answer the question.

Figure 46 (Survey Question 9e)
n = 155; 151; 155; 140; 143



In the written comments, two respondents expressed support for notice pleading, while two respondents called for pleading the specific factual and legal basis of claims and damages calculations. There were also comments on the relationship between the pleading standard and disclosures, as related to the need to narrow the issues. One respondent suggested that the system of notice pleading followed by disclosures is not effective because disclosures are required to occur "too early to assess legal theories and factual claims, and it becomes a cat and mouse game." Another respondent suggested: "If you continue notice pleadings, consider making Plaintiff's first Rule 26.1 disclosure due *prior* to the Answer…it will force some focus and allow an answer to be meaningful rather than a form denial or vague allegations."

E. THE ROLE OF COMPULSORY ARBITRATION: MOVING CASES OUT OF LITIGATION

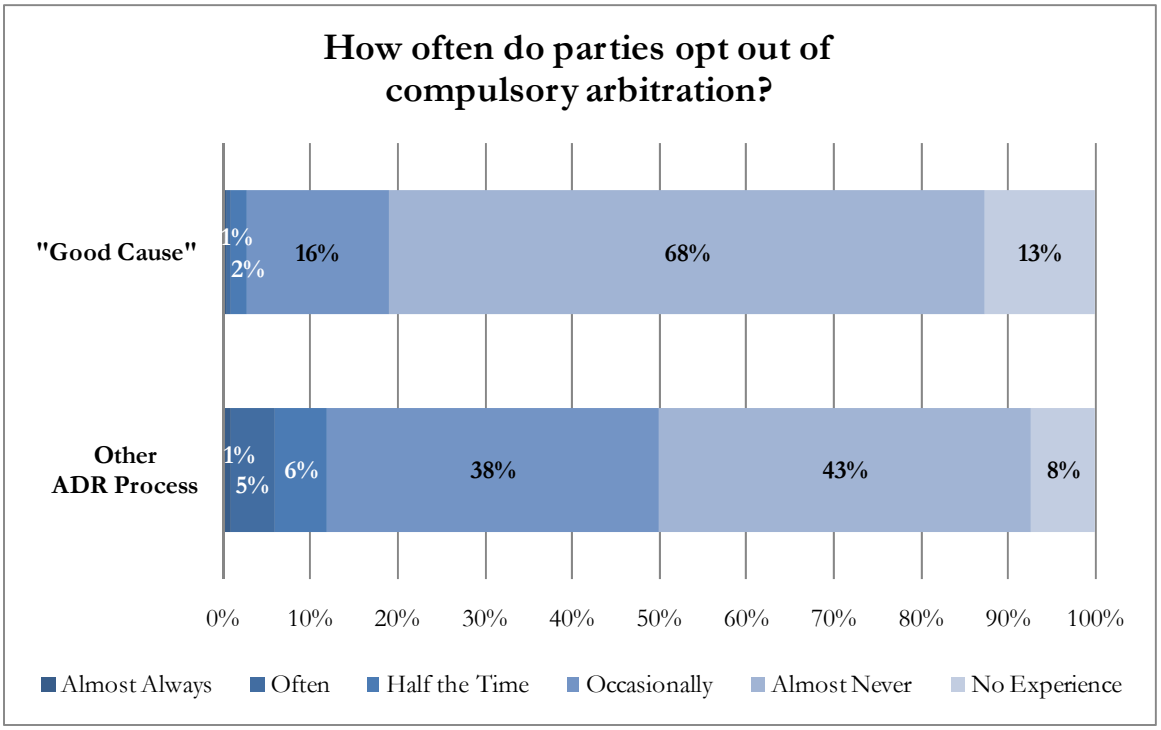
Under ARCP 72-77 and A.R.S. § 12-133, Superior Court claims involving only requests for monetary relief that do not exceed a certain jurisdictional limit qualify for compulsory arbitration. The jurisdictional amount for arbitration varies by county. The arbitrator's decision may be appealed to the Superior Court, which then holds a trial *de novo*.

1. CASES QUALIFYING FOR COMPULSORY ARBITRATION

Considering *all* respondents to the survey, almost 65% indicated that they have had a Superior Court case qualify for compulsory arbitration. Considering *only* those respondents who provided an answer to the question on whether they have had a qualifying case, nearly 75% answered in the affirmative.

Figure 47 depicts the frequency with which parties opt out of the compulsory arbitration process in qualifying cases. The vast majority of respondents indicated that opt-out occurs only "occasionally" or "almost never." However, it appears that parties opt out for another alternative dispute resolution process more frequently than by showing "other good cause" for avoiding compulsory arbitration.

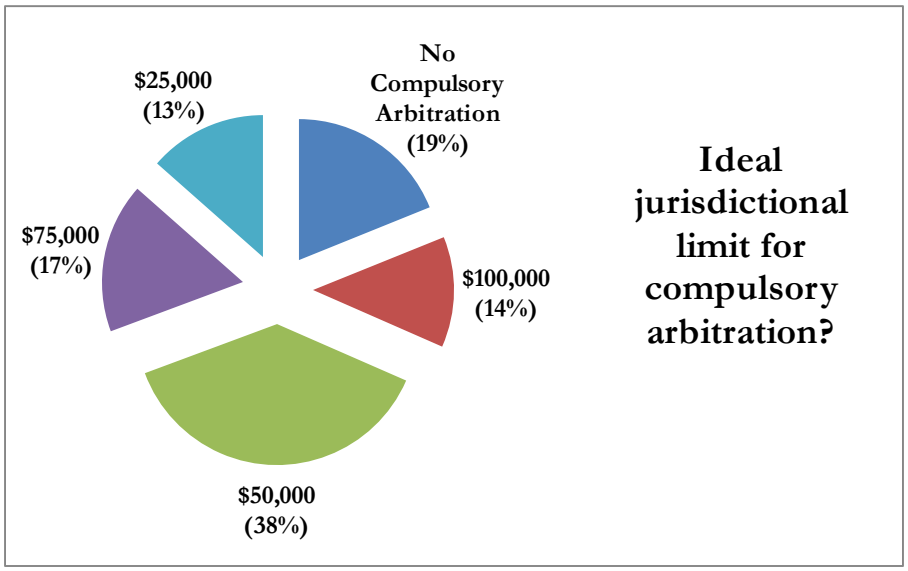
Figure 47 (Survey Questions 27a, 27b)
n = 482; 480



In Arizona, most people reside in counties with a $50,000 jurisdictional limit for compulsory arbitration (including Maricopa, Pima, Yuma, and Cochise Counties).[29] The survey asked what the limit should be, in the best interest of litigants. Approximately one-third of respondents in all counties felt that $50,000 was the right limit. Approximately one-third felt that the limit should be at a higher level, which would increase the number of qualifying cases. Approximately one-third felt that the limit should be lower or the program should not exist, which would decrease or eliminate qualifying cases. Significantly, almost 20% indicated that "[t]here should not be a compulsory arbitration program in Superior Court." See Figure 48.

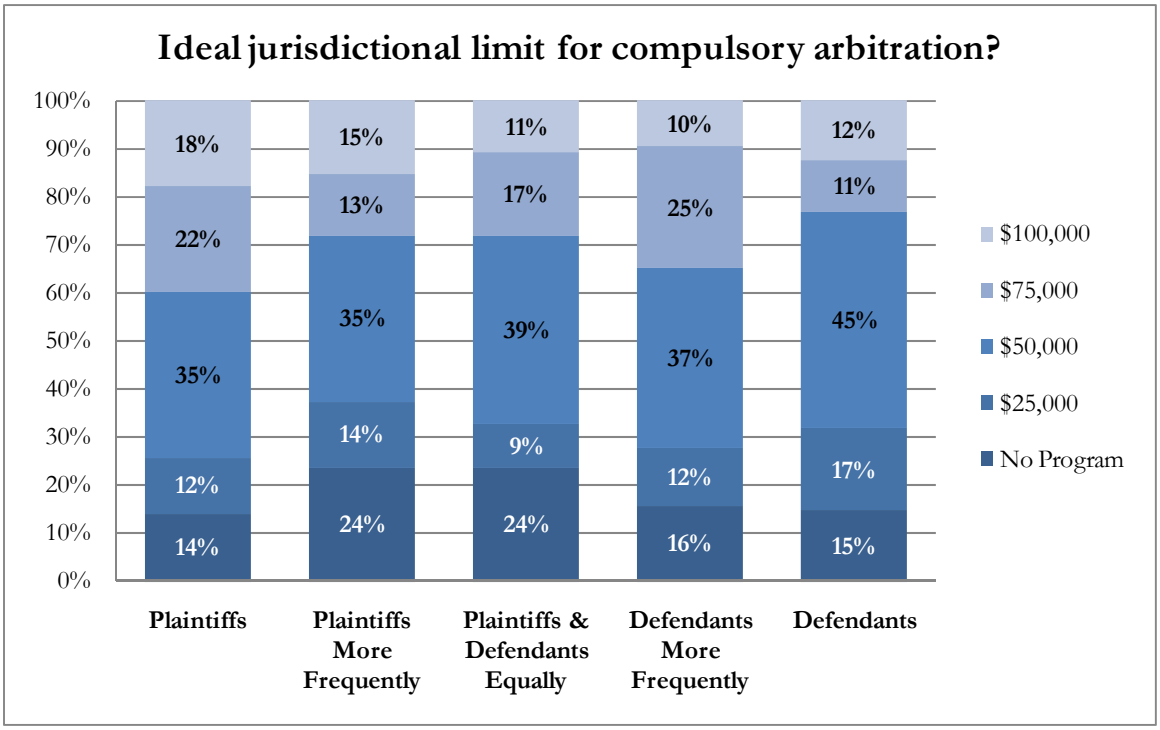
[29] U.S. Census Bureau, *State and County QuickFacts, Arizona*, http://quickfacts.census.gov/qfd/states/04000.html (2008 estimate; each county must be selected separately in the drop-down menu).

Figure 48 (Survey Question 29)
n = 482



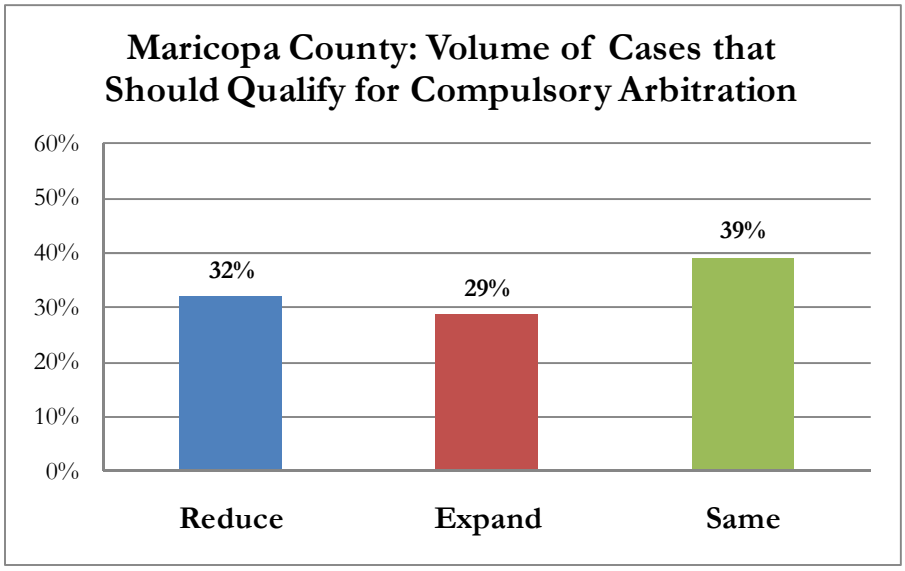
For the ideal limit for compulsory arbitration, Figure 49 shows the distribution of responses by party (for those who have had a qualifying case and indicated a party most frequently represented). The responses do not vary widely by group.

Figure 49 (Questions 5, 29)
n = 78; 118; 110; 83; 82



Three-quarters of respondents (76%) have had the most cases qualify for arbitration in Maricopa County, which has a $50,000 jurisdictional limit. Using respondents' ideal jurisdictional limit as an indication of whether the number of cases that proceed through compulsory arbitration should remain the same, be reduced, or be expanded, it is clear that there is not a consensus in that County.[30] See Figure 50.

Figure 50 (Questions 28, 29)
n = 362



2. CASES PROCEEDING THROUGH COMPULSORY ARBITRATION

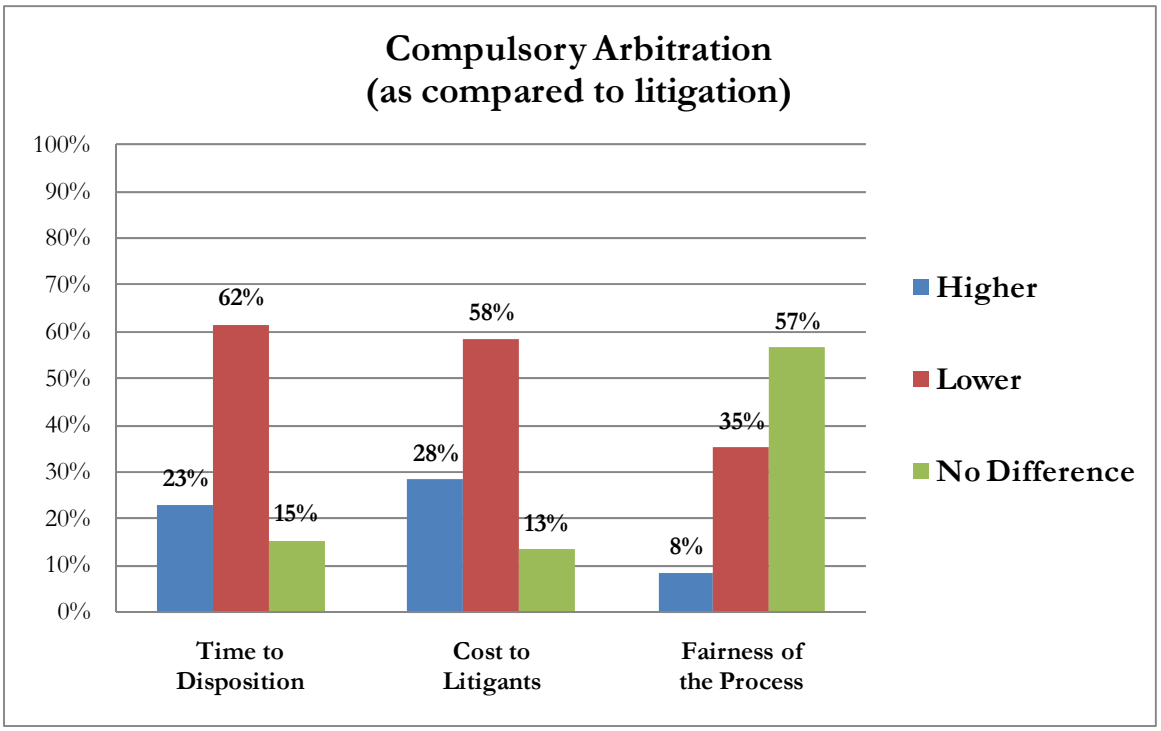
Almost 90% of respondents who had a case qualify for arbitration have also had a case proceed through the arbitration process (56% of total respondents).

As shown in Figure 51, according to Arizona practitioners, compulsory arbitration has a faster time to disposition[31] and a lower cost than litigation. However, it does not compare favorably to litigation on the issue of procedural fairness.

[30] The "reduce" category includes those who wish to eliminate compulsory arbitration completely.

[31] According to court data collected in a 2004-2005 study, cases in Maricopa and Pima Counties that were *subject to* compulsory arbitration were resolved more quickly than cases not subject to arbitration (by three to five months, on average). However, "the faster resolution can not necessarily be attributed to the arbitration process," due to differences in the amount in controversy and associated differences in complexity and the amount of discovery. Moreover, tort and contract cases subject to arbitration still did not meet the Arizona Supreme Court's time processing standards (90% resolved within 9 months). Finally, the time to disposition was longer for the subset of cases actually *assigned to* arbitration. In Maricopa and Pima Counties, only 50% of cases assigned to arbitration concluded within 10-14 months of the complaint. Roselle L. Wissler & Bob Dauber, *A Study of Court-Connected Arbitration in the Superior Courts of Arizona*, SUBMITTED TO THE SUP. CT. OF ARIZ. ADMIN. OFFICE OF THE CTS., http://www.law.asu.edu/?id=607, Executive Summary, vi (July 13, 2005).

Figure 51 (Survey Questions 31a-31c)
n = 422; 421; 422



By and large, the written comments concerning compulsory arbitration were negative. Due to appeal provisions resulting in trial *de novo*,[32] those respondents characterized the program as wasting time, causing delay, and increasing costs. Commenting respondents were also critical of the system for appointing arbitrators. They believe that randomly selecting an "unsuspecting" member of the bar – who may not have any litigation experience or any familiarity with the substantive area – and requiring service without proper training or compensation leads only to resentment and a poor process. As one respondent stated:

> All that mandatory arbitration accomplishes in Maricopa County is to relieve the [court] for a time from having to do anything on a civil case, hoping that one or more of the parties will abandon the case before it emerges from arbitration. Forcing an outside member of the Bar to perform unfamiliar legal work whilst the court waits for the natural effects of attrition to reduce its civil caseload is not good public policy.

Also, a respondent indicated that in small counties where the attorneys know each other well, it is difficult for an arbitrator to be fair knowing that the roles will soon be reversed.

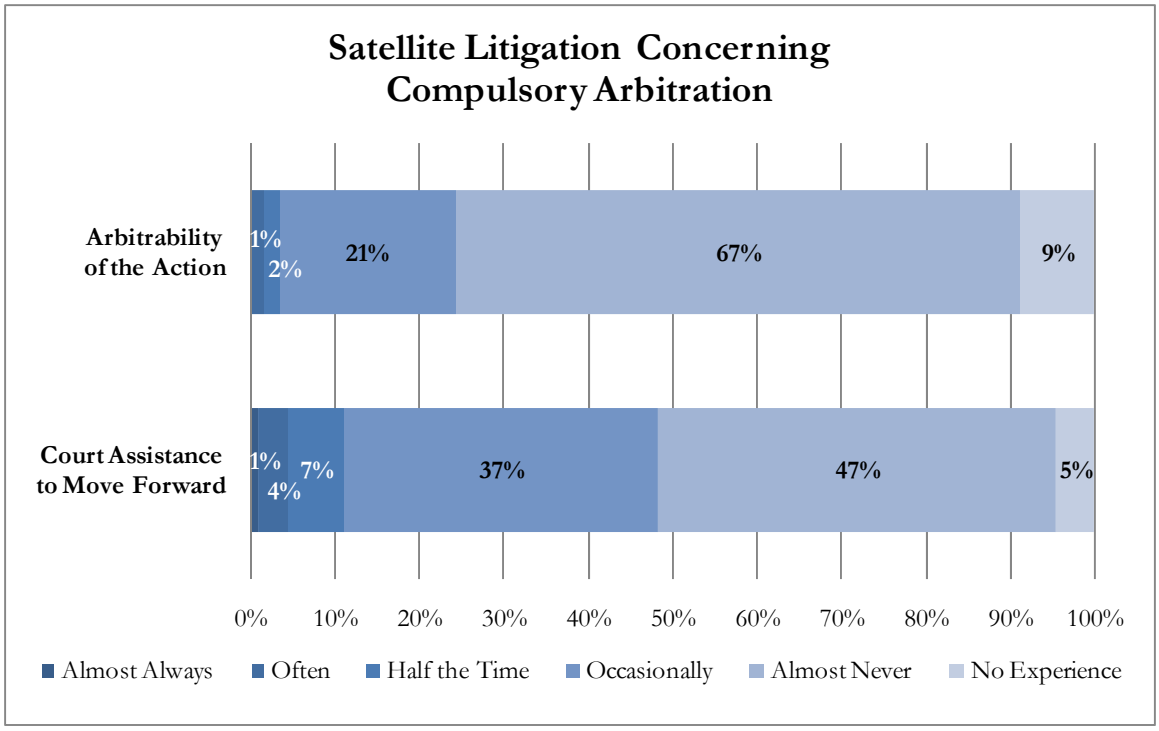
A majority (57%) of respondents with experience in compulsory arbitration indicated that arbitrators "almost never" limit discovery during the arbitration process to ensure an efficient and inexpensive resolution. An additional 22% believe that discovery is limited in arbitration only "occasionally." Only 12% of respondents indicated that arbitrators limit discovery half the time or

[32] According to the 2004-2005 study of court data, the frequency of appeal in cases with an arbitration award ranged from 17% to 46%, and was 22% in both Maricopa and Pima Counties. *Id.* at v.

more. One respondent wrote: "[T]he person who will ultimately be deciding the matter often has little or no interest in hearing arguments regarding discovery prior to arbitration."

As shown in Figure 52, compulsory arbitration does not seem to generate much satellite litigation. Two-thirds of respondents (67%) with a qualifying case indicated that parties "almost never" litigate the issue of arbitrability and another 20% or so indicated that the issue is litigated only "occasionally." Notably, however, over 10% of respondents with experience in compulsory arbitration indicated that parties have to seek assistance from the court at least half of the time in order to move cases forward in arbitration.

Figure 52 (Survey Questions 27c, 32b)
n = 477; 422



F. RESPONDENT SUGGESTIONS FOR A MORE TIMELY AND COST-EFFECTIVE PROCESS

While respondents generally view Arizona's civil litigation process in a positive light, the survey asked respondents to name one rule or procedure they would change to achieve a more timely and cost-effective process for litigants. Suggestions not incorporated into the previous discussion are set forth below.

A number of respondents would like to see early involvement in and monitoring of the case by the judge, though one respondent qualified the suggestion with a plea for attorneys to generally maintain control over case management. Respondents believe that judges should be more consistent in enforcing the existing rules. Respondents also expressed a preference for setting the trial date early in the litigation.

A number of respondents would like to see a faster and better mechanism for handling disclosure and discovery disputes. It was proposed that a discovery "master" or "proctor" dedicated

to such issues could be appointed and readily available to resolve disputes and enforce the rules. An alternative proposal: have sitting judges reserve a couple of hours each afternoon for immediate hearings in a "mass-docket" setting.

A number of respondents would like to see a system of mandatory settlement conferences after initial disclosures, for the purpose of obtaining a third-party assessment of the case at an early stage in the litigation. Some specifically stated that this should occur in lieu of arbitration.

Several respondents suggested adopting the British "loser pays" system of fee shifting. Two respondents suggested allowing attorneys to appear by telephone. One respondent suggested limiting motions for reconsideration to situations involving the discovery of new facts or a change in the law.

Finally, there is the issue of increasing funding for Arizona courts. As one respondent commented, state courts can only be an "engine of justice" if they are adequately resourced to meet that mission.

V. CONCLUSION

IAALS sincerely thanks all of the individuals and organizations who dedicated precious time, effort, and energy to make the Arizona Rules Survey possible. It is our hope that this study will make a valuable contribution to the national dialogue on civil justice reform. We look forward to processing this information in conjunction with other efforts to understand and improve the American civil justice system.

APPENDIX: SURVEY INSTRUMENT

Are you an attorney or judge with past or present CIVIL LITIGATION experience in the SUPERIOR COURTS of Arizona? For this survey, civil litigation does not include domestic relations or family law.

- ☐ Yes
- ☐ No

If you answered "Yes," please proceed to Question 1. If you answered "No," you may stop here. The Institute for the Advancement of the American Legal System thanks you for your time. We encourage you to learn more about our work by visiting www.du.edu/legalinstitute.

I. ATTORNEY BACKGROUND

1. Number of years you have practiced law in Arizona, rounded to the nearest year:

_____

2. Estimated number of Arizona Superior Court civil cases in which you have been an attorney of record (entered an appearance) or a judge within the last five years:

- ☐ None
- ☐ 1 to 5
- ☐ 6 to 20
- ☐ 21 to 50
- ☐ 51 to 100
- ☐ Over 100

3. Estimated number of your Arizona Superior Court civil cases that have gone to trial over the last five years (judges, please include cases over which you have presided at trial):

- ☐ None
- ☐ 1 to 5
- ☐ 6 to 20
- ☐ 21 to 50
- ☐ 51 to 100
- ☐ Over 100

4. Types of civil cases with which you have the most experience in Arizona Superior Court:

Select up to three areas, but do not include areas of minimal involvement.

- ☐ Administrative law
- ☐ Breach of fiduciary duty
- ☐ Civil rights
- ☐ Complex commercial
- ☐ Construction
- ☐ Consumer fraud
- ☐ Contract disputes
- ☐ Domestic relations
- ☐ Employment discrimination
- ☐ Insurance disputes
- ☐ Labor law
- ☐ Personal injury
- ☐ Probate
- ☐ Product liability
- ☐ Professional malpractice (generally)
- ☐ Property damage
- ☐ Real property
- ☐ Tax
- ☐ Torts (generally)
- ☐ Mass torts
- ☐ Medical malpractice
- ☐ Other _____
- ☐ Other _____
- ☐ Other _____

5. Your civil litigation role over the course of your career:

If applicable, you may check "neutral decision-maker" in addition to any other box.

- ☐ Represent plaintiffs in all or nearly all cases
- ☐ Represent defendants in all or nearly all cases
- ☐ Represent plaintiffs and defendants, but plaintiffs more frequently
- ☐ Represent plaintiffs and defendants, but defendants more frequently
- ☐ Represent plaintiffs and defendants equally
- ☐ Neutral decision-maker

6. Your current position:

- □ Law firm lawyer or solo practitioner
- □ In-house counsel
- □ Government lawyer
- □ Judge
- □ Law clerk
- □ ADR provider
- □ Academician or researcher
- □ Retired, last year of practice: _____
- □ Inactive, last year of practice in Arizona: _____
- □ Other, please specify: _____

If your current position as indicated in Question 6 is "Law firm lawyer or solo practitioner," "In-house counsel," or "Government lawyer," please answer Questions 7 and 8. If you do not hold one of these positions, please skip to Question 9.

7. Current number of full- and part-time attorneys at your organization who work in YOUR office location:

- □ 1 to 5
- □ 6 to 10
- □ 11 to 20
- □ 21 to 50
- □ 51 to 100
- □ 101 to 250
- □ 251 to 500
- □ Over 500

8. Current number of full- and part-time attorneys at your organization who work in ALL office locations:

- □ 1 to 5
- □ 6 to 10
- □ 11 to 20
- □ 21 to 50
- □ 51 to 100
- □ 101 to 250
- □ 251 to 500
- □ Over 500

II. CIVIL LITIGATION GENERALLY

9. Below is a list of common complaints about the American civil justice system. Please indicate your level of agreement with each statement as a whole, as it relates specifically to ARIZONA SUPERIOR COURT.

	Strongly Disagree	Disagree	Agree	Strongly Agree	No Opinion
a. The civil justice system is too complex.	□	□	□	□	□
b. The civil justice system takes too long.	□	□	□	□	□
c. The civil justice system is too expensive.	□	□	□	□	□
d. Opposing counsel are generally uncooperative.	□	□	□	□	□
e. Notice pleading prevents disputed issues from being identified early enough.	□	□	□	□	□
f. The system of hourly billing for attorneys contributes disproportionately to litigation costs.	□	□	□	□	□

If your current position as indicated in Question 6 is "Law firm lawyer or solo practitioner," please answer Question 10. If not, please skip to Question 11.

10. As a general matter, your firm will not file or defend a case unless the amount in controversy exceeds:
$_____
□ Firm will not refuse a case based on the amount in controversy
□ Don't know

III. COMPARATIVE QUESTIONS

11. Do you have experience litigating in FEDERAL court in the District of Arizona?
□ Yes
□ No

If you answered "Yes" to Question 11, please answer Question 12. If you answered "No," please skip to Question 13.

12. Between Arizona Superior Court and the U.S. District Court for the District of Arizona:
□ I prefer litigating in the Arizona state court.
Reason: _____
□ I prefer litigating in the Arizona federal court.
Reason: _____
□ No preference.
Reason: _____

13. Do you have Superior Court civil litigation experience prior to the July 1, 1992 amendments to the Arizona rules ("Zlaket" amendments)?
□ Yes
□ No

If you answered "Yes" to Question 13, please answer Question 14. If you answered "No," please skip to Question 15.

14. Please indicate your opinion as to the effect of the "Zlaket" amendments on the following groups and state the reason for your answer.

	Negative Development	Neutral Development	Positive Development	Reason
a. Litigants	□	□	□	
b. Lawyers	□	□	□	
c. Judges	□	□	□	
d. Public	□	□	□	

IV. RULES OF CIVIL PROCEDURE FOR THE SUPERIOR COURTS OF ARIZONA

A. Rule 16(b) Comprehensive Pretrial Conferences

15. Below is a list of statements about Arizona Rule 16(b) comprehensive pretrial conferences. Assuming that a conference takes place, please indicate your level of agreement with each statement as a whole.

	Strongly Disagree	Disagree	Agree	Strongly Agree	No Opinion
a. Rule 16(b) conferences establish early judicial management of cases.	☐	☐	☐	☐	☐
b. Rule 16(b) conferences encourage judges to stay involved throughout the case.	☐	☐	☐	☐	☐
c. Rule 16(b) conferences focus discovery to the disputed issues.	☐	☐	☐	☐	☐
d. Rule 16(b) conferences improve trial preparation.	☐	☐	☐	☐	☐
e. Rule 16(b) conferences expedite case dispositions.	☐	☐	☐	☐	☐
f. Rule 16(b) conferences are cost-effective.	☐	☐	☐	☐	☐

16. Please indicate how often the following occur, in your experience. If you have no personal experience with the topic, please select "No Experience."

	Almost Never	Occasion-ally	About Half the Time	Often	Almost Always	No Exper-ience
a. Rule 16(b) conferences are held.	☐	☐	☐	☐	☐	☐
b. Litigants request sanctions for noncompliance with the letter and spirit of Rule 16(b).	☐	☐	☐	☐	☐	☐
c. Upon request, courts impose sanctions for noncompliance with the letter and spirit of Rule 16(b).	☐	☐	☐	☐	☐	☐
d. Courts *sua sponte* impose sanctions for noncompliance with the letter and spirit of Rule 16(b).	☐	☐	☐	☐	☐	☐

17. Should a Rule 16(b) conference be mandated in every case?

☐ Yes

Reason: _____

☐ No

Reason: _____

B. Initial Disclosures And Presumptive Discovery Limits

18. Please indicate the extent to which, in your experience, litigants ADHERE to the following Arizona discovery rules AS WRITTEN.

	Almost Never	Occasion-ally	About Half the Time	Often	Almost Always	No Exper-ience
a. The content and scope of initial disclosures under Rule 26.1(a)	☐	☐	☐	☐	☐	☐
b. The 40-day time limit for initial disclosures under Rule 26.1(b)	☐	☐	☐	☐	☐	☐
c. The presumptive limit of one expert per side per issue under Rule 26(b)(4)(D)	☐	☐	☐	☐	☐	☐
d. The presumption against deposing individuals who are not parties, testifying expert witnesses, or document custodians under Rule 30(a)	☐	☐	☐	☐	☐	☐
e. The presumptive limit of four hour depositions under Rule 30(d)	☐	☐	☐	☐	☐	☐
f. The 40- and 60-day time limits for answering interrogatories under Rule 33(a)	☐	☐	☐	☐	☐	☐
g. The presumptive limit of 40 interrogatories per party under Rule 33.1(a)	☐	☐	☐	☐	☐	☐
h. The 40- and 60-day time limits for fulfilling requests for production under Rule 34	☐	☐	☐	☐	☐	☐
i. The presumptive limit of one request for production of not more than 10 distinct items or categories of items under Rule 34	☐	☐	☐	☐	☐	☐
j. The 40- and 60-day time limits for answering requests for admission under Rule 36(a)	☐	☐	☐	☐	☐	☐
k. The presumptive limit of 25 requests for admission of one factual matter under Rule 36(b)	☐	☐	☐	☐	☐	☐

19. In Arizona, discovery misconduct is defined as "unreasonable, groundless, abusive, or obstructionist conduct." Please indicate how often the following occur, in your experience.

	Almost Never	Occasion-ally	About Half the Time	Often	Almost Always	No Exper-ience
a. Litigants request sanctions for discovery misconduct.	☐	☐	☐	☐	☐	☐
b. Upon request, courts impose sanctions for discovery misconduct.	☐	☐	☐	☐	☐	☐
c. Courts *sua sponte* impose sanctions for discovery misconduct.	☐	☐	☐	☐	☐	☐
d. The rules providing for sanctions deter discovery misconduct.	☐	☐	☐	☐	☐	☐

20. Below is a list of statements about Arizona Rule 26.1 DISCLOSURES. Assuming adherence to the rule AS WRITTEN, please indicate your level of agreement with each statement as a whole.

	Strongly Disagree	Disagree	Agree	Strongly Agree	No Opinion
a. Disclosures reveal the pertinent facts early in the case.	☐	☐	☐	☐	☐
b. Disclosures help narrow the issues early in the case.	☐	☐	☐	☐	☐
c. Disclosures facilitate agreement on the scope and timing of discovery.	☐	☐	☐	☐	☐
d. Disclosures reduce the total volume of discovery.	☐	☐	☐	☐	☐
e. Disclosures reduce the total time required to conduct discovery.	☐	☐	☐	☐	☐
f. Disclosures require too much investment early in the case.	☐	☐	☐	☐	☐
g. Disclosures increase the cost of litigation.	☐	☐	☐	☐	☐
h. Parties should be prevented from introducing supporting evidence that was not timely disclosed.	☐	☐	☐	☐	☐

21. Please indicate how often the following occur with respect to Rule 26.1 DISCLOSURES, in your experience.

	Almost Never	Occasion-ally	About Half the Time	Often	Almost Always	No Exper-ience
a. Parties abuse the disclosure process through overproduction.	□	□	□	□	□	□
b. Parties abuse the disclosure process by withholding information.	□	□	□	□	□	□
c. Parties abuse the disclosure process by revealing information late.	□	□	□	□	□	□
d. Courts enforce disclosure requirements.	□	□	□	□	□	□
e. Parties litigate the scope and adequacy of disclosures.	□	□	□	□	□	□

22. Below is a list of statements about Arizona's PRESUMPTIVE LIMITS ON DISCOVERY. Assuming adherence to the rules AS WRITTEN, please indicate your level of agreement with each statement as a whole.

	Strongly Disagree	Disagree	Agree	Strongly Agree	No Opinion
a. The presumptive limits require parties to focus their discovery efforts to the disputed issues.	□	□	□	□	□
b. The presumptive limits reduce the total volume of discovery.	□	□	□	□	□
c. The presumptive limits reduce the total cost of litigation.	□	□	□	□	□
d. The presumptive limits reduce the total time required for litigation.	□	□	□	□	□
e. The presumptive limits make litigation costs more predictable.	□	□	□	□	□
f. The presumptive limits reduce the use of discovery as a tool to force settlement.	□	□	□	□	□
g. The presumptive limits generally favor defendants over plaintiffs.	□	□	□	□	□
h. The presumptive limits force parties to go to trial with insufficient information.	□	□	□	□	□
i. The court should have more control over the discovery process.	□	□	□	□	□

23. Please indicate how often the following occur with respect to PRESUMPTIVE LIMITS, in your experience.

	Almost Never	Occasion-ally	About Half the Time	Often	Almost Always	No Exper-ience
a. Courts enforce presumptive limits on discovery.	☐	☐	☐	☐	☐	☐
b. Parties litigate whether to depart from the presumptive limits.	☐	☐	☐	☐	☐	☐

24. In the best interest of litigants, presumptive limits should be modified – if at all – in the following way:

	Limit Made Lower	No Modification	Limit Made Higher	No Opinion
a. One expert per side per issue	☐	☐	☐	☐
b. Automatic depositions only for parties, experts, and custodians	☐	☐	☐	☐
c. Depositions limited to four hours	☐	☐	☐	☐
d. Interrogatories limited to 40 per party	☐	☐	☐	☐
e. Requests for production limited to one request for not more than 10 items	☐	☐	☐	☐
f. Requests for admission limited to 25 requests for one factual matter	☐	☐	☐	☐

If you answered "Yes" to Question 11, indicating that you have experience litigating in federal court, please answer Question 25. If you answered "No," please skip to Question 26.

25. Please indicate whether you prefer the Arizona Rules of Civil Procedure or the Federal Rules of Civil Procedure with respect to each of the following:

	State Court	Federal Court	No Preference
a. Timing of initial disclosures	☐	☐	☐
b. Content and scope of mandatory disclosures	☐	☐	☐
c. Number of expert witnesses	☐	☐	☐
d. Extent of deposition discovery	☐	☐	☐

C. Compulsory Arbitration

26. Have any of your SUPERIOR COURT cases QUALIFIED FOR Arizona's compulsory arbitration program (A.R.S. § 12-133 and Rules 72-77)?

Superior Court claims involving only requests for monetary relief that do not exceed a certain jurisdictional limit qualify for compulsory arbitration. The jurisdictional amount for arbitration varies by county.

☐ Yes
☐ No

If you answered "Yes" to Question 26, please answer Questions 27-30. If you answered "No," please skip to Question 33.

27. Please indicate how often the following occur, in your experience.

	Almost Never	Occasion-ally	About Half the Time	Often	Almost Always	No Exper-ience
a. In cases qualifying for compulsory arbitration, parties opt out in favor of some other alternative dispute resolution process.	□	□	□	□	□	□
b. In cases qualifying for compulsory arbitration, parties opt out for "other good cause."	□	□	□	□	□	□
c. Parties litigate the issue of arbitrability.	□	□	□	□	□	□

28. County in which you have had the most cases qualify for compulsory arbitration:

□ Cochise - $50,000 limit
□ Coconino - $65,000 limit
□ Gila - $25,000 limit
□ Graham - $30,000 limit
□ La Paz - $25,000 limit
□ Maricopa - $50,000 limit
□ Mohave - $25,000 limit
□ Navajo - $25,000 limit
□ Pima - $50,000 limit
□ Pinal - $40,000 limit
□ Yavapai - $65,000 limit
□ Yuma - $50,000 limit

29. In the best interest of litigants, the jurisdictional limit for compulsory arbitration in Superior Court should be:

□ $25,000
□ $50,000
□ $75,000
□ $100,000
□ There should not be a compulsory arbitration program in Superior Court.

30. Have any of your SUPERIOR COURT cases PROCEEDED THROUGH compulsory arbitration?

□ Yes
□ No

If you answered "Yes" to Question 30, please answer Questions 31-32. If you answered "No," please skip to Question 33.

31. Compulsory arbitration (generally), as compared to litigation (generally):

a. Time	**b. Cost to Litigants**	**c. Fairness of the Process**
□ Shortens time to disposition	□ Decreases cost	□ Less fair
□ No difference in time	□ No difference in cost	□ No difference in fairness
□ Lengthens time to disposition	□ Increases cost	□ More fair

32. Please indicate how often the following occur, in your experience.

	Almost Never	Occasion-ally	About Half the Time	Often	Almost Always	No Exper-ience
a. Arbitrators limit discovery to ensure an efficient and inexpensive resolution.	☐	☐	☐	☐	☐	☐
b. Parties have to seek assistance from the court to move the case forward in arbitration.	☐	☐	☐	☐	☐	☐

V. CONCLUSION

33. If you could change any one rule or procedure in Arizona Superior Court to achieve a more timely and cost-effective process for litigants, what would it be and why?

_____
_____
_____
_____
_____

34. Please include any information, clarification, or comment you would like to add:

_____
_____
_____
_____
_____

35. Are you willing to be contacted to participate in further studies concerning civil litigation in Arizona? By selecting "yes," your contact information will not be associated with your responses to this survey, which remain confidential. Contact information will be used only for the purpose indicated above, and will not be shared or distributed.

☐ Yes

First name: _____
Last name: _____
Email: _____
Phone: _____
How would you prefer to be contacted? ☐ By email ☐ By phone

☐ No

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