

**Comments on the ACTL/IAALS “Pilot Project Rules” for Civil Litigation”  
by Certain Members of the ABA Litigation Section Special Committee  
on the Future of Civil Litigation**

This paper was prepared by Scott Nelson, of the Public Citizen Litigation Group in Washington D.C.. He prepared it for discussion by the Special Committee on the Future of Civil Litigation of the ABA Section of Litigation. The paper concerns the “Pilot Project Rules” of the American College of Trial Lawyers (ACTL) and the Institute for the Advancement of the American Legal System (IAALS). Because of the press of time, the Special Committee was not able to engage in the extended discussions that would have been necessary to reach consensus on our reactions about the ACTL/IAALS proposals. Accordingly, this paper reflects the views of only some of the committee members. Others disagreed to a greater or lesser extent with the views expressed. This paper was prepared before the “Joint Report” of the ACTL and IAALS that modified their proposal about pleadings.

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We have taken as our baseline the existing Federal Rules of Civil Procedure and considered whether changing theme rules to conform to the ACTL/IAALS proposed rules would improve the administration of justice.

Although we believe many of the goals of the proposed rules are sound, in general we do not view them as improvements to the existing Federal Rules. Those aspects of the proposed rules that strike us as sound are generally already in the Federal Rules. We respectfully submit that those that are not in the Federal Rules are not, in our view, likely to improve the system.

**Rule One      Scope**

- 1.1. These Rules govern the procedure in all actions that are part of the pilot project. They must be construed and administered to secure the just, timely, efficient, and cost-effective determination of such actions.
- 1.2. At all times, the court and the parties must address the action in ways designed to assure that the process and the costs are proportionate to the amount in controversy and the complexity and importance of the issues. The factors to be considered by the court in making a proportionality assessment include, without limitation: needs of the case, amount in controversy, parties’ resources, and complexity and importance of the issues at stake in the litigation. This proportionality rule is fully applicable to all discovery, including the discovery of electronically stored information.

*Special Committee Comment:*

Federal Rule of Civil Procedure 1 already incorporates these principles, although in different words (“just, speedy and inexpensive”). Because the existing rule addresses the subject in similar terms, we do not believe that a change is

necessary to express or achieve the purposes of proposed Rule 1.1. The word “timely” may be more appropriate than “speedy” because some cases will necessarily proceed at a rate that may not be “speedy,” and that “cost-effective” is more apt than “inexpensive” because some litigation may appropriately be expensive. It is unclear what is meant or added by the term “efficient” in view of the inclusion of the terms “timely” and “cost-effective.”

Proposed Rule 1.2’s requirement that “[a]t all times, the court and the parties must address the action in ways designed to assure that the process and the costs are proportionate” seems overbroad. Some aspects of litigation may not be amenable to a cost-benefit analysis and should continue to be governed by the existing standards that balance fairness and efficiency. For example, it would not seem reasonable to suggest that a court might reject a party’s filing of a motion for summary judgment on the ground that responding to it would be too costly for the other party (or, for that matter, , that its preparation was too costly).

We question the ability of courts to make accurate judgments about the costs and benefits of particular pieces or stages of litigation in ways that are precise enough to guide each aspect of the case. For some parts of the process (for example, whether dispositive or discovery motions should be filed, whether particular witnesses should be called, etc.), there may be no better guide than the judgment of the parties, which itself necessarily reflects their own assessment of the costs, risks, and benefits of proceeding. Proposed Rule 1.2 does not describe the method by which process and cost proportionality will be addressed, and we are concerned the added layer of briefing that may result will be counter to the goals of the proposed Rule.

As for discovery, the balancing called for by the proposed rule is already found in Federal Rule of Civil Procedure 26(b)(2)(C), which requires a court to limit discovery if “the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.” Again, while the wording is not identical, the existing Rule 26(b)(2)(C) appears to state the appropriate standard as well as or better than the proposed one..

## **Rule Two Pleadings – Form and Content**

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

- 2.2. Any statement of fact that is not specifically denied in any responsive pleading is deemed admitted. General denials are not permitted and a denial that is based on the lack of knowledge or information must be so pleaded.

*Special Committee Comment*

The Special Committee has not developed a consensus in favor of the particularized fact pleading called for by proposed Rule 2.1. The proposal requires far more than the specificity required by *Twombly* and *Iqbal* (which a majority of the Special Committee regard as significantly exceeding what should be demanded).

*Twombly* and *Iqbal* do not (at least, not expressly) insist on “particularity” with respect to any matters not within the scope of Rule 9, and we are not convinced that imposing this requirement on all factual allegations is appropriate. Nor do those decisions purport to require pleading of all “material facts,” which on its face appears to be a particularly sweeping requirement. (We recognize that proposed Rule 2.1 goes on to define “material facts” in terms that are somewhat narrower than the ordinary meaning of those words, but that in itself is problematic because of how significantly the definition deviates from the understanding of the same words in the principal context in which they appear in the Federal Rules: namely, the Rule 56 summary judgment standard.)

The requirements of proposed Rule 2.1 seem likely to result in an increase in litigation costs as parties prepare increasingly prolix pleadings and engage in motion practice over whether (a) facts have been pleaded with sufficient “particularity” and (b) facts that may have been omitted are “material.”

We are also not convinced that, for most cases, notice pleading has proved inadequate or results in a failure of the defending parties and the court to understand what the plaintiff is alleging. In a relatively small (although not insignificant) number of cases, there is legitimate ground for debate about whether the plaintiff has alleged enough to state a claim of actionable wrongdoing by the defendant to justify the costs of proceeding with litigation. It is in these cases that the debate over *Iqbal* and *Twombly* takes on significance, with critics asserting that they demand too much of a plaintiff who has not yet had the benefit of discovery, with others arguing that they strike the right balance or do not go far enough. We believe, however, that the approach taken by this proposed rule, demanding particularity and pleading of all material facts, would tilt the balance against plaintiffs to a much greater degree than even those of us who would advocate some level of factual pleading beyond bare notice think justified.

Proposed Rule 2.2 adds little to the existing requirements of Rule 8(b), which already demand specific denials in most circumstances, provide that the failure to deny is an admission, and require that denials based on lack of knowledge be identified as such. Rule 8(b) further provides that a denial “must fairly respond to the substance of the allegation” and that parties that deny only parts of an

allegation must admit the rest. Even under the existing rule, answers sometimes fail to satisfy these important requirements, so omitting them seems likely to further lessen the usefulness of answers. The proposed rule's prohibition on general denials does not seem like a great improvement on Rule 8, which already strictly limits the use of general denials.

### **Rule Three Precomplaint Discovery**

- 3.1. On motion by a proposed plaintiff with notice to the proposed defendant and opportunity to be heard, a proposed plaintiff may obtain precomplaint discovery upon the court's determination, after hearing, that:
  - a. the moving party cannot prepare a legally sufficient complaint in the absence of the information sought by the discovery;
  - b. the moving party has probable cause to believe that the information sought by the discovery will enable preparation of a legally sufficient complaint;
  - c. the moving party has probable cause to believe that the information sought is in the possession of the person or entity from which it is sought;
  - d. the proposed discovery is narrowly tailored to minimize expense and inconvenience; and
  - e. the moving party's need for the discovery outweighs the burden and expense to other persons and entities.
- 3.2. The court may grant a motion for precomplaint discovery directed to a nonparty pursuant to PPR 3.1. Advance notice to the nonparty is not required, but the nonparty's ability to file a motion to quash shall be preserved.
- 3.3. If the court grants a motion for precomplaint discovery, the court may impose limitations and conditions, including provisions for the allocation of costs and attorneys' fees, on the scope and other terms of the discovery.

### *Special Committee Comment*

The Special Committee does not favor adoption of these provisions. They appear intended to ameliorate hardships to plaintiffs who otherwise would lack access to information needed to meet the elevated pleading standard in proposed Rule 2.1. However, we are not convinced of the benefits of moving to a system where discovery aimed at fleshing out the particulars of a plaintiff's claim is shifted from after to before the filing of a complaint. As a practical matter, it is not clear whether the net effect would be to reduce, increase, or leave unchanged the overall burdens of discovery.

It would appear, however, that a plaintiff who could meet existing standards for pleading a claim under Rules 8 and 11 should be able to satisfy the standard of

having “probable cause” for believing that precomplaint discovery would enable the party to file an adequate complaint under the heightened pleading standards of proposed rule 2.1. It is possible that it could be easier to obtain discovery under the proposed rule than under existing standards that require a party to file a complaint subject to the demands of Rule 11 before obtaining discovery. And it is unclear whether discovery would proceed more expeditiously and efficiently in circumstances where it was not carried out under the pressure of having to conform with an overall litigation schedule aimed at preparing a case for summary judgment or trial.

In addition, except in cases where an applicable statute of limitations would prevent refiling, it would appear that a plaintiff whose complaint was dismissed (without prejudice) under the heightened pleading standards of Rule 2.1 would then be able to seek precomplaint discovery under this rule to address the deficiencies in particularity and comprehensiveness of factual allegations relied on by the court in dismissing the case. How such a procedure (which would likely entail several additional rounds of motions practice) would be superior to the current practice is difficult to understand.

Implementing broad precomplaint discovery in the federal courts would also pose knotty issues surrounding Article III and statutory jurisdictional limits. Plaintiffs, defendants, and courts would be faced with the conundrum of establishing the existence of (a) a case or controversy, (b) statutory jurisdictional requirements and (c) personal jurisdiction over the defendant in a situation where, by definition, the plaintiff did not have the ability to file a complaint that stated a claim. The procedural complications of creating an entirely new form of proceeding in the federal courts seem likely to undermine the goal of streamlining litigation.

Finally, there was great opposition by the members of the Special Committee who represent plaintiffs to endorse any rule change that forced a plaintiff to assert that he/she/it could not state a legally sufficient complaint without conducting pre-filing discovery.

#### **Rule Four     Single Judge**

- 4.1. As soon as a complaint is filed, a judge will be assigned to the case for all purposes, and, absent unavoidable or extraordinary circumstances, that judge will remain assigned to the case through trial and post-trial proceedings. It is expected that the judge to whom the case is assigned will handle all pretrial matters and will try the case.

#### *Special Committee Comment*

The Special Committee agrees that judges should be assigned to cases for all purposes at the outset. This is the general practice in the federal district courts. We do not favor adopting proposed Rule 4.1 as phrased, however, for two principal reasons. First, there may be circumstances that are not unavoidable or

extraordinary that may justify reassignment of a case. Second, the rule does not appear to allow for the use of magistrate judges or special discovery masters to handle some pretrial matters, which can be a useful case management technique.

#### **Rule Five      Initial Disclosures**

- 5.1. No later than (x) days after service of a pleading making a claim for relief, the pleading party must make available for inspection and copying all reasonably available documents and things that may be used to support that party's claims.
- 5.2. The date for each responsive pleading should be fixed to follow the due date of the applicable initial disclosures required by PPR 5.1 by (x) days.
- 5.3. No later than (x) days after service of a pleading defending against a claim for relief, the pleading party must make available for inspection and copying all reasonably available documents and things that may be used to support any defense of that party.
- 5.4. Each party has an ongoing duty to supplement the initial disclosures promptly upon becoming aware of the supplemental information.
- 5.5. A party that fails to comply with PPR 5.1, 5.3 or 5.4 may not use for any purpose the document or thing not produced, unless the court determines that the failure to disclose was substantially justified or was harmless.

#### *Special Committee Comment*

Proposed Rule 5 appears to be based on some of the existing requirements of Rule 26(a)(1), but with slight variations. For example, the proposed rule requires that documents supporting claims or defenses be made available for inspection and copying, while Rule 26 says that the party must either provide a copy or identify the documents by category.)

In general, the Special Committee does not consider the existing rule requiring the disclosure of documents *supporting* a party's claims or defenses to be particularly useful in making litigation more efficient or expeditious, because discovery is so often focused on identifying information in the other party's possession that does *not* support its position. We therefore propose eliminating the current requirement that the parties' disclosures include documents upon which their claims or defenses are based and instead require disclosures of only individuals likely to have discoverable information and the damages and insurance information described in Rule 26(a)(1)(C) and (D). Document exchange will be an important component of the initial pretrial conference. We also do not support requiring the plaintiff's initial disclosures to precede the filing of an answer (or motion under Rule 12). Responding to the complaint typically does not require access to documents disclosed by the plaintiff. The provisions of Rule 26 that key the timing of disclosure to the timing of the parties' required conference (which in turn is keyed to that of the Rule 16 conference) appear preferable. Finally, the

provisions of Rule 26 exempting certain types of cases from initial disclosures should apply to any rules of this type.

#### **Rule Six      Motion to Dismiss/Stay of Discovery**

- 6.1.      Upon the making of a motion directed to the personal or subject matter jurisdiction of the court or the legal sufficiency of one or more claims for relief, made together with an answer or at the time within which an answer would otherwise be due, the court, at the request of the moving party based on good cause shown, may stay initial disclosures and discovery in appropriate cases for a period of up to 90 days. The motion must be decided within that 90 day period.

#### *Special Committee Comment*

The Special Committee believes that existing rules provide courts with adequate tools to stay discovery when justified. In many cases, discovery should not be stayed pending a motion to dismiss, while in others a stay may be appropriate. We do not believe that a court should receive additional encouragement to issue a stay by the addition of a rule specially authorizing it.

The Special Committee agrees that prompt disposition of dispositive motions is one of the best ways to expedite litigation. We are not, however, convinced that merely stating in a rule that a motion must be decided within 90 days (presumably of filing, though it might be preferable to provide for deadlines running from the completion of briefing) will make it so. The proposed rule does not state what the consequence is if the motion is not decided within that time. Is there some default resolution (*e.g.*, the motion is denied)? Such a default may not provide much incentive or motivation for the judge to resolve the motion. Is there some other negative consequence? In the criminal speedy trial context, the trial clock resumes running once a motion has been under advisement beyond a specified number of days, so judges are motivated by the desire to avoid having to dismiss a case on speedy trial grounds. It may be impossible to devise consequences in a civil action that judges would have a similar desire to avoid. If the only remedy for a violation of the deadline is a mandamus action in a court of appeals, the deadline may not, as a practical matter, be enforceable. Even so, the mere existence of a stated deadline is likely to have an impact, as the great majority of judges will likely strive to comply with it.

#### **Rule Seven      Preservation of Electronically Stored Information**

- 7.1.      Promptly after litigation is commenced, the parties must meet and confer about preservation of any electronically stored information. In the absence of an agreement, any party may move for an order governing preservation of electronically stored information. Because the parties require a prompt response, the court must make an order governing preservation of electronically stored information as soon as possible.

#### *Special Committee Comment*

The preservation of ESI is already covered by Rule 26(f) and the pretrial order required by Rule 16. The Special Committee agrees that this issue is of great importance in many cases, but because the subject is already part of a required pretrial conference that takes place promptly after the litigation is commenced, we question whether in all cases it needs to be the subject of a separate meet-and-confer obligation. If entered as promptly as it should be, the Rule 16 pretrial order should be issued early enough to be the appropriate vehicle for any orders of the court about the preservation of ESI. Moreover, the preservation of ESI is not an issue in many types of cases in federal court, and a rule providing that the court in every case must enter an order addressing it is unrealistic. We therefore believe that adding a rule along these lines is neither necessary nor appropriate, since the existing rules provide adequate means of resolving the issue through early agreement of the parties or order of the court. The possibility of a motion for an order addressing this issue before the Rule 16 pretrial order is issued, should circumstances so warrant, is also available under existing rules.

#### **Rule Eight Initial Pretrial Conference**

- 8.1. Unless requested sooner by any party, the judge to whom the case has been assigned must hold an initial pretrial conference as soon as practicable after appearance of all parties. Each party's lead trial counsel must attend this conference. At least three days before the conference, the parties must submit a joint report setting forth their agreement or their respective positions on the following matters, if applicable:
- a. an assessment of the application to the case of the proportionality factors in PPR 1.2;
  - b. production, continued preservation, and restoration of electronically stored information, including the form in which electronically stored information is to be produced and other issues relating to electronic information;
  - c. proposed discovery and limitations on discovery, specifically discussing how the proposed discovery and limitations on discovery are consistent with the proportionality factors in PPR 1.2. Limitations on discovery may include:
    - i. limitations on scope of discovery;
    - ii. limitations on persons from whom discovery can be sought;
    - iii. limitations on the types of discovery;
    - iv. limitations on the restoration of electronically stored information;
    - v. numerical limitations;
    - vi. elimination of depositions of experts when their testimony is strictly limited to the contents of their written report;



- vii. limitations on the time available for discovery;
  - viii. cost shifting/co-pay rules, including the allocation of costs of the production of electronically stored information;
  - ix. financial limitations; and
  - x. discovery budgets that are approved by the clients and the court.
- d. proposed date for the completion of discovery;
  - e. proposed date for disclosure of prospective trial witnesses;
  - f. dispositive motions;
  - g. the amount of time required for the completion of all pretrial activities and the approximate length of trial;
  - h. the issues to be tried;
  - i. the appropriateness of mediation or other alternative dispute resolution;
  - j. sufficiency of pleadings and compliance with PPR 2;
  - k. amendment of pleadings;
  - l. joinder of parties;
  - m. expert witnesses, including dates for the exchange of expert reports;
  - n. computation of damages and the nature and timing of discovery relating to damages; and
  - o. any other appropriate matter.
- 8.2. As soon as possible after that conference, the judge to whom the case is assigned must make an initial pretrial order with respect to each of the matters set forth above and set a trial date. The initial pretrial order must specifically include the court's own assessment of the applicability to the case of the proportionality factors in PPR 1.2. In arriving at that assessment, the court should consider, but is not bound by, the assessments made by the parties. Modifications to the initial pretrial order may be made only upon a showing of good cause. Except as otherwise provided by the PPR, continuances and stays must not be permitted.

*Special Committee Comment*

The Special Committee strongly agrees that the pretrial conference and pretrial order as established in Rule 16 are critically important to the goal of attaining just, expeditious, efficient, and cost-effective case management. The existing requirements of Rule 16, if they are carried out, provide judges with all the

necessary tools for proper case management. Like proposed rule 8, existing Rule 16 provides for the issuance of a pretrial order “as soon as practicable.” Rule 16 goes further than this proposed rule by actually setting outside dates (120 days after service or 90 days after appearance of defendant, whichever is earliest) for the issuance of the order. Those dates may be too lengthy, but this proposed rule does not address that problem, as it simply leaves in place the “as soon as practicable” requirement.

To the extent that proposed rule 8 differs from existing Rule 16, the Special Committee does not believe that the proposed changes are necessarily desirable. The requirement that in all civil cases a conference be held before the order issues, or that lead counsel attend in person in all cases, is not needed. There are many civil cases in the federal courts (especially cases involving review of federal government actions) where parties can agree on a pretrial order, and there is no need to appear personally before the judge or address some of the issues specified in the proposed rule. In cases where a conference is unnecessary, holding one does not advance the speedy and efficient pursuit of justice.

We also disagree that in every case discussion of “limitations” on discovery must be required or encouraged. For the majority of civil cases, the limitations already established in the rules on subject-matter, number of requests and depositions, etc., will be adequate, and special limitations need not be tailored in every case. In more complex cases, these matters will likely be part of the Rule 26(f) discussion and Rule 16 order. The existing approach of Rule 16, which makes modification of the scope of discovery (which may mean either limitation or expansion) a permitted subject of the pretrial order rather than a mandatory one is preferable.

We do not favor the approach of requiring the court and the parties to base the pretrial order on some explicit, ad hoc cost-benefit analysis created for the particular case. Neither litigants nor judges are expert in engaging in this kind of analysis, and while the balancing of costs and benefits must inform decisions about the scope of discovery if presented to the court for resolution, requiring the court in every case to make recitations about costs and benefits is likely to waste significant amounts of time and resources (or result in judges’ devising boilerplate recitations for use in standard orders) without contributing much to the quality of the pretrial order or the effective administration of the case.

The idea that the pretrial order should contain litigation “budgets” for the parties or “financial limitations” of an unspecified nature would require intrusion by the court into areas where it is likely to lack expertise and that in any event should not be within the court’s power to control. We do not agree with the suggestion that a court should be empowered to dictate how much money a party may spend on the prosecution or defense of a case.

The final provision of Rule 8.2 that “[e]xcept as otherwise provided by [these proposed rules], continuances and stays *must not be permitted*” (emphasis added) seems excessive. The proposed rules, it should be noted, have only one provision authorizing a stay (proposed Rule 6, stay of discovery pending decision on motion to dismiss) and only one providing for a continuance (proposed Rule 9.4, trial date must not be changed absent extraordinary circumstances), so the effect of the rule would be to prohibit any stays or continuances of any other events under any circumstances. This appears to be too rigid.

We do agree that it is important to establish an ambitious but practical schedule in the pretrial order and to stick to it. This principle is found in the ABA Standards for Final Pretrial Submissions and Orders (August 2008). The existing rule might be improved if it required (rather than merely permitted) not only dates for the close of discovery and the filing of dispositive motions, but also for the submission of a final pretrial order (except in cases where it is clear that the case necessarily will be resolved by motion rather than by trial). Rule 16 as it currently exists already provides that the schedule it establishes may not be altered except for good cause. That standard could perhaps be made stricter, or judges could be encouraged to adhere to it more stringently. But a provision that stays and continuances “must not be permitted” fails to account for myriad events both intrinsic and extrinsic to a case that may alter the initial predictions of the parties and the court of a reasonable time for resolving it.

**Rule Nine     Additional Pretrial Conferences/ Setting the Trial Date**

- 9.1. A party may request a special conference with the court to seek guidance on or the modification or supplementation of the court’s outstanding pretrial orders.
- 9.2. The court may hold additional status conferences on its own motion.
- 9.3. A conference may be held in person or by telephone or videoconference, at the court’s discretion.
- 9.4. If not already set in the initial pretrial order, the court must set a trial date at the earliest practicable time, and that trial date must not be changed absent extraordinary circumstances.

*Special Committee Comment*

In many cases, active judicial case management is critical to keeping litigation moving, and status conferences or additional pretrial conferences may be important case management tools (as may requiring periodic reports from the parties). Rule 16(a) already provides for the court to hold additional conferences either on its own motion or on motion of a party.

The requirement that in every case the court set a trial date at the earliest practical time, which must not be changed absent extraordinary circumstances, is not, in the Special Committee's view, desirable.

First, many civil cases in the federal courts, including thousands of Social Security cases, other cases decided on administrative records, and FOIA cases, are not resolved through trials; a requirement that a trial date be set is therefore not appropriate for all civil cases.

Second, especially in light of speedy trial rights that often require later-filed criminal cases to be given priority over civil cases, trial dates set at the earliest practicable time often will be unrealistic; or, put another way, the "earliest practicable time" to set a trial date that a judge realistically will be able to maintain may be quite late in the process.

Third, one circumstance that is not extraordinary but that should justify altering a trial date is if a substantial motion for summary judgment is unresolved on or shortly before the date set for trial.

As set forth in the ABA Standards for Final Pretrial Submissions and Orders (August 2008), we believe it is preferable for the court's initial pretrial order to set dates for the completion of discovery, the filing of dispositive motions, followed by a prompt decision and, if necessary, a final pretrial conference, with trial to be held reasonably soon (normally within six to eight weeks) after the final pretrial conference.

#### **Rule Ten      Discovery**

- 10.1. Discovery must be limited in accordance with the initial pretrial order. No other discovery will be permitted absent further court order based on a showing of good cause and proportionality.
- 10.2. Discovery must be limited to matters that would enable a party to prove or disprove a claim or defense or to impeach a witness and must comport with the factors of proportionality in PPR 1.2, including the importance of the proposed discovery in resolving the issues, total costs and burdens of discovery compared to the amount in controversy, and total costs and burdens of discovery compared to the resources of each party.

#### *Special Committee Comment*

Proposed Rule 10.1 appears unnecessary. The provisions of the pretrial order will, if and to the extent that they alter the scope of discovery, by definition be controlling, and the considerations of good cause and proportionality set forth in the rule would already apply to proposed modifications to a pretrial order on the scope of discovery.

Proposed Rule 10.2 does not appear to be preferable to the already-amended standard of relevance in Rule 26(b)(1) and the proportionality standard in Rule 26(2)(C). Proposed Rule 10.2's standard is also unduly strict: It is impossible to know whether "matters" would actually enable a party to prove or disprove something before they have been discovered. An individual matter that might not by itself enable proof of a claim or defense may nonetheless be a critical part of a mosaic of proof or lead to discovery of an element of that mosaic. In addition, matters that would prevent a party from proving or disproving a claim or defense should be as discoverable as matters that would enable such proof.

It is unclear under proposed Rule 10.2 whether discovery requests falling within the limits established by the pretrial order must also, on a request-by-request basis, satisfy the additional factors identified in the rule. At some point, the cost of surmounting the restrictions placed on the party desiring discovery would exceed the cost and efficiency savings intended by the rule.

### **Rule Eleven Expert Discovery**

- 11.1. Each expert must furnish a written report setting forth his or her opinions, and the reasons for them, and the expert's direct testimony will be strictly limited to the contents of the report. There must be no additional discovery of expert witnesses except as provided by the initial pretrial order.
- 11.2. Except in extraordinary cases, only one expert witness per party may be permitted to submit a report and testify with respect to any given issue.

### *Special Committee Comment*

Rule 26(a)(2)(B) already requires a written report of an expert that sets forth his or her opinions and their basis. Proposed Rule 11.1's additional requirement that the direct testimony must be "*strictly* limited to the contents of the report" (emphasis added) is not helpful. Because reports and testimony generally take different forms and are designed for different purposes (reports being designed to provide notice to an adversary's lawyers and experts of the expert's opinions while testimony is presented in a question and answer form calculated to convey information to a jury) there will almost always be room for debate over whether the expert has "strictly" limited testimony to the report unless the report is simply read into the record without elaboration. The current requirement that the report set forth the opinions and their bases completely is sufficient without providing a standard that is likely to generate time-consuming and distracting disputes at trial.

We note that proposed Rule 11.1's provisions concerning expert depositions contradict proposed Rule 8.1(c)(vi). The latter says that the court "may" consider precluding expert depositions, while the former says that such depositions "must not" be allowed unless the court specifically provides for them in the pretrial order. Leaving that drafting issue aside, the Special Committee is of the view that

depositions of experts are often highly informative and useful and that, like other depositions, they should not be prohibited but may be subject to reasonable limitations within the discretion of the court. It is also not realistic to expect that all issues concerning expert discovery can be effectively identified or addressed in connection with the initial pretrial order.

Finally, the Special Committee generally agrees that in most cases, one expert per issue should be the default rule, although “good cause” rather than “extraordinary circumstances” might be a preferable standard for allowing departures from the general rule.

## **Rule Twelve Costs and Sanctions**

- 12.1. The court may impose sanctions in addition to those set forth in PPR 5.5, as appropriate for any failure to provide or for unnecessary delay in providing required disclosures or discovery.
- 12.2. Sanctions may be imposed for destruction or failure to preserve electronically stored information only upon a showing of intent to destroy evidence or recklessness.

### *Special Committee Comment*

Proposed Rule 12.1 is generally superfluous, as existing provisions of the Federal Rules of Civil Procedure (in particular Rules 11 and 37) as well as the courts’ inherent authority are more than ample to empower courts to impose sanctions.

With respect to proposed Rule 12.2, the Special Committee notes that the standard for imposing sanctions for failure to provide electronically stored information was the subject of recent extensive debate leading to the addition three years ago of Federal Rule of Civil Procedure 37(e), which provides a safe harbor against sanctions for parties who fail to provide “electronic information lost as a result of the routine, good-faith operation of an electronic information system.” We do not think that reopening that debate, which involves the substantive standard for imposing sanctions only for one type of discovery failure, is likely to be beneficial in the context of an effort to consider more broadly the proper shape of a system of civil procedure. Negligence, in some circumstances, may fairly warrant sanctions. This inquiry should be for the trial court to decide.