ADVISORY COMMITTEE
ON
CIVIL RULES

Washington, DC
October 30-31, 2014

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ADVISORY COMMITTEE ON CIVIL RULES

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Liaison for the Advisory Committee on Criminal Rules	**Judge Amy J. St. Eve**	***(Standing)***
Liaison for the Advisory Committee on Evidence Rules		***(Bankruptcy)***
Liaison for the Advisory Committee on Evidence Rules	**Judge Paul S. Diamond**	***(Civil)***
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TAB 1

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COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of May 29–30, 2014
Washington, D.C.
Draft Minutes as of September 22, 2014

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ATTENDANCE

The mid-year meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Washington, D.C., on Thursday and Friday, May 29 and 30, 2014. The following members participated in the meeting:

Judge Jeffrey S. Sutton, Chair
Dean C. Colson, Esquire
Roy T. Englert, Jr., Esquire
Gregory G. Garre, Esquire
Judge Neil M. Gorsuch
Judge Susan P. Graber
Chief Justice Wallace B. Jefferson
Dean David F. Levi
Judge Patrick J. Schiltz
Judge Amy J. St. Eve
Larry D. Thompson, Esquire
Judge Richard C. Wesley
Judge Jack Zouhary

Deputy Attorney General James M. Cole was unable to attend. Stuart Delery, Esq., Assistant Attorney General for the Civil Division, Elizabeth J. Shapiro, Esq., Theodore Hirt, Esq., Allison Stanton, Esq., Rachel Hines, Esq., and J. Christopher Kohn, Esq., represented the Department of Justice at various times throughout the meeting.

Professor R. Joseph Kimble, the committee's style consultant, participated. Judge Jeremy D. Fogel, Director of the Federal Judicial Center, also participated. Judge Michael A. Chagares, member of the Appellate Rules Committee and chair of the CM/ECF Subcommittee, also participated. Judge John G. Koeltl, member of the Civil Rules Committee and chair of that committee's Duke Subcommittee, participated in part of the meeting by telephone.

Providing support to the committee were:

Professor Daniel R. Coquillette	The committee's reporter
Jonathan C. Rose	The committee's secretary and Rules Committee Officer
Benjamin J. Robinson	Deputy Rules Officer
Julie Wilson	Rules Office Attorney
Andrea L. Kuperman	Chief Counsel to the Rules Committees
Tim Reagan	Senior Research Associate, Federal Judicial Center
Emery G. Lee, III	Senior Research Associate, Federal Judicial Center
Catherine Borden	Research Associate, Federal Judicial Center
Scott Myers	Attorney in the Bankruptcy Judges Division
Bridget M. Healy	Attorney in the Bankruptcy Judges Division
Frances F. Skillman	Rules Office Paralegal Specialist
Toni Loftin	Rules Office Administrative Specialist

Representing the advisory committees were:

Advisory Committee on Appellate Rules —
Judge Steven M. Colloton, Chair
Professor Catherine T. Struve, Reporter
Advisory Committee on Bankruptcy Rules —
Judge Eugene R. Wedoff, Chair
Professor S. Elizabeth Gibson, Reporter
Professor Troy A. McKenzie, Associate Reporter
Advisory Committee on Civil Rules —
Judge David G. Campbell, Chair
Professor Edward H. Cooper, Reporter
Professor Richard L. Marcus, Associate Reporter
Advisory Committee on Criminal Rules —
Judge Reena Raggi, Chair
Professor Sara Sun Beale, Reporter

Professor Nancy J. King, Associate Reporter
Advisory Committee on Evidence Rules —
Judge Sidney A. Fitzwater, Chair

Professor Daniel J. Capra, Reporter to the Evidence Rules Committee, was unable to attend.

INTRODUCTORY REMARKS

Judge Sutton opened the meeting by welcoming everyone and thanking the Rules Office staff for arranging the logistics of the meeting and the committee dinner. Judge Sutton reported that all of the rules proposals that were before the Supreme Court were approved in April, including the proposed amendment to Criminal Rule 12, which had been modified as agreed at the January Standing Committee meeting. The proposals to amend the Bankruptcy Rules to respond to *Stern v. Marshall* were withdrawn for the time being, while the committee waits to see what the Supreme Court does in *Executive Benefits Insurance Agency v. Arkison*, which may address an issue involved in the *Stern* proposals.

Judge Sutton also noted that the term of Chief Justice Wallace Jefferson, the committee's state court representative, was coming to a close. He said that Chief Justice Brent Dickson, of the Indiana Supreme Court, would succeed Chief Justice Jefferson as the state court representative. Judge Sutton thanked Chief Justice Jefferson for his wonderful service to the committee, described some of Justice Jefferson's outstanding contributions to the committee's work and some of his accomplishments outside the committee, and presented him with a plaque signed by Judge John Bates, Director of the Administrative Office, and by Chief Justice John G. Roberts. Chief Justice Jefferson expressed his thanks to the committee for a terrific experience and for doing such good work for the nation.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee unanimously approved the minutes of the last meeting, held on January 9–10, 2014.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Campbell and Professors Cooper and Marcus presented the report of the advisory committee, as set out in Judge Campbell's memorandum and attachments of May 2, 2014 (Agenda Item 2).

Amendments for Final Approval

DUKE RULES PACKAGE
(FED. R. CIV. P. 1, 4, 16, 26, 30, 31, 33, 34, AND 37)

Judge Campbell reported that the Civil Rules Committee had a final proposed package of amendments to implement the ideas from the Civil Litigation Conference held at Duke Law School in May 2010 ("Duke Conference"). He noted that the Duke Conference was intended to look at the Civil Rules generally and whether they are working and what needs to be improved. The conclusion from that Conference, he said, was that the rules generally work well, but that improvement was needed in three areas: (1) proportionality; (2) cooperation among counsel; and (3) early, active judicial case management. The advisory committee had eventually narrowed the list of possible amendments to address these areas and had published its proposals for public comment in August 2013. Judge Campbell reported that there was great public interest in the proposals, with the public comment period generating over 2,300 comments and over 40 witnesses at each of three public hearings. Judge Campbell believed that the response of the bar and the public demonstrated the continuing vitality of the Rules Enabling Act process, and he stated that the comments the committee received were very helpful in refining the proposals. He also expressed gratitude to the reporters for their excellent work in reviewing and summarizing all of the testimony and comments.

Judge Campbell next explained that the advisory committee had made a number of changes to the published proposals to address issues raised during the public comment period. In addition, the advisory committee had decided not to recommend for final adoption the published proposals to place presumptive limits on certain types of discovery devices.

Judge Campbell and Professor Cooper reported that the advisory committee proposed a few changes to some committee note language that appeared in the Standing Committee agenda materials. First, the advisory committee proposed to take out some language in the committee note for Rule 26. The proposed revised committee note would remove the language in the committee note appearing in the agenda book at page 85, lines 277 to 289. The deleted matter provided additional background on the 2000 amendment to Rule 26 that had moved subject-matter discovery from party-controlled discovery to court-managed discovery. Professor Cooper explained that the deleted language was unnecessary. Second, a paragraph was added after line 262 on page 84 of the agenda materials, to encourage courts and parties to consider computer-assisted searches as a means of reducing the cost of producing electronically stored information, thereby addressing possible proportionality concerns that might arise in ESI-intensive cases.[1] Third, Judge Campbell reported

[1] The added language stated:

> The burden or expense of proposed discovery should be determined in a realistic way. This includes the burden or expense of producing electronically stored information. Computer-based methods of searching such information continue to develop, particularly for cases involving large volumes of electronically stored information. Courts and parties should be willing to consider the opportunities for reducing the burden or expense of discovery as reliable means of searching electronically stored

that the proposal to amend Rule 1, which will emphasize that the court and the parties bear responsibility for securing the just, speedy, and inexpensive resolution of the case, now includes some added committee note language that was not in the agenda materials. The added language would make it clear that the change was not intended to create a new source for sanctions motions. The proposed added language would state: "This amendment does not create a new or independent source of sanctions. Neither does it abridge the scope of any other of these rules."

A member commented that the Duke package is "awesome" and that the advisory committee had done a marvelous job. He added that the problems being addressed are intractable, difficult problems, complicated by the commitment to transsubstantivity. He said that the advisory committee had invited as much participation as possible and he believed the proposals could make a real difference in meeting the goals of Rule 1. He added that the committee would need to continue to evaluate the rules to make sure the system is working well. He congratulated Judge Koeltl (the chair of the Duke Subcommittee), Judge Campbell, Judge Sutton, and the reporters for putting together a great package. Other members added their gratitude and commended the good work and extraordinary effort.

A member asked whether a portion of the proposal to amend Rule 34(b)(2)(B)—that "The production must then be completed no later than the time for inspection stated in the request or another reasonable time stated in the response"—would allow a responding party to simply state that it would produce documents at a reasonable time without providing a specific date. Another member suggested a friendly amendment that would revise the proposal to state: "If production is not to be completed by the time for inspection stated in the request, then the response must identify another date by which production will occur." After conferring with the reporters, Judge Campbell reported that the idea was to make the provision in Rule 34(b)(2)(B) parallel Rule 34(b)(1)(B), which states that a request "must specify a reasonable *time* . . . for the inspection . . ." (emphasis added). For that reason, it was necessary to retain "time" in the proposed revision to Rule 34(b)(2)(B), instead of substituting "date." However, the advisory committee changed its proposal to refer to "specified" instead of "stated," to emphasize that it would not be sufficient to generally state that the production would occur at a reasonable time. He noted that the proposed advisory committee note already stated that "[w]hen it is necessary to make the production in stages the response should specify the beginning and end dates of the production." A motion was made to change "stated" to "specified" in the proposal, so that it would read: "The production must then be completed no later than the time for inspection specified in the request or another reasonable time specified in the response." The motion passed unanimously.

The Duke package of proposed amendments passed by a unanimous vote. Judge Sutton thanked Judge Koeltl for his tireless work on the Duke Conference and on this very promising set of proposed amendments, as well as Judge Campbell and the rest of his team.

The committee unanimously approved the Duke package of proposed amendments to

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information become available.

the Civil Rules, revised as stated above, to be submitted for final approval by the Judicial Conference.

FED. R. CIV. P. 37(e)

Judge Campbell reported on the proposed amendment to Rule 37(e), which is intended to give better guidance to courts and litigants on the consequences of failing to preserve information for use in litigation. He said that comments on the version that was published for public comment were extensive, and the advisory committee had substantially revised the rule to address issues raised by the comments. The subcommittee and the advisory committee decided that the following guiding principles should be implemented in the revised proposal: (1) It should resolve the circuit split on the culpability standard for imposing certain severe sanctions; (2) It should preserve ample trial court discretion to deal with the loss of information; (3) It should be limited to electronically stored information; and (4) It should not be a strict liability rule that would automatically impose serious sanctions if information is lost. Judge Campbell explained that the rule text and committee note had been revised after publication in line with these principles.[2]

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[2] Judge Campbell also noted that the advisory committee's final proposal revised the committee note that was included in the agenda materials for the Standing Committee's meeting. Specifically, the paragraphs on pages 322–23, lines 170–91 were revised as follows:

> Subdivision (e)(2) requires a finding that the party acted with the intent to deprive another party of the information's use in the litigation. This finding may be made by the court when ruling on a pretrial motion, when presiding at a bench trial, or when deciding whether to give an adverse inference instruction at trial. If a court were to conclude that the intent finding should be made by a jury, the court's instruction should make clear that the jury may infer from the loss of the information that it was unfavorable to the party that lost it only if the jury first finds that the party acted with the intent to deprive another party of the information's use in the litigation. If the jury does not make this finding, it may not infer from the loss that the information was unfavorable to the party that lost it.
>
> Subdivision (e)(2) does not include a requirement that the court find prejudice to the party deprived of the information. This is because the finding of intent required by the subdivision can support not only an inference that the lost information was unfavorable to the party that intentionally destroyed it, but also an inference that the opposing party was prejudiced by the loss of information that would have favored its position. Subdivision (e)(2) does not require any further finding of prejudice.
>
> Courts should exercise caution, however, in using the measures specified in (e)(2). Finding an intent to deprive another party of the lost information's use in the litigation does not require a court to adopt any of the measures listed in subdivision (e)(2). The remedy should fit the wrong, and the severe measures authorized by this subdivision should not be used when the information lost was relatively unimportant or lesser measures such as those specified in subdivision (e)(1) would be sufficient to redress the loss.
>
> ~~Subdivision (e)(2) does not include an express requirement that the court find prejudice to the party deprived of the information. The adverse inference permitted under this subdivision can itself satisfy the prejudice requirement: if a court or jury infers the lost information was unfavorable to the party that lost it, the same inference suggests that the opposing party was prejudiced by the loss.~~

The committee engaged in discussion on the proposal. After considering some suggestions and discussing them with the reporters, the advisory committee agreed to make a suggested change to delete "may" in line 9 on page 318 of the agenda materials, and to add "may" on line 10 before "order," and on line 13 after "litigation." Judge Campbell stated that he and the reporters agreed that this change adds more emphasis to the word "only" on line 12, underscoring the intent that (e)(2) measures are not available under (e)(1).

A member commented that, in looking at this proposal from multiple perspectives, it is going to be very helpful and is clearly needed. He added his congratulations to the advisory committee for their terrific work.

The committee unanimously approved the proposed amendment to Rule 37(e), revised as stated above, to be submitted for final approval by the Judicial Conference.

FORMS
(FED. R. CIV. P. 84 AND 4 AND APPENDIX OF FORMS)

Judge Campbell reported on the proposal to abrogate Rule 84 and the Appendix of Forms. He said that there were relatively few comments on this proposal and that the advisory committee remained persuaded after reading the comments that the forms are rarely used and that the best course is abrogation. Professor Cooper added that Forms 5 and 6 on waiver of service would be incorporated into Rule 4.

A member suggested that he thought the sense of the committee was that forms can be and are extremely important in helping lawyers and pro se litigants, but that the advisory committee should no longer bear responsibility for them. He added that he favored abrogation, but the advisory committee should continue to have a role in shaping the forms, perhaps by participating in a group at the Administrative Office (AO) that can handle the forms, helping to draft model forms, and/or having a right of first refusal on forms drafted by the AO. Judge Sutton agreed that forms are very useful and that this proposal is simply about getting them out of the Rules Enabling Act process. He added that there are many options in terms of how civil forms are handled if the abrogation goes into effect and suggested that the advisory committee consider what it thinks its role should be in shaping the forms going forward. He suggested that the advisory committee present its suggestion in that regard for discussion at the next Standing Committee meeting in January.

The committee unanimously approved the proposed amendments to abrogate Rule 84 and the Appendix of Forms, and to amend Rule 4 to incorporate Forms 5 and 6, to be submitted for final approval by the Judicial Conference.

~~In addition, there may be rare cases where a court concludes that a party's conduct is so reprehensible that serious measures should be imposed even in the absence of prejudice. In such rare cases, however, the court must still find the intent specified in subdivision (e)(2).~~

Judge Sutton congratulated and praised Judge Campbell, the reporters, and the subcommittee chairs for all their hard work and terrific leadership and insight in bringing the Duke proposals, the Rule 37(e) amendments, and the Rule 84 amendment to the Standing Committee. He added that all three sets of proposals were done through consensus, which is a credit to the chairs of the subcommittees and the chair of the advisory committee. He also said that many of these proposals started with former Civil Rules Committee and Standing Committee chairs Judge Lee H. Rosenthal and Judge Mark R. Kravitz. This package of amendments, he said, was a wonderful tribute to Judge Kravitz's memory. Judge Sutton added that the way to thank the chairs and reporters for all of their work on these proposals is to make sure they make a difference in practice. He said that in the near future, the Standing Committee should discuss these amendments in terms of broader reform, including pilot projects and judicial education efforts, to make sure that they are making a difference on the ground. Judge Campbell expressed his thanks to Judge Grimm, for his tireless efforts on Rule 37, and to Judge Sutton for all of his insight and time in overseeing the work on these proposals.

FED. R. CIV. P. 6(d)

Professor Cooper reported that the advisory committee had also published an amendment to Rule 6(d) that would revise the rule to provide that the three added days provided for actions taken after certain types of service apply only after being served, not after "service" more generally. Few comments were received and no changes were made after publication. Judge Campbell said that the advisory committee recommended approving this proposal, but not sending it on to the Judicial Conference yet, so that it can be presented together with another proposed amendment to Rule 6(d), which would remove the three added days for electronic service and which was being proposed for publication.

The committee unanimously approved the proposed amendment to Rule 6(d), to be submitted for final approval by the Judicial Conference at the appropriate time.

FED. R. CIV. P. 55(c)

Professor Cooper reported that the final proposal that was published for public comment in 2013 was a proposal to amend Rule 55(c) to make explicit that only a final default judgment could be set aside under Rule 60(b).

The committee unanimously approved the proposed amendment to Rule 55(c) to be submitted for final approval by the Judicial Conference.

Amendments for Publication

FED. R. CIV. P. 82

Professor Cooper reported that at its January 2014 meeting, the Standing Committee had approved for publication at a suitable time an amendment to Rule 82 to reflect enactment of a new

venue statute for civil actions in admiralty. Since January, further reflection had led the advisory committee to believe that a cross-reference in the rule to 28 U.S.C. § 1391 should be deleted and that the text should be further revised to reflect the language of new § 1390. The advisory committee renewed its recommendation to publish the proposal, as revised.

The committee unanimously approved publication of the proposed amendment to Rule 82.

FED. R. CIV. P. 4(m)

Professor Cooper reported on the recommendation to publish a clarifying amendment to Rule 4(m) to ensure that service abroad on a corporation is excluded from the time for service set by Rule 4(m).

The committee unanimously approved publication of the proposed amendment to Rule 4(m).

REPORT OF THE INTER-COMMITTEE CM/ECF SUBCOMMITTEE

Judge Chagares presented the report of the CM/ECF Subcommittee, as set out in his memorandum of May 5, 2014 (Agenda Item 3).

Amendments for Publication

FED. R. APP. P. 26(c), FED. R. BANKR. P. 9006, FED. R. CIV. P. 6, FED. R. CRIM. P. 45

Judge Chagares reported that the subcommittee had been working with the advisory committees for the Appellate, Bankruptcy, Civil, and Criminal Rules on proposals to remove the provisions in each set of rules that currently provide three extra days for acting after electronic service. Each advisory committee recommended an amendment to its set of rules for publication. The subcommittee had unanimously supported the recommendation of the advisory committees to publish these amendments for public comment. The amendments to eliminate the "three-day rule" as applied to electronic service would be to Appellate Rule 26(c), Bankruptcy Rule 9006, Civil Rule 6, and Criminal Rule 45.

Judge Sutton noted that a Standing Committee member had asked at the last Standing Committee meeting whether other types of service should be removed from the three-day rule. Judge Chagares said that question would take some study and for the time being the only recommendation of the subcommittee was to take electronic service out of the three-day rule. Judge Sutton added that the advisory committees would each study that question separately.

A member suggested removing "in" before "widespread skill" in the last sentence of the second paragraph of each of the draft committee notes. The reporters all agreed to make that change.

The committee unanimously approved publication of the proposed amendments to Appellate Rule 26(c), Bankruptcy Rule 9006, Civil Rule 6, and Criminal Rule 45, with the change to the committee notes described above.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Raggi and Professors Beale and King presented the report of the advisory committee, as set out in Judge Raggi's memorandum and attachments of May 5, 2014 (Agenda Item 4).

Amendments for Publication

FED. R. CRIM. P. 4

Judge Raggi reported that the advisory committee recommended publication of an amendment to Rule 4 to address service of summons on organizational defendants who are abroad. The proposed amendment would: (1) specify that the court may take any action authorized by law if an organizational defendant fails to appear in response to a summons, filling a gap in the current rule; (2) for service of a summons on an organization within the United States, eliminate the requirement of a separate mailing to an organizational defendant when delivery has been made to an officer or to a managing or general agent, but require mailing when delivery has been made on an agent authorized by statute, if the statute requires mailing to the organization; and (3) authorize service on an organization at a place not within a judicial district of the United States, prescribing a non-exclusive list of methods for service.

A member suggested making it clearer in the proposed additional sentence in Rule 4(c)(2) that the reference to the summons under Rule 41(c)(3)(D) is to summons to an organization. Judge Raggi agreed to change the sentence to: "A summons to an organization under Rule 41(c)(3)(D) may also be served at a place not within a judicial district of the United States."

Another member asked about the phrase "authorized by law" in the proposed amendment to Rule 4(a), asking whether it clarifies what actions a judge can take if an organizational defendant fails to appear in response to a summons. The committee discussed whether to add "United States" before "law," and decided to include that addition in the version published for public comment, noting that including it would be more likely to elicit comments on whether it was helpful.

Another member suggested that, in the illustrative list of means of giving notice in proposed Rule 4(c)(3)(D)(ii), "stipulated by the parties" be changed to "agreement of the organization" or that the list add "agreed to by the party." Judge Raggi explained that a stipulation implied a certain level of formality and that the list was merely illustrative. She said she could not agree to this change without going back to the advisory committee. The member stated that his suggestion could just be considered the first comment of the public comment period.

The member also suggested that on page 492, line 58, in proposed Rule 4(c)(3)(D)(i),

"another agent" be changed to "an agent" to avoid implying that foreign law always authorizes officers and managing or general agents to receive notice. Judge Raggi agreed to accept that suggestion, noting that it reflected the advisory committee's intent.

The committee unanimously approved publication of the proposed amendment to Rule 4, revised as noted above.

FED. R. CRIM. P. 41

Judge Raggi reported that the advisory committee recommended publishing an amendment to Rule 41, to provide that in two specific circumstances a magistrate judge in a district where activities related to a crime may have occurred has authority to issue a warrant to use remote access to search electronic storage media and seize or copy electronically stored information even when the media or information is or may be located outside of the district. Judge Raggi explained that this proposal came about because the Department of Justice had encountered special difficulties with Rule 41's territorial venue provisions—which generally limit searches to locations within a district—as applied to investigating crimes involving electronic information.

The current limits on where a warrant application must be made make it difficult to secure a search warrant in two specific situations: First, when the location of the storage media or electronic information to be searched, copied, or seized is not known because the location has been disguised through the use of anonymizing software, and second, when a criminal scheme involves multiple computers located in many different districts, such as a "botnet" in which perpetrators obtain control over numerous computers of unsuspecting victims. Judge Raggi explained that proposed new subparagraph (b)(6)(A) addresses the first scenario. It would provide authority to issue a warrant to use remote electronic access to search electronic storage media and to seize or copy electronically stored information within or outside the district when the district in which the media or information is located has been concealed through technological means. Proposed (b)(6)(B) addresses the second scenario. It would eliminate the burden of attempting to secure multiple warrants in numerous districts and allow a single judge to issue a warrant to search, seize, or copy electronically stored information by remotely accessing multiple affected computers within or outside a district, but only in investigations of violations of 18 U.S.C. § 1030(a)(5), where the media to be searched are "protected computers" that have been "damaged without authorization" (terms defined in 18 U.S.C. § 1030(e)(2) & (8)) and are located in at least five different districts. Judge Raggi added that the proposed amendments affect only the district in which a warrant may be obtained and would not alter the requirements of the Fourth Amendment for obtaining warrants, including particularity and probable cause showings.

She noted that the proposal also includes a change to Rule 41(f)(1)(C), to ensure that notice that a search has been conducted will be provided for searches by remote access as well as physical searches. The rule now requires that notice of a physical search be provided "to the person from whom, or from whose premises, the property was taken" or left "at the place where the officer took the property." The proposed addition to the rule would require that when the search is by remote

access, reasonable efforts must be made to provide notice to the person whose information was seized or whose property was searched.

The committee unanimously approved publication of the proposed amendment to Rule 41.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Colloton and Professor Struve presented the report of the advisory committee, as set out in Judge Colloton's memorandum and attachments of May 8, 2014 (Agenda Item 5).

Amendments for Publication

Judge Colloton reported that the advisory committee had five proposals it recommended for publication. The first, the proposed amendment to Rule 26(c) to eliminate the three-day rule for electronic service, was already addressed during the CM/ECF Subcommittee's report.

INMATE FILING RULES
(FED. R. APP. P. 4(c)(1) AND 25(a)(2)(C), FORMS 1 AND 5, AND NEW FORM 7)

Judge Colloton reported that the advisory committee recommended publishing a set of amendments designed to clarify and improve the inmate-filing rules. The amendments to Rules (4)(c)(1) and 25(a)(2)(C) would make clear that prepayment of postage is required for an inmate to benefit from the inmate-filing provisions, but that the use of an institution's legal mail system is not. The amendments clarify that a document is timely filed if it is accompanied by evidence—a declaration, notarized statement, or other evidence such as a postmark and date stamp—showing that the document was deposited on or before the due date and that postage was prepaid. New Form 7 is a suggested form of declaration that would satisfy the rule. Forms 1 and 5 (suggested forms of notices of appeal) are revised to include a reference alerting filers to the existence of Form 7.

Professor Struve noted that a few stylistic changes had been made to the proposals in the Standing Committee's agenda materials. First, in Rule 4(c)(1)(B), on page 560, lines 3–4, "meets the requirements of" was changed to "satisfies." A similar change was made to Rule 25(a)(2)(C)(ii), on page 562, lines 9–10. In Rule 25(a)(2)(C)(i), subdivisions (a) and (b), on pages 561 and 562, would become bullet points. As a result, in Rule 25(a)(2)(C)(ii), the cross-reference to Rule 25(a)(2)(C)(i)(a) would refer only to Rule 25(a)(2)(C)(i).

A member noted that in Rule 4(c)(1)(A)(ii), the "it" on page 559, line 20, referred to the "notice" referenced quite a bit earlier in the rule. Judge Colloton agreed to make revisions to clarify the reference. In Rule 4(c)(1)(A)(ii), "it" was changed to "the notice." A corresponding change was made to Rule 25(a)(2)(C)(i), changing "it" to "the paper" on page 562, line 5. Finally, the advisory committee agreed to change "and" to "or" in Rule 25(a)(2)(C)(i), on page 562, line 4, and in Rule 4(c)(1)(A)(ii), page 559, line 20, so that evidence such as a postmark or a date stamp would suffice.

Professor Struve said that, at the suggestion of a committee member, the advisory committee would consider whether to change the references in Rule 4(c)(1)(B) and Rule 25(a)(2)(C)(ii) from "exercises its discretion to permit" to simply "permits." She said that the committee would also consider a member's suggestion that the rules need not suggest the option of getting a notarized statement when a declaration would suffice. She said these suggestions would be brought to the advisory committee for consideration as it works through the comments on the published draft.

The committee unanimously approved publication of the proposed amendments to Rules 4(c)(1) and 25(a)(2)(C), revised as noted above, and to Appellate Forms 1 and 5, and proposed new Form 7.

FED. R. APP. P. 4(a)(4)

Judge Colloton reported that the advisory committee recommended publishing a proposed amendment to Rule 4(a)(4) to address a circuit split on whether a motion filed outside a non-extendable deadline under Civil Rules 50, 52, or 59 counts as "timely" under Rule 4(a)(4) if a court has mistakenly ordered an "extension" of the deadline for filing the motion. The proposal is to adopt the majority approach, which is that postjudgment motions made outside the deadlines set by the Civil Rules are not "timely" under Rule 4(a)(4).

The committee unanimously approved publication of the proposed amendment to Rule 4(a)(4).

LENGTH LIMITS
(FED. R. APP. P. 5, 21, 27, 28.1, 32, 35, AND 40, AND FORM 6)

Judge Colloton reported that the advisory committee recommended publishing a set of proposals to address length limits. The proposed amendments to Rules 5, 21, 27, 35, and 40 would impose type-volume limits for documents prepared using a computer, and would maintain the page limits currently set out in the rules for documents prepared without the aid of a computer. They would also employ a conversion ratio of 250 words per page for these rules. The proposed amendments also shorten Rule 32's word limits for briefs to reflect the pre-1998 page limits multiplied by 250 words. The word limits set by Rule 28.1 for cross-appeals are correspondingly shortened. Finally, the proposals add a new Rule 32(f), setting out a list of items that can be excluded when computing a document's length.

A member asked why it was necessary to have line limits in addition to word limits. Judge Colloton agreed that the advisory committee would examine that question in the future, but he said that it would require careful consideration and the advisory committee recommended publishing the current proposals for now.

The committee unanimously approved publication of the proposed amendments to

Appellate Rules 5, 21, 27, 28.1, 32, 35, and 40, and to Form 6.

FED. R. APP. P. 29

Judge Colloton reported that the advisory committee recommended publishing an amendment to Rule 29, addressing amicus filings in connection with rehearing. The amendment would re-number the existing rule as Rule 29(a) and would add Rule 29(b) to set default rules for the treatment of amicus filings in connection with petitions for rehearing.

Judge Colloton noted that two stylistic changes were made to the version that appeared in the Standing Committee's agenda materials. First, on page 584, line 14, in proposed Rule 29(b)(2), "Rule 29(a)(2) applies" was changed to "Rule 29(a)(2) governs the need to seek leave." Second, on page 584, line 16, in proposed Rule 29(b)(3), "the" was changed to "a."

The committee discussed whether Rule 29(b)(2) should incorporate any of the language of Rule 29(a)(2). Some members noted that some appellate courts do not allow the filing of amicus briefs without leave of court, because a practice had developed of filing amicus briefs in order to force recusals. Judge Colloton agreed, on behalf of the advisory committee, to borrow some of the language from Rule 29(a)(2) for use in Rule 29(b)(2). The proposed amendment to Rule 29(b)(2) would read: "The United States or its officer or agency or a state may file an amicus-curiae brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court." Judge Sutton noted that Rule 29(a), which allows filing amicus briefs by consent during initial consideration of a case on the merits, may be in tension with some circuits' practice, and suggested that the advisory committee consider whether it should be changed in the future. Judge Colloton agreed that the advisory committee would add Rule 29(a) to its agenda.

The committee unanimously approved publication of the proposed amendment to Rule 29, revised as stated above.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Fitzwater presented the report of the advisory committee, as set out in his memorandum and attachment of April 10, 2014 (Agenda Item 6). Judge Fitzwater noted that the advisory committee had no action items to present.

Informational Items

Judge Fitzwater reported that, in connection with its spring meeting, the advisory committee had worked with the University of Maine School of Law to host a symposium on the challenges of electronic evidence. He said that no concrete rules proposals came out of the symposium, but that it set the stage for issues that the advisory committee will need to monitor going forward.

Judge Fitzwater said that the advisory committee is examining a possible amendment to Rule

803(16), the hearsay exception for "ancient documents," and that it will discuss the matter further at its fall meeting.

The Standing Committee's liaison to the Evidence Rules Committee commented that Judge Fitzwater's term as chair was drawing to a close and that he had greatly admired Judge Fitzwater's leadership. He expressed his personal gratitude for Judge Fitzwater's exceptional leadership and reported that Judge Bill Sessions would serve as the next chair. Judge Sutton echoed the praise and gratitude.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Wedoff and Professors Gibson and McKenzie presented the report of the advisory committee, as set out in Judge Wedoff's memorandum and attachments of May 6, 2014 (Agenda Item 7).

Amendments for Final Approval

OFFICIAL FORMS 17A, 17B, AND 17C

Professor Gibson reported that an amendment to Form 17A and new Forms 17B and 17C had been published for comment in connection with the revision of the bankruptcy appellate rules. Form 17A and new Form 17B would implement the provisions of 28 U.S.C. § 158(c)(1) that permit an appellant and an appellee to elect to have an appeal heard by the district court in districts for which appeals to a bankruptcy appellate panel have been authorized. New Form 17C would be used by a party to certify compliance with the provisions of the bankruptcy appellate rules that prescribe limitations on brief length based on number of words or lines of text. Professor Gibson reported that no comments had been received, that the advisory committee had unanimously approved the proposals, and that the advisory committee recommended them to be approved and take effect in December of this year. Professor Gibson noted that there was a typographical error on page 702 of the agenda materials, and that the reference to "U.S.C. § 158(c)(1)" should say "28 U.S.C. § 158(c)(1)."

The committee unanimously approved the proposed amendments to Form 17A and new Forms 17B and 17C, with the revision stated above, for submission to the Judicial Conference for final approval.

OFFICIAL FORMS 3A AND 3B

Judge Wedoff reported that the advisory committee recommended amending Forms 3A and 3B to eliminate references to filing fees, because those amounts are subject to periodic changes by the Judicial Conference that can render the forms inaccurate. Judge Wedoff said that since the amendments were technical in nature, publication was not needed.

The committee unanimously approved the proposed amendments to Forms 3A and 3B for submission to the Judicial Conference for final approval without publication.

OFFICIAL FORMS 22A-1, 22A-1 SUPP, 22A-2, 22B, 22C-1, AND 22C-2

Judge Wedoff reported that the advisory committee recommended approval of the amendments to the modernized "means test" forms that were originally published in 2012 and then republished in 2013. Judge Wedoff said that the comments on the republished drafts were generally favorable, but that the advisory committee had made several changes after publication to take account of some of the suggestions made during the public comment period.

The committee unanimously approved the proposed amendments to Forms 22A-1, 22A-1 Supp, 22A-2, 22B, 22C-1, and 22C-2 for submission to the Judicial Conference for final approval.

MODERNIZED INDIVIDUAL FORMS
(OFFICIAL FORMS 101, 101A, 101B, 104, 105, 106SUM, 106A/B,
106C, 106D, 106E/F, 106G, 106H, 106DEC, 107, 112, 119, 121, 318, 423, AND 427)

Professor Gibson reported that the advisory committee recommended approving the modernized forms for individual-debtor cases that were published in 2013. She explained the process used by the subcommittee and the advisory committee to carefully review the comments and make changes as needed. She added that some of the comments had made suggestions outside the scope of the modernization project, and that the advisory committee had noted those for consideration at a later date. Professor Gibson said that the advisory committee recommended approving the forms, but making their effective date correspond with the non-individual modernized forms recommended for publication this summer, making the earliest possible effective date December 1, 2015.

The committee unanimously approved the proposed amendments to the modernized forms for individual-debtor cases for submission to the Judicial Conference for final approval at the appropriate time, likely in 2015.

Amendments for Publication

MODERNIZED FORMS FOR NON-INDIVIDUALS
(OFFICIAL FORMS 11A, 11B, 106J, 106J-2, 201, 202, 204, 205,
206SUM, 206A/B, 206D, 206E/F, 206G, 206H, 207, 309A, 309B, 309C, 309D, 309E)

Professor Gibson reported that the nearly final installment of the Forms Modernization Project consisted primarily of case-opening forms for non-individual cases, chapter 11-related forms, the proof of claim form and supplements, and orders and court notices for use in all types of cases. The advisory committee also sought to publish two revised individual debtor forms and the

abrogation of two official forms.

At the suggestion of a committee member, Judge Wedoff agreed to revise the instructions at the top of Form 106J-2 to make it clear that the form requests only expenses personally incurred, not those that overlap with the expenses reported on Form 106J.

The committee unanimously approved publication of the modernized forms for non-individuals, described above and with the revision described above.

CHAPTER 13 PLAN FORM AND RELATED AMENDMENTS
(OFFICIAL FORM 113 AND FED. R. BANKR. P. 2002, 3002, 3007, 3012, 3015, 4003, 5009, 7001, AND 9009)

Judge Wedoff reported that the chapter 13 plan form had been published for comment in August 2013, that the advisory committee had revised the form in response to public comments, and that it now recommended republication in August 2014. Judge Wedoff noted that one improvement in the revised form is that it adds an instruction that clarifies that the form sets out options that may be appropriate in some cases, but the presence of an option on the form does not indicate that the option is appropriate in all circumstances or that it is permissible in all judicial districts. A member asked whether that should be done on all of the forms to avoid needing to tweak forms every time a decision changes the applicability of some aspect of a form. Judge Wedoff said that the advisory committee would consider whether it might be appropriate to amend Rule 9009 to state that the presence of an option on a form does not mean that it is always applicable. But he said that such an amendment should be pursued separately from the current proposal to amend the chapter 13 plan form.

Judge Wedoff explained that because of the significant changes to the proposed form, the advisory committee recommended republication. As to the related rule amendments that were published in 2013, Judge Wedoff said that republication was probably not necessary, but that the advisory committee recommended republication of the rule amendments so that they could remain part of the same package as the plan form. He said that republication of the rules would delay the package by a year because, under the Rules Enabling Act, the rules would not go into effect until at least 2016 if they are republished this year. But, he said, the advisory committee did not think it wise to put the rule amendments into effect without the related form that was the driving force behind the amendments. Professor McKenzie described the proposed rule amendments and the changes made after publication, most of which were minor. He said the request for comment would seek input as to whether the rule amendments should go into effect even if the advisory committee were to decide not to proceed with the plan form.

The committee unanimously approved publication of the revised chapter 13 plan form and related amendments to Rules 2002, 3002, 3007, 3012, 3015, 4003, 5009, 7001, and 9009.

FED. R. BANKR. P. 3002.1

Judge Wedoff reported that the advisory committee recommended proposed amendments to Rule 3002.1, which applies in chapter 13 cases and requires creditors whose claims are secured by a security interest in the debtor's principal residence to provide the debtor and trustee certain information about the mortgage while the bankruptcy case is pending. The proposed amendments would clarify when the rule applies and when its requirements cease.

The committee unanimously approved publication of the proposed amendment to Rule 3002.1.

OFFICIAL FORM 410A

Judge Wedoff reported that the advisory committee recommended publication of amendments to Official Form 410A (currently Form 10A), the Mortgage Proof of Claim Attachment that is required to be filed in an individual debtor case with the proof of claim of a creditor that asserts a security interest in the debtor's principal residence. The advisory committee recommended publication of a revised form that would replace the existing form with one that requires a mortgage claimant to provide a loan payment history and other information about the mortgage claim, including calculations of the claim and the arrearage amounts. Judge Wedoff noted that there was one typographical error in the draft in the Standing Committee's agenda materials. On page 1103, the reference to Rule 3001(c)(2)(A) should be to the Federal Rules of Bankruptcy Procedure, not the Federal Rules of Civil Procedure.

The committee unanimously approved publication of the proposed amendments to Official Form 410A, with the revision noted above.

CHAPTER 15 FORM AND RULES AMENDMENTS
(OFFICIAL FORM 401 AND FED. R. BANK. P. 1010, 1011, 1012, AND 2002)

Professor McKenzie reported that the advisory committee recommended publication of an official form for petitions under chapter 15, which covers cross-border insolvencies. The proposed form grew out of the work of the Forms Modernization Project. Professor McKenzie said that the advisory committee also recommended publishing amendments to the Bankruptcy Rules to improve procedures for international bankruptcy cases. The proposals would: (1) remove the chapter 15-related provisions from Rules 1010 and 1011; (2) create a new Rule 1012 to govern responses to a chapter 15 petition; and (3) augment Rule 2002 to clarify the procedures for giving notice in cross-border proceedings.

The committee unanimously approved publication of proposed Official Form 401, the proposed amendments to Rules 1010, 1011, and 2002, and proposed new Rule 1012.

Informational Items

Professor Gibson reported that the advisory committee had withdrawn its proposed amendment to Rule 5005, which was published in 2013 and which would have replaced local rules on electronic signatures and permitted the filing of a scanned signature page of a document bearing the signature of an individual who is not a registered user of the CM/ECF system. The amendment would have allowed the scanned signature to have the same force and effect as the original signature and would have removed any requirement of retaining the original document with the wet signature. Professor Gibson said that the advisory committee had been persuaded by the public comments that the amendment was not needed and could be problematic.

Judge Wedoff said that his term as chair of the advisory committee was coming to a close and that Judge Sandra Ikuta would be taking over as chair. He added that he had very much appreciated the opportunity to serve as chair.

Judge Sutton said that Judge Wedoff had done amazing work, together with the reporters and the subcommittees. He added that Judge Wedoff's enthusiasm was infectious and that he was a national treasure for the Bankruptcy Rules. Judge Sutton said the committee was grateful for Judge Wedoff's service and his leadership.

REPORT OF THE ADMINISTRATIVE OFFICE

Julie Wilson and Ben Robinson provided the report of the Administrative Office. Ms. Wilson said that the Rules Office had been watching legislation that would attempt to address issues related to patent assertion entities. She said that a bill did pass in the House in December, but that recent developments indicated that the legislation was not moving forward in the Senate for now. She said that the Rules Office would continue to monitor the legislation.

Judge Sutton thanked the Rules Office for all its great work on the preparations for the committee's meeting.

NEXT COMMITTEE MEETING

The committee will hold its next meeting on January 8–9, 2014, in Phoenix, Arizona.

Respectfully submitted,

Andrea L. Kuperman
Chief Counsel

Jonathan C. Rose
Secretary

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DRAFT MINUTES

CIVIL RULES ADVISORY COMMITTEE

APRIL 10-11, 2014

The Civil Rules Advisory Committee met at the Lewis & Clark Law School in Portland, Oregon, on April 10-11, 2014. Participants included Judge David G. Campbell, Committee Chair, and Committee members John M. Barkett, Esq.; Elizabeth Cabraser, Esq.; Hon. Stuart F. Delery; Judge Paul S. Diamond; Judge Robert Michael Dow, Jr.; Parker C. Folse, Esq.; Judge Paul W. Grimm; Peter D. Keisler, Esq.; Dean Robert H. Klonoff; Judge John G. Koeltl; Judge Scott M. Matheson, Jr.; Justice David E. Nahmias; Judge Solomon Oliver, Jr.; and Judge Gene E.K. Pratter. Professor Edward H. Cooper participated as Reporter, and Professor Richard L. Marcus participated as Associate Reporter. Judge Jeffrey S.Sutton, Chair, Judge Neil M. Gorsuch, Liaison, and Professor Daniel R. Coquillette, Reporter, represented the Standing Committee. Standing Committee member Judge Susan P. Graber also attended. 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, Alison Stanton, and James C. Cox. Judge Jeremy Fogel participated for the Federal Judicial Center. Jonathan C. Rose, Andrea Kuperman, Benjamin J. Robinson (by telephone), Julie Wilson, and George Everly represented the Administrative Office. Observers included Judge Lee H. Rosenthal, past chair of the Committee and of the Standing Committee; Professor Steven S. Gensler, a former member of the Civil Rules Committee; Joseph D. Garrison, Esq. (National Employment Lawyers Association); Jerome Scanlan (EEOC); Alex Dahl, Esq. and Robert Levy, Esq. (Lawyers for Civil Justice); Patrick Coyne, Esq. (American Intellectual Property Law Association); John Vail, Esq.; Valerie M. Nannery, Esq. (Center for Constitutional Litigation); Thomas Y. Allman, Esq.; Jonathan Redgrave, Esq.; Ariana Tadler, Esq.; Henry Kelsen, Esq.; and William Butterfield, Esq.

The first morning of the meeting was devoted to a Symposium honoring Judge Mark R. Kravitz, former chair of the Civil Rules Committee and former chair of the Standing Committee. The Symposium included tributes by Chief Justice John G. Roberts (read by Dean Klonoff), Elizabeth Cabraser, Charles Cooper, Judge Jeremy Fogel, Peter Keisler, and Judge Anthony Scirica (also read by Dean Klonoff). Two panels completed the symposium. Judge Sutton moderated a panel on The Rulemaking Process, which explored papers by Edward J. Brunet, Edward Cooper, and Richard Marcus. Judge Campbell moderated a panel on Applying The Rules, which explored papers by Judge Rosenthal and Steven S. Gensler, and by Judge Diane P. Wood. The symposium will be published in the Lewis & Clark Law Review.

Judge Campbell began the afternoon portion of the first day by noting that it was a privilege for all present to be part of the

tribute to Judge Kravitz.

Judge Campbell noted that there have been no changes in Committee membership to occasion welcoming introductions or fond farewells. He also expressed the Committee's appreciation of the presence of Judge Sutton, Judge Gorsuch, Judge Graber, and Professor Coquillette for the Standing Committee, and of the presence of Judge Fogel for the Federal Judicial Center.

Judge Campbell concluded the introduction by stating that through the Subcommittees, Committee members had worked harder in preparing the materials for the agenda than any group he had ever observed doing volunteer work purely for the good of the public order. "This is a full-participation rulemaking enterprise."

April 2013 Minutes

The draft minutes of the April 2013 Committee meeting were approved without dissent, subject to correction of typographical and similar errors.

I Proposals For Adoption

A. Duke Rules Package

Many of the proposals published for public comment and testimony in August 2013 were initially prepared by the Duke Conference Subcommittee chaired by Judge Koeltl. They included changes in Rules 1, 4, 16, 26, 30, 31, 33, 34, and 37. Judge Campbell noted that the voluminous public comments and extensive testimony had provided both new reasons for supporting the proposals and serious challenges. The Subcommittee evaluated these ideas and has suggested changes both in rule texts and in Committee Notes. Publication of the April agenda materials prompted a few comments on the proposed revisions that have further illuminated the issues, including a letter from four United States Senators. These comments too have been considered by the Subcommittee and presented to the Committee. Judge Campbell then asked "the indefatigable" Judge Koeltl to present the Duke Conference Subcommittee Report.

Judge Koeltl introduced the Subcommittee Report as one that recommends a few changes in some of the published proposals, withdrawal of parts of the proposals, and several changes in Committee Note language to respond to concerns raised in the hearings and comments.

The Duke Conference was the inspiration of Judge Kravitz. Preparations began a year and a half before the conference. Participants were broadly representative of the bar, bench, and academy. The lawyer participants in private practice were balanced

between those who ordinarily represent plaintiffs and those who ordinarily represent defendants. Other lawyers were drawn from house counsel, combining the perspectives of lawyers with the perspectives of clients, and from government. The enthusiasm of those invited to participate was extraordinary; only one person declined to participate in the two days of panel discussions, and only because of a schedule conflict. The participants accepted the direction to leave their clients at the door. The charge was to seek consensus on measures that can be taken to advance the Rule 1 goals — the just, speedy, and inexpensive determination of civil actions.

Three broad areas of agreement were expressed at the Conference. Improvements in civil litigation can be made by enhancing cooperation among the parties and counsel; by limiting use of procedural devices and opportunities to what is proportional to the needs of the case; and by providing early and active case management by judges.

The Subcommittee began its work promptly after the Conference concluded in May 2010. It met frequently, both in person and by conference calls. Minutes in the form of Notes were prepared for all its meetings and made public. A diverse group of lawyers and judges were gathered for a miniconference that discussed early drafts of rules proposals, some of which were later abandoned. Notes on the miniconference also were made public.

Following publication, more than 120 witnesses testified at the three public hearings, and more than 2,300 comments were submitted. Most of the witnesses and most of the comments addressed parts or all of the Duke Subcommittee proposals. All of this advice was very helpful in refining the published proposals.

The Subcommittee was able to achieve consensus on the recommendations made in the Report. The recommendations are unanimous. The Report appears at pages 79-93 of the agenda book. The proposals appear at pages 95-113. They will advance the goals of cooperation, proportionality, and early and active judicial case management. Rather than follow the order of the rules themselves, the proposals are presented in three steps: those that deal with discovery; those that deal with case management; and the one that deals with cooperation beyond the elements of cooperation built into the discovery and case-management proposals.

DISCOVERY PROPOSALS

Scope: Rule 26(b)(1): Four changes are proposed for Rule 26(b)(1).

Proportionality is emphasized by moving the factors found in present Rule 26(b)(2)(C)(iii) to become part of the scope of discovery. Seven words are added to make proportionality explicit: "proportional to the needs of the case." One consideration in

moving this concept up to (b)(1) is that "in fairness, many people never got down to Rule 26(b)(2)(C)(iii)."

Present Rule 26(b)(1) includes a list of examples of discoverable matter: "the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter." The proposal deletes these words. The purpose is to reduce the great length of Rule 26, in the belief that discovery of these matters is so well established that the list is no longer needed or even useful. The Subcommittee recommendations include adding language to the published Committee Note to emphasize that all of these and other matters will remain as fully discoverable as they are now. The new language will defeat attempts to argue that deletion of these examples implies that such matter is not discoverable.

Rule 26(b)(1) now includes two spheres of discovery. Discovery is available as a matter of right as to nonprivileged matter that is relevant to any party's claim or defense. Beyond that, "[f]or good cause, the court may order discovery of any matter relevant to the subject matter involved in the action." The proposals eliminate this distinction between lawyer-managed and court-managed discovery by deleting the provision for discovery of matter relevant to the subject matter. All discovery must be relevant to a party's claim or defense. New language is proposed for the Committee Note to address concerns raised in the comments and testimony. When the distinction between "claims and defenses" discovery and "subject-matter" discovery was adopted in 2000, the Committee Note recognized that it can be difficult to draw the distinction. Examples were given of things that, suitably focused, would be relevant to the parties' claims or defenses. The proposed new Note repeats that such discovery is not foreclosed by the amendments. The proposed new Note language emphasizes the need to focus directly on what is relevant to the claims or defenses, and recognizes that it may be appropriate to amend the pleadings to add new claims or defenses. In addition, new Note language emphasizes the common purpose that was emphasized in the 2000 Committee Note — the purpose is to engage the court more actively in regulating the breadth of discovery.

Finally, the next-to-last sentence of present Rule 26(b)(1) provides: "Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." This sentence would be revised to continue the concept that discovery is not limited by the rules that govern admissibility in evidence, but also to make it clear that inadmissibility does not expand the scope of discovery. All discovery is limited to matter relevant to any party's claim or defense and proportional to the needs of the case.

Turning first to proportionality, many of the comments and

many parts of the testimony have questioned the need to add an explicit proportionality limit to the Rule 26(b)(1) scope of discovery. But there was a consensus at the Duke Conference on the need for proportionality. It is in the rules now. Several reports show that many lawyers believe that discovery now is often not proportional to what the litigation needs. Rule 26(g) now makes proportionality an obligation of both the party that requests discovery and the party that responds. It was added to the rules in 1983, along with the proportionality requirement that now appears in Rule 26(b)(2)(C)(iii). An effort to reinforce proportionality was made in the 1993 amendments. And yet another effort to reinforce it was made in the 2000 amendments. The revised Committee Note describes these repeated attempts to achieve thorough recognition and enforcement of the 1983 concept. The 2000 amendment is a particular witness to the sense of frustration that surrounds proportionality. It added a completely redundant final sentence to (b)(1); no new or independent meaning was added by the reminder that all discovery is subject to the limitations imposed by Rule 26(b)(2)(C). This compelling sense of need carried through the Style Project, defeating repeated efforts to strike this sentence as the surplusage that it is. The present proposal is a fourth attempt that seeks to fulfill the purpose that has not yet been fully implemented.

The Subcommittee recommends two changes in the proportionality factors as published. The first transposes the first two considerations, to be "the importance of the issues at stake in the action, the amount in controversy * * *." This change responds to the concerns expressed in hundreds of comments. Many claims may seek relatively low amounts of money damages, or seek only specific relief without any damages at all. Focus on the importance of the issues at stake was included in the 1983 rule as an explicit recognition that many actions that seek minimal or no damages involve matters of personal or public importance beyond, and perhaps far beyond, money alone. Often an individual plaintiff may be functioning in part as a private attorney general. Proportionality cannot be measured by the money alone. Although this principle has been embodied by the rules from the beginning, there is a fear that placing the amount in controversy first in the list may cause courts to impose inappropriate limits on discovery. At the other end of the line, other comments expressed a fear that focus on the money involved might lead some courts to allow absolutely unlimited discovery in actions involving huge sums of money. The reordering in the rule text is further supported by new language proposed for the Committee Note.

The second change recommended for the rule text adds a new factor to the list of proportionality considerations: "the parties' relative access to relevant information." This language, along with

an explanation proposed for the Committee Note, is meant to address circumstances commonly described as involving "asymmetric information." Some categories of litigation are characterized by an uneven distribution of discoverable information. Civil rights actions in general, and most particularly individual employment claims, are examples identified by many comments and much testimony. An individual plaintiff claiming adverse employment action, for example, may have very little information that the defendant employer needs to discover. The employer, on the other hand, may have relatively large amounts of information that the employee can obtain only through formal discovery, particularly when it is necessary to present evidence of the treatment of other employees in similar circumstances. An asymmetric distribution of discoverable information often means an asymmetric incidence of discovery burdens. This factor recognizes that proportionality may allow one party to request more extensive discovery than its adversary requests.

Many of the comments and much of the testimony expressed a fear that moving proportionality from Rule 26(b)(2) to (b)(1) would effect a change in the burdens imposed on the parties in presenting discovery motions. The argument was that the present rule simply expresses a limitation on discovery, so that a party resisting discovery has the "burden" of persuading the court that proposed discovery is disproportional. Characterizing proportionality as part of the scope of discovery, on the other hand, was feared to mean that the party requesting discovery will have the full burden of justifying the request as proportional. Additions to the Committee Note are proposed to address these fears, which arise from quite unintended interpretations of the proportionality proposal that have no basis in either the proposed rule or the Committee Note. The Note now makes it clear that the new rule text "does not change the existing responsibilities of the court and the parties to consider proportionality, and the change does not place on the party seeking discovery the burden of addressing all proportionality considerations." Boilerplate objections are not permitted. Proposed Rule 34, indeed, requires that objections be specific. Nor can a party unilaterally decide to limit its responses to what it considers proportional — "the parties and the court have a collective responsibility to consider the proportionality of all discovery and consider it in resolving discovery disputes."

Further additions to the Committee Note are recommended to respond to other concerns expressed in the comments and testimony that the factors to be considered in implementing proportionality are subjective and impossible to define. The basic point is that these factors began with the somewhat shorter list in 1983, and have been expanded since then. They are familiar. When concerns

were expressed about the open-ended nature of a simple reference to "proportionality" at the miniconference on early drafts, participants suggested that the concept should be given content by incorporating the factors now listed in Rule 26(b)(2)(C)(iii). They agreed that when a court does turn to consider proportionality, these factors are familiar and work well.

Turning to the new formulation of the proposition that discovery is not limited to matter that would be admissible in evidence, Judge Koeltl emphasized that the history of the "reasonably calculated" phrase shows that it was not intended to expand the scope of discovery. This phrase was originally added in 1946, when it applied only to depositions, to overcome decisions ruling that a deponent could not be required to testify to hearsay. The 2000 amendment made it clear that discovery of inadmissible matter is subject to the Rule 26(b)(1) limits on the scope of discovery. But many lawyers and courts continue to treat this provision as expanding, and indeed defining, the scope of discovery. Andrea Kuperman's research provides many examples. This view is incorrect. An attempt was made to correct it in 2000.

Most of the organized bar association groups that have commented on the changes to Rule 26(b)(1) support them. The Department of Justice also supports it.

Discussion began with a Committee member who thought the work extraordinary. "I'm a big believer in proportionality." Proportionality was added to the English Practice Rules in 2009. It is essential. The need for proportionality is demonstrated in long experience as a mediator in federal courts.

Another member noted that as a new member he had been impressed by the serious attention both Subcommittees and the Committee had devoted to the public testimony and comments. He had had some concerns about the published proposals. These concerns have been resolved by the proposed changes in rule text and Committee Notes.

A judge echoed these observations. He had been concerned by the testimony and comments that worry about the burdens of arguing proportionality, and about what the factors bearing on proportionality mean. All these concerns have been addressed in the Committee Note.

Another judge recalled that two witnesses at the Dallas hearing expressed fear that the hearings and comment process were a charade. The changes that have been made show the Committee in fact does listen and respond.

It was noted that the Department of Justice generally has supported proportionality. There were some specific issues, but they have been addressed by the Subcommittee recommendations. Support for the proposed rule was confirmed by circulating it within the Department.

Other members made similar observations. Moving "the importance of the issues at stake in the action" up to become the first factor, and adding "the parties' relative access to relevant information" to the factors, make for a better rule and reflect the Committee's responsiveness. The recommendations are "a wonderful job in careful response to comments." The quantity and quality of the comments and testimony show the importance of involvement by all segments of the bar in public rulemaking.

Cost-Bearing: Rule 26(c)(1)(B): Judge Koeltl noted that the new reference to "the allocation of expenses" by a protective order simply confirms authority that is already established by the rule provisions for protecting against undue burden or expense. The authority is exercised now. But adding it to rule text will forestall arguments to the contrary. The proposed Committee Note adds new material that responds to public comments that feared the new rule text would encourage routine cost-bearing orders. The Note now says that cost-shifting should not become a common practice, and also says that courts and parties should continue to assume that a responding party ordinarily bears the costs of responding. A comment responding to this new material has objected that it seems to prejudge the continuing work of the Committee on "requester pays" proposals. That is not so. The work will continue, and will be thorough. But "it will not be easy." The proposed rule and Committee Note, in short, should not change current practice by making cost-shifting a common event.

There was no further discussion of proposed Rule 26(c)(1)(B).

"Early" Rule 34 Requests: Rule 26(d)(2): The Subcommittee does not recommend any changes in the published proposal that would allow early delivery of Rule 34 requests to produce. Present Rule 26(d)(1) establishes a moratorium on discovery, barring discovery before the parties have conferred as required by Rule 26(f), except in cases exempted from initial disclosure. Proposed Rule 26(d)(2) would allow delivery of Rule 34 requests before the parties' conference, but only after 21 days from service of a summons and complaint on a party. Delivery of the requests does not start the time to respond. Instead, the requests are considered to have been served at the parties' first Rule 26(f) conference, starting the time to respond. The advantage of early delivery is that the parties will have a concrete focus for discussion at the conference, making for a more productive conference, and a better

Rule 16(b) conference.

Public comments generally were favorable. Many plaintiff-side lawyers like the proposal. Defense lawyers generally say they would not be likely to make early delivery, but some said they would be glad to see plaintiffs' requests before the parties' conference.

Brief discussion focused on the time calculation. The time to respond begins at the first Rule 26(f) conference, and the Committee Note says that the opportunity for advance consideration of early requests should not affect the determination whether to extend the time to respond. The time provisions for early requests should be read carefully. The requests cannot be delivered with the complaint. Initially, an early request may be delivered to a party 21 days after that party has been served with the summons and complaint. That party then can deliver early requests to any plaintiff and also to any other party that has been served.

In deference to a recommendation by the Style Consultant, Rule 26(d)(2)(B) will read: "The request is considered to have been served at the first Rule 26(f) conference," rather than "considered as served."

Rule 34: Judge Koeltl noted that Rule 34 would be revised to reflect the Rule 26(d)(1) provision for early requests, and summarized the three other proposed changes in Rule 34. The proposals reflect experience with responses that often "are absurd." General objections often incorporate boilerplate protests that the requests are overbroad, unduly burdensome, and so on, without providing any specific explanation. The responses then produce materials "subject to these objections" without stating whether anything has been withheld on the basis of the objections. And the responses often fail to state whether anything actually will be produced. All of this "is true abuse. The response is only an invitation to meet and confer, not any real indication of what will be produced." The proposals require that the response "state with specificity" the grounds for objecting; allow a response that rather than permit inspection the requested materials will be produced; and provide that production must be completed no later than the time stated in the request or a later reasonable time stated in the response. In addition, an objection must state whether any responsive materials are being withheld on the basis of the objection.

The proposed Committee Note responds to a concern expressed in testimony and comments. A party may limit its search to a scope smaller than the request. A request for "all documents," for example, may be met by a search for all documents back to 2005 and nothing earlier. The party does not know whether relevant and

responsive documents might be found if the search were extended back beyond 2005, and does not know whether anything has been "withheld." The Note explains that this potential dilemma ties to the direction to state objections with specificity. The response should object that the request is overbroad and state that the search will be limited to documents created in 2005 and later. This response counts as a statement that anything earlier has been "withheld." The parties are then free to discuss the response and, if they cannot resolve the issue, seek a court order.

The Note also anticipates an issue addressed by some of the testimony and comments. It says that the producing party does not need to provide a detailed description or "log" of all documents withheld.

In response to a suggestion by the Style Consultant, Rule 34(b)(2)(B) will provide: "state with specificity the grounds for objecting," rather than "state the ground for objecting * * * with specificity."

There was no further discussion of the Rule 34 proposals.

Numerical Limits: Rules 30, 31, 33, and 36: Judge Koeltl summarized several published proposals that would reduce present presumptive limits on discovery events and add a new presumptive limit. The presumptive limit on the number of depositions under Rules 30 and 31 would be reduced from 10 to 5 per side. The presumptive limit on the number of interrogatories under Rule 33 would be reduced from 25 to 15. And, for the first time, Rule 36 would impose a presumptive limit of 25 on requests to admit, excluding from the count requests to admit the genuineness of documents. In addition, the presumptive time limit for oral depositions would be reduced from one day of 7 hours to one day of 6 hours.

The Committee expected that these presumptive limits would be only that, simply presumptive. The proposals relied on the parties to understand what numbers are proportional to the needs of individual cases, and to agree on higher numbers whenever appropriate. Failing party agreement, the expectation was that courts would respond flexibly in ordering higher numbers suitable to the needs of each case. The purpose was to encourage realistic appraisal of the level of discovery proportional to individual case needs. "To put it mildly, these proposals generated strong opposition." Opposition came from the organized bar as well as from testimony and comments from individual lawyers. The proposals were seen as counter-productive. Lawyers fear that some courts would view the presumptive numbers as hard ceilings, and that attempts to achieve reasonable accommodations through party discussions would often fail, leading to increased motion practice.

The Subcommittee recommends that these proposals be withdrawn. Such widespread and forceful opposition deserves respect. The hope remains that most parties will continue, as they do now, to discuss reasonable discovery plans at the Rule 26(f) conference and with the court initially and, if need be, as the case unfolds. Failing party agreement, courts have power to shape discovery to the reasonable needs of the case.

A Subcommittee member noted that the testimony and comments on the numbers of depositions were impressive. Only a minority of cases now involve more than 5 depositions per side; withdrawing the proposal will not affect most cases. For the cases that do involve more than 5 depositions per side, it is "better to leave well-enough alone." As to the number of interrogatories, the change is not as important because they are not much used anyway.

One judge reported that colleagues were pleased with the recommendation to withdraw these proposals.

CASE MANAGEMENT

Judge Koeltl began discussion of this segment of the package proposal by noting that early and active judicial case management has encountered little opposition and widespread support from the organized bar. There is concern that the early steps in an action take too long.

Rule 4(m): Time to Serve: The published proposal reduced the time to serve the summons and complaint from 120 days to 60 days. The comments and testimony persuaded the Subcommittee to recommend that the time be set at 90 days.

Several practical observations support the change to 90 days. Many comments suggest the need for time to serve multiple defendants, or defendants who seek to evade service. When service is to made by a marshal, 60 days may strain the Marshals Service. A 60-day period may deter requests to waive service, since not much time will remain when the plaintiff learns that service will not be waived.

In addition to recommending a 90-day period, the Subcommittee proposes adding new language to the Committee Note to reflect some of the circumstances that will justify an extension of the time.

The published proposal also amends Rule 4(m) to exclude service of a notice under Rule 71.1(d)(3)(A). There was almost no comment on this proposal. The Subcommittee recommends it for adoption. The Committee Note should carry forward as published, striking an extraneous clause that was inadvertently carried into

the agenda book materials from an earlier sketch.

Many of the comments on Rule 4(m) reflected an assumption that the limit applies to service on a corporation in a foreign country. There are powerful reasons to exclude these cases from Rule 4(m), which does not apply to service abroad on individuals and a foreign state or its subdivision. The Subcommittee's recommendation for publication of a clarifying amendment of Rule 4(m) was discussed later in the meeting.

Rule 16 Scheduling Conferences and Orders: Judge Koeltl described the proposed changes in Rule 16(b).

The proposal continues to allow entry of a scheduling order on the basis of the parties' Rule 26(f) report without a conference. But it emphasizes the value of direct simultaneous communication by deleting the reference to a conference "by telephone, mail, or other means." Telephone conferences remain available. But mail, or other means that do not involve direct simultaneous communication, are excluded.

The time to issue a scheduling order is reduced to the earlier of 90, not 120, days after any defendant has been served, or 60, not 90, days after any defendant has appeared. This acceleration is offset by adding a new provision that allows the judge to set a later time on finding good cause for delay. The Department of Justice has continued to be concerned that the reduced time periods may not be enough to support a meaningful conference, a concern that has been echoed by other comments about the needs of complex cases. The Subcommittee proposes new language for the Committee Note to reflect the circumstances that may show good cause to extend the time, including cases that involve "complex issues, multiple parties, and large organizations, public or private."

New subjects are added to the list of permitted contents of a scheduling order, as wella s the Rule 26(f) discovery plan, including preservation of electronically stored information and agreements reached under Federal Rule of Evidence 502. These topics are added to emphasize the importance of paying early attention to them.

Finally, a new provision would recognize that a scheduling order may direct that before moving for an order relating to discovery, the movant must request a conference with the court. This provision reflects practices adopted by local rule or individual judges in many courts. About one-third of judges now do this. But many do not, and the Subcommittee recognizes that some courts may not be able to do it. So this provision simply provides another option, not a mandate.

Discussion began with the question why it is useful to foreclose a scheduling conference by mail or other means that do not involve simultaneous communication among the parties and court. The rule continues to allow entry of the order without any conference at all, relying on the parties' Rule 26(f) report. The initial response focused on the value of allowing entry of the order on the basis of the Rule 26(f) report alone. This can be an effective practice, particularly in "routine" cases in which the judge trusts the lawyers. Some judges would not willingly give up this option to a requirement of an actual conference in all cases. But this response did not satisfy the question: "sure, it can make sense to allow entry of the order without any conference. But why limit the means available for having a conference if the judge chooses to have one? The rule text, moreover, does not directly say that there must be simultaneous communication." A further response stated that a "conference" implies simultaneous communication, not, for example, an exchange of correspondence. And it is desirable to emphasize the value of simultaneous communication by deleting the reference to mail or other means.

COOPERATION

Rule 1: Judge Koeltl introduced the proposed amendment of Rule 1 that directs that the rules be "employed by the court and the parties" to secure the just, speedy, and inexpensive determination of every action. This amendment applies Rule 1 aspirations directly to the parties. The published Committee Note observes that effective advocacy is consistent with, and indeed depends upon, cooperative and proportional use of procedure.

The Subcommittee recommends that the Rule 1 proposal go forward without change. The testimony and comments went in different directions. Some urged that "cooperation" be introduced directly into rule text. Others urged that the proposal be abandoned, fearing that although it seems desirable in the abstract it will become the occasion for prompting exactly the sort of behavior it is meant to discourage. "Rule 1 motions" will be made as a strategic means of increasing cost and delay. And still others — including the Sedona Conference — think the proposal gets it just right.

DUKE PACKAGE CONCLUSION

Judge Koeltl concluded the presentation of the Duke Rules Package with thanks to all who have been instrumental in developing it. Judges Kravitz, Rosenthal, Sutton, and Campbell provided great help. Judge Wood provided extraordinary help as liaison from the Standing Committee, working as if a member of both the Advisory Committee and the Subcommittee. All members of the Subcommittee

worked with tireless skill and diligence. Professor Gensler has helped throughout. The Subcommittee, further, operated by seeking consensus on a package that is unanimously endorsed by every member. And every member "has fingerprints all over the product." Judge Koeltl thanked Professor Cooper and Professor Marcus for their tireless and invaluable contributions to the work of the Subcommittee.

A Subcommittee member recalled that Chief Justice Roberts approved the concept of the Duke Conference only with the expectation that it would lead to specific proposals. "All these years later, dealing with these sprawling and diffuse questions, we have done it." The patience, care, and creativity that Judge Koeltl showed "were inspirational."

Another Subcommittee member observed that great care was taken in keeping track of each change, large and small. "The result is reliable."

Another Subcommittee member said that "Judge Koeltl made the almost impossible look easy."

Judge Campbell said that Judge Koeltl was the one whose hard work pulled the Duke Conference together. He enlisted the participants and saw to it that all papers were produced on time. The Conference itself was great. Combing through the record and pulling it all together has been a remarkable accomplishment.

Judge Rosenthal added that this work owes a debt to Judge Scirica and Judge Levi who embraced the concept of the Conference and helped to push forward the importance of relying on empirical data to support Committee action, as well as the importance of listening carefully to the many constituencies the Rules serve. And, of course, Dean Levi must be thanked for helping with arrangements for the Conference itself. And Judge Koeltl was closely engaged with all of this and more, never impatient, always cooperative and proportional.

Judge Campbell noted that several comments on the revised proposals in the agenda book have been received and carefully considered. One comment comes from four United States Senators who remain concerned about adding proportionality to Rule 26(b)(1). Committee members have read their letter with care, as the other letters also, and have carefully considered their views. The letters are thoughtful. "With some, we do not fully agree." Those who continue to oppose proportionality are not satisfied with the revised version in the agenda book. They do not think it is needed. The Committee thinks it is needed. Four different advisory committees, going back 30 years, have believed it is needed: it was

originally added in 1983, encouraged in 1993, and emphasized in 2000. The present Committee, as the Committees that recommended the 1993 and 2000 amendments, continues to believe that the 1983 rule has never really been applied. It is time to renew the effort.

The Committee voted unanimously to recommend adoption of the entire Duke Rules Package as proposed by the Subcommittee.

Judge Campbell expressed the Committee's thanks to Judges Sutton and Gorsuch and Professor Coquillette for attending this meeting to represent the Standing Committee. Thanks as well were expressed to Judge Fogel for representing the Federal Judicial Center. "We hope the rules will prompt more judicial education."

B. Rule 37(e): Failure to Preserve ESI

Judge Campbell introduced the Report of the Discovery Subcommittee by observing that the Subcommittee had met repeatedly since preparation of the revised Rule 37(e) draft presented in the agenda materials. The result of these further deliberations, which included consideration of several outside comments on the agenda-book version, is a still further revision of the proposed rule text. There was not time to revise the Committee Note to reflect the rule text changes. A revised Committee Note will be prepared by the Subcommittee and circulated to the full Committee with the goal of approving final Note language in time for inclusion in the agenda materials for the Standing Committee meeting at the end of May. The task for today is to work on the rule text, allowing for comments on the ways in which the Note might be revised to respond to whatever rule text is approved for adoption.

Judge Grimm presented the Discovery Subcommittee Report. The Report is supplemented by the revised Rule 37(e) text handed out to the Committee.

The first step of the Report is a recommendation that the new Rule 37(e) should replace current 37(e), without carrying forward the current language.

Revising the proposed rule text began at a Subcommittee meeting held the morning after the February 7 public hearing in Dallas. Several meetings were held by conference call after that, culminating in a two and one-half hour call on Tuesday, April 8. A final meeting was held in the evening of the first day of the present Committee meeting. Subcommittee members have given great amounts of time to the project, as have Judges Campbell and Sutton, and also Andrea Kuperman.

Present Rule 37(e) was adopted in 2006 as part of a package of

amendments that for the first time expressly brought electronically stored information into Civil Rules texts. It was an attempt to provide a limited safe harbor that some came to see as a limited not-so-safe harbor. It applied only to sanctions "under these rules," leaving inherent power intact. The Note showed that once a duty to preserve arises, there may be a duty to intervene to stop the destruction of ESI by auto-delete functions or by other events.

A panel at the Duke Conference, chaired by Gregory Joseph, made a unanimous recommendation for a comprehensive review of ESI preservation. The concern was that large enterprises have felt forced to over-preserve huge amounts of ESI for fear of spoliation sanctions imposed under the most demanding standards adopted by the most demanding court in the country. The common law of spoliation provided the background — all things are presumed against one who spoliates evidence. But ESI is not like traditional evidentiary materials, whether paper documents or tangible things. Different circuits have developed different approaches to the duty to preserve ESI, although all agree that the duty can arise before an action is actually filed. There are differences in looking to the relevance of the information and the prejudice that may arise from its loss, and different standards of culpability have been adopted. The Second Circuit approved sanctions for negligence or gross negligence, based on a remedial focus: who should bear the loss, how do we level the playing field? The Fifth and Tenth Circuits, on the other hand, allow adverse-inference instructions only if there is enough culpability to support an inference that the lost information was unfavorable to the party who lost it. Organizations that are subject to nationwide jurisdiction have to observe the most demanding preservation regimes that may be imposed.

The Duke Conference panel asked that a rule be adopted. The Subcommittee was charged with developing a proposal. The Dallas miniconference discussed initial sketches addressing these issues.

Repeated attempts to draft a rule defining the duty to preserve failed to find a satisfactory definition. The panel recommendation wanted to establish definitions of when the duty to preserve arises; of the scope of the duty, both backward in time and continuing through the litigation and perhaps beyond; how many custodians should be subject to a "litigation hold"; and still other matters. The further these drafts progressed, the greater the obstacles that were identified. Even articulating the events that might trigger a duty to preserve in anticipation of litigation proved difficult, despite the widespread agreement that the duty can arise before an action is actually filed. The Subcommittee simply could not draft a rule that provided meaningful guidance and at the same time applied fairly to the wide variety of civil cases filed in federal court.

April 17, 2014 draft

The first conclusion, then, was to rely on the common law to establish the duty to preserve. A new Rule 37(e) should address only the procedural consequences when the duty is breached.

Subcommittee work, after many drafts and repeated discussion in the full Advisory Committee, led to the proposal that was published for comment last summer. Comments and testimony were expected. The message transmitting Rule 37(e) for publication specifically invited comment on five stated questions. These questions asked whether the new rule should be limited to the loss of ESI; whether to retain a provision that allowed "sanctions" without a showing of bad faith when loss of the information irreparably deprived a party of any meaningful opportunity to present or defend against the claims in the litigation; whether the provisions of present Rule 37(e) should be retained; and whether the rule text should attempt to provide definitions of "substantial prejudice," "willful," and "bad faith."

The volume of comments up to the time of the February hearing led to an expectation that as many as 1,000 comments might be addressed to the full set of proposals published in August. In the end, more than twice that number were received.

The comments and testimony persuaded the Subcommittee that the published proposal "is not the best we can do." Several concerns guide the need to adopt a reshaped rule.

There is a great need for a rule to address the consequences of losing ESI. Over-preservation and the lack of uniformity in dealing with loss are real problems. It would be good to deal with the circuit disagreements, even if nothing else can be accomplished.

It remains important to define responses to failures to preserve ESI that should have been preserved. Over-reactions should be cabined, while preserving needed flexibility. John Barkett generated an encyclopedic review of the case law. This review demonstrates the need to establish a flexible range of responses, a need that is underscored by the prospect that the ESI universe will change greatly in only a few years.

The published rule sought to establish a distinction between curative measures and sanctions. The comments and testimony persuaded the Subcommittee that this distinction would not work well. "ESI is so voluminous that you cannot preserve it all." But the volume of it also makes the inevitable losses likely to be less serious than might seem. Often there are exact duplicates of a source that has been lost. Often a lost source can be retrieved. And often measures aimed to cure the loss will involve steps that

also might be viewed as "sanctions." Invoking the list of sanctions in Rule 37(b)(2)(A) also does not work well. These measures properly are "sanctions" in the context of Rule 37(b) because they address violation of a court order. In the context of ESI lost without violating any court order, they seem to serve a remedial purpose. And some of the choices available under (b)(2)(A) do not fit failure to preserve ESI — contempt is not available when there is no court order, and it makes no sense to "stay[] further proceedings until the order is obeyed." The "sanctions" label came to seem inappropriate.

Further problems appeared with the concepts of substantial prejudice and willfulness or bad faith, and with some of the factors listed in proposed 37(e)(2). The provisions designed to address loss of unique tangibles — for example the automobile claimed to have been improperly designed — also caused difficulty. And the attempt to deal with losses caused by forces outside a party's control was not easily understood.

The Subcommittee set out to improve the rule, maintaining as much of the published version as possible. The goal was to refine the expression in response to the comments and testimony.

The starting point remains the same. The revised proposal, as the published proposal, addresses loss of information that should have been preserved in the anticipation or conduct of litigation. And the revised proposal is intended to make it clear that losses of information caused by forces outside a party's control are outside Rule 37(e). The published Note addressed that clearly, and the revised Note will continue to be clear.

Further revisions pursue the distinction between curative measures and sanctions by refining the approach to curative measures and abandoning any reference to "sanctions." Curative or remedial measures are addressed in two steps. The introduction focuses on restoring or replacing lost information by additional discovery. If that does not work, the court can order measures no greater than necessary to cure prejudice caused by the loss. But it is not required that the court do everything possible to restore or replace the lost information, nor that it do everything possible to cure prejudice caused by the loss. Great flexibility is maintained. Finally, an intent to deprive another party of the lost information's use in the litigation is required for any of four measures: the court's presumption that the lost information was unfavorable to the party who lost it, an instruction that the jury may or must presume the lost information was unfavorable to party who lost it; or dismissal or a default judgment.

This version in part responds to concerns expressed about the

dimensions of "curative measures" under (e)(1)(A) of the published proposal. There was a fear that curative measures could come to overlap many of the orders alternatively authorized as sanctions, but without the restrictions that limited sanctions under the published rule.

Greater concerns were expressed in comments dealing with "sanctions" under the published (e)(1)(B). The central provision, (i), allowed sanctions only on finding substantial prejudice and willful or bad-faith loss. Many comments, responding to one of the questions inviting comment, urged that there should be a definition of what is "substantial" prejudice. Still greater concerns addressed the concept of willfulness. Many comments pointed to the great range of definitions that appear in judicial opinions. "Wilful" is interpreted differently in different contexts. In many contexts it means only an intent to do the questioned act, without any need to show an intent to produce the act's consequences. An intent to discard an old smart phone, for example, could be willful even though no thought was given to the loss of information stored in the phone. "Bad faith" also drew criticism. Many comments suggested the two concepts should be combined as "willful and in bad faith," or that at least "willful" should be discarded entirely.

The comments on the alternative in proposed (e)(1)(B)(ii) were equally strong. Although it was intended to dispense with the requirement of willful or bad-faith conduct only on finding an irreparable defeat of any meaningful opportunity to present or defend against a claim, a consequence far worse than "substantial prejudice," many comments suggested that a court unhappy with the bad-faith requirement would seize on this provision to make an end-run around both the substantial prejudice and willfulness or bad-faith requirements.

The version in the agenda book responded to these comments in several ways.

The revised version carried forward the starting point: the rule applies only to a failure to preserve information that should have been preserved in the anticipation or conduct of litigation.

The next step preserved a separate paragraph (1) for curative measures, but specified that the measures must be no greater than necessary to cure the loss of information. It continued to include examples of curative measures. It did not require a finding of prejudice.

The next step, paragraph (2), addressed situations in which the court finds prejudice, and authorized measures no greater than

necessary to cure the prejudice. No element of culpability was required.

The final step, paragraph (3), addressed four specific measures: a court's presumption that the lost information was unfavorable to the party who lost it; an instruction that a jury may or must presume that the information was unfavorable to the party who lost it; dismissal; or default. Any of these measures could be taken only on finding an intent to deprive another party of the information's use in the action.

Comments on the agenda-book version suggested that it did not fully address the challenges made to the published version. They asked what it means to "cure" a loss of information? They questioned the absence of any culpability requirement for curative measures — with no definition of curative measures, this provision could be used to justify powerful measures, such as excluding evidence, defeating the limits of the next two paragraphs. So too, it was noted that no culpability was required to support measures designed to cure prejudice, and that again there were no limiting standards apart from the exclusion of the measures identified in the paragraph that requires an intent to deprive another party of the lost information's use in the action. And the intent paragraph also caused concerns that it could authorize sanctions based on culpable intent without any showing of prejudice.

The new draft proposed by the Subcommittee addresses these concerns. It limits the rule to settings in which a party "failed to take reasonable steps to preserve" information that should have been preserved. This standard is meant to encourage reasonable preservation behavior. Proportionality is part of the calculus of reasonableness.

The new draft eliminates the separate paragraph covering curative measures for lost information, and instead makes clear in the introduction that the succeeding paragraphs apply only when the lost information "cannot be restored or replaced through additional discovery." The illustrations of additional discovery provided in the abandoned paragraph (1) on curative measures will be explored in the Committee Note, which will be further revised to explore what it means to restore or replace lost information and what is meant by "additional discovery." Additional discovery is authorized by Rules 16 and 26, and includes discovery aimed at determining whether in fact any information was lost. If a source of information was lost, additional discovery may show that the very same information resides in a different source. An e-mail message deleted from the system of one person, for example, may survive intact in another system. Or the court may order discovery under Rule 26(b)(2)(B) from sources that otherwise would be thought not

reasonably accessible because of undue burden or cost. The goal is to put other parties effectively back in the position that would have existed if the information had not been lost.

If the lost information cannot be restored or replaced, the next step in the revised proposal is paragraph (1). This paragraph remains exactly the same as paragraph (2) in the agenda book: on finding prejudice, the court may order measures no greater than necessary to cure the prejudice.

Finally, the revised proposal carries forward unchanged as paragraph (2) the agenda-book paragraph (3) provision for information lost because a party acted with the intent to deprive another party of the information's use in the litigation.

The Subcommittee, both in the agenda book proposal and in its revised proposal, has responded to its own question by limiting Rule 37(e) to the loss of ESI. There is much to be said for adopting a rule that establishes a uniform procedure for loss of any form of discoverable information. But the loss of a unique tangible object is difficult to capture in a rule. There may be circumstances that justify the ultimate sanctions of dismissal or default even though there was no intent to deprive another party of the use of the object in the litigation. The *Silvestri* case cited in the published Committee Note is an example of the problem. As comments on the published proposal show, there is a risk that any attempt to draft a rule for this problem may open the door to evade the restrictions embodied in other provisions. Beyond that, there is a well-developed body of law for losses of things other than ESI. Further, the abundance of ESI makes it likely that satisfactory ways can be found to work around the loss.

In short, the revised proposal has these features: It is limited to circumstances in which a party failed to take reasonable steps to preserve information that should have been preserved, thus embracing a form of "culpability." The concept of attempting first to cure the loss is maintained by focusing on additional discovery to restore or replace the lost information. If those steps fail, the central focus is on prejudice and measures no greater than necessary to cure the prejudice. The circuit split on serious sanctions is resolved; an intent to deprive another party of the information's use in the litigation is required for adverse inferences, dismissal, and default. Flexibility is the central theme. The court need not order all additional discovery that might restore or replace the lost information. It may, but need not, order all measures that might cure prejudice from the loss. The focus is on what is appropriate in the circumstances, neither too demanding nor too forgiving. Nor must a court impose the most severe sanctions when an intent to deprive is found.

April 17, 2014 draft

Comments and testimony raised the question whether the new rule will affect the burden of proving prejudice. The answer is that the burden is allocated to the party that has the knowledge that bears on the issue. The party who lost the information generally is in the better position to have some idea of what was lost. The party who wants the information generally is in a better position to explain why information in the category of the lost information may have been important to its case.

The concept of willfulness or bad faith is abandoned. All that remains is an intent to deprive another party of the lost information's use in the action. This intent is required only for a limited range of powerful measures. The court may presume that the lost information was unfavorable to the party who lost it for such purposes as motion practice, summary judgment, or a bench trial; adverse-inference jury instructions; or dismissal or default.

The requirement of an intent to deprive another party of the information's use in the litigation is designed to supersede the *Residential Funding* decision. That decision allows adverse-inference instructions on finding negligence or gross negligence. Superseding this approach may give comfort that will reduce over-preservation, at least in some measure. And restricting the use of adverse-inference jury instructions carries with it the same restriction on the even more definitively fatal measures of dismissal or default.

Limiting the use of adverse-inference jury instructions invokes a spectrum of instructions. The rule text refers only to an instruction that the jury may or must "presume" the information was unfavorable to the party that lost it. "Presume" is the language of many opinions. But the mental task involved is inference, not the rebuttable presumption of evidence law. This form of instruction stands at one end of the line. The other end of the line involves instructions that address evidence actually introduced at trial. Evidence may be introduced to show the failure to preserve. That evidence may be met by other evidence that explains the failure. The parties may argue about what inferences the jury should draw from all the evidence about the favorable or unfavorable character of the lost evidence. The court might instruct the jury that it is proper to evaluate the loss as suggested by the evidence and arguments. The distinction invoked by the rule text is explored in the Committee Note provided to explain the agenda-book version, which is the same as the Subcommittee's new proposal on this point. The Subcommittee will work further on the Committee Note. There is a proper evidentiary aspect to lost information, something that is not a "sanction." One example is provided by a case in which the defendant introduced a memorandum to show that an employment

plaintiff voluntarily quit his job; the plaintiff was allowed to show that metadata went missing from the ESI file for the memorandum.

The "intent to deprive" provision raises another issue: should prejudice be an explicit limitation? That might seem implicit in presuming that the lost evidence was unfavorable, and supported by the inference that deliberate destruction shows awareness that the information is unfavorable. But the Subcommittee concluded that these measures, including dismissal or default, should be available as a deterrent without adding an explicit prejudice requirement. The Committee Note will say that the court should not dismiss or default simply for deliberate loss of immaterial information. But if there is prejudice — including what may be inferred from the deliberate intent to deprive — dismissal or default is available. The choice invokes discretion, and the Note will suggest limits on the sound exercise of discretion.

The Subcommittee recommends that the list of factors in the published version, and the revised list of factors in the agenda-book version, be abandoned. In the published version, these factors bore both on determining whether information should have been preserved and on determining whether the failure to preserve was willful or in bad faith. In the agenda-book version, the factors bore generally on "applying Rule 37(e)." In addition to the usual problems that attend an incomplete "laundry list" of factors in rule text, these factors seem less important now that "failure to take reasonable steps" has been added to rule text. Reasonableness includes proportionality. Two of the factors are thus made redundant. And reasonableness also reflects another of the factors, the extent of the party’s notice about impending litigation.

The Committee Note will be shortened, simplified, and adjusted to reflect the revised proposal. Among other elements, it will explain the "restore or replace" element, along with the related focus on "additional discovery."

Judge Campbell observed that Judge Grimm’s thorough report "gave a short version of what happened." The revised proposal continues the progress made by the agenda-book version toward a simpler, more modest rule. The failure to preserve ESI presents many problems. The drafting challenge is great. The difficulties push toward doing less, rather than attempting to do more in the rule. And even in attempting less, we can aim only to get a good rule, not to get a perfect rule. This proposal is a good rule. It can be adopted, and then tested in application. We will learn more from how it works.

A Subcommittee member agreed that the Subcommittee had decided

to be satisfied with a more modest approach. There are great limitations on what we can do by rule to alleviate the burdens of ESI preservation. The rule does not define the duty to preserve. Nor could the rule define duties to preserve imposed by state law. The comments and testimony did not say much about how these rules will alleviate the burden of preservation. The Subcommittee followed many paths. Nothing in the rule requires a court to do anything. All of its provisions are "may." It is an authorization of discretion. And there are limits: there must be a loss of information that should have been preserved, a breach of the duty to preserve; the breach must at least be a failure to take reasonable steps to preserve; and further steps can be taken only if the lost information cannot be restored or replaced. The inquiry passes to prejudice and curing prejudice only if restoration or replacement cannot be accomplished.

Another Subcommittee member began by recalling his reaction on first reading the *Residential Funding* decision: "Oh my, look out." The case itself had nothing to do with spoliation, but it had the potential to wreak havoc. It has. Decisions in the Second Circuit and in its district courts have been inconsistent. There is something woefully wrong with them. We need to establish uniformity, and it is not uniformity in the (non-uniform) Second Circuit approach. And we should observe the separation between evidence law and procedure. Several recent decisions in the district courts show that judges are pausing in the approach to lost ESI because they realize the lost information may be restorable or replaceable, or may be merely cumulative even though it is not restored or replaced. They may wait for trial to decide what to do about the loss, based on the trial evidence. Some courts, attempting to level the playing field, have in the past invoked remedies that tilt the playing field in the opposite direction. We should cure that. The "should have been preserved" element brings in relevance, "content" as well as "intent." The Committee Note should mark the line between evidence and procedure, to avoid tilting the playing field one way or the other. This proposal may not be a perfect rule, but it is far better than the undisciplined case law. "I'm not sure what a perfect rule is." But we can establish a measure of uniformity in approaching the loss of ESI, and "this is a HUGE improvement."

Another Subcommittee member agreed that "it was a hard rule to write, and it will not be entirely comfortable to apply." We want to preserve authority to maintain the integrity of the ESI discovery process, but without going overboard. The Committee Note should make it clear that the rule does not intrude on jury freedom to find the facts. "To avoid open season," the Note should emphasize "replace or restore," and can draw on court help in ordering additional discovery. Measures in response to prejudice

will be the exception.

A fourth Subcommittee member described "two realities." First, ESI will be lost. It will be lost a lot in a lot of cases. More often the loss will result from failure to take reasonable steps than from intentional loss. And reasonable steps are not perfect steps; information will be lost even when reasonable steps are taken to preserve it. Second, all of these problems are case-specific. Subcommittee discussions included specific hypothetical cases, eliciting different intuitions. And even if all members shared common intuitions, "we could not draft them." We depend on the court's discretion. But, while depending on discretion, we can guide it in ways that will achieve greater uniformity. Beyond these realities, the rule can cabin discretion in invoking the most severe sanctions. In this dimension, the Subcommittee talked a lot about remedy, as compared to deterrence and punishment. There is agreement that the principal focus is on remedy, even if not complete agreement on the role of deterrence. "Bad intent is the periphery of the rule. The core is in the preface and in curing prejudice."

An active participant in the Subcommittee process said that the proposal is a fine rule. The limits in the preface — failure to take reasonable steps, and efforts to restore or replace — are impressive. "The Subcommittee work is brilliant."

A fifth Subcommittee member noted that he had come late to the Subcommittee. He was impressed by the seriousness of the attention paid to the testimony and comments, and to the comments on the version in the agenda book. The proposed simplification, focusing on the core things that need to be done, is what we should do. "We cannot write a rule that will deal with all cases."

General discussion began with a reminder that in 2009 Judge Kravitz suggested there might be Enabling Act problems in framing a rule to address pre-litigation conduct. It is "brilliant avoidance" to frame a rule that, rather than attempt to establish an independent duty to preserve, takes as given the duty established by court decisions.

The Committee Note addressing the parties' burdens in arguing whether a failure to preserve caused prejudice, however, was found confusing. "I would fear the burden may shift during the hearing." Nor is it clear whether the preponderance standard applies. It would help to say that a party seeking remedial measures normally has the burden.

The burden question was addressed by noting the difficulty of proving what was in the lost source of information. Imposing a

burden on the party seeking to cure the loss "may thwart justice." So it was that every attempt to write a burden provision proved difficult. "Some courts say where the burden lies. Others are silent." There is this much guidance in the rule: the court must find prejudice to invoke paragraph (1), and it must find intent to invoke paragraph (2).

The response was the same question, reframed: "Do we require the party who lost information to prove the other party was not prejudiced"? If the party who lost the information has the burden it has no way to know what other information is available to the party who may have been prejudiced. "I fear discretion will be a complete lack of discipline. Allocating the burden may determine the outcome."

Another judge reframed the question: "How does a trial judge get through this flexible process? It is very complex. When I start to hear all this, whom do I look to at the starting point, recognizing the burden may change as the hearing moves along"?

The response was the same. "We have not attempted to say where the burden rests, nor when it may shift." The aim is only to draft a modest but broad rule, and to establish uniformity. Another Committee member said that the basic law imposes the burden of proving prejudice on the moving party. But when bad faith is shown, there is either a very low threshold on prejudice, or the burden is shifted.

A Committee member commended the "restore or replace" provision as "an important and good change." The next steps follow — measures no greater than necessary to cure prejudice, and then intent. But if you cannot cure the prejudice by other means, paragraph (2) allows the court to draw adverse inferences, give an adverse-inference jury instruction, or dismiss or default only on finding an intend to deprive another party of the lost information's use in the litigation. Not even reckless loss will support those measures. So if the court does not find the required intent, it will not ask the jury to find the intent. What does the court say to the jury?

One response was that in the (e)(2) situation, the jury has heard what happened — that information was not preserved. An example is proof of the loss of metadata for a document that survives and is introduced in evidence. Even if the loss occurred at a time when there was no duty to preserve, the jury may consider whether the missing evidence would be helpful to a party opposing the party who lost it.

It was noted that the Subcommittee will work to refine the

part of the Committee Note that deals with the forms of jury instructions that may be given when there is no finding of an intent to deprive another party of the lost information's use. This work will consider the later observation that there is such a broad range from negligent to intentional conduct that we should be clear in reflecting on the cases in which a jury may hear evidence on what was lost. There is a range of remedies not circumscribed by a requirement of finding intent under (e)(2).

A Committee member said it is "good not to commoditize, to avoid a one-size-fits-all approach, to tailor reactions to each case." Modesty is a strong mark of intelligence. It is good to encourage a tailor-made approach to each case. But should a greater range of options be made available under (e)(2) when intent is found? It was pointed out that (2) does not require resort to any of the remedies it lists. The Committee Note says explicitly that the court may adopt less severe remedies designed to cure the prejudice, if any, or to otherwise address the party's conduct.

A Committee member asked whether prejudice is required to invoke the severe measures provided by paragraph (2) for a failure to preserve for the purpose of depriving another party of the lost information's use in the action. The response was that to a certain extent, a finding of this intent permits the judge to infer from the intent that the information was unfavorable to the party who lost it. It would be confusing to add an explicit prejudice requirement. The case of deliberate intent without prejudice raises the question of deterrence: should we remove any consideration of deterrence from the choice of remedies? The Subcommittee decided that a need for deterrence might justify even dismissal or default, but not if the lost information is truly inconsequential.

It was pointed out that if the "incompetent spoliator" is an attorney, the court has another remedy by reporting to the state disciplinary authority.

Another Committee member recognized that "the rule presents challenging issues." The proposed draft is in many ways an elegant way of improving on the complexities of the version that was published for comment. And it is good to limit remedies to those that are no greater than necessary to cure prejudice. But what types of loss start you down this path? The draft is not limited to loss of "discoverable" information, nor does it require materiality. Some clarification in the Committee Note would be helpful. It was agreed that the Subcommittee would attempt to do this.

The same member asked whether restoring backup tapes fits under the preface as additional discovery to restore or replace

lost information, or only under paragraph (1) as a measure to cure prejudice? The preface goes beyond determining whether anything was lost. "Replace or restore can be very expensive": should such measures be available without finding prejudice? Should we build proportionality, a "no greater than necessary" limit into the approach to restoring or replacing the lost information? Again the response was that this would be addressed in the Committee Note. "Often you don't know whether there is prejudice until you've had the added discovery." Facing a renewed protest that restoring or replacing can be very expensive, the response was that this is a matter of discretion. The more reasonable the conduct was, the less likely it is that the judge will order extreme measures. Proportionality concerns may persuade the judge to order phased discovery, as many judges do now. "If there is a cost to some steps, we can talk about who pays."

The question whether present Rule 37(e) should be preserved in the text of the new rule was renewed. The value may lie not so much in guiding litigants and courts as in providing a tool for lawyers to use in persuading IT staff to design information systems that facilitate preservation. "Does 'reasonable steps' build in this idea"? It was suggested that something can be built into the Committee Note to reflect this concern — it could be something like the portions of the Note that appear in the agenda book at lines 37-47 and 384-385.

The question whether to limit the rule to loss of electronically stored information also was renewed. The Subcommittee Report lays out powerful reasons for adopting this limit. But "I'm not as confident there are not ESI equivalents to the vanishing car and air bag: there can be unique ESI in unique sources." Not all ESI is redundant. And is the case law on the loss of tangible things in fact less disuniform than the law on loss of ESI, so less in need of a uniform rule? A further concern is that a single case may involve loss both of ESI and of a tangible thing: do we want to leave it open to take different approaches to the different losses?

This question was characterized as a reflection of the reasons that make it unwise to attempt to write a rule for all situations. Examining the cases equivalent to the lost car failed to find any where there was not bad faith and a really critical loss of ESI. At the same time, it must be recognized that some cases may present serious questions whether a particular bit of lost information qualifies as ESI — our running example has been a printout of a vanished e-mail message.

A participant confessed to have begun by wanting a rule to address all forms of information. But the complications are great.

If the proposed rule is adopted, "we will monitor it closely." If it works, we can think seriously about extending it to other forms of information. If it does not work, we will look at it for that reason.

Another participant asked when the proposed rule would permit "issue sanctions, or evidence sanctions." Can the court exclude testimony as a remedy without finding the intent required for paragraph (2) measures, or — shades of Rule 37(b)(2)(A)(i) — direct that designated facts be taken as established? The Committee Note should address this. It was responded that the Note calls these steps "measures." But are they available without a showing of intent? Can the court forbid a witness from testifying to the contents of an e-mail message he wrote and lost when there is "no mens rea"? The Committee Note says, and is expected to say still, that anything that is equivalent to dismissal or default requires intent.

A similar question asked whether taking a matter as established can extend to taking "liability" as established? It was agreed that such a measure is equivalent to default, and is available only on finding the intent required by paragraph (e)(2).

The Subcommittee agreed with a separate suggestion that the Note should make clear that (e)(2) measures should not be punitive.

Brief discussion led to agreement that the "factors" in the published rule and the modified list of factors in the agenda-book proposal would be deleted from rule text. Some discussion of them may be provided in the Committee Note.

The Committee voted unanimously to approve the substitute draft proposed by the Subcommittee at this meeting. A revised Committee Note will be prepared and promptly circulated to the Committee.

The final question was whether approval of the new rule text should be for adoption or for republication. The sense of the Subcommittee is that republication is not necessary. "We have accomplished the purpose of publication and have had the full benefit of public input. Every issue has been fully explored." The published proposal, moreover, gave full notice of everything that remains in the rule. The new version still applies only to a failure to preserve information that should have been preserved. The first step still is to try to restore, the equivalent of permitting discovery in the language of the published proposal. The next step continues to address prejudice. And the new rule continues to limit the *Residential Funding* decision. Beyond that, "this has been a long process." There is a real need for

clarification and uniformity. It is better to avoid further delay.

Agreement with this view was expressed. "The rule text is within the four corners of the published proposal." A revised Committee Note that reflects the new rule text does not have to be republished. When other proposals have been republished it has been because the revised version involves a new factor that was not at all involved in what was published.

The Committee unanimously agreed that the recommendation should be for adoption without republication.

Judge Campbell concluded the discussion with praise for the Subcommittee. "It has been a great Subcommittee." It included a balance of lawyers "on both sides of the v." The judges also did great work. Thanks are due from all for their substantial work.

C. Rule 84

Judge Pratter presented the Report of the Rule 84 Subcommittee.

The Subcommittee recommends approval of the published proposal to abrogate Rule 84 and all of the Rule 84 Forms. Form 5, the request to waive service, and Form 6, the waiver, would be carried forward by amending Rule 4(d) to incorporate them.

"The Forms from 1938 should be thanked for their service and retired."

A number of comments, especially many from the academy, reflect a wish that the Forms remain. The hope is that people will return to them and use them. But there is little evidence of actual use. And there are many readily available sources of excellent forms.

Another concern is that the Forms are part of the debate about the consequences of the Supreme Court decisions in the *Twombly* and *Iqbal* cases.

The Subcommittee continues to believe, for reasons reflected in its Report, that abrogation will reflect current reality. The Committee cannot be in the business of keeping official Forms up to date in shapes that will be useful in today’s litigation world.

The recommendation to recommend for adoption the published Rule 84 proposal, and the related Rule 4(d) proposal, was unanimously approved.

D. Rule 6(d)

A modest revision of Rule 6(d) was published for comment in August, 2013. The change corrects an unintended ambiguity created by a style choice to allow 3 added days to respond "after service" by specified means. This formulation could be read to allow the 3 added days for periods set for action by the party who makes service. It was intended to carry forward the original meaning that allows the 3 added days only for a party who is served. The correction is simple: "after ~~service~~ being served * * *."

Three written comments supported the proposal.

The Committee unanimously approved the amendment for adoption. The timing for the next steps should be determined by the Standing Committee in light of the prospect that further changes may be made in Rule 6(d). Last January the Standing Committee approved for publication a revision that would exclude service by electronic means from the categories of service that provide 3 added days to respond. That proposal may be published for comment this summer if the advisory committees for other rules that have similar 3-added-days provisions recommend publication of parallel changes. It also is possible that these questions will be held back for a determination whether to recommend withdrawal of the 3-added-days provision entirely, or for some other modes of service. There is no urgency about the "being served" amendment. The ambiguity was identified in a law review article, and there is no indication that it has caused any significant problems in actual practice. The advantages of accomplishing all potential revisions of Rule 6(d) in a single package are real.

E. Rule 55(c)

A modest revision of Rule 55(c) was published for comment in August, 2013. The change corrects an ambiguity by adding one word: "The court may * * * set aside a final default judgment under Rule 60(b)." Rule 60(b) authorizes relief from "a final judgment." Rule 54(b) provides that any order or other decision that adjudicates fewer than all the claims among all the parties "may be revised at any time before the entry of a judgment" adjudicating all claims among all parties. Present Rule 55(c) is meant to govern only relief from a final default judgment, whether finality is achieved by an order under Rule 54(b) to enter a partial final judgment or results from complete disposition of all claims among all parties. Courts have reached this result, but often have had to struggle through the three rules to understand that it is the proper result. The amendment makes the point clear, sparing future parties and courts from the need to work through to the correct answer.

April 17, 2014 draft

Three public comments supported the proposal.

The Committee unanimously approved the proposal for adoption.

II PROPOSALS FOR PUBLICATION

A. Rule 4(m)

As noted in discussing the Duke Rules Package, many comments on the proposal to reduce the time set by Rule 4(m) for serving the summons and complaint suggested that even 120 days are not enough to accomplish service abroad, whether under the Hague Convention or otherwise. Most of these comments were puzzling. By its express terms, Rule 4(m) "does not apply to service in a foreign country under Rule 4(f) or 4(j)(1)." The apparent source of the confusion is that Rule 4(f) governs service on an individual at a place not within any judicial district of the United States, and Rule 4(j)(1) governs service on a foreign state or its political subdivision, agency, or instrumentality in accordance with 28 U.S.C. § 1608. Service on a corporation, partnership or other unincorporated association outside any judicial district of the United States is governed by Rule 4(h)(2). Rule 4(h)(2) in turn directs service "in any manner prescribed by Rule 4(f) for serving an individual, except personal delivery under (f)(2)(C)(i)." This sequence of cross-references could be construed to mean that service under Rule 4(h)(2), "in any manner prescribed by Rule 4(f)," is service under Rule 4(f). Then the present 120-day limit, and the proposed 90-day limit, would not apply. That construction makes sense; there is no reason to think that service abroad can be any more expeditious when service is to be made on a corporation rather than an individual. But that conclusion is not manifestly required, and the comments suggest that many lawyers have not thought of it. One thoughtful comment pointed to the uncertainties in Rule 4, suggested that courts that have confronted the problem of serving a corporation in another country have reached the right result, albeit without clear analysis, and urged that Rule 4(m) be amended.

The Committee unanimously recommended publication of an amendment to Rule 4(m): "* * * This subdivision does not apply to service in a foreign country under Rule 4(f)<u>, 4(h)(2),</u> or 4(j)(1) * * *."

B. Rule 82

The Standing Committee at the meeting last January approved publication of a proposal to amend Rule 82 to reflect amendments of the statutory venue provisions governing admiralty or maritime actions. New 28 U.S.C. § 1390(b) provides that apart from the transfer provisions, the venue provisions of Chapter 87 do not govern the venue of a civil action in which the district court exercises the jurisdiction conferred by § 1333 over admiralty or maritime claims. It was agreed that the message transmitting the amended rule for comment would ask whether the rule should continue to refer to 28 U.S.C. § 1391. Further reflection prompted the need

for further consideration.

Rule 82 serves to make it clear that the Civil Rules do not "extend or limit the jurisdiction of the district courts or the venue of actions in those courts."

The second sentence of Rule 82 was added to reflect the well-established rule that the general venue statutes do not apply to admiralty or maritime actions, apart from the transfer provisions. This specific statement reflects potential ambiguities about the exercise of admiralty or maritime jurisdiction. Some admiralty and maritime claims are inescapably admiralty or maritime claims; as to them there is no ambiguity. But other claims, governed by the "saving to suitors" clause in 28 U.S.C. § 1333, may be brought either as admiralty or maritime claims within § 1333 jurisdiction or as common-law claims that can be brought in federal court only by asserting a different basis for jurisdiction. Rule 9(h) allows a pleading that states such a claim to designate it as an admiralty or maritime claim. But the merger of the admiralty rules into the general Civil Rules in 1966 made an action asserting an admiralty or maritime claim a "civil action." The remedy was to add the second sentence, stating that an admiralty or maritime claim under Rule 9(h) is not a civil action for purposes of 28 U.S.C. §§ 1391-1393. Section 1393 was deleted from Rule 82 when § 1393 was repealed.

The venue amendments enacted in 2012 repeal § 1392. If nothing else, Rule 82 must be revised to strike the reference to § 1392.

That leaves the question whether to continue to refer to § 1391. The proposal approved for publication in January was conservative. It retained much of the present language of Rule 82, revising it only to provide that an admiralty or maritime claim under Rule 9(h) is not a civil action for purposes of §§ 1390-1391. The snag is that § 1390(b) twice refers to actions under § 1333 as civil actions. It seems at best incongruous to say in the rule that an admiralty or maritime claim is not a civil action for purposes of § 1391, and flatly inconsistent with § 1390(b) to say it is not a civil action for purposes of § 1390.

The revised version proposed in the agenda book was this: "An admiralty or maritime claim under Rule 9(h) is an exercise of the jurisdiction conferred by 28 U.S.C. § 1333, including for purposes of 28 U.S.C. § 1390." The Committee voted to recommend this revised version for publication.

Subsequent consultation with Professor Kimble, the Style Consultant, suggested a clearer version: "An admiralty or maritime claim under Rule 9(h) is governed by 28 U.S.C. § 1390." That

version will be included with the recommendation to the Standing Committee.

III. Information

Judge Dow delivered a report on the preliminary work of the Rule 23 Subcommittee. The Subcommittee met in Phoenix after the public hearing on the published rules proposals. The sense of the Subcommittee is that it is timely to start considering possible revisions of Rule 23. Many developments that affect class actions have occurred since Rule 23 was last revised. The Class Action Fairness Act and a number of Supreme Court interpretations of Rule 23 have affected ongoing practice in many ways.

The Subcommittee has considered a number of possible topics, with the sense that a manageable project should not attempt to address every issue that might be identified. It has worked up a list that identifies three topics as potential "front burner" subjects, with another half dozen as potential further subjects.

One subject is presented by settlement classes. Some work identifying issues within this category has already been done. the issues include criteria for certifying a settlement class; cy pres provisions; criteria for approving a settlement; and a matter currently on the agenda of the Appellate Rules Committee, the responses appropriate when an objector appeals approval of a class settlement and then seeks to dismiss the appeal, perhaps because of an agreement with proponents of the approved settlement. Most class actions settle. Consideration of settlements seems desirable, including work with the Appellate Rules Committee on settlements pending appeal.

Issues classes present a second set of issues. Different circuits treat Rule 23(c)(4) differently. Serious questions arise from integration of Rule 23(c)(4) with the predominance criterion of Rule 23(b)(3).

Notice to class members also presents interesting questions. Contemporary technology presents many alternative possibilities for accomplishing notice. Different means may be consistent with due process as an abstract matter, and may in fact be more effective than some contemporary modes of accomplishing notice.

After these issues come several that have not percolated as much in initial Subcommittee deliberations and that may not be appropriate for present action. Among those that have been identified, several seem to present both attractive opportunities to improve the rule and equally daunting risks of interfering with current practices that may be better than formal rule provisions

could manage. These include: (1) the extent to which consideration of the claims on the merits should be explored at the certification stage; (2) implementation of the predominance and superiority requirements in Rule 23(b)(3); (3) the extent to which a mandatory (b)(2) class for injunctive or declaratory relief should extend to monetary awards; (4) the questions of commonality raised by the *WalMart* decision, including related questions of consolidation by other means; and (5) amending the language that prompted the *Shady Grove* ruling that allows certification of a class to enforce state-law claims that state law excludes from class recovery.

It was noted that the Supreme Court continues to take cases involving class actions, but that this is not a reason to abandon work on Rule 23.

The prospect that people often junk class-action notices without reading them was noted.

The next step for the Subcommittee will be to generate a more concrete list of topics for consideration at the fall meeting. More detailed work can be launched after that; when the work has advanced to an appropriate stage, it is likely that a miniconference will prove helpful. No rule text drafts have been prepared, apart from an initial sketch of small changes that would supersede the textual foundation for the Shady Grove result.

A thank you

The Committee expressed gratitude and appreciation to Dean Klonoff and the staff of the Lewis and Clark Law School for their extensive and gracious efforts in hosting the Kravitz symposium and the Committee meeting.

Adjournment

The meeting adjourned. The next meeting will be on October 30 and 31 in Washington, D.C.

Respectfully submitted,

Edward H. Cooper
Reporter

April 17, 2014 draft

TAB 3

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Item 3 will be an oral report.

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E-Rules Amendments

Introduction

The Standing Committee has appointed a subcommittee, chaired by Judge Chagares and reported by Professor Capra, to examine the ways in which the several sets of rules might be amended to reflect the accelerating dominance of electronic means of communication. Joint consideration will enhance the deliberations of each advisory committee. It also will enhance the effort to adopt common answers to common questions, commonly expressed. At the same time, it is recognized that each advisory committee should examine the ways in which each particular set of rules addresses different circumstances that may warrant departures from the common model.

Two common issues have already been addressed extensively. Proposals to eliminate the "3 added days" for reacting after service by electronic means were published for comment in August, 2014. The Civil Rule proposal would amend Rule 6(d). The question of electronic signatures was addressed by a proposed amendment of Bankruptcy Rule 5005(a)(3) that was published in 2013. That proposal encountered significant criticism and was withdrawn. The question of electronic signatures remains open, but there are no proposals to be considered now.

Other issues common to several sets of rules remain. Professor Capra thinks it would be helpful to begin with consideration of the Civil Rules on three topics: Mandatory electronic filing; mandatory electronic service of materials that follow the summons and complaint or similar compulsory process; and a rule providing that, with identified exceptions, anything that can be done by paper may be done electronically. These common issues are addressed in that order. Amendments of Rule 5 are provided to illustrate mandatory e-filing and mandatory e-service. These topics seem ready for consideration. Drafts also are provided to illustrate general permission to substitute electrons for paper, but with a recommendation that the Civil Rules include too many potential exceptions to warrant further consideration now.

The Civil Rules include many provisions that might benefit from adjustments to reflect the general progress of e-activity in substituting for paper activity. An earlier memorandum describing these possibilities is carried forward below. Some of the proposals seem potentially useful, but none of them seems to call for urgent action. Any that seem worthy after Committee deliberation could be included as a package with the e-filing and e-service proposals. Timing will likely depend on the pace of deliberations by the joint subcommittee and the other advisory committees.

Issues Common Across the Sets of Rules

Electronic Filing

Rule 5(d)(3) now depends on local rules to establish electronic filing. Local rules that require e-filing must allow "reasonable exceptions." It may be that there is no need for change. A survey by the Administrative Office found that 92 districts have adopted local e-filing rules. The AO study found wide variations in the exceptions; notes on the local rules are attached as an appendix. The notes suggest that there may be good reasons to provide different exceptions in different districts.

But it may be that the time has come to move at least part way toward a uniform national e-filing practice. The AO study reports that 85 districts have adopted mandatory e-filing as the default. Present Rule 5(d)(3) begins by providing that a court may, by local rule, allow papers to be filed by electronic means. The next-to-last sentence, however, provides that "a local rule may require electronic filing only if reasonable exceptions are allowed." The illustrative sketch of a revised Rule 5(d)(3) set out below begins with a mandate for e-filing, but requires exceptions for good cause and allows additional exceptions by local rule. This draft reflects the belief that it is not yet time to attempt to adopt more definite exceptions in the national rule, leaving the question to ongoing development in local rules.

(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 allowed for other reasons by local rule.[1] ~~A~~

[1] The Committee Note could illustrate circumstances that suggest good cause for exemption, but that may be dangerous.

Alternative drafting has been suggested, to come closer to the current Appellate Rule 25 (a)(2)(D): "A local rule may require filing by electronic means only if reasonable exceptions are allowed." In the format suggested for Civil Rule 5, this might become "and a local rule may provide other reasonable exceptions."

It would be possible to carry forward the present provision that recognizes local rule provisions that specify the form of e-filing. The suggested text does not expressly preclude that. Do we want to call attention to the prospect, or should we rely on uniform adoption of the NextGen system?

~~local rule may require electronic filing only if reasonable exceptions are allowed.~~

Pro se litigants might be exempted by rule text. The AO study shows that some local rules actually exclude pro se litigants from the opportunity to file electronically. Many local rules require a pro se litigant to get permission to e-file; one requires pro se litigants to e-file after filing a paper complaint; and two (there is at least a third) allow pro se prisoners to e-file through special programs with their prisons. On balance it seems better to leave development of these practices to local rules.

Service After Initial Process

Rule 5 now provides for service by electronic means, but only with the consent of the person served. There seems to be general agreement that a party should not be able to deny other parties the convenience of service by electronic means. Local rules in many districts effectively coerce consent now by requiring e-filing and including consent to e-service in the conditions for signing up for e-filing. At the same time, it seems likely that some exceptions should be allowed. The structure of this draft includes one big exemption. Consent of the person served is no longer required for e-service, but e-service is not required. The draft only provides that a paper "is served" by electronic means; it does not abrogate any of the alternative methods of service recognized in Rule 5(b)(2)(A) through (D) and (F). That is important, particularly when physical paper is filed with the court. Many local rules, for example, provide for filing social security records in paper form; even if they are eventually converted to pdf, service should not have to await the conversion. (It is possible to draft the rule to require e-service of anything that is e-filed, subject to whatever exemptions are adopted. Since many things are served that have not been filed, the drafting might become a bit tricky.)

Another obvious possibility would be to exempt pro se parties, but reflection suggests that it may not be wise to adopt a blanket national rule exemption. Some courts are experimenting with plans that include pro se litigants in e-filing and e-service systems.

Various possibilities appear for specific exemptions. This draft, however, follows the approach of the mandatory e-filing draft. Exemptions are allow for good cause or by local rule:

(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[2] — 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;

Certificate of Service. It seems convenient to supplement this illustration with a revision of Rule 5(d)(1) that responds to a question raised by the Committee on Court Administration and Case Management. In line with their preference, the rule would be amended to allow a notice of electronic filing to be a certificate of service. That seems a good idea. But there may be subtle complications. It does not work to provide simply that a certificate of service or a notice of electronic filing must be filed — the notice is already in the court's system. It could work to provide that the notice is a substitute for the certificate:

(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 for every party that was not served by means that provide[d] [generate[d]] a notice of electronic filing. * * *

The notice of electronic filing serves as a certificate of service only on the assumption that a local rule says that e-filing accomplishes service.[3] An alternative might escape the perils of this assumption:

> a certificate of service also must be filed, but a notice of electronic filing is a certificate of service

---

[2] Although e-filing and e-service predominate today, some means of exemption should be recognized apart from the alternatives that inhere in the alternative means of service authorized by present 5(b)(2).

At least two possible additions to rule text might be considered. One would allow a person to elect to refuse to be served by electronic means by filing the refusal at the time of the person's first appearance in the action. That may give inappropriate power to thwart efficient service by others. Another possibility would be to provide one specific illustration of good cause — the person has no [known? valid?] address for electronic service.

[3] New Mexico Local Rule 5.1 provides that "Electronic filing constitutes service for purposes of" Rule 5.

on any party served through the court's transmission facilities.

Contemplating these alternatives suggested a further question. Rule 5(d)(1) says only that a certificate of service must be filed. It does not say whether the certificate also must be served on all parties. Rule 5(a)(1), "Service: When Required," provides uncertain guidance — subparagraph (E) requires service of "A written notice, appearance, demand, or offer of judgment, *or any similar paper*." The prospect of infinite regress looms, but does not seem a serious problem — no one is likely to demand that a party serve on all other parties certificates of serving the first certificates, and so on.

So what is it? Is there a uniform understanding that can be relied on in drafting for the notice of electronic filing?

Or is there some prospect of confusion? Rule 5(d)(1) was added in 1991. Before that, certificates of service were required only by local rules, but most courts had the local rules. The Committee Note explained: "Having such information on file may be useful for many purposes, including proof of service if an issue arises concerning the effectiveness of the service." That statement looks only to having the certificate on file, and that is all the rule text has required. One treatise treatment of Rule 5(a)(1) sheds little light. See 4B, Wright & Miller, Federal Practice & Procedure: Civil §§ 1143, 1150 (3d ed. 2002 & 2013 Supp.).

Requiring service of the certificate of service could have at least two advantages. One is to provide a second-chance notice that cures any failure of the first service. Another is to reassure all parties that all other parties indeed were served.

On the other hand, the potential advantages might seem outweighed by the sheer bother of requiring a second round of service — the certificate — whenever anything needs to be served. The waste may seem particularly unseemly in a two-party case. Or in a case with multiple parties, but only one attorney per "side."

E-service raises this question because of the prospect that some cases will involve some parties subject to e-service and others who are not. Although the notice of electronic filing seems an adequate certificate of service that need not be served on those who participate in e-service, should the e-serving party be required to serve either a certificate or a print-out of the notice on parties served by other means? If it is determined that service of the certificate or notice should be required, and that present practice may not be well-settled or well-known, Rule 5(a)(1)(E) could be amended to include "certificate of service or notice of electronic filing." The Note could observe that service of the notice of electronic filing would be automatically

accomplished as to parties participating in e-service under a rule that equates the notice with service, while a copy of the notice or a certificate of e-service must be served on parties served by other means.

Generic "e=p[aper]" Provision

The ascendancy of electronic delivery raises the question whether to adopt a general provision recognizing electronic action whenever the same action could be accomplished by physical paper. There is a strong temptation to adopt a rule stating that whatever may be done by paper may be done electronically. The drafts described above pretty much do that for filing and service after the initial summons and complaint. What remains unresolved is whether to generalize beyond that.

A generic draft has been provided by the Subcommittee, recognizing that it may require adaptation to the circumstances established by any particular set of rules. This draft is direct:

Rule X. Information in Electronic Form and Action by Electronic Means

(a) INFORMATION IN ELECTRONIC FORM. In these rules, [unless otherwise provided] a reference to information in written form includes electronically stored information.

(b) ACTION BY ELECTRONIC MEANS. In these rules, [unless otherwise provided] any action that can or must be completed by filing or sending paper may also be accomplished by electronic means [that are consistent with any technical standards established by the Judicial Conference of the United States].

The brackets leave open the opportunity to "otherwise provide," apparently by writing an explicit exception — likely with a cross-reference — into each rule that does not seem suitable for an electronic substitute for paper.

The brackets referring to Judicial Conference standards reflect present provisions — in the Civil Rules, Rule 5(d)(3). One question to be explored is whether parties frequently transmit papers directly, without passing through the court system. Many discovery materials, for example, are never filed with the court. If transmission is accomplished without using the court's system, and the parties are agreeable to using their own methods, it may be inappropriate to require adherence to Judicial Conference standards.

Alternative drafting is possible.[4] The following illustration is only an alternative, not a preferred alternative. One shortcoming is that the list of acts beginning with "delivering" is long enough to be annoying, but almost certainly incomplete.

Rule 5. Serving and Filing Pleadings and Other Papers

(a) *Electronic filing and transmission.* Electronic filing or transmission satisfies a rule [that provides] for delivering, entering, filing, issuing, producing, sending, or serving if [it][the filing or transmission]

(1) satisfies the requirements of form applied to a physical writing;[5] and

(2) is transmitted by authorized means.

However drafted, a general rule equating electrons with paper presents the perennial problem of balancing need and potential benefit against uncertainty and risk. Apart from filing and service, which are addressed directly by the proposals set out above, what benefits will accrue to addressing which needs for explicit permission to substitute electrons for paper? What are the countervailing risks of failing to identify each of the circumstances that should be made exceptions?

The potential benefits of a general rule equating electronic communication with communication by more tangible means could be significant. The opportunities for uncertainty are illustrated by the appendix that sets out examples of Civil Rules vocabulary that may seem ambiguous in this context. Some of the terms that obviously but ambiguously imply paper include affidavit, certificate, copy, declaration, document (remember that Rule 34 seems to distinguish electronically stored information from "documents," and was deliberately intended to make the distinction), minute, newspaper, papers, publish, record, sign (Rule 5(d)(3) seems to take care of this for things that are filed, but the rules provide for signing things that are not filed), transcript, warrant, writ, and writing (written, in writing).

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[4] A limited example is provided by Local Rule 5.1 in the Northern, Eastern, and Western Districts of Oklahoma: "Any paper filed electornically constitutes a written paper for purposes of applying these rules and the Federal Rules of Civil Procedure."

[5] This choice of words provides a good illustration of the risks that inhere in attempting to draft a rule. It was only later rereading that suggested grave difficulties — to allow an electronic transmission that satisfies the requirements of form applied to a physical writing could upset the elaborate provisions in Rule 34 that govern the form for producing electronically stored information.

Examining every appearance of the ambiguous words, and others like them, will be a challenging task. But it could be done. The purpose would be to decide whether, in each instance, electrons are an acceptable — or encouraged — substitute for paper. If there are only a few exceptions, they could be made in either of two ways. The general rule could, as the Subcommittee draft, refer generally to exceptions that would be identified in each rule. Or the exceptions could be enumerated in the general rule. Given the likelihood that readers of any particular rule may fail to heed the general rule, it seems likely that the better course is to adhere to the "unless otherwise provided" approach in the general rule, spelling out the exceptions in each rule.

More important questions will be raised by the effort to decide which rules should be made exceptions. Prominent examples are provided by service of the initial summons and complaint, Rule 4; service of "process" under Rule 4.1; service of a summons and third-party complaint, Rule 14; service of summons and process in Supplemental Rule B attachment and garnishment; service of a warrant to arrest under Supplemental Rule C and D (and the territorial limits on service in Rule E(3)); and service of an arrest warrant in a civil forfeiture action under Supplemental Rule G. It may be too early to rely on e-service in some or all of these settings. But if that is generally right, still an outright exemption may not do. Rule 4 incorporates state grounds of personal jurisdiction. If the state practice allows service by mail, and is interpreted to allow service by e-mail, should the federal courts be precluded from adopting the state practice? A broadly worded exemption of Rule 4 from the general rule that equates e-mail with postal mail would not do, at least not without careful thought.

A less prominent but more recent example is provided by service of a subpoena. After serious discussions, it was decided not to provide for service by mail in framing the revised Rule 45 that took effect on December 1, 2013. Of course the discussion can be reopened — some courts are now ruling that the Post Office can make service by delivering a copy of the subpoena, see Ott v. City of Milwaukee, 682 F.3d 552 (7th Cir.2012)(Wood, J.). But it is often wise to postpone reconsideration of a recent deliberate decision, at least for a while.

It is difficult to guess at the number of more obscure examples that may arise. Supplemental Rule B(2)(b) provides for any form of mail requiring a return receipt: do e-mail systems count? Should they — many institutional systems do not provide for the equivalent of a return receipt, and systems that do may be short-circuited. Some rules provide for notice in a "newspaper." "Publish" may be linked to this. "Stenographically reported," Rule 80? A stipulation "signed by all parties who have appeared"? Rule 32(c) directs that a party provide a transcript of any deposition testimony the party offers, but allows nontranscript form "as well" and mandates nontranscript form in some circumstances. Can a "writ" be in e-form? Written findings or questions in Rule 49 verdicts?

Written notice of an application for a default judgment if the defaulter has "appeared" by means that do not provide an e-address?

So the question: recognizing that there may be real value in a rule that generally equates electronic communication with paper, equivalence is not likely to be desirable in all branches of the Civil Rules. Defining the appropriate exceptions will require much careful work. The question is whether the task of identifying the exceptions can produce such sound results as to repay the effort and risk of error. One further element of the answer may appear if the other sets of rules adopt a general provision equating electronic messages with paper. The absence of such a provision from the Civil Rules might support arguments against recognizing e-messages by inference from the comparison.

All of these complications suggest that it is not yet time to go forward with a proposal that equates e-action with paper action. Exceptions are necessary, and it will be difficult to identify the exceptions.

Issues Peculiar to the Civil Rules

The Subcommittee project prompts a review of the Civil Rules to determine whether to recommend revisions that may not prompt parallel revisions in other sets of rules. A number of possibilities are described below. It will be helpful to have comments on the need to pursue them.

Rule 4(a)(1), (2); (b): These suggestions come from Laura Briggs. The idea is that the clerk and attorneys can save time if the clerk can sign and seal a summons electronically. This happens now, but may not comport with the rule text:

Rule 4. Summons

(a) CONTENTS; AMENDMENTS.

(1) *Contents.* A summons must: * * *
(F) be signed by the clerk, either physically or electronically; and

(G) bear the court's seal, either physically or electronically.[6] * * *

(b) ISSUANCE. On or after filing the complaint, the plaintiff may present a summons to the clerk for signature and seal. If the summons is properly completed, the clerk must sign, seal, and issue it to the plaintiff for service on the defendant. When

[6] Of course drafting variations are possible: "be signed [in writing] [physically] or electronically by the clerk"; "bear the court's [physical][written] or electronic seal."

issued on paper, a ~~A~~ summons — or a copy of a summons that is addressed to multiple defendants — must be issued for each defendant to be served [with a paper summons].

This form assumes that paper service is required. It is implicit that the plaintiff may present the summons to the clerk electronically, and that the clerk may sign, seal, and return the electronic version of the summons to the plaintiff. The plaintiff then prints out the summons. But if the plaintiff brings paper to the clerk, the clerk must issue a paper summons for each defendant to be served. At least some courts are already signing and sealing by electronic means.

Rule 7.1: Rule 7.1 requires a nongovernmental corporate party to "file 2 copies of a disclosure statement." Memory suggests that the purpose of requiring two copies was to have one for the judge. (Appellate Rule 26.1 was amended in 1994 to require 3 copies if the statement is filed before the principal brief; the Committee Note observed that there is no need for copies otherwise because the statement is included in each copy of the brief.) Notice to the judge is now accomplished by the ECF system, or should be. This suggests an amendment:

Rule 7.1. Disclosure Statement

(a) WHO MUST FILE; CONTENTS. A nongovernmental corporate party must file ~~2 copies of~~ a disclosure statement * * *.

Rule 11(a): As noted above, a proposed revision of Bankruptcy Rule 5005(a)(3) addressing electronic signatures was published for comment in 2103 and later withdrawn.

Rule 11(a) could be a good location for a general electronic signature provision, whether in competition with Rule 5(d)(3) or as a replacement. Rule 11 requires that a "pleading, written motion, and other paper" be signed. Instead of focusing on filing, as Rule 5(d)(3) does, Rule 11 would provide a more general requirement. A simple version would be:

Rule 11. Signing Pleadings, Motions, and other Papers; * * *

(a) SIGNATURE. Every pleading, written motion, and other paper [document?] must be signed — [physically] [in writing?][or electronically —]by at least * * *."

This version may be too simple when it comes to a paper that must be signed by someone other than the person filing it. That problem has stymied the Bankruptcy Rules Committee for the moment; it may be wise to await their further deliberations, if any.

Rule 33: Rule 33 now calls for written interrogatories, to "be answered separately and fully in writing under oath." The answers and objections, moreover, must be signed. It has been several years

since outside suggestions have been made that Rule 33 should provide for submitting interrogatories in e-form, with provision for providing answers by filling in the same e-file. Are we there yet? Some doubts have been expressed. Perhaps it is enough for now to rely on the inventiveness of litigants — explicit or tacit consent to e-exchanges should be acceptable.

Rule 71.1(c)(5): Rule 71.1(c)(5) requires the plaintiff in an eminent domain action to give at least one copy of the complaint to the clerk for the defendants' use, "and additional copies at the request of the clerk or a defendant." Rule 71.1(d) requires the plaintiff to deliver to the clerk "joint or several notices directed to the named defendants." Additional notices must be delivered when the plaintiff adds defendants. (d)(3) calls for personal service of the notice, without a copy of the complaint, on each defendant (with exceptions). Rule 71.1(f) directs that notice of filing an amended pleading, but not the pleading, be served. At least one additional copy of the amendment must be filed with the clerk, with more at the request of the clerk, in parallel with the requirement of copies in 71.1(c)(5). All of these copies seem an unnecessary nuisance if the complaint is e-filed and the complaint and amended pleadings are not served anyway. We should find out, presumably from the Department of Justice, whether it is enough to carry forward the requirement that the notice and answer be served.[7] All parties would have access to the court file to get the complaint and amended pleadings. (It also might be enlightening to see whether it would make better sense to require that service of notice under Rule 71(d) be supplemented by at least an e-mail link to the complaint on file with the court.)

Rule 72(b)(1):

> * * * The magistrate judge must enter a recommended disposition, including, if appropriate, proposed findings of fact. The clerk must promptly ~~mail~~ serve a copy ~~to~~ on each party.
>
> Self-explanatory. This is existing practice.

Rule 79(a)(2),(3): Rule 79(a)(2) and (3) refer to docketing requirements for papers. If we do not manage a generic resolution of this problem, here too "documents" might be substituted, still subject to the uneasiness generated by the Rule 34 distinction between documents and electronically stored information.

Rule 79(b):

(b) CIVIL JUDGMENTS AND ORDERS. The clerk must keep a copy of every final judgment and appealable order; of every order affecting

[7] A limited informal inquiry suggests that there is no need for multiple "copies."

> title to or a lien on real or personal property; and of any other order that the court directs to be kept. The clerk must keep these, either physically or electronically, in the form and manner prescribed by the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States.

The purpose of this suggestion seems plain. But why is it not enough to ask the Director to approve electronic form and win approval of the Judicial Conference?

Rule 79(c):

> **(c)** INDEXES; CALENDARS. Under the court's direction, the clerk must:
>
> > **(1)** keep indexes of the docket and of the judgments ~~and orders~~ described in Rule 79(b); * * *

The basic question is whether the clerk should be directed to keep an index of orders, or whether an index of judgments should suffice. The argument is that orders can be found electronically within a case, and a quick search can be made for all judgments issued within a particular date range. This might be a bit tricky. Rule 79(b), quoted above, requires the clerk to keep a copy of every "appealable order," every order affecting title or a lien on property, and any other order the court directs to be kept. Rule 79(a)(2)(C) directs that all orders be marked with the file number and entered chronologically on the docket. Just to make matters more complicated, Rule 54(a) provides that "'Judgment'" as used in these rules includes * * * any order from which an appeal lies." Those orders still would be covered by the proposed Rule 79(c)(1), and the clerk still would be left to guess which orders may be appealable. One common example of uncertainty would be the collateral-order appealability of an order denying a motion for summary judgment on official-immunity grounds.

CM/ECF Issues

Two CM/ECF issues raised by the Committee on Court Administration and Case Management are noted above. One deals with preserving "wet" signature originals of things filed electronically, a matter left after withdrawal of proposed Bankruptcy Rule 5005(a)(3). The other is addressed in the draft of Civil Rule 5(d)(1) that would allow a notice of electronic filing to be a certificate of service.

Other CACM Issues

CACM and the rules committees have been asked to consider the possibility that a district judge could use videoconferencing to preside at a bench trial physically occurring in a courtroom in another district. For the Civil Rules, this question implicates at least Rule 43(a) and Rule 77(b). Rule 43(a) allows testimony "in open court by contemporaneous transmission from a different

location," but only "[f]or good cause in compelling circumstances and with appropriate safeguards." Rule 77(d) provides that "no hearing — other than one ex parte — may be conducted outside the district unless all the affected parties consent." This question seems to be on hold for now.

Appendix 1: Notes on Exemptions in Local e-Filing Rules

These notes identify several categories of exemptions provided in local e-filing rules. Some of the exemptions are widely embraced. Some are provided by only a few courts. There are good reasons to believe that it would be unwise to incorporate many or most of them in a national rule that mandates e-filing. Some depend on local conditions. Examples are exemptions for lawyers in areas that do not have access to highspeed internet services, or, in one court, a rule that makes e-filing mandatory for all attorneys admitted to practice in the district on or after January 1, 2008. Other exemptions reflect technology restraints that may disappear with time; adopting them in a national rule could mean that the national rule must be revisited are regular intervals, and revised almost as often. Still others may reflect the capacities of clerks offices to deal with physical filings. And, as always, it may be possible to learn from the experience of different courts with different rules.

Exclusion presents questions different from exemption. Many courts exclude all pro se litigants from e-filing. The exclusion may be narrower, applying only to pro se prisoners. The exclusion may be qualified by allowing e-filing by a pro se litigant who demonstrates willingness and capacity to do it. There has been enough success with e-filings by pro se parties that it may be better to leave this matter to local rules. Who knows? It even may be that local circumstances differ — a state prison system, for example, may be set up in ways that make e-filing easy for computer-literate inmates, while the system in another state may not provide reliable access to the internet.

The most common exemption is available on court order. Often standards are set, looking for hardship or good cause. That general idea may be made more specific, providing an exemption when e-filing is "impracticable," or in "exceptional circumstances," or for exceptional circumstances "including technical failure." At least one court requires notice of manual filing "to the court" if an exemption is invoked. Some courts also contemplate that a particular attorney may seek a blanket exemption for all cases without having to seek a specific exemption in each case.

The persons authorized to grant exemptions under these general standards vary. Often it is "the court." It may be the assigned judge, a district or magistrate judge, or a "judicial officer." The local rule in the Southern District of Alabama allows the clerk’s office to "deviate" in specific cases. This is an issue that might be addressed in a national rule. It is tempting to believe that the

clerk, or a court administrator, could carry much of the burden of authorizing case-specific objections. But the workloads shouldered by such officials may vary from court to court. And different judges may have different degrees of attachment to e-records; even if physical filings are converted to e-files in the court system, there may be a lag that the judge would prefer to avoid. On the other hand, it might not be inconsistent with a national rule authorizing exemptions by the clerk to allow departures when directed by a judge. In a different direction, it may be wondered whether clerks would always welcome the authority to grant exemptions — the dynamics of relations between a clerk's office and attorneys may be significantly different from the forces that encourage attorneys to be reasonable when seeking action by a judge.

Some of the boxes in the AO spreadsheet suggest that exemptions are provided in separate local rules, or in various administrative orders, including orders that specifically govern e-filing. There well may be exemptions in addition to those described here.

A common category of exemptions contemplate cases that include extensive written materials that do not also exist in e-form. Social security cases are often noted; that exemption is likely to make sense until social security records are routinely provided in e-form. Similar exemptions apply to administrative records, state-court records, state-court records in habeas cases, or administrative records in ERISA cases. At least one court exempts records for bankruptcy appeals (somewhat surprising, given that the bankruptcy courts led the way to electronic dockets). Compare the District of New Jersey, which requires e-files of all documents filed in state court before removal. Here too, there may be local differences. Some state courts may be well advanced in electronic case management, while others lag.

Like exemptions apply to exhibits or to documents that are impractical to convert, that will be illegible if scanned, or that "cannot" be converted.

Many courts allow — or may even require — a paper complaint, perhaps in addition to an e-filing. (Some local rules expressly direct that a case be opened on the court's system.) This approach may be extended to any filing that adds or changes the parties or claims.

Sealed records are another common exemption. Qui tam filings are exempted as a narrower category of sealed matters. Related exemptions apply for documents submitted for in camera review, or documents to support an ex parte application.

Magistrate judge consents are exempted by a few local rules.

Closely related rules may be noted. The Northern and Southern

Districts of Iowa, channeling Rule 5(d)(4), direct that the clerk will not refuse to accept a document for filing, but add that the court may strike it or order that it not be filed.

New Mexico Local Rule 5.1 provides that electronic filing constitutes service for purposes of Rule 5.

The three districts in Oklahoma have a general statement that e=paper.

All of this may suggest that the safe approach in a national rule that mandates e-filing would be to provide for exemptions (1) for good cause, and (2) by local rule. Any more detailed list could go astray, now or in the reasonably near-term future.

Appendix 2: Vocabulary

The common question is how far various words imply physical paper, and how strong is each implication. Many of these words could be read to authorize action by electronic means. Most of them were used long before anyone was thinking about the question.

Listing these words does not imply that we should attempt to define them one-by-one. Nor does it imply that we should pursue some more global solution. It may be too early to attempt that. Or there may be no real need — sensible administration of rules written before the onslaught of e-information systems may adapt to new circumstances faster and better than formal amendments could do. The provisions in Rule 5 for electronic service and filing are a beginning. They can be expanded. Rule 5(b), for example, could provide that anything can be served electronically, and that there is no need to provide a physical paper of anything that has been served electronically. Rule 5(d) is already close to electronic filing for documents and papers, but does not reach things that are not filed. And it prohibits filing discovery requests and responses until they are used in the proceeding. (Supplemental Rule F(8) allows a party to a limitation-of-liability proceeding to "question or controvert any claim without filing an objection thereto.")

affidavit: appears throughout the rules. ("Declaration" is used in Rule 56 to reflect 28 U.S.C. § 1746; the sense of "writing" in § 1746 probably is limited to physical embodiments.)

agree: parties can agree to a mode of sale in civil asset forfeiture proceedings, Supplemental Rule G(7)(b)(iii). Compare consent and stipulate.

appear: Rule 16(f)(1)(A) authorizes sanctions if a party or attorney "fails to appear" at a Rule 16 conference. How about Skype? Text messaging? (Presumably a court can authorize this; should the rules speak to it?)

appearance: The concept of "appearance" is more complex than

"appear." E-acts often should count as an appearance for such purposes as timing a scheduling order, Rule 16(b)(2); signing a stipulation of dismissal, Rule 41(a)(1)(A)(ii); or a notice of an application for default judgment, Rule 55(b)(2).

certificate: e.g., "certificate of service," Rule 5(d)(1).
"Certification" is required before submitting some discovery motions. E.g., Rule 26(c), 37(a)(1), 37(d)(1)(B).

certify: As compared to the potential physical implications of "certificate," "certify" seems to direct an act. Why not acting by electronic means?

civil docket: Rule 79(a)(1) takes care of this – the form and manner are prescribed by the Director of the Administrative Office and approved by the Judicial Conference. E-dockets can be established without changing the Rule.

confer: Rule 26(f) requires the parties to confer. The original face-to-face requirement was deleted by amendment. Telephone will do. Surely Skype will do. Texting? E-mail by contemporary exchange?

consent: Rule 53(a)(1)(A) provides that a special master may perform duties "consented to by the parties." How does this differ from agree, or stipulate, in the world of e-communication? (See "written consent," Rule 15(a)(2).)

copy: E.g., Rule 44 on proving an official record.
Rule 26(b)(5)(B), and a parallel provision in Rule 45, direct that on notice of a claim of privilege or work-product protection for materials produced in discovery, the receiving party must return, sequester, or destroy the specified information and any copies. Surely e-copies are included.

deliver[ing]: E.g. Rule 4(e)(2)(C). E-mail could be seen to deliver the summons and complaint. It does not seem likely the rule would be read this way.

document: This is a longstanding issue. In the first round of amendments to address e-files, a deliberate choice was made to partially separate "electronically stored information" from "document" in Rule 34. And it also was decided not to couple "electronically stored information" with "document" at every appearance of "document" in other rules. The seeming implication may be that "document" standing alone does not include electronically stored information. But it is possible to read Rule 34(a)(1)(A) to include electronically stored information in the definition of "document." Discovery extends to "any designated documents or electronically stored information – including * * * other data or data compilations stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form." That reading seems better; the question is whether it should be

made explicit, a simple drafting task: "any designated documents ~~or electronically stored information~~ – including electronically stored information, writings, drawings * * *."

Without attempting a complete list, Rule 26(a)(3)(A)(iii) requires pretrial disclosure of "each document or other exhibit" the party may present at trial.

Rule 26(b)(5)(A) requires a privilege log that describes the "documents" not produced or disclosed.

Rule 30(f)(2)(A) addresses only "documents * * * produced for inspection during a deposition," and in (B) provides for attaching "the originals" to the deposition.

Rule 34(b)(2)(E) directs that a party "produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request." Why not ESI?? Will requests for ESI come to be made and negotiated in terms of key-word searches, predictive coding strategies, and the like that automatically sort responses by the categories in the request?

Rule 36 includes requests to admit "the genuineness of any described documents." Surely ESI should be included.

Rule 58 is an eccentric entry in this list. It requires entry of judgment "in a separate document." The tie to Appellate Rule 4 is direct and sensitive.

Rule 70(a) empowers a court to direct an appointed person "to deliver a deed or other document." (Think of electronic systems for recording security interests.)

enter: "The magistrate judge must enter a recommended disposition * * *." Rule 72(b)(1). Surely this can be done within the court's electronic system?

examination (physical or mental): Medical practice is moving toward on-line diagnosis. But it is likely too early to think of this for Rule 35.

exhibit: Rule 10(c): "A copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes."

file: Appears continually. Rule 5(d)(3) may be broad enough to cover all variations. We should be sure.

hearing: E.g., Rule 32(a)(1) on use of a deposition "at a hearing or trial." Telephone "hearings" seem common. At least when the court can dispense with any hearing, can other modes of e-communication be used, at least if simultaneous?

inform: The court must inform the parties of proposed instructions, Rule 51(b)(1).

leaving: E.g., Rule 4(e)(2)(B). Unlike "deliver," this carries a significant hint of physical paper. So Rule 5(b)(2)(B).

mailing: The means of serving papers after the summons and complaint include "mailing it to the person's last known address."

Rule 5(b)(2)(C). Given the juxtaposition with e-service in (b)(2)(E), this likely does not mean e-mail. But what of other rules? Rule 15(c)(2), for example, provides for relation back of an amended pleading "if, during the stated period, process was delivered or mailed to" the United States Attorney, etc.

Supplemental Rule B(2)(b) provides for "any form of mail requiring a return receipt." Can e-mail "receipts" be made equally reliable?

make: With variations, appears throughout the rules. E.g., Rule 7(b)(1): "A request for a court order must be made by motion." Rule 12(b): a motion "must be made." The meaning for e-acts may depend on context. Rule 26(a)(1)(C), for example, sets the time to "make" initial disclosures. E-disclosures should be perfectly acceptable, subject to the interplay between 26(a)(4), which requires all disclosures to be "in writing" unless the court orders otherwise, and Rule 5(d)(3).

minute: How’s this for an exotic one? Supplemental Rule E(5)(b) provides for a general bond to stay execution of process against a vessel in all pending actions. The bond "shall be indorsed by the clerk with a minute of the actions wherein process is so stayed."

newspaper: For notice of condemnation by eminent domain, Rule 71.1(3)(B), and notice of limitation-of-liability proceedings, Supplemental Rule F(4).

notice: "filing a notice of dismissal," Rule 41(a)(1)(A)(i).

offer: Rule 68(a) provides for serving an offer of judgment. Is paper implied?

paper: Is it enough that Rule 5(d)(3) provides: "A paper filed electronically in compliance with a local rule is a written paper for purposes of these rules"?

What of papers that are served, not filed? Rule 65.1 — a surety on a bond given to the court appoints the court clerk as its agent for service of "any papers * * *." Presumably the clerk files the papers when served; does that authorize electronic service?

preserved: The order appointing a master must state "the nature of the materials to be preserved and filed." E-preservation?

produce: Rule 34 provides a request "to produce" documents. It clearly addresses the form for producing ESI. It seems likely that production of paper documents often is made by converting to an electronic format.

publish: May be linked to newspaper, see Rule 71.1(d)(3)(B). Service by publication is subject to statutory provisions in proceedings to cancel citizenship certificates, Rule 81(a)(3).

Published notice is required in civil asset forfeiture proceedings, Supplemental Rule G(4); publication on an official government forfeiture site can satisfy the requirement.

record: When used in general references to the court record, e.g., Rule 60(a), it may be safe to rely on external definitions of what constitutes the court's record. So of the direction in Rule 73(a) that "A record must be made in accordance with 28 U.S.C. § 636(c)(5)" in a trial by consent before a magistrate judge.

record: official record: E.g., Rule 44 on proving an official record.

record: on the record: A party must object to jury instructions "on the record," Rule 51 (c)(1). Findings of fact and conclusions of law in a bench trial may be stated on the record.

seal: One question seems to involve only technology. E-files can be sealed.

"Seal" also appears in a different sense. Rule 30(f)(1) requires the officer to presides at a deposition to "seal the deposition in an envelope or package." That seems to require producing a physical recording – tape, disc, flash drive. Is this antique if the parties are content to have the record delivered electronically?

send: Does "send" embrace e-sending? Some rules elaborate in ways that may carry a stronger implication than "send" alone. Supplemental Rule G(4)(b)(iii)(A), for example, provides that notice of a civil forfeiture action "must be sent by means reasonably calculated to reach the potential claimant." The implication is bolstered by (b)(iv), providing that notice is sent on the date when it is sent by electronic mail.

serve: Rule 4.1, for example, simply provides that process other than a summons or a Rule 45 subpoena must be served by specified means. Does "serve" imply physical delivery? Probably.

Rule 71.1(f) provides for service of an amended pleading on "every affected party who has not appeared."

sign: Rule 5(d)(3) allows papers to be signed by electronic means. Does this dispense with any occasion for generating and signing a paper?

Rule 26(g)(2) and (3) specify consequences for failing to sign a disclosure, request, response, or objection, and for signing without substantial justification. Many of these things are not filed, so Rule 5(d)(3) does not cover them. The same holds for Rule 30(e)(1)(B), signing a statement of changes in a deposition transcript or recording.

Answers to interrogatories must be "signed." Same 5(d)(3) omission.

The clerk may deliver to a party a subpoena, "signed but otherwise in blank," Rule 45(a).

More generally, other rules require the clerk to "sign." E.g., Rule 58(b)(1) on entering judgment.

stenographically reported: Rule 80. Compare Rule 26(a)(3)(A)(ii), directing pretrial disclosure of witnesses whose testimony will be presented by deposition "and, if not taken stenographically, a transcript of the pertinent parts of the deposition."

stipulate: Stipulate and stipulation appear frequently. Occasionally signing may be specified — Rule 41(a)(1)(A)(ii): "a stipulation of dismissal signed by all parties who have appeared."

submit: This seems to cover e-action. For example, Rule 11(b) provides that an attorney or party certifies several things "by filing, submitting, or later advocating" a pleading, written motion, or other paper.

transcript: Rule 32(c) calls for a transcript of any deposition testimony offered at trial, and allows non-transcript form "as well."

verify: Rule 5(d)(3) authorizes local rules allowing "papers to be filed, signed, or verified by electronic means." Verification does not appear frequently in the rules. See, e.g., Rules 23.1(b), 27, 65(b)(1)(A); Supplemental Rules B(1)(a), C(2)(a), C(6)(b), G(2)(a)

warrant: For arrest, Supplemental Rules C(3)(a), D, E(9)(b), G(3)(b)(i), etc.

writ: E.g., "writ of execution," Rule 69(a)(1); "every * * * writ issued," Rule 79(a)(3).

writing, written, in writing: Rule 5(d)(3) provides that a paper filed electronically in compliance with a local rule "is a written paper for purposes of these rules." How far does this extend to other settings? Rule 5(a)(1)(C), (D), and (E) require service of a written motion or a written notice, etc. Variations of writing appear regularly throughout the rules.

"written consent": Rule 15(a)(2).

"in writing": Rule 26(e)(1)(A) excuses the duty to supplement discovery responses if the new information was made known to other parties "in writing." This was drafted in 1991 or 1992. Surely e-mail notice or the like should do, even though there is no filing and no occasion to invoke Rule 5(d)(3).

"reasonable written notice": Rule 30(b)(1). Rule 5(d)(3) includes "depositions" in the list of "discovery requests and responses" that must not be filed. So does this fall outside the (d)(3) provision treating filed e-things as written papers?

"Written questions" for a Rule 31 deposition?

"Written interrogatories" for Rule 33? See "obvious issues."

"Written request to admit" for Rule 36.

"Written demand" for jury trial, Rule 38(b).

"pleading or other writing": notice of an issue of foreign law, Rule 44.1.

"written objection" to a subpoena

Rule 49 provides for special verdicts with written findings, submitting written questions, and submitting written forms. It provides for "written questions" to supplement a general verdict. When jurors get tablets or the like, will that do?

Rule 51 calls for written requests for jury instructions.

Rule 55(b)(2) provides "written notice" of an application for default judgment.

"certifies in writing," Rule 65(b)(1)(B).

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Removal Petitions: Rule 81: A preliminary sketch

28 U.S.C. § 1441(a) provides for removal from state court to a district court "by the defendant or the defendants." Section 1446(a) and (b) flesh out the procedure. Section 1446(a): "A defendant or defendants desiring to remove * * * shall file in the district court * * * a notice of removal signed pursuant to Rule 11 * * * and containing a short and plain statement of the grounds for removal." Subsection (b)(2)(A) directs: "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." (b)(2)(B) gives "each defendant" 30 days from receipt or service of the initial pleading to file the notice of removal. (b)(2)(C) provides that if defendants are served at different times, a later-served defendant can file a notice of removal and "any earlier-served defendant may consent to the removal."

The common understanding is that removal requires the consent of all defendants, subject to these timing provisions.

Mayo v. Board of Education of Prince George's County, 713 F.3d 735, 740-742 (4th Cir.2013), addresses this question: Suppose all defendants in fact agree to remove. Can the attorney for one party sign the notice of removal on behalf of all, or must each party sign separately? The court describes a Seventh Circuit decision ruling that all served defendants have to sign the petition.[1] It describes a Sixth Circuit decision, later adopted by the Ninth Circuit, accepting a notice filed by three defendants and stating that the fourth defendant concurred. The Fifth Circuit, finally, is described as adopting a "hybrid" petition, accepting one signature but requiring some timely filed written indication from each served defendant that it has actually consented to removal.

Faced with this array of precedent, the Fourth Circuit accepted a notice signed by one defendant. The notice stated that that defendant had consulted with the other defendant and that the other defendant consented to the removal. The court noted that the statute requires only "a notice of removal." A notice filed by the attorney for one defendant, representing that all defendants consent to removal, satisfies the statutory purposes. It is common to have one attorney represent to the court the position of other parties.[2] A motion stating that the opposing party consents is often accepted without requiring that the opposing party file a

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[1] The change of procedure from "petition" to "notice" likely does not affect the decision.

[2] Rule 11 says that "Every * * * other paper must be signed by at least one attorney of record * * *." It would be possible to argue that § 1446(a)'s requirement that the notice be "signed pursuant to Rule 11" implies that the signature of one attorney suffices.

separate paper. The attorneys for the defendants who consent to remove will soon be before the federal court even though they do not individually sign the notice of removal. Rule 11 sanctions are a strong deterrence to filing a notice without actual consent of the other defendants.

The question is whether this question should be addressed in the Civil Rules. If it is to be addressed, the likely place would be in Rule 81(c), which addresses removed actions. Interference with the structure of present Rule 81(c) could be minimized by recasting paragraph (2) to address both "further pleading" and the notice of removal. And any answer could be given — the illustrations here are the two more obvious alternatives. The drafting is straightforward if it is assumed that all defendants who have been served are represented by counsel:

(2) *Notice of Removal; Further Pleading.* (A) The notice of removal may be signed by an attorney for at least one of the defendants and must state that all defendants who have been served and who have not filed separate notices [of removal] consent to removal.
(B) After removal, repleading is unnecessary unless the court orders it. * * *

or

(2) *Notice of Removal; Further Pleading.* (A) The notice of removal must be signed by an attorney for each defendant that has been served. (And again, designating present (2) as (B).)

Drafting becomes somewhat awkward if it accounts for defendants who are not represented. Section 1446(a) requires that the notice be "signed pursuant to Rule 11." Rule 11 provides for signing "by a party personally if the party is unrepresented." It seems plain enough that a new rule should not allow an unrepresented party to sign the notice of removal on behalf of all, representing that all others have consented to remove. So, to illustrate the first variation:

(2) *Notice of Removal; Further Pleading.* (A) The notice of removal may be signed by an attorney for at least one of the defendants and must state that all defendants who have been served and who have not filed separate notices [of removal] consent to removal. A defendant who is unrepresented may sign the notice of removal only for that defendant.
(B) After removal, repleading is unnecessary unless the court orders it. * * *

Although the procedure for removal is established by statute, it seems likely that the Enabling Act authorizes rulemaking to implement the statutory procedure at this level of petty detail. The requirement of consent, drawn from the statute, means whatever

it means in the statute. (It would be possible to incorporate the statute by direct reference, but reassurance in the Committee Note should do the job.)

That the Enabling Act likely authorizes this kind of rulemaking does not establish the wisdom of addressing this kind of problem in the Civil Rules. It begins as a problem of interpreting a statute. The statute, moreover, directly regulates the mode of invoking removal jurisdiction; courts and the custodians of Enabling Act rules should be sensitive to the values that require special deference to Congress in matters of subject-matter jurisdiction.

On the other hand, rulemaking here could be seen as acting to advance congressional policies by providing a uniform and clear answer to an uncertain question. Clear answers are much to be prized in dealing with subject-matter jurisdiction.

It will be important to coordinate with the Federal-State Jurisdiction Committee if any work is undertaken in this area. Preliminary inquiries at the staff level suggest that the Federal-State Jurisdiction Committee does not have any plan to address this question, and is content to have the Civil Rules Committee pursue it if that seems desirable. Any actual proposal, however, likely should be submitted to them for review.

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Submission 14-CV-B

This is a joint submission from the U.S. Chamber Institute for Legal Reform, the American Insurance Assoc., the American Tort Reform Assoc., Lawyers for Civil Justice, and the National Association of Manufacturers. It proposes adding another provision to Rule 26(a)(1)(A) calling for initial disclosure (in addition to the four sorts of initial disclosure already required under the rule) of the following:

> (v) for inspection and copying as under Rule 34, 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, judgment or otherwise.

In some ways, this proposal builds on the requirement in Rule 26(a)(1)(A)(iv) of disclosure as follows:

> (iv) for inspection and copying as under Rule 34, any agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment.

The explanation for this proposal is that third-party litigation funding (TPLF) has emerged as a "burgeoning aspect" of at least some litigation, and that it can produce "potentially adverse effects * * * on our civil justice system." Several reasons are advanced for adopting a change along the proposed lines. Before turning to those reasons, however, it seems useful to sketch out something about litigation funding and also to describe the development of what is now in Rule 26(a)(1)(A)(iv).

Third-Party Litigation Funding

In the "good old days," one might say that there was almost nothing that could be called TPLF. Private law firms called for their partners to put up the capital needed for firm operations. Contingency-fee lawyers might find their income very uneven as it depended on settlement of cases. In recent decades, some large private law firms have turned to letters of credit or similar arrangements with lenders, often banks, to finance ongoing firm activities. According to reports in the press, some of those firms have borrowed considerably, and that borrowing (and its conditions) may have contributed to the failure of some large law firms in the last decade or so. Plaintiff-side firms, meanwhile, seem increasingly to have obtained financing for their operations from other sorts of lenders, not traditional banks. Magazines targeting plaintiff firms therefore include ads about such financing options.

This proposal appears not to inquire into all these various

kinds of law firm financing. Instead, it focuses on a relatively new field that sometimes involves lending tied to a specific lawsuit, with payment contingent on the outcome of that lawsuit, an activity which the proposers call TPLF. The proposed draft attempts to define that focus by calling for disclosure of "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, judgment or otherwise." Whether this could include other means of financing litigation of plaintiff-side law firm operations might be debated in some cases.

The whole topic of law firm financing -- including TPLF -- has received quite a lot of attention in recent years. One illustration is a conference at DePaul University Law School in 2013 entitled "A Brave New World: The Changing Face of Litigation and Law Firm Finance," which produced papers published at 63 DePaul L. Rev. 195-718 (2014). A Google search for "litigation financing" produced over 36 million responses, including, up front, several links to firms offering the sorts of services also appearing in ads in plaintiff-lawyer magazines. A quick review of those web pages suggests that they offer something in the nature of a general line of credit for law firms representing plaintiffs, not what this proposal is about. Others seem more directed to what appears to be the specific focus of this proposal -- underwriting a specific litigation (often after some review of the litigation itself) in return for some sort of high return if the litigation produces a settlement or judgment, with the amount of the return related to the level of success.

Some bar organizations have addressed some issues about litigation financing, broadly considered, in recent years. Perhaps members of the Advisory Committee are familiar with some of those efforts. It may be that the entire landscape of other legal responses to new financing arrangements has not yet stabilized, which may be a factor in deciding whether to proceed now along the lines suggested by this proposal.

The Rule 26 treatment of insurance coverage

As noted above, Rule 26(a)(1)(A)(iv) already has a requirement that insurance coverage be disclosed at the outset of the litigation. This disclosure requirement built on an amendment to the rule in 1970 prompted by a distinct split in the cases on whether insurance agreements were properly subject to discovery.

It is easy to understand why there was a split on that question before 1970. If discovery is designed to enable parties to obtain evidence for use at trial, this information does not seem within it. Indeed, evidence the defendant is insured is

almost universally excluded. See, e.g., Fed. R. Evid. 411. Thus, arguments that the existence of insurance (or absence of it) bear on whether defendant was negligent, etc., would not support discovery of this sort. More generally, discovery is not ordinarily allowed to verify that the defendant will have sufficient assets to pay a judgment. Indeed, in California discovery regarding defendant's assets is permitted in relation to a punitive damages claim (where defendant's wealth may be a measure of the award) only after a showing that plaintiff has a "substantial probability" of prevailing on the punitive damages claim. Cal. Civ. Code § 3295(c). So more generally the question of discovery regarding assets is a sensitive one.

Notwithstanding, the rulemakers decided in 1970 to opt in favor of allowing discovery regarding insurance coverage; as the Committee Note then explained:

> Disclosure of insurance coverage will enable counsel for both sides to make the same realistic appraisal of the case, so that settlement and litigation strategy are based on knowledge and not speculation. It will conduce to settlement and avoid protracted litigation in some cases, though in others it may have an opposite effect. The amendment is limited to insurance coverage, which should be distinguished from any other facts concerning defendant's financial status (1) because insurance is an asset created specifically to satisfy the claim; (2) because the insurance company ordinarily controls the litigation; (3) because information about coverage is available only from defendant or its insurer; and (4) because disclosure does not involve a significant invasion of privacy.

The rulemakers emphasized the narrowness of the discovery opportunity:

> The provision applies only to persons "carrying on an insurance business" and thus covers insurance companies and not the ordinary business concern that enters into a contract of indemnification. Thus, the provision makes no change in existing law on discovery of indemnity agreements other than insurance agreements by persons carrying on an insurance business. Similarly, the provision does not cover the business concern that creates a reserve fund for purposes of self-insurance.

It should be apparent that there are differences between TPLF arrangements and the insurance agreements brought within discovery in 1970. An insurance agreement often contained two basic features -- a duty to defend and a duty to indemnify. Although disclosure of the agreement presumably would ordinarily include both features, the focus of the 1970 amendment appears to have been on the indemnity aspect. Many may be familiar with

"settlement for the coverage limits" discussions. Discovery about the insurer's indemnity obligation would provide information highly pertinent to those discussions. Under these circumstances, it seems that revealing information about the indemnification aspect would "conduce toward settlement," as the Committee Note observed. Perhaps knowing the terms of TPLF agreements could similarly bear on litigants' willingness to settle; knowing that the other side has an "unlimited budget" to continue the litigation might prompt a party to settle if it had believed before that the adverse party's litigation budget was strapped. But that does not seem to be the reason that discovery of insurance agreements was authorized in 1970, and discovery of TPLF agreements seems to raise different issues.

The TPLF situation differs from the insurance situation in other ways. The 1970 amendment was designed to be limited to persons "carrying on an insurance business" and did not reach other indemnification arrangements. This limitation to insurance companies responds to their distinctive treatment in other ways. In many states, insurance is a peculiarly regulated business; it is not clear that those involved in the TPLF business are similarly regulated. Indeed, some of the recent discussion of TPLF seems to be about whether the activities of these entities, or of the lawyers who use them, should be regulated, and what the regulations should be.

Another point that may distinguish TPLF is the Committee Note's observation that the insurer "ordinarily controls the litigation." Much concern has arisen about whether that is true in the TPLF situation, a point made in this submission. At least some involved in this new business seem to abjure such efforts to control.

For example, in November, 2011, the Association of Litigation Funders of England and Wales (where TPLF seems to be more widespread than in the U.S.) adopted a Code of Conduct for Litigation Funders including the following:

> A Funder will: * * *
>
> (b) not take any steps that cause or are likely to cause the Litigant's solicitor or barrister to act in breach of their professional duties;
>
> (c) not seek to influence the Litigant's solicitor or barrister to cede control or conduct of the dispute to the Funder * * *

How such commitments actually work in the UK, and whether practices in the U.S. differ, are probably considerably debated.

One point of tension might be settlement; in the U.S. "bad

faith failure to settle" claims against insurers have been recognized in many states. It is conceivable that similar arguments could be made if TPLF entities have a veto power over settlement, and disagreements about settlement emerge between plaintiffs and TPLF entities.

The contractual arrangements between plaintiffs and TPLF providers might have pertinent provisions on the proper role of each in the settlement context. One American enterprize included the following in its "Code of Best Practices":

> 13. The LFA [litigation funding agreement] shall state plainly whether and in what circumstances the Funder may be entitled to participate in the Claimant's settlement decisions. For example, subject to agreement between the parties, the LFA may provide that:
>
> > a. The Claimant, counsel and the Funder shall consult in good faith as to the appropriate course of action to take in connection with all settlement demands or offers.
> >
> > b. If the Funder and the Claimant differ in their views as to whether a claim should be settled and they are unable to resolve their differences after consulting in good faith, then either of them may refer their differences to an independent arbitrator for expedited resolution, whose decision shall be final and binding.

Bentham IMF, Code of Best Practices (January 2014).

In sum, authorizing discovery of TPLF arrangements might differ substantially from the authorization given in 1970 for discovery of insurance agreements and might immerse the Committee in tough and tricky emerging and uncertain issues surrounding TPLF activity. At the same time, it does appear that courts are struggling with whether such discovery should be allowed under the current rules. For a thoughtful and thorough examination of such issues by Magistrate Judge Jeffrey Cole, see Miller UK Ltd. v. Caterpillar, Inc., 2014 WL 67340 (N.D. Ill., Jan. 4, 2014).

In 1993, initial disclosure was introduced and the insurance agreement discovery authority was converted into an initial disclosure obligation applicable in all cases. The Committee Note's explanation for making a discovery request unnecessary was that these four types of information "have been customarily secured early in litigation through formal discovery."

It seems unlikely that there has to date been a history of discovery of TPLF information. Even in cases that order such discovery, it seems to be justified by specific circumstances in

the given case. For example, in Conlon v. Rosa, 2004 WL 1627337 (Mass. Land Court, July 21, 2004), a case cited in the submission, the court cited indications that the plaintiff's lawsuit was actually funded by a competitor of defendant and asserted that "[a] surprising number of plaintiff's lawsuits are secretly funded by outsiders, often commercial competitors or political opponents." The Massachusetts court cited, e.g., Jones v. Clinton, where the federal judge had ordered production of documents showing contributions to plaintiff to support her litigation against the President. In the Massachusetts case, the court noted that there was a claim that the funding was provided for competitive purposes by a competitor of defendant.

Whether or not such considerations sometimes would justify ordering discovery of TPLF information, it may be that there is no reason to add a TPLF provision to initial disclosure under Rule 26(b)(1)(A), which applies to all cases except those excluded under Rule 26(a)(1)(B). Moreover, it appears that such financing is sometimes extended only after the litigation has been under way for some time. Some funders may even wait until a favorable verdict occurs at trial and provide funding then during the pendency of an appeal. That timing would make "initial" disclosure impossible. Ordinary indemnity insurance agreements presumably do not present this timing wrinkle, but TPLF arrangements may present it often.

In sum, there are some ways in which the current proposal builds on the handling of insurance under Rule 26 presently, but other factors that make it appear significantly different.

Reasons offered for proposed amendment

The proposal urges that "[w]henever a third party invests in a lawsuit, the court and the parties involved in the matter should be so advised." It offers four reasons:

Enabling courts and counsel to ensure compliance with ethical obligations: The first reason presented is that some TPLF entitles are publicly traded companies or companies supported by investment funds whose individual shareholders may include judges or jurors. Whether that would make information about this subject discoverable under Rule 26 is uncertain. It might be that the right focus would be on Rule 7.1 disclosure statements. Moreover, to the extent it is true that some funders only invest after a favorable verdict, it would seem that any possible implications about the interests of the trial court judge or the jurors would not be relevant then.

In addition, the submission says that "counsel in the case may have investment or representational ties to a funding entity that they may need to disclose to their clients." The example given is that defense counsel may be a shareholder in an entity

that may profit from plaintiff's victory in the litigation, a potential conflict that counsel should broach with the defendant. At least some of these concerns seem to have occurred to some involved in the TPLF business. Thus, one TPLF enterprize includes in its best practices between the funder and claimants' attorneys the following: "7. The Funder shall not knowingly allow an attorney or law firm representing a Claimant to invest in the Funder." Bentham IMF Code of Best Practices (January 2014).

So these issues may be important in some cases, though it is not clear how many. Certainly, avoiding conflicts of interest for judges, jurors, and attorneys is a desirable goal. That would seem to be the role of disclosure statements like those called for by Rule 7.1. Whether discovery is a suitable vehicle for that purpose may be more debatable. A plaintiff's discovery request for information about the investment portfolio of defense counsel would likely be resisted vigorously. This proposal does not authorize such discovery, but does seem to involve the courts more deeply in policing such topics.

In the same vein, it is not at all clear that the way to police lawyers' ethics is for trial courts to take the lead. Traditionally, that is the job of state bar ethics committees and the like. Judges who become aware of questionable conduct thus may refer matters to the state bar. So the entire topic seems somewhat outside the normal scope of disclosure and discovery.

Alerting defendants to who is "really on the other side of an action": Citing the 2004 Massachusetts Land Court case involving financing of litigation by a commercial competitor of defendant mentioned above, the submission urges disclosure of all TPLF arrangements. It is not clear how many such cases there are, or whether they are a model that calls for a rule like the one proposed.

This second reason emphasizes a somewhat different concern, however -- that "[a] party that must pay a TPLF entity a percentage of the proceeds of any recovery may be inclined to reject what might otherwise be a fair settlement offer in the hopes of securing a larger sum of money." Indeed, the agreement may show that the funder will get a disproportionate share of the first dollars in a settlement, which might deter otherwise reasonable settlements.

This argument resembles one of the reasons for allowing discovery of insurance coverage -- that it would "enable counsel for both sides to make the same realistic appraisal of the case," in the words of the 1970 Committee Note. Given the history in many cases of settlement for "the coverage limit," that was an understandable motivation for the 1970 provision. How exactly information about TPLF arrangements factors into settlement

discussions is less clear. It does not appear that those arrangements constitute funds to cover settlement payouts, which could play a role like the indemnity feature (not the duty to defend) of insurance policies. Perhaps the defendant would be moved to increase its offer once aware that plaintiff has ample financial resources to continue litigating. Perhaps information about the TPLF funder's "take" would inform that decision. But if that's really true, plaintiff's counsel would presumably have an incentive to alert defense counsel to these considerations during settlement negotiations.

The submission also suggests that, having learned of the role of the funder, "the court may wish to require that funder to attend any mediation." On that score, there is at least some uncertainty about whether the insurance analogy is useful. There has been uncertainty about the power of the court to command a nonparty insurer (rather than the insured party) to attend and participate in settlement conferences. See In re Novak, 932 F.2d 1397, 1407-08 (11th Cir. 1991) (holding that the court did not have inherent authority to require attendance by a representative of a party's insurer at a settlement conference). Rule 16 was amended in response to rulings that the court could not require a represented party to attend settlement conferences, and Rule 16(c)(1) now authorizes the court to require a party to attend or be "reasonably available" to consider possible settlement. No specific provision extends to insurers or TPLF providers. It might be worthwhile to revisit the insurer question under Rule 16(c)(1) and add TPLF providers.

Finally, it might be noted that if the objective is to identify those with a real stake in the litigation, some revision of Rule 17(a) on real party in interest might be in order.

Facilitating resolution of motions for cost-shifting: The third reason given for the amendment focuses on cost-shifting with regard to discovery. The submission notes that, on questions of discovery cost-shifting, courts may consider the parties' financial ability to pay, and urges that it may be pertinent that one party's suit is "being financed by a lucrative TPLF company." It adds that the pending proposal to revise Rule 26(b)(1) invites consideration of "the parties' resources" in making that determination, a consideration that might be illuminated by requiring disclosure of TPLF agreements.

One reaction to this suggestion is that it is a variant on the "discovery about discovery" issue that occasionally arises -- the question whether it is proper to order discovery about one matter in order to illuminate whether to order discovery about another. One recently-adopted example is Rule 26(b)(2)(B), which recognizes that there may sometimes be reason to allow discovery about the costs of retrieving information from sources that are allegedly not reasonably accessible. That discovery is not

pertinent to the outcome of the suit, but only to the resolution of a discovery dispute about whether to order contested discovery. Similarly here, reference to TPLF arrangements would bear on proportionality only once a proportionality issue has arisen.

Whether initial disclosure of TPLF arrangements is useful to deciding cost-bearing issues is uncertain. Presumably, once parties have put proportionality at issue both the question of the cost of complying with discovery demands and the wherewithal of the party seeking discovery could merit examination. So it's possible that both sorts of "discovery about discovery" might come into play.

Perhaps relatedly, the submission seems to suggest that TPLF arrangements are somehow improper. Not only does it describe TPLF companies as "lucrative," it also notes that "[u]nlike an average plaintiff, a TPLF entity's business purpose is *to raise funds to prosecute and to profit from litigation*." Id. at 6, emphasis in original. How this factor should affect a determination about the parties' resources under amended Rule 26(b)(1) (if it is amended effective Dec. 1, 2015) is uncertain. It may be worth mentioning that the Committee Note to the current proposed amendment observes:

> [C]onsideration of the parties' resources does not foreclose discovery requests addressed to an impecunious party, nor justify unlimited discovery requests addressed to a wealthy party. The 1983 Committee Note cautioned that "[t]he court must apply the standards in an even-handed manner that will prevent use of discovery to wage a war of attrition or as a device to coerce a party whether financially weak or affluent."

How this observation will affect the courts' handling the role of the parties' resources in making proportionality determinations remains to be seen.

It may be premature to forecast how TPLF arrangements would affect consideration of the parties' resources beginning after Dec. 1, 2015, should the amendment be adopted. It is probably premature (and possibly unwise) for the Committee to take a view on the propriety of TPLF arrangements.

In regard to the current proposal, the key point seems to be that much depends on the interpretation of the pending amendment to Rule 26(b)(1). Furthermore, even if that amendment makes resources important sometimes, that nonetheless would likely be in the relatively rare case, so that a blanket rule of disclosure may be too broad.

Information bearing on sanctions: The fourth and final

reason focuses on sanctions. Citing a Florida state-court case holding that TPLF funders who controlled a litigation should be regarded as parties for purposes of sanctions under a state statute authorizing levy of attorneys' fees for claims advanced "without substantial fact or legal support," the submission urges that the proposed disclosure provision would provide important information in such circumstances. It might be noted that Magistrate Judge Cole rejected defendant's reliance on this Florida case in Miller UK Ltd. v. Caterpillar, Inc., 2014, WL 67340 (N.D. Ill., Jan. 6, 2014):

> Contrary to Caterpillar's assertion that the [Florida] court held the financing agreement was relevant to the issues in the case-in-chief, there was not so much as an insinuation that it was. Nor did the opinion have anything to do with pretrial discovery of a funding agreement; it involved an appeal of the trial court's denial of plaintiff's *post-trial* motion for attorney's fees and costs against [the nonparty] who funded and controlled plaintiffs' case.

Slip op. at 8-9 (emphasis in original).

The frequency of such situations is uncertain. As noted above, if the idea appears to be to recognize that the funder is actually the real party in interest, it might be that Rule 17(a) is the place to focus. Whether the right place to look for sanctions of this nature is in the rules might also be a subject for discussion. Perhaps this issue really arises more in relation to 28 U.S.C. § 1927 sanctions. It is likely true that the number of cases in which sanctions of any sort are seriously considered is fairly limited, and the number of those that involve TPLF arrangements probably a good deal smaller. Under those circumstances, a disclosure regime that applies in every case except those exempted by Rule 26(a)(1)(B) might seem far too broad to address the concern raised.

* * * * *

This submission raises a number of intriguing issues in relation to a just-emerging phenomenon. Should the Committee wish to proceed, it might well be important initially to try to get a better grasp of the TPLF phenomenon itself, for devising a rule that suitably deals with it seems to depend on some confidence about how it works. Although the phenomenon may have stirred controversy in some quarters, it is not clear how much a rule change would improve the handling of those controversies.

April 9, 2014

Mr. Jonathan C. Rose
Secretary of the Committee on Rules of
Practice and Procedure of the Administrative
Office of the United States Courts
One Columbus Circle, NE
Washington, D.C. 20544

RE: Proposed Amendment to Fed. R. Civ. P. 26(a)(1)(A)

Dear Mr. Rose:

On behalf of the U.S. Chamber Institute for Legal Reform, the American Insurance Association, the American Tort Reform Association, Lawyers for Civil Justice, and the National Association of Manufacturers, we are writing to urge the Advisory Committee on Civil Rules (the "Committee") to adopt an amendment to Rule 26(a)(1)(A) of the Federal Rules of Civil Procedure that would require disclosure of third-party investments in litigation (also called "third-party litigation funding" or "TPLF") at the outset of a lawsuit. A draft of that proposed amendment is attached as Appendix A.

TPLF occurs when a person or entity with no other connection to a lawsuit (usually a specialized investment company) acquires a right to an outcome-contingent payment from any proceeds produced by the case. Typically, the TPLF investor obtains that right by paying money to the plaintiff (or plaintiff's counsel). In many instances, that money is used to finance prosecution of the case (e.g., discovery costs, attorneys' fees, expert witness expenses). Often, plaintiff's counsel takes the lead in securing the third-party investment; in addition, they sometimes receive the money and agree to make the specified outcome-contingent payment to the TPLF investor from their fee recovery.

TPLF is a burgeoning aspect of civil litigation in the United States. As a recent article put it: "[T]he American TPLF market in complex commercial cases has

exploded."[1] We are concerned about the potentially adverse effects TPLF may have on our civil justice system.[2] At the very least, if TPLF is to be part of our legal system, its use should be transparent. Whenever a third party invests in a lawsuit, the court and the parties involved in the matter should be so advised.

The proposed amendment to Rule 26(a)(1)(A) would simply add to the list of required "initial disclosures" in the existing provision a requirement that "a party must, without awaiting a discovery request, provide to the other parties . . . for inspection and copying as under Rule 34, 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, judgment or otherwise." (New language underscored.) We believe that this amendment would serve several important purposes, all related to transparency.

First, by identifying persons/entities with a stake in the outcome of the litigation, the contemplated disclosures would allow courts and counsel to ensure compliance with ethical obligations. Many TPLF entities are either publicly traded companies or companies supported by investment funds whose individual shareholders may include judges or jurors.[3] Thus, without disclosure of TPLF, a

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[1] Jasminka Kalajdzic, Peter Cashman & Alana Longmoore, *Justice for Profit: A Comparative Analysis of Australian, Canadian and U.S. Third Party Litigation Funding*, 61 Am. J. Comp. L. 93, 145 (2013); *see also* Cassandra Burke Robertson, *International Law in Domestic Courts: The Impact of Third-Party Financing on Transnational Litigation*, 44 Case W. Res. J. Int'l L. 159, 181 (2011) ("Third-party litigation finance is a growing industry. The market for lawsuit investment is already quite large in . . . the U.S.").

[2] *See* U.S. Chamber Institute for Legal Reform ("ILR"), *Selling Lawsuits, Buying Trouble: The Emerging World of Third-Party Litigation Financing in the United States* (Oct. 28, 2009) and U.S. Chamber Institute for Legal Reform, *Stopping the Sale on Lawsuits: A Proposal to Regulate Third-Party Investments in Litigation* (Oct. 24, 2012) for additional background from ILR regarding TPLF.

[3] Credit Suisse, for example, recently "spun off its 'litigation risk strategies' division into a standalone litigation financing firm." *See* Bert I. Huang,, *The Democratization of Mass Litigation?: Litigation Finance: What Do Judges Need to Know*, 45 Colum. J.L. & Soc. Probs. 525, 527 (2012) (citing Jennifer Smith, *Credit Suisse Parts with Litigation Finance Group*, WALL ST. J. L. BLOG (Jan. 9, 2012, 6:13 PM), http://blogs.wsj.com/law/2012/01/09/credit-suisse-parts-with-litigation-finance-group). In addition, Citigroup financed an investment firm that funded the multi-million-dollar lawsuit brought by 9/11 ground zero workers. *See* Binyamin Appelbaum, *Betting on Justice: Putting Money on Lawsuits, Investors Share in the Payouts*, N.Y. TIMES, Nov. 15, 2010, at A1. And Burford Capital Limited raised funds from institutions that had shareholders who could have been connected to the litigation in order to bankroll a lawsuit against Chevron in Ecuador. A Special Master appointed in an ancillary proceeding to that case explained that disclosure of the TPLF arrangement was necessary to ensure that U.S. judges hearing aspects of the case had no relationship with Burford that might disqualify them

judge or juror may unwittingly sit in judgment of a case in which he or she has a financial interest, a scenario that creates an appearance of impropriety and may violate applicable ethics rules. Further, counsel in the case may have investment or representational ties to a funding entity that they may need to disclose to their clients, consistent with their zealous representation obligations. For example, if a defendant's counsel is a shareholder in an entity that may profit from a plaintiff's victory in the litigation, that counsel would need to appropriately address that conflict with his/her client. The proposed amendment would thus aid in the identification of potential ethical issues and thereby protect the integrity of the judicial process.

Second, the proposed amendment would satisfy defendants' entitlement to know who is really on the other side of an action. The decision in *Conlon v. Rosa* is illustrative.[4] In that case, the plaintiffs challenged a decision of a zoning board of appeals to allow a developer to demolish existing buildings and construct a Walgreens drugstore on the site. One of the plaintiffs owned property near the site and leased her property to Brooks Drugs, a competitor of Walgreens. The developer challenged the plaintiff's asserted status as a real party in interest and demanded disclosure of any funding agreement between her and Brooks Drugs, contending that Brooks Drugs was driving the litigation. The plaintiff objected, contending that evidence of such an agreement was not relevant. But the court disagreed, holding that litigation funding was "surely a relevant subject to explore in discovery."[5] In so holding, the court warned that "[s]uch hidden funding can introduce a dynamic into a plaintiff's case – an agenda unrelated to its merits, a resistance to compromise – that otherwise might not be present and, unless known, cannot be managed or evaluated."[6]

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from acting as neutral arbiters in the case. *See* Roger Parloff, *Have you got a piece of this lawsuit?*, Fortune, June 28, 2011, http://features.blogs.fortune.cnn.com/2011/06/28/have-you-got-a-piece-of-this-lawsuit-2/.

4 Nos. 295907, 295932, 2004 Mass. LCR LEXIS 56, at *5 (Mass. Land Ct. July 21, 2004).

5 *Id.* at *6-7.

6 *Id.* In its ruling, the court in *Conlon* noted that "[a] surprising number of plaintiff's lawsuits are secretly funded by outsiders" and relied on several unreported trial court rulings ordering the production of documents pertaining to litigation funding. *Id.* at *5-6 (citing *Jones v. Clinton*, No. LR-C-94-290 (E.D. Ark. Dec. 4, 1997) (ordering production of documents showing contributions to plaintiff); *Jones v. Clinton*, No. LR-C-94-290 (E.D. Ark. Nov. 25, 1997) (same); *Margolis v. Gosselin*, No. 95-J-959 (Mass. App. Ct. Dec. 18, 1995) (upholding Superior Court Order allowing discovery into whether plaintiff filed and pursued her lawsuit "in aid of a super-market operator that competed with Star Market"); *Triandafilou v. Kravchuk*, No. 95-J-355 (Mass. App. Ct. May 30, 1995) (directing production of documents showing funding of challenge to supermarket expansion by a competing supermarket chain).

That troubling dynamic is particularly apparent when it comes to settlement efforts. A party that must pay a TPLF entity a percentage of the proceeds of any recovery may be inclined to reject what might otherwise be a fair settlement offer in the hopes of securing a larger sum of money. In short, the party will seek extra money to make up at least some of the amount (likely substantial) that will have to be paid to the TPLF entity. Further, some of the TPLF agreements that have become public reveal that TPLF entities often structure their agreements to maximize their take of the first dollars of any recovery, thereby deterring reasonable settlements.[7] In fact, in the first empirical study of the effects of TPLF, researchers in Australia (where TPLF is prevalent) found that increased litigation funding was "associated with slower case processing, larger backlogs, and increased spending by the courts."[8] Disclosures stating that TPLF investments are present in a case will allow both courts and defendants to more accurately evaluate settlement prospects and to better calibrate settlement initiatives. Further, it will allow courts to structure settlement protocols with greater potential to succeed. For example, if a litigation funder controls settlement decisions (in whole or in part), the court may wish to require that funder to attend any mediation. Absent the proposed disclosures, the funder's presence as a player in the settlement process likely will remain hidden.

Third, a litigation-funding disclosure provision would facilitate a fuller, fairer discussion of motions for cost-shifting in cases involving onerous e-discovery. Courts confronted with cost-shifting requests typically consider a party's financial ability to pay in determining whether to impose cost-shifting in complex discovery disputes.[9] If

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[7] The most notorious example of this problem was the $4 million investment by a fund associated with Burford in the lawsuit against Chevron filed in an Ecuadorian court alleging environmental contamination in Lago Agrio, Ecuador. The investment agreement included a "waterfall" repayment provision, which provided for a heightened percentage of recovery on the first dollars of any award. Under the agreement, Burford would receive approximately 5.5% of any award, or about $55 million, on any amount starting at $1 billion. But, if the plaintiffs settled for less than $1 billion, the investor's percentage would actually go up. *See* Funding Agreement Between Treca Financial Solutions and Claimants, *Chevron Corp. v. Donziger*, No. 11-cv-0691 (S.D.N.Y.), Docket No. 356, Ex. B. In a March 4, 2014, opinion in the *Chevron* case, Judge Kaplan found that the Ecuadorian plaintiffs' "romancing of Burford," led plaintiffs' counsel to adopt a litigation strategy against Chevron designed to maximize plaintiffs' ability to collect on any judgment – rather than focus on securing a just and speedy resolution. *See Chevron*, Docket No. 1874, at 175.

[8] Daniel Chen, *A Market for Justice: A First Empirical Look at Third Party Litigation Funding* (January 2012), at 27, www.law.upenn.edu/cf/faculty/dabrams/workingpapers/MarketforJustice.pdf.

[9] *See, e.g.*, *Xpedior Credit Trust v. Credit Suisse First Boston (USA), Inc.*, 309 F. Supp. 2d 459, 466 (S.D.N.Y. 2003) (refusing to order cost-shifting even though the information was not reasonably accessible largely

a plaintiff's suit is being financed by a lucrative TPLF company, the calculus may differ from a case in which funding is not present. Indeed, the involvement of a TPLF company that has invested to profit from a lawsuit might make cost-shifting all the more appropriate. For this reason too, disclosure of TPLF arrangements at the beginning of civil litigation makes sense.

For similar reasons, a disclosure provision would be particularly appropriate if the Supreme Court adopts the Advisory Committee's current proposal to amend Rule 26(b)(1) to include a proportionality element. The Committee's proposed amendment to Rule 26(b)(1) would make the scope of discovery "proportional to the needs of the case, considering . . . the parties' resources . . . [and] whether the burden or expense of the proposed discovery outweighs its likely benefit." When a TPLF entity acquires an outcome-contingent right to proceeds in a case, it becomes a real party in interest for practical purposes: the TPLF investor pays to prosecute the case; it presumably is involved in strategic decision-making;[10] it presumably communicates with attorneys;[11] and it often stands to recover the lion's share of any recovery.[12] Moreover, unlike an

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because the defendant's "assets clearly dwarf[ed] [plaintiff's]"); *Lent v. Signature Truck Sys.*, No. 06CV569S, 2009 U.S. Dist. LEXIS 95726, at *7 (W.D.N.Y. Oct. 14, 2009) ("In light of the . . . relative financial resources of the parties, the Court declines to shift the cost of the inspection to the plaintiff."); *see also Annex Books, Inc. v. City of Indianapolis*, No. 1:03-cv-918-SEB-TAB, 2012 U.S. Dist. LEXIS 34247, at *9 (S.D. Ind. Mar. 14, 2012) (basing discovery cost decision in large part on possibility that "the Defendant, a municipality, has greater financial resources than Plaintiffs.").

[10] The lawsuit-investment industry makes no secret of its interest in protecting litigation investments by influencing cases. A principal of investor BlackRobe Capital Partners, LLC, was quoted as saying his firm would take a "'pro-active' role in lawsuits." A former Burford chairman said that his new investment company would not "control" litigation, but would "do[] more than was done before." *See* Nate Raymond, *Sean Coffey Launches New Litigation Finance Firm with Juridica Co-Founder, Vows to Move Beyond 'Litigation Funding 1.0,'* The American Lawyer (June 17, 2011).

[11] Recent commercial arbitration between a company called S&T Oil Equipment & Machinery Ltd. and the Romanian government is illustrative. S&T had sought financing for its case from Juridica Investments Limited, and, under their agreement, Juridica paid some legal fees for S&T in exchange for a percentage of arbitration proceeds. After Juridica withdrew funding, causing S&T's case to collapse, a sealed complaint filed by S&T against Juridica in Texas federal court alleged that S&T's own lawyers had begun seeking legal advice from Juridica after Juridica began paying their fees, and that Juridica required the lawyers to share with Juridica their legal strategy for the arbitration and any factual or legal developments in the case. *See* B.M. Cremades, Jr., *Third Party Litigation Funding: Investing in Arbitration*, Transnational Dispute Management, Vol. 8, Issue 4 (Oct. 2011), at 25-33, 27 n.105 (citing *S&T Oil Equip. & Mach. Ltd. v. Juridica Invs. Ltd.*, No. H-11-0542 (S.D. Tex. Feb. 14, 2011), sealed complaint, ¶¶ 29, 30.

[12] Litigation between a network-security company called Deep Nines and a TPLF provider that had invested in Deep Nines's prior commercial litigation against a software company illustrates this point. Deep Nines had entered into an agreement with the TPLF provider to finance patent litigation with an $8 million investment. Deep

average plaintiff, a TPLF entity's business purpose is *to raise funds to prosecute and to profit from litigation*. The existence of a TPLF agreement to fund litigation is thus relevant to the proportionality element of the scope of discovery. TPLF companies are well-heeled strangers to a case who willingly buy into the litigation hoping to profit from its successful prosecution. For the purposes of the resources element of the proportionality requirement contained in the Committee's proposed amendment to Rule 26(b)(1), any TPLF company that has bought a stake in a case should be considered as part of the "parties' resources."

Fourth, the disclosure of TPLF arrangements would be important information to have on the record in the event that a court determines it should impose sanctions or other costs. For example, in *Abu-Ghazaleh v. Chaul*, a Florida state appeals court held that TPLF funders (an individual and company) that controlled the litigation qualified as a party to the lawsuit and therefore became liable for the defendant's attorneys' fees and costs.[13] The state statute at issue in that case specifically authorized the levy of attorneys' fees on the plaintiff where the claim advanced was "without substantial fact or legal support."[14] The court found that the plaintiff's claim was bereft of such legal or factual support. The court then determined that the TPLF providers were liable for the attorneys' fees because they were essentially a "party" to the litigation (and the named plaintiff was financially unable to pay such fees, which is often the case). The court reached this conclusion by scrutinizing the agreement entered into by the plaintiff and the TPLF providers, which provided that the funders were to receive 18.33% of any award the plaintiffs received and gave them "final say over any settlement agreements proposed to the plaintiffs."[15] As evidenced by *Abu-Ghazaleh*, if courts are put on notice that a third party is financing the underlying litigation, they will be in a much better position to determine how to impose sanctions or other costs, if such costs are warranted in a given case.

Nines had a strong case, and eventually, the case settled for $25 million. After paying off the investor, as well as paying its attorneys and court costs, Deep Nines only ended up with $800,000 – about three percent of the total recovery. The TPLF investor took $10.1 million (the return of its $8 million investment, plus 10% annual interest, plus a $700,000 fee). *See* Alison Frankel, *Patent Litigation Weekly: Secret Details of Litigation Financing*, The Am Law Litigation Daily (Nov. 3, 2009); *Altitude Nines, LLC v. Deep Nines, Inc.*, No. 603268-2008E (N.Y. Sup. Ct.); *see also* Joe Mullin, *Patent Litigation Weekly: How to win $25 million in a patent suit – and end up with a whole lot less*, The Prior Art (Nov. 2, 2009).

[13] *See Abu-Ghazaleh v. Chaul*, 36 So. 3d 691, 693-94 (Fla. Ct. App. 2009).

[14] *Id.* at 694.

[15] *Id.*

For all of the foregoing reasons, we urge the Committee to consider adoption of the attached proposed amendment to Fed. R. Civ. P. 26(a)(1)(A). Your review of this proposal is greatly appreciated.

Sincerely,

Lisa A. Rickard
President
U.S. Chamber Institute for Legal Reform

J. Stephen Zielezienski
Senior Vice President
American Insurance Association

Sherman "Tiger" Joyce
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APPENDIX A – PROPOSED AMENDED RULE

The amended Fed. R. Civ. P. 26(a)(1)(A) would read as follows, with the new proposed language in underscore and deletions in ~~strikethrough~~:

(A) In General. Except as exempted by Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties:

(i) the name and, if known, the address and telephone number of each individual likely to have discoverable information—along with the subjects of that information—that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;

(ii) a copy—or a description by category and location—of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment;

(iii) a computation of each category of damages claimed by the disclosing party—who must also make available for inspection and copying as under Rule 34 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered; ~~and~~

(iv) for inspection and copying as under Rule 34, any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment~~.~~; and

(v) for inspection and copying as under Rule 34, 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, judgment or otherwise.

TAB 6B

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13-CV-E: Nonparty Rule 30(b)(6) Deposition

13-CV-E is a set of recommendations by the Committee on Federal Courts of the New York City Bar. The Bar Committee offers a reasonably clear picture of the problems they see with nonparty Rule 30(b)(6) depositions, although the discussion wanders into party depositions and at least two of the specific suggestions at the end address deposition subpoenas more generally. The problems are related to topics that were considered during the process of framing the recent amendments of Rule 45. It is easy to imagine that attempts to address them could generate greater problems than would be solved. These first notes provide a sketch. The proposals are described first. Then come the reasons for caution.

The Proposals

The problem clearly identified has to do with subpoenas for a nonparty Rule 30(b)(6) deposition. There may be not enough "notice" to give time to prepare adequately. Unlike an individual deponent, who can appear when demanded without advance preparation if that seems like the thing to do, an entity subject to a Rule 30(b)(6) deposition must provide one or more witnesses who can testify to information known or reasonably available to the entity. That takes time. And there may not even be enough time to make an orderly motion for a protective order. A pending motion, moreover, does not excuse compliance; it is only a court order that protects.

Two "common practices" are adopted in an attempt to mitigate these problems. The entity may "issue written objections to the scope of a Rule 30(b)(6) subpoena * * * and prepare their witness only to the extent the topics are not the subject of objections." Or it may seek a protective order and choose not to appear until the motion is decided. Neither tactic is authorized by the rules. Either may be met by sanctions imposed as a matter of inherent power.

The City Bar Committee has concluded that it would be overkill to expand the Rule 45(d)(2)(B) objection procedure to include oral depositions, whether under Rule 30(b)(6) or more generally. Recall that this procedure applies to a subpoena to produce. The person subject to the subpoena can object "before the earlier of the time specified for compliance or 14 days after the subpoena is served." The objection automatically suspends the subpoena; production is required only on court order, which must spare the nonparty from "significant expense resulting from noncompliance." Applying this procedure to a Rule 30(b)(6) subpoena "would shift the balance of power too far in favor of" the witness, resulting in unnecessary delays and disputes. The deposition is a discrete event, as compared to the often "rolling" nature of document and ESI productions. There is less time to negotiate a reasonable outcome.

The first suggestion, then, is "a minimum notice period for Rule 30(b)(6) depositions of non-parties." 21 calendar days would be reasonable. A specific location in the rules is not proposed.

Presumably what counts is notice to the nonparty subject to the subpoena, not the notice given to other parties under Rule 30(b)(1). The parallel to a nonparty subpoena to produce under Rule 45 is no help, because the closest provision is Rule 45(d)(3)(A)(i), which directs that the court must quash or modify a subpoena that fails to allow a reasonable time to comply. That provision is there now, and applies to deposition subpoenas as well as subpoenas to produce. One approach would be to add a few words here:

(3) Quashing or Modifying a Subpoena.

(A)*When Required.* On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply<u>, which must be at least 21 days if the subpoena is for a nonparty deposition under Rule 30(b)(6) [or 31(a)(4)</u>[1]; * * *

This approach would avoid a question that was avoided deliberately in framing the recent Rule 45 amendments — whether a specific notice period should be provided for a subpoena to produce. And it could be justified by accepting the arguments advanced by the proponents.

The second suggestion is that "to avoid unnecessary disputes a Rule 30(b)(6) non-party subpoena should be required to contain an explanation of the party's need for the testimony being sought." This is illustrated by NY CPLR § 3101(a)(4), requiring notice to a nonparty "stating the circumstances or reasons such disclosure is sought or required." This suggestion could be incorporated in Rule 45(a)(1), either as a new item (iv) in (a)(1)(A) or perhaps better as a new subparagraph (B):

(a) IN GENERAL.

(1) *Form and Contents.* * * *

<u>(B) *Nonparty Rule 30(b)(6) [or Rule 31)(a)(4)] Deposition*. A command that a nonparty attend a Rule 30(b)(6) [or Rule 31(a)(4)] deposition must [describe with reasonable particularity the matters for examination and]</u>[2] <u>state the reasons for</u>

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[1] The Bar Committee does not refer to Rule 31(a)(4). Presumably the subpoena should be the vehicle for informing the nonparty of the matters for examination. Whether depositions on written questions create problems similar to those described for depositions on oral examination remains to be determined.

[2] This is the direction of Rule 30(b)(6), which says that the notice of the deposition or the subpoena must do this. If we go down this road, it may be useful to have a reminder in Rule 45. Rule 30(b)(6) already provides that "[a] subpoena must advise

[seeking] discovery [of these matters].

This proposal raises serious questions about the value of the required statement and about the risk of inviting prolonged disputes. In addition, it could easily imply a substantive limit on the right to depose a nonparty entity. A nonparty entity could easily argue for something akin to a "good cause" standard.

The third proposal is at least framed as one that would apply to "any deposition." If a timely motion is made for a protective order, the deposition should be "suspended." This would supplement the provision in Rule 30(d)(3) for suspending a deposition after it has begun, see also Rule 30(c)(2) on instructing a deponent not to answer while presenting a motion under (d)(3). The motion would require certification that the movant has in good faith conferred, or attempted to confer, with the "relevant" parties. If this approach is to apply to all depositions, it likely would fit in Rule 30, with a parallel provision in Rule 31. Rather than squeeze it into an existing subdivision, it might become a new subdivision (b). The fourth proposal is likely to fit in the same place – it would require that the motion for protection be "made" "sufficiently in advance of the scheduled deposition."

(b) MOTION FOR PROTECTIVE ORDER. The time stated for the deposition [in the Rule 30(b)(1) notice] is voided by a motion [for a protective order] under Rule 26(c) or [a motion to quash or modify] under Rule 45(d)(3)(A)(i) if the motion is made no later than 14 days after service on the deponent of the notice or the subpoena, whichever is served earlier, and if the movant certifies that it has in good faith conferred or attempted to confer with the party who gave the notice. After the motion is decided, a new time may be set by order or by the party who noticed the deposition.

Reasons for Caution

One reason for caution is noted above. In framing the proposals that have become the recent amendments of Rule 45, the Discovery Subcommittee considered whether to add some specific minimum notice period. It decided not to. Recent consideration is itself reason to go slow.

More importantly, this proposal is the first inkling we have had that there may be a problem with deposition notices and subpoenas that do not allow a reasonable time for compliance by a nonparty Rule 30(b)(6) organization named as deponent. Professor Marcus attempts to read all reported discovery cases and has not

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a nonparty organization of its duty to make this designation" of persons who will "testify about information known or reasonably available to the organization."

found any that address this possible problem. It may be that the problem arises only in the peculiarities of local practice as encountered by the City Bar Committee. Lawyers around the rest of the country may be more sensitive to these matters in setting the time for a Rule 30(b)(6) deposition, whether the organization named as deponent is a party or is not. A great many cases struggle with claims that an organization has not honored the direction to provide witnesses who know, or who have been taught, the information known or reasonably available to the organization. The party noticing the deposition has every incentive to allow sufficient time to enable a fruitful deposition that actually produces the desired information. And if the time is not sufficient to the needs of a particular deposition, lawyers elsewhere may be better attuned to the need to negotiate a reasonable schedule. Rather than rush to make a national rule to address what may be a local problem, it is better to wait for better information about experience elsewhere.[3]

Many years ago a committee of the New York State Bar Association raised a different question about Rule 30(b)(6) depositions that may go more to depositions of an organization that is a party than to nonparty depositions. One of the problems they saw was that the lawyer taking the deposition would badger, lure, or otherwise fool the witness designated by the organization to make statements about things the witness did not know and had not been taught by the organization. The answers then would be put to use as if the committed position of the organization. All of the questions raised by this report were considered seriously by the Civil Rules Committee and the Discovery Subcommittee, but no proposed solution commanded any confidence and Rule 30(b)(6) was put aside.[4]

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[3] The cases noted in the City Bar Committee recommendation bear on issues collateral to the question whether parties are attempting to force unreasonably short periods to prepare for nonparty Rule 30(b)(6) depositions. For example, one supports the proposition that a nonparty deponent cannot refuse to appear at the time stated in a subpoena simply because it has made a motion for a protective order. Only an actual protective order will do.

Judge John Koeltl reports that he has never encountered the problem identified by the City Bar Committee, and adds that local rules governing discovery motions in the Southern District should avoid any apparent need to appear for the deposition before obtaining a ruling on a motion for a protective order.

[4] The report is 04-CV-B. It raised many challenging questions about the conduct and scope of Rule 30(b)(6) depositions. The focus was deliberately limited to depositions of a party, but with the observation that many of the problems occur

The short of the matter is that Rule 30(b)(6) is not free of problems. Underpreparation of the organization's witnesses seems to recur with some frequency. Overreaching questioning may also be a persistent, if less prominent problem. It would be good to know whether there are enough signs of unreasonably abrupt nonparty deposition notices to justify adding these proposals to the log of Rule 30(b)(6) problems. The collective experience of Committee Members is likely to be the best basis for deciding whether to develop any of these topics further.

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with nonparty depositions as well. See pp. 15-17. It would be a shame to lose sight of this report in the Rules Committee archives. But there is no apparent reason to revisit these matters now.

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NEW YORK CITY BAR

13-CV-E

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April 3, 2013

Secretary of the Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, D.C. 20544

Re: Proposed Amendment to Rule 45 Regarding Subpoenas for Rule 30(b)(6) Depositions

Dear Secretary:

I write on behalf of the Committee on Federal Courts of The Association of the Bar of the City of New York to provide comments with regard to Federal Rules 45 and 30(b)(6). The Association of the Bar, founded in 1870, has over 24,000 members practicing throughout the nation and in over 50 foreign jurisdictions. The Committee on Federal Courts is charged with studying and making recommendations regarding the Federal Rules of Civil Procedure and other aspects of the federal judiciary and federal litigation.

As one of our Committee's projects, we have engaged in a review of Federal Rules 45 and 30(b)(6). We propose that the Federal Rules of Civil Procedure be amended to provide non-parties who are served with Rule 30(b)(6) deposition subpoenas with greater protections against undue burdens. Specifically, we propose the adoption of a minimum notice period for such non-party depositions, as well as an automatic stay of such depositions upon the filing of a motion for a protective order

Our proposal attempts to address the problem that non-party recipients of deposition subpoenas for Rule 30(b)(6) depositions cannot postpone or limit the scope of such a deposition without moving for and obtaining a protective order before the date of the scheduled deposition, which can be required by subpoena on very short notice. This needlessly generates emergency

applications that, in the Committee's view, impose unnecessary burdens on the litigants and the court system, and also results in routine violations of the Rules. We believe a more orderly process would better balance the interests of parties seeking discovery with those of witnesses.

The current rules treat deposition discovery differently than document discovery. Rules 30 and 45 provide an objection procedure for document discovery, Fed. R. Civ. P. 30(b)(2), 45(c)(2)(B), but none for depositions. The recipient of a deposition notice or subpoena may move for a protective order, but the motion itself does not stay the deposition. To avoid having to appear, the receiving party must actually obtain a court order before the deposition date set forth in the subpoena. *See, e.g., Fed. Aviation Admin. v. Landy*, 705 F.2d 624, 634 (2d Cir. 1983) ("[I]t is not the filing of such a motion [for a protective order] that stays the deposition, but rather a court order."); Fed. R. Civ. P. 37 advisory committee's notes (stating that a motion for a protective order is "not self-executing — the relief authorized under that rule depends on obtaining the court's order to that effect"). This can be especially difficult where the target receives little advance notice — a problem compounded by the fact there is no fixed period of advanced notice for a deposition subpoena or notice. Rule 30 requires only "reasonable written notice" to parties, Fed. R. Civ. P. 30(b)(1), and, for nonparties, Rule 45 states only that a subpoena may be quashed if it "fails to allow a reasonable time to comply." Fed. R. Civ. P. 45(c)(3)(A)(i). Of course, a subpoena with an unreasonable time to comply usually entails an unreasonably short time in which to prepare and file a motion to quash.

Rule 30(b)(6) imposes a greater burden of compliance than a conventional deposition. Although testimony is burdensome for any witness, a witness required to testify solely based on their personal knowledge could comply simply by showing up and answering questions, without preparation or any refreshment of recollection. Although preparation is advisable, it is in that case entirely voluntary. Not so under Rule 30(b)(6), which demands substantial work by the organization receiving the subpoena before any testimony is given. Rule 30(b)(6) requires the deponent organization to produce a witness or witnesses with all the "information known or reasonably available to the organization," Fed. R. Civ. P. 30(b)(6), which may include information "from documents, past employees, or other sources." *Bank of New York v. Meridien BIAO Bank Tanzania Ltd.*, 171 F.R.D. 135, 151 (S.D.N.Y. 1997) (citation omitted).

Courts interpret this rule to require the deponent organization to "make a conscientious good-faith endeavor to designate the persons having knowledge of the matters sought by [the party noticing the deposition] and to prepare those persons in order that they can answer fully, completely, unevasively, the questions posed . . . as to the relevant subject matters." *Id.* These efforts are often burdensome and expensive, especially where there are numerous and broadly phrased deposition topics. And the stakes are high, because a witness's statement at a Rule 30(b)(6) deposition is "a sworn corporate admission that is binding on the corporation." *In re Vitamins Antitrust Litig.*, 216 F.R.D. 168, 174 (D. D.C. 2003).

This burden is exacerbated where a Rule 30(b)(6) subpoena of a non-party requires appearance on short notice. Of course, this should be rare. However, in some cases Rule 30(b)(6) testimony of a non-party is demanded on unreasonably short notice where the litigants'

counsel have overlooked the need for the discovery until deadlines are looming, or simply have underestimated the burden upon the witness organization.

In the experience of the Committee, the concerns above are incompletely mitigated in practice by at least two common practices that unfortunately entail routine disregard for the Rules' requirements. First, deposition targets sometimes issue written objections to the scope of a Rule 30(b)(6) subpoena (even though this procedure is not contemplated the Rules), and prepare their witness only to the extent the topics are not the subject of objections. Second, deposition targets sometimes move for a protective order and choose not to appear until the motion is resolved. While this is not permitted by the Federal Rules, a party is likely to avoid sanctions for taking this course. Rule 37(d), relating to discovery sanctions, states: "A failure described in Rule 37(d)(1)(A) [including the failure to appear at a deposition] is not excused on the ground that the discovery sought was objectionable, *unless the party failing to act has a pending motion for a protective order under Rule 26(c)*." Fed. R. Civ. P. 37(d)(2) (emphasis added).

This sends mixed messages to the bar: failure to appear is improper, but, at least under Rule 37, cannot alone be grounds for sanctions. Courts have concluded that, "[t]he fact that conduct is not sanctionable under Rule 37 does not render it proper," and that they retain "inherent authority" to sanction a party for not appearing at a deposition, notwithstanding a pending motion for a protective order. *See Amobi v. District of Columbia Dept. of Correction*, 257 F.R.D. 8, 10-11 (D.D.C. 2009); *see also, e.g., In re Steffen*, 433 B.R. 879, 883 (M.D. Fla. 2010) ("Sanctions for failure to appear at a deposition can be ordered in spite of a pending motion for protective order if that motion is found to be untimely, frivolous, or otherwise for the purpose of avoiding the taking of a deposition."). This circumstance calls for a rationalization of procedures, so that the Rules' requirements are more clearly defined and consistently respected.

We have considered proposing an explicit objection procedure for Rule 30(b)(6) deposition subpoenas, akin to Fed. R. Civ. P. 45(c)(2)(B). Such a rule, however, in our view would shift the balance of power too far in favor of Rule 30(b)(6) witnesses, to a degree that is not required to bring about just results and which could create unnecessary delays and disputes. An explicit objection procedure could be used on a routine basis to avoid any meaningful deposition at all, without the discipline of any motion being required.

The different treatment of document and deposition subpoenas in this regard is warranted. Abuse of objections is more easily resolved with respect to document production subpoenas, which are often the subject of an ongoing negotiation based on the production of information over time (under the threat of a motion to compel). In contrast, the Rule 30(b)(6) deposition is a discrete event, for which there is only a single occasion for compliance. Further compliance would require that all parties and a court reporter convene on an additional day, possibly in a locale remote from the litigation. This imposes a structural barrier to the sort of ongoing negotiation that is typical of document discovery. Instead of an objection procedure, we believe that the following amendments should be sufficient.

We do not propose specific language for rule amendments, but propose three straightforward concepts that we urge the Committee on Rules of Practice and Procedure to consider.

First, we propose a minimum notice period for Rule 30(b)(6) depositions of non-parties. Despite the historical absence of a minimum notice period for subpoenas, such is appropriate in the limited case of Rule 30(b)(6) depositions because of the special burdens involved that are detailed above. The general sense of the Committee is that 21 calendar days (or a comparable time) is an appropriate minimum notice period. Litigants would retain the right to apply to the court for a shorter period if circumstances warrant.

Second, to avoid unnecessary disputes, a Rule 30(b)(6) non-party subpoena should be required to contain an explanation of the party's need for the testimony being sought. *See, e.g.*, NY CPLR § 3101(a)(4) (requiring that non-party witnesses receive "notice stating the circumstances or reasons such disclosure is sought or required").

Third, Rules 30 and 45 should be amended to suspend any deposition that is the subject of a timely motion for a protective order, including a certification that the witness has attempted in good faith to meet and confer with the relevant party's counsel to resolve the dispute. This would provide subpoena recipients some protection akin to that enjoyed by document subpoena recipients through the Rule 45(c)(2)(B) objection procedure, but would require a level of effort that is appropriate and would avoid abuse.

Fourth, to avoid last-minute motions by witnesses that would waste the resources of litigants who were preparing for the deposition, the Rules should require that a motion be filed within a limited timeframe after the subpoena and notice is served (e.g.,14 days) or at least sufficiently in advance of the scheduled deposition (e.g., 3 business days). *See e.g.,* D. Kan. Local R. 26.2 (suspending a deposition upon a motion for a protective order, if filed within 14 days of service of the notice and no later than 48 hours prior to the deposition); Rule 45(c)(2)(b) (requiring objections to document subpoenas be served by the earlier of 14 days or when response is due). In addition, courts would retain their inherent authority to sanction a party who makes a motion that is "frivolous, or otherwise for the purpose of avoiding the taking of a deposition." *Steffen*, 433 B.R at 883.

We thank the Committee on Rules of Practice and Procedure in advance for its consideration of these matters.

Respectfully submitted,

Marilyn C. Kunstler

cc: Honorable John G. Koeltl,
United States District Court, Southern District of New York

TAB 6C

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Submission 10-CV-A

Amy Smith proposes that Rule 37 be amended -- building on the model of Rule 23(f) -- to authorize a court of appeals to grant a petition for immediate review of a district court ruling granting or denying a motion to compel discovery of information claimed to be protected by the attorney-client privilege. The stimulus for this proposal was the Supreme Court's decision in Mohawk Industries, Inc. v. Carpenter, 130 S.Ct. 599 (2009) (Justice Sotomayor's first opinion), holding that the collateral order doctrine did not permit an immediate appeal from a district court ruling that privileged material must be turned over because the privilege had been waived.

The Appellate Rules Committee has also received two submissions (one from Amy Smith) suggesting rulemaking in response to the Supreme Court's Mohawk Industries decision. Prompted by those submissions, it has had some discussion of whether discretionary review might be desirable for other interlocutory rulings. After discussion of the possibility of broader application, at its April, 2014, meeting that committee focused on the possibility of a rule dealing with attorney-client privilege appeals. It plans further consideration of these issues during its Fall 2014 meeting. Final action on the submission to this committee should presumably await the Appellate Rules Committee's completion of its review of related issues.

The Role of Rulemaking

As the Supreme Court noted in Mohawk Industries, the 1990 amendment to the Rules Enabling Act to authorize adoption of rules defining when a ruling of a district court is final for purposes of appeal, 28 U.S.C. § 2072(c), may make rulemaking a better way of dealing with problems of appealability than case-by-case adjudication (id. at 609):

> [T]he rulemaking process has important virtues. It draws on the collective experience of bench and bar, and it facilitates the adoption of measured, practical solutions. We expect that the combination of standard post-judgment appeals, § 1292(b) appeals, mandamus, and contempt appeals will continue to provide adequate protection to litigants ordered to disclose materials purportedly subject to the attorney-client privilege. Any further avenue for immediate appeal of such rulings should be furnished, if at all, through rulemaking, with the opportunity for full airing it provides.

Justice Thomas, concurring in the judgment, fully agreed with the desirability of deferring to the rulemaking process. For that reason, he declined to join the rest of the Court's opinion: "The Court's choice of analysis is the more ironic because applying Cohen [v. Beneficial Loan Corp.] to the facts of

this case requires the Court to reach conclusions on, and thus potentially prejudice, the very matters it says would benefit from 'the collective experience of bench and bar' and the 'opportunity for full airing' that rulemaking provides." Id. at 610.

The Ruling in Mohawk Industries

Whether one treats the Court's analysis of the issues in Mohawk Industries as instructive to the rulemakers, it is useful to review what happened in that case and why the Court concluded that application of the collateral order immediate-appeal doctrine was not justified. The issues that would be raised by rulemaking may correspond to issues discussed by the Court.

One starting point is that the issue in the case was not what one might call a "typical" privilege question. Plaintiff Carpenter, a former employee of defendant, wrote to defendant's human resources department to report that the company was employing undocumented immigrants. Although Carpenter did not know it then, defendant had also been accused in a proposed class action of trying to drive down the wages of its legal employees by employing illegal immigrants. Defendant directed plaintiff to meet with its retained counsel in that class action, and plaintiff claims counsel pressured him to recant what he had said. According to his suit, he was fired in retaliation when he refused to recant.

Meanwhile, plaintiffs in the class action learned about Carpenter's report to Mohawk, leading to an evidentiary hearing during which Mohawk asserted that actually Carpenter had been trying to cause it to circumvent federal immigration law, and that it had fired him for that reason.

Carpenter sought production of all materials related to his meeting with retained counsel and Mohawk's termination decision. Mohawk claimed that the information was protected under the attorney-client privilege, but Carpenter persuaded the district court that Mohawk had waived this protection by making representations in the class action evidentiary hearing about the interaction he had with Mohawk's counsel in that case. It ordered that the requested material be turned over, and refused to certify the waiver issue for immediate appeal under 28 U.S.C. § 1292(b). Noting that there was a conflict in the circuits about whether the collateral order doctrine could apply to permit such an appeal in a situation involving claimed privilege protection, the Court granted cert. See id. at 604 & n. 1 (listing 3d, 9th, and D.C. Circuits as favoring appealability, and 2d, 5th, 7th, 10th, 11th, and Fed. Circuits as finding no ground for immediate appeal).

The collateral order doctrine depends on three factors: (1)

that the ruling conclusively determined the issue in controversy; (2) that the issue is entirely separate from the merits of the case; and (3) that the ruling would be effectively unreviewable after final judgment. The Court addressed only the last factor, and found it unsatisfied.

The Court emphasized that its collateral order analysis was "categorical" -- that it makes immediate appeal available in "the entire category to which the claim belongs." 130 S.Ct. at 605. As presented to the Court, the issue Mohawk wanted addressed was "whether disclosure orders adverse to the attorney-client privilege qualify for immediate appeal under he collateral order doctrine." Id. at 603. The submission before the Committee, on the other hand, asks for authority to appeal from any order "granting or denying a motion to compel discovery of information claimed to be protected." In addition, unlike the situation with the collateral order doctrine -- which makes all orders in the category immediately appealable -- the proposal before the Committee seeks only to introduce discretionary review similar to that now provided for review of orders granting or denying class-action status.

Noting that its earlier rulings had required litigants to await review after final judgment for such important issues as disqualification of counsel in civil or criminal cases, the Court thought a similar outcome was justified in this case: "In our estimation, postjudgment appeals generally suffice to protect the rights of litigants and assure the vitality of the attorney-client privilege." Id. at 606. In a footnote, it added: "Perhaps the situation would be different if district courts were systematically underenforcing the privilege, but we have no indication that this is the case." Id. at 607 n.2.

The Court was also persuaded that alternative routes to early review would suffice to guard the privilege, mentioning 28 U.S.C. § 1292(b) certification, petitioning for a writ of mandamus, and refusing to obey the order, with appeal after final judgment if a sanction were imposed, and immediate appeal if the refusal led to being held in contempt.

Considering the category Mohawk urged be included under the collateral order doctrine, it observed that "rulings adverse to the privilege vary in their significance; some may be momentous, but others are more mundane." Id. at 608. And authorizing "the blunt, categorical instrument of a § 1291 collateral order appeal" would likely lead to disruptive consequences: "Permitting parties to undertake successive, piecemeal appeals of all adverse attorney-client rulings would unduly delay the resolution of district court litigation and needlessly burden the Courts of Appeals." Id.

The Rule 23(f) analogy

The submission does not urge that appellate review be automatic, but instead that a new rule provision be tailored to the discretionary method adopted in Rule 23(f) -- requiring prompt petition to the court of appeals, leaving the question whether to grant review entirely up to the discretion of the court of appeals, and directing that the pendency of the petition does not stay proceedings in the district court absent an order to that effect by the district court or the court of appeals.

Nonetheless, it is not clear that Rule 23(f) furnishes a good analogy to the present submission. In at least some quarters it was thought when this amendment was adopted that there was insufficient opportunity for the courts of appeals to provide district courts with guidance about class-certification decisions. It is not apparent that there is any similar need for appellate guidance about application of the attorney-client privilege.

Moreover, as the Committee Note accompanying the 1998 adoption of Rule 23(f) noted, class certification orders were often of very great importance:

> An order denying certification may confront the plaintiff with a situation in which the only sure path to appellate review is by proceeding to final judgment on the merits of an individual claim that, standing alone, is far smaller than the costs of litigation. An order granting certification, on the other hand, may force a defendant to settle rather than incur the costs of defending a class action and run the risk of a potentially ruinous liability.

As the Supreme Court observed in Mohawk, many (perhaps most) rulings on privilege are likely not to be similarly momentous. (Indeed, some may result from in camera review of individual documents with document-by-document rulings that ordinarily would not present issues of much importance.) There is no indication that the contours of the privilege are regularly found to be indistinct, or that district courts are regularly misreading the contours of the privilege.

One more difference deserves mention: There are many, many more privilege rulings than class-certification decisions. So the potential burden of a new rule as proposed could be much, much larger than Rule 23(f), even with expedited features.

The wake of Mohawk Industries

This submission was made a few months after the Supreme Court's decision in Mohawk Industries. As noted, a considerable majority of the circuits had already decided that the collateral order doctrine did not support immediate appeals regarding rulings on the privilege before the Supreme Court so ruled.

Since the Court ruled, there have been many cases citing the Court's decision, but it is not clear that it has had a major effect on the attorney-client privilege. No comprehensive review of those post-Mohawk Industries cases has been made, but a quick look at some cases that distinguished it, and mentioning some might be informative:

> In re Kellogg Brown & Root, Inc., 756 F.3d 754 (D.C. Cir. 2014) -- The court says that, under Mohawk, the first prong of the collateral order doctrine will usually be satisfied by orders denying privilege protection.
>
> S.E.C. v. Merrill Scott & Assoc., Ltd., 600 F.3d 1262 (10th Cir. 2010) -- The collateral order doctrine would still apply to permit immediate appeal of a district court order regarding release of confidential documents that were produced subject to the terms of a protective order forbidding the release later sought.
>
> Sandra T.E. v. Smith Berwyn School Dist. 100, 600 F.3d 612 (7th Cir. 2010) -- Raises but does not decide the issue whether Mohawk Industries requires reconsideration of the rule that a nonparty served with a discovery demand could have immediate review of an adverse ruling, rather than having to await final judgment in a case to which it is not a party.
>
> Perry v. Schwartzenegger, 591 F.3d 1147 (9th Cir. 2009) -- In the California Proposition 8 same-sex marriage case, the court found that using the collateral order doctrine to permit immediate review of a district court order requiring disclosure of the identity of donors to the Prop. 8 campaign violated the First Amendment rights to associate of persons whose identities would be revealed. The court treated the matter as a petition for a writ of mandamus and issued a writ.

No doubt a fuller review of decisions citing Mohawk Industries would provide a basis for a fuller report, but the smattering above offers some insights. It does not appear that attorney-client privilege issues have been prominent among these cases.

Rulemaking choices

The rulemakers' relatively recent grant of authority to determine by rule when immediate appeals are warranted could suggest many concerns that would warrant immediate appeals of discovery orders. Questions of wide dissemination of material obtained through discovery -- sometimes protected as trade secrets and sometimes involving highly private matters -- might be considered sufficiently momentous to warrant immediate review.

Somewhat similarly, recurring controversies about whether district courts may too often enter protective orders that could interfere with broader dissemination of discovered information about issues of public safety might support allowing immediate appeal from such orders. Given the reportedly escalating cost of discovery of electronically stored information in some cases, orders that supposedly would impose large costs might qualify, particularly if the "proportionality" amendments approved by the Standing Committee in May are implemented at the end of 2015.

No doubt other issues might be identified, but the point is that attorney-client privilege rulings might not be the most compelling discovery orders to include were immediate discretionary appeal authorized. And it is conceivable that rulings of other sorts might be equally validly subject to such immediate review. For example, decisions under Rule 19(a) that nonparties are or are not "required parties" may often be of such significance that the possibility of immediate review should be provided.

Thus, the whole question of how and when to use the new authority to permit immediate review of certain kinds of orders could itself be the subject of much study. And the model of totally discretionary review -- perhaps somewhat like "supervisory mandamus" -- could be regarded as a low-impact safety valve for a variety of orders. Whether there is a need to undertake such a broad review of interlocutory review of an array of orders is unclear. But that is not the question presented by this submission, which is limited to rulings on the attorney-client privilege in discovery.

As noted at the outset, the Appellate Rules Committee has already advanced a considerably greater distance in studying these issues, and it might be best for this committee to await the outcome of that committee's work.

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March 5, 2010

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Washington, DC 20544

10-CV-A

Re: Suggestion and Recommendation

Dear Mr. McCabe:

Pursuant to the Procedures for the Conduct of Business by the Judicial Conference Committees on Rules of Practice and Procedure, I am writing to make a suggestion and recommendation with respect to the Federal Rules of Civil Procedure. This suggestion and recommendation would require an amendment to Federal Rule of Civil Procedure 37 to authorize discretionary interlocutory appeals from a district court's order granting or denying a motion to compel discovery of information claimed to be protected by the attorney-client privilege.

On December 8, 2009, the Supreme Court decided *Mohawk Industries, Inc. v. Carpenter*, 130 S. Ct. 599 (2009). In that case, the Court held that disclosure orders adverse to the attorney-client privilege do not qualify for immediate appeal under the collateral order doctrine because postjudgment appeals, together with other review mechanisms, suffice to protect the rights of litigants and preserve the vitality of the attorney-client privilege. *Id.* at 603. The Court bolstered its conclusion with reference to Congress's amendment in 1990 of the Rules Enabling Act, 28 U.S.C. §§ 2071-2077, to authorize the Court to adopt rules "defin[ing] when a ruling of a district court is final for the purposes of appeal under section 1291," *id.* 2072(c), and its subsequent enactment of 28 U.S.C. § 1292(e), which empowered the Court to prescribe rules in accordance with the Rules Enabling Act to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for under Section 1292. Indeed, this is the *only* portion of the opinion in which Justice Thomas joined. *See id.* at 609-10.

In 1998, the Supreme Court employed the rulemaking authority in Section 1292(e) in promulgating Federal Rule of Civil Procedure 23(f). Rule 23(f) permits an interlocutory appeal from an order granting or denying class certification at the sole discretion of the court of appeals. The current version of Rule 23(f), which was amended in December of 2009, provides that a petition for permission to appeal must be filed with the circuit clerk within fourteen days after the order is entered. An appeal does not stay proceedings in the district court absent an order to that effect entered either in the district court or court of appeals.

Note that also in 1998, Federal Rule of Appellate Procedure 5, which governs appeals by permission, was similarly amended to accommodate new rules such as Rule 23(f) authorizing additional interlocutory appeals. Rather than add a separate rule governing each such appeal, it was believed preferable to amend Rule 5 so that it would govern all such appeals.

Please consider my suggestion and recommendation to promulgate an amendment to Rule 37 to add a new subsection similar to the amendment in Rule 23(f) permitting an interlocutory appeal from a district court's order granting or denying a motion to compel discovery of information claimed to be protected by the attorney-client privilege at the sole discretion of the court of appeals, and providing that a petition for permission to appeal must be filed with the circuit clerk within fourteen days after the order is entered. Similar to the practice under Rule 23(f), an appeal under any amendment to Rule 37 should not stay proceedings in the district court absent an order to that effect entered either in the district court or court of appeals.

Thank you for your attention to this matter.

Very truly yours,

Amy M. Smith

AMS/jw
000001.00006

TAB 6D

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Rule 41: Docket 14-CV-D; 10-CV-C

Docket 14-CV-D is a law review article, Bradley Scott Shannon, *Dismissing Federal Rule of Civil Procedure 41*, 52 U. of Louisville L.Rev. 265 (2014). Professor Shannon makes several suggestions to amend Rule 41. They can be described in two groupings. First are a number of suggestions for clarifying the rule text to address issues that generally are well known. Second is a lament that use in rule text of the much-misused terms "on the merits" and "with prejudice" adds to confusion about the preclusion effects of both voluntary and involuntary dismissals. The suggestion on this score is to root out those phrases and to shape rule text that instead refers to the general law of preclusion.

As with so many suggestions, this article presents a carefully documented statement of changes that indeed might improve the Rule 41 text. That is reason to take at least an initial look. The case for change, however, must be balanced against the familiar concerns that regularly thwart the temptation to tidy things up. Constant revisions of many rules may dissipate Enabling Act resources that should be saved for more important topics. Bench and bar may be irritated, or worse, by an ever-flowing stream of refinements that need to be mastered and broken into actual use. The process of adapting practice to the changes may demonstrate unanticipated flaws that create problems worse than any that have been cured. And the problems to be cured may not be serious; in some cases cosmetic flaws in a rule may be readily corrected in actual practice.

So it is here. There may be room to improve Rule 41. The question is whether the potential gains justify the work that will be required, and the occasional risks — identifiable and not identifiable — that may be involved.

I Why Allow Dismissal Without Court Order?

Rule 41 rests on the premise that it is desirable to allow a plaintiff to abandon an action without court order at some early stage and without sacrificing the right to bring a new action on the same claims. The primary check is that if a new action is filed, the court may order the plaintiff to pay all or part of the costs incurred in the previous action and may stay proceedings until the plaintiff complies.

If Rule 41 is to be revisited, it may be wise to begin by asking whether this premise holds true. Allowing dismissal "without prejudice" before a defendant has been served or otherwise notified of the action may be attractive. But significant burdens are imposed once the defendant has learned of the action. It could be urged that commencing an action is such serious business that any plaintiff who takes this step should be required to get court approval as a condition of emerging with the right to bring a second action on the same claim.

This general concern can be augmented by reflecting that a right to dismiss may be invoked for strategic purposes. The reason may be as simple as dissatisfaction with the judge assigned to the case by random draw. It may be as manipulative as the desire to defeat diversity jurisdiction of a removed action by reformulating a new action with a diversity-destroying defendant.

A more pointed question may be raised by the aspect of present Rule 41(a)(1)(A)(i) that cuts off the right to dismiss by notice on service of "either an answer or a motion for summary judgment." Why not also a motion to dismiss? If the motion points to a want of subject-matter jurisdiction, personal jurisdiction, inadequate service, or improper venue, it makes sense to allow the plaintiff to recognize the problem and seek out a clearly proper a court. But suppose the motion asserts failure to state a claim? The defendant may invest substantial resources in the motion, perhaps as much as would be devoted to filing an answer. A court might be easily persuaded to permit dismissal without prejudice, but should the plaintiff be given a unilateral choice?[1]

Part of the answer may be that a plaintiff who dismisses by notice before the action is well under way is not likely to file a second action. If that is the lesson of experience, there may be little reason to reconsider the basic premise that some opportunity should be allowed to dismiss without court order and without prejudice.

II General Text Changes

Partial Dismissal: Rule 41(a)(1)(A) provides that a "plaintiff may dismiss an action without a court order * * *." This language seems to contemplate dismissal of an entire action, but not dismissal as to one or more plaintiffs, one or more defendants, or one or more

[1] This question is also raised by **10-CV-C**. A pro se plaintiff files in state court with a complaint that is "very difficult to understand." The defendant removes and moves to dismiss, attaching documents that — if considered — would convert the motion to one for summary judgment. The plaintiff files a notice of voluntary dismissal without prejudice and without costs; apparently the notice is copied from an on-line source. The clerk's office closes the case without consulting a judge. The specific suggestion is that a "responsive pleading" should cut off the right to dismiss by notice. It might be rendered instead, borrowing from Rule 15(a), as cutting off the unilateral right to dismiss by notice when a motion is filed under Rule 12(b), (e), or (f). (A motion for judgment on the pleadings would be made after the pleadings are closed, so there would be an answer that already serves the purpose under Rule 41(a)(1)(A)(i).)

claims. Some courts seem to read it that way; others allow dismissal as to some but not all parties; and dismissal of a claim can be accomplished by filing an amended pleading when allowed under Rule 15.

Professor Shannon proposes to allow a plaintiff "to dismiss the action or any claim without a court order * * *." That language could embrace all claims by one of plural plaintiffs, or all claims against one of many defendants.

So long as a plaintiff is allowed to dismiss all of an action without prejudice and without court order, it seems sensible to allow dismissal of less than all of the action.

But if that is so, the question remains whether it is better to extend the Rule 41 dismissal-by-notice procedure, or instead to require amendment of the pleadings. There is some parallel between Rule 15(a) and Rule 41: One amendment as a matter of course is permitted until 21 days after the earlier of a responsive pleading or a motion under Rule 12(b), (e), or (f). Rule 15 does not invoke a motion for summary judgment as a cutoff; Rule 41 does not invoke Rule 12. Amendment of the pleadings may be desirable to reflect clearly what remains in the action. And amendment may become more desirable after passing into the zone where Rule 41 requires court permission to dismiss without prejudice. Perhaps the best reason for adding "claim" to Rule 41 is to resolve the question whether Rule 41 can be used to dismiss by notice as to some parties. And that purpose might be better served by referring to a party rather than a claim.

Beyond that, there may be a risk of serious confusion arising from the complexity of "claim" as a term of procedure. Much of what Rule 41 addresses is preclusion by judgment. Claim preclusion rests on a broad transactional concept, both for federal courts and for many state courts. A party might easily see permission to dismiss a "claim" as allowing dismissal of what preclusion analysis views as only part of a claim. Professor Shannon's draft 41(a)(1)(B) provides that the dismissal "does not preclude the relitigation of the action or claim so dismissed." This language could easily be read to condone what should be an impermissible splitting of a single claim. Any attempt to redraft that relies on that besmirched word will confront serious difficulties.

Claims Beyond Complaint: Rule 41(c) applies Rule 41 "to a dismissal of any counterclaim, crossclaim, or third-party claim." Voluntary dismissal by notice must be made before a responsive pleading is served; if there is no responsive pleading, it must be made before evidence is introduced at a hearing or trial.

Professor Shannon points out that there are other varieties of claims not listed in Rule 41(c). A third-party defendant may make a claim against a plaintiff. A plaintiff may make a claim against

a third-party defendant. Quibbles might be made about characterizing a claim in intervention, or claims by interpleaded claimants. Supplemental Rule C provides for a claim to property in an in rem proceeding, and Supplemental Rule G provides for a claim to property seized for civil forfeiture. Professor Shannon's draft responds to these possibilities by a new Rule 41(c): "This rule applies similarly to a dismissal of any other type of claim provided for by these rules."

There may be drafting issues here. "applies similarly" may or may not address an asymmetry between Rule 41(a)(1)(a)(i), under which a motion for summary judgment cuts off dismissal by notice, and Rule 41(c), which does not refer to a motion for summary judgment. The proposed Committee Note says that the rule text does invoke the summary-judgment cutoff. (One treatise treats this difference as a result of absent-mindedness in the 1948 amendments.) "similarly" suggests room for variations that would not be authorized by a simple "applies," but it is unclear just what the variations might be.

More importantly, it is not clear whether dismissal by notice should be available for everything that qualifies as a claim. Supplemental Rules C and G both call for a claim, and then further provide that the claimant must file an answer. It would be important to determine whether there is something in this structure that warrants a different approach to Rule 41.

Penalty Dismissals: Rule 41(b) provides for involuntary dismissal "if the plaintiff fails to prosecute or to comply with these rules or a court order * * *." There is a great deal of learning about these dismissals. Professor Shannon observes that this is not a complete list, however, and urges that the rule should list none or should be all-embracing. His choice is to expand: "If a plaintiff engages in improper conduct, a defendant may move to dismiss * * *." This formula could include conduct now approached as a matter of inherent power.

There is good reason to be wary of new rule text authorizing dismissal for "improper conduct." A more detailed list, however, may present difficulties of its own.

Other Possible Revisions: If the details of Rule 41 are to be considered, there may be other points to take up.

"Manufactured finality" presents familiar questions that have been hanging on for several years. A joint subcommittee created by the Appellate and Civil Rules Committees studied the questions to impasse. But if Rule 41 is opened up, this could be the occasion to make the hard choices. The common problem arises when an interlocutory order disposes of central parts of a case, leaving other parts unresolved. At least most courts accept the strategy of dismissing all remaining parts with prejudice, generating a final

and appealable judgment. Reversal of the previously interlocutory order does not revive the parts that were voluntarily dismissed with prejudice. But there is some life left in a "conditional prejudice" approach: the remaining claims are dismissed with prejudice in the sense that they are finally resolved if the appeal results in affirming the interlocutory order made final by the voluntary dismissal. But if the appeal leads to reversal, the dismissed parts are revived. Rule 41 can be drafted to make an explicit choice, and there may be some advantage in doing that.

Another set of problems that may well be left alone arise from the practice of "administrative closing." Generally an administrative closing is not a dismissal; reopening is contemplated. But there may never be a reopening. It may be worth considering the possibility of framing a rule, whether as part of Rule 41 or as a new rule "41.1," addressing these practices.

III Preclusion Consequences

Rule 41 repeatedly identifies the consequences of dismissal by invoking two time-worn phrases: "without prejudice" and "operates as an adjudication on the merits." Dismissal without prejudice is meant to say that the resolution of this action does not preclude another action on the same claim, and does not support issue preclusion. "Adjudication on the merits" implies at least claim preclusion.[2]

Professor Shannon reports at length on the maddening inconsistencies that arise from these phrases in Rule 41. One simple example: The court finds that plaintiff and defendant are citizens of the same state and dismisses for lack of diversity jurisdiction. Rule 41 says that a dismissal for lack of jurisdiction does not operate as an adjudication on the merits. What it really means is that the dismissal does not establish claim preclusion if the plaintiff then sues the same defendant on the same claim in the state court. The dismissal, however, precludes relitigation of the same issue of diversity jurisdiction — unless the plaintiff or the defendant effect a change of domicile, an attempt to relitigate the same diversity issue is precluded.

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[2] Issue preclusion might be appropriate if the parties litigate an issue to a resolution that would support preclusion on entry of a final judgment, but then the plaintiff wins dismissal by order under Rule 41(a)(2) that does not state that the dismissal is with prejudice. Rule 41(a)(2) says that the dismissal is "without prejudice" in that circumstance. If the defendant asked that the dismissal be with prejudice and the court refused, issue preclusion seems inappropriate. But if the question was simply ignored, the matter may not be so simple. One concern may be that the dismissal was sought for the strategic purpose of avoiding issue preclusion.

There are many examples, some of them involving strained reading of Rule 41 to accomplish the proper results. Professor Shannon offers many of them, frequently relying on a respectable treatise. His solution is to extirpate all references to "without prejudice" and "adjudication on the merits." In place of these terms, he refers directly to preclusion consequences: "does not preclude the relitigation of the action or claim so dismissed" (twice); "precludes the relitigation of that claim"; and "If the claim preclusive effect of the dismissal * * * is not dictated by operation of law, the dismissal precludes the relitigation of the claim or action dismissed unless the order states otherwise."

These preclusion problems again present the familiar choices. The language of present Rule 41 is unsatisfying; the phrases are familiar and their shortcomings are equally familiar. But the very notoriety of these failings ensures that few are misled, and not for long. Resources are readily available to explore the preclusion effects of most dismissals. Still, the need to look, and the risk that some will be misled for want of looking, suggest it would be good to work toward a clarification that does not itself generate new uncertainties.

And of course that is the rub. Simply adopting general statements of preclusion or no preclusion, or referring to preclusion by operation of law, may generate more questions in more minds than may be laid to rest. And there is a risk that some actual mischief will follow.

One illustration: A complaint is met by motion to dismiss for failure to state a claim. The standard doctrine is that a final judgment of dismissal — an "involuntary dismissal not under this rule" in the language of Professor Shannon's draft — precludes a second action on the same claim. That rule is generally sound: by imposing the burdens of litigation on the defendant, the plaintiff may properly be held to make as good a job of it as possible in the action the plaintiff chose to initiate. If that effort proves inadequate, the defendant deserves the protection of claim preclusion. But perhaps not always. Laments continue to be heard about the combination of "heightened pleading" with a system that does not directly allow discovery in aid of framing a complaint even in circumstances of pronouncedly asymmetric access to information. A court may well claim discretion to dismiss without prejudice. Professor Shannon's draft rule seems to allow that outcome only "if the claim preclusive effect * * * is not dictated by operation of law." It may be that "the law" operates to establish claim preclusion unless the order states otherwise, but more complex drafting may be desirable.

IV Tentative Suggestion

There are infelicities in Rule 41. It is tempting to address them. But it is not clear that there are any serious problems in

practice. And taking up the task will require extensive work that may lead to few significant improvements and even create some new problems.

Much, in short, will depend on developing a better sense of the actual problems that may lurk outside the books.

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From:	Virginia Morgan/MIED/06/USCOURTS
To:	Rules_Support@ao.uscourts.gov
Date:	11/30/2010 11:35 AM
Subject:	Suggestions for Amendment to Rule 41, FR Civil P

Dear Rules Committee:

First, thank you for this easy method of submitting suggestions for amendments to the Rules.

I would like to ask for consideration regarding an amendment to Rule 41(a) in light of some recent experience. I would like to request that the rule be amended to change Rule 41(a)(1)(A) *Without a Court Order* as follows: strike "motion for Summary Judgment" and substitute "responsive pleading." Alternatively, perhaps the rule should exclude removal actions where it is the defendant who has paid the filing fee.

The circumstances are these: Pro se plaintiff files an action in state court which is removed by the defendant. The complaint is very difficult to understand but appears to challenge a mortgage foreclosure action. Service is probably not correct but the defendant bank removes the case to federal court. So, defendant pays the filing fee. It then files a motion to dismiss attaching various documents, which if considered would clarify the complaint and convert the M/Dismiss to one for Summary Judgment. Relief sought by bank includes dismissal with costs and with prejudice. In what appears to be a response to the motion and in a notice which appears to be copied from a website or another case, pro se plaintiff files a Notice of Voluntary Dismissal without prejudice and without costs and the Clerk's office closes the case with no contact with the judge or chambers staff.

Perhaps this is a local procedure issue and the Clerk should not close the case. If so, please advise. I think the situation is exacerbated by the CMECF system where reaction is instantaneous.

Please do not hesitate to contact me if you need more information.

Sincerely,

Virginia M. Morgan
United States Magistrate Judge
200 E. Liberty
Ann Arbor, MI 48104
734-741-2378

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DISMISSING FEDERAL RULE OF CIVIL PROCEDURE 41

Bradley Scott Shannon[*]

Despite its long pedigree, Federal Rule of Civil Procedure 41, the rule generally governing the dismissal of federal civil actions, is ill-equipped to deal with the realities of modern federal civil practice. But the many problems with Rule 41 need not be tolerated. As this Article demonstrates, Rule 41 can and should be amended in a manner that preserves much of its history, yet comports with these realities. An amended Rule 41 also would more clearly avoid running afoul of the substantive limitations imposed by the Rules Enabling Act.

I. INTRODUCTION

Dismissals play a prominent role in federal civil practice.[1] It is no exaggeration to say that most actions are resolved by dismissal.[2] This fact alone would seem to make dismissals a subject worthy of study.

Though the Federal Rules of Civil Procedure refer to dismissals in many places,[3] dismissals are governed generally by Federal Rule of Civil

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* Professor of Law, Florida Coastal School of Law. I thank Professors Stephen Burbank and Kevin Clermont, who, though not necessarily agreeing with the contents of this Article, were kind enough to provide helpful comments.

[1] Dismissals also play a prominent role in state civil practice and, to the extent that state practice parallels federal, much of what is said here applies there as well. Indeed, this might be particularly true in this area, for Federal Rule of Civil Procedure 41—the primary focus of this Article—"has served as a model for similar provisions in many states." RESTATEMENT (SECOND) OF JUDGMENTS § 19 cmt. b (1982).

[2] Most actions are resolved by settlement. *See* Marc Galanter & Mia Cahill, *"Most Cases Settle": Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1339 (1994) (observing that "settlement is the most frequent disposition of civil cases in the United States"). Though "surprisingly little systematic knowledge exists about settlement rates," one recent study of two large federal districts over a two-year period revealed an aggregate settlement rate of 66.9%. Theodore Eisenberg & Charlotte Lanvers, *What is the Settlement Rate and Why Should We Care?*, 6 J. EMPIRICAL LEGAL STUD. 111, 111–12, 115 (2009). Because a settlement typically results in a dismissal of the underlying action, *see infra* note 27 and accompanying text (discussing settlements in conjunction with dismissals), this study similarly suggests a dismissal rate of at least 67%. *See id.* at 115. And, because this figure does not take into account the many other ways in which an action may be dismissed, some of which are quite common, *see infra* notes 19–20 and accompanying text (discussing the various types of dismissals), the total dismissal rate must be much higher. It might be observed, though, that there are other means of disposing of an action, and that not every disposition results in (or is caused by) a dismissal. *See infra* note 18 and accompanying text (distinguishing dismissals from other types of dispositions).

[3] *See* Bradley Scott Shannon, *Action Is an Action Is an Action Is an Action*, 77 WASH. L. REV. 65, 117–18 (2002) (cataloging the various types of dismissals expressly provided for in the Federal Rules of

Procedure 41.[4] Rule 41 was one of the original rules promulgated in 1938, and it has changed very little since.[5]

It is time for more substantial change. Regardless of whether Rule 41 ever served its purpose—or even represented a correct statement of the relevant law—it has become increasingly apparent that the rule is not adequately aligned with the realities of modern federal practice. This is perhaps most vividly demonstrated by the Supreme Court's decision in *Semtek International Inc. v. Lockheed Martin Corp.*,[6] in which the Court relied upon an erroneous interpretation of Rule 41—holding that the phrase "operates as an adjudication [on] the merits" means only that such a dismissal precludes the relitigation of the same action in the same federal district court—to avoid confronting the question whether the rule as applied in that case exceeded the Court's rulemaking power.[7] But there are other problems—so many, in fact, that the rule itself should be dismissed. That dismissal, though, should be without prejudice. Rule 41 can and should be saved, but only after these problems have been rectified.

Civil Procedure). It might be observed, though, that many grounds for dismissal are not specifically mentioned in the Federal Rules of Civil Procedure. One example is a dismissal pursuant to a contractual forum selection clause. *See, e.g.*, Lauro Lines S.R.L. v. Chasser, 490 U.S. 495, 496 (1989) (holding that the denial of a motion to dismiss for enforcement of a forum-selection clause is not immediately appealable under the collateral order doctrine). Another is a dismissal for expiration of the applicable statute of limitation. *See, e.g.*, Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 509 (2001) (holding that "the claim-preclusive effect of the California federal court's dismissal . . . of [an] action on statute-of-limitations grounds is governed by a federal rule that in turn incorporates California's law of claim preclusion"). Incidentally, as used in this Article, "Rule" (or "Rules") refers to the Federal Rules of Civil Procedure.

[4] *See* FED. R. CIV. P. 41 ("Dismissal of Actions"). The full text of current Rule 41 is reproduced *infra* app. A.

[5] *See* 9 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2361, at 406–07 (3d ed. 2008) ("Federal Rule 41 has been amended seven times since it originally was promulgated in 1938. The amendments, however, have been substantively insignificant. It is doubtful if a single case would have been decided differently if the rule stood as it did in 1938 . . . .").

[6] *Semtek*, 531 U.S. 497.

[7] FED. R. CIV. P. 41(b); *Semtek*, 531 U.S. at 506. *See also* Stephen B. Burbank, Semtek, *Forum Shopping, and Federal Common Law*, 77 NOTRE DAME L. REV. 1027, 1045–46 (2002) (footnotes omitted), stating:

> The drafting history [of Rule 41] makes it clear that the Court in Semtek was correct in positing that the rulemakers used the words "operates as an adjudication [on] the merits" in Rule 41(b) as the opposite of "without prejudice," and thus as synonymous with the words "with prejudice." It also reveals, however, that to the extent they thought about the question, the rulemakers believed that they had authority to define both when a dismissal would not be eligible to bar another action on the same claim and when it would be eligible for such effect, and that they sought to do the latter in Rule 41(b). I have found no suggestion in this history that the rulemakers intended to cabin the effects to the rendering court.

The primary purposes of this Article, then, are to expose these many problems with Rule 41 and to propose some possible solutions.[8] The Article will proceed as follows: In Part II, the Article will briefly describe the nature of dismissals in general and the various preclusive effects thereof. In Part III, the Article will compare this understanding of dismissals with the text of Rule 41. This comparison will reveal several problems with Rule 41 as currently written, many of which are quite serious. Then in Part IV, the Article will propose some amendments to Rule 41 that would solve the problems identified in Part III and more accurately reflect the way in which dismissals operate in practice.[9] Perhaps most significantly, the Article will conclude that although there are situations in which the relevant order or stipulation properly may prescribe the preclusive effect thereof, this should occur only in those situations in which that effect is not dictated by operation of law. This change would not only be more consistent with the constraints imposed by the Rules Enabling Act,[10] it would prevent district courts—as well as the rule itself—from assigning a preclusive effect to a dismissal that it ought not bear.

II. WHAT IS A DISMISSAL AND WHAT IS ITS EFFECT?

Before engaging in a full-scale critique of Rule 41, it might be helpful to step back a bit and start with a review of the different types of dismissals and their various preclusive effects.

Generally speaking, a dismissal is a means (though not the only means) of disposing of or otherwise resolving an action.[11] More specifically, a dismissal is a disposition in favor of a defendant usually on grounds independent of the underlying merits of the action (e.g., the plaintiff's claims and the defendant's merits-based defenses).[12] Depending upon the

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[8] The scope of this Article appears to be unprecedented. A few articles have been written regarding the current confusion as to the nature of dismissals and the problems caused thereby. *See* Shannon, *supra* note 3, at 116–46; Bradley Scott Shannon, *A Summary Judgment Is Not a Dismissal!*, 56 DRAKE L. REV. 1, 2–9 (2007). And certainly some scholars and even courts have expressed concern as to whether certain portions of Rule 41 are consistent with the federal rulemaking power. *See Semtek*, 531 U.S. at 503–04; Stephen B. Burbank, *Interjurisdictional Preclusion, Full Faith and Credit and Federal Common Law: A General Approach*, 71 CORNELL L. REV. 733, 782–83 (1986). But there does not appear to be any prior effort to identify the problems with Rule 41 more comprehensively and to propose a more comprehensive solution.

[9] A revised version of Rule 41 that includes all of the changes proposed in this Part may be found *infra* app. B.

[10] *See* 28 U.S.C. §§ 2071–77 (2012).

[11] *See* Shannon, *supra* note 3, at 116–46 (discussing the various means of resolving an action).

[12] *See* Shannon, *supra* note 3, at 116 (defining "dismissal" as "a nonadjudicatory (in the sense that there is no actual adjudication on the merits) disposition by motion, notice, or stipulation (rather than by

circumstances, a dismissal may be accomplished upon notice by the plaintiff,[13] by stipulation of the parties,[14] or by motion and order of the district court.[15] A dismissal may relate to an action as a whole or to any claim or party therein,[16] and a claim may be dismissed by fewer than all plaintiffs, as to fewer than all defendants (though a dismissal of all claims against any given defendant is tantamount to the dismissal of that defendant), or both.[17] A dismissal may be distinguished from other types of dispositions, such as dispositions resulting from the granting of other types of dispositive motions or adjudication by trial.[18]

There are many different bases for the dismissal of an action (or any claim therein). Though the Rules do not purport to describe them all, various bases for dismissal are provided for throughout.[19] But some bases for dismissal exist simply as a matter of federal procedural common law.[20]

Perhaps the most interesting aspect of dismissals is that the various bases for dismissal, as well as the various means of obtaining a dismissal,

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trial) in favor of a defending party"). It might be observed that the Rules themselves do not expressly define the meaning of the term "dismissal." Though this fact is not unusual—most of the terms used in the Rules are not expressly defined therein—the absence of such a definition probably has contributed to the widespread ignorance as to its true meaning. *See, e.g.*, Fox v. Vice, 131 S. Ct. 2205, 2211 (2011) (erroneously referring to a summary judgment as a dismissal with prejudice); BLACK'S LAW DICTIONARY 502 (8th ed. 2004) (defining "dismissal" overbroadly as the "[t]ermination of an action or claim without further hearing, especially before the trial of the issues involved"). Incidentally, it might be more accurate here to speak of claiming and defending parties, rather than plaintiffs and defendants, for Rule 41 also applies to the "dismissal of any counterclaim, crossclaim, or third-party claim." FED. R. CIV. P. 41(c). But, for ease of understanding, this Article will use the shorthand terms "plaintiff" and "defendant" to refer to these concepts.

[13] *See* FED. R. CIV. P. 41(a)(1)(A)(i) (providing generally that a plaintiff may obtain a dismissal by filing "a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment").

[14] *See* FED. R. CIV. P. 41(a)(1)(A)(ii) (providing generally that a plaintiff may obtain a dismissal by filing "a stipulation of dismissal signed by all parties who have appeared").

[15] *See* FED. R. CIV. P. 41(a)(2) (providing generally that a dismissal may be obtained "at the plaintiff's request . . . by court order, on terms that the court considers proper"); FED. R. CIV. P. 41(b) ("If the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it."). Incidentally, Rule 41 refers to dismissals initiated or joined by a plaintiff as "voluntary" dismissals, and to dismissals initiated by a defendant (or, presumably, the court) as "involuntary" dismissals. FED. R. CIV. P. 41(a)–(b).

[16] For example, a motion to dismiss for lack of subject-matter jurisdiction might relate only to a single claim, and a motion to dismiss for lack of personal jurisdiction might relate only to a single defendant. *See* FED. R. CIV. P. 41(b).

[17] It is unclear, though, whether the voluntary dismissal of fewer than all claims or parties may properly be accomplished via Rule 41. *See* FED. R. CIV. P. 41. For more on this problem, *see infra* notes 622–677 and accompanying text.

[18] *See* Shannon, *supra* note 8, at 2–9 (discussing the distinction between dismissals and summary judgment); Shannon, *supra* note 3, at 116–46 (discussing the distinction between dismissals and other dispositive motions and trial).

[19] *See* Shannon, *supra* note 3, at 116–46.

[20] *See supra* note 3 and accompanying text (describing two such dismissals).

result in many different types of dismissals, at least in terms of their preclusive effect.[21]

At one end of the spectrum lies the voluntary dismissal by a plaintiff.[22] Such a dismissal generally has no preclusive effect whatsoever, meaning a plaintiff in that situation would be free to recommence the same action in another court or even in the same court.[23]

At the other end of the spectrum lies the dismissal for "failure to state a claim upon which relief can be granted."[24] A motion to dismiss for failure to state a claim, if granted, generally is completely preclusive, in that the underlying action may not be recommenced in any court.[25] The same is true of certain other involuntary dismissals, such as the "penalty" dismissals described in Rule 41(b), that, in appropriate circumstances, may be given the same effect.[26] In addition, stipulated dismissals that are the product of a settlement generally provide for the same result, for defendants almost

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[21] *See* Shannon, *supra* note 3, at 116–46.

[22] *See* FED. R. CIV. P. 41(a).

[23] *See* 9 WRIGHT & MILLER, *supra* note 5, § 2367, at 554–55 (observing that such dismissals generally are "considered to be without prejudice, which means that it effectively erases the dismissed action and permits the initiation of a second action"). This is not true, though, of a notice of dismissal filed by a plaintiff who previously voluntarily dismissed the same action; in that situation, the second voluntary dismissal by rule "operates as an adjudication on the merits." FED. R. CIV. P. 41(a)(1)(B).

[24] *See* FED. R. CIV. P. 12(b)(6).

[25] *See* Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394, 399 n.3 (1981) ("The dismissal for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) is a 'judgment on the merits.'"). For this reason, a dismissal for failure to state a claim arguably should not be referred to as a dismissal at all, but rather should be called a motion for judgment on the complaint. Essentially, a dismissal for failure to state a claim functions more like a motion for judgment on the pleadings or for summary judgment, in that it does not simply "operate[] as an adjudication on the merits." *See* FED. R. CIV. P. 41(b). It *is*, in a very real (albeit pretrial) sense, an adjudication on the merits. *See* Shannon, *supra* note 8, at 4 n.11. Of course, in assigning a claim-preclusive effect to a dismissal for a failure to state a claim, care must be taken to determine the proper scope of the prior action. *See id.* Moreover, some courts have recognized a few, limited exceptions to this general rule. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 26 (1982) ("Exceptions to the General Rule Concerning Splitting"). And one legal scholar has suggested that some dismissals of this nature should not be given preclusive effect in a court with a less rigorous pleading regime. *See* Bradley Scott Shannon, *I Have Federal Pleading All Figured Out*, 61 CASE W. RES. L. REV. 453, 491–94 (2011). In the vast majority of cases, though, the presumption that a dismissal for failure to state a claim is claim preclusive should hold sway. *See id.*

[26] *See* FED. R. CIV. P. 41(b) (providing that "[u]nless the dismissal order states otherwise" a dismissal for failure by a plaintiff "to prosecute or to comply with these rules or a court order . . . operates as an adjudication on the merits"). *See also* 18A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION § 4435, at 133–34 (2d ed. 2002) ("The characteristics that determine the extent of preclusion may have little to do with actual resolution of the merits, although the paradigm will always be a judgment entered after full trial of all disputed matters. Thus it is clear that an entire claim may be precluded by a judgment that does not rest on any examination whatever of the substantive rights asserted.").

invariably will insist on the preclusion of any future litigation of the same claims by the same parties as a condition thereto.[27]

But many dismissals lie somewhere between these two extremes. Many dismissals (to use Rule 41 terminology) do not operate as an adjudication on the merits, and yet cannot be said to be completely without prejudice.[28] And the reason has to do with the distinction between issue and claim preclusion.[29]

Take, for example, a dismissal for lack of subject-matter jurisdiction. Is such a dismissal preclusive with respect to the federal district court that issued it? Absolutely.[30] If a plaintiff, having had its action dismissed for lack of subject-matter jurisdiction, were to recommence the same action in the same court, the result would be the same: the action would be dismissed.[31] The second time, though, the court would not dismiss the action for lack of subject-matter jurisdiction, nor, generally speaking, would it reexamine the propriety of its prior conclusion regarding jurisdiction. Instead, the court would simply observe that it had previously decided this issue (subject-matter jurisdiction) and had held in favor of the defendant.[32] And the same result would inure were the plaintiff to recommence the action in any other federal district court.[33] The prior dismissal would preclude further litigation.

But what if the plaintiff were to recommence this same action in a *state* trial court? Would such an action also be subject to dismissal? Not necessarily, for the issue whether the state court has subject-matter jurisdiction is quite different from the issue confronting the federal court.[34] Thus, such a dismissal has preclusive effect, but only as to the issue

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[27] *See* 18 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 131.30[3][c][ii], at 131-105 (3d ed. 2013) ("Parties to an action who resolve their disputes prior to trial need to disengage from the litigation by appropriate means. If the parties intend their resolution to permanently resolve their claims . . . , they can stipulate, pursuant to [Rule] 41(a), to a dismissal with prejudice."); 18A WRIGHT, MILLER & COOPER, *supra* note 26, § 4443, at 265 ("In most circumstances, it is recognized that consent agreements ordinarily are intended to preclude any further litigation on the claim presented . . . ."). Of course, other types of dispositive motions—such as motions for summary judgment—and trials are claim preclusive as well. *See* Shannon, *supra* note 3, at 134–35.

[28] *See infra* notes 30–33 and accompanying text.

[29] *See* 18 WRIGHT, MILLER & COOPER, *supra* note 26, § 4402, at 7–20. (explaining that after a judgment has been rendered claim preclusion bars any issue relevant to the cause of action—such as duty or breach—between the same parties, but issue preclusion bars only the issues litigated and necessary to the preceding judgment).

[30] *See* 18A *id.* § 4435, at 139.

[31] *Id.*

[32] *See id.* (observing that dismissals for lack of jurisdiction "generally do preclude relitigation of the underlying issue of jurisdiction").

[33] *See id.*

[34] *See id.* (observing that the initial jurisdictional defect must be overcome before a second action may be brought).

decided;[35] it prevents the relitigation of the same action in some, but not all, courts.[36] All a plaintiff need do to avoid the effects of preclusion is solve the problem that led to the initial dismissal.[37] With respect to a dismissal for lack of subject-matter jurisdiction, the solution likely would be recommencement in another judicial system.[38] By contrast, with respect to a dismissal for lack of personal jurisdiction, the problem is not so much the nature of the court, but rather relates more to geography. The solution likely would involve recommencement in a jurisdiction with a closer connection to the defendant.[39] For a dismissal for insufficient service of process, better service.[40] And so on.[41]

And there is one more quantum level of complexity. In the Introduction, this Article spoke of dismissals having a preclusive effect that is dictated by operation of law. What is meant by this statement is that the preclusive effect of some dismissals (whatever that effect might be) is a matter of federal common law[42] and generally is not something over which either the parties or the dismissing court have any control.[43] Admittedly, district courts do have some limited ability to expressly exempt all or part of an action otherwise disposed of from the effects of claim preclusion.[44]

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[35] *See id.*

[36] *See id.*

[37] *See, e.g.*, *id.* ("[D]ismissals for lack of jurisdiction, for improper venue, or for failure to join a party under Civil Rule 19. . . . should not preclude a second action on the same claim that overcomes the initial defect of jurisdiction, venue, or parties.").

[38] *See* 18 *id.* § 4402, at 20 ("Dismissal of a suit for want of federal subject-matter jurisdiction, for example, should not bar an action on the same claim in a court that does have subject[-]matter jurisdiction, but ordinarily should preclude relitigation of the same issue of subject-matter jurisdiction in a second federal suit on the same claim.").

[39] *See* 18A *id.* § 4436, at 168–70 ("Personal jurisdiction is treated like subject-matter jurisdiction. Dismissal for want of personal jurisdiction precludes relitigation of the same issue of jurisdiction, but does not preclude issues not decided and does not preclude a second action on the same claim in a court that can establish personal jurisdiction." (footnotes omitted)).

[40] *See* 5B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1353, at 342 (3d ed. 2004).

[41] *See* RESTATEMENT (SECOND) OF JUDGMENTS § 20 cmt. b (1982) (recognizing and discussing this principle).

[42] *See* Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 508 (2001) ("[F]ederal common law governs the claim-preclusive effect of a dismissal by a federal court . . . ."). The *Semtek* Court further held, though, that "federal common law" sometimes will require further reference to state preclusion law. *See id.* ("adopting, as the federally prescribed rule of decision," in that case "the law that would be applied by state courts in the State in which the federal diversity court sits"). *See also* Burbank, *supra* note 7, at 1040 n.60 ("Even read literally, [Rule 41] simply does not speak to the question of the law that otherwise governs the effect of a dismissal.").

[43] *See* 18 WRIGHT, MILLER & COOPER, *supra* note 26, § 4413, at 312 (recognizing the "general rule that a court cannot dictate preclusion consequences at the time of deciding a first action").

[44] *See* RESTATEMENT (SECOND) OF JUDGMENTS § 26(1)(b) (1982); 18 WRIGHT, MILLER & COOPER, *supra* note 26, § 4413, at 312–20; *see also* Tobias Barrington Wolff, *Preclusion in Class Action*

But in the vast majority of cases, the preclusive effect of a dismissal just is what it is.[45] Thus, for example, that a dismissal for failure to state a claim for which relief can be granted is claim preclusive, whereas a dismissal for lack of subject-matter jurisdiction has only issue preclusive effect is, in a practical sense, essentially preordained.[46] The dismissing court generally is powerless to alter these effects, meaning that in most instances, any language to the contrary properly should be disregarded by the parties and any later court. As well-explained by the authors of the *Restatement (Second) of Judgments*:

> [A] judgment may not have an effect contrary to that prescribed by the statutes, rules of court, or other rules of law operative in the jurisdiction in which the judgment is rendered. Thus in a jurisdiction having a rule patterned on Rule 41(b) of the Federal Rules of Civil Procedure, a dismissal for lack of jurisdiction, for improper venue, or for nonjoinder may not be a bar regardless of the specification made. And even in the absence of such a rule, a dismissal on any of these grounds is so plainly based on a threshold determination that a specification that the dismissal

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Litigation, 105 COLUM. L. REV. 717, 760 (2005) ("Within the parameters established by the applicable preclusion doctrine, . . . the rendering court has many tools at its disposal through which to shape the course of the proceedings and control the positive effects of its judgment," including "those through which the rendering forum can impose constraints—that is, the mechanisms by which it can employ less than the full extent of the authorization that the applicable preclusion doctrine provides in attaching prescriptive force to its judgment."). Such a reservation, though, requires "special reasons," RESTATEMENT (SECOND) OF JUDGMENTS § 26 cmt. b, at 236 (1982), and because there are "few cases that justify this course, [ ] the power of reservation should be sparingly exercised," 18 WRIGHT, MILLER & COOPER, *supra* note 26, § 4413, at 312. Moreover, to the extent such dismissals are in some sense discretionary, such dismissals presumably could be reversed on appeal for abuse of discretion. Finally, it bears recalling that "[a] court cannot give its judgment prescriptive force in excess of that authorized by the applicable preclusion rules . . . ." Wolff, *supra*, at 760.

[45] *See Semtek*, 531 U.S. at 508. Of course, if the preclusive effect of a dismissal is dictated by federal common law, a court at some point in the past must have properly determined what that effect should be and announced it in the course of deciding a case, thereby establishing precedent on that issue. *See* Ronan E. Degnan, *Federalized Res Judicata*, 85 YALE L.J. 741, 742 (1976) (asserting early 19th century courts "shared a common understanding of res judicata in terms of *what* a judgment decided"). It is in this sense that a court today can be said to have no control over that effect; it will not only be obligated to adhere to such precedents, but typically it will also have no normative reason for deviating from them.

[46] This is not to say that such effects were not different at some point in the past. Indeed, the preclusive effect of a dismissal for failure to state a claim might be an example of one that has changed, at least in part. *See* ROBERT C. CASAD & KEVIN M. CLERMONT, RES JUDICATA: A HANDBOOK ON ITS THEORY, DOCTRINE, AND PRACTICE 87–91 (2001) (discussing the evolution of the treatment of "dismissal for insufficiency of complaint"). This is also not to say that such effects could not change to some limited extent in the future, or cannot vary among jurisdictions. The preclusive effect of a dismissal for expiration of the applicable statute of limitations might be an example of both. *See id.* at 93–96 (discussing the preclusive effect of "dismissal for statute of limitations"). Still, for present purposes and (again) in the vast majority of cases, there are fairly definite answers to most of these questions, at least as a matter of positive law.

will be a bar should ordinarily be of no effect.[47]

Yet not all dismissals follow this pattern. For example, a dismissal for improper conduct on the part of a plaintiff might be made claim preclusive.[48] Or it might not.[49] For the appropriate penalty (i.e., the severity of the punishment) is a matter within the sound discretion of the district court, depending on the circumstances.[50] There is no preordained effect and, because of this, the dismissing court must specify what that effect is (at least if it wants to avoid future arguments along this line).[51] A similar problem arises with respect to voluntary dismissals. Though Rule 41 generally provides for a default—"without prejudice"[52]—should the parties or the district court fail to specify otherwise, the parties and the court are at liberty to alter that presumption by so providing to the contrary.[53]

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[47] RESTATEMENT (SECOND) OF JUDGMENTS § 20 cmt. d (1982) (emphasis added). See also Burbank, *supra* note 7, at 1035 n.33 (quoting Goddard v. Sec. Title Ins. & Guar. Co., 92 P.2d 804, 807 (Cal. 1939)):

> If the intention of the court, gathered from its order or other source, were the test of the effect of the judgment on subsequent actions, the doctrine of res judicata would disappear as a legal principle, and the bar of a judgment would depend wholly upon the whim of the first judge, or, more probably, on the form of the proposed order drafted by successful counsel.

Presumably, this also means that a failure on the part of a later court to respect such effects (whatever they are) constitutes reversible error.

[48] See, for example, both FED. R. CIV. P. 37(b)(2) and FED. R. CIV. P. 41(a)(2), which provide a court discretion regarding whether a dismissal for improper conduct is with or without prejudice.

[49] *See* Nat'l Hockey League v. Metro. Hockey Club, Inc., 427 U.S. 639, 643 (1976) (holding that the district court did not abuse its discretion in dismissing the underlying action pursuant to Rule 37(b)(2), though acknowledging that the court properly might have imposed a lesser sanction).

[50] 8B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE § 2289, at 537 (3d ed. 2010) ("Rule 37(b)(2) gives the court a broad discretion to make whatever disposition is just in the light of the facts of the particular case.").

[51] *See* CASAD & CLERMONT, *supra* note 46, at 97–98 ("Dismissals for failure to prosecute the claim, or penalty dismissals for failure to comply with the rules or orders of the court, are prime examples of such judgments in state or federal court."). Alternatively, the law could provide for some sort of default effect should the dismissing court fail to so specify, and Rule 41 currently so provides. *See* FED. R. CIV. P. 41(b) (providing generally that an involuntary dismissal, "[u]nless the dismissal order states otherwise, . . . operates as an adjudication on the merits").

[52] *See* FED. R. CIV. P. 41(a)(1)(B)–(2).

[53] *See id.* Of course, neither the parties nor the district court can compel a later court to respect these choices. But as in the preordained effect context, a failure to respect the parties' or the court's designation in this context likewise would constitute reversible error. *See supra* note 47 and accompanying text.

III. RULE 41 AND ITS DISCONTENTS

With the foregoing understanding of dismissals and their various preclusive effects in mind, it is time to turn our attention to Rule 41 and determine whether and to what extent this rule reflects this understanding and otherwise accomplishes its apparent purposes. When seen in this light, several problems with Rule 41 are revealed. Though many of these problems are fairly innocuous, some are quite serious.

But before beginning, and out of respect to those who played a role in the drafting of Rule 41, a word might be said about the nature of that endeavor. Because of the many different bases for dismissal, the differences in the procedures relating to voluntary and involuntary dismissals, and the wide range of preclusive effects, some of which are determinate and some of which are not, the formulation of a single rule on this topic is a difficult task. The primary difficulty, though, lies not in the length of the rule; many rules are longer.[54] Rather, the difficulty is trying to coherently capture the variety that is inherent in this concept. But a proposed rule is the topic of the next Part. The purpose of this Part is to show how Rule 41 in its current form falls short.

A. The Scope of Rule 41

One fairly obvious problem with Rule 41 relates to its scope. Rule 41 begins by speaking only of original claims—that is, claims by a plaintiff against a defendant[55]—though later, it also provides for the dismissal of counterclaims, crossclaims, and third-party claims.[56] But there are other types of claims not accounted for by this rule. For example, it might be possible for a third-party defendant to assert a claim against an original plaintiff,[57] or for that plaintiff to assert a claim against a third-party defendant.[58] It is unclear why Rule 41 does not expressly provide for the dismissal of all claims.

B. The Disparate Treatment of Claimants

Rule 41 provides that a plaintiff may obtain a dismissal by notice if filed "before the opposing party serves either an answer or a motion for

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[54] *See, e.g.*, FED. R. CIV. P. 4; FED. R. CIV. P. 26.
[55] *See* FED. R. CIV. P. 41(a)–(b).
[56] *See id.* 41(c).
[57] *See* FED. R. CIV. P. 14(a)(2)(D).
[58] *See id.* 14(a)(3).

summary judgment."[59] But with respect to other types of claims, Rule 41 provides that the notice of dismissal must be filed "before a responsive pleading is served" or "if there is no responsive pleading, before evidence is introduced at a hearing or trial."[60] There does not seem to be any strong reason for treating original claims different from other types of claims with respect to the deadline for the filing of a notice of dismissal. Absent such a reason, the disparate treatment of claimants with respect to this deadline seems unduly complicating, if not unfair.[61]

C. The Dismissal of Fewer Than All Claims

Rule 41 permits the "voluntary dismissal" of an "action,"[62] whereas a defendant may move for an "involuntary dismissal" with respect to "the action or any claim against it."[63] It is unclear whether the drafters of Rule 41(a) intended that the word "action" be given its technical meaning in this context.[64] Though general principles of textual interpretation might suggest that it should,[65] commentators have suggested that such a reading makes little sense, for there does not seem to be a strong reason for preventing the voluntary dismissal of fewer than all claims,[66] particularly considering that Rule 15(a) permits essentially the same result via amendment.[67]

D. The Bases for Involuntary Dismissal

Though Rule 41 does not expressly mention all of the possible bases for dismissal, it does provide for a dismissal (or at least the possibility of a dismissal) "[i]f the plaintiff fails to prosecute or to comply with these rules

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[59] FED. R. CIV. P. 41(a)(1)(A)(i).

[60] *Id.* at 41(c)(1)–(2).

[61] It also might be observed that a "responsive pleading" to a counterclaim, crossclaim, or third-party claim (or, presumably, any other type of claim) likewise is now an answer. *See* FED. R. CIV. P. 7(a). There is, therefore, no longer any compelling reason for using the former phrase. Moreover, it is unclear why the alternative deadline provided for in Rule 41(c)—"before evidence is introduced at a hearing or trial"—is contingent upon the absence of such a "responsive pleading." FED. R. CIV. P. 41(c). Though it is always possible that a defending party might fail to file and serve an answer to a counterclaim, crossclaim, or third-party claim, this possibility seems remote, given that such a response is required. *See* FED. R. CIV. P. 7(a).

[62] *See* FED. R. CIV. P. 41(a).

[63] *See id.* 41(b).

[64] *See id.* 41 advisory committee's notes.

[65] *See* 8 MOORE, *supra* note 27, ¶ 41.13[6], at 41-25 (concluding that "Rule 15(a) is the preferred method for eliminating claims, as the courts have held that the dismissal of an 'action' under Rule 41 does not include fewer than all claims against any particular defendant").

[66] *See, e.g.*, 9 WRIGHT & MILLER, *supra* note 5, § 2362, at 409–14.

[67] *See infra* notes 126–27 and accompanying text (discussing the operation of this rule).

or a court order."[68] Each of these three bases for involuntary dismissal is well-established,[69] and each seems justifiable. But it also seems that there might be other types of improper conduct by plaintiffs that are not covered by this (or any other) rule. Though some types of improper conduct might be sanctionable pursuant to a federal statute[70] or even the court's inherent power,[71] it seems theoretically possible that there could be some types of improper conduct that might fall outside of both. There is, therefore, no obvious reason why the "penalty" dismissals provided for in Rule 41 should be limited to these three particular bases.

E. The Preclusive Effect of Dismissals

Setting aside (for the moment) any possible Rules Enabling Act concerns, there appear to be four main preclusion-related problems with Rule 41: (1) the terminology employed by the current rule; (2) the failure to expressly provide for all involuntary dismissals lacking claim-preclusive effect, and therefore exempt from the presumption that such dismissals operate as an adjudication on the merits; (3) the proper treatment of involuntary dismissals whose preclusive effect is dictated by operation of law; and (4) the proper treatment of voluntary and involuntary dismissals lacking any sort of preordained claim-preclusive effect. Each of these four problems is discussed below.

1. Terminology. — The first preclusion-related problem with Rule 41 involves its choice of terminology.[72] The rule generally speaks of voluntary dismissals as presumptively being "without prejudice."[73] By contrast, an involuntary dismissal—"except one for lack of jurisdiction, improper venue, or failure to join a party under Rule 19"—presumptively "operates as an adjudication on the merits."[74] As a means of expressing preclusive effect, though, the phrase, "without prejudice" (as well as the companion phrase "with prejudice") has long been a source of some confusion.[75] The

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[68] FED. R. CIV. P. 41(b).

[69] *See, e.g.*, 18A WRIGHT, MILLER, & COOPER, *supra* note 26, § 4435, at 139–40 (discussing general treatment by courts of each basis for involuntary dismissal).

[70] *See, e.g.*, 28 U.S.C. § 1927 (2012) ("Counsel's liability for excessive costs").

[71] *See, e.g.*, Chambers v. NASCO, Inc., 501 U.S. 32, 35 (1991) (holding that federal courts have some inherent power to sanction litigants for bad-faith conduct).

[72] *See* CASAD & CLERMONT, *supra* note 46, at 86 (explaining that misleading terminology, such as "prejudice" and "on the merits," fail to distinguish "which judgments have bar effect").

[73] FED. R. CIV. P. 41(a)(1)(B)–(2). There is one exception: "if the plaintiff previously dismissed any federal- or state-court action based on or including the same claim, a notice of dismissal operates as an adjudication on the merits." *Id.* at 41(a)(1)(B).

[74] *Id.* at 41(b).

[75] *See, e.g.*, *Developments in the Law: Res Judicata*, 65 HARV. L. REV. 818, 838 (1952) ("It may be

same is true of the phrase "operates as an adjudication on the merits,"[76] which also lacks parallelism. Moreover, though "operates as an adjudication on the merits" generally had been understood as meaning claim-preclusive effect,[77] that understanding was changed by the Supreme Court in *Semtek*,[78] which interpreted this phrase as meaning only that it prevents the recommencement of the same action in the same federal district court.[79] This interpretation, though perhaps accurate as far as it goes, does not accurately reflect the full preclusive effect of dismissals that are said to so operate, some of which further preclude the recommencement of the same action in other federal district courts, other state courts, or even all courts.[80]

2. Involuntary Dismissals Lacking Claim-Preclusive Effect. — A more serious problem relates to the list of involuntary dismissals lacking claim-preclusive effect set forth in Rule 41. Rule 41 provides, in part: "Unless the dismissal order states otherwise, a dismissal under this subdivision (b) and any dismissal not under this rule—except one for lack of jurisdiction, improper venue, or failure to join a party under Rule 19—operates as an adjudication on the merits."[81] But this list of exceptions is incomplete.

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provided by rule that a dismissal will be 'with prejudice' unless the contrary is expressed by the court, or 'without prejudice' unless the court otherwise specifies. The meaning of these phrases therefore is significant; unfortunately they have not been used uniformly." (footnote omitted)).

[76] FED. R. CIV. P. 41(b). The RESTATEMENT (SECOND) OF JUDGMENTS § 19 cmt. a (1982), expresses:

> It is frequently said that a valid and final personal judgment for the [defendant] will bar another action on the same claim only if the judgment is rendered "on the merits." The prototype case continues to be one in which the merits of the claim are in fact adjudicated against the plaintiff after trial of the substantive issues. Increasingly, however, by statute, rule, or court decision, judgments not passing directly on the substance of the claim have come to operate as a bar. Although such judgments are often described as "on the merits" or as "operating as an adjudication on the merits," that terminology is not used here in the statement of the general rule because of its possibly misleading connotations.

[77] *See id.*

[78] Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497 (2001).

[79] *See id.* at 506. Many have found the *Semtek* Court's interpretation dubious, at best. *See, e.g.*, 8 MOORE, *supra* note 27, ¶ 41.50[7][a], at 41-197 ("The Court's interpretation of adjudication on the merits under Rule 41(b) to not include a traditional res judicata effect is completely inconsistent with well established judicial interpretation."). *Cf.* Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 396 (1990) ("'Dismissal without prejudice' is a dismissal that does not 'operate as an adjudication [on] the merits,' Rule 41(a)(1), and thus does not have a res judicata effect."). Regardless, the Court's interpretation is binding until *Semtek* is overruled or Rule 41 is amended.

[80] *See supra* notes 22–41 and accompanying text. *See also* 18A WRIGHT, MILLER & COOPER., *supra* note 26, § 4435, at 132–33 (describing "on the merits" as "an unfortunate phrase, which could easily distract attention from the fundamental characteristics that entitle a judgment to greater or lesser preclusive effects").

[81] FED. R. CIV. P. 41(b).

Dismissals for insufficient process[82] or for insufficient service of process[83] likewise do not operate as adjudications on the merits.[84] There are others.[85] This oversight has led to problems, for "[a]lthough the language of the rule may seem clear, some of the results that seem clearly dictated are so plainly untenable that sound decisions have been reached only with considerable artistry or without cogent analysis."[86]

One such example can be found in *Costello v. United States*.[87] At issue in *Costello* was whether a dismissal for failure to file the affidavit of good cause in a prior denaturalization proceeding "barred" the United States from "instituting the present proceeding."[88] The Supreme Court recognized that "[a]t common law dismissal on a ground not going to the merits was not ordinarily a bar to a subsequent action on the same claim,"[89] and therefore that "the failure of the Government to file the affidavit of good cause in a denaturalization proceeding does not present a situation calling for the application of the policy making dismissals operative as adjudications on the merits."[90] At the same time, the Court observed that this sort of dismissal was not one of the exceptions expressly provided for in Rule 41(b), and that the district court in the earlier proceeding also had failed to specify "whether the dismissal was with or without prejudice."[91] Yet, the Court did not "discern in Rule 41(b) a purpose to change this common-law principle with respect to dismissals in which the merits could not be reached for failure of the plaintiff to satisfy a precondition."[92] Accordingly, "[i]n defining the situations where dismissals 'not provided for in this [R]ule' also operate as adjudications on the merits, and are not to be deemed jurisdictional, it seems reasonable to confine them to those situations where the policy behind the enumerated grounds is equally

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[82] *See* FED. R. CIV. P. 12(b)(4).

[83] *See id.* 12(b)(5).

[84] *See* CASAD & CLERMONT, *supra* note 46, at 87 ("[D]ismissals for . . . inadequate notice . . . do not have bar effect."). This might be true even under the interpretation of "operates as an adjudication on the merits" adopted by the Supreme Court in *Semtek*.

[85] *See* 18A WRIGHT, MILLER & COOPER, *supra* note 26, § 4435, at 140 ("There are many grounds of dismissal that do not seem to fall within the categories 'provided for in this rule' and yet clearly should not—and do not—operate as an adjudication that precludes a second action on the same claim."). *See also* Burbank, *supra* note 7, at 1044 (recalling Charles E. Clark's warning during the drafting of Rule 41 that "'listing is always dangerous because of possible omissions'").

[86] 18A WRIGHT, MILLER & COOPER, *supra* note 26, § 4435, at 138–39 (footnote omitted). *See also id.* at 140 (observing further that this portion of Rule 41(b) "has caused substantial difficulty").

[87] Costello v. United States, 365 U.S. 265 (1961).

[88] *Id.* at 268, 288.

[89] *Id.* at 285.

[90] *Id.* at 287.

[91] *Id.* at 284.

[92] *Id.* at 286.

applicable."[93] The Court therefore held "that a dismissal for failure to file the affidavit of good cause is a dismissal 'for lack of jurisdiction,' within the meaning of the exception under Rule 41(b)."[94] Rationalizing its holding, the Court continued:

> Nothing in the term "jurisdiction" requires giving it the limited meaning that the petitioner would ascribe to it. Among the terms of art in the law, "jurisdiction" can hardly be said to have a fixed content. It has been applied to characterize other prerequisites of adjudication which will not be re-examined in subsequent proceedings and must be brought into controversy in the original action if a defendant is to litigate them at all.[95]

The *Costello* Court almost certainly reached the correct result regarding the preclusive effect of the dismissal in question, but having to achieve that result by characterizing a dismissal for failure to file an affidavit of good cause as "jurisdictional" seems regrettable.[96] Obviously, the problem here is the rule.

One might argue that the problem in *Costello* could have been avoided had the district court in the earlier proceeding "stated otherwise" and specified that its dismissal was not to operate as an adjudication on the merits.[97] But this seems like a curious (not to mention somewhat onerous) requirement with respect to a dismissal whose preclusive effect is essentially fixed as a matter of federal common law. And of course, if the district court fails to do so (as was the case in *Costello*),[98] the problem is not averted.

A variation of the same problem occurred in *Semtek*.[99] In *Semtek*, the district court—adopting language proposed by the defendant—dismissed the underlying action for expiration of the applicable statute of limitations "'on the merits and with prejudice.'"[100] To the extent this language manifested an intent to give this dismissal claim-preclusive effect, this effort appears to have been misguided, and the Supreme Court ultimately

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[93] *Id.*

[94] *Id.* at 285.

[95] *Id.* at 287–88.

[96] *Cf.* Sebelius v. Auburn Reg'l Med. Ctr., No. 11-1231, slip op. at 6 (U.S. Jan. 22, 2013) (observing that "jurisdiction" "'has been a word of many, too many, meanings,'" and that "we have tried in recent cases to bring some discipline to the use of the term" (quoting Steel Co. v. Citizens for Better Environment, 523 U.S. 83, 90 (1998))).

[97] *See Costello*, 365 U.S. at 268 (noting the district court did not specify whether its dismissal was to operate as an adjudication on the merits).

[98] *See id.*

[99] Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497 (2001).

[100] *Id.* at 499.

rejected such a result.[101] But rather than characterize this dismissal as jurisdictional, as the Court had done in *Costello*, the *Semtek* Court instead interpreted the phrase "operates as an adjudication [on] the merits" for purposes of Rule 41(b) as meaning only that the dismissal precluded the relitigation of a defense based on the same statute of limitations in the same federal district court.[102] The full preclusive effect of such a dismissal, according to the Court, was not provided for in Rule 41, but rather was (again) a matter of federal common law.[103]

Though the *Semtek* Court, therefore, did not decide whether the California federal district court's dismissal order barred the refiling of the same action in Maryland, the Court speculated that it should not.[104] If that is true, then a dismissal for expiration of the applicable statute of limitations (at least for the purpose of that case) is yet another example of a dismissal lacking claim-preclusive effect but not exempted from default "adjudication on the merits" treatment under Rule 41(b).[105] Though this would seem to be another occasion in which a district court should "state otherwise"—something (again) a district court seemingly should not have to do—the irony here is that the district court in *Semtek* did supplement its dismissal order with express language regarding its claim-preclusive effect.[106] The problem (unless one agrees with the Supreme Court's interpretation of Rule 41 and what it means to operate as an adjudication on the merits) was that the district court got it wrong. The district court should have said that its dismissal did *not* operate as an adjudication on the merits (or, more accurately, that it might not, depending upon the nature of the court in which the action is recommenced). Yet, if the district court had said nothing—i.e., if it had simply stated the basis for the dismissal (expiration of the statute of limitations), but no more—the Supreme Court would have found itself in the same awkward position.

A final problem with this portion of Rule 41(b) concerns its failure to specify the preclusive effect of those involuntary dismissals as to which the usual presumption does *not* apply. Does this mean that dismissals "for lack

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[101] *See id.* at 509 (concluding that "there is no conceivable federal interest in giving that time bar more effect in other courts than the California courts themselves would impose"). There was, though, no appeal of the district court's ruling (at least insofar as the language used), *see id.* at 499, an unfortunate fact that might have led in part to the Court's rather convoluted interpretation of Rule 41(b) and the meaning of the phrase "operates as an adjudication [on] the merits." *See id.* at 506.

[102] *See id.* at 506.

[103] *See id.* at 508.

[104] *See id.* at 504 (discussing the "traditional rule" in this regard).

[105] *See id.* at 508–09; *see also supra* notes 28–41 and accompanying text.

[106] *See id.* at 499.

of jurisdiction, improper venue, or failure to join a party under Rule 19"[107] have no preclusive effect whatsoever? No. Rather, "[t]his provision means only that the dismissal permits a second action on the same claim that corrects the deficiency found in the first action. The judgment remains effective to preclude relitigation of the precise issue of jurisdiction or venue that led to the initial dismissal."[108] Though this failure to specify this effect does not, of itself, seem like a serious problem, it seems somewhat odd considering the effect of other involuntary dismissals *is* specified.

3. Involuntary Dismissals Having Claim-Preclusive Effect. — Yet another problem with Rule 41—perhaps the most significant problem—relates to those dismissals that *do* have claim-preclusive effect.

As discussed previously, the preclusive effect of many dismissals (whatever that is) is dictated by operation of law.[109] At least one of those dismissals—a dismissal for failure to state a claim upon which relief can be granted—typically precludes the relitigation of the same action.[110] Again, Rule 41 provides that, "[u]nless the dismissal order states otherwise," such dismissals operate "as an adjudication on the merits."[111] But, as interpreted by the Court in *Semtek*, the phrase "operates as an adjudication [on] the merits" now means only that it prevents the relitigation of the same claim in the same federal district court.[112] The rule therefore does not fully reflect the effect of such a dismissal.[113]

Moreover, Rule 41 provides no guidance as to when it might be appropriate for a district court to issue an order that states otherwise, and thus it almost seems to invite those courts to attempt to alter that which cannot be altered, and purport to make that which is preclusive, not, and

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[107] FED. R. CIV. P. 41(b).

[108] 18A WRIGHT, MILLER & COOPER, *supra* note 26, § 4436, at 149 (footnote omitted).

[109] *See supra* notes 42–47 and accompanying text.

[110] *See supra* note 25 and accompanying text.

[111] FED. R. CIV. P. 41(b).

[112] *See* Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 505–06 (2001).

[113] Indeed, the Court's interpretation in *Semtek* did not even accurately reflect the full preclusive effect of the dismissal (for expiration of the California statute of limitations) in that case, a dismissal that presumably would also have had a preclusive effect in a California *state* court. *See Semtek*, 531 U.S. at 508 (adopting "the law that would be applied by state courts in the state in which the federal diversity court sits"). See also RICHARD H. FALLON, JR. ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 595 (6th ed. 2009):

> Instead of reading [Rule 41(b)] to provide for claim preclusive effect in only one court (the court that dismissed the action) but not in others, the Court might more plausibly have construed the rule as rendering a dismissal falling within its terms eligible for claim preclusive effect in any court, but only if that effect was required by the governing law of preclusion (in [Semtek], federal common law). That interpretation would have avoided a novel and confusing distinction between the rendering court and other courts.

vice versa.[114] So long as the district court does *not* state otherwise, and attempt to give a dismissal a preclusive effect other than what it has by operation of law, no problem arises.[115] Regrettably, sometimes district courts (such as the district court in *Semtek*)[116] make mistakes in this regard, and Rule 41 seems to require that those mistakes be respected.

4. Voluntary and Involuntary Dismissals Lacking Preordained Claim-Preclusive Effect. — As discussed previously, the preclusive effect of many dismissals is essentially dictated by operation of law. But some dismissals, such as the "penalty" dismissals described in Rule 41(b),[117] have no preordained preclusive effect. A district court conceivably (and properly) could make such dismissals completely without prejudice (i.e., with no claim-preclusive effect whatsoever), completely claim preclusive, or perhaps something in between.[118] As to these types of involuntary dismissals—though only as to these types—Rule 41 properly provides for such exercises of discretion.[119] Judges must be allowed to say what they are allowed to do. The same is true of voluntary dismissals, such as a voluntary dismissal that is the product of a settlement by the parties. In that situation, the parties, if desired, must be able to avoid the default effect provided for in the rule ("without prejudice")[120] and stipulate that such a dismissal has a claim-preclusive effect.

IV. A PROPOSED SOLUTION

There is no need to tolerate the problems with Rule 41 identified in Part III or to rely upon imaginative reconstructions of rule text in order to reach correct results. At the same time, there does not seem to be any need to eliminate Rule 41 entirely or to redraft it from scratch. Rule 41 can be

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[114] See 18A WRIGHT, MILLER & COOPER, *supra* note 26 § 4435, at 139 (footnotes omitted):

> Dismissal [for lack of jurisdiction, improper venue, or failure to join a party under Rule 19] indeed should not preclude a second action on the same claim that overcomes the initial defect of jurisdiction, venue, or parties. Despite some possible ambiguity in the language of the rule, moreover, the court should not have any option to provide that such a dismissal does operate as an adjudication that bars a second action. At the same time, such dismissals generally do preclude relitigation of the underlying issue of jurisdiction, venue, or party joinder.

[115] *Id.* at 135–37.

[116] *See Semtek*, 531 U.S. at 499.

[117] *See* FED. R. CIV. P. 41(b) (providing for a dismissal "[i]f the plaintiff fails to prosecute or to comply with these rules or a court order").

[118] *See supra* notes 50–53 and accompanying text.

[119] *See* 9 WRIGHT & MILLER, supra note 5, § 2369, at 591–94.

[120] FED. R. CIV. P. 41(a)(1)(B).

saved, but it should be amended. Some of the problems with Rule 41 can be corrected fairly easily. But some of the problems—particularly those relating to the preclusive effect of dismissals—are more difficult and require more creative solutions.

A. Symmetry Between Claims and Claimants

1. Inclusion of All Types of Claims. — Regarding its scope, it seems that Rule 41 should provide for the dismissal of *all* claims that may be stated in an action, and not just original claims, counterclaims, crossclaims, and third-party claims. Though other types of claims might be relatively rare, there does not seem to be any reason to exclude them.[121] Like the more common types of claims, those other types of claims also must be adjudicated or otherwise disposed of in some appropriate manner.

2. Equal Treatment of Claimants. — Just as Rule 41 should apply equally to all claims, so should it apply with respect to all claimants. Among other things, this means that the deadline for the filing of a notice of dismissal by any claimant should be functionally the same. And of the alternative deadlines for the filing of a notice of dismissal currently provided for in the rule—either a) before the service of "an answer or a motion for summary judgment,"[122] or b) "before a responsive pleading is served,"[123] or "if there is no responsive pleading, before evidence is introduced at a hearing or trial"[124]—the former seems the more sensible. Rule 41 should so provide in all contexts.

3. Voluntary Dismissal of Fewer Than All Claims. — Just as Rule 41(b) provides for the involuntary dismissal of "the action or any claim,"[125] it seems that Rule 41(a) also should expressly provide for the *voluntary* dismissal of fewer than all of the claims in the action.

Admittedly, such an amendment would result in some overlap with Rule 15, the rule that governs the amendment of pleadings. Rule 15 permits a party to amend its pleading (an amendment that presumably could result in the elimination of a claim or claims) "once as a matter of course" if done within "21 days after serving it" or the earlier of "21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f)."[126] Alternatively, Rule 15 provides that a party may amend its

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[121] *See* 9 WRIGHT & MILLER, supra note 5, § 2362, at 409–14.
[122] FED. R. CIV. P. 41(a)(1)(A)(i).
[123] *Id.* 41(c)(1).
[124] *Id.* 41(c)(2).
[125] *Id.* 41(b).
[126] FED. R. CIV. P. 15(a)(1).

pleading "with the opposing party's written consent or the court's leave."[127] A side-by-side comparison shows that there is probably little, if anything, that could be voluntarily dismissed pursuant to Rule 41(a), even if amended as proposed in this Article, that could not be accomplished via Rule 15(a).[128] But Rule 15 *itself* could be amended and, in any event, the desire for symmetry between voluntary and involuntary dismissals seems to outweigh the cost of any redundancy.

B. Expansion of the "Penalty" Dismissals

Though Rule 41 currently provides for the involuntary dismissal of an action or claim on certain grounds (failure to prosecute or to comply with the Rules or a court order[129]), it does not expressly so provide with respect to other types of improper conduct. It seems that Rule 41 either should go one way or the other—i.e., either it should not specifically mention *any* grounds for dismissal, or it should provide for all of them, at least with respect to "penalty"-type dismissals (to the extent that such dismissals are the proper subject for a federal rule and not provided for elsewhere in the Rules). There does not seem to be any strong reason for providing for some such dismissals, but not all of them.[130] And of these two alternatives, the latter seems the more preferable.[131] In part, this is due to tradition, and the fact that Rule 41 has always provided for such dismissals, at least to some extent.[132] But it is also based on what seems to be some perceived need for a provision of this nature.[133] Some types of improper conduct might not be proper subjects for the invocation of a federal district court's inherent power.[134] A more universal "penalty"-type provision also would avoid the

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[127] *Id.* 15(a)(2).

[128] *Compare* FED. R. CIV. P. 41(a) (providing a plaintiff may dismiss an action unilaterally or by consent), *with* FED. R. CIV. P. 15(a) (providing a plaintiff may dismiss parties by unilaterally or consensually amending the complaint), *and* a revised version of Rule 41 that includes all of the changes proposed *infra* app. B (providing a plaintiff may dismiss by filing a timely notice of dismissal or by a consensual stipulation signed by all parties).

[129] *See* FED. R. CIV. P. 41(b).

[130] *See* 9 WRIGHT & MILLER, *supra* note 5, § 2369, at 578–94.

[131] Of course, in fairness, Rule 55 should probably be amended as well to provide for a default judgment in the event of improper conduct by a *defendant*. *See* Shannon, *supra* note 3, at 126 n.254 (discussing this "apparent oversight"). But that is a matter that is beyond the scope of this Article.

[132] *See* 9 WRIGHT &. MILLER, *supra* note 5, § 2361, at 406–07 (stating Rule 41 has change very little substantively over the years).

[133] *See* 9 WRIGHT & MILLER, *supra* note 5, § 2369, at 609–13 (noting the circuits echo similar sentiments that "'a serious showing of willful default'" warrants the harsh penalty of Rule 41(b) (footnote omitted)).

[134] *See* MARTIN H. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER 20–22 (2d ed. 1990) (1980) (challenging generally the inherent rulemaking power of the federal courts).

need to catalog all of the various types of behavior (failure to prosecute, failure to comply with a court order, etc.) that might lead to the invocation of this rule.

Some might object on the ground that the procedures for dealing with some types of improper conduct are already included elsewhere in the Rules.[135] But this is true of current Rule 41 as well and, in line with conventional rules of textual interpretation, the particular, rather than the general, presumably would take priority.[136] Some also might object on the ground that not all instances of improper conduct call for a dismissal. But the same is also true of the grounds for dismissal currently provided for in Rule 41.[137] Some measure of discretion is probably going to attach to any provision of this nature, with a dismissal with claim-preclusive effect simply marking the outer limit of a range of potential punishments.

C. Changes With Respect to Preclusion-Related Issues

Again, the greatest challenges with respect to Rule 41 dismissals relate to their preclusive effect. One challenge relates to the terminology currently being used and how that terminology has been interpreted by the Supreme Court.[138] But the bigger challenge relates to how to account for dismissals whose preclusive effect is dictated by operation of law and, at the same time, provide for dismissals whose preclusive effect is not, all without running afoul of the Rules Enabling Act.[139]

1. Terminology. — In order to avoid the ambiguities and interpretive baggage associated with terms such as "without prejudice" and "operates as an adjudication on the merits,"[140] Rule 41, as necessary and appropriate, should instead speak only of the preclusive effect of a dismissal. The alternative would be stipulated definitions of current terms but, given their history, a clean break from the past seems warranted. "Claim preclusion" and "issue preclusion" have fairly well-established meanings and therefore appear to be superior ways of describing dismissals that have (or are

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[135] *See, e.g.*, FED. R. CIV. P. 11 ("Signing Pleadings, Motions, and Other Papers; Representations to the Court; Sanctions"); FED. R. CIV. P. 37 ("Failure to Make Disclosures or to Cooperate in Discovery; Sanctions").

[136] *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 183–88 (2012) (discussing the "General/Specific Canon").

[137] *See* 9 WRIGHT & MILLER, *supra* note 5, § 2369, at 609–14 (noting federal courts consider lesser sanctions before imposing Rule 41).

[138] *See supra* notes 72–80 and accompanying text.

[139] *See* 28 U.S.C. § 2072(b) (2012) (stating "[s]uch rules shall not abridge, enlarge or modify any substantive right"); *supra* notes 42–53 and accompanying text.

[140] *See* FED. R. CIV. P. 41; *supra* notes 72–80 and accompanying text.

intended to have) such preclusive effects.[141] Such a change also would pave the way for a rule governing dismissals that accommodates the true preclusive effects thereof.

2. Dismissals Whose Preclusive Effect Is Dictated by Operation of Law. — As discussed previously, the preclusive effect of many dismissals, such as those described in Rule 12(b), is essentially preordained. Of those dismissals, some have claim-preclusive effect, but most only preclude the relitigation of the issue that resulted in the dismissal.[142] The question, then, is how to account for this variety in a rule like Rule 41.

One approach would be to do what Rule 41 does currently: adopt a presumption or default, but provide for exceptions.[143] But, in order to utilize that approach, several obstacles must be overcome. The first is the formulation of an appropriate default. In the involuntary dismissal context, claim preclusion seems like the best option, for at least it marks the outer limit of any such effects.

However, even if Rule 41 were to prescribe such a default, a second obstacle, one that exists currently, arises. Because many dismissals do not have claim-preclusive effect, some dismissals would have to be exempted from this presumption and, as discussed previously, the list of such dismissals currently found in Rule 41 is incomplete. Though one solution might be to compile a more complete list, such an endeavor probably would be prone to underinclusiveness. The better solution, it seems, would be to eliminate any reference to any such a list.

This raises a third obstacle. For those dismissals that do not have claim-preclusive effect, the district court would have to specify a different, more appropriate preclusive effect.[144] However, this seems like an odd requirement with respect to those dismissals whose preclusive effect is already dictated by operation of law. Indeed, with respect to such dismissals, it makes little sense even to provide for a default. Accordingly, in this context, it seems that the best solution of all would be to forgo the

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[141] *See, e.g.*, 18 WRIGHT, MILLER & COOPER, *supra* note 26, § 4402, at 12 ("The distinction between claim preclusion and issue preclusion achieves greater clarity of expression, and at times seems to contribute to greater clarity of thought."); *id.* at 7 ("Although the time has not yet come when courts can be forced into a single vocabulary, substantial progress has been made toward a convention that the broad 'res judicata' phrase refers to the distinctive effects of a judgment separately characterized as 'claim preclusion' and 'issue preclusion.'").

[142] *See supra* notes 42–53 and accompanying text.

[143] *See* FED. R. CIV. P. 41(a)(1)(B)–(b) (providing the current defaults of without prejudice for a voluntary dismissal and with prejudice for an involuntary dismissal).

[144] *See supra* notes 50–53 and accompanying text.

specification of preclusive effects and simply defer to established federal common law.[145]

Thus, with respect to those dismissals whose preclusive effect is dictated by operation of law, certainly the district courts should be allowed to state the *grounds* for the dismissal (e.g., lack of subject-matter jurisdiction).[146] But Rule 41 should not say anything regarding the *preclusive effect* of such dismissals, for nothing need (or should) be said. In addition to leading to more correct results, such a rule seemingly would avoid any Rules Enabling Act problems associated with the specification of preclusive effects therein.[147]

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[145] *Cf.* 18A WRIGHT, MILLER & COOPER, *supra* note 26, § 4435, at 140:

> Courts have not yet come upon it, but the best way to reconcile these results with the language of the rule is to find that these dismissals have only the preclusive effect as an adjudication on the merits that is appropriate to the circumstances. Issue preclusion is generally appropriate as to the precise issues resolved, and the dismissal operates as an adjudication on the merits to that extent. Analysis independent of the language of the rule may show that claim preclusion is also appropriate. Only then should the dismissal operate as an adjudication on the merits of the claim as well as the issues actually decided.

[146] *See* Earl C. Dudley, Jr. & George Rutherglen, *Deforming the Federal Rules: An Essay on What's Wrong with the Recent* Erie *Decisions*, 92 VA. L. REV. 707, 726 (2006) ("Even if the Federal Rules do not, by themselves, determine issues of preclusion, they operate as part of a procedural system in which they provide the conditions and structure under which these issues are resolved.").

[147] *See* Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 503 (2001) (describing Rule 41 as "a highly peculiar context in which to announce a federally prescribed rule on the complex question of claim preclusion, saying in effect, 'All federal dismissals (with three specified exceptions) preclude suit elsewhere, unless the court otherwise specifies'"). Indeed, the *Semtek* Court later noted:

> We do not decide whether, in a diversity case, a federal court's "dismissal upon the merits" (in the sense we have described), under circumstances where a state court would decree only a "dismissal without prejudice," abridges a "substantive right" and thus exceeds the authorization of the Rules Enabling Act. We think the situation will present itself more rarely than would the arguable violation of the Act that would ensue from interpreting Rule 41(b) as a rule of claim preclusion; and if it is a violation, can be more easily dealt with on direct appeal.

Id. at 506 n.2. But if Rule 41 were to be amended so as to prevent this label from being affixed to dismissals to which it does not apply, this problem would never arise. Surely, that would be a better solution. The Court also noted:

> Rule 41(b), interpreted as a preclusion-establishing rule, would not have the two effects described in the preceding paragraph—arguable violation of the Rules Enabling Act and incompatibility with [Erie R.R. v. Thompkins, 304 U.S. 64[] (1938)]—if the court's failure to specify an other-than-on-the-merits dismissal were subject to reversal on appeal whenever it would alter the rule of claim preclusion applied by the State in which the federal court sits. No one suggests that this is the rule, and we are aware of no case that applies it.

Of course, even if Rule 41 were to say nothing about preclusion with respect to those dismissals whose preclusive effect is dictated by operation of law, there is still at least one additional obstacle. Rule 41 currently permits a district court (apparently without limitation) to "state otherwise" and alter the presumptive preclusive effect of the dismissal in question.[148] But Rule 41 should not permit the district courts to alter the preclusive effect of a dismissal whose effect is dictated by operation of law. For if the preclusive effect of some particular dismissal has been established as a matter of federal common law as being X, specifying that the effect instead is Y does not (or at least should not) make it Y.[149] The preclusive effect of such dismissals is (appropriately) found in law lying outside the province of the Rules, and any attempt to alter that law via Rule 41 might be problematic on a number of fronts.[150] There is, generally speaking, no need for discretion in this context.[151]

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531 U.S. at 504 n.1 (citation omitted). But regardless of whether any appellate court has, in fact, applied (or should apply) such a rule, the amendment to Rule 41 proposed in this Article seemingly would solve this problem as well. In other words, if a district court *were* to specify a preclusive effect other than that dictated by operation of law, there does not seem to be any reason why that contrary specification could not be reversed on appeal, or disregarded in any collateral proceeding.

[148] *See* FED. R. CIV. P 41 (a)(1)(B)–(b).

[149] *See* RESTATEMENT (SECOND) OF JUDGMENTS § 20 cmt. d (1982) ("While there are instances in which a court may have discretion to determine that a judgment of dismissal shall operate as a bar . . . , a judgment may not have an effect contrary to that prescribed by the statutes, rules of court, or other rules of law operative in the jurisdiction in which the judgment is rendered."); *see also* Burbank, *supra* note 8, at 782 ("[P]roperly viewed, Rule 41(b) merely states what other sources of federal law, of a nationally binding character, have the power to determine; it thus provides fair notice to litigants." (footnotes omitted)). Perhaps an analogy may be drawn to the law relating to judgments. The Rules define a "judgment" as an appealable order, *see* FED. R. CIV. P. 54(a), and generally require that judgments be set out in a separate document (typically called a "judgment"), *see* FED. R. CIV. P. 58(a). But the preparation of this separate "judgment," of itself, does not render the order to which it relates appealable, and the failure to prepare a separate "judgment" does not prevent an appealable order from being appealed. *See* Shannon, *supra* note 3, at 155–56 & n.375 (discussing these issues and the Supreme Court cases supporting these conclusions). And so it is here. A dismissal whose preclusive effect is dictated by operation of law has such effect (whatever it might be) as a matter of federal common law, and not as a result of anything a district court might say. For the same reason, such effect generally may not be altered by that court—or, for that matter, any other court (aside from the Supreme Court, which presumably could alter such effects by overruling contrary federal common law precedent). This is, again, essentially what happened in *Semtek*, in which the Court more or less rejected the district court's attempt to alter the proper preclusive effect of a dismissal for expiration of a California statute of limitations in that case, thereby enabling other, later courts to disregard such language. *See Semtek*, 531 U.S. at 509 ("Because the claim-preclusive effect of the California federal court's dismissal 'upon the merits' of petitioner's action on statute-of-limitations grounds is governed by a federal rule that in turn incorporates California's law of claim preclusion . . . , the Maryland Court of Special Appeals erred in holding that the dismissal necessarily precluded the bringing of this action in the Maryland courts.").

[150] *See Semtek*, 531 U.S. at 503 ("[I]t would be peculiar to find a rule governing the effect that must be accorded federal judgments *by other courts* ensconced in rules governing the internal procedures of the rendering court itself. Indeed, such a rule would arguably violate the jurisdictional limitation of the Rules Enabling Act. . . ." (emphasis added)); Burbank, *supra* note 8, at 767 ("The rendering court does

A more difficult question relates to that portion of Rule 41 dealing with voluntary dismissals. Rule 41 provides that "if the plaintiff previously dismissed any federal- or state-court action based on or including the same claim, a notice of dismissal operates as an adjudication on the merits."[152] A dismissal made pursuant to this rule also would be a dismissal whose preclusive effect (presumably claim preclusion)[153] is determinate, though not as a matter of federal common law, but rather pursuant to the rule itself.[154]

From a procedural standpoint, such a rule seems reasonable. Though different policy makers might select a lesser penalty for such conduct, claim preclusion does not seem wholly inappropriate. It also seems reasonable to eliminate any discretion on the part of the district courts in this context.

The more difficult question, though, is whether and to what extent a federal rule properly may prescribe the preclusive effect of this (or any) disposition.[155] This issue arises because of the Rules Enabling Act and its proviso that any rule promulgated pursuant thereto "shall not abridge, enlarge or modify any substantive right."[156] Preclusion law (particularly that relating to claim preclusion) arguably falls on the substantive side of this line,[157] and some believe this to be true even when such effects are the

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not determine the preclusive effects of a federal judgment, and some of the courts that determine them are not federal courts." (footnote omitted)). Whether the *Semtek* Court's statement regarding the Rules Enabling Act—which arguably constitutes dicta—should be interpreted as applying to all attempts to prescribe, by federal rule, the preclusive effect of a dismissal seems doubtful. In any event, the amendments proposed in this Article, at least as they relate to dismissals whose preclusive effect is dictated by operation of law, take this issue off the table. *See infra* app. B.

[151] Some district court judges might be concerned as to whether they will be able to correctly determine whether the preclusive effect of any given dismissal is dictated by operation of law. Upon some reflection, though, this determination is probably easier than some might now imagine. In any event, if Rule 41 were to acknowledge that such dismissals only have the preclusive effect to which they are entitled, then those judges might be comforted by the fact that any contrary designation, though perhaps causing confusion a la *Semtek*, (again) would have no binding effect on later courts.

[152] FED. R. CIV. P. 41(a)(1)(B).

[153] At least this seems to be the interpretation it was given pre-*Semtek*. *See* 9 WRIGHT & MILLER, *supra* note 5, § 2368, at 567 (observing that such a dismissal generally "prevents the institution of another action on the same claim"). The version of Rule 41 proposed in this Article, which is not intended to change the meaning of this particular provision, makes this effect explicit. *See infra* app. B.

[154] *See* FED. R. CIV. P. 41(a)(1)(B).

[155] *See* DAVID L. SHAPIRO, CIVIL PROCEDURE: PRECLUSION IN CIVIL ACTIONS 146 n.44 (2001) ("The question of the extent to which a Federal Rule of Civil Procedure can, consistently with the Rules Enabling Act (28 U.S.C. § 2072), control the preclusive effect of a federal judgment is one that remains unresolved.").

[156] 28 U.S.C. § 2072(b) (2012).

[157] *See* 7AA WRIGHT, MILLER & KANE, FEDERAL PRACTICE AND PROCEDURE § 1789, at 557 (3d ed. 2005) ("Since the preclusive effect to be given a judgment typically is viewed as a 'substantive' matter, a federal rule that purported to govern the subject might be held to violate the . . . Enabling Act . . . ."); Burbank, *supra* note 8, at 764 ("[T]he Rules Enabling Act does not authorize Federal Rules of preclusion.").

result of what appear to be procedural matters, such as dismissals.[158] The challenge, then, is to design a procedural rule governing dismissals—something the Act obviously permits[159]—while at the same time avoiding the "substantive rights" prohibition.[160]

Because of the importance of the question and the frequency with which it might be asked, the determination whether a rule complies with the Rules Enabling Act ought to be a relatively simple task. Regrettably, "even after seventy-plus years, the [Supreme] Court has been unable to come up with definitions of 'procedural' and 'substantive' which predictably resolve that distinction."[161]

But we do have some Supreme Court precedent. The Court's latest case on this topic is *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*[162] In *Shady Grove*, Justice Scalia (who also delivered the opinion of the Court in *Semtek*[163]) summarized the prevailing standard for assessing the propriety of a federal rule as follows: "We have long held that th[e] limitation [in 28 U.S.C. § 2072(b)] means that the Rule must 'really regulat[e] procedure,—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them.'"[164] Justice Scalia stated the test:

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[158] *See* Burbank, *supra* note 7, at 1031 (concluding "that the Federal Rules of Civil Procedure do not, by and large, contain preclusion law and that they cannot validly prescribe such law"); Jay Tidmarsh & Brian J. Murray, *A Theory of Federal Common Law*, 100 NW. U. L. REV. 585, 611 (2006) ("Implicit but never expressly stated in the [*Semtek*] Court's reasoning is the premise that rules of claim preclusion are substantive rather than procedural in nature."). Such an understanding does to some extent parallel the development of the law in these two areas. *See* RESTATEMENT (SECOND) OF JUDGMENTS ch. 1, intro. note, at 5–6 (1982) ("In modern times, the foundation of civil procedure in most jurisdictions in the United States is the Federal Rules of Civil Procedure, with statutory supplementations and modifications. The law of res judicata, in contrast, has remained largely the product of decisional law."). Nonetheless, it is far from certain that preclusion law is substantive, at least in all contexts, and many have disagreed with this characterization. *See, e.g.*, Amy Coney Barrett, *Procedural Common Law*, 94 VA. L. REV. 813, 829–32 (2008) (concluding that preclusion law is predominantly procedural).

[159] *See* 28 U.S.C. § 2072(a) (empowering the Supreme Court to "prescribe general rules of practice and procedure . . . for cases in the United States district courts").

[160] *Id.* § 2072(b) ("Such rules shall not abridge, enlarge or modify any substantive right.").

[161] Joseph P. Bauer, *Shedding Light on* Shady Grove*: Further Reflections on the* Erie *Doctrine from a Conflicts Perspective*, 86 NOTRE DAME L. REV. 939, 947 (2011). Legal scholars seem to have fared no better. *See* Leslie M. Kelleher, *Taking "Substantive Rights" (in the Rules Enabling Act) More Seriously*, 74 NOTRE DAME L. REV. 47, 49 (1998) ("Despite the passage of more than six decades, neither the Court nor the commentators have managed to produce a workable definition of the [Rule Enabling Act's] 'substantive rights' limitation.").

[162] Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393 (2010).

[163] Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 499 (2001).

[164] *Shady Grove*, 559 U.S. at 407 (opinion by Scalia, J.) (quoting Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1941)).

> The test is not whether the rule affects a litigant's substantive rights; most procedural rules do. What matters is what the rule itself regulates: If it governs only "the manner and means" by which the litigants' rights are "enforced," it is valid; if it alters "the rules of decision by which [the] court will adjudicate [those] rights," it is not.[165]

"Applying that test," Justice Scalia continued,

> [W]e have upheld rules authorizing imposition of sanctions upon those who file frivolous appeals or who sign court papers without a reasonable inquiry into the facts asserted. Each of these rules had some practical effect on the parties' rights, but each undeniably regulated only the process for enforcing those rights; none altered the rights themselves, the available remedies, or the rules of decision by which the court adjudicated either.[166]

Based on this precedent, there appears to be little doubt that the Federal Rules of Civil Procedure may properly provide for penalties for the violation of those rules, and the Supreme Court has so held on a number of occasions.[167] It further appears that those penalties may include a dismissal with preclusive effect, even claim-preclusive effect.[168] Obviously, the

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[165] *Id.* (citation omitted) (quoting Miss. Publ'g Corp. v. Murphree, 326 U.S. 438, 446 (1946)). Though this portion of Justice Scalia's opinion failed to capture a majority, his articulation of the standard for assessing the propriety of a federal rule fairly may be considered the holding of the Court on this issue. *See* Kevin M. Clermont, *The Repressible Myth of* Shady Grove, 86 NOTRE DAME L. REV. 987, 1013 (2011) ("[*Shady Grove*] may not say much for eternity, but it does say that the unadorned [*Sibbach-Hanna*] test, so protective of the Federal Rules, is the law."). If nothing else, it reflects the holdings of earlier Courts on this issue.

[166] *Shady Grove*, 559 U.S. at 407 (citations omitted).

[167] *See, e.g.*, Bus. Guides, Inc. v. Chromatic Commc'ns Enters., Inc., 498 U.S. 533, 552 (1991) ("There is little doubt that [Federal Rule of Civil Procedure] 11 is reasonably necessary to maintain the integrity of the system of federal practice and procedure, and that any effect on substantive rights is incidental."); Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 393 (1990) ("It is now clear that the central purpose of Rule 11 is to deter baseless filings in [d]istrict [c]ourt and thus, consistent with the Rule Enabling Act's grant of authority, streamline the administration and procedure of the federal courts."); Burlington N. R.R. Co. v. Woods, 480 U.S. 1, 4, 5, 8 (1987) ("The cardinal purpose of Congress in authorizing the development of a uniform and consistent system of rules governing federal practice and procedure suggests that Rules which incidentally affect litigants' substantive rights do not violate [the Rules Enabling Act] if reasonably necessary to maintain the integrity of that system of rules.") (upholding, unanimously, Federal Rule of Appellate Procedure 38, which permits the court of appeals to award "just damages and single or double costs to the appellee" for frivolous appeals).

[168] *See* Patrick Woolley, *The Sources of Federal Preclusion Law After* Semtek, 72 U. CIN. L. REV. 527, 585 (2003) ("In short, the key question in determining whether the Court has authority to promulgate rules of preclusion should not be whether the enforcement of a procedural policy will require cutting off rights, but whether the policy choice itself is one the Court should be allowed to mandate through the Federal Rules."); *id.* at 602 ("If courts conclude—as I believe they should—that the [Rules Enabling Act] permits promulgation of Federal Rules of Civil Procedure which directly enforce

purpose of the two-dismissal provision found in Rule 41 is to prevent a plaintiff from abusing the system, as well as the defendant, by preventing that plaintiff from repeatedly commencing and then dismissing the same action.[169] The rule seems eminently fair in that it not only gives the plaintiff two chances, but also requires an affirmative and unilateral act by that plaintiff (the filing of a notice of dismissal) in order to trigger its effect.[170] Such a rule, if revised to clarify that such a dismissal indeed has claim-preclusive effect, might seem to implicate the very Rules Enabling Act concerns raised by the *Semtek* Court.[171] But unlike the scenario in *Semtek*, prescribing a claim-preclusive effect to a dismissal for violation of a two-dismissal rule would not conflict with any contrary "rule" that appropriately might have been established pursuant to federal common law (including any further reference to state law).[172] Thus, given the nature of this rule and the federal interests at stake—not to mention that it has remained in force for more than 75 years—that the rule apparently allows for no discretion and specifies a claim-preclusive effect does not seem to raise any serious Rules Enabling Act issues.[173]

3. Dismissals Whose Preclusive Effect Is Not Dictated by Operation of Law. — Though the preclusive effect of many dismissals is dictated by operation of law, we have also seen that some dismissals—including most voluntary dismissals and the "penalty" dismissals provided for in Rule 41(b)—have no preordained claim-preclusive effect.[174] This means that someone—either the district court or the parties themselves—must be permitted to prescribe the preclusive effect that is appropriate under the circumstances. Any scheme to the contrary would be unworkable, for the alternative either would be no prescribed effect or some default effect, and neither would accurately reflect the intended preclusive effect in all situations.[175]

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otherwise valid procedural obligations through preclusion, there can be no doubt courts may create uniform federal common law rules of preclusion governing penalty dismissals. Such uniform federal rules would be justified by the federal interest in the integrity of the Federal Rules.").

[169] *See* FED. R. CIV. P. 41(a)(1)(B).

[170] *Id.*

[171] *See* Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 503–04 (2001).

[172] *See supra* notes 164–67 and accompanying text.

[173] *But see* Burbank, *supra* note 8, at 782–83 & n.239 ("[T]he most that can be said for [this provision] is that it suggests a rule that could validly be formulated as a matter of federal common law as a corollary to the basic federal law obligation to respect federal judgments.").

[174] *See* FED. R. CIV. P. 41(b); *see also supra* notes 42–53 and accompanying text.

[175] If a defendant intends to alter the preclusive effect that would typically attach to the dismissal at issue—for example, if the court intends to deprive a dismissal for failure to state a claim of preclusive effect—it should also state in the corresponding order of dismissal the reasons why some other effect is appropriate under the circumstances.

But even if the district court or the parties were to be permitted to prescribe the appropriate preclusive effect (as they are currently), at least two issues relating to Rule 41 remain. The first is whether Rule 41 should make any reference to this limited ability to prescribe the appropriate preclusive effect, given that this power is probably not dependent upon the inclusion of any such reference. The second is whether the inclusion of such language would run afoul of the Rules Enabling Act.

Regarding the issue whether Rule 41 should make any reference to this ability to prescribe the preclusive effect of a dismissal: It seems, as a practical matter, that it would do no harm, and probably would do some good, to utilize Rule 41 as a means of reminding the district court and the parties of their obligations in this regard. The rule need not be written in a manner that *compels* them to make this determination, or even *permits* them to do so; rather, it can be written so as to simply recognize their ability to do so. But it also seems prudent to retain defaults (no claim-preclusive effect in the case of a voluntary dismissal, but claim-preclusive effect for involuntary dismissals) in this context should the parties fail to so specify.[176] The alternative would be an unspecified effect and, though federal common law presumably would fill in the gaps, some level of confusion would ensue, for (again) such dismissals have no preordained preclusive effect.[177]

Regarding the Rules Enabling Act issue: It seems that if the "penalty" provision found in Rule 41(a)(1), even if amended to reaffirm that such a dismissal has claim-preclusive effect, passes muster, then the sort of provisions proposed here also would be permissible. Certainly, no one seems to doubt the ability of federal courts, as appropriate, to impose

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[176] These presumptions as to the effects of voluntary and involuntary dismissals seem to reflect common law understandings as to the effects of such dismissals. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 20 cmt. f (1982) (discussing the traditional effect of a voluntary "nonsuit"); RESTATEMENT (SECOND) OF JUDGMENTS § 19 cmt. e (1982) (discussing the traditional effect of a plaintiff's failure to prosecute or obey a court order).

[177] Indeed, the *Restatement* expressly recognizes:

> the growing importance in this area of statutes and rules of court, which reflect a wide variety of views as to the circumstances in which fairness to the defendant and avoidance of undue burdens on the courts require that a dismissal operate as a bar. Thus even among those states that have statutes or rules closely patterned on Rule 41 of the Federal Rules of Civil Procedure, there are variations, for example as to the time periods when there is a right to a voluntary dismissal, and as to whether certain dismissals (e.g., for failure to prosecute) operate as a bar in the absence of a specification by the court.

RESTATEMENT (SECOND) OF JUDGMENTS § 20 cmt. j (1982).

penalties for improper conduct.[178] The most problematic portions would be the defaults. But as appropriate, the default proposed for involuntary dismissals (claim preclusion) is easily avoidable by the district court and goes no farther than the claim-preclusive effect prescribed in proposed Rule 41(a)(1). The same should be true of a rule that permits the parties to specify that a voluntary dismissal is to be regarded as having the same effect. Again, such a rule, in a sense, would not be specifying the effect of any dismissal per se, but rather would be doing little more than recognizing the ability of the court (or the parties) to memorialize their intent in those situations. Indeed, here also, the proposed rule does no more than what has been permitted for the past 75 years. In fact, it does less.[179]

V. CONCLUSION

A comprehensive review of Rule 41 reveals a number of problems therewith. Though the rule might seem fine on the surface, it is in fact practically and theoretically unworkable. Rule 41, in its current form, is incomplete, internally inconsistent, and in some instances, just plain wrong. Most significantly, Rule 41 appears to give some dismissals a preclusive effect in excess of what is appropriate under the common law, and it appears to confer discretion upon the district courts to avoid such preclusive effects in a manner contrary to that law. As a result, in many cases, federal courts have achieved appropriate results only by ignoring clear rule text or

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[178] *See* Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 509 (2001) ("If, for example, state law did not accord claim-preclusive effect to dismissals for willful violation of discovery orders, federal courts' interest in the integrity of their own processes might justify a contrary federal rule."). *See also id.* at 503 ("Rule 41(b) sets forth nothing more than a default rule for determining the import of a dismissal (a dismissal is 'upon the merits,' with the three stated exceptions, unless the court 'otherwise specifies.'")); SHAPIRO, *supra* note 155, at 146 n.44 ("[T]he Federal Rules can at the least create a context that will, and should, affect the content of the federal common law rule."). Additionally, Burbank, *supra* note 8, at 782–83 (footnotes omitted), states:

> Federal standards are necessary to determine when a federal judgment can preclude subsequent litigation, whatever law governs the preclusive effects of that judgment. In the case of so-called penalty dismissals under Rule 41(b), that interest is buoyed by the additional consideration that uncertainty as to the binding nature of federal judicial action might lead to disregard of perfectly valid Federal Rules and orders and that the costs of such disregard would fall on the federal courts.

[179] Of course, if the view of the Rules Enabling Act expressed in this Article is incorrect, presumably one could accomplish the same revisions to Rule 41 via a congressional bill or even an amendment to the Act itself. Neither is without precedent, and there do not appear to be any constitutional impediments to either course.

through tortured interpretations of that text. Obviously, this is not a happy state of affairs.

But these many problems need not be tolerated. It is time for change. Rule 41 should be amended in a manner that adequately addresses the needs of the federal judiciary and acknowledges the realities surrounding dismissals and the preclusive effect thereof. Only then can Rule 41 serve the purposes for which it was intended.

APPENDIX A:
CURRENT FEDERAL RULE OF CIVIL PROCEDURE 41

Rule 41. Dismissal of Actions

(a) VOLUNTARY DISMISSAL.

(1) *By the Plaintiff.*

(A) *Without a Court Order.* Subject to Rules 23(e), 23.1(c), 23.2, and 66 and any applicable federal statute, the plaintiff may dismiss an action without a court order by filing:

(i) a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment; or

(ii) a stipulation of dismissal signed by all parties who have appeared.

(B) *Effect.* Unless the notice or stipulation states otherwise, the dismissal is without prejudice. But if the plaintiff previously dismissed any federal- or state-court action based on or including the same claim, a notice of dismissal operates as an adjudication on the merits.

(2) *By Court Order; Effect.* Except as provided in Rule 41(a)(1), an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper. If a defendant has pleaded a counterclaim before being served with the plaintiff's motion to dismiss, the action may be dismissed over the defendant's objection only if the counterclaim can remain pending for independent adjudication. Unless the order states otherwise, a dismissal under this paragraph (2) is without prejudice.

(b) INVOLUNTARY DISMISSAL; EFFECT. If the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it. Unless the dismissal order states otherwise, a dismissal under this subdivision (b) and any dismissal not under this rule—except one for lack of jurisdiction, improper venue, or failure to join a party under Rule 19—operates as an adjudication on the merits.

(c) DISMISSING A COUNTERCLAIM, CROSSCLAIM, OR THIRD-PARTY CLAIM. This rule applies to a dismissal of any counterclaim, crossclaim, or third-party claim. A claimant's voluntary dismissal under Rule 41(a)(1)(A)(i) must be made:

(1) before a responsive pleading is served; or

(2) if there is no responsive pleading, before evidence is introduced at a hearing or trial.

(d) COSTS OF A PREVIOUSLY DISMISSED ACTION. If a plaintiff who previously dismissed an action in any court files an action based on or including the same claim against the same defendant, the court:

(1) may order the plaintiff to pay all or part of the costs of that previous action; and

(2) may stay the proceedings until the plaintiff has complied.

APPENDIX B:
PROPOSED FEDERAL RULE OF CIVIL PROCEDURE 41 (AND NOTES)

Rule 41. Dismissal of Claims and Actions

(a) VOLUNTARY DISMISSAL.

(1) *Without a Court Order.* Subject to Rules 23(e), 23.1(c), 23.2, and 66 and any applicable federal statute, a plaintiff may dismiss the action or any claim without a court order by filing:

(A) a notice of dismissal before the defendant to whom the action or claim relates serves either an answer or a motion for summary judgment; or

(B) a stipulation of dismissal signed by all parties who have appeared. Unless the notice or stipulation states otherwise, the dismissal does not preclude the relitigation of the action or claim so dismissed. But if the plaintiff previously dismissed any federal- or state-court action based on or including the same claim, a notice of dismissal precludes the relitigation of that claim.

(2) *By Court Order.* Except as provided in Rule 41(a)(1), the action or any claim may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper. If a defendant has pleaded a counterclaim before being served with the plaintiff's motion to dismiss, the action may be dismissed over the defendant's objection only if the counterclaim can remain pending for independent adjudication. Unless the order states otherwise, the dismissal does not preclude the relitigation of the action or claim so dismissed.

(b) INVOLUNTARY DISMISSAL. If a plaintiff engages in improper conduct, a defendant may move to dismiss the action or any claim against it. If the claim preclusive effect of the dismissal—as well as any involuntary dismissal not under this rule—is not dictated by operation of law, the dismissal precludes the relitigation of the claim or action dismissed unless the order states otherwise.

(c) DISMISSING OTHER TYPES OF CLAIMS. This rule applies similarly to a dismissal of any other type of claim provided for in these rules.

(d) COSTS OF A PREVIOUSLY DISMISSED ACTION. If a plaintiff who previously dismissed an action in any court files an action based on or including the same claim against the same defendant, the court:

(1) may order the plaintiff to pay all or part of the costs of that previous action; and

(2) may stay the proceedings until the plaintiff has complied.

NOTES TO PROPOSED RULE 41[180]

To the extent reasonably possible, the structure and language of Rule 41 was left unchanged. The proposed rule might be written differently if done on a clean slate. But the long history of the rule, which has changed little over the past seventy-five years, counsels against a wholesale rewriting. Thus, the proposed rule adopts the same general structure as the current rule, and subdivision (d) has not been changed at all. Even with respect to subdivisions (a) through (c), some of the changes are subtle and discernible only after a careful reading and comparison of the current and proposed versions. Most of the changes are substantive (i.e., non-technical), though a few are designed more to streamline the rule, to bring parallelism and conformity with respect to similar portions of the rule, and, where possible, to shorten unnecessarily long passages.

Subdivision (a). Current paragraph (1), which consisted only of a heading ("By the Plaintiff"), has been eliminated as redundant (considering that a voluntary dismissal is, essentially by definition, a dismissal that is initiated or at least joined by the plaintiff). This enables what are currently subparagraphs (A) and (B) to become paragraphs (1) and (2), thus shortening the rule and eliminating one layer of complexity. Also, current subparagraph (B) ("Effect") has been combined with current subparagraph (A) and this separate heading has been eliminated. This renders what are now paragraphs (1) and (2) more similar in style to current (and proposed) subdivision (b), which likewise does not separate the effect of the dismissal in question from the rest of the rule. Including the word "effect" in the heading of current Rule 41(a)(1)(B) (as well as in the headings of current Rules 41(a)(2) and (b)) also seemed to add little or nothing to the organization or understanding of the rule.

Proposed paragraph (1) ("Without a Court Order") provides that a plaintiff may dismiss a claim (or, by implication, claims) as well as the entire action. This change is consistent with what is already occurring in practice, and is consistent also with similar language currently found in subdivision (b). This change is not intended to supplant the possible amendment of pleadings pursuant to Federal Rule of Civil Procedure 15(a), which should continue to operate on its own terms and without reference to this rule. In addition, the phrase "opposing party" has been replaced by the phrase "defendant to whom the action or claim relates." Though longer, the latter phrase seems to more accurately identify the relevant defending party.

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[180] These notes are not intended to serve as draft advisory committee's notes. Rather, they are simply an explanation of the language included in the proposed rule.

Finally (and most significantly), the phrase "is without prejudice" currently found in subparagraph (B) is replaced by the phrase "does not preclude the relitigation of the action or claim so dismissed." This change reflects the general change away from outdated (and potentially misleading) phrases such as "with prejudice" and "without prejudice" to more accurate (and less ambiguous) claim preclusion-type language.

Proposed paragraph (2) similarly replaces "action" with "action or any claim," and "is without prejudice" with "does not preclude the relitigation of the action or claim so dismissed." Proposed paragraph (2) also eliminates the phrase "under this paragraph (2)" as unnecessary, it being clear that the dismissal referred to in this proposed paragraph is the dismissal referred to in this proposed paragraph.

Subdivision (b). Again, the word "effect" has been eliminated in the heading of proposed subdivision (b) as unnecessary. In addition, the grounds for dismissal currently included in Rule 41(b) (failure to prosecute or to comply with the rules or a court order) are now simply referred to as "improper conduct." The latter phrase has the virtues of being simpler and arguably (and appropriately) broader. Consistent with prior practice, though, this rule is not intended to supplant or supersede more specific penalty provisions found elsewhere in the Rules, such as those found in Rules 11 and 37.

The remaining changes to subdivision (b) are fairly substantial. Currently, the last sentence of this subdivision provides: "Unless the dismissal order states otherwise, a dismissal under this subdivision (b) and any dismissal not under this rule—except one for lack of jurisdiction, improper venue, or failure to join a party under Rule 19—operates as an adjudication on the merits." By contrast, the last sentence of proposed subdivision (b) provides: "If the claim preclusive effect of the dismissal—as well as any involuntary dismissal not under this rule—is not dictated by operation of law, the dismissal precludes the relitigation of the claim or action dismissed unless the order states otherwise." This change accomplishes several things. First, rather than trying to catalog all those involuntary dismissals that, by operation of law, do not operate "as an adjudication on the merits," the proposed rule simply acknowledges the fact that there are some differences with respect to the preclusive effect of the various types of involuntary dismissals, and that, in most instances, such effects are the product of federal (or perhaps state) common law, and not Rule 41. Second, the proposed rule recognizes that, with respect to those involuntary dismissals whose effect is dictated by operation of law, there is nothing that a district court can (or should) do to alter that effect. Finally, though the proposed rule preserves the concept of a default effect with

respect to those involuntary dismissals whose preclusive effect is not preordained (such as might be the case with respect to a "penalty"-type dismissal), it abandons the antiquated (and potentially confusing) phrase "operates as an adjudication on the merits" (as well as the interpretive baggage that comes with it) in favor of the more modern (and seemingly less confusing) "precludes the relitigation of the claim or action dismissed unless the order states otherwise."

Subdivision (c). Rather than limiting the reach of Rule 41 to counterclaims, crossclaims, and third-party claims, proposed subdivision (c) simply states that this rule "applies similarly to a dismissal of any other type of claim provided for in these rules." Thus, for example, the proposed rule properly would bring under its ambit a claim by a plaintiff against a third-party defendant. Moreover, because there does not seem to be any reason why the deadline for voluntarily dismissing such other claims should vary from that provided for in subdivision (a), the proposed rule by implication adopts that standard ("before the defendant . . . serves either an answer or a motion for summary judgment") rather than that currently provided for in Rule 41(c) ("before a responsive pleading is served" or "if there is no responsive pleading, before evidence is introduced at a hearing or trial").

TAB 6E

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13-CV-A: Rule 48: Nonunanimous Verdicts

Rule 48(b):

(b) VERDICT. Unless the parties stipulate otherwise, the verdict must be unanimous and must be returned by a jury of at least 6 members.

Docket 13-CV-A suggests that Rule 48 be amended to adopt state majority-verdict rules for diversity cases. The basis for the argument is the belief that the unanimous verdict requirement "results in more hung juries and in smaller damage awards." Out-of-state defendants thus seek to remove to federal court. The defendant hopes for a hung jury, viewed as equivalent to a verdict for the defendant, or for a smaller damages award that results when a juror threatens to hang the jury unless others agree to a reduced award. (It is implicit in this argument that an out-of-state plaintiff can take advantage of the state practice by suing in state court — 28 U.S.C. § 1441(b)(2) prohibits removal by an in-state defendant even though there is diversity jurisdiction.)

This proposal raises several questions. The first is whether non-unanimous, "majority" verdicts are desirable. If they are, the likely conclusion would be to enable them for all civil actions, not merely those arising in states that have adopted the practice. If they are not, the question is whether federal courts exercising diversity jurisdiction should conform to state practice either from an Erie-like deference to state practice or from a pragmatic desire to reduce what might seem an artificial incentive to remove an action filed in state court.

If it should come to seem that majority verdicts should be recognized, either in general or in conformity to state practice, it would remain to determine whether majority verdicts are consistent with the Seventh Amendment. The unceremonious abandonment of the 12-person jury requirement in Colgrove v. Battin, 413 U.S. 149 (1973), may provide some indication that unanimity also can be abandoned as a mere ancient tradition founded in medieval superstitions. (See the set of alternative explanations of the unanimity tradition for criminal cases in Apodaca v. Oregon, 406 U.S. 404, 407 n. 2 (1972)(plurality opinion); the most intriguing is the suggestion that at a time when jurors were supposed to decide on the basis of personal knowledge, minority jurors must be guilty of perjury.) The question could become complicated by arguments that the Seventh Amendment's invocation of common law is a distinctive tie to unanimity, and by doubts about the relationship between unanimity and jury size. The suggestion notes that in Utah state courts, a verdict may be returned by 6 jurors out of 8. How about 4 or 5 out of 6? These questions may not be readily resolved. See 9B Federal Practice & Procedure § 2492 (3d ed. 2008).

Nearly 20 years ago, this Committee approved a proposal to

restore the 12-person civil jury. The proposal ultimately failed to win acceptance. One part of the discussion contemplated the possibility of adopting some form of majority-verdict provision if the jury were returned to 12 members. No conclusion was reached, nor even attempted. The question was raised to explore the possibility that a nonunanimous verdict could be more attractive with a 12-person jury. And indeed it may make sense to fear a majority verdict more when the jury is smaller.

The question of deference to state law is more uncertain. Rule 48 now requires unanimity absent party consent to a majority verdict. Rule 48 is unquestionably valid under the Enabling Act. So it controls in diversity cases. But it can be amended to defer to state practice, at the price of sacrificing uniform federal practice, if the choice between unanimity and nonunanimity seems closely balanced or if the values reflected in state practice seem to overcome the values enshrined in the federal practice. There is a strong strain of thought that majority verdict rules favor plaintiffs in general. Although this perception is not tied to particular types of claims more than other types of claims, so it does not appear to be "bound up with" any particular state substantive law, it might be argued that the state interest in a pro-plaintiff tilt should be honored. There might be occasions when a rule incorporating state practice would lead a plaintiff to choose a federal court in a state with majority verdicts in preference to a federal court in a state with unanimous verdicts, but that may not seem an important concern.

These concerns seem to frame the question. Drafting will not be difficult if it seems useful to pursue the matter further. But the underlying choices will be difficult. The dynamics of jury deliberation may be fundamentally altered by allowing a majority verdict. That is the premise of the proposal. But the changes may not all be for the better. Careful consideration will be needed to justify a decision to go ahead.

13-CV-A

Suggested amendment to FRCP 48
Nelson Abbott
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01/02/2013 02:00 PM
Hide Details
From: Nelson Abbott <nelson@abbottlawfirm.com>

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2 Attachments

image001.jpg Nelson Abbott.vcf

I suggest that FRCP 48 be amended so that in diversity cases the number of jurors and the percentage that must vote in favor of a decision matches state law.

The reason I think this is justified is that the number one reason diversity cases are removed to Federal Court in Utah is that in Federal Court a jury must be unanimous while in State Court the jury must have (75% in favor of the verdict. This has created a perception amongst the defense bar that verdicts are harder to get in Federal Court than in State Court. Those that see a hung jury as equivalent to a no-cause remove their cases to Federal Court. It is widely believed that unanimous verdicts also result in smaller damage awards. The reason for this is that any single holdout gets veto power in Federal Court whereas in States that require less than a unanimous verdict, any holdout on damages must convince others that he or she is right. If the holdout fails to convince others, the holdout has no power to prevent the verdict.

The amendment I suggest is as follows:

48(b) VERDICT.

48(b)(1) In cases in which jurisdiction is based solely upon diversity of citizenship and unless the parties stipulate otherwise, the verdict shall be determined by the number of jurors that would have been required under the State law where the case would have been tried absent diversity jurisdiction;

48(b)(2) In all other cases, unless the parties stipulate otherwise, the verdict must be unanimous and must be returned by a jury of at least 6 members.

This existing rule is unfair and is not justified.

Let me give an example. Imagine a case where both litigants are from the State of Utah and the case does not involve any federal question. That case will be tried in State court and a party must receive 6 votes out of 8 jurors to receive a verdict. In the exact same case, in which diversity jurisdiction exists, the case would be tried to a 12 person jury and any verdict must be unanimous. This makes it much more difficult for both the defense and for the plaintiff to get a verdict. The other thing is that it makes compromise verdicts much more likely. If one juror holds out on liability, that juror may be successful in getting other jurors to compromise on damages to win the holdout's vote on liability. It also makes it more likely that a biased or unreasonable juror can influence a verdict, even though that juror is not able to convince any other jurors to follow the holdout.

The result is that the odds of winning the case and the amount of damages awarded are significantly different in diversity cases compared to non-diversity cases. That is not fair and is not consistent with the reason Federal Courts grant diversity jurisdiction in the first place, ie. creating a fair and level playing field for out of State defendants. The existing rule actually gives out of State defendants an advantage over in State defendants, at least in those States that don't require a unanimous verdict.

Put another way, the purpose of diversity jurisdiction is to take away the home field advantage for out of State defendants. Under diversity jurisdiction, the issue is tried under State law. The idea is to create a level playing field and get the same result as if no diversity existed. The result of Rule 48 is to change the game significantly. In practice, in Utah at least, it is the defense who almost always pushes for Federal jurisdiction through removal. They do this for the sole reason that they believe the Federal Rules are more favorable to the defendant than State rules. Specifically, Rule 48 favors the defense because it requires a unanimous verdict. This results in more hung juries and in smaller damage awards. I believe this is true. Thus, the effect of diversity jurisdiction is to change the playing field in favor of the defendant.

This is not right. To fix it, Rule 48 should be amended.

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Docket 14-CV-E: Rule 56: Summary-Judgment Standards

This suggestion was presented by Professor Suja A. Thomas in the form of a short article in 97 Judicature 222 (March/April 2014). The article suggests serious shortcomings in the established standard for granting summary judgment. It closes by suggesting that the standard "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 Rule 56 standard is identified in the words most often used: whether a "reasonable jury" could find for the nonmovant. Several flaws in this standard are asserted. First, judges often employ variations on the central rhetoric, variations that may subtly alter the standard. A judge may ask, for example, what a reasonable "juror" could find, impliedly overlooking the proposition that what may not be reasonable for a single person thinking alone may in fact prove reasonable given the benefit of deliberating with the remaining members of the jury. Beyond that, a judge is only one person, captured by one person's life experiences and perspectives. A judge cannot fully imagine the things that others will find reasonable. The difficulty of the chore is shown by the fact that different judges may set different limits on what is reasonable in examining the same case: The Supreme Court itself may divide by vote of five Justices concluding that no reasonable jury could find for the nonmovant, while four Justices conclude that a reasonable jury could so find. And when lower-court judges are added to the mix, a majority of the judges who acted in the case may have disagreed with the Supreme Court majority. All of this suggests that judges often grant summary judgment on the basis of their own views of the sufficiency of the evidence, not by determining what a reasonable jury might do. Worse, "a court actually cannot determine what a reasonable jury could find." Even if a judge attempts the analysis — and ordinarily judges do not — "it would be speculative because courts are incapable of making such a determination." "[T]he standard appears to be a legal fiction based on the false factual premise that a court can actually apply the standard."

The question is whether the Committee should reexamine the standard for granting summary judgment, either now or in the near future. Several considerations prompt caution.

The procedures for presenting and deciding motions for summary judgment were considered at length in a project that spanned several years and led to the revised Rule 56 that took effect on December 1, 2010. The project was guided throughout by a determination to take the summary-judgment standard as it is, without any attempt to reconsider. That determination carried through to rejection of any attempt to articulate the allocation of moving burdens, apart from the implicit reflections in Rule 56(c). It influenced the decision to abandon the part of the 2007 version that said the court "should" grant summary judgment when there is

no genuine dispute as to any material fact, restoring the otherwise prohibited "shall." That Committee was firmly convinced it would be unwise to attempt to revisit the summary-judgment standard.

Reluctance to revisit the standard was rooted in part in the direct tie to the standard for granting judgment as a matter of law. From the beginning in 1938, Rule 56 has provided for summary judgment when "the moving party is entitled to judgment as a matter of law." It was only in 1991 that Rule 50 was amended to drop the traditional "directed verdict" terminology; the Committee explained that "[t]he term 'judgment as a matter of law' is an almost equally familiar term and appears in the text of Rule 56; its use in Rule 50 calls attention to the relationship between the two rules." The 1991 amendments also added, for the first time, a reference to the standard for judgment as a matter of law: "a reasonable jury would not have a legally sufficient evidentiary basis to find" for the nonmovant. The Committee Note observed that these words articulate the standard, but "effect[] no change in the existing standard. That existing standard was not expressed in the former rule, but was articulated in long-standing case law." Further: "Because this standard is also used as a reference point for entry of summary judgment under 56(a), it serves to link the two related provisions."

The summary-judgment standard, in short, is the directed-verdict standard. The Supreme Court has long since ruled that the Seventh Amendment permits judgment as a matter of law. It would be difficult to assert confidently that the current standard goes to the very limit of what the Seventh Amendment permits judges to do, but any attempt to expand the present degree of judicial control would be met by vigorous resistance framed in constitutional terms. The "reasonable jury" articulation, indeed, implies the outer limits of judicial power: who could defend a judgment directed by a judge when a reasonable jury could decide otherwise? The standard might be raised to a level that allows judgment as a matter of law only when the evidence falls to some degree — however articulated — below the point at which the Seventh Amendment commands submission to the jury. "Although a reasonable jury could not do this, a judge must accept it because it is not" What? Grossly, flagrantly, outrageously, laughably unreasonable? The Committee did not want to attempt to frame the standard in rule text. There is good reason to believe they were right.

A more radical response would follow the arguments against the present standard to their apparent logical end: judgment as a matter of law is improper.[1] If it is impossible for a judge to say

[1] Toward the end of her article, Professor Thomas comes close to suggesting as much in the context of judgment as a matter of law notwithstanding the verdict. The reasonable jury standard fails to account for the jury-selection process and for

what is reasonable — indeed, if judges may disagree among themselves in a particular case — what is left but to leave it to the jury?

The standard response is that judgment as a matter of law does not reflect the judge's or judges' determination of what is reasonable. Even at and after trial, it involves an appraisal of the record as it appears on paper. No judge is to evaluate the credibility of the witnesses, apart from the testimony of witnesses that must be believed or must not be believed. Judges are not to draw fact inferences, but instead are to imagine the outermost limits of inference that reason might allow. Judges do not apply legal standards to the congeries of facts within the frontiers of credibility and inference. They only determine what could be made of the standards. And these limits on judicial authority are variable. One familiar illustration invokes the standard of persuasion: a higher degree of probative value is required to enable a reasonable jury to find a proposition by clear and convincing evidence than would be required if the same proposition must be proved by a mere preponderance of the evidence. The 1991 Committee Note put it this way: judgment as a matter of law "is a performance of the court's duty to assure enforcement of the controlling law and is not an intrusion on any responsibility for factual determinations conferred on the jury by the Seventh Amendment or any other provision of federal law." Whether or not it might be useful to revisit the standard, it may not be useful to consider abandonment of judgment as a matter of law.

The summary-judgment standard, however, could be open for study even if it be accepted that the Committee should not take on the task of exploring the legitimacy of judgment as a matter of law, or even attempt to find new ways of guiding exercise of the power to enter judgment as a matter of law. The directed-verdict standard establishes a floor. Summary judgment cannot be granted on a showing that would require submission to the jury at trial. But there are reasonable arguments that at least in some circumstances summary judgment should not be granted even if judgment as a matter of law (or a new trial) would be required if the same showing were made at trial.

The broadest suggestion is that the only way to know whether a trial would show sufficient evidence to support submission to the jury is to have a trial. Not even the safeguards of sweeping discovery and the (sometimes criticized) integration of discovery with the timing of summary judgment in Rule 56(d) guarantee what

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jury instructions. If the parties participated in jury selection, with motives to maximize their chances of winning, it should be presumed that the jury was reasonable. And so we presume that juries follow their instructions; again, it should be presumed that the actual verdict is reasonable.

the trial record would be. It is difficult to know where to stop this line of argument before concluding that summary judgment is always improper. It is difficult to articulate the point at which the possibility of a reasonably supported verdict for the nonmovant is outweighed by the advantages for court and adversary in avoiding further preparation and trial.

A narrower suggestion, reflected in the retreat from "shall" to "should" and back again, is that the court should have discretion to deny summary judgment even when the record fails to show a genuine dispute as to any material fact. Although there is no discretion to enter judgment on a jury verdict that lacks sufficient support in the record, the imperfect connection between summary-judgment record and trial record, as well as other considerations, may support this discretion. The Committee considered the arguments in recommending the 2007 amendments, and reconsidered them in recommending the 2010 amendments. The question was deliberately left open. The very fact that it has been explicitly left open may argue in favor of awaiting further consideration in the courts.

All of that conceptual discussion fails to address the troubling core of Professor Thomas's article. Who can say whether trial judges, or for that matter appellate judges, have fully internalized the duty to go beyond their own personal concepts of what is reasonable to imagine the outer permissible reach of jury reasoning? Or, perhaps more realistically, who can provide compelling evidence that judges do not, more often than we would like, fail in discharging this duty?

This is the point at which the call for study by this Committee, with assistance from the Federal Judicial Center, enters. It would be extraordinarily difficult, quite possibly impossible, to design a study that would provide persuasive evidence of the frequency of "right" and "wrong" grants of summary judgment.[2] Tallying motions, grants, and denials would not do it. Nor would it be done by breaking the tallies down by substantive categories of cases, or courts, or judges, or periods of time. Actual and complete review of the summary-judgment records in myriad cases would be required, and even then there would be questions about the thoroughness of the review, the qualifications of the reviewers, and the difference between a research exercise and actual disposition of a case. Joe Cecil, the regular researcher for Federal Judicial Center projects on Rule 56, reports that, after frequent exchanges with Professor Thomas over the years, he has not been able to design a research project that would do the

[2] To the extent that there is discretion to deny, an evaluation of denials would be even more difficult. But it could be the same as for grants if substantive law in a particular area — most likely official immunity — defeats discretion to deny.

job.

Suppose, finally, that a persuasive research model could be created and implemented. It may well be that, because of the concerns sketched above, the purpose should not be to support amendments of Rule 56. The purpose might instead be to support Federal Judicial Center programs designed to renew judges' understandings of the complexity and variability of summary-judgment standards. Rule 56 was adopted in the belief that it is possible for judges to understand and administer a "reasonable jury" standard. Rather than embark on research that challenges that belief, it may be better to seek ways to improve implementation of the belief in actual practice.

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June 23, 2014

Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, D.C. 20544

Dear Committee:

I have enclosed an article that concludes with a suggestion that the Rules Committee consider studying the summary judgment standard with help from the FJC. The article explores the propriety of the reasonable jury standard underlying summary judgment, argues the standard has become a proxy for a judge's own view of the evidence, and proposes renewed study of the standard.

I already sent copies of the article to the civil rules advisory committee members. Upon Judge Koeltl's suggestion, I am sending this letter to the Administrative Office as an official request for a suggested Civil Rules agenda item.

Thank you for considering this.

Sincerely,

Suja A. Thomas
Professor

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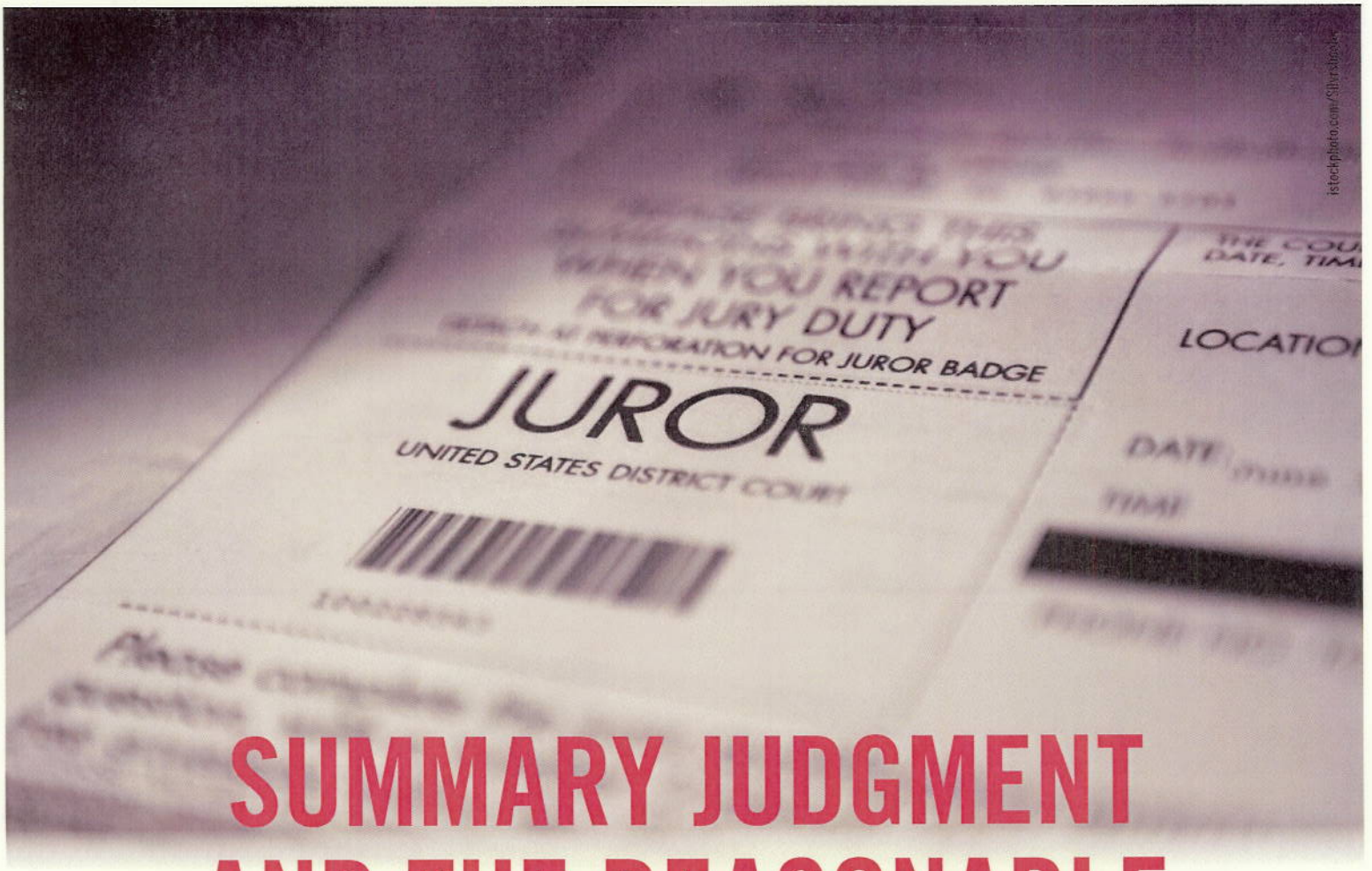

SUMMARY JUDGMENT AND THE REASONABLE JURY STANDARD

A Proxy for a Judge's Own View of the Sufficiency of the Evidence?

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Under motions for summary judgment, directed verdict, and judgment as a matter of law, judges employ the reasonable jury standard, deciding whether a reasonable jury could find for the nonmoving party. This article explores the propriety of the reasonable jury standard, argues the standard has become a proxy for a judge's own view of the evidence, and proposes renewed study of the standard.

by **SUJA A. THOMAS**

Judges use the reasonable jury standard to decide motions for summary judgment, the directed verdict, and judgment as a matter of law.[1] Under this standard, a judge dismisses a case if he decides that no reasonable jury could find for the nonmoving party. The reasonable jury standard is thus extremely important to civil litigation because litigants' cases rest on this standard. A prominent example of a case using this standard is the Supreme Court's decision in *Scott v. Harris*. There, using the reasonable jury standard, the Supreme Court dismissed a case in

Excerpted in large part from *The Fallacy of Dispositive Procedure*, 50 B.C. L. REV. 759 (2009)

1. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

which the plaintiff alleged the police had used excessive force during a car chase. Upon viewing a videotape of the car chase, the Court, eight to one, decided that no reasonable jury could find for the plaintiff. Previously, however, four lower court judges had propounded a different view of the evidence and decided that a reasonable jury could find for the plaintiff. The *Scott* case and the possibility that people can think differently about evidence have been the subject of important commentary. For example, Professor Dan Kahan and his co-authors surveyed approximately 1,350 people to study their views of the police's actions in *Scott*.[2] Based on their backgrounds, people differed on whether they thought the police acted properly. The conflicting views of judges on what a reasonable jury could find in *Scott*, as well as the different perspectives of survey participants, illustrate potential problems with the use of the reasonable jury standard to dismiss cases.

Here, I explore these problems and the propriety of the reasonable jury standard. I first describe the origins of the reasonable jury standard and then set forth the Supreme Court's interpretation of that standard. Next, I describe the different opinions of the judges in *Scott* and evaluate the use of the reasonable jury standard in that case. I go on to argue that the reasonable jury standard has become a proxy for a judge's own view of the evidence. Next, I describe Professor Kahan's proposal on how judges can account for differences in people's opinions of evidence. While the proposal is well crafted, I show that the reasonable jury standard is a questionable manner to decide summary judgments and other dispositive motions because of the impossibility of the standard. I also identify other difficulties with the reasonable jury standard. Finally, I propose that the standard for summary judgment and other dispositive motions be subject to renewed study.

Origins of the Reasonable Jury Standard

The Supreme Court set forth the reasonable jury standard in 1986, in *Anderson v. Liberty Lobby, Inc.*,[3] one of the famous trilogy of cases regarding summary judgment. The Court stated that "summary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party."[4] The Court emphasized that the decision regarding summary judgment should not rest on the judge's own view of the evidence; "at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial...[T]he judge must ask himself not whether he thinks the evidence unmistakedly [*sic*] favors one side or the other but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented."[5] The Court pointed out that this reasonable jury standard for summary judgment is the same for judgment as a matter of law under Rule 50.[6] Citing *Jackson v. Virginia*, the Court also compared the reasonable jury standard to the similar standard for acquittal in criminal cases where the inquiry involves a court's determination of "whether a reasonable jury could find guilt beyond a reasonable doubt."[7] In dissent, Justice Brennan questioned the use of the reasonable jury standard. He emphasized that it was not apparent how a judge could determine "what a 'fair-minded' jury could 'reasonably' decide."[8] Similar to Justice Brennan in *Anderson*, the concurrence in *Jackson v. Virginia* also pointed out the difficulty of applying the reasonable jury standard.[9]

The Supreme Court's Interpretation of the Reasonable Jury Standard

The Supreme Court has made different, arguably inconsistent statements about the standard that underlies dispositive motions. On the one hand, the Court has stated that judges should decide whether a reasonable jury could find for the nonmoving party, and it has stated that what a reasonable jury could find is different than what a reasonable *juror* could find.[10] In deciding how an instruction regarding a death sentence was perceived by jurors, the Court stated that an "inquiry dependent on how a single hypothetical 'reasonable' juror could or might have interpreted the instruction" was not appropriate.[11] The Court explained that "[j]urors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might. Differences among them in interpretation of instructions may be thrashed out in the deliberative process, with commonsense understanding of the instructions in the light of all that has taken place at the trial likely to prevail over technical hairsplitting."[12]

On the other hand, although the Court has recognized differences between a finding by a jury and individual jurors, it continues to interchange phrases that can have different meanings including reason-

2. Dan M. Kahan et al., *Whose Eyes Are You Going to Believe?* Scott v. Harris *and the Perils of Cognitive Illiberalism, Video Evidence and Summary Judgment*, 122 HARV. L. REV. 837 (2009); *see also* Dan M. Kahan et al., *"They Saw a Protest": Cognitive Illiberalism and the Speech-Conduct Distinction*, 64 STAN. L. REV. 851 (2012) (additional study of cognitive illiberalism). For a criticism of the Kahan videotape study, see Christopher Slobogin, *The Perils of the Fight Against Cognitive Illiberalism*, 122 HARV. L. REV. 1 (2009).

3. 477 U.S. at 248.

4. *Id.*

5. *Id.* at 249, 252.

6. *Anderson*, 477 U.S. at 250–251; *see also Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000) (stating that the summary judgment standard and the standard for judgment as a matter of law are the "same"). Other cases decided prior to this time also mentioned the term "reasonable jury." *See, e.g., Moore v. Chesapeake & Ohio Ry. Co.*, 340 U.S. 573, 579 (1951) (Black, J., dissenting).

7. 477 U.S. at 252 (citing *Jackson v. Virginia*, 443 U.S. 307, 318–319 (1979)).

8. *Id.* at 265 (Brennan, J., dissenting).

9. *See* 443 U.S. at 331, 334 note 8, 336 (based partly on the fact that it was unclear how judges were to determine whether the factfinder or factfinders had been rational). In *Jackson*, Justice Stevens also stated that the new rule appeared to derive from a dissent to the denial of certiorari in *Freeman v. Zahradnick*. *Id.* at 334, note 8 (citing *Freeman v. Zahradnick*, 429 U.S. 1111, 1111–1116 (1977) (Stewart, J., dissenting)).

10. *See Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986).

11. *Boyde v. California*, 494 U.S. 370, 380 (1990).

12. *See id.* at 380-381.

able jury, reasonable juror, reasonable mind, rational factfinder, and other terms.[13]

An Illustration of the Reasonable Jury Standard in *Scott v. Harris*

An examination of the recent prominent case of *Scott v. Harris*[14] where the Supreme Court uses the reasonable jury standard yields more information about the potential problems with the standard. There, the plaintiff driver, Victor Harris, alleged that the police used excessive force against him while pursuing him, which resulted in an unreasonable seizure under the Fourth Amendment. The defendant, deputy Timothy Scott, responded with a motion for summary judgment on the basis of qualified immunity. Based upon its viewing of a videotape of the police chase, the Supreme Court ultimately concluded that no reasonable jury could find for the plaintiff and uniquely invited readers to view the tape. (As a side note, the Supreme Court will soon decide *Plumhoff v. Rickard*, which concerned a summary judgment decision that involved some facts similar to those in *Scott*, including a fleeing motorist, a videotape, and a car chase by police officers.[15])

The facts of *Scott* included that the plaintiff was traveling at 73 miles per hour in a 55 miles per hour zone. When the police pursued the plaintiff, he did not stop his car, and the chase that followed involved numerous police officers, including the defendant. During the chase, the plaintiff left the road and entered a shopping center parking lot, where he continued to evade the police and hit the defendant's car. Thereafter, back on the road, in an attempt to stop the plaintiff, the defendant rammed the plaintiff's car from behind, and the plaintiff was rendered a quadriplegic after his car went down an embankment.

The U.S. District Court for the Northern District of Georgia denied the defendant's motion for summary judgment. Using the plaintiff's version of the facts, the United States Court of Appeals for the Eleventh Circuit affirmed the denial. It decided that the defendant's actions could constitute deadly force, that the use of such force would violate the plaintiff's Fourth Amendment right to be free from excessive force during a seizure, and as a result, a reasonable jury could find that the defendant violated the plaintiff's Fourth Amendment rights. Further, the Eleventh Circuit held that the defendant did not possess qualified immunity because he possessed sufficient notice that his actions could be unlawful.

Writing for the majority, Justice Scalia reversed the Eleventh Circuit's decision and ordered summary judgment. The Court decided that no reasonable jury could find for the plaintiff, and as a result there were no genuine issues of material fact for a jury to decide. Justice Scalia stated that while the plaintiff and the defendant had very different views of the facts, the plaintiff's version should be disregarded. Specifically, he stated that "[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment."[16] Justice Scalia described what he and his colleagues saw when they viewed the videotape and concluded that the police videotape demonstrated that no reasonable jury could believe the plaintiff's version of the facts.[17] Justice Scalia aimed to balance the Fourth Amendment interests of the plaintiff and the government's interest in protecting the public. While the defendant's actions posed a high likelihood of serious injury or death to the plaintiff, there was also significant likelihood of injury to the public or the police from the plaintiff's actions. In his decision, Justice Scalia took into account the culpability of those involved, namely the high culpability of the plaintiff for the situation that he created.[18] Justice Scalia also stated that other alternative police actions, including ceasing the pursuit, could have resulted in other undesirable outcomes, including injury to other drivers. Justice Scalia concluded that "[t]he car chase that respondent initiated in this case posed a substantial and immediate risk of serious physical injury to others; no reasonable jury could conclude otherwise. Scott's attempt to terminate the chase by forcing respondent off the road was reasonable, and Scott is entitled to summary judgment."[19] Justices Breyer and Ginsburg concurred that, in light of the videotape, no reasonable jury could find for the plaintiff.[20]

In his dissent, Justice Stevens argued that a reasonable jury *could* find for the plaintiff.[21] Justice Stevens discussed other facts in the record that showed this, including that the plaintiff had not run any red lights and that the roads had been cleared. He emphasized that the District Court and Court of Appeals judges who considered the case had decided that a reasonable jury could find for the plaintiff. He stated that "eight of the jurors on this Court reach a verdict that differs from the views of the judges on both the District Court and the Court of Appeals who are surely more familiar with the hazards of driving on Georgia roads than we are."[22]

13. *See, e.g., Cuellar v. United States*, 128 S. Ct. 1994, 2006 (2008) ("reasonable jury"); *United States v. Williams*, 128 S. Ct. 1830, 1846 (2008) ("reasonable juror"); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) ("rational trier of fact"); *see Anderson*, 477 U.S. at 249-252.

14. 550 U.S. 372 (2007).

15. *Estate of Allen v. City of West Memphis*, 509 Fed. Appx. 388 (6th Cir. 2012), *cert. granted*, 134 S. Ct. 635 (Nov. 15, 2013) (No. 12-1117).

16. *See id.* at 380.

17. *See id.* at 381-386.

18. "It was respondent, after all, who intentionally placed himself and the public in danger by unlawfully engaging in the reckless, high-speed flight that ultimately produced the choice between two evils that Scott confronted. Multiple police cars, with blue lights flashing and sirens blaring, had been chasing respondent for nearly 10 miles, but he ignored their warning to stop. By contrast, those who might have been harmed had Scott not taken the action he did were entirely innocent." *Id.* at 384.

19. *See id.* at 386.

20. *Id.* at 386-387 (Ginsburg, J., concurring); *id.* at 387-389 (Bryan, J., concurring).

21. *See id.* at 389-397 (Stevens, J., dissenting).

22. *Id.* at 389.

Evaluating the Use of the Reasonable Jury Standard in *Scott v. Harris*

While the Supreme Court stated that no reasonable jury could find for the plaintiff in *Scott*, it is unclear how the Court came to this conclusion. Some of the language in the opinion suggests that the justices used their own opinions of the evidence to come to this decision. As an example, Justice Scalia repeatedly referred to what he and the other justices for whom he wrote saw in the videotape to reach the conclusion that no reasonable jury could find for the plaintiff. He stated, "for example we see respondent's vehicle racing down narrow, two-lane roads....We see it swerve around more than a dozen other cars....We see it run multiple red lights....Far from being the cautious and controlled driver the lower court depicts, what we see on the video more closely resembles a Hollywood style car chase of the most frightening sort...."[23] Furthermore, Justice Scalia disagreed with what he described as Justice Stevens's "hypothesi[s]" regarding why the other motorists acted as they did in pulling to the side of the road.[24] Justice Scalia also disagreed with Justice Stevens on how an ambulance drives in response to an emergency, describing what he stated was his and the other justices' "experience" with what ambulances do.[25] He also analyzed the factual conclusions of the Eleventh Circuit.[26] As another example of the use of a justice's own opinion of the evidence, in the oral arguments for *Scott*, Justice Alito stated that after viewing the videotape "[i]t seemed to [him] that [Harris] created a tremendous risk to drivers on that road."[27] Nowhere in the opinion or otherwise does the Court refer to how a jury itself might analyze the evidence and deliberate about the matter. Instead, it happens that the only manner by which the justices determined whether a reasonable jury could find for the plaintiff was to decide what the justices themselves concluded regarding the sufficiency of the evidence. In his dissent, Justice Stevens emphasized that the justices decided whether a reasonable jury could find for the plaintiff based on their own views of the sufficiency of the evidence.[28]

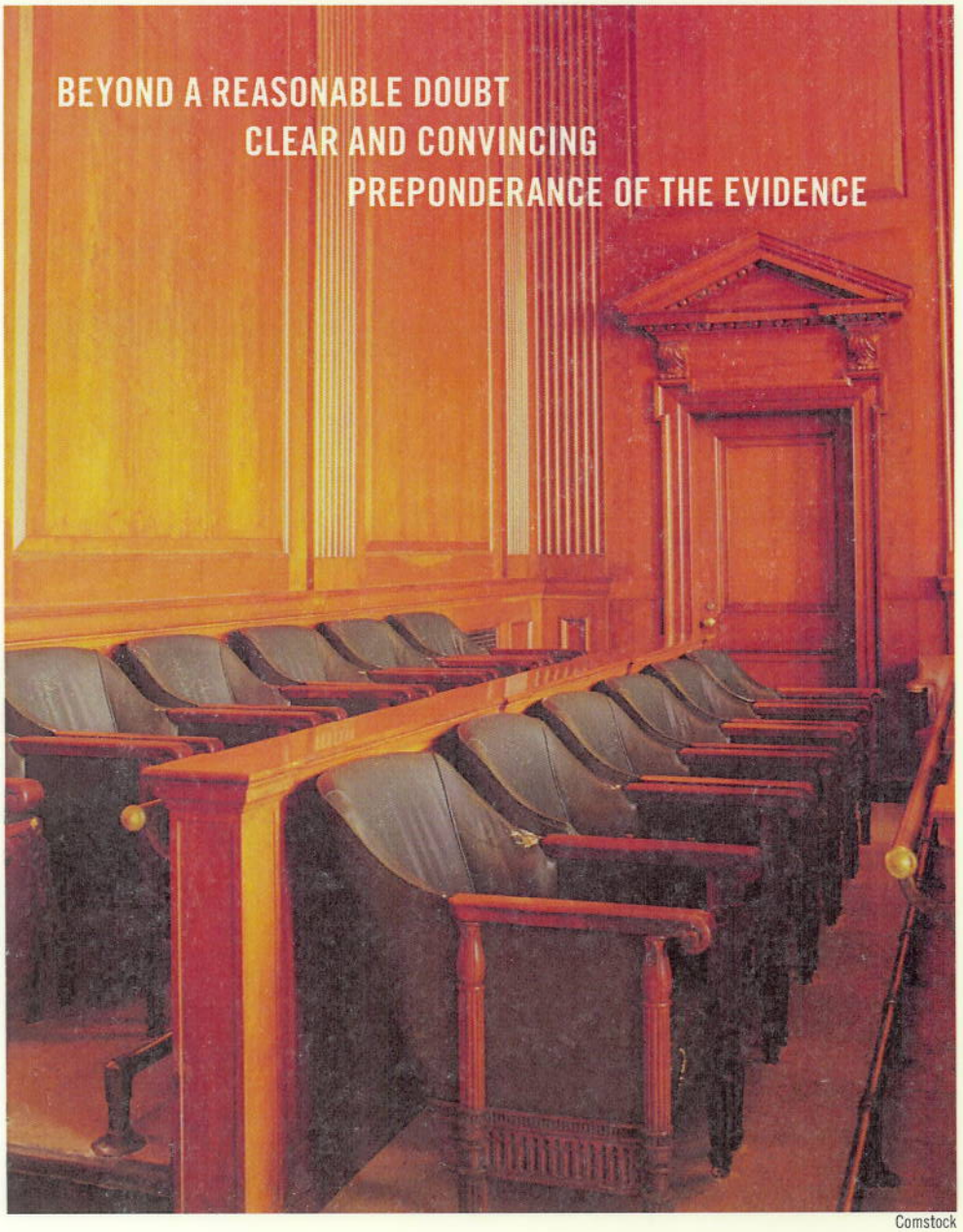
> JUDGES MAY FALL PREY TO THEIR OWN OPINIONS OF EVIDENCE UPON MOTIONS FOR SUMMARY JUDGMENT.

The Reasonable Jury Standard: A Proxy for a Judge's Own View of the Evidence

There may be good reason why judges explain their decisions on motions for summary judgment and other dispositive motions based on their views of the facts and not otherwise on what a reasonable jury could find. As mentioned above, the standard for dispositive motions has been loosely defined with different words that can have different meaning; the Supreme Court has interchangeably used "reasonable juror," "reasonable mind," "rational juror," and "rational factfinder," along with "reasonable jury."[29] What a reasonable jury would find, for example, is not necessarily the same as what a reasonable juror would find because there is at least some possible difference between group decision making versus individual decision making.[30] The ease with which the Supreme Court interchangeably uses all of these terms suggests these labels have no specific meaning in the decisions and that they are all labels for the judges' own views of the sufficiency of the evidence in a case.

Other evidence that judges decide whether a reasonable jury could find for the nonmoving party based on their own views of the facts is actual disagreement among judges on whether a reasonable jury could find for the nonmoving party. For example, in *Matsushita Electronic Industrial Co. v. Zenith Radio Corp.*,[31] another one of the famous trilogy of summary judgment cases, five justices of the Supreme Court decided that, in the absence of other evidence, summary judgment should be entered against the plaintiff (American television manufacturers), which had alleged antitrust violations against Japanese television manufacturers. They concluded that no rational trier of fact could find for the plaintiffs. Four justices of the Supreme Court disagreed, stating summary judgment should not be entered because a rational trier of fact could find for the plaintiffs. As another example, in *Harbor Tug & Barge Co. v. Papai*[32] six justices concluded that no reasonable jury could find that the plaintiff was a seaman under the Jones Act, and three justices concluded the opposite. Interestingly, the Court of Appeals for the Ninth Circuit had also decided that a reasonable jury could find that the plaintiff was a seaman, while the district court had ordered summary judgment.[33] Finally, in *Scott*, four lower court judges and Justice Stevens found that a reasonable jury could find for the plaintiff, while eight justices found that no

23. *Id.* at 379-380 (majority).
24. *Id.* at 379, note 6.
25. *Id.*
26. *Id.* at 380, note 7.
27. Transcript of Oral Argument at 27, *Scott*, 550 U.S. 372 (No. 05-1631).
28. *See* 550 U.S. at 389-397 (Stevens, J., dissenting).
29. *See supra* text accompanying note 13.
30. *See supra* text accompanying notes 11-12.
31. 475 U.S. 574 (1986).
32. 520 U.S. 548 (1997).
33. *See Papai v. Harbor Tug & Barge Co.*, 67 F.3d 203, 205-206 (9th Cir. 1995), *rev'd*, 520 U.S. 548 (1997).



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reasonable jury could find for the plaintiff.[34] Again, in all of these decisions judges do not explain how a reasonable jury could not find for the nonmoving party, except to analyze what the judges themselves think the evidence shows. That these judges disagree about whether a reasonable jury could find for the plaintiff is some indication that these judges have different views of the facts, views that form the basis of their different decisions.[35]

The Kahan Proposal

After the Supreme Court decided the *Scott v. Harris* case, in an important study published in the *Harvard Law Review*, Professor Dan Kahan and his co-authors studied how different people can respond to evidence. They sought to identify how different segments of the population would view the actions of the plaintiff and the police in the *Scott* videotape. The police had generated four videotapes.[36] Kahan showed a diverse group of over 1,000 people a videotape that was derived from two of the videotapes that he contended contained the most influential material.[37] Although a large majority of the subjects reacted to the video in a similar manner to the Court, with 75 percent agreeing that deadly force was warranted, certain subgroups had significantly different reactions to the video.[38] African American, Democratic, liberal, egalitarian, communitarian, lower income, more educated, single, and older subjects generally appeared more pro-plaintiff than their respective counter groups.[39] Kahan argued that these results conflicted with the Court's conclusion that reasonable people would find agreement regarding the risk involved in the chase or the role of the police in increasing or decreasing the risk.[40] Because the study showed that different segments of people could disagree, Kahan argued that the Court in effect referred to such people as unreasonable, and Kahan contended they were not.[41] The Court's view demonstrated a bias that Kahan referred to as "cognitive illiberalism."[42]

Kahan proposed an alternative method for judges to decide summary judgment motions.[43] Kahan stated that when a judge believes that no reasonable jury could find for the nonmovant, the judge should imagine what the particular jurors would look like who *would* find for the nonmovant. If the judge cannot identify the particular group to which these jurors belong, the judge should order summary judgment. In other words, if jurors who would perceive a particular situation differently "are mere outliers—if they don't share experiences and an identity that endow them with a distinctive view of reality, if the factual perceptions in question don't arise from their defining group commit-

34. *See Scott*, 550 U.S. at 374-386.

35. Recently, in *Ashcroft v. Iqbal*, the Court actually embraced a similar standard when it decided that a judge can use judicial experience and common sense when it decides whether a claim is plausible on a motion to dismiss. *See Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

36. 550 U.S. at 395 note 7 (Stevens, J., dissenting).

37. Kahan et al., *Whose Eyes, supra* note 2, at 855–856.

38. Kahan et al., *Whose Eyes, supra* note 2, at 864–870.

39. Kahan et al., *Whose Eyes, supra* note 2, at 868–869.

40. Kahan et al., *Whose Eyes, supra* note 2, at 881–902.

41. Kahan et al., *Whose Eyes, supra* note 2, at 881.

42. Kahan et al., *Whose Eyes, supra* note 2, at 894-902.

43. Kahan et al., *Whose Eyes, supra* note 2, at 894-902.

ments—summary judgment will not convey the message of exclusion that delegitimizes the law in the eyes of the identifiable subcommunities."[44] On the other hand, if the judge can identify a particular subcommunity to which the jurors belong, the judge should "think hard" before deciding a case summarily.[45] If "privileging her own view of the facts risks conveying a denigrating and exclusionary message to members of such subcommunities," then the judge should not enter summary judgment on the basis that no reasonable jury could find this way.[46]

The Impossibility of the Reasonable Jury Standard

Kahan himself assumed that judges use their own opinion of the evidence when they decide summary judgment.[47] He also acknowledged that the results from his study did not include jurors' actual engagement in deliberations but rather only an individual's view of the videotape.[48] And the caselaw and commentary suggest that a court actually cannot determine what a reasonable jury could find. First, under the current standard, judges are not supposed to decide what they think about the sufficiency of the evidence. But, as illustrated by *Scott v. Harris*, that is the analysis that appears to occur. Second, under the current standard, judges must decide whether a reasonable jury could find for the nonmoving party, but judges do not actually engage in an analysis of what such a jury could find. Third, if courts attempted such an analysis, it would be speculative because courts are incapable of making such a determination. Although under the reasonable jury standard, courts could attempt to consider all viewpoints constituted in a hypothetical jury, this standard assumes that judges can perform this analysis. However, there is no evidence that judges can determine what other people, including those who do not have the same characteristics as they have, would decide. In *How Judges Think*, Judge Posner states that "[p]eople see (literally and figuratively) things differently, and the way in which they see things changes in response to the environment. That is true of judges. As Cardozo said, 'We may try to see things as objectively as we please. Nonetheless, we can never see them with any eyes except our own.'"[49] Thus, despite the hypothetical appeal of the reasonable jury standard, as currently used or as reformulated by Professor Kahan, the standard appears to be a legal fiction based on the false factual premise that a court can actually apply the standard.

The Practical Difficulties with the Reasonable Jury Standard

In addition to the false factual premise behind the reasonable jury standard, there are other potential problems or inconsistencies that underlie the standard. First, under the current standard, an appellate court can dismiss a case at summary judgment even if some judges (appellate or lower court) decide that a reasonable jury could find for the nonmoving party. As Justice Stevens emphasized in his dissent in *Scott*, such a disagreement indicates that a reasonable jury *could* find for the nonmoving party in such cases. He stated that "[i]f two groups of judges can disagree so vehemently about the nature of the pursuit and the circumstances surrounding that pursuit, it seems eminently likely that a reasonable juror could disagree with this Court's characterization of events."[50]

In cases where a jury has already found for the nonmoving party and a motion for judgment as a matter of law is brought, a problem with the reasonable jury standard is that it does not assess the jury selection process. If both parties participated in the selection of the jury and the parties do not allege misbehavior on the part of the jurors, the decision of the jury arguably should be considered presumptively reasonable. Both parties chose jurors attempting to maximize their chances of winning. Moreover, jurors were excluded if biased.

Finally, while jury instructions can be challenged otherwise, where a judge employs the reasonable jury standard upon a motion for judgment as a matter of law after a jury renders a verdict, the standard itself does not take into account that the jury followed the instructions. If there are no errors with the instructions after the jury has been properly selected, again arguably the jury should be considered presumptively reasonable.

A Suggestion for Renewed Study

As described here, judges may fall prey to their own opinions of evidence upon motions for summary judgment, directed verdict, and judgment as a matter of law. Moreover, judges may not be able to determine what a reasonable jury could find. As a result, the reasonable jury standard underlying these motions is in need of study. Given that the Supreme Court established this standard in conjunction with the Seventh Amendment right to a civil jury trial—in other words, not to dismiss a case that a reasonable jury could find in favor of—it appears that this important standard by which judges dismiss cases 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. ★

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44. Kahan et al., *Whose Eyes, supra* note 2, at 886.
45. Kahan et al., *Whose Eyes, supra* note 2, at 898.
46. Kahan et al., *Whose Eyes, supra* note 2, at 898-899.
47. Kahan et al., *Whose Eyes, supra* note 2, at 894-902.
48. Kahan et al., *Whose Eyes, supra* note 2, at 849.
49. RICHARD A. POSNER, HOW JUDGES THINK 68 (2008) (quoting BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 13 (1921)).
50. *See Scott*, 550 U.S. at 397 (Stevens, J., dissenting). Previously, in his 2004 dissent in *Brosseau v. Haugen*, Justice Stevens similarly stated that "reasonable jurors" could disagree regarding qualified immunity, and he also stated similarly that his "conclusion [was] strongly reinforced by the differing opinions expressed by the Circuit Judges who ha[d] reviewed the record." 543 U.S. 194, 207 (2004) (Stevens, J., dissenting).

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Rule 68: Dockets 13-CV-B, C, D, and More

This memorandum frames a broad question that has persisted on the agenda for many years: Has the time come to undertake a thorough study of the offer-of-judgment provisions of Rule 68? The study would embrace the multitude of suggestions for amendment and the astonishingly complex questions they raise. But it also would ask whether the best choice is to abrogate Rule 68. Any proposals that might emerge would be highly controversial. A sanguine view would be that the controversy would emerge from the belief that Rule 68 works well now. Less comforting views would emphasize the belief that Rule 68 is largely innocuous because it is seldom used outside cases where an offer can cut off a right to statutory attorney fees, and is not routinely used even in those cases; the compelling need to reconsider the rulings in two Supreme Court cases;[1] and the great difficulties of addressing the questions raised by the most common proposals for reform — extending the rule to offers by claimants and increasing the incentives to accept an offer by augmenting the adverse consequences for a party who rejects an offer and then fails to win a judgment more favorable than the offer.

The persistence of "mailbox" suggestions to revise Rule 68 is reflected in the number that have been carried forward on the agenda without further action. They include at least 13-CV-B, 13-CV-C, 13-CV-D, 10-CV-D, 06-CV-D, 04-CV-H, 03-CV-B, and 02-CV-D. The Committee has considered 06-CV-D and the three earlier suggestions and carried them forward for further consideration. The more recent four suggestions have not been considered.

These notes will begin by describing the suggestions that remain pending on the docket. Then come a variety of materials that describe past Committee work, going back to extensive work that was done twenty years ago. These materials include excerpts from Committee Minutes for October 20-21, 1994. The final paragraph of those Minutes expresses the conclusion that "the time has not come for final decisions on Rule 68. * * * It was agreed that the motion

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[1] One ruled that a Rule 68 offer cuts off any right to statutory attorney fees if the plaintiff wins, but wins less than the offer — but only if the fee statute characterizes the award as "costs." Marek v. Chesny, 473 U.S. 1 (1985). That ruling has been criticized because it seems directly at odds with the congressional purpose to favor some categories of claims by providing for fee awards. It also can be criticized on the ground that there is little reason to suppose that fee statutes are always drafted with an eye to the effect the choice of words has on Rule 68. The other decision ruled that if the plaintiff wins nothing after rejecting a Rule 68 offer, the defendant is not eligible for a Rule 68 award because the plaintiff has not obtained a judgment. Delta Air Lines, Inc. v. August, 450 U.S. 346 (1981).

to repeal would be carried to the next meeting, or until such time as there is additional information to help appraise the effects of the present rule or the success of various alternative state practices." Interest in revising Rule 68 has emerged spontaneously from the bar at regular intervals in the ensuing 20 years. But it seems fair to observe that the suggestions do not develop answers to the difficulties that arise in attempting to address the complexities that inevitably follow.

The Pending Suggestions

13-CV-B: This proposal emerges from experience in defending "patent troll" litigation. The purpose is to redress a perceived imbalance: "plaintiffs have no risk and minimal investment in bringing lawsuits, and * * * defendants are forced to pay millions of dollars in legal fees, discovery and expert witness fees * * *. The plaintiffs extort settlements based on this asymmetrical advantage." Suggested rule language is included. The suggestion would allow claimants to make Rule 68 offers. The proposed rule language describes an offer "exclusive of attorney fees"; provision to make an offer limited to a specific claim or claims; explicit statement of any prospective effect of the offer – such as whether the offeror obtains a paid-up license, a running royalty license, or a permanent injunction; allowing Rule 68 awards to a defendant who wins outright; and requiring an offeree who does not better the judgment to pay "reasonable attorney fees incurred by the offeror related to the claim, or claims, in the offer after the offer was made."

13-CV-C: The proposal itself is only that Rule 68 allow for offers by plaintiffs. The New Jersey rule allows plaintiffs to make offers, and it is "very effective in forcing the defendant to take a realistic view of the value of a case * * *." New Jersey Rule 4:58 is attached. The rule addresses several questions not addressed by Rule 68 text. The rule is limited to cases in which "the relief sought by the parties * * * is exclusively monetary in nature." There are detailed provisions for offers, and counter-offers and successive offers. There is a 20% safety zone: a plaintiff wins sanctions only on recovering 120% or more of the offer, while a defendant wins only if judgment for the plaintiff is 80% of the offer or less. "Allowances" for failing to improve on the offer by the prescribed margin include "all reasonable litigation expenses incurred following non-acceptance," augmented interest, and "a reasonable attorney's fee for such subsequent services as are compelled by the non-acceptance." But allowances are not awarded if they would impose undue hardship. Allowances to defendants are denied if the claim is dismissed, a no-cause verdict is returned, only nominal damages are awarded, or "a fee allowance would conflict with the policies underlying a fee-shifting statute or rule of court."

13-CV-D: This submission by the New York City Bar starts off on a

seemingly modest note, but in fact is an ambitious exploration of many different Rule 68 issues. The only explicit recommendation is that offers by plaintiffs be brought into the rule. "[T]he Committee could not reach consensus on recommending drastic changes * * * such as including attorneys' fees within the costs awarded under it * * *." The cover letter recognizes that including plaintiffs' offers without adding a provision for fee awards would have little impact, but notes that an alternative such as a multiplier of recoverable costs might add some force to a plaintiff's offer.

One implicit theme is worth noting. The emphasis is not on promoting settlement — almost all cases settle if they are not otherwise disposed of before trial. The purpose of Rule 68 instead is seen as promoting early settlement, avoiding pretrial costs that now are incurred before the parties feel driven to settle or achieve the mutual information basis needed to support settlement.

The discussion of using awards of attorney fees as an incentive to accept an offer provides both sides of the debate. Fee awards "would deter plaintiffs from pursuing marginal claims beyond the point where the costs of litigation outstrip any potential recovery, and — if the rule were made symmetrical — deter defendants from using superior resources to 'wear out' plaintiffs."[2] The risk of unjust results could be met by allowing discretion to reduce or deny a fee award. Two state rules, from Alaska and California, are offered as illustrations. A margin of error may be introduced, denying fees if the judgment is within, for example, 10% of the offer. Adjustments may be made to reflect the complexity of the litigation, the reasonableness of the claims and defenses pursued by each side, "bad faith," the risk that onerous fees would deter future litigants, the reasonableness of the offeree's failure to accept, the closeness of the questions of law and fact, the offeror's unreasonable failure to disclose relevant information, whether the case included a question of significant importance not yet addressed by the courts, what relief might reasonably have been anticipated, the amount of damages and other relief sought, the efforts made to settle, and a range of factors commonly considered in making fee awards for other reasons. It is recognized that if a plaintiff prevails but fails to improve on the offer, an award of fees to the defendant might be tempered or denied if the plaintiff's claim is made under a statute that allows fees to a prevailing plaintiff. And to make the rule truly symmetrical, a plaintiff entitled to a statutory fee award would have to be awarded a premium on the statutory fees award.

The arguments against fee awards begin with the fear of

[2] These effects are likely to be more complex and less easily calibrated than this summary suggests, but the tendencies are real.

exerting undue pressure on plaintiffs to accept low offers rather than risk the outcome of trial. Inconsistency with "the American Rule" is an obvious concern. Going beyond that, it is urged that although settlement is important as a practical matter, "one of the rights of Americans is to have their disputes decided by an impartial judge." A plaintiff, moreover, may sue for reasons beyond damages or even an injunction: "A fair amount of litigation is brought, or defended, for purposes of obtaining vindication, to act as a test case, or for other legitimate purposes." Fee awards would, "in effect, fine them for exercising their right to obtain their legitimately sought objectives through the litigation system." Consider libel plaintiffs, or civil rights plaintiffs. The court system exists to decide cases; "[t]he main purpose of courts is to do justice."[3] Discretion to mitigate the harshness of fee awards in particular cases is not a workable solution — it will aggravate the problem by generating costly satellite litigation. And a fee-award system may "increase the acrimony of cases that don't settle, because litigants then need not only to win, but also to 'beat the spread.'"

After making these central points, the memorandum adds observations on many others. The rule that a defendant gets no Rule 68 award if the plaintiff takes nothing is often criticized as perverse, but others argue that defendants should not be able to make a nominal offer in the hope that it will defeat the court's discretion to deny defense costs even when the plaintiff loses.

Another possibility is to attach consequences "to every settlement offer," without requiring a formal offer process. The offer is to settle, not for entry of judgment. Some settlements are not easily reduced to judgment, as confidential settlements and those that involve conditional obligations. But such a rule also could lead to a refusal even to discuss settlement in the early stages of a case. And cases with multiple possible outcomes on multiple claims may make it difficult to determine whether the outcome is better than the settlement offer. And this approach could deter settlement when a plaintiff insists on entry of judgment and a defendant specifically wants no judgment. If a plaintiff rejects the offer and obtains less money by judgment, still the value of an explicit judgment for the plaintiff may add up to something more favorable than the offer of money alone.

Finally, it is noted that many courts refuse to include the expenses incurred to retrieve and review electronically stored information as statutory costs of copying. It has been suggested

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[3] These considerations closely parallel an avalanche of comments on the proposal to incorporate proportionality into the Rule 26(b)(1) scope of discovery. It is fair to suggest that a wide swath of the bar would react in similar ways to a proposal to add attorney fees to the catalogue of Rule 68 sanctions.

that adding these expenses as Rule 68 sanctions could add real force to the rule. But opponents of this approach urge that the result could be to encourage unnecessary e-discovery in hopes of coercing settlement, and that here too the result would be extensive and costly satellite litigation.

10-CV-D: The central proposition here is that Rule 68 should not be available when a plaintiff claims nominal damages. A defendant need only offer $1.01, or $10, to be able to recover all post-offer costs if the plaintiff wins what is asked, $1. So too Rule 68 should not be available on a claim for punitive damages — punitive damages are not calculable and are imposed for social purposes. A further suggestion is that the plaintiff should be able to file a defendant's offer with the court for purposes other than a determination of costs, compare Rule 68(b). One purpose might be to seek relief from a bad-faith offer, here illustrated by the $1.01 offer that may frighten the plaintiff into abandoning the case, or settling for something less than vindication by judgment. A further related suggestion is that a Rule 68 offer is not a confidential settlement communication, cf. Evidence Rule 408.

06-CV-D: This is the Second Circuit opinion discussed in one of the attachments, "Rule 68: A Progress Report," which was the basis for earlier Committee discussion.

04-CV-H: Proposes expanding Rule 68 to allow plaintiffs to make offers. Section 998 of the California Code of Civil Procedure is attached as an illustration. The California statute allows an award of expert witness fees as a sanction for failing to beat the rejected offer; the award does not appear to be limited to fees incurred after the offer.

03-CV-B: This is a letter from Judge A. Wallace Tashima, suggesting that plaintiffs should be authorized to make Rule 68 offers, pointing to the California statute. It includes a response by Judge David F. Levi, describing the Committee's earlier struggles with Rule 68: "In the end we were not able to develop a proposal that we had confidence in."

02-CV-D: This is a report "narrowly approved" by the Committee on Federal Procedure of the Commercial and Federal Litigation Section of the New York State Bar Association. It offers interesting variations on familiar themes: Rule 68 should include offers by claimants; sanctions should be expanded to include expenses other than attorney fees, subject to reduction in the court's discretion; sanctions should be available against a claimant-offeree who loses all claims on dispositive motion or at trial.

The report begins with an explanation of the reasons why Rule 68 is little used. Quoting the Seventh Circuit, it "'bites only when the plaintiff wins but wins less than the defendant's offer of judgment.'" And even then the bite does not hurt much because

offers often are made after most costs have been incurred — the post-offer costs are likely to be relatively small.

Suggestions that sanctions should be expanded to include attorney fees are resisted. That approach would cut too deeply into the American Rule. The suggestion instead is to award post-offer expenses, excluding attorney fees, for such things as "photocopying, deposition transcripts, travel and lodging for attorneys, witnesses, and other personnel, fees of testifying experts and other expert expenses recoverable under Fed.R.Civ.P. 26(b)(4)(C), and office services such as electronic imaging and storage." [If the report were written today, it might include post-offer expenses incurred in responding to ESI discovery demands.]

The award of expenses would be a matter of discretion. The court would consider:

> (1) the relation of the claim to any other claim in the action, (2) the relation of the expenses to the claim, (3) the reasonableness of the offer, (4) the burden on the offeree in paying the expenses, (5) the resources of the offeror, (6) the importance of the claim, and (7) the reasonableness of the rejection of the offer.

A final suggestion is not much explained. The circumstance is that an accepted Rule 68 offer and ensuing judgment may include fewer than all claims among all parties. Rule 54(b) seems to mean that the judgment is not final. So Rule 68 would be amended to provide that the judgment, "if with respect to fewer than all claims or all parties, shall nonetheless be considered an appealable final judgment." There is no explanation of the reasons why either offeror or offeree would have grounds, or even standing, to appeal.

The letter transmitting the report provides the only explanation of the "strong dissent" from the "narrow[] approv[al]" of the report:

> The strong dissent in the Section was concerned that the proposal contained a significant and inappropriate disincentive to litigate imposed upon plaintiffs, especially less wealthy plaintiffs; contained a strong incentive for deep-pocket defendants to run up costs beyond what they would otherwise spend; and left it to the uncertain and undoubtedly non-uniform discretion of individual judges to ameliorate any unfairness in imposing expenses upon parties who reject settlement offers less [sic] favorable than the outcome after trial.

Past Efforts

Proposals to amend Rule 68 were published for comment in 1983 and 1984. They were not carried further. Brief notes on those

proposals are added below, and the full texts are included as an appendix. The topic came back for extensive work, including FJC research, in the early 1990s. As noted above, the Committee abandoned the project without recommending publication of any proposal. "Mailbox" suggestions from the public, such as those noted above, have brought Rule 68 back for brief consideration at almost regular intervals. Each time, the decision was to put off any further consideration. Diffidence in the face of such persistent interest surely reflects the many complexities that appear on any close examination of the questions that seem to deserve an answer in rule text. The alternative of attempting a small number of relatively simple amendments has not seemed responsible. Of course that series of temporizing conclusions remains open to reconsideration. But continuing reluctance may reflect a still deeper concern. The 1994 Minutes quoted on the first page reflect a decision to carry forward a motion to "repeal" Rule 68. The motion could be supported by concerns of the sort expressed by the dissent to the New York State Bar Committee report described above. And failure to act on it could be supported by the thought that because Rule 68 is not much used, it does not cause much serious mischief. Perhaps it is better to stick by a largely ineffective rule, although it is occasionally troublesome, than to attempt to frame a rule that effectively promotes earlier and desirable settlements without coercing frequent sacrifice of the fundamental right to judgment on the merits after trial.

Rather than recreate all of the past work, or even summarize it, the attachments begin with excerpts from Minutes for the April and October, 1994, Committee meetings. They are followed by a draft rule text and draft Committee Note of the sort the Committee then considered. Then come "Rule 68: A Progress Report" stimulated by 06-CV-D, and excerpts from Minutes for Committee meetings in April, 2007, November, 2007, and November, 2008. Even this provides quite a bit of reading. It does not support any immediate Rule 68 proposals. But it should provide a solid foundation for determining whether to take these questions back for sustained, even arduous, work.

Notes on the 1983 and 1984 proposals

The 1983 proposal is readily found at 98 F.R.D. 337, 361-367. The latest time for the offer is set at 30 days before trial begins, not 10 days. Rather than an offer for judgment, it would be an offer "to settle a claim and to enter into a stipulation dismissing the claim or to allow judgment to be entered accordingly." The offer must remain open for 30 days. Evidence of the offer would be admissible in a proceeding to enforce a settlement. Both plaintiffs and defendants could make offers. If the judgment is not more favorable to the offeree than the offer, the starting point is that the offeree must pay expenses, including reasonable attorney fees, incurred by the offeror after making the offer. If the offer was made by a claimant, interest on the amount

of the claimant's offer would be added if not otherwise included in the judgment. The court would have authority to reduce the award of expenses and interest found to be "excessive or unjustified under all of the circumstances. Nor would costs, expenses, or interest be awarded if the offer was made in bad faith (the Committee Note uses a $1 offer as an example). The language of the text is revised to allow an award to a defendant when the judgment is for the defendant. Finally, class and derivative actions under Rules 23, 23.1, and 23.2 are excluded from Rule 68. The Committee Note explains that this is in part because the court must approve settlements under those rules, and also because a representative party should not be exposed to a risk of heavy liability for costs and expenses — a prospect that could lead to a conflict of interests.

The 1984 proposal is readily found at 102 F.R.D. 432-437. It is different in many ways, some dramatic. Timing is changed: the offer may be made at any time more than 60 days after the service of summons and complaint on a party, but not less than 90 days (or 75 days for a counter-offer) before trial. The offer "shall remain open for 60 days unless sooner withdrawn." If an offer is not accepted, a subsequent offer can be made.

The most dramatic changes in the 1984 proposal are in the provisions for sanctions. These provisions obviously reflect the comments on the 1983 proposal.

The first step is to provide for a sanction. Sanctions depend on finding "that an offer was rejected unreasonably, resulting in unnecessary delay and needless increase in the cost of the litigation." This determination depends on "all of the relevant circumstances at the time of rejection." Six examples are provided: (1) the apparent merit or lack of merit of the claim; (2) "the closeness of the questions of fact and law at issue, (3) whether the offeror had unreasonably refused to furnish information necessary to evaluate the reasonableness of the offer, (4) whether the suit was in the nature of a 'test case,' presenting questions of far-reaching importance affecting non-parties, (5) the relief that might reasonably have been expected if the claimant should prevail, and (6) the amount of the additional delay, cost, and expense that the offeror reasonably could be expected to incur if the litigation should be prolonged."

The next step, if a sanction is ordered, is to determine the amount. In addition to the factors considered in determining to award a sanction, the court is to "take into account (1) the extent of the delay, (2) the amount of the parties' costs and expenses, including any reasonable attorney's fees incurred by the offeror as a result of the offeree's rejection, (3) the interest that could have been earned at prevailing rates on the amount that a claimant offered to accept * * *; and (4) the burden of the sanction on the offeree."

These flexible sanctions provisions might have had a significant effect in reducing the risk that Rule 68 can be a device that enables a defendant to take advantage of a risk-averse plaintiff or a plaintiff who has valid reasons for preferring judgment on the merits to settlement. But the work involved in implementing them is apparent.

EXCERPTS FROM APRIL 28-29, 1994 MINUTES

Rule 68

Discussion of Rule 68 began with presentation by John Shapard of the preliminary results of the Federal Judicial Center survey of settlement experience. The survey was divided into two parts. The first part drew from 4 matched sets of 200 cases each, 100 of which settled and 100 of which went to trial. The effort was in part an attempt to learn more about the factors that foster or thwart settlement, and in part to learn the reactions of practicing attorneys to possible changes in Rule 68. The questions to be tested were whether there is reason to cling to the hope that strengthened consequences might make Rule 68 an effective tool to increase the number of cases to settle, to advance the time at which cases settle, and to reduce misuse of pretrial procedures lest the misuser be forced to pay attorney fees incurred by the adversary. The concerns about strengthened consequences also were tested in an effort to determine whether the rule might force unfair settlements on financially weak parties or might cause trial of some cases that now settle. The second part of the survey used a different questionnaire for 200 civil rights cases, in which present Rule 68 has real teeth because of its effect on recovery of statutory attorney fees.

The questionnaire used in the general survey took two approaches. One, and likely the more useful, was to ask counsel about what happened and what might have happened in their actual cases. The second was to ask counsel for general opinions. It is an important caution that only first-round responses are available, with a 30-35% response rate. As an illustration of a strengthened Rule 68, the questionnaire posited a sanction of one-half of post-offer attorney fees. At this stage of response, there is evidence that approximately 25% of the attorneys responding for cases that went to trial believed that a strengthened Rule 68 might have led to settlement, and approximately 25% of the attorneys responding for cases that settled believed that a strengthened Rule 68 might have led to earlier settlement.

In specific cases, there was a wide variation of plaintiff and defendant settlement demands. In tried cases in which counsel for both sides responded — a total of 22 cases — there were three that apparently should have settled because of overlap between the demands of plaintiff and defendant. The problem may have been failure of communication-negotiation, or it may have been divergence between the settlement views of counsel and clients.

The answers for the civil rights cases were comparable to other cases on many questions. But there was polarization on some questions. Defendants want Rule 68 strengthened, and plaintiffs would be happy to abolish it. These answers reflect the fact that defendants and plaintiffs both understand the way Rule 68 works

today in litigation under attorney fee-shifting statutes.

The information about expenses incurred in responding to pretrial requests is one important result of the survey.

Mr. Shapard responded to a question by stating that if he were writing the rule, he would try to give it teeth for both sides, without upsetting the fee-shifting statutes. He would be encouraged by the survey responses to proceed on a moderate basis to allow offers by both plaintiffs and defendants, with greater consequences such as shifting 50% of post-offer attorney fees. Although it would be more effective to avoid any cap on fee-shifting, it is a political necessity to adopt a cap that protects a plaintiff against any actual out-of-pocket liability for an adversary's attorney fees.

Another question asked about the element of gamesmanship that might be introduced by increasing Rule 68 consequences, leading to strategic moves designed to control or exploit this new element of risk rather than to produce settlement. Mr. Shapard recognized the risk, but observed that we can create a new set of game rules. Although there are cases that the parties do not wish to compromise, most cases settle because of the economics of the situation. A changed game will only lead to getting better offers on the table.

Mr. Shapard also suggested that this survey will provide about 90% of what might be learned by empirical research. There is a growing body of theoretical research as well. Some states have rules that might be considered in the effort to gain additional empirical evidence of the effects of enhanced consequences.

It was asked what might be done to generate positive incentives for plaintiffs in fee-shifting cases, since they get fees if they win without regard to Rule 68. Mr. Shapard replied that this was uncertain, although expert witness fees might be used as a consequence if they are not reached by the fee-shifting statute. Another possibility would be to allow an increment above the statutory fee.

It was observed that some lawyers would like to abolish Rule 68. Mr. Shapard suggested that this would be of little consequence in comparison to present practice, apart from statutory fee-shifting cases, since Rule 68 is little used. In civil rights fee-shifting cases, on the other hand, the survey shows that Rule 68 was used or had an effect in about 20% of the cases.

Mr. Shapard also noted that it may be possible to correlate the answers on the reasons for not settling with other answers about the nonsettling cases to learn more about the possible consequences of strengthening Rule 68. There still are cases that go to trial, and they are not all contract litigation between large

enterprises.

Discussion turned to the relationships between Rule 68 and attorney-fee arrangements. The "cap" in the current draft would avoid the problem of liability for defense attorney fees in an action brought by a plaintiff under a contingent-fee arrangement. Without the cap, it would be necessary to determine whether the plaintiff or the attorney should be responsible for this out-of-pocket cost. Plaintiff liability would have a dramatic effect on the character of contingent-fee representation. The effect on fee-shifting statutes also was noted. This effect extends beyond "civil rights" litigation to reach any fee-shifting statute characterized in terms of "costs." The view was expressed that using Rule 68 to cut off the right to post-offer statutory fees violates the Rules Enabling Act, notwithstanding the contrary ruling in Marek v. Chesny, and that the violation cannot be cured by the semantic device of referring to the result as a "sanction." There is no preexisting procedural duty to settle that supports denial of a fee award. We should not continue the violation of the Enabling Act in an amended Rule 68. Similar doubts were expressed about Enabling Act authority to adopt attorney-fee shifting as a sanction in more general terms.

More general discussion followed. One view was that there is little reason to suppose that it is desirable to foster earlier and more frequent settlements by means of Rule 68. Litigants with vast resources have too many advantages in our system, and their advantages would be entrenched and exacerbated by strengthening Rule 68. A supporting view was that the Judicial Center survey does not change the case against expanding the rule. On the other hand, it might be an undesirable symbol to abrogate the rule.

One possible problem with the survey was suggested: many of those who did not respond may have been worried about their freedom to answer the questions. Even with pledges of anonymity, client permission should be sought, and there is still some concern about loss of confidentiality. Another concern is that the first question about alternative sanction systems did not provide for indicating second choices.

Experience with the California practice was again recalled. California includes "costs" in the offer-of-judgment sanctions, and costs commonly include expert witness fees. The rule seems to exert a real influence on settlement. It also is helpful in effecting settlement pending appeal because the cost award is a useful bargaining item. One conclusion was that the Committee should find out more about the actual operation of the California practice as a more modest means of encouraging acceptance of offers.

Mr. Sherk was asked to describe experience with Arizona Rule 68. Starting with a rule like Federal Rule 68, the Arizona rule

was first amended to make it bilateral. Then, noting that an award of costs does not provide a meaningful benefit to a plaintiff who has prevailed to the extent of doing better than its offer of judgment, stiffer sanctions were adopted. The rule has become more complicated, and is difficult to administer.

Professor Rowe described his ongoing research of the effects of different attorney fee sanctions by means of a computer simulation exercise sent to practicing attorneys. One of the hypotheses is that significant sanctions will smoke out more realistic offers, which will ease the path to settlement. Another concern to be tested is the effect of "low-ball" offers on risk-averse and poorly financed parties. One preliminary result of the research is that in a significant minority of cases there also can be a "high-ball" effect in which significant sanctions encourage defense attorneys to accept high plaintiff demands. The explanation may be that a defending lawyer hates to have to tell the client that the client must pay the plaintiff's attorney fees. Another effect is that substantial sanctions give poor plaintiffs the means to bring claims that are strong on the merits for relatively small amounts.

The observation that present Rule 68 can operate to distort relations between attorneys and clients in statutory fee-shifting cases led to the question whether a system that allows for offers by plaintiffs as well as by defendants might lead to arrangements in which clients insist that lawyers bear the cost of Rule 68 sanctions.

Note was made of a quite different sanction possibility. Founded on the premise that many contingent-fee cases do not involve any significant risk that the plaintiff will take nothing, this suggestion would limit plaintiffs' attorneys to hourly rates for post-offer work that leads to recovery of less than a Rule 68 offer.

The conclusions reached after this discussion were, first, that the current draft proposal should not now be presented to the Standing Committee. Second, Rule 68 should remain under consideration, including study of the effects on fee-shifting statutes, alternative sanctions such as awards of expert witness fees or restrictions on contingent fees, and abrogation of Rule 68. The Federal Judicial Center study will be completed and considered further. The Committee expressed its great appreciation for the work and help of the Judicial Center.

EXCERPTS FROM OCTOBER 20-21, 1994 MINUTES

Rule 68

Rule 68 has been before the Committee for some time. At the April, 1994 meeting, it was concluded that further action should

await completion of the Federal Judicial Center study of Rule 68. John Shapard, who is in charge of the study, put it aside over the summer for the purpose of completing the survey of practices surrounding attorney participation in voir dire examination of prospective jurors. See the discussion of Rule 47(a) above.

An informal survey of California practice was described. California "section 998" uses costs as an offer-of-judgment sanction, but costs commonly include expert witness fees in addition to the more routine items of costs taxed in federal courts. Generally this sanction is seen as desirable, although respondents generally would like more significant sanctions. Most thought the state practice was more satisfactory than Rule 68. There was no strong feeling against the state practice. One lawyer thought the state practice restricts his freedom in negotiating for plaintiffs. This state practice seems preferable to the complicated "capped benefit-of-the-judgment" approach embodied in the current Rule 68 draft.

Another comment was that Rule 68 becomes an element of gamesmanship in fee-shifting cases. It is like a chess game – an extra shield and tool in civil-rights litigation. It is working close to a casino mentality. But Rule 68 has meaning only in cases where attorney fees are thus at stake. It would be better to abandon it.

Professor Rowe described his ongoing empirical work with Rule 68, investigating the consequences of adding attorney-fee sanctions. The work does not answer all possible questions. An offer-of-judgment rule may have the effect of encouraging strong small claims that otherwise would not support the costs of suit; this hypothesis has not yet been subjected to effective testing. There does seem to be an effect on willingness to recommend acceptance of settlement offers, and perhaps to smoke out earlier offers. Results are mixed on the question whether such a rule may moderate demands or, once an offer is made, encourage the offeror to "dig in" and resist further settlement efforts in hopes of winning sanctions based on the offer. And there is a possible "high-ball" effect that encourages defendants to settle for more, just as there may be a "low-ball" effect that encourages plaintiffs to settle for less.

John Frank reminded the Committee of the reactions that met the efforts in 1983 and 1984 to increase Rule 68 sanctions. At the time, he had feared that efforts to pursue those proposals further might meet such protest as to bring down the Enabling Act itself. He also noted that there are other means of encouraging settlement, and imposing sanctions, that involve less gamesmanship and more neutral control. "Michigan mediation," which was recognized as a form of court-annexed arbitration with fee-shifting consequences for a rejecting party who fails to do almost as well as the mediation award, was described. The view was expressed that this

and other alternate dispute resolution techniques have made Rule 68 antique in comparison.

Some members of the Committee suggested that the best approach would be to rescind Rule 68. It might work well between litigants of equal sophistication and resources, but it is not fair in other cases, even if it is made two-way. A motion to abrogate Rule 68 was made and seconded twice. Brief discussion suggested that there was support for this view, but also support for an attempt to provide more effective sanctions in a form less complicated than the present draft.

Alfred Cortese noted that Rule 68 has been "studied to death." An ABA committee looked at it but could not reach any consensus. Most lawyers are adamantly opposed to fee-shifting sanctions.

After further discussion, it was concluded that the time has not come for final decisions on Rule 68. It has significant effect in actions brought under attorney fee-shifting statutes that characterize fees as costs. Repeal would have a correspondingly significant effect on such litigation. Even if the present rule seems hurtful, there should be a better idea of the consequences of repeal. It was agreed that the motion to repeal would be carried to the next meeting, or until such time as there is additional information to help appraise the effects of the present rule or the success of various alternative state practices.

Rule 68. Offer of Settlement

(a) Offers. A party may make an offer of settlement to another party.

(1) The offer must:

(A) be in writing and state that it is a Rule 68 offer;

(B) be served at least 30 days after the summons and complaint if the offer is made to a defendant;

(C) [not be filed with the court] {be filed with the court only as provided in (b)(2) or (c)(2)};

(D) remain open for [a stated period of] at least 21 days unless the court orders a different period; and

(E) specify the relief offered.

(2) The offer may be withdrawn by writing served on the offeree before the offer is accepted. [Withdrawal nullifies the offer for all purposes.]

(b) Acceptance; Disposition.

(1) An offer made under (a) may be accepted by a written notice served [on the offeror] while the offer remains open.

(2) A party may file {the} [an accepted] offer, notice of acceptance, and proof of service. The clerk or court must then enter the judgment specified in the offer. [But the court may refuse to enter judgment if it finds that the judgment is unfair to another party or contrary to the public interest.]

(c) Expiration.

(1) An offer expires if it is not withrawn or accepted before the end of the period set under (a)(1)(D).

(2) Evidence of an expired offer is admissible only in a proceeding to determine costs and attorney fees under Rule 54(d).

(d) Successive Offers. A party may make an offer of settlement after making [, rejecting,] or failing to accept an earlier offer. A successive offer that expires does not deprive a party of {remedies} [sanctions] based on an earlier offer.

(e) {Remedies}[Sanctions]. Unless the final judgment is more favorable to the offeree than an expired offer the offeree must pay a {remedy} [sanction] to the offeror.

(1) If the offeree is not entitled to a statutory award of attorney fees, the {remedy} [sanction] must include:

(A) costs incurred by the offeror after the offer expired; and

(B) reasonable attorney fees incurred by the offeror after the offer expired, limited as follows:

(i) the monetary difference between the offer and judgment must be subtracted from the fees; and

(ii) the fee award must not exceed the money amount of the judgment.

(2) If the offeree is entitled to a statutory award of attorney fees, the {remedy} [sanction] must include:

(A) costs incurred by the offeror after the offer expired; and
(B) denial of attorney fees incurred by the offeree after the offer expired.

(3) (A) The court may reduce the {remedy}[sanction] to avoid undue hardship [or because the judgment could not reasonably have been expected at the time the offer expired].
(B) No {remedy may be given} [sanction may be imposed] on disposition of an action by acceptance of an offer under this rule or other settlement.

(4) (A) A judgment for a party demanding relief is more favorable than an offer to it:
(i) if the amount awarded — including the costs, attorney fees, and other amounts awarded for the period before the offer {was served} [expired] — exceeds the monetary award that would have resulted from the offer; and
(ii) if nonmonetary relief is demanded and the judgment includes all the nonmonetary relief offered, or substantially all the nonmonetary relief offered and additional relief.
(B) A judgment is more favorable to a party opposing relief than an offer to it:
(i) if the amount awarded — including the costs, attorney fees, and other amounts awarded for the period before the offer {was served} [expired] — is less than the monetary award that would have resulted from the offer; and
(ii) if nonmonetary relief is demanded and the judgment does not include [substantially] all the nonmonetary relief offered.

(f) Nonapplicability. This rule does not apply to an offer made in an action certified as a class or derivative action under Rule 23, 23.1, or 23.2.

Fee statute alternative

(e) {Remedies}[Sanctions]. Unless the final judgment is more favorable to the offeree than an expired offer the offeree must pay a {remedy}[sanction] to the offeror.

(1) The {remedy}[sanction] must include:
(A) costs incurred by the offeror after the offer expired; and
(B) reasonable attorney fees incurred by the offeror after the offer expired, limited as follows:
(i) the monetary difference between the offer and judgment must be subtracted from the fees; and
(ii) the fee award must not exceed the money amount of the judgment.

(2) (A) The court may reduce the {remedy}[sanction] to

avoid undue hardship [or because the judgment could not reasonably have been expected at the time the offer expired].

(B) No {remedy may be given}[sanction may be imposed]:

(i) against a party that otherwise is entitled to a statutory award of attorney fees;

(ii) on disposition of an action by acceptance of an offer under this rule or other settlement.

(e)(2)(B)(i) might take less protective forms: No remedy may be given:

Costs but not fee shifting

(i) that requires payment of attorney fees by a party that is entitled to a statutory award of attorney fees; or

Statutory fees not affected

(i) that affects the statutory right of a party to an award of attorney fees;

COMMITTEE NOTE

Former Rule 68 has been properly criticized as one-sided and largely ineffectual. It was available only to parties defending against a claim, not to parties making a claim. It provided little inducement to make or accept an offer since in most cases the only penalty suffered by declining an offer was the imposition of the typically insubstantial taxable costs subsequently incurred by the offering party. Greater incentives existed after the decision in *Marek v. Chesny*, 473 U.S. 1 (1985), which ruled that a plaintiff who obtains a positive judgment less than a defendant's Rule 68 offer loses the right to collect post-offer attorney fees provided by a statute as "costs" to a prevailing plaintiff. The decision in the Marek case, however, was limited to cases affected by such fee-shifting statutes. It also provoked criticism on the ground that it was inconsistent with the statutory policies that favor special categories of claims with the right to recover fees.

Earlier proposals were made to make Rule 68 available to all parties and to increase its effects by authorizing attorney fee sanctions. These proposals met with vigorous criticism. Opponents stressed the policy considerations involved in the "American Rule" on attorney fees. They emphasized that the opportunity of all parties to attempt to shift fees through Rule 68 offers could produce inappropriate windfalls and would create unequal pressures and coerce unfair settlements because parties often have different levels of knowledge, risk-averseness, and resources.

The basis for many of the changes made in the amended Rule 68 is provided in an article by Judge William W. Schwarzer, Fee-Shifting Offers of Judgment – an Approach to Reducing the Cost of Litigation, 76 Judicature 147 (1992).

The amended rule allows any party to make a Rule 68 offer. The incentives for early settlement are increased by increasing the consequences of failure to win a judgment more favorable than an expired offer. A plaintiff is liable for post-offer costs even if the plaintiff takes nothing, a result accomplished by removing the language that supported the contrary ruling in Delta Air Lines, Inc. v. August, 1981, 450 U.S. 346. Post-offer attorney fees are shifted, subject to two limits. The amount of post-offer attorney fees is reduced by the difference between the offer and the judgment. In addition, the attorney fee award cannot exceed the amount of the judgment. A plaintiff who wins nothing pays no attorney fees. A defendant pays no more in fees than the amount of the judgment.

A plaintiff's incentive to accept a defendant's Rule 68 offer includes the incentive that applies to all offers – the risk that trial will produce no more, and perhaps less. It also includes the fear of Rule 68 consequences; the defendant's post-offer attorney

fees may reduce or obliterate whatever judgment is won, leaving the plaintiff with all of its own expenses and the defendant's post-offer costs. A defendant's incentive to accept a plaintiff's Rule 68 offer is similar: not only must it pay a larger judgment, but it can be held to pay post-offer costs and the plaintiff's post-offer attorney fees up to the amount of the judgment.

Attorney fee shifting is limited to reflect the difference between the offer and the judgment. The difference is treated as a benefit accruing to the fee expenditure. If fees of $40,000 are incurred after the offer and the judgment is $15,000 more favorable than the offer, for example, the maximum fee award is reduced to $25,000.

Subdivision (a). Several formal requirements are imposed on the Rule 68 offer process. Offers may be made outside of Rule 68 at any time before or after an action is commenced. The requirement that the Rule 68 offer be in writing and state that it is made under Rule 68 is designed to avoid claims for awards based on less formal offers that may not have been recognized as paving the way for an award.

A Rule 68 offer is not to be filed with the court until it is accepted. The offeror should not be influenced by concern that an unaccepted offer may work to its disadvantage in later proceedings.

The requirement that an offer remain open for at least 21 days is intended to allow a reasonable period for evaluation by the recipient. Consquences cannot fairly be imposed if inadequate time is allowed for evaluation. Fees and costs are shifted only from the time the offer expires; see subdivision (e)(1) and (2). A party who wishes to increase the prospect of acceptance may set a longer period. The court may order a different period. As one example, it may not be fair to require a defendant to act on an offer early in the proceedings, under threat of Rule 68 consequences, without more time to gather information. If the court orders that the period for accepting be extended, the offer can be withdrawn under paragraph (2). The opportunity to withdraw is important for the same reasons as the power to extend — developing information may make the offer seem less attractive to the plaintiff just as it may make the offer seem more attractive to the defendant. As another example, the 21-day period may foreclose offers close to trial; the court can grant permission to shorten the period to make an offer possible.

Paragraph (2) establishes power to withdraw the offer before acceptance. This power reflects the fact that the apparent worth of a case can change as further information is developed. It also enables a party to retain control of its own offer in face of an order extending the time for acceptance. Withdrawal nullifies the offer — consequences cannot be based upon a withdrawn offer.

Subdivision (b). An offer can be accepted only during the period it

remains open and is not withdrawn. Acceptance requires service on the offeror. An acceptance is effective notwithstanding an attempt to withdraw the offer if the acceptance is served on the offeror before the withdrawal is served on the offeree. If it is uncertain whether acceptance or withdrawal was served first, the doubt should be resolved by giving effect to the withdrawal, since the parties remain free to make successive Rule 68 offers or to settle outside the Rule 68 process.

Once an offer is accepted, judgment may be entered by the clerk or court according to the nature of the offer. Ordinarily the clerk should enter judgment for money or recovery of clearly identified property. Action by the court is more likely to be required for entry of an injunction or declaratory relief.

The court has the same power to refuse to enter judgment under Rule 68 as it has to refuse judgment on agreement of the parties in other settings. An injunction may be found contrary to the public interest, for example, if it requires the court to enforce terms that the court feels unable to supervise. A settled decree may affect public interests in broader terms, particularly in actions such as those to control the conduct of public institutions, protect the environment, or regulate employment practices. The parties cannot force the court to adopt and enforce a decree that defeats important interests of nonparties. A Rule 68 judgment also might be unfair to other parties in a multiparty action. An extreme illustration of unfairness would be an agreement to allocate all of a limited fund to one party, excluding others. Less extreme settings also might justify refusal to enter judgment.

Subdivision (c). An offer expires if it is not withdrawn or accepted.

An expired offer may be used only for the purpose of providing remedies under subdivision (e). The procedures of Rule 54(d) govern requests for costs or attorney fees.

Subdivision (d). Successive offers may be made by any party without losing the opportunity to win remedies based on an earlier expired offer, and without defeating exposure to remedies based on failure to accept an offer from another party. This system encourages the parties to make early Rule 68 offers, which may promote early settlement, without losing the opportunity to make later Rule 68 offers as developing familiarity with the case helps bring together estimates of probable value. It also encourages later Rule 68 offers following expiration of earlier offers by preserving the possibility of winning remedies based on an earlier offer.

The operation of the successive offers provision is illustrated by Example 4 in the discussion of subdivision (e).

Subdivision (e). Remedies are mandatory, unless reduced or excused under paragraph (3).

Final judgment. The time for determining remedies is controlled by entry of final judgment. In most settings finality for this purpose will be determined by the tests that determine finality for purposes of appeal. Complications may emerge, however, in actions that involve several parties and claims. A final judgment may be entered under Rule 54(b) that disposes of one or more claims between the offeror and offeree but leaves open other claims between them. Such a judgment can be the occasion for invoking Rule 68 remedies if it finally disposes of all matters involved in the Rule 68 offer. It also is possible that a Rule 54(b) judgment may support Rule 68 remedies even though it does not dispose of all matters involved in the offer. A plaintiff's $50,000 offer to settle all claims, for example, might be followed by a $75,000 judgment for the plaintiff on two claims, leaving two other claims to be resolved. Usually it will be better to defer the determination of remedies to a single proceeding upon completion of the entire action. If there is a special need to determine remedies promptly, however, an interim award may be made as soon as it is inescapably clear that the final judgment will be more favorable than the offer.

Costs and fees. Remedies are limited to costs and attorney fees. Other expenses are excluded for a variety of reasons. In part, the limitation reflects the policies that underlie the limits of attorney fee awards discussed below. In addition, the limitation reflects the great variability of other expenses and the difficulty of determining whether particular expenses are reasonable.

Costs for the present purpose include all costs routinely taxable under Rule 54(d). Attorney fees are treated separately. This provision supersedes the construction of Rule 68 adopted in *Marek v. Chesny*, 473 U.S. 1 (1985), under which statutory attorney fees are treated as costs for purposes of Rule 68 if, but only if, the statute treats them as costs.

Several limits are placed on remedies based on attorney fees incurred after a Rule 68 offer expired. The fees must be reasonable. The award is reduced by deducting from the amount of reasonable fees the monetary difference between the offer and the judgment. To the extent that the judgment is more favorable to the offeror than the offer, it is fair to attribute the difference to the fee expenditure. This reduction is limited to monetary differences. Differences in specific relief are excluded from this reduction because the policy underlying the benefit-of-the-judgment rule is not so strong as to support the difficulties frequently encountered in setting a monetary value on specific relief.

The attorney fee award also is limited to the amount of the judgment. A claimant's money judgment can be reduced to nothing by a fee award, but out-of-pocket liability is limited to costs. A defending party's exposure to fee shifting is made symmetrical by

limiting the stakes to the money amount of the judgment. If no monetary relief is awarded, attorney fee remedies are not available to either party. This result not only avoids the difficulties of setting a monetary value on specific relief but also diminishes the risk of deterring litigation involving matters of public interest.

Several examples illustrate the working of this "capped benefit-of-the-judgment" attorney fee provision.

Example 1. (No shifting) After its offer to settle for $50,000 is not accepted, the plaintiff ultimately recovers a $25,000 judgment. Rejection of this offer would not result in any award because the judgment is more favorable to the offeree than the offer. Similarly, there would be no award based on an offer of $50,000 by the defendant and a $75,000 judgment for the plaintiff.

Example 2. (Shifting on rejection of plaintiff's offer) After the defendant rejects the plaintiff's $50,000 offer, the plaintiff wins a $75,000 judgment. (a) The plaintiff incurred $40,000 of reasonable post-offer attorney fees. The $25,000 benefit of the judgment is deducted from the fee expenditure, leaving an award of $15,000. (b) If reasonable post-offer attorney fees were $25,000 or less, no fee award would be made. (c) If reasonable post-offer fees were $110,000, deduction of the $25,000 benefit of the judgment would leave $85,000; the cap that limits the award to the amount of the judgment would reduce the attorney fee award to $75,000.

Example 3. (Shifting on rejection of defendant's offer) After the plaintiff rejects the defendant's $75,000 offer, the plaintiff wins a $50,000 judgment. (a) The defendant incurred $40,000 of reasonable post-offer attorney fees. The $25,000 benefit of the judgment is deducted from the fee expenditure, leaving a fee award of $15,000. (b) If reasonable post-offer attorney fees were $25,000 or less, no fee award would be made. (c) If reasonable post-offer fees were $110,000, deduction of the $25,000 benefit of the judgment would leave $85,000; the cap that limits the fee award to the amount of the judgment would reduce the attorney fee award to $50,000. The plaintiff's judgment would be completely offset by the fee award, and the plaintiff would remain liable for post-offer costs.

Example 4. (Successive offers) After a defendant's $50,000 offer lapses, the defendant makes a new $60,000 offer that also lapses. (a) A judgment of $50,000 or less requires an award based on the amount and time of the $50,000 offer. (b) A judgment more than $50,000 but not more than $60,000 requires an award based on the amount and time of the $60,000 offer. This approach preserves the incentive to make a successive offer by preserving the potential effect of the first offer.

Example 5. (Counteroffers) The effect of each offer is determined independently of any other offer. Counteroffers are likely to be followed by judgments that entail no award or an award against only one party. The plaintiff, for example, might make an early $25,000 offer, followed by $20,000 of fee expenditures before a $40,000 offer by the defendant, additional $15,000 fee expenditures by each party, and judgment for $42,000. The plaintiff's $25,000 offer is more favorable to the defendant than the judgment, so the plaintiff is entitled to a fee award. The $35,000 of post-offer fees is reduced by the $17,000 benefit of the judgment, netting an award of $18,000. The defendant is not entitled to any award.

In some circumstances, however, counteroffers can entitle both parties to awards. Offers made and not accepted at different stages in the litigation may fall on both sides of the eventual judgment. Each party receives the benefit of its offer and pays the consequences for failing to accept the offer of the other party. The awards are offset, resulting in a net award to the party entitled to the greater amount. As an example, a plaintiff might make an early $25,000 offer, then incur reasonable attorney fees of $5,000 before the defendant's $60,000 offer, after which each party incurred reasonable attorney fees of $25,000. A judgment for $50,000 would support a fee award for each party. The $50,000 judgment is more favorable to the plaintiff than the plaintiff's expired offer. The $50,000 is less favorable to the plaintiff than the defendant's expired offer. The attorney fee award to the plaintiff would be reduced to $5,000 by subtracting the $25,000 benefit of the judgment from the $30,000 of post-offer fees. The attorney fee award to the defendant would be reduced first to $15,000 by subtracting the $10,000 benefit of the judgment from the $25,000 of post-offer fees. The $15,000 award to the defendant would be set off against the $5,000 award to the plaintiff, leaving a $10,000 net award to the defendant.

Example 6. (Counterclaims) Cases involving claims and counterclaims for money alone fall within the earlier examples. Each party controls the terms of any offer it makes. If no offer is accepted, the final judgment is compared to the terms of each offer. (a) The defendant's offer to pay $10,000 to the plaintiff to settle both claim and counterclaim is followed by a $25,000 award to the plaintiff on its claim and a $40,000 award to the defendant on its counterclaim. The result is treated as a net award of $15,000 to the defendant. This net is $25,000 more favorable to the defendant than its offer. If the defendant's reasonable post-offer attorney fees were $35,000, the attorney fee award payable to the defendant is $10,000. (b) If the defendant's reasonable post-offer attorney fees in example (a) had been $45,000, the attorney fee award payable to the defendant would be limited to the $15,000 amount of the net award on the merits. (c) The defendant's offer to accept $10,000 from the plaintiff to settle both claim and counterclaim is followed by an award of nothing to the plaintiff on its claim and a $40,000 award to the

defendant on its counterclaim. The result is treated as a net award of $40,000 to the defendant, which is $30,000 more favorable to the defendant than its offer.

Contingent Fees. The fee award to a successful plaintiff represented on a contingent fee basis should be calculated on a reasonable hourly rate for reasonable post-offer services, not by prorating the contingent fee. The attorney should keep time records from the beginning of the representation, not for the post-offer period alone, as a means of ensuring the reasonable time required for the post-offer period.

Hardship or surprise. Rule 68 awards may be reduced to avoid undue hardship or reasonable surprise. Reduction may, as a matter of discretion, extend to denial of any award. As an extreme illustration of hardship, a severely injured plaintiff might fail to accept a $100,000 offer and win a $100,000 judgment following a reasonable attorney fee expenditure of $100,000 by the defendant. A fee award to the defendant that would wipe out any recovery by the plaintiff could be found unfair. Surprise is most likely to be found when the law has changed between the time an offer expired and the time of judgment. Later discovery of vitally important factual information also may establish that the judgment could not reasonably have been expected at the time the offer expired.

Statutory Fee Entitlement. Rule 68 consequences for a party entitled to statutory attorney fees have been governed by the decision in *Marek v. Chesny*, 473 U.S. 1 (1985). Revised Rule 68 continues to provide that an otherwise existing right to a statutory fee award is cut off as to fees incurred after expiration of an offer more favorable than the judgment. The only additional Rule 68 consequence for a party entitled to statutory fees is liability for costs incurred by the offeror after the offer expired. The fee award provided by subdivision (e)(1)(B) for other cases is not available. These rules establish a balance between the policies underlying Rule 68 and statutory attorney fee provisions. It is desirable to encourage early settlement in cases governed by statutory attorney fee provisions just as in other cases. Effective incentives remain important. The award of an attorney fee against a party entitled to recover statutory fees, however, could interfere with the legislative determination that the underlying claim deserves special protection. The balance struck by Rule 68 does not address the question whether failure to win a judgment more favorable than an expired offer should be taken into account in determining whether any particular statute supports an award for fees incurred before expiration of the offer.

Settlement. All potential effects of a Rule 68 offer expire upon acceptance of a successive Rule 68 offer or other settlement. This rule makes it easier to reach a final settlement, free of uncertainty as to the prospect of Rule 68 consequences. The prospect of Rule 68 consequences remains, however, as one of the

elements to be considered by the parties in determining the terms of settlement.

Judgment more favorable. Many complications surround the determination whether a judgment is more favorable than an offer, even in a case that involves only monetary relief. The difficulties are illustrated by the provisions governing offers to a party demanding relief. The comparison should begin with the exclusion of costs, attorney fees, and other items incurred after expiration of the offer. The purpose of the offer process is to avoid such costs. Costs, attorney fees, and other items that would be awarded by a judgment entered at the expiration of the offer, on the other hand, should be included. An offer that matches only the award of damages is not as favorable as a judgment that includes additional money awards. Beyond that point, comparison of a money judgment with a money offer depends on the details of the offer, which are controlled by the offeror. An offer may specify separate amounts for compensation, costs, attorney fees, and other items. The total amount of the offer controls the comparison. There is little point in denying a Rule 68 award because the offer was greater than the final judgment in one dimension and smaller — although to no greater extent — in another dimension. If the offer does not specify separate amounts for each element of the final judgment and award, the same comparison is made by matching any specified amounts and treating the unspecified portion of the offer as covering all other amounts. For example, a defendant's lump-sum offer of $50,000 might be followed by a $45,000 judgment for the plaintiff. The judgment is more favorable to the plaintiff than the offer if costs, attorney fees, and other items awarded for the period before the offer expired total more than $5,000.

Comparison of the final judgment to successive offers requires that the judgment be treated as if entered at the time of each offer and adjusted to reflect any Rule 68 award that would have been made had judgment been entered at that time. To illustrate, a plaintiff's $25,000 offer might be followed by reasonable attorney fees of $15,000 before a defendant's $35,000 offer, followed by a $30,000 judgment. The judgment is more favorable to the plaintiff than the offer because a $30,000 judgment at the time of the offer would have supported a $10,000 fee award to the plaintiff. The judgment and fee award together would have been $40,000, $5,000 more than the offer.

Nonmonetary relief further complicates the comparison between offer and judgment. A judgment can be more favorable to the offeree even though it fails to include every item of nonmonetary relief specified in the offer. In an action to enforce a covenant not to compete, for example, the defendant might offer to submit to a judgment enjoining sale of 30 specified items in a two-state area for 15 months. A judgment enjoining sale of 29 of the 30 specified items in a five-state area for 24 months is more favorable to the plaintiff if the omitted item has little importance to the

plaintiff. Any attempt to undertake a careful evaluation of significant differences between offer and judgment, on the other hand, would impose substantial burdens and often would prove fruitless. The standard of comparison adopted by subdivision (e)(4)(A)(ii) reduces these difficulties by requiring that the judgment include substantially all the nonmonetary relief in the offer and additional relief as well. The determination whether a judgment awards substantially all the offered nonmonetary relief is a matter of trial court discretion entitled to substantial deference on appeal.

The tests comparing the money component of an offer with the money component of the judgment and comparing the nonmonetary component of the offer with the nonmonetary component of the judgment both must be satisfied to support awards in actions for both monetary and nonmonetary relief. Gains in one dimension cannot be compared to losses in another dimension.

The same process is followed, in converse fashion, to determine whether a judgment is more favorable to a party opposing relief.

There is no separate provision for offers for structured judgments that spread monetary relief over a period of time, perhaps including conditions subsequent that discharge further liability. The potential difficulties can be reduced by framing an offer in alternative terms, specifying a single sum and allowing the option of converting the sum into a structured judgment. If only a structured judgment is offered, however, the task of comparing a single-sum judgment with a structured offer is not justified by the purposes of Rule 68, even when a reasonable actuarial value can be attached to the offer. If applicable law permits a structured judgment after adjudication, however, it may be possible to compare the judgment with a single sum offer. Should a structured judgment offer be followed by a structured judgment, it seems likely that ordinarily the comparison should be made under the principles that apply to nonmonetary relief, since the elements of the structure are not likely to coincide directly.

Multiparty offers. No separate provision is made for offers that require acceptance by more than one party. Rule 68 can be applied in straight-forward fashion if there is a true joint right or joint liability. An award should be made against all joint offerees without excusing any who urged the others to accept the offer; this result is justified by the complications entailed by a different approach and by the relationships that establish the joint right or liability. Rule 68 should not apply in other cases in which an offer requires acceptance by more than one party. The only situation that would support easy administration would involve failure of any offeree to accept, and a judgment no more favorable to any offeree. Even in that setting, a rule permitting an award could easily complicate beyond reason the already complex strategic

calculations of Rule 68. Offers would be made in the expectation that unanimous acceptance would prove impossible. Acceptances would be tendered in the same expectation. Apportioning an award among the offerees also could entail complications beyond any probable benefits.

Subdivision (f). Rule 68 does not apply to actions certified as class or derivative actions under Rules 23, 23.1, or 23.2. This exclusion reflects several concerns. Rule 68 consequences do not seem appropriate if the offeree accepts the offer but the court refuses to approve settlement on that basis. It may be unfair to make an award against representative parties, and even more unfair to seek to reach nonparticipating class members. The risk of an award, moreover, may create a conflict of interest that chills efforts to represent the interests of others.

The subdivision (f) exclusions apply even to offers made by class representatives or derivative plaintiffs. Although the risk of conflicting interests may disappear in this setting, the need to secure judicial approval of a settlement remains. In addition, there is no reason to perpetuate a situation in which Rule 68 offers can be made by one adversary camp but not by the other.

Rule 68: A Progress Report

Rule 68 has provoked regular suggestions for reform. Substantial efforts early in the 1980s and again a decade later in the early 1990s did not result in proposals for amendment. This memorandum discusses whether the time has come to reopen Rule 68.

In *Reiter v. MTA New York City Transit Authority*, 2d Cir. July 20, 2006, Docket No. 04-5420-cv, the Second Circuit recommended to the Standing and Advisory Committees that the Advisory Committee examine the offer-of-judgment provisions of Rule 68 to "address the question of how an offer and judgment should be compared when non-pecuniary relief is involved." This opinion was included in the agenda book for the October 2006 meeting and is included again to preserve the proposal for rule amendment for the Committee's consideration.

The *Reiter* case offers a relatively straightforward illustration of the questions raised by demands for specific relief and offers of judgment. The plaintiff, a high-ranking official in the New York City Transit Authority, won a jury verdict finding that he had been demoted in violation of Title VII in retaliation for filing a charge with the EEOC. His complaint requested both money damages and equitable relief returning him "to his prior position, along with all the benefits of that position." The Rule 68 offer was for $20,001; it said nothing about specific relief. The verdict awarded $140,000 for emotional suffering. The court ordered a remittitur to $10,000, which the plaintiff accepted. The court also granted an injunction restoring the plaintiff to his former position with all of its perquisites, including an office, confidential secretary, and "Hay points" indicating the importance of the position. The parties agreed that a magistrate judge would decide the plaintiff's motion for attorney fees. The magistrate judge concluded that the right to fees terminated at the time the plaintiff rejected the Rule 68 offer because the reinstatement order was "of limited value." The Second Circuit reversed the conclusion that the Rule 68 offer of $20,001 was better than the judgment for $10,000 and reinstatement. It accepted the basic approach taken by the magistrate judge — the question was whether the equitable relief was worth more than the $10,001 difference between the Rule 68 offer and the judgment damages. This question was approached as one of fact, reviewed only for clear error. But the court also noted that the offeror, who "alone determines the provisions of the offer," "bears the burden of showing that the Rule 68 offer was more favorable than the judgment." The court began by observing that "equitable relief lies at the core of Title VII." Then it compared the great importance of the plaintiff's former job to the demotion job. Apparently the pay was the same for both jobs. But in the former job the plaintiff headed a department with a budget that "exceeded one billion dollars, eight senior executives reported directly to him, and he headed a staff of more than 900 employees. After his demotion * * *, he had no

staff, no direct reports, no corner office, no Hay Points and found himself in one of the NYCTA's smallest departments with ten employees." The court readily concluded that the differences between the jobs made reinstatement more valuable than the $10,001 difference between offer and judgment damages.

The Second Circuit's conclusion is persuasive. The approach, however, is a self-fulfilling demonstration of the difficulty of comparing specific relief to dollars. It is easy to imagine ever finer distinctions between original job and demoted job, blurring the comparison. Beyond that, the opinion seems to imply that the comparison is made by considering broader social values — specific relief is specially valued in Title VII cases "because this accomplishes the dual goals of providing make-whole relief for a prevailing plaintiff and deterring future unlawful conduct." The comparison might come out differently if the claim were only for breach of contract.

Other specific-relief cases compare Rule 68 offers to judgments in a variety of settings. See 12 Federal Practice & Procedure: Civil 2d, § 3006.1. Comparison of an offer for specific relief with the judgment may be easy. The offer is for a one-year injunction; the judgment is a two-year injunction, clearly more favorable, or a one-year injunction on the same terms, clearly not more favorable. The comparison may be muddled, however, if the offer does not spell out the full terms of the injunction. *Andretti v. Borla Performance Indus., Inc.*, 6th Cir.2005, 426 F.3d 824, 837-838, is an example. The offer was for an injunction forever barring the defendant from disseminating any advertisement or promotional material containing a specific quotation from the plaintiff. The actual injunction was broader, barring any act to pass off any good or service as authorized or sponsored by the plaintiff. The court, however, concluded that the offer was understood by the plaintiff to embrace all of the terms of the outstanding preliminary injunction that was simply transformed by the judgment into a permanent injunction. It may be wondered whether Rule 68 offers of injunctive or declaratory relief commonly include full decrees, and whether arguments about the framing of an eventual decree should be shaped by the parties' concerns for the Rule 68 consequences.

But what if an offer of a one-year injunction is followed by a two-year injunction that is not [quite] as broad? An offer that the defendant will put five named customers off limits to an employee hired away from the plaintiff is followed by an injunction barring two of those customers and three or four others? Should courts be forced to the work of evaluating these differences?

Yet another complication can arise if an offer for specific relief is followed by self-correction in circumstances that persuade the court to deny specific relief as unnecessary or even moot. The defendant offers to submit to an injunction limiting the

activities of the plaintiff's former employee. As the case approaches trial and the defendant views its prospects with alarm, the defendant fires the employee, who goes to work elsewhere. There is no occasion for a "judgment" dealing with this element of the demand for relief or the offer. Surely the practical outcome should be factored into the assessment.

The comparison of specific relief to dollars aggravates the difficulties. The offer in the Second Circuit *Reiter* case provided no specific relief at all. Why should the defendant — who predicted completely wrong in this dimension — be allowed to force the court through the comparison, even by saddling the defendant with the burden of showing that the judgment is not more favorable than the offer?

The question raised by the Second Circuit would arise in many cases if Rule 68 were used extensively. The Federal Judicial Center undertook a study of Rule 68 practice to support the Advisory Committee's most recent undertaking. See John E. Shapard, Likely Consequences of Amendments to Rule 68, Federal Rules of Civil Procedure (FJC 1995). The survey included a question asking what type of relief was sought, anticipating the very question addressed by the Second Circuit: "The problem is illustrated by trying to compare an offer to settle for $100,000 with a judgment awarding reinstatement and back pay of $40,000. The percentage of cases involving exclusively monetary relief varied from 95% in tort cases to 47% in the 'other' category, and the percentage of cases involving 'significant' nonmonetary relief varied from 35% in the 'other' category to 3% in tort cases." Id., p. 24.

The Rule 68 work in the 1990s was stimulated by a proposal to encourage more offers of judgment. The project was abandoned, in part because of the growing complexity of attempts to implement the limited "benefit-of-the-judgment" approach and — at least to some participants — because of growing doubts about the value of Rule 68. One issue is the interpretation of the rule that a successful offer cuts off a prevailing plaintiff's right to statutory attorney fees if the statute refers to the fee award as "costs," but not if the statute does not characterize the award as "costs." Even that specific question will reopen the Enabling Act question that divided the Supreme Court when it adopted this interpretation — it is not at all apparent why a rule that cuts off a statutory fee right does not abridge a "substantive" right. And of course broader questions are nearly unavoidable: why should plaintiffs not be enabled to make Rule 68 offers — is it only because of reluctance to provide sanctions greater than statutory costs, which a prevailing plaintiff ordinarily wins without regard to Rule 68? If some meaningful sanction is created to facilitate a rule that allows plaintiff offers, should a similar sanction be provided so that a judgment for the defendant carries Rule 68 consequences?

Apart from such large questions, the *Reiter* case itself

illustrates an interesting wrinkle. The plaintiff's rejection of the $20,001 offer proved an accurate anticipation of the jury verdict for $140,000. The Rule 68 comparison, however, is not to the verdict but to the judgment. Should the plaintiff's decision whether to accept a remittitur to $10,000 be complicated by the Rule 68 consequences – here loss of the right to statutory fees after the offer? For that matter, is it right that Rule 68 sanctions should apply at all in an area as indeterminate as a court's estimate of the maximum reasonable jury award for emotional distress? Remember that the court of appeals found reinstatement clearly worth more than $10,001, the plaintiff faced a retrial if the remittitur were rejected, and acceptance of the remittitur waives the right to appeal the money award. Thorough reconsideration of Rule 68 will involve a great deal of work.

Professors Thomas A. Eaton and Harold S. Lewis, Jr., have completed an invaluable interview survey of practicing lawyers, reflected in part in the Symposium transcript and papers, *Revitalizing FRCP 68: Can Offers of Judgment Provide Adequate Incentives for Fair, Early Settlement of Fee-Recovery Cases?*, 2006, 57 Mercer L. Rev. 717-855. What distinguishes their work from many articles is that it draws from intensive interviews with 64 attorneys selected to represent, in even numbers, plaintiff-side and defense-side practice in employment discrimination and "civil rights" litigation. They picked these practice fields for two reasons. First, Rule 68 is more likely to be used when statutes provide attorney fees for successful plaintiffs – an offer that jeopardizes the right to recover post-offer fees is more likely to be considered seriously. Second, these fields together account for a significant share of the federal civil docket. Each federal circuit was covered by interviewing at least one set of four attorneys. The attorneys were not chosen at random, but instead by seeking leads to those with long and extensive experience in their areas of practice.

The underlying purpose began with the perception that Rule 68 offers are relatively rare even in these fields of practice. The questions pursued were first an effort to understand why Rule 68 is not routinely used and then to learn whether Rule 68 can be amended to encourage greater use. Although greater use might not contribute much by causing a still greater number of potential civil trials to "vanish," it might encourage earlier and therefore less costly disposition by settlement.

As the first of two articles, this one focuses on the reactions of the lawyers to various proposals to amend Rule 68. For present purposes, it suffices to provide a sketch of the proposals:

Change to Offer of Settlement: Many lawyers agreed that defendants are deterred by the need to offer a "judgment." The collateral consequences of being recorded as a judgment loser are important,

particularly to individual defendants.

Require Plaintiffs to Disclose Accrued Fees When Asked: Some defense lawyers find it difficult to estimate a reasonable offer because they do not know what is a proper amount for pre-offer fees in a fee-award regime. Many plaintiff lawyers resist disclosure for fear of yielding strategic information – particularly that they are not yet heavily invested and thus by inference are not yet well prepared.

Extend Rule 68 To Award Sanctions When Defendant Wins: One explanation of the paucity of offers is that – particularly in employment cases in many courts – defendants believe, quite realistically, that they are going to win on the merits, often by summary judgment. Being confident that they will win, the rule that Rule 68 sanctions are not available if the plaintiff loses dissuades them from making offers. More offers might be made if the Delta Air Lines decision were reversed.

Incorporate Rule 68 into Early Judicial Interventions and Mediating: There was some support for explicitly requiring discussion of Rule 68 at the Rule 26(f) conference, or in mediation of judicially supervised conferences. The idea is that this would give defense counsel a lever to persuade the defendant that an offer is a good thing.

Address Fee Consequences in Rule: These lawyers were richly experienced. Among them they handled more than 13,000 civil rights or employment discrimination cases in the 5 years before the interviews. Some of them were not aware that Rule 68 can cut off post-offer fee awards. Amending Rule 68 to flag this issue – even to specify which fee statutes carry this effect [!] – would help.

Two-Way Rule: If plaintiffs can make demands under Rule 68, the result might well be more settlements – a defendant's offer is met with a cross-demand, a plaintiff's demand is met with a counter-offer, and so on. Several variations were explored. (1) A two-way "pressure" model would impose sanctions on a party who rejected an offer unless the party beat the offer by some margin – for example, a plaintiff who rejected a $100,000 offer would suffer Rule 68 consequences unless the judgment was at least $125,000. As a two-way rule, the same would hold for defendants. Defendants did not much like this rule. (2) A two-way "cushion" model would deny sanctions if the party rejecting the offer achieved a respectable portion – a plaintiff rejecting a $100,000 offer, for example, would incur Rule 68 sanctions only if the judgment was less than $80,000. Plaintiffs' lawyers liked this. But the survey asked a different question, working on the assumption that there are so few Rule 68 offers now that defendants would make even fewer offers if a plaintiff could avoid sanctions by simply coming close to the rejected offer. This one-way cushion version applied to benefit a defendant who rejects a plaintiff's demand, but not to a plaintiff

who rejects an offer. Plaintiffs did not like this. In the end, plaintiffs' civil rights lawyers liked two-way offer rules; defense lawyers' reactions were more complicated. Plaintiffs' employment discrimination lawyers liked the idea.

Separate problems are recognized if sanctions are expanded in a two-way rule. If a plaintiff loses entirely, and is presumptively liable for defense costs, the most likely meaningful sanction is a multiple of costs or defense post-offer fees. If a plaintiff wins entirely and is entitled to costs and statutory fees, the defendant could be made liable for multiple costs or increased fees.

Prior proposals for amending Rule 68 are set out below.

Excerpts from 1992-1994 Rule 68 Drafts

Rule 68(e)(4)

(4)(A) A judgment for a party demanding relief is more favorable than an offer to it:

(I) if the amount awarded — including the costs, attorney fees, and other amounts awarded for the period before the offer {was served}[expired] — exceeds the monetary award that would have resulted from the offer; and

(ii) if nonmonetary relief is demanded and the judgment includes all the nonmonetary relief offered, or substantially all the nonmonetary relief offered and additional relief.

(B) A judgment is more favorable to a party opposing relief than an offer to it:

(I) if the amount awarded — including the costs, attorney fees, and other amounts awarded for the period before the offer {was served} [expired] is less than the monetary award that would have resulted from the offer; and

(ii) if nonmonetary relief is demanded and the judgment does not include [substantially] all the nonmonetary relief offered.

Committee Note

Nonmonetary relief further complicates the comparison between offer and judgment. A judgment can be more favorable to the offeree even though it fails to include every item of nonmonetary relief specified in the offer. In an action to enforce a covenant not to compete, for example, the defendant might offer to submit to a judgment enjoining sale of 30 specified items in a

two-state area for 15 months. A judgment enjoining sale of 29 of the 30 specified items in a five-state area for 24 months is more favorable to the plaintiff if the omitted item has little importance to the plaintiff. Any attempt to undertake a careful evaluation of significant differences between offer and judgment, on the other hand, would impose substantial burdens and often would prove fruitless. The standard of comparison adopted by subdivision (e)(4)(A)(ii) reduces these difficulties by requiring that the judgment include substantially all the nonmonetary relief in the offer and additional relief as well. The determination whether a judgment awards substantially all the offered nonmonetary relief is a matter of trial court discretion entitled to substantial deference on appeal.

The tests comparing the money component of an offer with the money component of the judgment and comparing the nonmonetary component of the offer with the nonmonetary component of the judgment both must be satisfied to support awards in actions for both monetary and nonmonetary relief. Gains in one dimension cannot be compared to losses in another dimension.

The same process is followed, in converse fashion, to determine whether a judgment is more favorable to a party opposing relief.

This provision was included in a rule that was far more complicated than present Rule 68. The rule authorized offers by claimants as well as defendants, and explicitly authorized successive offers by the same party. It provided attorney-fee sanctions, subject to complicated offsets and limits. But even then, the Committee Note — after providing a dizzying series of illustrations of increasingly complex calculations involving successive offers by both parties — did not address successive offers for specific relief.

The standard of comparison suggested in this draft was simpler than the approach taken by the Second Circuit in the *Reiter* case. If nonmonetary relief is demanded, the judgment is more favorable than the offer if it either includes all of the nonmonetary relief offered or includes substantially all the nonmonetary relief offered and additional relief. The drafting should be improved, but the intended answer for the *Reiter* case is clear: There is no Rule 68 sanction because the offer included no nonmonetary relief, while the judgment awarded monetary relief. There is no occasion to compare the difference between the money judgment and the money offer with the judgment's nonmonetary relief.

Among possible alternatives, the simplest would be a rule that explicitly requires the offeror to prove that the judgment was not

more favorable than the offer. The Committee Note could note the difficulties presented by demands, offers, and judgments for specific relief. Other alternatives would expressly authorize one or both of two weighing approaches. Comparison of the offer and judgment for specific relief could be addressed in open-ended terms that direct the court to determine whether the overall effect of the judgment is more favorable than the offer. This comparison could be made without reference to the money elements of offer and judgment. Or the comparison could be complicated by adding a second dimension: if the claimant wins more money than the offer, the court weighs a shortfall in specific relief against the gain in money, while a judgment for less money than the offer would require the court to weigh the money shortfall against the gain in specific relief.

How much complication is appropriate depends on the overall value of Rule 68 offers of judgment. This assessment can be made either in the context of the present rule, otherwise unchanged, or in the quite different context of imagining a thoroughly revised Rule 68. Limited revision of the present rule will not be easy, but it may not be a major undertaking. Thorough reconsideration of Rule 68, however, will be a major undertaking.

RULE 68

The agenda materials include a brief memorandum reporting on survey research on Rule 68 offers of judgment being done by Professors Thomas A. Eaton and Harold S. Lewis, Jr.. Rule 68 escaped revision in each of two lengthy Advisory Committee undertakings in the 1980s and 1990s. But suggestions for revision regularly appear on the agenda, fueled by a desire to find ways to encourage earlier settlements reached before unnecessary litigation costs are incurred. Completion of the articles reporting on this research and making recommendations supported by it may provide an occasion to return once again to Rule 68.

Rule 68

The Committee was reminded that proposals to "put teeth" into the Rule 68 offer-of-judgment provisions continue to arrive "in the mail box" at rather regular intervals. Rule 68 was studied, and revisions were published for comment, in the 1980s. These proposals may have been the origin of the warnings that one proposal or another will generate a firestorm of protest. They did. Rule 68 was studied again in the 1990s in response to an elegant "capped benefit-of-the-judgment" proposal advanced by Judge Schwarzer. The FJC undertook a study of Rule 68 practice to support the work. That undertaking led to an increasingly complicated draft and eventually to abandonment of the project without publishing any proposal. Last year the Second Circuit published an opinion explicitly inviting revision of Rule 68 to address the problems presented by cases that involve specific relief. Recent empirical work investigating the use of Rule 68 offers in fee-shifting cases involving employment discrimination and civil rights has been undertaken by Professors Thomas A. Eaton and Harold S. Lewis, Jr.. Specific proposals will emerge from their work.

It was noted that Pennsylvania state courts use added interest awards as an incentive to accept an offer of judgment. It may be possible to rely on enhanced costs or interest awards to make Rule 68 more effective without intruding on the traditional attorney-fee rules that apply outside the realm of statutory fee shifting.

It was agreed that Rule 68 can remain on the agenda for possible future consideration.

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Rule 68

Judge Kravitz introduced the Rule 68 discussion by noting a recent article by Professor Robert Bone. The article provides a great discussion of the history. Rule 68 was designed not so much to encourage settlement as to deal with recalcitrant plaintiffs. The conclusion is that if promoting settlement has become an important goal, the present rule should be scrapped in favor of starting over.

Four options are presented in the agenda materials: Do nothing; abrogate the rule; undertake relatively modest revisions; or undertake a thorough revision.

Connecticut state courts have a rule that allows offers by plaintiffs as well as defendants, and that imposes big penalties for guessing wrong in the form of prejudgment interest at high rates. The interest award can easily double a jury verdict. The rule "has turned into a game." A plaintiff with a $1,000,000 claim will make an offer of $750,000 before the defendant's attorney even knows what the action is about. The inevitable ignorance-induced rejection then opens the way for further bargaining in the shadow of rule-based sanctions. One challenge will be whether it is possible to develop a rule that is much used without becoming the occasion of gamesmanship.

The history of Committee efforts to address Rule 68 in the 1980s and 1990s was reviewed. The proposal to adopt strong sanctions in the 1980s led to the proverbial firestorm of protest. One concerned and thoughtful observer of the Enabling Act process, John P. Frank, feared that continued pursuit of the subject might lead Congress to alter or abandon the Enabling Act process. The effort in the 1990s made a serious attempt to address many of the complexities that could be foreseen. The work was supported by Federal Judicial Center research. In the end the draft became so complex as to be abandoned. The discussions led several members to the view that abrogation might be the best solution, but the question was never put to a vote.

It is common ground in Rule 68 discussions that offers are seldom made. Even in fee-shifting cases empirical studies have repeatedly shown that offers are made in only a relatively small minority of cases. Recent empirical work by Professors Eaton and Lewis shows that attorneys with long experience in civil rights and employment-discrimination litigation, where offers can cut off statutory fee rights, agree that ADR mechanisms are more effective than Rule 68 in promoting early settlement. It also is common ground that no possible version of Rule 68 could do much to increase the number of cases that actually settle; the most that might be hoped is that cases that settle will settle earlier and at lower cost.

The list of topics that might be addressed by a modest revision has a way of expanding. One obvious candidate is the ruling that a plaintiff who fails to better a rejected Rule 68 offer loses the right to statutory attorney fees incurred after the

offer if – but only if – the fee statute refers to fees as "costs." Turning the consequence on the happenstance of statutory language seems a puzzling use of "plain meaning" interpretation – no plausible reason can be advanced for believing that the wording choice of fee statutes is made with an eye to invoking, or rejecting, Rule 68 consequences. More fundamentally, it is difficult to agree that Rule 68 should become a vehicle for cutting off fee rights established for prevailing plaintiffs enforcing specially favored rights. This effect seems to abridge or modify important substantive statute-based rights. The fear of losing statutory fees, moreover, may create at least a tension between the interests of counsel and the party's interests.

Another seemingly modest change would be to provide an opportunity for plaintiffs to make offers. The difficulty is that sanctions would be available only when the defendant loses more than the offer. The plaintiff would be entitled to statutory costs in any event, so a Rule 68 sanction would have to be something additional. The most common suggestion is to award attorney fees, a manifestly sensitive prospect. Multiple costs might be provided instead. California provides expert witness fees. Finding the right sanction might not be easy, but at least it would make the rule seem more fair if all parties can make offers. Of course expanding the opportunities to offer would also expand the opportunities for strategic game playing.

Other relatively modest changes could begin by changing the procedure to one offering settlement, not judgment. The lawyers surveyed by Eaton and Lewis often said that they do not make offers of judgment because their clients do not want the career-blighting effects of an adverse judgment. The time to consider the offer could be extended from the 14 days available under the day-counting approach of the present rule or the explicit provision of the Time Project revision. Extending the time to consider would be an obvious occasion to answer a question that has divided the courts by allowing retraction of an offer before acceptance. Class actions might be removed from Rule 68's reach.

The Second Circuit has asked for consideration of the complications that arise when offer or judgment include specific relief as well as money. The draft that was put aside in 1994 offered a relatively simple solution to what could be an enormously complicated comparison – judgment and offer are compared by recognizing a judgment for a plaintiff as more favorable than the offer only if it includes all of the nonmonetary relief offered, or substantially all of the offered relief and additional relief as well.

More thorough revision would address such questions as offers made to multiple parties; the opportunity to make successive offers – which could greatly complicate not only the rule, but also the consequent strategic use of the rule; and adoption of a margin of error, hoping to reduce the problems of uncertainty by invoking sanctions only if the offer beats the judgment by a factor of 20% or 25%.

Dissatisfaction with Rule 68 at its core arises in part from

the unpredictability of litigation. Imposing sanctions — and particularly imposing sanctions severe enough to create meaningful incentives — may seem unfair when a party simply guesses wrong within an often wide range of plausible outcomes. More fundamental concerns focus on risk aversion and endowment. A poorly endowed plaintiff, in great need of some remedy and unable to bear the risk of relief, may be pressured to accept an offer well below the reasonable range.

Discussion began with the suggestion that one approach would be to amend Rule 68 to provide only § 1920 cost consequences. Overruling statutory fee-shifting consequences would be the next closest thing to abrogation, leaving the rule to wallow in obscurity.

It was noted that Indiana has a bilateral rule that "is not much used." Proposals to add greater sanctions have proved controversial. Calling it settlement rather than judgment might make a difference, but the more likely guess is that if the dollars are right the existence or nonexistence of an offer-of-judgment (settlement) provision will not much affect the parties' ability to settle.

Another member noted that Florida has a procedure that can be used effectively.

An observer noted that six years ago New Jersey adopted attorney fee sanctions, with a 20% safety margin of difference. Use of the rule "has become complex." The rule was amended to exclude nonmoney judgments and statutory fee shifting. The rule can be useful in addressing the obstinate party who clings to a meritless position.

A member noted that Rule 68 offers are made on rare occasions in class actions, usually in a seeming attempt to moot the individual claim of the class representative. The offer is inherently coercive. And it creates a conflict between attorney and client. If it is carried forward, class actions should be explicitly excluded from its reach.

Another member suggested that it will be very difficult and controversial to make Rule 68 effective. Even small changes will open up controversy.

A judge noted that lawyers very seldom use Rule 68.

Another judge thought it may be worthwhile to explore the option of changing from an offer of judgment to an offer of settlement. An attorney replied that it was difficult to imagine that Rule 68 would make a difference; "if you're talking, you're talking."

A motion to do nothing now carried unanimously. Rule 68 will be carried forward on the agenda, perhaps for more detailed consideration in the fall of 2009.

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FEDERAL RULES DECISIONS

Volume 98

Opinions, Decisions and Rulings

involving the

FEDERAL RULES OF CIVIL PROCEDURE

AND

FEDERAL RULES OF CRIMINAL PROCEDURE

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v. Banco de Ponce, 616 F.2d 573, 576 (1st Cir. 1980); In re Sierra Trading Corp., 482 F.2d 333, 337 (10th Cir. 1973); Case v. Morrisette, 475 F.2d 1300, 1306-07 (D.C. Cir. 1973).

The commentators also disagree as to the proper interpretation of the Rule. Compare Wright, The Doubtful Omniscience of Appellate Courts, 41 Minn. L. Rev. 751, 768-70 (1957) (language and intent of Rule support view that "clearly erroneous" test should apply to all forms of evidence), and 9 C. Wright & A. Miller, Federal Practice and Procedure: Civil § 2587, at 740 (1971) (language of the rule is clear), with 5A J. Moore, Federal Practice ¶ 52.04, at 2687-88 (2d ed. 1982) (rule as written supports broader review of findings based on non-demeanor testimony).

The Supreme Court has not resolved the issue. See United States v. United States Gypsum Co., 333 U.S. 364, 394-96 (1948); United States v. General Motors Corp., 384 U.S. 127, 141 n.16 (1966); Pullman Standard v. Swint, 102 S.Ct. 1781 (1982).

The principal argument advanced in favor of a more searching appellate review of findings by the district court based solely on documentary evidence is that the rationale of Rule 52(a) does not apply when the findings do not rest on the trial court's assessment of credibility of the witnesses but on an evaluation of documentary proof and the drawing of inferences from it, thus eliminating the need for any special deference to the trial court's findings. These considerations are outweighed by the public interest in the stability and judicial economy that would be promoted by recognizing that the trial court, not the appellate tribunal, should be the finder of the facts. To permit courts of appeals to share more actively in the fact-finding function would tend to undermine the legitimacy of the district courts in the eyes of litigants, multiply appeals by encouraging appellate retrial of some factual issues, and needlessly reallocate judicial authority.

Rule 68. Offer of ~~Judgment~~ Settlement

At any time more than ~~10~~ 30 days before the trial begins, ~~a party defending against a claim~~ any party may serve upon ~~the~~ an adverse party an offer, denominated as an offer under this rule, to ~~allow judgment to be taken against him~~ settle a claim for the money or property or to the effect specified in his offer~~, with costs then~~

~~accrued.~~ and to enter into a stipulation dismissing the claim or to allow judgment to be entered accordingly. The offer shall remain open for 30 days unless a court authorizes earlier withdrawal. ~~If within 10 days after service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment.~~ An offer not accepted in writing within 30 days shall be deemed withdrawn. ~~and~~ Evidence ~~thereof~~ of an offer is not admissible except in a proceeding to enforce a settlement or to determine costs and expenses.

If the judgment finally ~~obtained by the offeree~~ entered is not more favorable to the offeree than ~~the~~ an unaccepted offer that remained open 30 days, the offeree must pay the costs and expenses, including reasonable attorneys' fees, incurred by the offeror after the making of the offer~~.~~, and interest from the date of the offer on any amount of money that a claimant offered to accept to the extent such interest is not otherwise included in the judgment. The amount of the expenses and interest may be reduced to the extent expressly found by the court, with a statement of reasons, to be excessive or unjustified under all of the circumstances. In determining whether a final judgment is more or less favorable to the offeree than the offer, the costs and expenses of the parties shall be excluded from consideration. Costs, expenses, and interest

shall not be awarded to an offeror found by the court to have made an offer in bad faith.

The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, ~~the~~ any party ~~adjudged liable~~ may make an offer of settlement under this rule, which shall be effective for such period of time, not more than 30 days, as is authorized by the court. ~~judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability.~~ This rule shall not apply to class or derivative actions under Rules 23, 23.1, and 23.2.

COMMITTEE NOTE

The purpose of Rule 68 as adopted in 1938 was to encourage settlements and avoid protracted litigation by taxing a claimant with costs if he should recover no more after trial then he would have received if he had accepted the defending party's offer to enter judgment in the claimant's favor for a specified amount of money or property, or other relief. The rule, which has been amended twice but only in minor respects, has rarely been invoked and has been considered largely ineffective as a means of achieving its goals.

The principal reasons for the rule's past failure have been (1) that "costs," except in rare instances in which they are defined to include attorney's fees, see, e.g., Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k), (1976), are too small a factor to motivate parties to use the rule; and (2) that the rule is a "one-way street," available only to those defending against claims and not to claimants. Moreover, some parties defending

against claims for money are inclined to delay making otherwise acceptable offers until trial so that in the interim they may have the use at favorable interest rates of funds that otherwise would have been available to the offeree under an offer accepted at an earlier time.

Rule 68 has been amended to remedy these weaknesses and render it effective as a means of accomplishing its original goals. It has been recaptioned to refer to "settlement" to indicate it is that process rather than entry of judgment that is being fostered. Accordingly, the rule now authorizes a dismissal pursuant to a stipulation and no longer requires the formal filing of the offer and acceptance and the entry of a judgment. The parties, of course, remain free to do that if they wish.

The first sentence of the rule has been revised to permit all parties, including claimants, to make offers of settlement. The earlier requirement that the offer be made at least 10 days before trial has been revised to at least 30 days before trial. This change reflects the view that parties should be encouraged to consider settlement seriously at a reasonably early stage in the litigation after enough discovery has been had to appraise the strengths and weaknesses of a claim.

The first sentence of the rule also has been revised to eliminate the former provision that the offeror add to his offer the "costs then accrued." Some statutes presently provide that "costs" include attorney's fees. See, e.g., Freedom of Information Act, 5 U.S.C. § 552(a)(4)(E) (1976); Clayton Act, 15 U.S.C. § 15 (1976); Copyright Act, 17 U.S.C. § 505 (1976); Voting Rights Amendments Act of 1975, 42 U.S.C. § 1973l(e) (1976); Civil Rights Attorneys' Fees Awards Act, 42 U.S.C. § 1988 (1976). This has led to uncertainty whether an offer under Rule 68 also must specifically add attorney's fees. See, Delta Air Lines, Inc. v. August, 450 U.S. 346, 363-66 (1981) (Powell, J., concurring); Scheriff v. Beck, 452 F. Supp. 1254, 1260 (D. Colo. 1978). The rule's purpose can be achieved with less confusion by deleting the former provision so that costs and attorney's fees will be excluded from consideration in determining whether a final judgment is more or less favorable to the offeree than the offer.

The second sentence of the rule has been revised to give the offeree 30 days instead of 10 days (as formerly provided) within which to decide whether to accept. The 10-day period was thought to be too short to enable many offerees to act upon offers made to them, particularly when authority from others (for example insurers or the government) had to be obtained before action could be taken on an offer or when the offeree needed additional information to which it would be entitled by way of discovery under the rules to appraise the fairness of the offer. The rule now makes it clear that the offer remains open throughout the 30-day period unless the court orders otherwise and that it is deemed withdrawn at

the end of that period. Only offers that have remained open for 30 days are affected by the remaining provisions of Rule 68.

The first sentence of the second paragraph has been revised to provide that when an offer of settlement is not accepted and ultimately turns out to have been more favorable to the offeree than the judgment entered after trial, the offeree must pay not only the offeror's costs but also its expenses, including attorney's fees, from the date of the offer. This new provision is similar to provisions already adopted by some states. (See, e.g., 52 Conn. Gen. Stat. Ann. § 52-195 (West Supp. 1982); N.J. Civ. Prac. R. 4:582-2 (Pressler ed. 1982)). Since fees payable for attorney's services in the conduct of pretrial and trial activities often become sizeable, the increased risk faced by an offeree is expected to encourage more serious evaluation of a proposed settlement at an earlier stage than otherwise might occur, which should lead to more dispositions of cases before the heaviest expenses have been incurred.

The first sentence of the second paragraph of Rule 68 also has been revised to provide that when a claimant makes an offer that is not accepted within 30 days and obtains a judgment for an amount larger than the offer it may recover, in addition to the amount of the judgment, costs, and expenses, a sum equal to interest on the amount of the offer from the date it was made less interest payable under the judgment. It is anticipated that interest would be computed at the rate in effect with respect to money judgments at the time of the offer. This provision is intended to eliminate the incentive that a defendant party otherwise might have to decline an acceptable offer because of the interest advantage that might be gained by delaying payment until entry of judgment after trial. See Section 4 of the Clayton Act, as amended Sept. 12, 1980, Pub. L. 96-349, § 4(a)(1), 94 Stat. 1156, 15 U.S.C. § 15 (West Supp. 1982).

The second sentence of the second paragraph providing that the amount of expenses and interest may be reduced by the court to the extent found by the court to be "excessive" or "unjustified" was inserted to permit the court to avoid the Draconian impact of an "all-or-nothing" rule that would impose a heavy award of expenses against an offeree under all circumstances. For example, the court may exercise its discretion (1) when the offeree's refusal was reasonable at the time, (2) when the recovery was less favorable to the offeree than the offer by only a narrow margin, (3) when the offer is a sham and was made solely for the purpose of recovering attorney's fees if it should be refused (for example, a token $1 type of offer), (4) when the offeror incurred excessive attorney's fees or other expenses after making the offer, (5) when the offeree has made a reasonable counteroffer, or (6) when the award would be unduly burdensome. In multiparty litigation, the court may use its discretion to reduce an award under this rule on the ground that the offeree's failure to

accept an offer was reasonable because (1) the offer was out of proportion to a defendant's reasonably forseeable share of all defendants' liability to the plaintiff; or (2) a claimant-offeree reasonably concluded that a settlement with one tortfeasor would damage his ability to collect the balance of his damages from other tortfeasors.

The term "excessive" is designed to permit the judge to reduce expenses incurred when they are out of proportion to the needs of the case, and the term "unjustified" is intended to permit the judge to deny expenses altogether when, because of circumstances (for example, the "token" nature of the offer or the importance of the issues ("test case"), or the narrow difference between the offer and the recovery) an award basically would be unfair. The judge, however, does not have unbridled discretion since that might destroy the rule's potential for leading parties seriously to consider settlement at an early stage.

Nothing in the rule affects the court's statutory authority to award attorney's fees to a prevailing party in certain types of cases. See, e.g., 15 U.S.C. § 15 (1976) (Clayton Act); 15 U.S.C. § 1640(a)(3) (1976) (truth in lending); 17 U.S.C. § 505 (1976) (copyright); 33 U.S.C. § 1365(d) (1976) (water pollution); 42 U.S.C. §§ 1988, 2000a-3(b), 2000e-5(k) (civil rights). Nor does the rule prevent the court, in determining the reasonable value of the attorney's services, from taking into consideration the prevailing party's refusal to accept a reasonable offer that was more favorable to him than the judgment entered and that, if accepted, would have eliminated the necessity for further legal services from the date of the offer. Conversely, statutory authority to award attorney's fees to the prevailing party does not preclude or relieve the court from making an award under Rule 68 when it otherwise is appropriate to do so. In these cases the awards, each of which implements a different policy, would both be effective and might wholly or partially offset each other. As in other situations, however, the rule's express grant of discretion to the judge should protect against any award that is "unjustified under all of the circumstances." Indeed, this discretion should assure that awards under this rule do not frustrate the various policies of the fee statutes.

The third sentence of the second paragraph has been inserted to eliminate confusion and problems that would arise if the offeree's costs or expenses are included in the offer but not in the ultimate judgment, or vice versa.

The fourth sentence of the second paragraph authorizes the court to prevent the rule from being used by a party who makes an offer in bad faith. The purpose is to prevent a defending offeror from taking unfair advantage of a claimant-offeree by making a riskless offer, for example, offering to settle a non-frivolous claim for an amount so small in relation

to the merits of the claim that the offeror should know that the offeree certainly will decline to accept it. The issue of bad faith is expected to be determined objectively on the basis of the surrounding circumstances, including the possible merits of the claim or defense as of the time of the offer and the amount of money or property or the extent of other relief offered.

An offeror, after making an offer, must permit the offeree to have access to discoverable information in the offeror's control that is reasonably necessary to evaluate the fairness of the offer. Use of discovery also should minimize the risk that the offeror may not have disclosed material information bearing on the fairness of the offer.

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 heavy liability for costs and expenses 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. Calif. 1980).

Finally, the rule does not exclude from its application cases in which a claimant-offeree who rejects an offer fails ultimately to obtain a judgment in its favor. As a result the rule would apply if the refusing claimant wins nothing or wins a judgment in its favor for less than the offer he declined. Thus, the rule avoids the problem of construction that was involved in Delta Air Lines, Inc. v. August, 450 U.S. 346 (1981). Other portions of the rule protect plaintiffs who recover nothing from being victimized by sham offers.

Rule 71A. Condemnation of Property

* * *

(h) TRIAL. If the action involves the exercise of the power of eminent domain under the law of the United States, any tribunal specially constituted by an Act of Congress governing the case for the trial of the issue of just compensation shall be the tribunal for the determination of that issue; but if there is no such specially

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FEDERAL RULES DECISIONS

Volume 102

Opinions, Decisions and Rulings

involving the

FEDERAL RULES OF CIVIL PROCEDURE

AND

FEDERAL RULES OF CRIMINAL PROCEDURE

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efficient mechanism for completing these cases without violating the constitutional requirements of due process is needed to prevent unnecessary expense and delay. This amendment adds subdivision (a) to Rule 63, giving a successor judge the discretion to assume the duties of a judge who becomes disabled anytime after commencement without granting a new trial.

To avoid the injustice that may result in some cases due to the successor judge's unfamiliarity with the action, the new Rule 63(a) provides, in language similar to Federal Rule of Criminal Procedure 25(a), that the successor judge must certify familiarity with the record and determine that the case may be completed before that judge without prejudice to the parties. If the successor judge during trial determines that he cannot adequately familiarize himself with the evidence already presented to the court simply by reading the record, then a new trial may be ordered. This often would be the case when an assessment by the judge of the credibility of witnesses who have appeared is required.

Rule 63(b) continues the substance of the original rule and governs situations in which the trial has been completed and there has been a verdict or findings of fact and conclusions of law before the disability occurs. The text has been revised to align it with that of Rule 63(a).

Rule 68. Offer of ~~Judgment~~ Settlement; Sanctions

~~At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. 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. The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability.~~

At any time more than 60 days after the service of the summons and complaint on a party but not less than 90 days (or 75 days if it is a counter-offer) before trial, either party may serve upon the other party but shall not file with the court a written offer, denominated as a offer under this rule, to settle a claim for the money, property, or relief specified in the offer and to enter into a stipulation dismissing

the claim or to allow judgment to be entered accordingly. The offer shall remain open for 60 days unless sooner withdrawn by a writing served on the offeree prior to acceptance by the offeree. An offer that remains open may be accepted or rejected in writing by the offeree. An offer that is neither withdrawn nor accepted within 60 days shall be deemed rejected. The fact that an offer is made but not accepted does not preclude a subsequent offer. Evidence of an offer is not admissible except in proceedings to enforce a settlement or to determine sanctions under this rule.

If, upon a motion by the offeror within 10 days after the entry of judgment, the court determines that an offer was rejected unreasonably, resulting in unnecessary delay and needless increase in the cost of the litigation, it may impose an appropriate sanction upon the offeree. In making this determination the court shall consider all of the relevant circumstances at the time of the rejection, including (1) the then apparent merit or lack of merit in the claim that was the subject of the offer, (2) the closeness of the questions of fact and law at issue, (3) whether the offeror had unreasonably refused to furnish information necessary to evaluate the reasonableness of the offer, (4) whether the suit was in the nature of a "test case," presenting questions of far-reaching importance affecting non-parties, (5) the relief that might reasonably have been expected if the claimant should prevail, and (6) the amount of the additional delay, cost, and expense that the offeror reasonably would be expected to incur if the litigation should be prolonged.

In determining the amount of any sanction to be imposed under this rule the court also shall take into account (1) the extent of the delay, (2) the amount of the parties' costs and expenses, including any reasonable attorney's fees incurred by the offeror as a result of the offeree's rejection, (3) the interest that could have been earned at prevailing rates on the amount that a claimant offered to accept to the extent that the interest is not otherwise included in the judgment, and (4) the burden of the sanction on the offeree.

This rule shall not apply to class or derivative actions under Rules 23, 23.1, and 23.2.

COMMITTEE NOTE

The purpose of Rule 68 as adopted in 1938 was to encourage settlements and avoid protracted litigation by taxing a claimant with costs if he should recover no more after trial than would have been received if the claimant had accepted the defending party's offer to enter judgment in the claimant's favor for a specified amount of money or property, or other relief. The rule, which has been amended twice but only in minor respects, rarely has been invoked and has been considered largely ineffective as a means of achieving its goals.

The principal reasons for the rule's past failure have been (1) that "costs," except in rare instances in which they are defined to include

attorneys' fees, *see, e.g.*, Civil Rights Act of 1964, 42 U.S.C. § 2000e–5(k) (1976), are too small a factor to motivate parties to use the rule; and (2) that the rule is a "one-way street," available only to those defending against claims and not to claimants. Moreover, some parties defending against claims for money are inclined to delay making otherwise acceptable offers until trial so that in the interim they may have the use at favorable interest rates of funds that otherwise would have been available to the offeree under an offer accepted at an earlier time.

Rule 68 has been amended to remedy these weaknesses and render it effective as a means of accomplishing its original goals. It has been recaptioned to refer to "Settlement" to indicate it is that process rather than entry of judgment that is being fostered. Accordingly, the rule now authorizes a dismissal pursuant to a stipulation and no longer requires the formal filing of the offer and acceptance and the entry of a judgment. The parties, of course, remain free to do that if they wish. Nor need an offer under this rule be served on all adverse parties.

The first sentence of the rule has been revised to permit all parties, including claimants, to make offers of settlement. The earlier requirement that the offer be made at least 10 days before trial has been revised to at least 90 days before trial or to at least 75 days before trial if the offer is a counter-offer. This change reflects the view that parties should be encouraged to consider settlement seriously at a reasonably early stage in the litigation after enough discovery has been had to appraise the strengths and weaknesses of a claim or defense. The first sentence also delays the Rule 68 procedure to at least 60 days after the service of the summons and complaint on a party to an offer in order to guard against premature offers under the rule that a defending party is unable to evaluate properly.

The rule also has been revised to eliminate the former provision that the offeror add to his offer the "costs than accrued." Some statutes presently provide that "costs" include attorneys' fees. *See, e.g.*, Freedom of Information Act, 5 U.S.C. § 552(a)(4)(E) (1976); Clayton Act, 15 U.S.C. § 15 (1976); Copyright Act, 17 U.S.C. § 505 (1976); Voting Rights Amendments Act of 1975, 42 U.S.C. § 1973*l*(e) (1976); Civil Rights Attorneys' Fees Awards Act, 42 U.S.C. § 1988 (1976). This has led to uncertainty whether an offer under Rule 68 in such cases also must specifically add attorneys' fees. *See, Delta Air Lines, Inc. v. August*, 450 U.S. 346, 363–66 (1981) (Powell, J., concurring). Some courts have held that the term "costs" in existing Rule 68 includes attorneys' fees. *Fulps v. City of Springfield*, 715 F.2d 1088 (6th Cir.1983); *Waters v. Hueblein*, 485 F.Supp. 110 (N.D.Cal.1979); *Scheriff v. Beck*, 452 F.Supp. 254 (D.Colo.1978); *Chesny v. Marek*, 720 F.2d 474 (7th Cir. 1983), *cert. granted*, 104 S.Ct. 2149 (1984). Others take a contrary view. *Greenwood v. Stevenson*, 88 F.R.D. 225 (D.R.I.1980); *Gamlen Chemical Co. v. Dacar Chemical Products Co.*, 5 F.R.D. 215 (W.D.Pa.1946). The rule's purpose can be achieved with less confusion by deleting the former provision so that acceptance of the offer would amount to a settlement of the entire amount claimed by the offeree, including accrued costs and attorneys' fees.

The second sentence of the rule has been revised to give the offeree 60 days instead of 10 days (as formerly provided) within which to decide whether to accept. The 10-day period was thought to be too short to enable many offerees to act upon offers made to them, particularly when authority from others (for example, insurers or the government) had to be obtained

before action could be taken on an offer or when the offeree needed additional information to which it would be entitled by way of discovery under the rules to appraise the fairness of the offer. The rule now makes it clear that the offer remains open throughout the 60-day period unless it is withdrawn before acceptance or rejection in writing. However, a written counter-offer would not constitute a rejection unless it expressly so stated. An offer that has neither been withdrawn nor accepted within the 60-day period is deemed to have been rejected. Only offers that have been rejected are affected by the remaining provisions of Rule 68.

The last sentence of the first paragraph provides that evidence of an offer shall not be admissible except in proceedings to enforce a settlement or to determine sanctions under the rule. This provision is designed to encourage the making of offers under the rule by assuring that the offeror will be protected against prejudicial use of an offer. The provision is consistent with Fed.R.Evid. 408, which provides that offers of compromise are not admissible to prove liability for or the invalidity of a claim or its amount.

The second paragraph of the new rule provides that when the court finds that an offer of settlement is rejected unreasonably, resulting in unnecessary delay and needless increase in the cost of the litigation, the offeree, whether a claimant or a defendant, may be subjected by the court to an appropriate sanction. The increased risk faced by an offeree who has acted unreasonably, causing needless expense and delay, is expected to encourage more serious evaluation of a proposed settlement at an earlier stage than otherwise might occur, which should lead to more dispositions of cases before the heaviest expenses have been incurred.

The issue of what is an unreasonable rejection of an offer is expected to be determined objectively on the basis of the relevant surrounding circumstances, a number of which are enumerated in the rule. The court has sufficient authority to prevent the rule from being used by a party who makes an offer in bad faith. The purpose is to prevent a defendant offeror from taking unfair advantage of a claimant-offeree by making a riskless offer; for example, offering to settle a non-frivolous claim for an amount so small in relation to the merits of the claim that the offeror should know that the offeree certainly will decline to accept it. In multiparty litigation, the court may find that the offeree's failure to accept an offer was not unreasonable because (1) the offer was out of proportion to a defendant's reasonably foreseeable share of all defendants' liability to the plaintiff; or (2) a claimant-offeree reasonably concluded that a settlement with one tortfeasor would damage his ability to collect the balance of his damages from other tortfeasors.

The rule also acknowledges that the offeree may need to resort to discovery to evaluate the offer. Certainly an offeror, after making an offer, must permit the offeree to have access to discoverable information in the offeror's control that is reasonably necessary to evaluate the fairness of the offer. Use of discovery should minimize the risk that the offeror may not have disclosed material information bearing on the fairness of the offer.

The new rule also provides that in determining the amount of any sanction, the court must take into account a number of additional factors that have been set out in the third paragraph of the rule to make certain that the award is neither excessive nor insufficient. The judge should make certain that the amount awarded is in proportion to the needs of the case.

The judge, however, does not have unbridled discretion since that might destroy the rule's potential for encouraging parties to consider settlement seriously at an early stage in the action.

A sanction under Rule 68 must be sought within 10 days of the entry of judgment. A relatively short time period has been set in order to avoid problems created by a prompt appeal and a claim that the trial court has lost its power to make post-trial orders.

Nothing in the rule affects the court's statutory authority to award attorneys' fees to a prevailing party in certain types of cases. See, *e.g.*, 15 U.S.C. § 15 (1976) (Clayton Act); 15 U.S.C. § 1640(a)(3) (1976) (truth in lending); 17 U.S.C. § 505 (1976) (copyright); 33 U.S.C. § 1365(d) (1976) (water pollution); 42 U.S.C. §§ 1988, 2000a–3(b), 2000e–5(k) (civil rights). Rule 68 implements an entirely different policy—encouraging settlements at the earliest possible time—by imposing a sanction on conduct that is found to be unreasonable and that results in unnecessary delay or needless increase in litigation costs. The rule thus applies the principle that a court may impose a reasonable sanction, including an award of attorneys' fees, as a means of facilitating the efficient operation of the litigative process, as in the case of litigants who threaten the process by refusing disclosure, Rule 37(b)(2)(E), (c), and (d), who file pleadings or motions without having a reasonable basis for believing they are well-grounded in fact or law, Rules 11 and 26(g), who file summary judgment affidavits in bad faith, Rule 56(g), who fail to attend a noticed deposition, Rule 30(g), or who have claims dismissed under Rule 41(a)(2). Even without the rule the court already has the power in determining the value of the attorney's services under a fee award statute to take into consideration a party's refusal to accept a reasonable offer that, if accepted, would have eliminated the necessity for further legal services from the date of the offer.

Conversely, statutory authority to award an attorney's fee to the prevailing party does not preclude the court from imposing a sanction under Rule 68 for unreasonable conduct causing unnecessary delay and expense when it otherwise is appropriate to do so. As in other situations (e.g., Rules 11, 16, 26(g), and 37), the rule's express grant of discretion to the judge should protect against any sanction that is unjustified under all of the circumstances. Indeed, this discretion should assure that sanctions under this rule do not frustrate the various policies of the fee statutes.

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).

Finally, the rule does not exclude from its application cases in which a claimant-offeree who rejects an offer fails ultimately to obtain a judgment in its favor. As a result the rule would apply if the refusing claimant wins nothing or wins a judgment in its favor for less than the offer it declined. Thus, the rule avoids the problem of construction that was involved in *Delta*

Air Lines, Inc. v. August, 450 U.S. 346 (1981). Other portions of the rule protect plaintiffs who recover nothing from being victimized by sham offers.

PROPOSED AMENDMENTS TO THE SUPPLEMENTAL RULES FOR CERTAIN ADMIRALTY AND MARITIME CLAIMS

Rule C. Actions In Rem: Special Provisions

* * * * *

(3) Process. Upon the filing of the complaint the clerk shall forthwith issue a warrant for the arrest of the vessel ~~or other property~~ that is the subject of the action and deliver it to the marshal for service. If other property, tangible or intangible, is the subject of the action, the warrant shall be delivered by the clerk to the marshal or a person specially appointed by the court for service. If the property that is the subject of the action consists in whole or in part of freight, or the proceeds of property sold, or other intangible property, the clerk shall issue a summons directing any person having control of the funds to show cause why they should not be paid into court to abide the judgment.

* * * * *

(5) Ancillary Process. In any action in rem in which process has been served as provided by this rule, if any part of the property that is the subject of the action has not been brought within the control of the court because it has been removed or sold, or because it is intangible property in the hands of a person who has not been served with process, the court may, on motion, order any person having possession or control of such property or its proceeds to show cause why it should not be delivered into the custody of the marshal or special appointee or paid into court to abide the judgment; and, after hearing, the court may enter such judgment as law and justice may require.

* * * * *

Rule E. Actions In Rem and Quasi In Rem: General Provisions

* * * * *

(4) Execution of Process; Marshal's Return; Custody of Property.

(a) In General. Upon issuance and delivery of the process, or, in the case of summons with process of attachment and garnishment, when it appears that the defendant cannot be found within the district, the marshall shall forthwith execute the process in accordance with this subdivision (4) in the case of an arrest or attachment of a vessel, making due and prompt return. In the case of an arrest or attachment or garnishment of any other property the process shall

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April 19, 2002

02-CV-D

Mr. Peter G. McCabe
Secretary of the Committee on
Rules of Practice and Procedure
Administrative Office of the United
States Courts
1 Columbus Circle, N.E.
Room 4-170
Washington, D.C. 20544

Re: Federal Rule of Civil Procedure 68

Dear Mr. McCabe:

I am the Chair of the Committee on Federal Procedure of the Commercial and Federal Litigation Section of the New York State Bar Association. On April 17, 2002, the Section narrowly approved the enclosed report on Providing Offers of Judgment with "Teeth"; A Proposal for the Amendment of Federal Rule of Civil Procedure 68. On behalf of the Commercial and Federal Litigation Section, I would like to submit this report for consideration by the Advisory Committee on Civil Rules.

This report identifies an intriguing and possibly controversial change in an underutilized rule with the objective of encouraging settlements. The strong dissent in the Section was concerned that the proposal contained a significant and inappropriate disincentive to litigate imposed upon plaintiffs, especially less wealthy plaintiffs; contained a strong incentive for deep-pocket defendants to run up costs beyond what they would otherwise spend; and left it to the uncertain and undoubtedly non-uniform discretion of individual judges to ameliorate any unfairness in imposing expenses upon parties who reject settlement offers less favorable than the outcome after trial.

If you would like further information or wish to pass along any comments, I would be pleased to hear from you.

Sincerely yours,

Gregory K. Arenson

Enclosure

cc: Jay G. Safer, Esq. (w/o encl.)
Chair, Commercial and Federal Litigation Section

PROVIDING OFFERS OF JUDGMENT WITH "TEETH"; A PROPOSAL FOR THE AMENDMENT OF *FEDERAL RULE OF CIVIL PROCEDURE* 68

Summary

The concept of an "offer of judgment" under Rule 68 has been practically a dead letter since its adoption as one of the original *Federal Rules of Civil Procedure* in 1938. The intent of the Rule has been to encourage settlements by shifting taxable costs to a claimant (usually the plaintiff) who rejects a written settlement offer on the claim and later fails to obtain a judgment more favorable than the rejected offer. The Section believes that the Rule's lack of utility as a settlement-promoting device stems from the fact that it does not apply to a broad enough range of situations, and because its limited financial consequences do not provide a sufficient economic incentive for offerees to settle by accepting offers of judgment.

Accordingly, the Section recommends that Rule 68 be modified **(i)** to make it applicable to both claimants and defendants on a claim; **(ii)** to make it applicable when a claimant-offeror obtains a result that is more favorable than the offer; **(iii)** to make it applicable when the claimant-offeree loses at trial or on a dispositive motion; and **(iv)** to strengthen the potential economic consequences to the party rejecting the offer by shifting, in addition to taxable costs, the offeror's reasonable post-offer expenses (but not attorneys' fees) to the offeree, in the discretion of the court, if the offeree fails to obtain a result more favorable than the rejected offer.

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1. The Current State of the Federal Rule on Offers of Judgment

As a matter of course, Fed. R. Civ. P. 54(d)[1] provides that a party who loses at trial or on a dispositive motion, *i.e.*, the non-prevailing party, will be taxed the costs of suit defined in 28 U.S.C. § 1920,[2] unless the court otherwise directs. *See Kohus v. Cosco, Inc.*, Case No. 01-1358 (Fed. Cir. 2002) ("Section 1920 'embodies Congress' considered choice as to the kinds of expenses that a

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[1] **Rule 54. Judgments; Costs**

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(d) Costs; Attorneys' Fees.

(1) Costs Other than Attorneys' Fees. Except when express provision therefor is made either in a statute of the United States or in these rules, costs other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law. Such costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court.

[2] **§ 1920. Taxation of costs.**

A judge or clerk of any court of the United States may tax as costs the following:
(1) Fees of the clerk and marshal;
(2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
(3) Fees and disbursements for printing and witnesses;
(4) Fees for exemplification and copies of papers necessarily obtained for use in the case;
(5) Docket fees under section 1923 of this title;
(6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree.

federal court may tax against the losing party,' " citing *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437 (1987)).

Rule 68 of the *Federal Rules of Civil Procedure*[3] shifts the risk of being saddled with taxable costs to a prevailing claimant under the circumstances spelled out in the Rule, which reads as follows:

> **Rule 68. Offer of Judgment**
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> At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against the defending party for the money or property or to the effect specified in the offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. 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. The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment,

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3 For comprehensive discussions of Rule 68, *see* 12 *Wright, Miller & Marcus, Federal Practice and Procedure: Civil 2d* §§ 3001-3007 (1997); and 13 *Moore's Federal Practice* 3d §§ 68.01-68.10 and 68 App. 01-68 App. 101 (3d 2001). An extensive and scholarly analysis of Rule 68, its history, shortcomings, and proposals for amending it, can be found in Roy D. Simon, "*The Riddle Of Rule 68*," 54 Geo. Wash. L. Rev. 1 (1985).

> which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability.

Rule 68 introduced a new concept in federal jurisprudence[4] by allowing a party defending against a claim to serve upon the claimant more than 10 days prior to trial an offer "to allow judgment to be taken against the defending party for the money or property or to the effect specified in the offer, with costs then accrued." If the claimant-offeree refuses the offer but does not obtain a better result at trial, then "costs [under 28 U.S.C. § 1920] incurred after the making of the offer" are taxed to the offeree in accordance with Rule 54(d). Rule 68 operates only when the offeree refuses the offer and subsequently wins on the merits of the claim but obtains the same or less than the amount offered.[5] A plaintiff may make an offer of judgment under Rule 68 only as to a counterclaim or cross-claim against it. In short, "Rule 68 bites only when the plaintiff wins but wins less than the defendant's offer of judgment." *Amati v. City of Woodstock*, 176 F.3d 952, 957 (7th Cir. 1999).

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4 State court antecedents can be found in Minnesota, Montana and New York. *See* 2 *Minn.Stat.* (Mason, 1927) § 9323; 4 *Mont.Rev.Codes Ann.* (1935) § 9770; and *N.Y.C.P.A.* (1937) § 177.

5 Rule 68 does not apply if the claimant-offeree refuses the offer of judgment and subsequently loses on the merits, because the claimant-offeree did not "obtain" a judgment within the meaning of the Rule. In almost all such cases, Rule 68 would be superfluous because "costs" under 28 U.S.C. § 1920 are taxed against the losing claimant-offeree under Rule 54(d). *Delta Air Lines, Inc. v. August*, 101 S.Ct. 1146, 450 U.S. 346 (1981).

The long-recognized purpose of Rule 68 has been "to relieve overburdened courts from litigation by encouraging early settlement." Martha A. Mills et al., *Report on Proposed Rule 68: Offer of Settlement*, "The New and Proposed Rules of Civil Procedure" 501, 506 (PLI 1984). In theory at least, parties are more likely to settle early in the case when prolonging the litigation carries with it the prospect that the prevailing party (i.e., the claimant-offeree) will have to pay the losing party's costs taxable under 28 U.S.C. § 1920 which were incurred after the offer of judgment was served. The Supreme Court in *Delta Air Lines, supra*, explained the rationale of Rule 68 -- which has no purpose other than to promote settlement -- as follows:

> The purpose of Rule 68 is to encourage the settlement of litigation. In all litigation, the adverse consequences of potential defeat provide both parties with an incentive to settle in advance of trial. Rule 68 provides an additional inducement to settle in those cases in which there is a strong probability that the plaintiff will obtain a judgement but the amount of recovery is uncertain. Because prevailing plaintiffs presumptively will obtain costs under Rule 54(d), Rule 68 imposes a special burden on the plaintiff to whom a formal settlement offer is made. If a plaintiff rejects a Rule 68 settlement offer, he will lose some of the benefits of victory if his recovery is less than the offer.

101 S.Ct. at 1150, 450 U.S. at 352.

In his concurring opinion, Justice Powell commented further on the Rule's purpose as follows:

> The Rule particularly facilitates the early resolution of marginal suits in which the defendant perceives the

> claim to be without merit, and the plaintiff recognizes its speculative nature.

Id. at 1156, 450 U.S. at 363.

2. Why Has Rule 68 Not Fulfilled Its Purpose?

In reality, Rule 68 is used infrequently by litigants,[6] and has come to be generally regarded as ineffective as a means of inducing settlements, especially in protracted cases where the purpose of the rule would, in principle, be best served.[7] *See*, Association of the Bar of the City of New York, *Report of the Committee on the Federal Courts*, March 1, 1984 at 11.

There are several reasons why parties forego making offers of judgment under Rule 68. For instance, the Rule refers to "costs," which presumptively entail only *taxable costs* specified in 28 U.S.C. § 1920, incurred after the offer of judgment was made. Such costs (*see*, fn. 2, *supra*) are usually relatively small -- especially if the offer is made close to the 10-day pre-trial deadline -- compared to the offeree's actual expenses (even without taking into account its attorneys' fees), such as document imaging, travel and lodging, and

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6 See, Simon, *supra* at 8.

7 "[T]he rule 'has rarely been invoked and has been considered largely ineffective in achieving its goals.' " 12 *Wright, Miller & Marcus, supra*, at § 3001 at 67-68 (*quoting* Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, 98 F.R.D. 339, 363 (1983)). In a Court of Appeals decision, the Rule was described as being "among the most enigmatic of the Federal Rules of Civil Procedure because it offers imprecise guidelines regarding which post-offer costs become the responsibility of the plaintiff," *Crossman v. Marcoccio*, 806 F.2d 329, 331 (1st Cir. 1986).

interpreters and testifying experts. Therefore, the risk of having to pay the costs prescribed in 28 U.S.C. § 1920 provides little financial incentive for defending parties to make, and claimant-offerees to accept, Rule 68 offers of judgment even at an early stage of a case. Also, only a party defending against a claim may invoke the rule. While a plaintiff defending against a counterclaim or a cross-claim may make an offer of judgment, it may not make an offer of judgment in order to settle its affirmative claim, 12 *Wright, Miller & Marcus, supra*, § 3000 at fn. 7.

Recognizing the shortcomings of Rule 68, proposals to amend it were made in 1983[8] and 1984,[9] but were never enacted.

3. Opposing Views Regarding Possible Changes to Rule 68

Notwithstanding -- or perhaps because of -- its desuetude, there has been considerable debate over how Rule 68 can be made more effective as a

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[8] Committee on Rules of Practice & Procedure of the Judicial Conference of the United States, *Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, Federal Rules of Criminal Procedure, Rules Governing Section 2254 Cases in the United States District Courts, and Rules Governing Section 2255 Proceedings in the United States District Courts, reprinted in* 98 F.R.D. 337, 361-67 (1983).

[9] Committee on Rules of Practice & Procedure of the Judicial Conferences of the United States, *Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure, Federal Rules of Civil Procedure, Federal Rules of Criminal Procedure, and Rules Governing Section 2254 Cases and Section 2255 Proceedings in the United States District Courts, reprinted in* 102 F.R.D. 407, 432-37 (1984).

settlement tool in litigation.

It has been suggested that Rule 68 be amended to include an award of the offeror's attorney's fees.[10] The Association of the Bar of the City of New York has criticized such a change, reasoning that amending the rule to allow an award requiring "losing" claimants to pay defendants' litigation expenses beyond the usual taxable costs -- especially attorneys' fees -- would be a "radical departure from traditional American litigation philosophy." *See* Association of the Bar of the City of New York, *Report of the Committee on the Federal Courts*, *supra* at 10. Amending Rule 68 to include attorneys' fees, the Association later stated, would be tantamount to foregoing the traditional "American Rule" (requiring each party to bear its own legal expenses, regardless of the outcome) in favor of the "English Rule" (requiring the loser to pay the winner's attorneys' fees).[11] *See,* Association of the Bar of the City of New York, *Report of the*

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10 *See* 28 U.S.C. § 1927 (counsel's liability for excessive costs) The rule (R.4:58) governing offers of judgment in New Jersey state courts provides for the shifting of attorneys' fees. *See, New Jersey Law Journal*, January 14, 2002, p. 1.

11 The "English Rule" on attorneys' fees in litigation under the Civil Procedure Rules of England is that the unsuccessful party will be ordered to pay the "costs" (see below) of the successful party (Rule 44.3(2)(a)), although the court may order otherwise if it considers it appropriate (Rule 44.3(2)(b)). In assessing costs, the court will only allow those costs that were reasonably incurred, are reasonable in amount (Rule 44.4(1)) and are proportionate to the matters at issue in the case, which generally is about 65% -75% of a party's actual legal bills.

"Costs" are defined in the Civil Procedure Rules to include fees, charges, disbursements and expenses. There is no definition of either "disbursements" or "expenses" but, in addition to the time charges of its solicitors, a winning party may be entitled to claim:

Committee on Federal Legislation, "Attorney Fee-Shifting and the Settlement Process," *The Record*, Vol. 51, No. 4, 391 at 393-94 (1996).

The United States Supreme Court has repeatedly reaffirmed its commitment to the American Rule. *See, e.g., Fleischman Distilling Corp. v. Maier Brewing Co.*, 87 S. Ct. 1404, 386 U.S. 714 (1967) (citing several rationales for continued support of the American Rule); *Alyeska Pipeline Service v. Wilderness Society*, 95 S. Ct. 1612, 421 U.S. 240 (1975) (rejecting a general theory in support of attorney fee-shifting). But compare 35 U.S.C. § 285, a statutory partial abrogation of the American Rule, whereby courts in patent infringement cases of an "exceptional" nature "may award reasonable attorney fees to the prevailing party."

In short, plaintiffs generally contend that amending Rule 68 to allow

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1. The costs of being represented by a barrister;
2. Court fees;
3. The fees and expenses of expert witnesses;
4. The expenses of witnesses of fact; and
5. Disbursements such as travel expenses and translation fees.

Solicitors' internal expenses (photocopying, postage, couriers, outgoing telephone calls and faxes etc.) are assumed to be covered by the solicitors' time charges and are not normally recoverable separately (exceptions can be made where the expenses are heavy, for example photocopying voluminous discovery documents for trial bundles).

It is not possible to recover internal costs of a corporate client (e.g., time spent by in-house counsel in supervising the case) save in the rare situation where it can be shown that in-house counsel has performed a role normally carried out by the outside legal team.

for an award of attorneys' fees[12] would dramatically shift the risks of litigation in favor of well-financed defendants, thereby forcing many small or individual claimants to forego pursuing litigation claims. They argue that this would be especially true in "test cases," such as those involving civil rights or toxic torts, where there is a strong societal interest in allowing them to come to a final resolution on the merits rather than by settlement. *See* Mills et al., *supra,* at 509. On the other hand, defendants generally would obviously favor an award of attorneys' fees against plaintiffs who refuse to settle. Clearly, there is a need and consensus for changing Rule 68 to make it more vigorous in achieving its purpose,[13] but which would accommodate the concerns regarding attorneys' fees.

The Recommendation of The Section

(1) The Section recommends that Rule 68 be amended to state that the offeror can be either the claimant or a party defending against a claim. This was suggested by the Advisory Committee on the Federal Rules of Civil

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12 Some statutes provide for the award of attorneys' fees to the prevailing party as part of "taxable costs" under 28 U.S.C. § 1920. *See,* for example, 42 U.S.C. § 1988 (Civil Rights Act), 42 U.S.C. § 7413(b) (Clean Air Act), and 17 U.S.C. § 505 (Copyright Act). Fed.R.Civ.P. 54(d)(2) applies to applications for attorneys' fees in such cases, and the shifting of taxable costs under Rule 68 carries with it the denial of an attorney's fee to the prevailing plaintiff-offeree who fails to win a judgment for more than the offer. *See Marek v. Chesny*, 105 S.Ct. 3012, 3017, 473 U.S. 1, 11 (1985). Parties litigating under such statutes would not be treated any differently by the Section's recommendation.

13 *See*, Simon, *supra* at 53. ("Nearly everyone agrees that the existing procedures under Rule 68 should be changed.")

Procedure and favored by the Committee on Second Circuit Courts of the Federal Bar Council in 1984. *See* "Bar Panel Opposes Change in Civil-Procedure Rule," *New York Law Journal* Mar. 1, 1984. The Federal Bar Council Committee stated that a revised Rule 68 applicable equally to claimants and parties defending against claims would best serve the interests of all parties and eliminate concerns regarding parties on opposite sides of a litigation with unequal resources and levels of sophistication. *Id.* The Section submits that there is ample reason to allow claimants to make offers of judgment in view of the Section's proposal to allow the offeror to recover certain post-offer expenses from the offeree, subject to court approval. Counterpart rules in several states permit plaintiffs to make offers of judgment.[14]

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[14] *See 12 Wright, Miller & Marcus, supra*, at § 3001.2, fn. 2. For a detailed discussion of the applicability in federal cases of offers of judgment by plaintiffs under state rules, *see 12 Wright, Miller & Marcus, supra,* at § 3001.2.

For example, in Connecticut there are separate statutes for plaintiffs and defendants governing offers of judgment. The plaintiff's statute, *Conn. Gen. Statute* § 52-192a, provides that a plaintiff in an action on a contract or for the recovery of money (whether or not other relief is sought) can make a written pre-trial offer of judgment to the defendant offering to settle the claim underlying the action and to stipulate to a judgment as upon a default, for a sum certain. The offer is filed with the clerk of the court and notice thereof is served on the defendant. If the defendant rejects the offer by failing to file a written acceptance thereof with the clerk of the court within the earlier of 30 days or the rendering of the verdict or court award, and judgment is ultimately entered in the case, the court then determines whether the plaintiff has recovered an amount equal to or greater than the amount the plaintiff offered to settle for in the offer of judgment. If the amount recovered is equal to or greater than the sum certain stated in the offer of judgment, then the court adds 12% annual interest to the amount recovered, running either from the date on which the complaint was filed (if the offer of judgment was filed in the first 18 months of the case), or the date on which the offer of judgment was filed (if the offer was filed after the first 18

(2) In view of the Section's proposal to allow the offeror to recover certain post-offer expenses (see below), the Section recommends that the Rule be amended to make it applicable also to cases where a claimant-offeree loses on the merits at trial or on a dispositive motion.

(3) The Section further recommends that Rule 68 be amended so that the trial court has discretion as to whether and to what extent an award of post-offer expenses, exclusive of attorneys' fees, should be made beyond the costs that may be taxed under 28 U.S.C. § 1920. Such post-offer expenses could include discovery expenses such as photocopying, deposition transcripts, travel and lodging for attorneys, witnesses, and other personnel, fees of testifying

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months of the case). The court may also award up to $350 in reasonable attorney's fees to the plaintiff.

The defendant's statutes, *Conn. Gen. Statute* § 52-193 through § 52-195 provide, in essence, that the defendant in the same types of actions may offer judgment and file the offer with the clerk of the court. If the plaintiff fails to accept the offer of judgment within 10 days prior to the commencement of the trial and obtains a judgment for an amount not greater than the amount of the defendant's offer, with interest included, then plaintiff shall recover no costs that accrued after he received notice of the filing of the offer of judgment and must pay defendant's costs accruing after plaintiff's receipt of such notice. Defendant's costs may include defendant's reasonable attorneys' fees up to $350.

Because the Connecticut plaintiff's statute, *supra*, created a substantive right under state law (*see*, *Erie)*, it is not preempted in federal diversity actions by Fed. R. Civ. P. 68 which in its current form only allows offers of judgment by claim defendants. *See*, *Murphy v. Marmon Group, Inc.*, 562 F. Supp. 856 (D. Conn. 1983).

experts and other expert expenses recoverable under Fed.R.Civ.P. 26(b)(4)(c),[15] and office services such as electronic imaging and storage. Since the offeror could be the claimant or the party defending against the claim, giving courts such discretion would "up the ante" without embracing the "English Rule" as to attorneys' fees (and thereby avoid the possibility of running afoul of the Rules Enabling Act).[16]

There is also a procedural correction to Rule 68 which the Section

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[15] **Rule 26(b) Discovery Scope and Limits**

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(4) Trial Preparation: Experts.

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(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 subdivision; and (ii) 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.

[16] **28 U.S.C. § 2072. Rules of procedure and evidence; power to prescribe**

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals.

(b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

(c) Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title.

recommends. Since its enactment in 1938, Rule 54(a) has defined "judgment" to include "a decree and any order from which an appeal lies." In the interim, Rules 54(b)[17] and 62(h)[18] were amended to make clear that a judgment on less than all the claims or involving less than all the parties is not appealable as of right as a final judgment. Yet the provision in Rule 68 allowing the clerk of the court to enter judgment upon acceptance of an offer of settlement, which could be for less than all claims or involve less than all parties, was not so amended. This creates the potential for an anomalous situation of there being an offer and acceptance of

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[17] **Rule 54. Judgment; Costs**

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(b) Judgment Upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

[18] **Rule 62. Stay of Proceedings to Enforce a Judgment**

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(h) Stay of Judgment as to Multiple Claims or Multiple Parties. When a court has ordered a final judgment under the conditions stated in Rule 54(b), the court may stay enforcement of that judgment until the entering of a subsequent judgment or judgments and may prescribed such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered.

judgment on less than all the claims or involving fewer than all the parties which cannot be entered by the clerk. The Section recommends that this be corrected by providing that, if a judgment is entered under Rule 68 on fewer than all claims or involving fewer than all parties, then, to establish its finality, the judgment be considered an appealable final judgment.

Thus, the Section recommends that Rule 68 be amended as follows, where changes are indicated in boldface (additions underlined and deletions bracketed):

> **(a)** At any time more than 10 days before the trial begins, a party **[defending against a claim]** may serve upon **[the]** **an** adverse party an offer to **[allow judgment to be taken against the defending party]** **resolve a claim** for the money or property or to the effect specified in the offer**[, with costs then accrued]**. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment **which, if with respect to fewer than all claims or all parties, shall nonetheless be considered an appealable final judgment**. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the **[judgment finally obtained by the]** offeree **[is]** **does** not **obtain a** more favorable **judgment on the merits of the claim** than the offer, the offeree must pay **to the offeror** the costs incurred after the making of the offer **and, upon motion by the offeror, in the court's discretion, reasonable expenses, excluding attorneys' fees, incurred by the offeror after the making of the offer**. The fact that an offer is made but not accepted does not preclude a subsequent offer.

> **(b)** When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, **[the party adjudged liable may make an offer of judgment,] either party may make an offer to resolve the amount or extent of the liability,** which shall have the same effect as an offer made before trial if it is served **[within a reasonable time]** not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability.
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> **(c) In exercising its discretion whether and to what extent to award reasonable expenses, exclusive of attorneys' fees, a court may consider, among other things, (1) the relation of the claim to any other claim in the action, (2) the relation of the expenses to the claim, (3) the reasonableness of the offer, (4) the burden on the offeree in paying the expenses, (5) the resources of the offeror, (6) the importance of the claim, and (7) the reasonableness of the rejection of the offer.**

How Rule 68 would read, as amended, is shown in Appendix A.

The Section believes that this amendment effects a workable compromise in several respects.

First, it does not adopt the English Rule of awarding attorneys' fees to the winning party, because such fees are not normally awarded under the proposal. *See, Marek v. Chesny,* 105 S. Ct. 3012, 3016, 3018, 473 U.S. 1, 9, 12 (1985) (where a statute provides for attorneys' fees to be awarded to the prevailing party as part of costs, a claimant who rejects a Rule 68 offer and recovers less than the offer may not recover attorneys' fees incurred after the

offer); *Crossman v. Marcoccio*, 806 F.2d 329, 333-4 (1st Cir. 1986). Any award of the offeror's expenses is likely to be far less than the amount of its attorneys' fees incurred after a rejected offer.

Second, any expenses and costs that are shifted are only those incurred after an offer is rejected. It does not include what may be substantial expenses and costs incurred prior to the offer. It might be anticipated that offers would be made after substantial discovery occurs, thereby reducing the amounts that would be subject to shifting.

Third, under the proposal, judges may exercise their discretion to reduce the amount of costs and expenses to be shifted. Judges may explicitly consider the relative resources of the parties (items (4) and (5)), which is meant to alleviate concerns that shifting costs and expenses after rejection of an offer might have a chilling effect on civil actions which society has an interest in fostering, such as class actions in which class representatives reject an offer, environmental claims, etc. Further, judges should consider the importance of the claim or claims offered to be settled and their relationship to the other claims in the action and to the post-offer expenses (items (1), (2) and (6)) in apportioning additional costs and expenses incurred after the offer. Moreover, judges may examine any gamesmanship in making or rejecting the offer (items (3) and (7)).

The proposal retains the applicability of Rule 68 to non-monetary claims. 13 *Moore's Federal Practice 3d*, *supra*, at § 68.04[5]. Under the

Section's proposed amendment of Rule 68, offers of judgment would remain in the form of "money or property or to the effect specified in the offer." The Section agrees that the term "to the extent specified in the offer" includes equitable claims, which appears to be consistent with Fed.R.Civ.P. 1 making the rules applicable to "all suits of a civil nature" unless exempted by Fed.R.Civ.P. 81, and that allowing a party to make an offer to settle equitable claims, such as injunctive relief, would "create much greater incentives to use the Rule." *Mills et al., supra* at 506.

Finally, there may be some concern that proposed Rule 68 would lead to further litigation. To be sure, there would be an increase in collateral proceedings after some judgments on the merits. However, the Section believes that shortening of litigation times and reduction in case loads due to increased pretrial settlements would result in greater cost savings than any increase in collateral post-trial litigation costs in consequence of an amended Rule 68.

Conclusion

The Section believes that its present recommendation will add more "teeth" to Rule 68 by modifying it (i) to make it applicable to both a claimant and a party defending against a claim, (ii) to make it applicable when a claimant-offeror obtains a result that is more favorable than the offer, (iii) to make it applicable when a claimant-offeree loses on the merits at trial or on a dispositive motion,

and (iv) to strengthen its financial "bite" upon the party rejecting the offer by creating the risk that the offeror's reasonable post-offer expenses -- exclusive of attorneys' fees -- will be shifted to the offeree, in addition to taxable court costs. Most importantly, the Section believes that in the long run, the proposed amendment would make Rule 68 effective in achieving its intended purpose of encouraging settlement of litigation.

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APPENDIX A

Rule 68. Offer of Judgment

(a) At any time more than 10 days before the trial begins, a party may serve upon an adverse party an offer to resolve a claim for the money or property or to the effect specified in the offer. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment which, if with respect to fewer than all claims or all parties, shall nonetheless be considered an appealable final judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the offeree does not obtain a more favorable judgment on the merits of the claim than the offer, the offeree must pay to the offeror the costs incurred after the making of the offer and, upon motion by the offeror, in the court's discretion, reasonable expenses, excluding attorneys fees, incurred by the offeror after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer.

(b) When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, either party may make an offer to resolve the amount or extent of the liability, which shall have the same effect as an offer made before trial if it is served not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability.

(c) In exercising its discretion whether and to what extent to award reasonable expenses, exclusive of attorneys' fees, a court may consider, among other things, (1) the relation of the claim to any other claim in the action, (2) the relation of the expenses to the claim, (3) the reasonableness of the offer, (4) the burden on the offeree in paying the expense, (5) the resources of

the offeror, (6) the importance of the claim, and (7) the reasonableness of the rejection of the offer.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
125 SOUTH GRAND AVENUE
PO BOX 91510
PASADENA CALIFORNIA 91109-1510

CHAMBERS OF
A. WALLACE TASHIMA
UNITED STATES CIRCUIT JUDGE

TEL (626) 229-7373
FAX (626) 229-7457

May 2, 2003

03-CV-B

Hon. David F. Levi
United States District Judge
14-200 United States Courthouse
501 "I" Street
Sacramento, CA 95814-2322

Re: Rule 68 – Offers of Judgment

Dear David:

I write to you in your capacity as Chair of the Advisory Committee on Civil Rules. One of my colleagues asked me why Federal Rule of Civil Procedure 68, unlike the California rule, permits only defendants to make offers of judgment under the rule. As you know, in California (I have not checked any other states), both defendants and plaintiffs can make offers of compromise. See Calif. Civ. Code §§ 998 & 3291.

The only answer I could give was that the origin of the rule dates from early in the last century and it appears that Rule 68 has not been given a fresh look in many years. According to the original (1937) Advisory Committee Notes, the rule is based on a 1927 Minnesota statute, a 1935 Montana statute, and a 1937 New York statute. A rule applying equally to both defendants and plaintiffs would appear to be more even handed. I know that your committee has a full plate, but this may be a rule that is ripe for re-examination.

Sincerely,

A. Wallace Tashima

cc: Judge Cynthia H. Hall
Prof. Edward H. Cooper
John K. Rabiej, Esq.

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United States District Court
Eastern District of California
501 "I Street 14th Floor
Sacramento, California 95814
(916) 930-4090

Chambers of
David F Levi
Chief Judge

May 22, 2003

Honorable A. Wallace Tashima
United States Circuit Judge
Ninth Circuit Court of Appeals
Richard H. Chambers Court of Appeals Building
125 South Grand Avenue
Pasadena, California 91105-1652

Dear Wally:

Thank you for your letter on Rule 68 The New York State Bar Association Committee on Federal Procedure recently asked the Advisory Committee on Civil Rules to take another look at Rule 68. I recall that one of its suggestions is to permit plaintiffs to make a Rule 68 offer.

Some few years ago, the Committee tried to give Rule 68 greater bite. The original impetus to reconsider Rule 68 was a proposal by Judge Schwarzer to add more effective sanctions on the view that "costs" incurred after the offer is not much of a deterrent. His proposal included attorney fees as part of the calculus. As we were drawn further into the inquiry, we became overwhelmed by complexities suggested by game theory and negotiation experience. There are some significant Enabling Act problems as well. The Court has ruled that the Enabling Act allows Rule 68 to cut off statutory fee rights only so long as the statute characterizes fees as costs I am less sure whether we could create a right to fees through means of Rule 68, but probably we could not under the Enabling Act. Any fee shifting proposal would be controversial, to put it mildly. In the end we were not able to develop a proposal that we had confidence in.

A limited change to permit plaintiffs to make a Rule 68 offer is doable without much re-writing of the Rule, and might be helpful. But there is still the problem that attorney fees could be included in the offer only if provided by a statute that characterizes fees as "costs." Absent a

fee-shifting statute expressed as costs, a plaintiff who betters a rejected offer at trial still will recover only costs. And if the plaintiff has bettered its own offer, and if there is a fee-shifting statute, the Rule 68 sanction adds little since a prevailing plaintiff will get fees whatever the recovery.

I will confess that the fearsome complexities raised by Rule 68 do not make it an attractive project. And, as you know, our plate is rather full at the moment. Nonetheless, there do seem to be some glaring oddities about Rule 68 that might be addressed short of a more thoroughgoing revision.

Thank you for your inquiry.

I send best wishes to you and Judge Hall.

Sincerely,

cc: Judge Cynthia H. Hall
Judge William W Schwarzer
Professor Edward H. Cooper
John K. Rabiej, Esq. ✓

UNITED STATES DISTRICT COURT
UNITED STATES COURTHOUSE
312 NORTH SPRING STREET
LOS ANGELES, CALIFORNIA 90012

CHAMBERS OF
CHRISTINA A. SNYDER
UNITED STATES DISTRICT JUDGE

04-CV-H

TELEPHONE
(213) 894-8551

July 23, 2004

John Rabiej
Chief, Rules Committee Support Office
Thurgood Marshall Building
One Columbus Circle, Room 4-170d
Washington, D.C. 20544

Re: Federal Rule of Civil Procedure 68

Dear Mr. Rabiej:

Enclosed is a copy of an April 21, 2004, letter and attachment from Ned Good, Esq. requesting that our Local Rules Committee consider changing our Local Rules to permit plaintiffs to make offers of compromise pursuant to Federal Rule of Civil Procedure 68.

Because it would be inappropriate for our committee to enact a local rule that is inconsistent with Rule 68, I am sending this proposal to you. We do think that the suggested amendment would serve to encourage settlement, and I hope that the National Rules Committee will give this proposal its favorable consideration.

Very truly yours,

Christina A. Snyder

Christina A. Snyder

ly/CAS
encl.

cc: Consuelo B. Marshall, Chief United States District Judge

GOOD, WEST & SCHUETZE

TRIAL LAWYERS
Ned Good · Mark West · Steven Schuetze

Office (626) 440-0000
Fax (626) 449-0214
E-mail nedgoodlaw@aol.com
Ivan Miller *Law Clerk*
Linda Thoemmes *Calendar Manager*

April 21, 2004

To Each Judge of the U.S. District Court, Central District of California
Rules Committee of the Federal Bar Association
Rules Committee of the 9th Circuit

Dear Judge:

Federal Rules of Civil Procedure 68 dealing with offers to compromise only permits such an offer to be made by the defendant. Since 1971 California state court statute CCP §998 has permitted the offer to compromise to be made by plaintiff or defendant. This California rule has worked well. It encourages earlier disposition of cases thereby reducing the pressures of the trial calendars for all judges.

There is nothing unfair about permitting the plaintiff to have equal rights with defendants.

I have written to the Federal Courts on this subject before but my request unfortunately appears to have fallen on deaf ears. Hopefully someone will listen to this request and take action to update the Federal Rules.

Thank you for considering this request.

Sincerely yours,

NED GOOD
NG/vl

cc: LA Daily Journal
ATLA

12C:\===CASES===\Good\LETTERS\to Others\Rules Committee L1.wpd

70 South Lake Avenue · Suite 600 · Pasadena, CA 91101-2672

Library References

6 Witkin, Procedure (4th ed) Prov Rem § 42.

CHAPTER 3. OFFERS BY A PARTY TO COMPROMISE

Section

998. Withholding or augmenting costs following rejection or acceptance of offer to allow judgment.

§ 998. Withholding or augmenting costs following rejection or acceptance of offer to allow judgment

(a) The costs allowed under Sections 1031 and 1032 shall be withheld or augmented as provided in this section.

(b) Not less than 10 days prior to commencement of trial or arbitration (as provided in Section 1281 or 1295) of a dispute to be resolved by arbitration, any party may serve an offer in writing upon any other party to the action to allow judgment to be taken or an award to be entered in accordance with the terms and conditions stated at that time.

(1) If the offer is accepted, the offer with proof of acceptance shall be filed and the clerk or the judge shall enter judgment accordingly. In the case of an arbitration, the offer with proof of acceptance shall be filed with the arbitrator or arbitrators who shall promptly render an award accordingly.

(2) If the offer is not accepted prior to trial or arbitration, within 30 days after it is made, whichever occurs first, it shall be deemed withdrawn, and cannot be given in evidence upon the trial or arbitration.

(3) For purposes of this subdivision, a trial or arbitration shall be deemed to be actually commenced at the beginning of the opening statement of the plaintiff or counsel, and if there is no opening statement, then at the time of the administering of the oath or affirmation to the first witness, or the introduction of any evidence.

(c)(1) If an offer made by a defendant is not accepted and the plaintiff fails to obtain a more favorable judgment or award, the plaintiff shall not recover his or her postoffer costs and shall pay the defendant's costs from the time of the offer. In addition, in any action or proceeding other than an eminent domain action, the court or arbitrator, in its discretion, may require the plaintiff to pay a reasonable sum to cover costs of the services of expert witnesses, who are not regular employees of any party, actually incurred and reasonably necessary in either, or both, preparation for trial or arbitration, or during trial or arbitration, of the case by the defendant.

(2)(A) In determining whether the plaintiff obtains a more favorable judgment, the court or arbitrator shall exclude the postoffer costs.

(B) It is the intent of the Legislature in enacting subparagraph (A) to supersede the holding in Encinitas Plaza Real v. Knight, 209 Cal.App.3d 996, that attorney's fees awarded to the prevailing party were not costs for purposes of this section but were part of the judgment.

(d) If an offer made by a plaintiff is not accepted and the defendant fails to obtain a more favorable judgment or award in any action or proceeding other than an eminent domain action, the court or arbitrator, in its discretion, may require the defendant to pay a reasonable sum to cover costs of the services of expert witnesses, who are not regular employees of any party, actually incurred and reasonably necessary in either, or both, preparation for trial or arbitration, or during trial or arbitration, of the case by the plaintiff, in addition to plaintiff's costs.

(e) If an offer made by a defendant is not accepted and the plaintiff fails to obtain a more favorable judgment or award, the costs under this section, from the time of the offer, shall be deducted from any damages awarded in favor of the plaintiff. If the costs awarded under this section exceed the amount of the damages awarded to the plaintiff the net amount shall be awarded to the defendant and judgment or award shall be entered accordingly.

(f) Police officers shall be deemed to be expert witnesses for the purposes of this section; plaintiff includes a cross-complainant and defendant includes a cross-defendant. Any judgment or award entered pursuant to this section shall be deemed to be a compromise settlement.

(g) This chapter does not apply to either of the following:

(1) An offer that is made by a plaintiff in an eminent domain action.

(2) Any enforcement action brought in the name of the people of the State of California by the Attorney General, a district attorney, or a city attorney, acting as a public prosecutor.

(h) The costs for services of expert witnesses for trial under subdivisions (c) and (d) shall not exceed those specified in Section 68092.5 of the Government Code.

(i) This section shall not apply to labor arbitrations filed pursuant to memoranda of understanding under the Ralph C. Dills Act (Chapter 10.3 (commencing with Section 3512) of Division 4 of Title 1 of the Government Code). *(Added by Stats.1971, c. 1679, p. 3605, § 3. Amended by Stats.1977, c. 458, p. 1513, § 1; Stats.1986, c. 540, § 14; Stats.1987, c. 1080, § 8; Stats.1994, c. 332 (S.B.1324), § 1; Stats.1997, c. 892 (S.B.73), § 1; Stats.1999, c. 353 (S.B.1161), § 1; Stats.2001, c. 153 (A.B.732), § 1.)*

Library References

10 Witkin, Summary (9th ed) P & C § 167.
1 Witkin, Summary (9th ed) Contracts § 751.
3 Witkin, Summary (9th ed) Sales § 308.
5 Witkin, Summary (9th ed) Torts § 57.
6 Witkin, Summary (9th ed) Torts §§ 1167, 1399, 1400, 1462, 1172B, 1400A.
8 Witkin, Summary (9th ed) Const Law §§ 1053, 1062.
6 Witkin, Procedure (4th ed) PWT §§ 25, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 476, 560, 564, 579, 580, 85A, 86A.
7 Witkin, Procedure (4th ed) Judgm §§ 111, 112, 113, 129, 158, 185, 201, 263, 315, 377.
8 Witkin, Procedure (4th ed) Attack Judgm Trial Court § 48.
9 Witkin, Procedure (4th ed) Appeal §§ 17, 57, 126, 142, 151, 238, 239, 245.

CHAPTER 4. MOTIONS AND ORDERS

Section

1003. Order and motion defined.
1004. Motions; court in which made.
1005. Written notice for motions; service and filing of moving and supporting papers.
1005.5. Making and pendency of motion.
1006. Transfer of motion or order to show cause.
1006.5. Appearance of counsel by telephone; standard of judicial administration; incorporation by superior courts in local rules.
1008. Application to reconsider and modify or revoke prior order; affidavit; noncompliance; revocation of order; contempt.

§ 1003. Order and motion defined

Every direction of a court or judge, made or entered in writing, and not included in a judgment, is denominated an order. An application for an order is a motion. *(Enacted 1872.*

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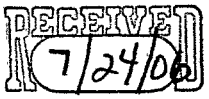
06-CV-D



UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 2005

(Argued: August 26, 2005 Decided: July 20, 2006)

Docket No. 04-5420-cv

JOHN REITER,

Plaintiff-Appellant,

—v.—

MTA NEW YORK CITY TRANSIT AUTHORITY,

Defendant-Appellee,

METROPOLITAN TRANSPORTATION AUTHORITY OF THE STATE OF NEW YORK AND MYSORE L. NAGARAJA, SENIOR VICE PRESIDENT AND CHIEF ENGINEER,

Defendants.

Before:

SACK, KATZMANN, AND B.D. PARKER,

Circuit Judges.

Plaintiff-Appellant John Reiter, a prevailing party on a claim of retaliation under Title VII of the Civil Rights Act of 1964, appeals from a judgment of the United States District Court for the Southern District of New York (Gorenstein, *M.J.*). Reiter appeals the denial of his application for post-Offer of Judgment attorneys' fees pursuant to Rule 68 of the Federal Rules of Civil Procedure and the calculation of his fee award.

AFFIRMED in part, REVERSED in part, and REMANDED.

GREGORY G. SMITH, Gregory G. Smith & Associates, New York, NY, *for Appellant John Reiter.*

STEVEN M. STIMELL, Bryan Cave LLP, New York, NY (Jay P. Warren, *on the brief*), *for Appellee MTA New York City Transit Authority.*

B.D. PARKER, *Circuit Judge*:

Plaintiff-Appellant John Reiter appeals from a judgment of the United States District Court for the Southern District of New York (Gorenstein, *M.J.*) limiting attorneys' fees under Rule 68.[1] The award followed a trial on a claim of retaliation under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. Reiter sued Defendant-Appellee MTA New York City Transit Authority ("NYCTA") for monetary and equitable relief, principally seeking compensatory damages plus restoration to the job from which he had been demoted. After the

[1] The parties consented to jurisdiction by a magistrate judge for resolution of the motions for attorneys' fees. *See* 28 U.S.C. § 636(c)(1).

litigation started, the NYCTA served an Offer of Judgment for $20,001 (the "Offer") under Rule 68. The Offer, however, made no mention of equitable relief. The case proceeded to trial and the jury awarded Reiter $140,000. The district court then awarded Reiter substantial equitable relief, the most prominent feature of which was his restoration to his job. *Reiter v. Metro. Transp. Auth.*, No. 01 Civ. 2762 (JGK), 2003 WL 22271223, at *14 (S.D.N.Y. Sept. 30, 2003). But the district court also granted the NYCTA's motion for a new trial conditioned on Reiter's agreement to accept a remittitur to $10,000. *Id.* at *16.

Reiter agreed to accept that amount and the parties agreed to permit a magistrate judge to determine attorneys' fees in the light of Reiter's success and NYCTA's Offer. This task required the magistrate judge to compare the monetary relief with the equitable relief Reiter secured. After that comparison, the magistrate judge concluded that the equitable relief did not have "any significant value" and that the final monetary award was less than the Offer. The court then awarded Reiter only pre-Offer attorneys' fees. Since this conclusion was clearly erroneous, we reverse. We also remand so the court can consider additional factors related to the calculation of attorneys' fees.

Background

The NYCTA provides public transportation in New York and is comprised of several departments, including the Capital Program Management ("CPM") department, which is responsible for major architectural and engineering projects. **(A 234).** In 1999, Reiter was employed by NYCTA as Deputy Vice President of Engineering Services ("DVP Engineering"),

making him the head of the Engineering Services Department. That Department, which was part of the CPM, was responsible for major NYCTA engineering projects. As DVP Engineering Services, Reiter was one of thirteen senior-level executives who reported directly to the Senior Vice President and Chief Engineer of CPM, and the position required Reiter to be a licensed engineer or architect. The Department had an annual budget in excess of one billion dollars.

As the head of Engineering Services, Reiter earned around $119,000 per year. Eight senior executives reported directly to him and he exercised supervisory responsibility over 900 employees. As a perquisite of the position, Reiter had a large, prominent corner office on the seventh floor (near his staff) with a front view of Manhattan and a confidential secretary who was among the most experienced secretaries in the organization. The NYCTA's salary and compensation structures are based on the "Hay Points" system, which ranks the importance and difficulty of various positions. Hay Points are essentially an objective measure of a position's value in terms of responsibility, complexity and salary. In his position, Reiter was given 1560 Hay Points – a relatively large amount – to reflect his responsibilities and salary.

In January 2000, Reiter received a negative annual performance review and was rated as a marginal employee. Reiter disagreed with the evaluation and filed several complaints through the internal appeals process and with the Equal Employment Opportunity Commission ("EEOC"), alleging that he received the negative evaluation as retaliation because his wife, who also worked for the NYCTA, had filed separate EEOC charges alleging discrimination and harassment.

In June 2001, Reiter was demoted. He was transferred to the position of Deputy Vice

President of Technical Services ("DVP Technical"). The Technical Services Department was responsible for working with the customers of CPM on the acceptance of capital projects. Its role was to ensure that capital projects built by Engineering Services could be used by customers and were capable of being maintained by Engineering Services over time. Reiter contended that the transfer was both retaliatory and a substantial demotion.

He pointed out that as DVP Engineering, he had supervisory responsibility for 900 employees and eight executives directly reported to him. As DVP Technical, he had no staff and no direct reports. While Engineering Services was the largest department within CPM, with roughly 60% of its workforce, Technical Services was one of the smallest departments, with approximately ten employees. Moreover, Reiter testified that in his new position he had no specifically assigned responsibilities or functions and did not have enough projects to fill his work day. While Engineering Services oversaw the development and implementation of large capital projects, Technical Services essentially ensured that the projects completed by Engineering Services were used and maintained. Moreover, in his new position, Reiter reported to the Vice-President of Technical Services, not to senior management of CPM as he done as DVP Engineering. The new position did not require that Reiter be a licensed architect or an engineer. In addition, Reiter's demotion resulted in the loss of a number of substantial perquisites. He lost his confidential secretary, was moved from his large corner office on the seventh floor with a front view of Broadway to a small, less desirable one on the second floor with a view of an alley, and lost all of his Hay Points.

In April 2001, Reiter sued the NYCTA. His complaint alleged that he was subject to retaliation -- in the form of verbal reprimands, negative performance reviews, and demotion -- for

filing his initial EEOC charge in March 2000. By way of relief, Reiter sought compensatory damages as well as equitable relief. Specifically, he alleged that he was entitled to return to his prior position, along with all of the benefits of that position.

In July 2001, defendants made an Offer of Judgment under Rule 68. In it they proposed allowing judgment to be taken against them in the amount of $20,001, "together with costs and reasonable attorneys fees accrued in this litigation to date." The Rule 68 Offer ignored the non-monetary relief Reiter had sought. Reiter did not accept the Offer and the case proceeded to trial with the jury deciding liability and compensatory damages and the court addressing equitable relief.

Following a six-day trial, the jury returned a verdict in favor of Reiter, finding that NYCTA unlawfully retaliated against him for filing an EEOC complaint and awarded him $140,000 in compensatory damages for emotional suffering. After the verdict, the NYCTA moved to vacate the award on the ground that Reiter had failed to present sufficient evidence of emotional distress. *See* Fed. R. Civ. P. 50. In the alternative, the NYCTA moved for a new trial or for a remittitur reducing the award to $5,000-$10,000. *See* Fed. R. Civ. P. 59(a) & (e).

While opposing these motions, Reiter continued to pursue equitable relief, seeking, among other things, reinstatement to his former position with the restoration of various perquisites of his job and an injunction against future retaliation. Reiter also sought back pay, front pay, and pre- and post-judgment interest.

Ultimately, the court denied the defendant's motion for judgment as a matter of law but agreed to a new trial unless Reiter accepted $10,000. Reiter accepted the remittitur and

ultimately received that amount. Judge Koeltl granted Reiter equitable relief. He ordered Reiter reinstated to his former position of DVP Engineering, with an office comparable to the one he had prior to the demotion, the return of a confidential secretary and the restoration of lost Hay Points. The parties then consented to have Reiter's request for attorneys' fees resolved by a magistrate judge.

Before the magistrate judge, Reiter sought substantial attorneys' fees at a rate of $350 per hour for two attorneys and $125 per hour for one attorney and court costs. NYCTA, on the other hand, contended that its Offer cut off attorneys' fees and costs incurred after the Offer.

Ultimately, the magistrate judge agreed with the NYCTA and denied Reiter fees and costs incurred after the Rule 68 Offer. *Reiter v. Metro. Transp. Auth.*, 224 F.R.D. 157, 159 (S.D.N.Y. 2004). He noted that the monetary award was less than the amount in the Offer and then proceeded to completely discount the equitable relief that Judge Koeltl had awarded on the ground that none "of the various injunctive elements of the final judgment [had] any significant value." *Id.* at 169. Specifically, the court concluded that Reiter's reinstatement to his former position, responsibilities, and status, was "of limited value," and "the restoration of Hay Points had no practical or economic significance." *Id.* at 168. The court also concluded that the value of a confidential secretary and desirable office space "was minimal, if anything." *Id.* at 168-69. Based on plaintiff's failure to accept NYCTA's "more favorable" monetary Offer of $20,001, the magistrate judge ruled that Reiter was foreclosed from post-Offer attorneys' fees and costs. He summarized his thinking as follows:

> While the Court has discussed the value of each element of the final judgment separately, Rule 68 requires a comparison of the entire final

> judgment against the entire Offer. But stripped of the vindication value that might be attributed to Reiter's gratification in having obtained what he sought in a final judgment, the equitable elements of the final judgment together are of such limited value that the Court can only conclude that they would not be considered more favorable by an objective, reasonable person than a $10,001 cash payment. As a result, Reiter must bear any costs or fees he incurred after the making of the Offer.

Id. at 169.

Having found that Reiter could not recover fees incurred subsequent to the Offer, the magistrate judge proceeded to calculate pre-Offer attorneys' fees and costs as $17,075.42. *Id.* Reiter's counsel sought compensation at $350 per hour for senior counsel and $150 per hour for junior counsel, arguing that these were the prevailing rates for experienced Title VII lawyers in the Southern District of New York. The court relied primarily on the retainer agreement rate, rather than prevailing current market rates, concluding that the amount actually charged by counsel was a dispositive indicator of a reasonable rate. Since Reiter's retainer agreement called for $175 per hour for in-office work and $200 for out-of-office work, the district court awarded $200 per hour to Reiter's two lead attorneys. *Reiter v. Metro. Transp. Auth.*, No. 01 Civ. 2762 (GWG), 2004 WL 2072369, at *8 (S.D.N.Y. Sept. 10, 2004). The court decreased the retainer rate to $125 per hour for Reiter's third attorney because she was less experienced. *Id.* at *7.

Reiter moved for reconsideration, arguing that higher hourly rates should apply based on the current market rates. The court based its determination on the plaintiff's retainer-based rate and rejected counsel's contention that he had not had a fair opportunity to prove customary rates. According to the magistrate judge's reasoning, Judge Koeltl's ruling that counsel provide to NYCTA only a copy of plaintiff's retainer agreement did not mean that its terms would be dispositive and "in no way prevented plaintiff's counsel from providing evidence of their

customary rate in support of the attorney's fees application."

This appeal followed.

DISCUSSION

Reiter principally raises two issues on appeal. First, he contends that the court below improperly denied attorneys' fees incurred after the Offer. Second, to the extent it awarded fees, he claims the court erred by not applying prevailing market rates. We review *de novo* a district court's interpretation of the Federal Rules of Civil Procedure, *Unicorn Tales, Inc. v. Banerjee*, 138 F.3d 467, 469 (2d Cir. 1998), and review for clear error any findings of fact. *Id.* Further, we review a court's decision to award or deny attorneys' fees for abuse of discretion and its calculation of those damages *de novo*. *Harris Trust & Sav. Bank v. John Hancock Mut. Life Ins. Co.*, 302 F.3d 18, 26 (2d Cir. 2002).

First, Reiter contends that the district court erred when it denied attorneys' fees and costs incurred after the Offer because the equitable relief he obtained, along with the $10,000 monetary award, was more favorable than the Offer. We agree. Rule 68 is a cost-shifting rule designed to encourage settlements without the burdens of additional litigation. Rule 68 provides: "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." Fed. R. Civ. P. 68. The Rule thus requires a court to compare the offer to the judgment and decide which is more favorable. The magistrate judge, undertaking that exercise, concluded that the Offer was more favorable than the judgment. The principal basis for this result was his conclusion that none of the equitable relief Judge Koeltl granted to Reiter had any significant value and that no reasonable person would value the relief more than a $10,001 cash payment. *Reiter*, 224 F.R.D. at 169. This conclusion is clearly

erroneous. Its most conspicuous shortcomings are that it: (1) fails to appreciate the significance of equitable relief in civil rights litigation, and (2) draws indefensible conclusions about the worthlessness of the equitable relief Reiter obtained.

Turning to the question of whether Reiter's reinstatement had any value, we note that equitable relief lies at the core of Title VII, which expressly provides for non-monetary relief such as "reinstatement" and "hiring." 42 U.S.C. § 2000e-5(g). In *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975), the Supreme Court commented that:

> the purpose of Title VII [is] to make persons whole for injuries suffered. . . . This is shown by the very fact that Congress took care to arm the Courts with full equitable powers. For it is the historic purpose of equity to secure complete justice . . . Where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief.

Id. (internal quotation marks, citations, and alterations omitted).

Under Title VII, equitable relief is not incidental to monetary relief. We, as well as other circuits, have repeatedly emphasized the importance of equitable relief in employment cases. *See Brooks v. Travelers Ins. Co.*, 297 F.3d 167, 170 (2d Cir. 2002) (noting that under Title VII reinstatement has been interpreted as the first choice); *Allen v. Autauga County Bd. of Educ.*, 685 F.2d 1302, 1305 (11th Cir. 1982) (reinstatement required "except in extraordinary cases"); *Williams v. City of Valdosta*, 689 F.2d 964, 977 (1st Cir. 1982) (reinstatement is a remedy to which plaintiff "is normally entitled . . . absent special circumstances"); *Jackson v. City of Albuquerque*, 890 F.2d 225, 233 (10th Cir. 1989) (reinstatement "is ordinarily to be granted") (emphasis omitted). Under Title VII, the best choice is to reinstate the plaintiff, because this accomplishes the dual goals of providing make-whole relief for a prevailing plaintiff and deterring

future unlawful conduct. *Brooks*, 297 F.3d at 170 (citing *Selgas v. Amer. Airlines*, 104 F.3d 9, 12 (1st Cir. 1997)). *See also Che v. Mass. Bay Transp. Auth.*, 342 F.3d 31, 43 (1st Cir. 2003) ("We have recognized that reinstatement is an important remedy because it most efficiently advances the goals of Title VII by making plaintiffs whole while also deterring future discriminatory conduct by employers.") (internal quotation marks omitted). By misapprehending the significance of the equitable relief Reiter obtained, the magistrate judge significantly under-valued what Reiter lost and what he was able to recover in litigation. As the Eleventh Circuit has noted in an analogous context:

> When a person loses his job, it is at best disingenuous to say that money damages can suffice to make that person whole. The psychological benefits of work are intangible, yet they are real and cannot be ignored. . . . We also note that reinstatement is an effective deterrent in preventing employer retaliation against employees who exercise their constitutional rights. If an employer's best efforts to remove an employee for unconstitutional reasons are presumptively unlikely to succeed, there is, of course, less incentive to use employment decisions to chill the exercise of constitutional rights.

Allen, 685 F.2d at 1306. These factors underpin the overarching preference in employment discrimination cases for reinstatement. *See NLRB v. Thalbo Corp.*, 171 F.3d 102, 110 (2d Cir. 1999) (finding "the responsibility of a court that finds a [Title VII] violation is to fashion equitable relief to make the claimant whole"); *see also Northcross v. Bd. of Educ. of the Memphis City Sch.*, 412 U.S. 427, 428 (1973) (construing attorney's fees provisions in civil rights statutes to be justified where plaintiffs injured by discrimination are successful in obtaining injunctive relief). "Reinstatement advances the policy goals of make-whole relief and deterrence in a way which money damages cannot." *Squires v. Bonser*, 54 F.3d 168, 172-73 (3d Cir. 1995).

Having rather easily concluded that the equitable relief Reiter secured was of considerable

importance under Title VII's overall remedial framework, we now turn to the more difficult issue of whether that relief -- the return of his old job -- was worth more than $10,000. We recognize that "it is difficult to compare monetary relief with non-monetary relief." 12 Charles Alan Wright, et al., *Federal Practice & Procedure* § 3006.1, 127 (2d ed. 1997). Justice Brennan described this problem best by stating: "[I]f a plaintiff recovers less money than was offered before trial but obtains potentially far-reaching injunctive or declaratory relief, it is altogether unclear how the Court intends judges to go about quantifying the 'value' of the plaintiff's success." *Marek v. Chesny*, 473 U.S. 1, 32 (1985) (Brennan, *J.*, dissenting). At least one court has suggested that this inherent difficulty counsels in favor of disregarding equitable relief for Rule 68 purposes. *See Real v. Cont'l Group, Inc.*, 653 F. Supp. 736, 739 (N.D. Cal. 1987) (concluding that "the better course is to compare monetary awards only").

However, we are not convinced that the difficulty of comparing a monetary offer and judgment that includes non-monetary elements means that Rule 68 should not be applied in such cases. Nothing in the language of Rule 68 suggests that a final judgment that contains equitable relief is inherently less favorable than a Rule 68 offer that contains monetary relief. As the Sixth Circuit has noted, in the Rule 68 context "a favorable judgment and an injunction can be more valuable to a plaintiff than damages." *Andretti v. Borla Performance Indus. Inc.*, 426 F.3d 824 (6th Cir. 2005). Most federal courts adopt this approach. *See, e.g., Liberty Mut. Ins. Co. v. EEOC*, 691 F.2d 438, 439, 442 (9th Cir. 1982) (considering offer of judgment consenting to an injunction against disclosure of information under Rule 68); *Lish v. Harper's Magazine Found.*, 148 F.R.D. 516, 520 (S.D.N.Y. 1993) (considering judgment's grant of authorial right to control publication and judicial determination of copyright violation); *Lightfoot v. Walker*, 619 F. Supp.

1481, 1485-86 (S.D. Ill. 1985) (considering offer of judgment consenting to prison health care reform). *See* Thomas L. Cubbage III, Note, *Federal Rule 68 Offers of Judgment and Equitable Relief: Where Angels Fear to Tread*, 70 Tex. L. Rev. 465, 475 (1991) (surveying court decisions involving the application of Rule 68 to equitable relief and articulating a set of criteria for evaluating the favorableness of equitable offers and judgments). We follow this approach and decline to disregard equitable relief for Rule 68 purposes.

In determining the value of the relief, the defendant bears the burden of showing that the Rule 68 offer was more favorable than the judgment. *See* Wright § 3006.1 ("Rule 68 is actually a tool for defendant to use, and defendant alone determines the provisions of the offer. Since defendant has drafted those provisions, the courts generally interpret the offer against the defendant. Consistent with that, the burden should be on defendant to demonstrate that those provisions are in fact more favorable than what plaintiff obtained by judgment.") Here, the NYCTA failed to carry that burden. Its Offer proposed only the amount of $20,001. It failed to confront Reiter's request for equitable relief and was conspicuously silent as to whether Reiter would remain demoted, in a self-evidently inferior position. The magistrate judge, in the face of this omission, concluded that the equitable relief was essentially valueless and, in any event, would not be regarded by any reasonable person as worth more than $10,000.

Readily acknowledging the difficulties posed by a comparison of monetary and equitable relief, we are still confounded by this conclusion. As DVP Engineering, Reiter shared high-level executive responsibility for the NYCTA's major architectural and engineering projects. The budget of his department exceeded one billion dollars, eight senior executives reported directly to him, and he headed a staff of more than 900 employees. After his demotion to DVP Technical, he

had no staff, no direct reports, no corner office, no Hay Points and found himself in one of the NYCTA's smallest departments with ten employees. The magistrate judge found these differences "of limited value" and concluded that no objective, reasonable person would prefer the more important job to a $10,000 cash payment. While the difference cannot be quantified with precision, we nonetheless think that the opposite is true. Reiter was a highly compensated, senior executive in one of the world's largest and most important public transportation agencies. For him, as for many who occupy such positions after long years of service, the personal satisfaction and sense of gratification and achievement derived from first being given, and then bearing, significant professional responsibilities cannot be understated. A powerful indication that such responsibilities are coveted is that Reiter spent years of litigation to regain them.

We have no difficulty concluding that any senior executive worthy of the title (who is rational and who is still anxious for responsibilities) would, at a moment's notice, exchange a job with no staff, no budget, no direct reports, and a work force of ten for a job with 900 employees and eight senior direct reports in a department with a billion-dollar budget. Further, we have no difficulty opining that any such rational executive would more likely than not jump at the chance if it were priced at just $10,000 -- an amount totaling less than 10% of a single year's salary. In sum, while monetizing equitable relief will, in many instances, pose vexing problems (ones we leave for another time) we have little difficulty concluding that Reiter ultimately recovered more than the Offer and that, consequently, it did not cut off his entitlement to post-Offer attorneys' fees.

Next, plaintiff contends that the award should be increased because the district court failed to apply the current market hourly rate for the Southern District of New York. In determining

reasonable attorney's fees, a district court must calculate a lodestar figure based upon the number of hours reasonably expended by counsel on the litigation multiplied by a reasonable hourly rate. *Blanchard v. Bergeron*, 489 U.S. 87, 94 (1989). The lodestar figure should be based on market rates "in line with those [rates] prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation." *Blum v. Stenson*, 465 U.S. 886, 896 n.11 (1984). It is well-established that the prevailing community a district court should consider to determine the lodestar figure is normally "the district in which the court sits." *Polk v. N.Y. State Dep't of Corr. Servs.*, 722 F.2d 23, 25 (2d Cir. 1983). *See also A.R. v. N.Y. City Dep't of Ed.*, 407 F.3d 65, 79 (2d Cir. 2005) (engaging in extensive discussion as to whether in that case the "prevailing rates in the district in which the court [sat]" should have been applied). The rates used by the court should be "'current rather than historic hourly rates.'" *Gierlinger v. Gleason*, 160 F.3d 858, 882 (2d Cir. 1998) (quoting *Missouri v. Jenkins*, 491 U.S. 274, 284 (1989)); *see also Cohen v. W. Haven Bd. of Police Comm'rs*, 638 F.2d 496, 506 (2d Cir. 1980) ("[F]ees that would be charged for similar work by attorneys of like skill in the area should [be] the starting point for determination of a reasonable award.").

In this case, the magistrate judge found that $200 per hour was a reasonable rate for two attorneys, using the hourly rate set forth in Reiter's attorneys' retainer agreement ($175), and increasing it by $25 per hour to adjust for inflation. *Reiter*, 2004 WL 2072369, at *8. By referring to the retainer agreement, the court also found the hourly rate of $125 to be appropriate for the junior attorney. *Id.* at *7. This approach was erroneous. The record indicates that Reiter's attorneys set the retainer rate because, in part, they were offering a discount to a plaintiff in a civil rights case. The magistrate judge failed to give appropriate weight to this explanation. Important

public policy considerations dictate that we should not punish an "under-charging" civil rights attorney. *See Getty Petroleum Corp. v. Bartco Petroleum Corp.*, 858 F.2d 103, 114 (2d Cir. 1988) (holding that an award of attorney fees may be assessed at a rate greater than the rate in a fee agreement). The Supreme Court in *Blum* also noted that courts "must avoid[.] . . . decreasing reasonable fees because the attorneys conducted the litigation more as an act pro bono publico than as an effort of securing a large monetary return." *Blum*, 465 U.S. at 895. Thus, the magistrate judge should have taken into account the current market rate in the Southern District of New York. Accordingly, we also vacate the fee award and remand for additional consideration of the rate "'prevailing in the [Southern District] for similar services by lawyers of reasonably comparable skill, experience, and reputation.'" *Farbotko v. Clinton County*, 433 F.3d 204, 210 (2d Cir. 2005) (quoting *Blum*, 465 U.S. at 896 n.11).[2]

CONCLUSION

For the foregoing reasons, we affirm in part and reverse and remand in part for further proceedings consistent with this opinion. We take this opportunity to express our concern over the current formulation of Rule 68 and to recommend to the Advisory Committee on Civil Rules and the Standing Committee on Practice and Procedure of the Judicial Conference of the United

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[2] We find no merit in Reiter's contention that the district court erred in eliminating 8.1 hours based on what he describes as a clerical error in his time records. The court subtracted 8.1 hours from the request of Reiter's counsel because the summary indicated that he had spent 9 hours drafting discovery demands on a particular day, but the contemporaneous time records showed that he had expended only 0.9 hours that day on the task. Because Reiter never presented an explanation for this time record discrepancy prior to the district court's decision and there were no circumstances warranting reconsideration, we find no abuse of discretion in the district court's elimination of those hours.

States that they address the question of how an offer and judgment should be compared when non-pecuniary relief is involved. *See Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, et al.*, 98 F.R.D. 337, 363 (1983) (rejecting proposals to amend Rule 68 to give the district courts discretionary power to refuse to award costs in some circumstances); *Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure, et al.*, 102 F.R.D. 407, 432-438 (1984) (same). The Clerk is directed to send copies of this opinion to the Chairman and Reporter of the Judicial Conference Advisory Committee on Civil Rules and the Standing Committee on Practice and Procedure.

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"Gregg R. Zegarelli"	Dear Secretary of the Committee on Rules of...	12/08/2010 10:21:54 AM

From: "Gregg R. Zegarelli" <gregg.zegarelli@zegarelli.com>
To: <Rules_Support@ao.uscourts.gov>
Date: 12/08/2010 10:21 AM
Subject: Rule 68 Offer of Judgment

Dear Secretary of the Committee on Rules of Practice and Procedure:
I suggest a change to the Rule 68 Offer of Judgment. I will explain the scenario briefly. I am generally available to testify to the Committee as appropriate.

I represented Aaron and Christine Boring in a case against Google in the Western District of Pennsylvania 2:08-cv-00694-CB, now resolved by consent judgment against Google for nominal damages. This was a proverbial mom and pop versus behemoth company. The case arose from a trespass to land by Google and claimed invasion of privacy from Google's Street View service, past signage. The claim for damages was an important part of the case, since the case was dismissed for failing to plead nominal damages and the trial court holding as a matter of law that compensatory damages were not available without physical injury to land. That issue was reversed by the Third Circuit, with reinstatement of the trespass count and the availability of the compensatory damage claim with or without physical damage to land. [The dismissal of the punitive damage claim was upheld by the Third Circuit, with asserted logic that yet defies me, but Certiorari was not granted. You may want to visit http://www.zegarelli.com/Cases/Borings%20v%20Google/Borings%20v%20Google%20Certiorari%20Petition.pdf]

When back at the trial court, plaintiffs then added a nominal damage claim for relief, as belt and suspenders. Compensatory damages could be proved in two ways, fact testimony such as costs and time associated with removal of improper Street View pictures, and expert testimony such as the value of the pictures acquired by Google in its hands and use of the land. Because of Google's power, and in light of the then-current magistrate judge's apparent inclinations, a Google Daubert might eliminate (rightly or wrongly) our expert. The risk of losing the expert testimony without a supportive nominal damage claim might actually bait Google to file a Daubert motion on that basis alone. Therefore, a nominal damage claim could keep plaintiffs in the game for a trial, even if plaintiffs could not prove compensatory damages.

In light of this posture, Google sent us a Rule 68 Offer for $10. I will state some conjecture, but it is relevant to your consideration. I believe that Google read Rule 68 with the interpretation that it could not be filed and/or publicized. Therefore, as a matter of strategy, Google could send the notice, which I would have to show to the client, and it would scare the client into conceding the case for the risk of having to pay all the costs a $34B company could accrue — and as if they need the money. At the same time, Google could do so without being publicly accountable for such a mean harassing head game. Just play out the attorney-client conversation in committee: you sue for nominal damages of $1 to prove an important point of right v. wrong (in the traditional American sense), and you receive a $10 or $1.01 offer. You win your $1 and still have to pay.

I interpreted the act by Google to be an improper use of Rule 68. I filed it with the trial court for a purpose other than intended by Rule 68 itself, that being to prove a point related to the merits of the stay, that is, as an item of supportive public evidence like any other. I can tell this Committee, that my intention in filing was in good faith, because we researched diligently and could not find controlling authority that the *recipient* could not file for a tangential purpose. I also openly raised the issue in my Petition to the

Supreme Court.

In any case, Google took the position that a Rule 68 Offer cannot be filed, and possibly that it is confidential. Our position was that Rule 68 must still be used by a defendant for a proper purpose and not to harass. Also, that the offer is able to be filed with the Court for some reasons other than the primary purpose intended by the Rule itself; otherwise, you could not file a Rule 11 motion resulting from a bad faith use of Rule 68. In any case, the trial court never ruled on Google's related sanction motion.

http://www.zegarelli.com/Cases/Borings%20v%20Google/Brief%20in%20Support%20of%20Motion%20to%20Stay%2020100406W.pdf
http://www.zegarelli.com/Cases/Borings%20v%20Google/Google%20Response%20to%20Motion%20web.pdf
http://www.zegarelli.com/Cases/Borings%20v%20Google/Reply%20Motion%20to%20Stay%20Web.pdf

Again, please watch how the Rule works with nominal damages: You sue with a non-frivolous case. The law provides only nominal damages of $1 for the proper symbolic purpose of vindication of the legal right itself. You properly recover nominal damages of $1. However, $1 is by formula less than the $10 offer of judgment; therefore, defendant gets costs. In other words, a $1.01 offer of judgment could always be used in a nominal damages case to harass a proper plaintiff vindicating its right. It vitiates the concept of nominal damages, which is a proper symbolic victory and vindication.

As a result of the above posture and strategic use of Rule 68, I believe the Rule should not be applicable if nominal damages are awarded, or if punitive damages are awarded. Confidentiality and filing issues should also be clarified. E.g.:

(e) Offers of judgment are not settlements, nor are offers confidential settlement communications, as such. [This clarifies that a proponent of the offer may make the offer, but will not escape any public scutiny that is appurtenant to the act itself. Offers can lead to a settlement discussion, but the offer itself is not confidential settlement communication. Offers of judgment are a "cram down," not an inspired settlement discussion.]

(f) Offers of judgment are not applicable to nominal damages or punitive damages. A judgment granting nominal or punitive damages nullifies the effectiveness of an unaccepted offer. [Nominal damages are $1 and symbolic; therefore, it is not appropriate for an offer of judgment. Punitive damages are not calculable and are socially imposed in discretion, and therefore not subject to offers. An award in such other categories must nullify the offer otherwise the limitation would be ineffective.] (It might be better to state that offers are applicable only to damages otherwise reasonably calculable. The point for nominal damages is distinct from punitive damages, but punitive damages exist for a reason, and it is not fair to make a recipient try to calculate punishment value. Offers should be for "rational" damages, not symbolic, exemplary, punitive, etc.)

(g) Attorneys fees reimbursements are not within the scope of offers.
(h) Nothing prevents the filing or admissability of an offer for a purpose other than to constrain the liability otherwise determined, as provided above in Sections (c)-(d).

I appreciate your consideration in this regard and offer the suggestion for the purpose of clarifying applicability of a rule that goes directly to the heart of all federal lawsuits. If I can be of further assistance, please contact me.

Very truly yours,
s/Gregg Zegarelli/

Gregg R. Zegarelli

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From: Alan Schoenbaum <aschoenb@rackspace.com>
To: "Andrea_Kuperman@txs.uscourts.gov" <Andrea_Kuperman@txs.uscourts.gov>
Date: 02/15/2013 11:15 AM
Subject: FRCP changes

Dear Ms. Kuperman,

I am the general counsel of Rackspace Hosting, a hosting and cloud computing company based in San Antonio. I have been working with legislators, lawyers and Internet companies from around the country on how to reform the US patent laws, which is something that a wide range of society is interested in due to the proliferation of so-called "patent trolls." The President actually spoke about the problem yesterday. http://arstechnica.com/tech-policy/2013/02/even-obama-knows-patent-trolls-are-extorting-money/

One of my patent lawyers suggested that changes to Rule 68 could help level the playing field between trolls and their victims. The troll game relies heavily on the fact that the plaintiffs have no risk and minimal investment in bringing lawsuits, and that defendants are forced to pay millions of dollars in legal fees, discovery and expert witness fees to defend themselves. The plaintiffs extort settlements based on this asymmetrical advantage. According to my patent lawyer, Rule 68 which is effective in civil litigation is not effective in patent cases.

Rule 68, intended to promote settlement between parties in litigation, permits recoupment of costs and attorneys fees in some cases where a defendant makes a pre-trial settlement offer, which is rejected by the plaintiff, but ends up being more favorable than a resulting judgment in favor of the plaintiff. But currently it has three critical flaws as it stands:

1) Based on a SCOTUS interpretation, Rule 68 includes or excludes fees based on the underlying statutory system – in the case of the patent system fees are not awarded to a defendant who makes such offer. Revising Rule 68 to explicitly permit recoupment of fees incurred *after* a valid offer will incentivize early and fair settlement offers.
2) Rule 68 provides no value to a defendant who submits an offer, which is reject, if the defendant wins. Even though the defendant was essentially proven correct – there is no benefit from Rule 68, effectively vitiating this scheme.
3) There is no mechanism for a plaintiff to make a binding offer, which preclude Rule 68 from incentivizing plaintiffs to make early, and *reasonable* offers for settlement.

We have taken a crack at a revised Rule 68. Can you help me get this in front of the Advisory Committee?

Thank you,
Alan

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Proposed Rule 68 storm.docx

RULE 68. OFFER OF JUDGMENT

(a) MAKING AN OFFER; JUDGMENT ON AN ACCEPTED OFFER. At least 14 days before the date set for trial, a party defending against a claim may serve on an opposing party an offer to allow judgment on specified terms, with the costs, exclusive of attorney fees, then accrued. In a case involving multiple claims, an offer under this rule may be limited to a specific claim, or claims, less than all the claims in the case. If, within 14 days after being served, the opposing party serves written notice accepting the offer, either party may then file the offer and notice of acceptance, plus proof of service. The clerk must then enter judgment in accordance with the offer. To the extent a claim has potential prospective application; the offer must explicitly state the prospective effect of the offer[1].

(b) UNACCEPTED OFFER. An unaccepted offer is considered withdrawn, but it does not preclude a later offer. Evidence of an unaccepted offer is not admissible except in a proceeding to determine costs and reasonable attorney fees.

(c) OFFER AFTER LIABILITY IS DETERMINED. When one party's liability to another has been determined but the extent of liability remains to be determined by further proceedings, the party held liable may make an offer of judgment. It must be served within a reasonable time—but at least 14 days—before the date set for a hearing to determine the extent of liability.

(d) PAYING COSTS AFTER AN UNACCEPTED OFFER. If the judgment that the offeree finally obtains on the claim, or claims, in the offer is not more favorable than the unaccepted offer or if the offeror obtains judgement in its favor on the claim, or claims, in the offer, the offeree must pay the costs and reasonable attorney fees incurred by the offeror related to the claim, or claims, in the offer after the offer was made.

[1] For example, in a patent infringement case, the offer must state whether the offeror obtains a paid-up license, a running royalty license or agrees to a permanent injunction.

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REPLY TO: TOMS RIVER

Our File

February 22, 2013

Committee Rules Practice and Procedure
Administrative Office of the United States Courts
1 Columbus Circle N.E.
Washington, DC 20544

RE: Rule 68 Offer of Judgment

Dear Committee Member:

I request that the Committee consider a change to the Offer of Judgment Rule 68 currently in effect. I submit to you that the current Rule, as it is currently constituted, is extremely one-sided and favors the defendant over the plaintiffs. I respectfully draw the Committee's attention to the New Jersey Court Rule 4:58 Offer of Judgment, which is attached. Under the New Jersey Rule, either party has the right to file an Offer of Judgment.

Why is the Federal Rule only available to the defendants? What policy reason precludes the plaintiff from utilizing this very effective mechanism? I found, in my practice, that the New Jersey Offer of Judgment is very effective in forcing the defendant to take a realistic view of the value of a case, weighing the consequences of their failure to accept a reasonable offer.

Respectfully submitted,

James J. Curry, Jr.

JJC/tv
Enclosure

accepted prior to verdict. See Granduke v. Lembesis, 256 N.J. Super. 546 (App. Div. 1992).

RULE 4:58. OFFER OF JUDGMENT

4:58-1. Time and Manner of Making and Accepting Offer

a. Except in a matrimonial action, any party may, at any time more than 20 days before the actual trial date, serve on any adverse party, without prejudice, and file with the court, an offer to take a monetary judgment in the offeror's favor, or as the case may be, to allow judgment to be taken against the offeror, for a sum stated therein (including costs). The offer shall not be effective unless, at the time the offer is extended, the relief sought by the parties in the case is exclusively monetary in nature.

b. If at any time on or prior to the 10th day before the actual trial date the offer is accepted, the offeree shall serve on the offeror and file a notice of acceptance with the court. The making of a further offer shall constitute a withdrawal of all previous offers made by that party. An offer shall not, however, be deemed withdrawn upon the making of a counter-offer by an adverse party but shall remain open until accepted or withdrawn as is herein provided. If the offer is not accepted on or prior to the 10th day before the actual trial date or within 90 days of its service, whichever period first expires, it shall be deemed withdrawn and evidence thereof shall not be admissible except in a proceeding after the trial to fix costs, interest, and attorney's fee. The fact that an offer is not accepted does not preclude a further offer within the time herein prescribed in the same or another amount or as specified therein.

Note: Source—R.R. 4:73. Amended July 7, 1971 to be effective September 13, 1971; amended July 13, 1994 to be effective September 1, 1994; amended June 28, 1996 to be effective September 1, 1996; amended July 10, 1998 to be effective September 1, 1998; text allocated to paragraphs (a) and (b), and paragraphs (a) and (b) amended July 27, 2006 to be effective September 1, 2006.

4:58-2. Consequences of Non-Acceptance of Claimant's Offer

(a) If the offer of a claimant is not accepted and the claimant obtains a money judgment, in an amount that is 120% of the offer or more, excluding allowable prejudgment interest and counsel fees, the claimant shall be allowed, in addition to costs of suit: (1) all reasonable litigation expenses incurred following non-acceptance; (2) prejudgment interest of eight percent on the amount of any money recovery from the date of the offer or the date of completion of discovery, whichever is later, but only to the extent that such prejudgment interest exceeds the interest prescribed by R. 4:42-11(b), which also shall be allowable; and (3) a reasonable attorney's fee for such subsequent services as are compelled by the non-acceptance.

(b) No allowances shall be granted pursuant to paragraph (a) if they would impose undue hardship. If undue hardship can be eliminated by reducing the allowance to a lower sum, the court shall reduce the amount of the allowance accordingly.

Note: Amended July 7, 1971 to be effective September 13, 1971; amended July 14, 1972 to be effective September 5, 1972; amended July 17, 1975 to be effective September 8, 1975; amended July 13, 1994 to be effective September 1, 1994; amended July 5, 2000 to be effective September 5, 2000; amended July 28, 2004 to be effective September 1, 2004; text amended and designated as paragraph (a), new paragraph (b) adopted July 27, 2006 to be effective September 1, 2006; paragraph (a) amended July 23, 2010 to be effective September 1, 2010.

4:58-3. Consequences of Non-Acceptance of Offer of Party Not a Claimant

(a) If the offer of a party other than the claimant is not accepted, and the claimant obtains a monetary judgment that is favorable to the offeror as defined by this rule, the offeror shall be allowed, in addition to costs of suit, the allowances as prescribed by R. 4:58-2, which shall constitute a prior charge on the judgment.

(b) A favorable determination qualifying for allowances under this rule is a money judgment in an amount, excluding allowable prejudgment interest and counsel fees, that is 80% of the offer or less.

(c) No allowances shall be granted if (1) the claimant's claim is dismissed, (2) a no-cause verdict is returned, (3) only nominal damages are awarded, (4) a fee allowance would conflict with the policies underlying a fee-shifting statute or rule of court, or (5) an allowance would impose undue hardship. If, however, undue hardship can be eliminated by reducing the allowance to a lower sum, the court shall reduce the amount of the allowance accordingly.

Note: Source—R.R. 4:73; amended July 13, 1994 to be effective September 1, 1994; amended July 5, 2000 to be effective September 5, 2000; amended July 28, 2004 to be effective September 1, 2004; text allocated into paragraphs (a), (b), (c), and paragraphs (a), (b), (c) amended July 27, 2006 to be effective September 1, 2006.

4:58-4. Multiple Claims; Multiple Parties

(a) Multiple Plaintiffs. If a party joins as plaintiff for the purpose of asserting a per quod claim, the claimants may make a single unallocated offer.

(b) Multiple Defendants. If there are multiple defendants against whom a joint and several judgment is sought, and one of the defendants offers in response less than a pro rata share, that defendant shall, for purposes of the allowances under R. 4:58-2 and -3, be deemed not to have accepted the claimant's offer. If, however, the offer of a single defendant, whether or not intended as the offer of a pro rated share, is at least as favorable to the offeree as the determination of total damages to which the offeree is entitled, the single offering defendant shall be entitled to the allowances prescribed in R. 4:58-3, provided, however, that the single defendant's offer is at least 80% of the total damages determined.

(c) Multiple Claims. If a claimant asserts multiple claims for relief or if a counterclaim has been asserted against the claimant, the claimant's offer shall include all claims made by or against that claimant. If a party not originally a claimant asserts a counterclaim, that party's offer shall also include all claims by and against that party.

Note: Adopted July 5, 2000 to be effective September 5, 2000; caption amended, former text redesignated as paragraph (b) and amended, and new paragraphs (a) and (c) adopted July 28, 2004 to be effective September 1, 2004.

4:58-5. New Trial

If an action is required to be retried, a party who made a rejected offer of judgment in the original trial may, within 10 days after the fixing of the first date for the retrial, serve the actual notice on the offeree that the offer then made is renewed and, if the offeror prevails, the renewed offer will be effective as of the date of the original offer. If the offeror elects not to so renew the original offer, a new offer may be made under this rule, which will be effective as of the date of the new offer.

Note: Former R. 4:58-5 redesignated as R. 4:58-6, and new R. 4:58-5 caption and text adopted July 23, 2010 to be effective September 1, 2010.

4:58-6. Application for Fee; Limitations

Applications for allowances pursuant to R. 4:58 shall be made in accordance with the provisions of R. 4:42-9(b) within 20 days after entry of final judgment. A party who is awarded counsel fees, costs, or interest as a prevailing party pursuant to a fee-shifting statute, rule of court, contractual provision, or decisional law shall not be allowed to recover duplicative fees, costs, or interest under this rule.

Note: Adopted July 27, 2006 as R. 4:58-5 to be effective September 1, 2006; redesignated as R. 4:58-6 July 23, 2010 to be effective September 1, 2010.

COMMENT

History and Analysis of Rule Amendments: See Online Edition

1. General Principles; 2004/2006 Amendments.
2. Operation of the Rules.
3. Applicability.
4. Eligibility of Offers.
5. Fee Shifting.
6. Multiple Parties.
   - 6.1. Multiple defendants.
   - 6.2. Multiple claimants.
   - 6.3. Crossclaims.
7. Application for fee; procedure.

1. General Principles; 2004/2006 Amendments. Inducement to settlement has remained the fundamental purpose of the rule as it has evolved. See, e.g., Best v. C & M Door Controls, Inc., 200 N.J. 348, 356 (2009); Firefreeze v. Brennan & Assoc., 347 N.J. Super. 435, 441 (App. Div. 2002); Sovereign Bank v. United Nat'l Bank, 359 N.J. Super. 534, 542 (App. Div.), certif. den. 177 N.J. 489 (2003); McMahon v. New Jersey Mfrs. Ins., 364 N.J. Super. 188, 192 (App. Div. 2003); Palmer v. Kovacs, 385 N.J. Super. 419, 425 (App. Div.), certif. den. 188 N.J. 356 (2006). And see Wiese v. Dedhia, 188 N.J. 587, 593 (2006).

Nevertheless the complexity of the rule through its various permutations continued to engender considerable confusion respecting its application, and as use of the rule became more widespread, it appeared that there were interpretive problems, including the consequences and effect of fee-shifting, whether by statute, rule or contract. That is to say, if the prevailing plaintiff is entitled to a fee because of a fee-shifting statute, rule or contract, but the losing party was entitled to a fee under this rule, having made an unaccepted offer in an adequate amount, the question arises as to how to reconcile the apparent conflict in award of fees. Moreover, there was growing concern that the rule was being used not primarily as a settlement device but rather to effect fee-shifting in cases where neither a rule nor a statute provided for attorney-fee allowances, that is, to move away from the American rule and towards the English rule discussed in History and Analysis of Rule Amendments Comment 1 on R. 4:42-9. Accordingly, the Civil Practice Committee again studied the rule during the 2002-2004 rule cycle, and while the study was not then completed, interim recommendations to simplify application and construction of the rule were made and adopted effective September 2004. The study was completed during the 2004-2006 cycle. Although a minority of the Civil Practice Committee was of the view that the offer of judgment rule created more problems than it solved and should therefore be deleted, the majority proposed additional amendments designed to address remaining problems, and these recommendations were accepted by the Supreme Court.

As a result of the 2004 recommendations, the major change made by the September 2004 amendment was the elimination of the former dichotomy

between liquidated and unliquidated damages in respect of the so-called margin of error. See, e.g., Sema v. Automall 46 Inc., 384 N.J. Super. 145, 153 (App. Div. 2006). That is, in all cases, the application of the rule is triggered only if the claimant obtains a recovery of less than 80% of the non-claimant's offer, and if the offeror is the claimant, he must obtain a recovery of 120% or more of the offer before the non-claimant is liable for fees. In addition, the former requirement of R. 4:58-3 that a claimant obtain a verdict of at least $750 in order for the offeror to qualify for a fee allowance was eliminated in favor of the provision that fees are not allowable against the claimant if the action is dismissed, a no-cause verdict is returned, or only nominal damages are awarded. The 2004 amendments also provide that for purposes of comparison of the offer with the recovery, prejudgment interest and attorney's fees otherwise allowable are disregarded. This provision accords with the holding in Lobel v. Trump Plaza Hotel & Casino, 335 N.J. Super. 319 (App. Div. 2000). See also Sema v. Automall 46 Inc., 384 N.J. Super. at 154. The amendments further provide that the additional eight percent prejudgment interest calculated from the date of the offer (or date of the completion of discovery) to the date of recovery is allowable only to the extent it exceeds prejudgment interest allowable by R. 4:42-11(b). Finally, the 2004 rule requires the application for the allowances permitted thereby to be made in accordance with R. 4:42-9(b) within 20 days after entry of final judgment.

The September 2006 amendments addressed these additional problems. The first derives from the difficulty of comparing an offer with a judgment actually rendered where non-monetary relief is sought, in full or in part, and is granted. Accordingly, R. 4:58-1 was amended to permit an effective offer to be made only if, when it is made, the relief sought is exclusively monetary. Thus, illustratively, if both an injunction and money damages are sought, a valid offer cannot be made. If, however, the injunctive count of the complaint is dismissed leaving only the monetary relief request, a valid offer may then be made. The second issue addressed by the September 2006 amendments is the amelioration of the English-rule aspect of the offer of judgment rule by the inclusion of a hardship exception. Thus R. 4:58-2 was amended to add a paragraph (b), which authorizes the court to withhold an allowance where there has been non-acceptance of a claimant's offer if an allowance would result in undue hardship or, alternatively, to reduce the amount of the allowance if a reduction will eliminate the hardship. With respect to the consequences of a non-claimant's rejection of the offer as provided by R. 4:58-3, the rule had provided that there would be no fee allowance if the claim was dismissed, a no-cause verdict returned or only nominal damages awarded. The September 2006 amendment added to this list the same hardship provision added to R. 4:58-2 as well as a fifth exception, namely, that a fee allowance would conflict with the policies underlying a fee-shifting statute or rule of court. This fifth exception is intended to deal with the fee-shifting problem where denial of a full fee to the prevailing party would be inconsistent with the policy of the fee-shifting statute involved. See further Comment 5 infra. Finally, by the adoption of 4:58-5, the 2006 amendments prohibit the award of duplicative fees, interest or costs. Although as a procedural rule, this amendment eliminating the liquidated-unliquidated damages distinction is subject to the time of decision rule, the Supreme Court relaxed the rule pursuant to R. 1:1-2 so as to preserve the distinction where the offer was made and the case fully tried before the rule change, the amendment having become effective during the period between completion of trial and the court's decision. Romagnola v. Gillespie, Inc., 194 N.J. 596 (2008). But see Best v. C & M Door Controls, 402 N.J. Super. 229, 240-242

(App. Div. 2008), aff'd in part, rev'd in part on other grds 200 N.J. 348 (2009), applying the 2006 amended rule where the jury verdict was returned before the amendment date but counsel did not seek fees until after. See also Kas Oriental Rugs, Inc. v. Ellman, 407 N.J. Super. 538, 551-552 (App. Div.), certif. den. 200 N.J. 476 (2009), applying the 2006 amendment to reverse the trial court's allowance of fees under the pre-2006 version of the rule where the amendment became effective while the judgment was pending appeal.

2. Operation of the Rules. Essentially, the rules provide that any party to any action, other than a matrimonial action, in which exclusively monetary damages are sought, including both liquidated and unliquidated damages, may, at any time not later than 20 days prior to the actual trial date serve upon the opposing party an offer to allow judgment in a specific amount or of a specific nature to be taken against him if he is defending against a claim or to be entered in his favor if he is asserting a claim. If, however, both non-monetary damages and monetary damages are sought, a valid offer cannot be made unless and until the non-monetary claim is dismissed.

The party to whom the offer is made has until the tenth day prior to the actual trial date or 90 days after service of the offer, whichever period first expires, to accept the offer. If the offer is accepted within the applicable time period, then none of the penalties of the rule applies. Estate of Okhotnitskaya v. Lezameta, 400 N.J. Super. 340, 348 (Law Div. 2007) (the 90-day period cannot be foreshortened by the offeror's intervening motion to confirm an arbitration award minus the amount of the offer). If it is not so accepted, it is deemed withdrawn and is inadmissible for any purpose except the fixing of allowances after trial. The "actual trial date" has been construed as the actual date of the first trial where the first trial ended in a mistrial and the verdict in the second trial was set aside, necessitating a third trial. Thus, an offer made prior to the first trial was deemed to be, for purposes of sanctions under the rule, still viable at the conclusion of the third trial. Negron v. Melchiorre, Inc., 389 N.J. Super. 70, 90, 94-96 (App. Div. 2006), certif. den. 190 N.J. 256 (2007). The question raised by the decision, particularly in view of the substantial financial consequences, is whether the offeree reasonably assumed that the offer made before the first trial terminated with its conclusion. See R. 4:58-5 now detailing the effect of a new trial on a previously tendered offer of judgment. See further 2010 Report of the Supreme Court Civil Practice Committee available online.

A counter-offer will not affect the viability of the original offer, which remains open until accepted or withdrawn. Moreover, a second offer by the offeror will not negate the fee-shifting consequences of the original unaccepted offer, and hence the date of the first offer will control the fixing of interest and attorney's fees. Palmer v. Kovacs, 385 N.J. Super. 419, 427 (App. Div.), certif. den. 188 N.J. 356 (2006).

As to the application of the rule's provisions that a fee will not be allowed when the cause of action by the rejecting party is dismissed in its entirety, see Kas Oriental Rugs, Inc. v. Ellman, 407 N.J. Super. 538, 556-558 (App. Div.), certif. den. 200 N.J. 476 (2009), precluding a fee allowance when a rejected offer of judgment did not distinguish between claims and the rejecting claimant prevailed on one claim. As to the application of the rule that precludes a fee when nominal damages are awarded, see Reid v. Finch, 425 N.J. Super. 196, 203-204 (Law Div. 2011), rejecting plaintiff's argument that trial expenses should be deducted in determining whether an award is nominal.

The rejection of the offer does not preclude the offering party from subsequently submitting the same or a different offer within the prescribed time. In the absence of a subsequent offer, a rejecting offeree will be subject to the consequences provided for by R. 4:58-2 and R. 4:58-3 on the basis of the rejected offer.

The consequences of non-acceptance are spelled out in R. 4:58-2 (consequences of non-claimant's rejection) and R. 4:58-3 (consequences of claimant's rejection). Both rules provide that if the judgment is within a 20 percent margin of error, the party whose offer was rejected is entitled to attorney's fees and actual litigation expenses incurred after the date of non-acceptance unless a stated exception of the rule applies. See, illustratively, Sovereign Bank v. United Nat'l Bank, 359 N.J. Super. 534, 542 (App. Div.), certif. den. 177 N.J. 489 (2003). In calculating the amount of the judgment, the question of whether to include a prevailing party's entitled court costs was raised but not answered in Kas Oriental Rugs, Inc. v. Ellman, 407 N.J. Super. 538, 554 (App. Div.), certif. den. 200 N.J. 476 (2009). R. 4:58-2 further provides that if a money judgment is entered in favor of a claimant in an amount at least equal to 120 percent of his rejected offer, the claimant is also entitled to eight percent interest on the judgment calculated from the date of the offer or the date of the completion of discovery, whichever is later, but only to the extent it exceeds prejudgment interest allowable by R. 4:42-11(b). The purpose of the stipulation of the later of these dates, i.e., the date of the order or the date of completion of discovery, is obviously designed to afford the defending party a reasonable opportunity to make his own evaluation of the reasonableness of the offer in terms of the probable financial worth of the claim. See also Malick v. Seaview Lincoln Mercury, 398 N.J. Super. 182, 189-190 (App. Div. 2008) (whether a high-low agreement preserving the right to attorney's fees under the offer of judgment rule also preserved the right to 8 percent prejudgment interest is a matter of contract interpretation). The amount of the fee is to be fixed by the court upon consideration of the relevant circumstances. It is, moreover, clear that a fee allowance under the rule is mandatory if its terms are met, subject only to the exceptions set forth in R. 4:58-2(b) and R. 4:58-3(c). See Wiese v. Dedhia, 188 N.J. 587, 592-593 (2006). See also Reid v. Finch, 425 N.J. Super. 196, 206-207 (Law Div. 2011)(considering undue hardship in reducing the costs). Included within the mandatory fee allowance are fees for appellate services incurred by a litigant-respondent entitled to a fee for trial services.

With respect to the withholding of a fee under the offer of judgment rule because allowance of a fee would conflict with the policy of a fee-shifting statute, see Best v. C & M Door Controls, Inc., 200 N.J. 348 (2009), holding that the policy of a fee-shifting statute would be violated by enforcement of the offer of judgment rule if the statute does not allow a fee to a prevailing defendant or allows it only under limited circumstances not present in the case before the court. Thus, an award may not be made to a defendant under the Prevailing Wage Act or, unless plaintiff acted without basis in law or fact and the employer was vindicated, under the Conscientious Employee protection Act (CEPA). Nevertheless the reasonableness of the defendant's offer of judgment may be taken into account in calculating the attorney's fee award under the shifting statute. Best v. C & M Door Controls, Inc., 200 N.J. at 360-361. It has also been held that the fee-shifting provisions of Sales Representatives' Rights Act (SRRA), N.J.S. 2A:61A-2, trump the offer of judgment rule. Kas Oriental Rugs, Inc. v. Ellman, 407 N.J. Super. 538, 559-560 (App. Div.), certif. den. 200 N.J. 476 (2009).

R. 4:58 does not mandate the acceptance by the offeree of an offer of judgment. Thus, a court cannot compel an offeree to accept such an offer. See Hoehn v. Barrett, 338 N.J. Super. 365, 372-373 (App. Div. 2001).

For purposes of determining which party prevails under this rule, it is the actual verdict that is compared to the offer. See Gonzalez v. Safe & Sound Security, 185 N.J. 100, 123-125 (2005), so holding where the defendant had wanted the offer compared to its liability as limited by a bankruptcy court.

Clearly, any fee allowed under this rule must be reasonable, must comport with R. 4:42-9(b) and must be supported by adequate findings of the trial judge based on the proofs. See Best v. C & M Door Controls, Inc., 200 N.J. 348, 360-361 (2009); Kas Oriental Rugs, Inc. v. Ellman, 407 N.J. Super. 538, 561-562 (App. Div.), certif. den. 200 N.J. 476 (2009).

3. Applicability. The rule is applicable to the Unsatisfied Claim and Judgment Fund. See Crudup v. Marrero, 57 N.J. 353 (1971). Cf. Boyd v. Marini, 132 N.J. Super. 324 (App. Div. 1975). It is also expressly applicable to arbitration proceedings pursuant to R. 4:21A. See R. 4:21A-3 and Comment thereon. See also Elrac, Inc. v. Britto, 341 N.J. Super. 400, 404 (App. Div. 2001). It has also been held to be applicable to marital torts, which are deemed not to constitute matrimonial actions for purposes of the rule. See Borchert v. Borchert, 361 N.J. Super. 175, 182-183 (Ch. Div. 2002).

If the claimant is an insured suing his own carrier for UIM benefits, he is entitled to the benefit of the rule if his offer is not accepted even if the addition of attorney's fees and costs to the compensatory damage award will result in an overall recovery exceeding the policy limits. McMahon v. New Jersey Mfrs. Ins., 364 N.J. Super. 188, 193 (App. Div. 2003).

Attorneys who appear pro se have been held entitled to the benefit of the rule if an offer of judgment made by them meeting the terms of the rule for an allowance has been declined by the offeree. See Brach, Eichler, P.C. v. Ezekwo, 345 N.J. Super. 1, 17-18 (App. Div. 2001).

The rule has, however, been held inapplicable to condemnation actions tried in the Law Division. Casino Reinvest. Dev. Auth. v. Marks, 332 N.J. Super. 509, 513-515 (App. Div.), certif. den. 165 N.J. 607 (2000). Nor does it apply to actions in the Special Civil Part. See Bandler v. Maurice, 352 N.J. Super. 158, 165 (App. Div. 2002).

4. Eligibility of Offers. An offer of no-cause for action is not an offer within the intendment of the rule. See Essex Bank v. Capital Resources Corp., 179 N.J. Super. 523 (App. Div.), certif. den. 88 N.J. 495 (1981).

Although the attorney's fee rule had originally been drawn in mandatory terms, R. 4:58-2 and 4:58-3 now provide for a hardship exception for both claimants and non-claimants and additional exceptions for claimants. Compare R. 4:21A-6(c)(5), authorizing the court to relieve an obligated party on a trial de novo of the expenses thereof in the event of substantial economic hardship.

While a party need not consider an offer to settle the full amount of all claims, the rule does apply to those claims surviving after partial summary judgment. City of Cape May v. Coldren, 329 N.J. Super. 1, 10-11 (App. Div. 2000).

5. Fee Shifting. The offer of judgment rule does not explicitly require that the offer be made in good faith and for the purpose of effecting a settlement of the controversy. Nor does it explicitly state that in order to be entitled to the benefits of the rule, the offeror must make an offer that is neither token nor nominal. It had been held, however, that a token or nominal offer would not satisfy the requirements of the rule since it would constitute fee-shifting in derogation of the

American rule and defeat the purpose of the rule, namely, to encourage settlement. See Frigon v. DBA Holdings, Inc., 346 N.J. Super. 352 (App. Div. 2002). R. 4:58-3 was amended to so provide. See further Comment 1 supra.

While there has apparently been no reported decision dealing with the problem of a defendant making a successful offer of judgment to a plaintiff who is in any event entitled to attorney's fees because of a statute, rule, or contract, the question was adverted to by Patock Const. v. GVK Enters., 372 N.J. Super. 380 (App. Div. 2004), certif. den. 182 N.J. 629 (2005), involving attorney fees pursuant to N.J.S. 2A:44A-15 for a willfully overstated construction lien. The court held that defendant was entitled to attorney's fees under both the statute and the offer of judgment rule provided, however, that the total did not exceed the actual value of the services rendered in defending the action. That holding accords with the current R. 4:58-5, which prohibits duplicate fees, interest or costs.

The fee-shifting problem vis-a-vis an offer of judgment is addressed by R. 4:58-3, which authorizes the court to withhold a fee allowance to the non-claimant if allowing such a fee would conflict with the policies underlying a fee-shifting statute or rule of court. See further Comment 2 on this rule.

6. Multiple Parties.

6.1. Multiple defendants. The intention of R. 4:58-4 is to permit the claimant to deal exclusively in terms of the total judgment rather than to require him to accept pro rata shares from individual defendants. Since each defendant's ultimate monetary responsibility depends upon the number of defendants ultimately held liable, the claimant is thereby spared the risk, for example, of having to accept one-half of his offer from one of two defendants only to find himself with a no-cause verdict against the other. Thus the rule specifically intends that the claimant need only state the total amount of the judgment he seeks and no individual defendant's offer to pay a pro rata share thereof shall be deemed an acceptance thereof. Similarly, an offer made by a single defendant to the claimant to pay a specific amount as his pro rata share should not be considered as an offer within the intendment of this rule such as will result in binding the claimant to the consequences stated in R. 4:58-3. See Schettino v. Roizman Development, 310 N.J. Super. 159, 167-168 (App. Div. 1998), aff'd 158 N.J. 476 (1999), accepting this proposition and holding that since defendant's offer there could not be deemed a total offer, attorney's fees were improvidently granted. See also Debrango v. Summit Bancorp., 328 N.J. Super. 219, 225-226 (App. Div. 2000); Wiese v. Dedhia, 354 N.J. Super. 256, 263 (App. Div. 2002).

If a defendant, however, either as offeror or offeree, does offer to pay a pro rata share which is no less than his obligation as determined after trial (or in an unliquidated case, at least 80 per cent thereof), it may well be inequitable to charge him with the financial consequences of R. 4:58-2. In such circumstances, the court may, presumably, consider all pro rata offers by the defendants in fixing both the amount of the award to be made to the successful party, and more significantly, the shares thereof to be made by the adverse parties. While the Supreme Court in Schettino, supra, endorsed the Comment's analysis in respect of multiple defendants, it referred the matter for further consideration to the Civil Practice Committee. The Committee recommended and the Supreme Court concurred that the basic scheme should remain unchanged with, however, one modification, namely that if a single defendant makes an offer that turns out to meet the requirement of the rule vis-a-vis total damages to which the offeror is determined to be entitled, whether or not intended as a pro rata share, the conditions for imposition of sanctions as to that defendant will be deemed to have been met. The

rule has, however, been construed to require that all defendants participate in the offer. Hence in a case where two of three defendants made individual offers totaling more than plaintiff's recovery, the consequences of the rule were held not to apply. See Cripps v. DiGregorio, 361 N.J. Super. 190, 194-195 (App. Div. 2003). See also Finderne Mgmt. Co. v. Barrett, 402 N.J. Super. 546, 581-582 (App. Div. 2008), certif. den. 199 N.J. 542 (2009)(individual offers made after aggregate offer was turned down constituted withdrawal of aggregate offer imposing no obligation of acceptance on plaintiff).

6.2. Multiple claimants. Although the September 2000 revision of the rule addressed multiple defendants, it did not deal with multiple plaintiffs and, more particularly, spouses, one of whom is joined only to assert a per quod claim. There being no conflict between them, it has been held that a single lump sum offer may be made on behalf of both plaintiffs in that circumstance. See Wiese v. Dedhia, 354 N.J. Super. 256, 264-265 (App. Div. 2002), whose holding in this regard was approved by Wiese v. Dedhia, 188 N.J. 587, 590 (2006). The September 2004 amendment expressly so provided. The 2004 amendment also requires that where there are multiple claims for affirmative relief or the assertion of a counterclaim, the claimant's offer includes all claims made by and against him.

6.3. Crossclaims. Where there are counterclaims and crossclaims, a party may make an offer intended to settle all claims. See Firefreeze v. Brennan & Assoc., 347 N.J. Super. 435, 441-442 (App. Div. 2002).

7. Application for fee; procedure. R. 4:58-5 requires the fee application to be made in accordance with R. 4:42-9(b) within 20 days following entry of the final judgment and prohibits the award of duplicative fees, interest or costs. The date of entry of final judgment is the date the judgment is entered on the civil docket. Reid v. Finch, 425 N.J. Super. 196, 202-203 (Law Div. 2011).

RULE 4:59. PROCESS TO ENFORCE JUDGMENTS

4:59-1. Execution

(a) In General. Process to enforce a judgment or order for the payment of money and process to collect costs allowed by a judgment or order, shall be a writ of execution, except if the court otherwise orders or if in the case of a capias ad satisfaciendum the law otherwise provides. Unless the court otherwise orders, the writ of execution shall be in the form prescribed by Appendix XII-D and Appendix XII-E, as appropriate, to these rules. Except with respect to writs issued out of the Special Civil Part, the amount of the debt, damages, and costs actually due and to be raised by the writ, together with interest from the date of the judgment, shall be endorsed thereon by the party at whose instance it shall be issued before its delivery to the sheriff or other officer. The endorsement shall explain in detail the method by which interest has been calculated, taking into account all partial payments made by the defendant. Except with respect to writs issued out of the Special Civil Part, the judgment creditor shall serve a copy of the fully endorsed writ, personally or by ordinary mail, on the judgment debtor after a levy on the debtor's property has been made by the sheriff or other officer and in no case less than 10 days prior to turnover of the debtor's property to the creditor pursuant to the writ. Unless the court otherwise orders, every writ of execution shall be directed to a sheriff and shall be returnable within 24 months after the date of its issuance, except that in case of a sale, the sheriff shall make return of the writ and pay to the clerk any remaining surplus within 30 days after the sale, and except that a capias ad satisfaciendum shall

NEW YORK CITY BAR

13-CV-D

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April 3, 2013

Secretary of the Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, D.C. 20544

Re: Proposed Amendment to Rule 68 and Recommendation for Further Study

Dear Secretary:

I write on behalf of the Committee on Federal Courts of The Association of the Bar of the City of New York to provide comments with regard to Federal Rule 68. The Association of the Bar, founded in 1870, has over 24,000 members practicing throughout the nation and in over 50 foreign jurisdictions. The Committee on Federal Courts is charged with studying and making recommendations regarding the Federal Rules of Civil Procedure and other aspects of the federal judiciary and federal litigation.

As one of our Committee's projects, we have engaged in a review of Federal Rule 68 and concluded that it has not succeeded in its ostensible purpose of encouraging early case settlement, at least in commercial cases, and is rarely used in that category of cases. The Committee believes that the Rule's infrequent use stems from the bar's unfamiliarity with how it works, the minimal consequences flowing from rejecting an offer of judgment under the Rule, and its unavailability to plaintiffs. Although the Committee could not reach consensus on recommending drastic changes to the Rule - - such as including attorneys' fees within the costs awarded under it - - it unanimously supports a more modest alteration to increase its use by permitting plaintiffs as well as defendants to make offers of judgment under the Rule. Twenty-three states have adopted some variation of a two-way rule in their Rule 68 counterparts.

Briefly stated, Rule 68 currently provides that if a defendant makes an offer of judgment (in keeping with certain time and procedural constraints) which is rejected by the plaintiff, and if the plaintiff then recovers a judgment at trial less favorable than the defendant's offer, the plaintiff must pay the costs incurred by the defendant after the offer was rejected. Those costs, in turn, have been limited to the costs recoverable under Federal Rule 54 (except where certain statutes, such as 42 U.S.C. § 1983, define costs to include attorneys' fees).

The Committee is not aware of any rationale for the current one-way regime. That said, it should be noted that if Rule 68 were simply to be made symmetrical, without more, the benefit to plaintiffs would be small, because Federal Rule 54 already awards costs (in the Court's discretion) to a prevailing plaintiff regardless of whether the defendant previously rejected a more favorable settlement offer. In contrast, defendants do benefit significantly from Rule 68 since, unless the Rule is triggered, they do not recover costs when plaintiffs recover a judgment of any amount at trial.

The Committee has prepared the attached report summarizing the results of its research on Rule 68, in hopes of educating the bar about how the Rule works, increasing its use as a settlement tool, and fostering thoughtful discussion of the pros and cons of incorporating into it some degree of attorneys' fee-shifting. The Committee also recommends further study of possible methods to enhance the costs recoverable by plaintiffs who successfully invoke Rule 68 by, for example, imposing a multiplier on recoverable costs or some other mechanism, to make a symmetrical rule more fair to plaintiffs and defendants, and to motivate plaintiffs to use the Rule. Regardless of how that discussion unfolds, we urge the Advisory Committee to consider in the meantime our proposal to make Rule 68 symmetrical, in the interest of fulfilling its purpose of encouraging the settlement of cases.

Respectfully submitted,

Marilyn C. Kunstler

cc: Honorable John G. Koeltl,
United States District Court, Southern District of New York

Enclosure

Federal Courts Committee
Report on Rule 68 of the Federal Rules of Civil Procedure

Introduction

As part of its 2012 review of issues relating to the settlement of cases in federal court, the Mediation and Settlement Subcommittee of the Federal Courts Committee studied Federal Rule 68[1] to determine whether amendments to the Rule would enhance its effectiveness in encouraging settlement of cases. In its current form, the Rule is considered largely toothless and rarely used (with some exceptions as discussed below). The Subcommittee prepared this report to summarize the results of its research and analysis and to promote discussion within the bar.

Although Rule 68 was presumably designed to encourage settlements of civil cases, it provides little incentive to do so, since the only consequence - - with certain exceptions - - of rejecting an offer of judgment under the Rule and subsequently recovering less at trial, is liability for the offeror's taxable costs, a nominal portion of litigation expense. The primary

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[1] Rule 68 provides:

(a) MAKING AN OFFER; JUDGMENT ON AN ACCEPTED OFFER. At least 14 days before the date set for trial, a party defending against a claim may serve on an opposing party an offer to allow judgment on specified terms, with the costs then accrued. If, within 14 days after being served, the opposing party serves written notice accepting the offer, either party may then file the offer and notice of acceptance, plus proof of service. The clerk must then enter judgment.

(b) UNACCEPTED OFFER. An unaccepted offer is considered withdrawn, but it does not preclude a later offer. Evidence of an unaccepted offer is not admissible except in a proceeding to determine costs.

(c) OFFER AFTER LIABILITY IS DETERMINED. When one party's liability to another has been determined but the extent of liability remains to be determined by further proceedings, the party held liable may make an offer of judgment. It must be served within a reasonable time—but at least 14 days—before the date set for a hearing to determine the extent of liability.

(d) PAYING COSTS AFTER AN UNACCEPTED OFFER. If the judgment that the offeree finally obtains is not more favorable than the unaccepted offer, the offeree must pay the costs incurred after the offer was made.

exception stems from the U.S. Supreme Court holding in *Marek v. Chesny,* 473 U.S. 1 (1985), that where a statute, such as 42 U.S.C. § 1983 and Title VII of the Civil Rights Act, defines recoverable costs to include attorneys' fees, a plaintiff who rejects an offer of judgment and then recovers less at trial loses the right to recover attorneys' fees incurred post-rejection (but is not obligated to pay the defendant's attorneys' fees).

Ultimately the Committee voted to recommend to the Advisory Committee on the Civil Rules that Rule 68 be amended to make it available to plaintiffs as well as defendants, and rejected a proposal that would have made attorneys' fees part of the costs potentially shifted under the Rule. Because the Committee was closely divided on the latter proposal, and because it raises substantial philosophical issues about which Association members may have strong views, we hope that posting this Report will benefit the Association by providing an overview of the Rule and several issues arising under it, including the pros and cons of amending it to include a fee-shifting provision.

Rule Symmetry

Plaintiffs are not permitted to make offers of judgment under the current version of Rule 68. Twenty-three states (but not New York) have adopted some variation of a two-way rule.

No articulated rationale for the current one-way regime was found in the sparse legislative history of the Rule. The Committee endorsed making the Rule symmetrical as a matter of fairness - - as it would give plaintiffs the same leverage currently available only to defendants - - and potentially to increase the Rule's use. However, unless attorneys' fees become part of recoverable costs, or some multiplier of costs is included, making Rule 68

available to plaintiffs would not confer any additional benefit on them, because the costs awarded under a Rule 68 scenario would be no more than the costs already recoverable by prevailing plaintiffs under Rule 54. (In contrast, defendants do benefit from Rule 68 since without it, their costs are not recoverable if a plaintiff recovers a judgment of any amount at trial.) Thus, this rule change will be meaningful only if accompanied by either an increase in the costs recoverable by plaintiffs, or an attorneys' fee-shifting provision.

Attorneys' Fees

Amending Rule 68 to include as part of recoverable costs the attorneys' fees incurred by the offeror following the rejection of a Rule 68 offer of judgment would significantly raise the stakes involved in weighing such an offer, and thus would encourage early settlement of cases, in turn enhancing the efficiency of litigation. Supporters of such a change note that it would deter plaintiffs from pursuing marginal claims beyond the point where the costs of litigation outstrip any potential recovery, and - - if the Rule were made symmetrical - - deter defendants from using superior resources to "wear out" plaintiffs.

To prevent potential injustice resulting from fee-shifting under the Rule, supporters suggest that (i) fee-shifting be inapplicable unless the offeree's recovery at trial is a certain percentage below the rejected offer; and (ii) district courts be given considerable discretion to modify or deny fee-shifting based on the facts and circumstances of a given case. By way of example, Alaska's counterpart to Rule 68, Alaska R. Civ. P. 68, contains these two elements, providing:

- An award of "reasonable actual" post-offer attorneys' fees to the offeror is triggered when the judgment at trial is 5-10% (depending on whether or not there are multiple defendants) less favorable than the refused offer.
- Courts are given discretion to deviate from the guidelines and adjust attorneys' fees based on: (i) the complexity of the litigation, (ii) the length of trial, (iii) the reasonableness of the attorney's rates, hours expended, attorneys used, and attorney's efforts to minimize fees, (iv) the reasonableness of the claims and defenses pursued by each side, (v) bad faith, (vi) the amount of work performed and the significance of the matters at stake, (vii) the extent to which an overly onerous fee would deter future litigants, and (viii) other equitable factors.

California's counterpart to Federal Rule 68, Cal. Civ. Proc. Code § 1021, also requires trial judges to consider the following multiple factors in deciding whether to award attorneys' fees to the offeror following a judgment at trial less favorable than the rejected offer:

- The reasonableness of the offeree's failure to accept the offer, including: (i) the merit or lack of merit of the claim; (ii) the closeness of the questions of fact and law; (iii) whether the offeror has unreasonably failed to disclose relevant information; (iv) whether the matter was considering a question of significant importance that the court had not yet addressed; (v) relief that might reasonably have been anticipated, given known information at the time of the offer; and (vi) the amount of additional delay, cost and expense that the offeror reasonably would be expected to incur if the litigation should be prolonged;
- The amount of damages and other relief sought and the results obtained;

- The efforts made by the parties or the attorneys to settle the controversy; and
- The existence of any bad faith or abuse of legal procedure by the parties or the attorneys.

Some supporters of fee-shifting recommend that discretion similar to that afforded to state trial judges in the above-described statutes accompany any amendment to Rule 68 that incorporates a fee-shifting mechanism. In this regard, the existence of a statutory fee-shifting mechanism applicable to the underlying claim (i.e., civil rights or employment discrimination) might be a factor militating against awarding the defendant some or all of the fees it would otherwise be entitled to. Conversely, if plaintiffs become entitled to make offers of judgment in Title VII or § 1983 cases, to make the rule truly symmetrical they would have to receive a "premium" on their recovery of attorneys' fees if they obtained a judgment in excess of a rejected Rule 68 offer.

In sum, supporters believe that adding "teeth" to Rule 68 in the form of liability for a portion of an adversary's attorneys' fees will force parties to evaluate their cases more seriously and objectively at an earlier stage in the litigation, and will save parties the substantial attorneys' fees they are forced to incur under the current system, either to defend borderline-frivolous claims or to prosecute meritorious claims that deserve reasonable settlement offers, while the ample discretion recommended to be given to trial judges will protect parties from unjust application of the rule.

In contrast, those with the opposing viewpoint strongly believe that incorporating fee-shifting into Rule 68 will put undue pressure on plaintiffs in particular to accept low offers of judgment, rather than risk being saddled with the defendant's attorneys' fees if the factfinder

at trial awards less than anticipated; accordingly, a party's right to a trial will, as a practical matter, be restricted (much as prosecutorial leverage causes many criminal defendants to accept a plea bargain rather than risk going to trial). In circumstances applying a modified Rule 68, the "American rule" long established in our jurisprudence - - which leaves each party responsible for its own attorneys' fees, win or lose, unless a relevant statute provides otherwise - - would be undone. Moreover, giving district courts discretion to modify the Rule will create a new layer of post-trial litigation and expense as parties attempt to influence the exercise of that discretion.

Other opponents emphasize that one of the rights of American citizens is to have their disputes decided by an impartial judge. A litigant or prospective litigant may voluntarily waive that right by, for example, agreeing to submit disputes to arbitration; a contracting party may elect to enter into an agreement that awards fees to the prevailing party in a dispute. But it is quite a different matter to tell litigants that part of the risk they run in seeking a judicial determination of their rights is that the other side may try to force them to settle prematurely, and at a level other than one they deem appropriate, by the simple device of making a Rule 68 offer which is coupled with the threat of shifting attorneys' fees. Building that into the system may well discourage litigants from seeking relief for genuine harms.

Opponents further note that not every litigation is brought or defended solely for money, nor even for an injunction. A fair amount of litigation is brought, or defended, for purposes of obtaining vindication, to act as a test case, or for other legitimate purposes. It is unfair to litigants who are not necessarily litigating solely for money to, in effect, fine them for exercising their right to obtain their legitimately sought objectives through the litigation

system. Libel plaintiffs, for example, or civil rights plaintiffs often care more about simply getting a judgment than about the amount they recover.

Other arguments against a fee-shifting provision include the following:

- Promoting settlement is most assuredly a legitimate policy objective in the federal court system, but it is not the primary objective. The proponents of fee-shifting have not explained why this policy is so much more important than other considerations that it warrants imposing the risk of large costs on litigants who want nothing more than to have their cases decided - - which is, after all, what the court system exists to do. There are institutional considerations, especially caseload-related considerations, that make settlement promotion an important policy. But the solution to large caseloads is more judges, not increasing the stakes in litigation to a level even higher than they are now. The main purpose of courts is to do justice, and a proposed rule that downgrades the rendering of justice as a goal is not a rule that lawyers should be recommending.
- Providing for judicial discretion to mitigate the potential harshness of such a rule is not a workable solution. For one thing, the expense of litigating how the judge should decide such a motion would itself drive up the costs. For another, the discretionary escape hatch will be yet another occasion for satellite litigation. If one reason to promote settlements is to ease the demands on the court system, this rule will not do so if it just creates one more arena for contention.
- Such a rule may operate to increase the acrimony of cases that don't settle, because litigants then need not only to win, but also to "beat the spread."

- Inasmuch as somewhere in the neighborhood of 95% of civil litigations settle, this may well be a solution in search of a problem. Arguably, some number of the cases that do settle should have settled earlier, but absent some fact-based demonstration that this causes some serious deterioration in the overall quality of justice in the federal courts, this is hardly a sufficient justification for seriously altering the dynamics of litigation.

Additional Issues Concerning Rule 68

Although they did not result in formal recommendations to the Committee, the Subcommittee also identified several additional issues worth noting, which are summarized below.

- **The *Delta Air Lines* Decision**

In ***Delta Air Lines, Inc. v. August*, 450 U.S. 346, 351 (1981)**, the Supreme Court held Rule 68's mandatory cost-shifting inapplicable to cases where the defendant prevails entirely, holding that under the Rule's plain language it applies only when a plaintiff "has obtained" a "judgment," *i.e.*, recovered a judgment in some amount. Where the defendant is the prevailing party, it may seek to recover costs in the court's discretion under Rule 54(d).

The dissent and some commentators criticize the holding as perverse for placing defendants who prevailed entirely (and thus were entitled to costs only in the court's discretion under Rule 54(d)) in a worse position than defendants in cases where the judgment obtained by plaintiff was less favorable than the defendant's offer (thus triggering mandatory payment of costs under Rule 68); this camp argues that "judgment obtained" by plaintiff does not necessarily mean "favorable judgment."

Delta supporters counter that were Rule 68 applied to situations where defendant has prevailed, defendants could always circumvent courts' discretion under Rule 54(d) to award costs, simply by making nominal offers under Rule 68 and later invoking that Rule's mandatory cost-shifting provision.

- **Allowing Offers of Settlement (vs. Offers of Judgment) to Trigger the Rule**

As currently drafted, Rule 68 provides that a defendant may offer in writing to have a "judgment" entered against it on specified terms. A simple settlement offer does not trigger Rule 68; only a formal written offer of judgment suffices. Insofar as an objective of Rule 68 is to promote settlements, providing that the rule is triggered by any settlement offer might potentially serve to promote this goal. Due consideration to Federal Rule of Evidence 408 would still be needed.

Arguments in favor of this change include:

- The prospect of paying the defendant's costs if the ultimate decision is less favorable than defendant's offer increases the plaintiff's risks in declining an offer, and thus may make settlement more likely. Therefore, attaching to every settlement offer the prospect of cost-shifting promotes settlement by making a refusal to settle more risky and thus more expensive.
- Certain settlement structures may not be easily amenable to being reduced to judgment. This is particularly the case with confidential settlements and settlements that involve conditional obligations. Changing the rule may promote settlement by allowing more complex settlement transactions to be covered by the rule.

Arguments against such a change point out that by adding increased risk to any settlement discussion, the proposal may lead in some cases to a refusal even to discuss settlement at early stages in the case. This may be especially true if the rule is changed to permit reciprocal offers.

Moreover, it will not always be clear whether the settlement proposal was more favorable than the ultimate judgment, particularly when there are multiple possible outcomes on multiple claims. In addition, the ability to obtain a judgment may itself be an issue, for example, where the offer is not accepted because defendant specifically wants no judgment to be entered and the plaintiff insists on entry of a judgment. If the final judgment is for fewer dollars than the offer, it is not necessarily the case that that outcome is less favorable than the offer.

- **Including E-Discovery Cost-Shifting Under Rule 68**

In the Southern District of New York, a prevailing party cannot recover e-discovery costs pursuant to the general federal costs statute, 28 U.S.C. § 1920. See S.D.N.Y. Local Civil Rule 54.1(c). However, some courts outside of the Second Circuit have permitted a party entitled to cost-shifting under Rule 68 to recover e-discovery costs. While the cost of "copying" electronic documents (in contrast to searching for or reviewing them) is minimal, some courts have been interpreting electronic "copying costs" expansively, e.g. *CBT Flint Partners, LLC v. Return Path, Inc.*, 676 F. Supp. 2d 1376 (N.D. Ga. 2009), *vacated on other grounds and remanded*, 654 F.3d 1353 (Fed. Cir. 2011). However, the first appellate court to address the issue recently rejected this approach. *Race Tires America, Inc. v. Hoosier Racing Tire Corp.*, 674 F. 3d 158, 160 (3rd Cir. 2012).

Proponents of including e-discovery costs as part of the costs shifted under Rule 68 argue that it would increase the incentives to accept a Rule 68 offer, and encourage litigants to seek only necessary discovery.

Opponents of such a change point out that it (i) could have the opposite effect of encouraging unnecessary e-discovery in the hope of convincing an adversary to accept a Rule 68 offer; (ii) would increase "satellite litigation" because courts would have to determine the reasonableness of various e-discovery costs sought by the Rule 68 offeror; (iii) would potentially create confusion among practitioners as to costs recoverable under 28 U.S.C. § 1920 versus costs recoverable under Rule 68; and (iv) contravenes the intent of Rule 68's drafters, who could not have envisioned/intended that the "copying" costs to be imported from Section 1920 would encompass the enormous costs of contemporary e-discovery.

Conclusion

As noted at the outset, the Committee hopes that this Report, and particularly the summary of arguments for and against the addition of a fee-shifting provision to Rule 68, will provoke thought and promote discussion within the bar. In further aid of this goal, a bibliography of relevant commentary and case law is attached to this Report.

Federal Courts Committee, Marilyn C. Kunstler, Chair

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TAB 7

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TAB 7A

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

This suggestion proposes amendment of Rule 4 to provide that a CD or some e-medium can satisfy the Rule 4(c)(1) direction that "[a] summons must be served with a copy of the complaint." It is inspired by a single event. A pro se prisoner plaintiff's complaint and exhibits totalled 300 pages. There were 30 defendants, and service also had to be made on the Attorney General of Pennsylvania. Service was to be made by the Marshal. Contemplating the costs of 9,300 copied pages, and the $12.50 charge for certified mail and return receipt to each defendant, the court had the pro se law clerk ask the department of corrections to agree to service of a CD-R disc with pdf files. They agreed. (It is not clear how far the department had authority to speak for all defendants; it seems to be assumed that there was only one mail charge.)

The proposal expresses concern that changing Rule 4 "probably takes an act of Congress," but suggests that service changes might be adopted by local rule. It has found its way to the Civil Rules docket.

Although the immediate suggestion focuses on CD copies, the question is not limited to a specific technology. It may well be, for example, that service on a flash drive will work more generally than the perhaps obsolescing CD technology. In turn, the suggestion ties to the question whether electronic service should be authorized generally for the initial summons and complaint. That question is on the agenda of the Standing Committee Subcommittee on e-filing and e-service, but it does not seem to be in line for imminent action. Still, it may be better to defer action on this docket item pending consideration by the Subcommittee or this Committee's representatives on the Subcommittee.

The suggestion highlights the ambiguity of present Rule 4. It seems clear enough that exhibits are so much part of the complaint that they must be included in the "copy" of the complaint.[1] In many settings, an e-copy would be thought of as a copy. But that is not a safe interpretation of "copy" in Rule 4.[2] Some appreciable number of defendants are not equipped to use a CD (or a flash drive or e-mail with attachments). It will not do to read the rule to permit service of a CD "copy" in the unguided choice of the plaintiff. Nor does it seem profitable to attempt to draft rule language that

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[1] Rule 10(c): " * * * A copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes."

[2] Compare, for example, Rule 26(b)(5)(B), which calls for return of "any copies" of protected information that has been inadvertently produced in discovery. Surely e-copies are included.

allows service in e-form, but only if the defendant is equipped to make ready use of the chosen form. Disagreements over the form for producing electronically stored information in discovery are problem enough. This problem would be worse, if only because the need for effective notice at the commencement of the action is more sensitive.

There might be some value in providing for service in e-form with the consent of the person to be served, as reflected in the suggestion. But a new rule might not add much weight to the ability to ask consent without benefit of encouragement in rule text. If new rule provisions were to be drafted, moreover, they might fit best with the waiver-of-service provisions in Rule 4(d). Rule 4(d)(1)(C) directs that the request to waive service "be accompanied by a copy of the complaint, 2 copies of a waiver form * * *." Providing the complaint in e-form, and also the waiver form, seems less troubling in this context. Consent to the e-form is established by the waiver. There might be some complication — if Rule 4(d) were amended to recognize the e-form, it might be desirable to allow inability to read the e-form as a ground for relief from the obligation to pay the costs of service after refusing to waive.

Laura Briggs has provided a valuable counterpoint to the docket suggestion. If the plaintiff pays the filing fee, the cost of service falls on the plaintiff. If the plaintiff seeks to proceed in forma pauperis, the complaint is likely to be screened before service. Screening may lead to an amended and shorter complaint, and to reducing or eliminating "exhibits." Then comes the question of who makes service. Rule 4(c)(3) directs that if the plaintiff is authorized to proceed in forma pauperis, the court must order service by a marshal "or by a person specially appointed by the court." She attached an order designating the clerk to issue and serve process. Asking either clerk or marshal to seek a defendant’s consent to service in e-form may impose little burden when there is an institutional party that is able to use the e-form at least as readily as paper. But there could be sticky questions whether, for example, the department of correction can consent for all of its employees who are joined as individual defendants, or act as an agent of service by making paper copies for the other defendants.

In all, there seems little reason to explore this proposal further.

Subject: Service of Pro-Se Prisoner and Non-Prisoner complaints and/or Petitions by CD-R media as opposed to photocopies of documents.

I would like to suggest that the AO look into the possibility of amending the service rules to allow service to be made by electronic media or CD in situations where documents are voluminous. It seems that the time and cost savings could be significant as well as ecologically sound.

A recent example of a service order that I processed where the U.S. Marshal was directed to serve a pro-se prisoner complaint and additional exhibits.

Complaint named 30 defendants with additional service to be made on the Attorney General of the State of PA. The Complaint and exhibits totalled 300 pages. Total of 9300 pages to be copied and served.

Cost of a case of paper $39.00 (5000 pages)

Certified Mail with return receipt for service of 300 pages $12.50 (it is my understanding that the USM serves via U.S. Postal Service, certified mail, return receipt)

Not included is the cost of shipping the 9300 pages via UPS to the USM Office in Scranton for service*. Or the wear and tear on photocopy machines and employee time to monitor the copying.

Before processing, I contacted the Pro-Se Law Clerk involved with the case and requested her to contact the department of corrections to see if they would allow service of a CD-R disc with pdf files of the documents. They approved. Resulting in the following costs:

Cost of a CD-R $0.30

Certified Mail with return receipt for service of CD-R Disc $6.90

The only paper used was for copying of the summons attached to each CD-R.

I understand that having the Federal Rules of Service amended probably takes an act of congress. But, I am thinking that a district could adopt service changes via their local rules.

That is my suggestion in a nutshell.

Thanks for reviewing it.

Mark Armbruster, Middle District of Pennsylvania

*In this particular instance we could possibly have had our Scranton Clerk's Office process the service order and carry the documents to the USM located in the same building.

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TAB 7B

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Submission 13-CV-F

David Yen wrote to suggest the following change to Rule 30(b)(2):

> (2) *Producing documents, Electronically Stored Information, and Tangible things.* If a subpoena duces tecum is to be served on the deponent, the materials designated for production, as set out in the subpoena, must be listed in the notice or in an attachment. The notice to a party deponent may be accompanied by a request under Rule 34 to produce documents, electronically stored information, and tangible things at the deposition.

The submission describes this change as a "technical correction." There is no explanation or supporting material submitted along with the proposed change.

Whether such a change would serve a useful purpose is uncertain. Some background may be helpful. When the E-Discovery amendments that became effective in 2006 were being developed, there was a considerable discussion about how to handle the addition of this new object for discovery in Rule 30 and elsewhere. One idea was that the rules' references to "documents" be defined as including electronically stored information. For a variety of reasons, that did not happen, and references to electronically stored information were added at several points in the rules.

The Committee Note to the 2006 amendments explained as follows (emphasis added at end):

> As originally adopted, Rule 34 focused on discovery of "documents" and "things." In 1970, Rule 34(a) was amended to include discovery of data compilations, anticipating that the use of computerized information would increase. Since then, the growth in electronically stored information and in the number of systems for creating and storing such information has been dramatic. Lawyers and judges interpreted the term "documents" to include electronically stored information because it was obviously improper to allow a party to evade discovery obligations on the basis that the label had not kept pace with changes in information technology. But it has become increasingly difficult to say that all forms of electronically stored information, many dynamic in nature, fit within the traditional concept of a "document." Electronically stored information may exist in dynamic databases and other forms far different from fixed expression on paper. Rule 34(a) is amended to confirm that discovery of electronically stored information stands on an equal footing with discovery of paper documents. The change clarifies that Rule 34 applies to information that is fixed in a tangible form and to information that is stored in a medium from which it can be retrieved and examined. At the

> same time, *a Rule 34 request for production of "documents" should be understood to encompass, and the response should include, electronically stored information unless discovery in the action has clearly distinguished between electronically stored information and "documents."*

The question presented by this submission, then, is whether the failure to say the same thing with regard to Rule 30(d)(2), or to add an explicit reference to electronically stored information to that rule, has caused problems. The submission does not identify any problems. If it is true that party deponents show up at depositions and say that they have only brought along "documents" but not electronically stored information, that might make this change worthwhile. Members of the Advisory Committee may have had experiences of this sort.

If there have been no experiences of this sort, it is unclear whether there is a reason to insert "electronically stored information" into this rule, even as a "technical amendment." That idea might justify a more comprehensive review of all the rules to see whether there are other places where this addition might be wise. One that quickly comes to mind is Rule 26(b)(3)(A), which might be revised as follows:

> **(A)** *Documents, Electronically Stored Information, and Tangible Things.* Ordinarily, a party may not discover documents, electronically stored information, and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). * * *

A change to Rule 26(b)(3)(A) might be warranted if, since the 2006 amendments, there have been actual problems caused by the absence of this language. Have litigants taken the position that work product protection extends only to "documents" and not to "electronically stored information"? That surely is important, but it has not been suggested.

Another example might be presented by the amendment to Rule 37(a)(3)(B)(iv) included in the pending amendment package approved by the Standing Committee in May (added conforming language in double underline format):

> **(iv)** a party fails to produce documents or electronically stored information or fails to respond that inspection will be permitted -- or fails to permit inspection -- as requested under Rule 34.

Hopefully, the experience operating under Rule 34 before

2006, as outlined in the quotation from the Committee Note above -- along with the 2006 Committee Note recommending that a request for "documents" be taken to include electronically stored information -- means that such problems have not arisen. It might be noted that Rule 26(f)(3)(C) calls for early discussions of issues related to electronic discovery, and particularly the form for production, which should serve to intercept problems that might arise under Rule 30(b)(2). It also might be hoped that the fact Rule 30(d)(2) says this is "a request under Rule 34" directly invokes the above-quoted Committee Note.

If this proposal merits further attention, however, it would probably be useful to identify and add other places -- like Rule 26(b)(3)(A) -- where a similar clarification might be useful.

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technical correction to Rule 30(b)2)
David S. Yen
to:
'Rules_Support@ao.uscourts.gov'
07/21/2013 02:23 PM
Hide Details
From: "David S. Yen" <dyen@lafchicago.org>

To: "'Rules_Support@ao.uscourts.gov'" <Rules_Support@ao.uscourts.gov>

13-CV-F

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1 Attachment

image002.jpg

This is to suggest a technical correction to Rule 30(b)(2).

The suggested changes are underlined.

(2) Producing Documents, Electronically Stored Information, and Tangible Things. If a subpoena duces tecum is to be served on the deponent, the materials designated for production, as set out in the subpoena, must be listed in the notice or in an attachment. The notice to a party deponent may be accompanied by a request under Rule 34 to produce documents, electronically stored information, and tangible things at the deposition.

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TAB 7C

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

This proposal would address the problem of "sewer service" by adding a requirement that photographic evidence of service be provided when service is made by leaving the summons "unattended" at a person's dwelling:

(e) SERVING AN INDIVIDUAL WITHIN A JUDICIAL DISTRICT OF THE UNITED STATES. Unless federal law provides otherwise, an individual — other than a minor, an incompetent person, or a person whose waiver has been filed — may be served in a judicial district of the United States by:

(1) following state law for serving a summons in an action brought in courts of general jurisdiction in the state where the district court is located or where service is made, and providing photographic evidence of service if state or local law permits the summons to be left unattended at the individual's dwelling or usual place of abode;

(2) doing any of the following: * * *

(B) leaving a copy of each at the individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there; * * *

Although the proposal is supported by referring to "gutter service," it seems to be aimed at a narrower category. The proposed language does not address the problem of deliberately falsified proof of service. Nor does it seem to address the problems that may arise if the person of "suitable age and discretion" served at the defendant's home fails to deliver the summons and complaint to the defendant. Instead, it seems to address circumstances in which state law allows service by fixing notice to real property, whether or not also requiring additional means of service such as mail or publication.

The argument expands on the proposed rule text by suggesting that the photographic evidence should show the notice posted at a place that allows the address to be shown as well. Failing that, "then an additional shot of the house — preferably also showing the summons — should be required."

At least two problems appear. First, this added requirement would qualify the general permission to serve by following state law. The advantages of conformity would be reduced. Second, anyone bent on falsifying service could easily take the picture and then remove the summons.

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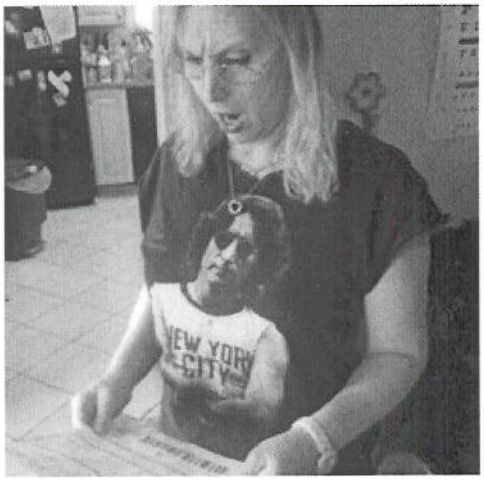
12-CV-A



1. **Signatures**

   12 out of 5,000

   Petitioning

   1. Secretary of the Committee on Rules of Practice and Procedure (Peter G. McCabe)

2. 

   Created By

   Russell Alexander
   Brentwood, NY

About this Petition Petition Letter Petition Updates

Why This Is Important

Hundreds of thousands of people have woken up to find there is a judgement against them for a lawsuit they never even knew about. In many states, all that is required is for a process server to swear they delivered the summons (including left it stuck to a door). But in reality the summons was never delivered - it was dumped, giving rise to the term "gutter service".

Digital photography is cheap and easy to use. At the very least, there should be a photo of the summons affixed to the door (window, whatever) with the address clearly visible. In cases where that isn't possible due to no address being posted, then an additional shot of the house - preferably also showing the summons - should be required.

Does this sound like an unusual situation? The truth is, it can happen to anyone, for any reason. It can happen to YOU. Just Google "summons gutter service" to see how prevalent it is.

Specifically, I propose a change to the Federal Rules of Civil Procedure, Rule 4, paragraph (e), which currently states:

(e) Serving an Individual Within a Judicial District of the United States. Unless federal law provides otherwise, an individual—other than a minor, an incompetent person, or a person whose waiver has been filed—may be served in a judicial district of the United States by:

(1) following state law for serving a summons in an action brought in courts of general jurisdiction in the state where the district court is located or where service is made; or
(2) doing any of the following:
(A) delivering a copy of the summons and of the complaint to the individual personally;
(B) leaving a copy of each at the individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there; or
(C) delivering a copy of each to an agent authorized by appointment or by law to receive service of process.

I propose changing subsection (1) to include the following: "and providing photographic evidence of service if state or local law permits the summons to be left unattended at the individual's dwelling or usual place of abode".

The petition will be submitted to Peter G. McCabe, the Secretary of the Committee on Rules of Practice and Procedure, Administrative Office of the United States Courts.

Why People Are Signing

- 
  Neil Alexander
  13 days ago

  There have been enough predatory lawyers making money off "legal" victimization. Enough class action suits where the affected citizens get five or ten dollars each while the lawyers make millions. Enough individual lawsuits where the lawyers know and don't care that process service was never made. If this is the only way these people can make money then they need to be reeducated. I hear prisons offer employment counseling.

Recent Signatures

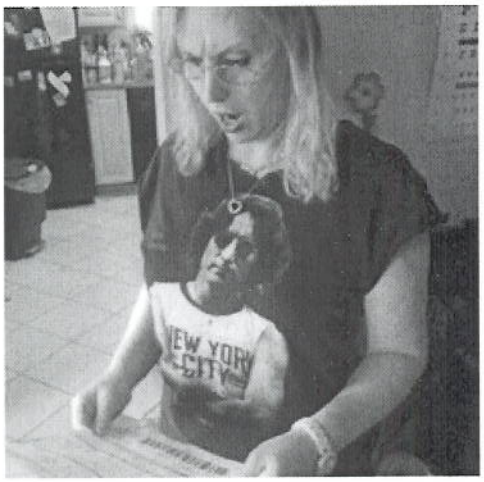
- LAURA GUNIEWICZ (East Northport, NY)
  13 days ago
- Neil Alexander (Flushing, NY)
  13 days ago
- Sandi Kiefer (Nyack, NY)
  14 days ago
- mary kelly (Homer, NY)
  14 days ago
- Eric Altarac (Brentwood, NY)
  14 days ago

- matt nappo (shoreham, NY)
  15 days ago
- clayton palmiter (hicksville, NY)
  15 days ago

- Keith Gutschwaher (Bay Shore, NY)
  15 days ago
- Dianee Alexander (Brentwood, NY)
  18 days ago
- Ross Milligan (Riverhead, NY)
  19 days ago

Change.org

Change.org is a social action platform that empowers anyone, anywhere to start, join, and win campaigns for social change. Millions of people sign petitions on Change.org each month on thousands of issues, winning campaigns every day to advance change locally and globally.



1. **Signatures**

   12 out of 5,000

   Petitioning

   1. Secretary of the Committee on Rules of Practice and Procedure (Peter G. McCabe)

2. 

   Created By

   Russell Alexander
   Brentwood, NY

About this Petition Petition Letter Petition Updates

Show photographic proof of delivery of a summons

Dear Mr. McCabe,

I just signed the following petition concerning: End Process Servers "Gutter Service" by requiring photographic proof of delivery of a summons.

Hundreds of thousands of people have woken up to find there is a judgement against them for a lawsuit they never even knew about. In many states, all that is required is for a process server to swear they delivered the summons - including left it affixed to a door. But often, it was never actually served, merely dumped. It happens so often there is a term for it - "gutter service".

Digital photography is cheap and easy to use. At the very least, there should be a photo of the summons affixed to the door (window, whatever) with the address clearly visible. In cases where that isn't possible due to no address being posted, then an additional shot of the house - preferably also showing the summons - should be required.

Specifically, I request a change to the Federal Rules of Civil Procedure, Rule 4, paragraph (e), which currently states:

(e) Serving an Individual Within a Judicial District of the United States. Unless federal law provides otherwise, an individual—other than a minor, an incompetent person, or a person whose waiver has been filed—may be served in a judicial district of the United States by:

(1) following state law for serving a summons in an action brought in courts of general jurisdiction in the state where the district court is located or where service is made; or

I propose changing subsection (1) to include the following: "and providing photographic evidence of service if state or local law permits the summons to be left unattended at the individual's dwelling or usual place of abode".

The petition will be submitted to the Secretary of the Committee on Rules of Practice and Procedure, Administrative Office of the United States Courts.

Sincerely,

[Your name]

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12-CV-B: Rule 15(a)(3): "any required response"

Before the Style Project, the final sentence of Rule 15(a) read:

> A party *shall plead* in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be longer, unless the court orders otherwise.

After the Style Project (and with an extension to 14 days in the Time Project), Rule 15(a)(3) reads:

> (3) Time to Respond. Unless the court orders otherwise, *any required* response to an amended pleading must be made within the time remaining to respond to the original pleading or within 14 days after service of the amended pleading, whichever is later.

Judge McBryde urges that "any required" should be deleted. He believes that the pre-Style Rule included a clear direction that if a required response has been filed before an amended pleading is filed, an amended response must be filed after the amendment. The Style version does not include a positive direction. Instead, it punts the question, refusing any attempt to say when a response is required.

The style change could be seen as a problem of conflicting ambiguities. To read the pre-Style rule as an unambiguous direction to plead in response to any amended pleading would go too far. The rules do not allow a reply to a simple answer unless the court orders a reply. It makes no sense to direct that there must be a reply to an amended simple answer.

Curing that ambiguity by referring to "any required" response does, in a way, create an ambiguity of its own. It might be read to suggest that if a defendant has already answered the original complaint, there is an answer and the defendant is not required to answer again in response to the amended complaint. That is not a good idea. Most importantly, there should be an answer to any new material in the amended complaint. To be sure, the amended complaint may not include any new matter – the amendments may all be deletions. Even then, it might be that the deletions will suggest the availability of an affirmative defense that seemed likely to fail in light of the withdrawn allegations. Apart from that, the original answer could be recaptioned as an answer to the amended complaint with little effort and with the benefit of enabling the court and parties to know that the defendant's positions remain unchanged. In addition, there could easily be disputes whether amended language does or does not include new matter – whether the response to the original carries forward to

the amended complaint. The file will be more orderly if an amended complaint is met by an amended answer. Requiring an amended answer also dispels any ambiguity in applying Rule 8(b)(6), under which an admission results from failure to deny an allegation "if a responsive pleading is required," but not "[i]f a responsive pleading is not required."

The question is whether there is a better way to express the idea that when a pleading is amended after a required response has been filed, an amended response should be filed. One possibility:

(3) *Response; Time to Respond.* Unless the court orders otherwise:
(A) if a pleading that requires a responsive pleading is amended after a responsive pleading has been filed, an amended response must be filed;
(B) any required response to an amended pleading must be made within the time remaining to respond to the original pleading or within 14 days after service of the amended pleading, whichever is later.

Any such amendment seems worth the effort only if there is a substantial risk that some responsive pleaders may be misled by "any required response" into the belief that having filed an original response, there is no further requirement to respond. Changes made in the Style Project are not immune from criticism and clarification. But it is difficult to offer any firm conclusion that this risk of ambiguity is substantial.

(Other suggestions to amend Rule 15(a)(1), Dockets 10-CV-E, F, are described separately below. They go to other matters.)

United States District Court
Northern District of Texas

Chambers of
Judge John McBryde

501 W. 10th Street, Rm. 401
Fort Worth, Texas 76102
(817) 850-6650
Fax (817) 850-6660

March 29, 2012

12-CV-B

Hon. Mark R. Kravitz
Chairman of the Committee
on Rules of Practice and Procedure
c/o Judicial Conference of the United States
Washington, DC 20544

Dear Judge Kravitz:

I am directing this letter to you because of my understanding that you currently are serving as Chairman of the Judicial Conference Committee on Rules of Practice and Procedure.

Before the wording of Rule 15(a) of the Federal Rules of Civil Procedure was changed as part of the Style Project effective December 1, 2007, the final sentence of Rule 15(a) was worded as follows:

> A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after the service of the amended pleading, whichever period may be longer, unless the court orders otherwise.

Throughout my years as a practicing attorney until I took the bench in 1990, and since I have been on the bench until I recently discovered a significant change in Rule 15(a), I have interpreted the part of the rule having to do with pleading in response to an amended pleading to require a response, subject to risk of entry of default if the response was not filed within the time specified by the rule.

When I recently was faced with an issue as to whether a default should be entered because of a defendant's failure after a period of months to respond to an amended pleading, I, fortunately, double-checked the wording of Rule 15(a) before making a decision. That is when I realized that the wording of the last sentence of the old Rule 15(a) had, as part of the Style Project, been redesignated Rule 15(a)(3) and that the wording had been changed to provide the following with respect to the filing

of a response to an amended pleading:

> **Time to Respond.** Unless the court orders otherwise, any required response to an amended pleading must be made within the time to respond to the original pleading or within 10 days after service of the amended pleading, whichever is later.[1]

(emphasis added).

My understanding is that the change in wording was pursuant to a 2007 amendment that had as its purpose the making of stylistic changes only. The purpose is described in the Advisory Committee Notes as follows:

> The language of Rule 15 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

(emphasis added).

As you can see by comparing the old with the new, a change has been made that renders the current Rule 15(a)(3) uncertain of meaning and no longer self-operative. The pre-Style Project version was self-operative, and clearly required, and fixed the deadline for, a response to an amended pleading so that the parties and the court would know in no uncertain terms that a responsive pleading must be filed and when it was to be filed. Now, attorneys and the courts will be hard put to find anything in the Rules that would enable them to know what is meant by the words "any required." The use of those words in the rule renders the rule virtually meaningless.

If a court takes the Advisory Committee Notes that the "changes are intended to be stylistic only" at heart, the court would assume that the new wording means the same as the old wording . . . that the time for filing a response to an amended

---

[1]In 2009 the "10 days" was changed to "14 days."

pleading is "within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be longer, unless the court otherwise orders." However, the courts could hardly act upon such an assumption because they would be faced with the proposition that few attorneys, if any, would understand that the current Rule 15(a)(3) really means the same as the pre-Style Project wording of the last sentence of the old Rule 15(a), and that the "any required" words in the Style Project version are to be disregarded.

I am sending an information copy of this letter to Amy Hale-Janeke, Head of Reference Services at the Fifth Circuit Court of Appeals Library, because she devoted significant time at my behest to an attempt to gain an understanding of why the words "any required" were put to the current version and what they mean. She visited with Fifth Circuit Judge Carl Stewart who, according to my understanding, chaired one of the advisory rules committees when the Style Project was functioning, and he recommended that she communicate with Professor Edward H. Cooper, who served as the reporter for the Advisory Committee on Civil Rules when the Style Project changes were made. Professor Cooper responded to her inquiry as follows:

> The change in Rule 15(a)(3) was made as part of the Style Project. It took effect on December 1, 2007.
>
> The purpose of the Style Project was to revise the language of the Civil Rules to make them easier to read, but without changing the meaning. The Committee Note for each rule begins with the same paragraph explaining this purpose.
>
> Before the restyling, all of Rule 15(a) was a single paragraph. The final sentence said: "A party shall plead in response to an amended pleading within the time remaining * * *["] and so on. That wording could be misread to include a command to plead in respon[se] to an amended pleading even though there was no obligation, or even option, to respond to the original pleading. Think of an answer that does not amend a counterclaim, followed by an amended answer

> that still does not include a counterclaim. Although I have no independent recollection of this part of the process -- you will understand that an attempt to rewrite the entire body of civil rules without changing meaning was a big and long-drawn project -- I believe that the change to "any required response" was meant to clarify the ambiguity. If the original pleading did not require a responsive pleading, the amended pleading does not.
>
> There may be some more "legislative history," but I have put all of my shelf-wide set of printed materials on the style project safely out of reach. The Administrative Office of the United States Courts has a full set of the materials; I am not sure whether they are easily searchable. For that matter, I'm not really sure whether they are available online at the AO Federal Rulemaking site. If you cannot find them on the site, contact the Rules Committee Support Office for help should your district judge want more. -- EHC

I have decided that I will not learn what the "any required" language means, and that I am not going to find an answer as to why it was put in the Style Project wording of the rule. Serious thought should be given to an amendment of Rule 15(a)(3) that would remove "any required" language from the rule. If that were to occur, the Style Project change in the rule, as was intended, would end up being stylistic only. Otherwise, if the language is left as it is, there has been a substantive change that, for all practical purposes, destroys the utility of the rule.

If, as Professor Cooper suggests, the change in wording was to make clear that there is no obligation to plead in response to an amended pleading even though there was no obligation, or even option, to respond to the original pleading, that problem could be solved by changing the words "amended pleading" as they appear in Rule 15(a)(3) to the words "amended complaint, counterclaim, cross-claim, or third-party complaint" or by use of some other wording that would identify the kinds of amended pleadings to which a response is required. Wording of that kind would be consistent with the wording used in Rule 12(a), which defines the deadlines for responding to original complaints, counterclaims,

and cross-claims. However, I do not see any problem with simply eliminating the words "any required." I am not aware of any instance when an attorney claimed, or a court found, that there was any ambiguity in the last sentence of the old Rule 15(a) that caused uncertainty as to the kinds of amended pleadings to which a response was required by the rule.

A reason why it is important for Rule 15(a) to be worded in such a way that a response to an amended pleading is required by a specified deadline is found in the requirements of Rule 8(b)(1) that "[i]n responding to a pleading, a party must: (A) state in short and plain terms its defenses to each claim asserted against it; and (B) admit or deny the allegations asserted against it by the opposing party." If a response to an amended pleading is not required, the parties and the courts will not benefit from the narrowing of the facts genuinely in dispute that occurs by the admissions or denials of the allegations in an amended pleading, and there will be uncertainty as to when the opposing party has an obligation to state its defenses to the claims asserted in the amended pleading (which may not have been asserted in the original pleading).

Would you be kind enough to put this letter in the hands of the committee, subcommittee, or person who would be in a position to explore the possibility of amending Rule 15(a), as I have suggested, and to pursue whatever avenues are appropriate to that end.

Thank you for your anticipated cooperation.

Yours truly,

JM/lr

cc: Ms. Amy Hale-Janeke
Head of Reference Services
Fifth Circuit Court of Appeals Library
600 Camp Street, Room 106
New Orleans, LA 70130

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

This suggestion seems to build on a misreading of Rule 55(b). Even if transposed to fit the rule, it does not seem worth pursuing.

The underlying setting is this: The plaintiff seeks a declaration that a trademark is valid; an injunction against further infringement; and damages. The defendant defaults. The plaintiff seeks entry of judgment on the default. The premise of the question is that the clerk may enter judgment for declaratory and injunctive relief on the default. But 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." Declaratory and injunctive relief do not fit.

The underlying issue seems to be that the plaintiff might be satisfied with the declaratory and injunctive relief, but hesitates to dismiss the damages claim for fear that when a final judgment is entered an appeal will be taken. The hope is that the judgment for declaratory and injunctive relief can be made final, starting the clock on appeal time. When the partial final judgment endures without a timely appeal, the plaintiff can then safely dismiss the damages claim.

Assuming the court enters judgment for declaratory and injunctive relief on the default under Rule 55(b)(2), it has authority now to make the judgment final under Rule 54(b). There might be circumstances in which it makes sense to do that, depending on what would be involved in the proceedings to determine damages. But it may not make sense to do that. And the reasons why it is the court, not the clerk, that must determine whether to enter judgment for the declaratory and injunctive relief suggest strongly that it would be unwise to adopt any device that leads to a partial final judgment without action by the court.

The strategic interests of the plaintiff described in the proposal, however significant they may be, do not seem to justify further consideration.

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Suggestion for Amendment to Civil Rule 55(b)
James Ishida to: Gregg R. Zegarelli 05/16/2011 08:46 AM
Cc: Peter_McCabe, Jeffrey Barr, LiAnn Shepard, Gale Mitchell

Follow Up: Urgent Priority.

Dear Mr. Zegarelli,

Thank you for your email, suggesting an amendment to Civil Rule 55(b). I am forwarding your suggestion to the chair of and reporters to the Advisory Committee on Civil Rules for their consideration. We will post updates on the status of your suggestion on the Federal Rulemaking web site. You may also contact our office via email or telephone at 202-502-1800 for further information.

We will send you shortly a letter formally acknowledging receipt of your suggestion.

Thank you very much for your suggestion, and for your interest in the federal rulemaking process.

Best,

James Ishida

"Gregg R. Zegarelli" I note that the gist of the suggestion is guided... 05/13/2011 10:28:03 AM

From: "Gregg R. Zegarelli" <gregg.zegarelli@zegarelli.com>
To: <Rules_Support@ao.uscourts.gov>
Cc: <James_Ishida@ao.uscourts.gov>
Date: 05/13/2011 10:28 AM
Subject: RE: Rule 55(b)

I note that the gist of the suggestion is guided but not resolved by Rule 54. The issue is the nature of why the Court should be interposed for matters that are summary in nature, whether or not the basis of the relief is a declaration or a sum certain. It seems that 60(b) would make it naturally a final order (in part) such as otherwise provided in substance in Rule 54. If the defendant does not show under 60(b), it bears the risk of any remain counts in that context. Otherwise, the plaintiff is stuck in the middle: it has a default, it's primary objective is the equitable remedy, but it does not want to eliminate the money counts unless the default judgment become non-appealable. This can all be resolved by the Court, of course, but the goal is to free the docket under 55(b) while providing a full and fair opportunity to defend.

Gregg R. Zegarelli

Z E G A R E L L I
Technology & Entrepreneurial
Ventures Law Group, P.C.
gregg.zegarelli@zegarelli.com
v.412.765.0401 c.412.559.5262

From: Gregg R. Zegarelli
Sent: Friday, May 13, 2011 10:07 AM
To: 'Rules_Support@ao.uscourts.gov'

Cc: 'James_Ishida@ao.uscourts.gov'

Subject: Rule 55(b)

Dear Rules Committee:

My suggestion regards clarification to Rule 55(b). Conceptually, default judgments can be entered by the Clerk or by the Court pursuant to (b)(1) and (b)(2), respectively.

Rule 55(b) tends to deal in damage calculations. I understand the distinction for sum certain liquidated damages versus damages that must be determined by court determination and judgment. There are two issues: multiple parties and multiple claims, more particularly in the context of non-monetary damage, and when this can be managed by the Clerk pursuant to (b)(1). A plaintiff, of course, (and with the purpose of the Rule in mind) prefers any default which is summarily entered by the Clerk, and the Court's schedule may prefer this as well for a dilatory defendant.

I do not have full electronic research. I have found cases, by the court, whereby entire cases were dismissed against one party only and cases for equity defaults. However, the precise question is whether the Clerk can enter an order for default judgment for certain claims against one party not dismissing the entire case. That is, allowing an optional two-step process, whereby the default is entered by the Clerk for less than all counts.

I have an experience in the Pa.WDC where the Clerk was not sure whether it could be done, and I could not locate (so far) authority either way. The presiding judge's law clerk did not know the answer, defaulting to the 55(b)(2) rule. Presumably the question escapes appeal determinations, but nevertheless the Rule remains unclear in text and intention.

For example, assume a trademark infringement case, 3 counts, one defendant: I. Declaratory Relief (declaring a registration valid and/or application invalid); II. Injunction (on further infringement); III. Unfair competition for unliquided money damages (for passing off). Defendant defaults with an entry pursuant to 55(a). A Rule 55(b)(1) Request for Judgment by the Clerk is filed on Counts I and II, for which there is no money at issue. As a practical matter, a summary default on Counts I and II is divided just as a Court might do it on motion practice, so it would appear consistent with judicial efficiency. Then, plaintiff could move the court for a hearing on any unliquidated counts which would play out in due course, or safely voluntarily withdraw the remaining count having possibly achieved the primary goal on the trademark rights declaration by default. If a plaintiff withdraws counts to acquire the default or easy court order, there is a practical risk.

I suggest a new 55(b)(3), such as, "Subject to the requirements of (b)(1) and (b)(2) hereof, as the case may be, default judgment may be entered by the Clerk or the Court: i) on all counts or less than all counts; ii) for all or less than all parties; and/or c) counts for which money is not the relief sought." Although it is not my suggestion, an express inverse provision, in substance, would also clarify the overall text and intention of the Rule.

Thank you for your consideration.

s/Gregg Zegarelli/

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Submission 11-CV-B

Daniel DeWit proposes the addition of a new Rule 33(e) as follows:

> **(e) Special Interrogatory to Use With Request for Admission.** In addition to the interrogatories that may be served pursuant to this Rule, whenever a party serves one or more requests for admission under Rule 36, that party may also serve, along with the request(s) for admission, alone or in addition to other interrogatories served pursuant to this Rule, and without prejudice as to any numerical limitation herein, the following interrogatory:
>
> "Is your response to each request for admission served with this interrogatory an unqualified admission? If not, for each response that is not an unqualified admission: (a) state the number of the request; (b) state all facts upon which you base your response; (c) state the name, address, and telephone number of each person who has knowledge of those facts; and (d) identify all documents and other tangible things that support your response and state the name, address, and telephone number of the person who has each document or thing."

By way of background, the Judicial Council of California has approved a set of form interrogatories that includes form instructions for the parties and form definitions. In full, there are nearly 90 form interrogatories, and users can indicate which they want answered by checking a box next to individual interrogatories. These form interrogatories appear to be focused mainly on personal injury cases, although there are also some questions about breach of contract. They were adopted pursuant to Cal. Code Civ. Pro. §2033.710:

> The Judicial Council shall develop and approve official form interrogatories and requests for admission of the genuineness of any relevant documents or of the truth of any relevant matters of fact for use in any civil action in a state court based on personal injury, property damage, wrongful death, unlawful detainer, breach of contract, family law, or fraud and for any other civil actions the Judicial Council deems appropriate.

The submission urges adoption of a question very similar to no. 17.1 on the list of California form interrogatories, and not any of the other California form interrogatories. The submission asserts that no. 17.1 "can be a powerful tool to root out baseless claims and dispose of them on summary judgment * * * even before depositions or other, more expensive forms of discovery and investigation need take place."

Whether the rules should promote early use of requests for admissions for such purposes could be debated. The package of proposed amendments published for comment in August, 2013, included a limitation to 25 requests, but that limitation was removed after the public comment period. The numerical limit on interrogatories remains, but coupling an interrogatory with a multitude of early requests for admissions could lead to burdensome results. There is no requirement that Rule 36 requests be deferred until late in the case, but premature use of them might produce considerable waste effort and not much illumination of the issues in the case. Consider, for example, a set of requests that went through every allegation in the complaint and/or answer and sought an admission by the adverse party that the propounding party's allegation was true. Such requests might be quite easy to draft but, coupled with such an interrogatory, extremely burdensome to respond to. So it seems curious that this particular interrogatory -- among the many possible interrogatories that might be asked in a routine case -- should be singled out for special treatment in the rules.

Certainly nothing would prevent use of such an interrogatory under the current rules; members of the Advisory Committee may even have seen such questions used in federal court. In that sense, it is not clear that the proposed amendment would make a substantial change in the rules, except to the extent it encouraged parties to use this particular question.

The proposed amendment would exempt such questions from the 25-question limitation of Rule 33(a)(1). It might be that all that would be needed to achieve the results sought by the amendment would be to amend that rule to exclude from counting a question like the one quoted in the proposal. If such questions are so useful, however, it would seem that litigants might be inclined to use them even if they are not exempted from the numerical limit. That limit can be increased by party agreement or court order.

The proposal appears to guarantee that exemption from the numerical limits only for interrogatories that use precisely the language quoted in the proposal. In that sense, this proposal seems to run counter to the recent proposed abrogation of Rule 84 and of the Official Forms, which has been approved by the Standing Committee for submission to the Judicial Conference. If that amendment is approved, Forms 50 and 51, which offer sample Rule 34 and 36 requests, would be abrogated. But even the Official Forms are not mandatory (except, perhaps for the ones on waiver of service that the proposed amendment appends to Rule 4). So trying to quote the exact question in the rule seems retrograde, although it might be that the Committee could encourage those involved in the A.O. forms development activity to consider something along this line.

(e) Special Interrogatory for Use with Request for Admission.

In addition to the interrogatories that may be served pursuant to this Rule, whenever a party serves one or more requests for admission under Rule 36, that party may also serve, along with the request(s) for admission, alone or in addition to other interrogatories served pursuant to this Rule, and without prejudice as to any numerical limitation herein, the following interrogatory:

"Is your response to each request for admission served with this interrogatory an unqualified admission? If not, for each response that is not an unqualified admission: (a) state the number of the request; (b) state all facts upon which you base your response; (c) state the name, address, and telephone number of each person who has knowledge of those facts; and (d) identify all documents and other tangible things that support your response and state the name, address, and telephone number of the person who has each document or thing."

Proposed addition to Federal Rules of Civil Procedure, Rule 33 (Interrogatories).

In California, the Judicial Council of California approved a set of form interrogatories for use in civil cases, which contain an interrogatory (No. 17.1) nearly identical to the one here. Practitioners have found that this interrogatory, combined with a well-drafted set of requests for admission, can be a powerful tool to root out baseless claims and dispose of them on summary judgment. In essence, this interrogatory in conjunction with requests for admission served under Rule 36, can provide sufficient grounds in some cases to dispose of claims and causes of action even before depositions or other, more expensive forms of discovery and investigation need take place.

Whereas this tool may be most effective in exposing weaknesses in a plaintiff's case, it is also a powerful tool to bring out weaknesses in a defendant's defenses or alternative theories of the case.

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11-CV-H: Pleading

This suggestion proposes amendment of the pleading rules to establish a general format: (1) a brief summary of the case, limited to no more than 200 words; (2) allegations of jurisdiction; (3) naming plaintiffs and defendants; (4) alleged acts and omissions of the parties, with times and places; (5) alleged law regarding the facts; and (6) the civil remedy or criminal punishment requested.

Pleading rules have been on the agenda pretty much continually since 1992. The intensity of consideration has fluctuated. Up to 2007 the questions tended to focus on the possibility of demanding more detailed pleading, either in general or for particular types of cases. Since 2007 the questions have tended to focus on the question whether the Supreme Court has come to demand more detail than should be. Implementation of the Supreme Court decisions in the lower courts was explored in an intensive study of the cases by Andrea Kuperman. The Federal Judicial Center launched empirical work that continues today.

Pleading questions have gradually receded from the first range of priority. They continue to hold a place on the docket, but there are no internally generated proposals for immediate consideration. It seems better to close this docket item. It provides a spontaneous illustration of discontent, but will not add measurably to the further progress of pleading topics on the agenda.

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Federal Complaints - Rule Change 11-CV-H
DEMOREP1
to:
Rules_Support
11/05/2011 04:13 PM
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From: DEMOREP1@aol.com

To: Rules_Support@ao.uscourts.gov

History: This message has been forwarded.

28 Oct 2011 Federal Complaints - Rule Change

New Age Federal Complaints have become an EVIL mess -- having a mixture of alleged facts, conclusions of law and brief type material -- sometimes in the same paragraph of complaints.

How about a Court Rule for having a STRICT separation in Complaints of --

1. A MINI-summary of the alleged case - in not more than [200] words.

2. Alleged court jurisdiction - Constitution, law or treaty.

3. Alleged plaintiff/defendant parties and third parties.

4-5-6 in separate numbered paragraphs in Counts.

4. Alleged facts -- the alleged acts/omissions of the parties at times and places.

5. Alleged law -- regarding the alleged facts -- e.g. The defendant's act/omission in paragraph [number] violated [will violate] [Constitution, law or treaty citation].

6. Civil Remedy or Criminal Punishment requested regarding the violation -- civil

injury / crime.

i.e. In each Count -- One or more type 4 alleged fact paragraphs followed by a type 5 alleged law paragraph followed by a type 6 requested remedy or punishment paragraph.

Any Brief material about 2-3 and each 4-5-6 Count shall be in a separate B-R-I-E-F.

T. Jones
15336 Cruse
Detroit, MI 48227-3227

TAB 7H

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

These suggestions would alter the time limits for amending once as a matter of course.

Rule 15(a)(1) now provides:

> (1) *Amending as a Matter of Course.* A party may amend its pleading once as a matter of course within:
>
> (A) 21 days after serving it, or
>
> (B) if the pleading is one to which a responsive pleading is required, 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 suggestion in 10-CV-E is modified in F, submitted by the same person. The version in E is prompted by a situation in which the court extends the time to respond to a Rule 12 motion. The idea may be that an extension of the time to respond to the motion should also extend the time to amend once as a matter of course. The suggested language would cut off the right to amend 21 days before the time to respond to a Rule 12 motion. The revised version in F is "21 days after * * * the time to respond after service of a motion under Rule 12(b), (e), or (f)." This version would allow a response, followed by an amendment as of right 21 days later. No reason appears to take up this suggestion, which in any event may have had something else in mind.

10-CV-F proposes a new 15(a)(1)(C) that would add an explicit provision for cases in which responsive pleadings are required from multiple parties. The cut-off would be set at 21 days after the first responsive pleading or after the time to respond after service of the first Rule 12 motion. That seems to be the effect of the current rule, which cuts off the right after service of "a" responsive pleading.

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Greetings.

I propose that the committee consider revising Rule 15(a)(1)(B) of the Federal Rules of Civil Procedure to REMOVE the second occurence of "21 days after service of" and REPLACE it with "before the time to respond to", to read as follows:

Rule 15. Amended and Supplemental Pleadings (effective 1 Dec 2009)
(a) Amendments Before Trial.
(1) Amending as a Matter of Course.
A party may amend its pleading once as a matter of course within:
(A) 21 days after serving it, or
(B): if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or [*21 days after service of*]before the time to respond to a motion under Rule 12(b), (e), or (f), whichever is earlier.

This revision encompasses the situation where the court grants a motion to enlarge time to respond to a Rule 12(b,e,f) motion, but the party had not contemplated a correspondingly request to enlarge the time to amend the pleading. The intent of the Rule remains in tact, to amend a pleading once as a matter of course up until the time to respond to a Rule 12 motion.

Carol Dalenko
Wake County, NC
(919) 632-7700
E-mail: cd2008@bellsouth.net

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Greeting ~ Please consider the following recommendations for amendments to Rules 15(a)(1) and 12(f).

The proposal below for Rule 15(a) incorporates my prior recommendation for the Rule at 15(a)(1)(B) to accommodate court-ordered extensions of time to respond to a Rule 12 motion. This also adds a new proposed Rule 15(a)(1)(C) to accommodate multiple responding parties.

Rule 15. Amended and Supplemental Pleadings
(a) Amendments Before Trial.
(1) Amending as a Matter of Course.
A party may amend its pleading once as a matter of course within:
(A) 21 days after serving it, or
(B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or ~~**21 days**~~**the time to respond** after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.

(C) if responsive pleadings are required from multiple parties, 21 days after service of a responsive pleading from the first party to respond or the time to respond after service of the first motion under Rule 12(b), (e), or (f), whichever is earlier.

The proposal below for Rule 12(f) contemplates dilatory and frivolous motions under Rule 12(b) in response to a pleading.

> Rule 12. Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions; Waiving Defenses; Pretrial Hearing
>
> (f) Motion To Strike.
> The court may strike from a pleading **or a motion under Rule 12(b) in response to a pleading** an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. The court may act:
> (1) on its own; or
> (2) on motion made by a party either before responding to the pleading or, if a response is not allowed, within 21 days after being served with the pleading.
> ==========
> Thank you for this opportunity.
Carol Dalenko, 1709 Horton Rd, Knightdale, NC 27545-8577
(919) 632-7700, e-mail: cd2008@bellsouth.net

TAB 7I

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10-CV-F: Strike Matter from Motion

This proposal would amend Rule 12(f) to provide for striking an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter from a Rule 12(b) motion as well as from a pleading.

The question is whether there is any need to recognize this power in a rule. As compared to a pleading, a motion is "[a] request for a court order," Rule 7(b)(1). Inherent power may suffice.

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TAB 8

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11-CV-C, D, E, G, I

The Reporters recommend that docket numbers 11-CV-C, D, E, G, and I be removed from the docket.

Each of these proposals is appended.

11-CV-C is submitted by a pro se litigant who finds Rule 26 "challenging and exciting," but who suggests that a vaguely described 28-day period be extended to 35 days. The difficulties pro se litigants encounter with court rules written to achieve Rule 1 goals when used by professional lawyers are familiar. Equally familiar is the question whether a rule should be revised by degrading its usefulness when used by lawyers in order to adapt it for more convenient use by non-lawyers. This suggestion is not sufficiently focused to prompt another foray into these fields.

11-CV-D and E were submitted in 2011 by organizations that were actively involved in the extensive process that generated the discovery rules amendments that the Judicial Conference has recommended for adoption by the Supreme Court. The proposed rules do not adopt every part of the suggestions advanced in these submissions, but all but one part were carefully considered. The one exception asks for consideration of "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." The questions raised by this topic are complicated. They raise manifest problems of comity. They are set in a framework of continually developing approaches in other countries, particularly in Europe. They were recognized but put aside in the process that generated the pending proposed discovery amendments. It does not seem that the time has yet come for focused work.

11-CV G and I focus on aspects of the work that led to proposed Rule 37(e). G was submitted by Ariana Tadler and Bill Butterfield. I was submitted by John Vail. All three of these people continued to be closely involved with the work on Rule 37(e), and assisted the Committee in valuable ways. It does not detract from the Committee’s appreciation of their unflagging interest and help to recognize that the occasion for further attention to these specific proposals, advanced relatively early in the process and carefully considered, has passed.

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8-23-2016

Dear, Secretary, of the Committee on Rules of Practice and Procedure, Administrative Office of the United States Courts.

Dear, Representative Body stated above, and Secretary thereof.

I write this letter to Suggest a "Rule additive", and/or a footnote addendum * example, *, like the Just previous example of one.

And my Suggestion goes as follows.

If a Pro Se Party is involved in a federal lawsuit then in all (legal language) that comes from any particular federal Court by any form, be it on Computer generated Articles or on Paper. And if any Legal language put forthright by the Court in any Paper from the Court that has Legal Language pertaining to Rule 26(f). Then it Should be written out like the following, I propose.

*Rule 26(f)

And I propose that the footnote and/or "Rule Additive" be related to giving Pro Se Litigants who are participants in federal Court Cases an extra week, or 7 days, to submit a Scheduling and Planning report between Parties. And so extending from 28 days, to 35 days. The time allowed for the Pro Se Litigant to file the report. Thus helping Pro Se Litigants to better prepare the report that so may be submitted.

* Pro Se Litigants Shall be afforded an extra 7 days prepare the report between parties.

Supporting Statement from I the proposant.

I am a pro se Plaintiff Litigant involved in a Court Case at the U.S. Courthouse in Anchorage, Alaska 99501 and the Court Case is James Andrew Polt V. Alaska Housing Finance Corporation Case # 3:11-CV-00055-JWS. Document 13 relates to the federal Rule 26(f) and the scheduling and planning report between parties.

In general, after reading and learning the entire scope of Rule 26. I find federal Rule 26 to be challenging and exciting. And in being challenging and exciting, I allso found Rule 26 to take time, effort, and thought process to try to grasp the legal particularitys involved in Rule 26. And I did have "difficultics" in filling out the report of the scheduling and planning between parties that I submitted to the Court. With an extra 7 days. I would of had the extra time to go over the report I filed. And thus doing so, I could of presented to the Court a better prepared document than the one I submitted in its "Rough Draft" form.

Thank You! above previous said Committee on Rules for your considerations in the proposal I presented above. Sincerely, from:

James Andrew Polt

James Andrew Polt

dated. August 23rd, 2011.

To: Peter McCabe/DCA/AO/USCOURTS,
Cc:
Bcc:
Subject: Re: Fw: Lawyers for Civil Justice Comment to Civil Rules Advisory Committee Regarding Discovery

Peter McCabe | From: Peter McCabe/DCA/AO/USCOURTS To:... | 08/19/2011 10:14:48 AM

From: Peter McCabe/DCA/AO/USCOURTS
To: James Ishida/DCA/AO/USCOURTS@USCOURTS, LiAnn Shepard/DCA/AO/USCOURTS@USCOURTS, Gale Mitchell/DCA/AO/USCOURTS@USCOURTS, Jeffrey Barr/DCA/AO/USCOURTS@USCOURTS
Date: 08/19/2011 10:14 AM
Subject: Fw: Lawyers for Civil Justice Comment to Civil Rules Advisory Committee Regarding Discovery

-----Forwarded by Peter McCabe/DCA/AO/USCOURTS on 08/19/2011 10:13AM -----
To: <'andrea_kuperman@txs.uscourts.gov'>, <'avalukas@jenner.com'>,
<'Chambers_of_judge_d_wood@ca7.uscourts.gov'>,
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<'rshepard@courts.state.in.us'>, <'sgensler@ou.edu'>, <'Theodore.hirt@usdoj.gov'>,
<'Tony.west@usdoj.gov'>
From: "Barry Bauman" <bbauman@lfcj.com>
Date: 08/18/2011 06:57PM
Subject: Lawyers for Civil Justice Comment to Civil Rules Advisory Committee Regarding Discovery
(See attached file: FRCP Discovery Sanctions Tort Comment 081811.pdf)

August 18, 2011

The Honorable Mark R. Kravitz

Chair, Advisory Committee on Civil Rules

United States District Court

Richard C. Lee United States Courthouse

141 Church Street

New Haven, CT 06510

Dear Judge Kravitz,

Lawyers for Civil Justice (LCJ), a nationwide coalition of corporate and defense counsel, respectfully submits the enclosed comment for the Committee's consideration: *A Prescription for Stronger Medicine: The Danger of Tinkering Change and the Need for Meaningful Action.*

LCJ fully appreciates and supports the Committee's goal to address the long-standing problems surrounding discovery and takes this early opportunity to submit its views on proposed amendments to the discovery rules currently being considered by Judge Koeltl's Subcommittee. In this Comment we reiterate our view that meaningful amendments to the Rules, not tinkering changes, are necessary to help solve the myriad discovery problems that have unfortunately continued to fester despite many earlier efforts to reduce the costs of discovery and increase its efficiency.

We appreciate this opportunity to express our views and encourage you to call upon us if we can provide you with any additional information.

Respectfully Submitted,

Barry Bauman

Executive Director

Lawyers for Civil Justice

Attachment: Comment: *A Prescription for Stronger Discovery Medicine:*

The Danger of Tinkering Change and the Need for Meaningful Action

cc: Honorable John G. Koeltl

Honorable David G. Campbell

Honorable Steven M. Colloton

Honorable Paul W. Grimm

Honorable Michael W. Mosman

Honorable Gene Pratter

Honorable Lee H. Rosenthal

Chief Justice Randall T. Shepard

Honorable Tony West

Honorable Diane P. Wood

Laura A. Briggs

Elizabeth Cabraser

Professor Edward H. Cooper

Professor Steven S. Gensler

Daniel C. Girard

Ted Hirt, Esquire

Peter D. Keisler

Andrea Kuperman

Professor Richard L. Marcus

Peter G. McCabe

Anton R. Valukas

Chilton D. Varner, Esquire

[attachment "image001.emz" deleted by LiAnn Shepard/DCA/AO/USCOURTS][attachment "FRCP Discovery Sanctions Tort Comment 081811.pdf" deleted by LiAnn Shepard/DCA/AO/USCOURTS] [attachment "image003.jpg" deleted by LiAnn Shepard/DCA/AO/USCOURTS]

LAWYERS FOR CIVIL JUSTICE

COMMENT
To
THE CIVIL RULES ADVISORY COMMITTEE

August 18, 2011

A Prescription for Stronger Discovery Medicine: The Danger of Tinkering Change and the Need for Meaningful Action

As has now been widely acknowledged, the "discovery system is broken" and the civil justice system is "in serious need of repair."[1] This is not a new problem, however, and significant effort has been expended to address long standing problems of "skyrocketing costs, over-discovery, and discovery abuse"[2] which have haunted the discovery process for many years.[3] Indeed, "[t]he history of rule amendments since 1970 is largely a history of trying to put the discovery genie back in the bottle. . . ."[4] In that time, many different approaches have been adopted in an attempt to address the problems.[5] In large part, though, those changes have done little to stem the tide of expanding discovery and have been particularly ineffective in addressing electronic discovery and its magnification of the problems of abuse, misuse, and cost.[6]

While the problems of discovery have long been acknowledged, the explosion of electronic discovery has only served to worsen the trouble and has created an untenable situation which threatens the availability of a "just, speedy, and inexpensive determination" for civil actions

[1] AM. COLLEGE OF TRIAL LAWYERS & INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYST., FINAL REPORT, 9, 2 (2009).
[2] INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYST., AMERICA'S AILING CIVIL JUSTICE SYSTEM, THE DIAGNOSIS AND TREATMENT OF THE FEDERAL RULES OF CIVIL PROCEDURE, 4 (2009).
[3] *See Id.* ("Some of the earliest criticisms of the FRCP related to the cost and abusive practice of discovery, although those criticisms were not immediately acknowledged. As early as 1968, studies were being undertaken addressing the relationship between discovery practices and cost increases in civil litigation.").
[4] *Id.* (Discussing the explosion of discovery in the 1970's "when the volume of available information and the scope of permitted discovery both expanded simultaneously.").
[5] *See* LAWYERS FOR CIVIL JUSTICE , A PRESCRIPTION FOR STRONGER MEDICINE: NARROW THE SCOPE OF DISCOVERY (Sept. 2010) [hereinafter "STRONGER MEDICINE"], *available at* http://www.lfcj.com/articles.cfm?articleid=1 and LAWYERS FOR CIVIL JUSTICE, DRI, FEDERATION OF DEFENSE & CORPORATE COUNSEL, INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL, WHITE PAPER, RESHAPING THE RULES OF CIVIL PROCEDURE FOR THE 21ST CENTURY: THE NEED FOR CLEAR, CONCISE AND MEANINGFUL AMENDMENTS TO KEY RULES OF CIVIL PROCEDURE (May 2, 2010) [hereinafter "RESHAPING THE RULES"], *available at* http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/$defaultview/888E977DFE7B173A8525771B007B6EB5/$File/Reshaping%20the%20Rules%20for%20the%2021st%20Century.pdf?OpenElement .
[6] *See, e.g.,* AM. COLLEGE OF TRIAL LAWYERS & INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYST., INTERIM REPORT, A-4 (2008) ("Only 34% of Fellows think that the cumulative effect of changes to the discovery rules since 1976 has significantly reduced discovery abuse; and 45% of Fellows still think discovery is abused in every case.").

before the courts.[7] After only a few years, electronic discovery is already being described as a "nightmare"[8], a "disaster"[9], and "the biggest problem with the system."[10] Coupled with the long-standing problems of discovery abuse, misuse and in particular rising cost, electronic discovery has pushed the civil justice system to the brink and decisive action is necessary to pull it back.

As history has shown, numerous modest amendments to the discovery Rules have done little to address the problems which have long-plagued the discovery process. Indeed, the prediction of Justice Powell has proven true, and acceptance of "tinkering changes" has "delay[ed] for years the adoption of genuinely effective reforms."[11] Now, in the midst of a major discovery paradigm shift from paper to electronic evidence, the danger of tinkering changes is all the more present, particularly where the problems of discovery will continue to grow and expand until they are addressed head on.

As we advocated in our White Paper *RESHAPING THE RULES* and Comment *STRONGER MEDICINE*, decisive action should come in several specific ways:

First, Rule 26 should be amended to narrow the scope of discovery by limiting discovery to "any nonprivileged matter that would support proof of a claim or defense" subject to a "proportionality assessment" as required by Rule 26(b)(2)(C).[12]

Second, Rule 26(b)(2)(B) should be amended to specifically identify categories, types or sources of electronically stored information that are presumptively exempted from discovery absent a showing of "substantial need and good cause" which, in turn, could be used to inform determinations of what constitutes "not reasonably accessible data" where the rule does not specifically address a particular type or category of electronically stored information.[13]

Third, the so called "proportionality rule", Rule 26(b)(2)(C), should be amended to *explicitly* include its requirements to limit the scope of discovery.

And finally, Rule 34 should be amended to limit the number of requests for production, absent stipulation of the parties or court order, to no more than 25, covering a time period of no more than two years prior to the date of the complaint, and limited to no more than 10 custodians.[14]

These steps would serve to address a myriad of discovery problems by reducing the volume of information and evidence subject to discovery (a major contributor to cost), providing a clearer standard of relevance, lessening the likelihood of satellite litigation on discovery issues and,

[7] *See, e.g., Id.* at B-3 ("Discovery rules and Rule 26 add significantly to cost of litigation, therefore diminishing access to justice.").
[8] *Id.* at B-1.
[9] *Id.* at B-3.
[10] *Id.* at B-2.
[11] Amendments to the Rules of Civil Procedure, 85 F.R.D. 521, 523 (1980) (Powell, J., dissenting).
[12] *See* RESHAPING THE RULES, supra note 5, at 23.
[13] *See* RESHAPING THE RULES, supra note 5, at 25-26.
[14] *See* RESHAPING THE RULES, supra note 5, at 31-32.

consequently, limiting the skyrocketing costs for litigants seeking fair and efficient resolution of claims.[15]

It bears repeating that similar proposals have been proffered for the Committee's consideration on numerous occasions in the last 34 years and have been widely acknowledged to constitute appropriate action to reduce discovery costs, misuse, and abuse and increase its efficiency[16]

The "Sanctions Tort" Proposals

The modest proposals of Rules Committee member Dan Girard[17] currently being considered by the Subcommittee are insufficient to address the major problems of discovery. First, the proposed amendments are a perfect example of the type of tinkering changes which have repeatedly proven ineffective in making any substantive headway in addressing the real problems of discovery and which have long served as a justification for deferring meaningful action on necessary reforms. Second, the proposed amendments fail to address a major cause for the problems of discovery, namely the breadth of discovery *requests.* Third, the proposed amendments will not only fail to meaningfully address the problems of discovery, they will worsen them.

[15] For a broader discussion of the benefits of these proposals, *See* RESHAPING THE RULES, *supra* note 5; STRONGER MEDICINE, *supra* note 5.
[16] *See* STRONGER MEDICINE, *supra* note 5, at 4-6, 11 (discussing support from the American Bar Association and the American College of Trial Lawyers for narrowing the scope of discovery).
[17] *See* Daniel C. Girard & Todd I. Espinoza, *Limiting Evasive Discovery: A Proposal for Three Cost-Saving Amendments to the Federal Rules*, 87 Denv. U. L. Rev. 473 (2010). These Proposed Amendments were summarized as follows in the December 6, 2010 Report of the Civil Rules Advisory Committee:

> (1) Evasive responses: This proposal draws from concern that discovery responses often are evasive, and the process often transforms from the intended "request-response" sequence to "an iterative, multi-step ordeal" in which the pre-motion conference requirement itself serves as an invitation to overbroad requests that anticipate over-narrow responses, negotiation, and eventual responses that may or may not be evasive. Rule 26(g) implicitly forbids evasive responses, but it should be made explicit by adding just two words to Rule 26(g)(l)(B)(i): signing a discovery request, response, or objection certifies that it is "not evasive, consistent with these rules and * * *."
>
> (2) Rule 34: Production added to Inspection: Rule 34(a)(l) refers to a request "to produce and permit the requesting party * * * to inspect, copy * * * "documents. Rule 34(b)(1)(B) directs that the request "specify a reasonable time, place, and manner for the inspection and for performing the related acts." 34(b)(2)(B) directs that for each item or category, the response must "state that inspection and related activities will be permitted as requested," or object. "Producing" enters only in (b)(2)(D), referring to electronically stored information, and then again in (b)(2)(E), specifying procedures for "producing documents or electronically stored information." Rule 34(c) invokes Rule 45 as the means of compelling a nonparty to "produce documents and tangible things." Girard observes that the common practice is simply to produce, rather than make documents available for inspection and copying. This leaves gaps in the language of the rules. Rule 37(a)(3)(B)(iv) should be amended to include "fails to produce documents" -a motion to compel may be made if "a party fails to produce documents or fails to respond that inspection will be permitted or fails to permit inspection -as requested under Rule 34." In addition, a new provision should be added to Rule 34(b)(2)(B): "If the responding party elects to produce copies of documents or electronically stored information in lieu of permitting inspection, the response must state that copies will be produced and the production must be completed no later than the date for inspection stated in the request."

1. These "Sanctions Tort Proposals" will merely tinker with the rules and will not serve to fix our broken discovery system. Indeed, the authors describe their proposals as "modest" and admit that evasive conduct, the primary problem sought to be addressed, is "already prohibited" by the rules. Such tinkering amendments have been repeatedly adopted with little success. Consider, for example, the bifurcation of attorney-managed and court-managed discovery in 2000. Despite the *appearance* of decisive change, in practice, the amended rule did not affect the scope of discovery and, consequently, did little (or nothing) to make discovery less costly or more efficient. In fact, the changes are widely recognized as being, essentially, ignored. [18]

Beyond being ineffectual, however—a very real possibility as evidenced by the track record of such changes so far—is the danger that the acceptance of tinkering changes, such as those offered by these proposals, will once again justify a delay in taking meaningful action. While past delay (more than 30 years worth) has no doubt resulted in substantial and unacceptable hardship to those suffering from abusive discovery tactics, to delay again could be disastrous. Now, unlike any time in the Rules' history, major changes in how evidence is created and stored (namely through electronic means) are changing the face of the litigation landscape, and are affecting in particular the realities of discovery. Moreover, those changes are occurring at a rapid and steadily accelerating pace and illustrate clearly the need for serious reconsideration of the discovery paradigm, and in particular the proper scope of discovery in this electronic age. Accepting the placebo of tinkering changes now will unnecessarily delay adoption of effective amendments for years. Meanwhile, the problems of discovery will *inevitably* worsen (as they have continued to do in years past), creating an even larger morass to be cleaned up in future.

2. The proposals fail to address the major problem of overly broad discovery *requests*, which encourage broad responses. As acknowledged by Magistrate Judge Grimm in, *Mancia v. Mayflower*, "kneejerk discovery requests served without consideration of cost or burden to the responding party" are "one of the most prevalent of all discovery abuses." [19] He went on to explain that "lawyers customarily serve requests that are far more burdensome than necessary to obtain sufficient facts to enable them to resolve the case through motion, settlement, or trial."[20] The authors of the Girard Proposals themselves acknowledge that "the problems often begin with overbroad, poorly crafted 'kitchen sink' style document requests"[21] and that the current rules may "encourage propounding parties to serve broader discovery requests that they otherwise would in order to leave themselves room to bargain"[22] which "encourage similarly broad objections, in turn leading to further bargaining and significantly driving up costs."[23] The authors attempt to minimize this problem by opining that "[c]ourts have shown little hesitation in paring back or restricting these overzealous or insufficiently focused discovery requests"[24] when, in fact, courts have instead clung to the tradition of very broad and liberal discovery which has

[18] *See* STRONGER MEDICINE, *supra* note 5, at 7-8.
[19] Mancia v. Mayflower Textile Servs. Co., 253 F.R.D. 354, 358 (D. Md. 2008).
[20] *Id.*
[21] *See* Girard & Espinoza, *supra* note 17, at 474-475.
[22] *See* Girard & Espinoza, *supra* note 17, at 477.
[23] *See* Girard & Espinoza, *supra* note 17, at 477.
[24] *See* Girard & Espinoza, *supra* note 17, at 475.

contributed greatly to the problems.[25] It falls to the Rules Committee, then, to finally take the necessary action to address the problem at its root and to narrow the scope of discovery.

3. More serious than merely delaying the adoption of meaningful reform, adoption of these Proposals would likely worsen the problems of discovery. For example, despite acknowledging that evasive discovery is prohibited under the current rules, the first proposal contemplates the addition of a specific prohibition against evasiveness in Rule 26(g) by requiring that counsel certify that the responses to discovery are "not evasive." Such language would likely serve to increase the frequency of motions for sanctions which arguably result from the common *misunderstanding* of many parties that their opponent is obligated to produce ALL potentially responsive information in their possession—a nearly impossible task[26]—and that failure to do so must result from an attempt to evade discovery. Even now, without specific language prohibiting "evasive" responses, the courts are inundated with motions to compel additional discovery and motions for sanctions based upon speculation that responsive material is being withheld with nefarious intent. The addition of a specific prohibition against evasion would only serve to embolden accusations of discovery violations, particularly where the notion of what constitutes evasive behavior is open to interpretation and likely to encourage disagreement amongst the parties. Moreover, where courts are also known to fall prey to the myth of full and complete disclosure, the danger of more frequent instances of unjust sanctions is great, and a major threat to the administration of justice.

Practitioners have long feared what has come to be known as the "sanctions tort" or "litigation by sanction." At its most dramatic, the "sanctions tort" has been described as discovery gamesmanship in which one party purposefully seeks impossibly broad discovery or, alternatively, discovery of the same information from multiple sources, and when mistakes are inevitably uncovered, moves for terminating sanctions.[27] The result of the moving party's success is not only to win their motion, but to deny the responding party's opportunity for a trial on the merits. Of course, "litigation by sanction" need not result in terminating sanctions to deprive a party of the opportunity for fair adjudication of their claims or defenses; sanctions short of default judgment or dismissal can also be devastating to a case and are becoming increasingly common in the modern age.

[25] *See* STRONGER MEDICINE, *supra* note 5, at 7-9.

[26] *See* Hopson v. The Mayor and City Council of Baltimore, 232 F.R.D. 228, 245 (D. Md. 2005) ("The days when the requesting party can expect to 'get it all' and the producing party to produce whatever they feel like producing are long gone. In many cases, such as employment discrimination cases or civil rights cases, electronic discovery is not on a level playing field. The plaintiff typically has relatively few electronically stored records, while the defendant has an immense volume of it. *In such cases, it is incumbent upon the plaintiff to have reasonable expectations as to what should be produced by the defendant.*" (emphasis added)); *Report of the Advisory Committee on Civil Rules* 4 (May 1998) *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV5-1998.pdf ("As we continue to adapt to this information age, the notion of having all information on a subject is almost unattainable. We are going to have to move increasingly to a notion that although disclosure must be fair and full, it does not necessarily require that every copy of every document that relates to a particular proposition be introduced. You need only think about the amount of material on every desktop computer in a large corporation to visualize what that entails."). *Cf.* Zubulake v. UBS Warburg, LLC, 220 F.R.D. 212, 217 (2003) ("Must a corporation, upon recognizing the threat of litigation, preserve every shred of paper, every e-mail or electronic document, and every backup tape? The answer is clearly, "no". Such a rule would cripple large corporations, like UBS, that are almost always involved in litigation").

[27] Charles F. Herring, Jr., *The Rise of the Sanctions Tort,* TEXAS LAWYER, Jan. 28, 1991, at 3-4.

The Sanction Tort Proposals, by creating additional obligations for responding parties (despite widespread agreement that the burden of discovery is already threatening the administration of justice), would only serve to create more "discovery related 'traps' to trigger sanctions."[28] For example, a corporate defendant that produced large volumes of responsive material and whose counsel made the requisite certifications could be subject to a motion for sanctions for "evasion" or false certification upon discovery of even one email that was produced by a third party but not the defendant. Perhaps even more probable is a scenario in which the parties disagree regarding what constitutes responsive evidence, resulting in accusations of evasion against the responding party. This likelihood is all the more probable in light of many practitioners' misunderstanding of the difficulties of responding to discovery in the modern age. Indeed, in arguing for their proposals, the authors opined that "it is usually relatively clear whether a document is responsive to a particular request"—a premise that if true would have precluded the need for many of the discovery motions before the courts today. Even where sanctions are ultimately denied, the resources expended by a responding party to defend itself can never fully be recouped nor the accusations erased.

The second Proposal, like the first, would not meaningfully address any of the major problems of discovery and would likely serve to worsen them. Specifically, the proposal to require that parties choosing to produce electronically stored information (rather than allowing inspection) state that production will be completed "no later than the date for inspection stated in the request"[29] will only serve to *encourage* the sort of discovery motions that result in the costs and delay which the Committee seeks to fix. It is inevitable that disputes will arise regarding the reasonableness of the timeframe laid out by the requesting party, particularly in cases where individual litigants seek discovery from large corporate entities and (as discussed above) misunderstand the difficulty of their requests. Indeed, the authors acknowledge that parties "seeking to compel compliance with wide-ranging requests without giving the producing party adequate time … can expect to be met with a motion for a protective order."[30] Consequently, rather than discouraging the need for judicial intervention (which inevitably results in delay and added cost), the proposed amendment would encourage it.

Moreover, despite the express acknowledgement by the authors of the Proposals that the amendments to Rule 34 were "not meant to create a routine right of access to a party's electronic information system," (as expressed in the Advisory Committee's notes) the language of their proposed amendment nonetheless implicitly relies on the premise that responding parties may avoid the timeline trap by simply choosing to allow inspection. [31] This "choice" fails to address the difficulties of creating an inspection protocol for ESI that does not first require its production[32] (thus rendering the choice a fiction) or require the acceptance of the incredible risk

[28] Brief for Chamber of Commerce of the United States of America et al. as Amici Curiae Supporting Respondent, Bahena v, Goodyear Tire & Rubber Co., No. A503395, at 11 (Nev. July 26, 2010).
[29] Girard & Espinoza, *supra* note 17, at 481.
[30] Girard & Espinoza, *supra* note 17, at 481.
[31] *See* Girard & Espinoza, *supra* note 17, at 481 (providing the proposed language to be incorporated in Rule 34: "**If** the responding party elects to produce copies of documents or electronically stored information **in lieu of permitting inspection**, the response must state that copies will be produced and the production completed no later than the date for inspection stated in the request." (Emphasis added.)).
[32] E.g., by printing the ESI for review by opposing counsel or by loading responsive information into a review platform for use by opposing counsel.

and considerable expense of allowing direct access to a responding party's information systems. In short, because "inspection" of ESI is not a practical or realistic alternative to its production, the proposed amendment would only serve to trap responding parties into unreasonable timelines or require expensive and time consuming satellite litigation to resolve disagreement surrounding production, as discussed above.

Additionally, the authors argue that under the current discovery processes parties are left without a "specific timeframe for production" while at the same time acknowledging that parties are subject to a standard of reasonableness (a widely used and accepted standard in legal jurisprudence) and altogether ignore the discovery cut off date present in every case. Once again, the proposed amendment has shown itself to be nothing more than tinkering, a strategy that will not bring about the necessary changes to discovery and, meanwhile, worsen discovery problems.

The third proposed amendment would also serve to fuel existing discovery problems rather than dampen them. The creation of yet another discovery obligation, particularly coupled with a heightened threat of accusations of evasion, would only serve to add to the burden of discovery, which in turn results in additional delays and inevitable disagreements regarding compliance. Moreover, the adoption of such an amendment creates for requesting parties yet another "sanctions trap" in which to snare their opponents. As proposed, the amendment would also negate the premise in at least one jurisdiction that where a discovery request is overly broad on its face, the respondent need not "provide specific detailed support" for its objection.[33] Facially overbroad requests often seek information "relating to" or "concerning" a "broad range of items" [34] and are quite common in modern discovery practice. Even requests which cannot be reasonably characterized as overly broad *on their face*, but which are nonetheless likely to result in undue burden to the responding party, would create an unfair obligation under the proposed amendment. Responding parties should not be required to first determine what if anything is responsive or not responsive to such a request in a manner sufficient to state whether information is being withheld. To require an objecting party to nonetheless determine the existence of responsive material for purposes of identifying it as being withheld would render moot the original objection—an absurd result.

Conclusion

Meaningful solutions to the problems of discovery will only come from decisive action to narrow the scope of discovery. No amount of tinkering will do. While the Girard Proposals are no doubt a good faith attempt to address long-recognized problems, they will only succeed in making them worse. Time after time meaningful action has been avoided. Now, with the rise of electronic discovery, the comfort of small change can no longer take priority over the need for

[33] Contracom Commodity Trading, Co. v. Seaboard Corp., 189 F.R.D. 655, 665 (1999) ("A party resisting facially overbroad or unduly burdensome discovery need not provide specific, detailed support." (citing Mackey v. IBP, Inc., 167 F.R.D. 186, 197 (D.Kan. 1996))).
[34] Cardenas v. Dorel Juvenile Group, Inc., 232 F.R.D. 377 381-382 (D. Kan. 2005).

decisive action. Indeed, "the process of change" can be "tortuous and contentious" but the consequences of failing to change will be worse.[35]

Respectfully Submitted,

Lawyers for Civil Justice

[35] Amendments to the Rules of Civil Procedure, 85 F.R.D. 521, 523 (1980) (Powell, J., dissenting).

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October 31, 2011

11-CV-E

Honorable David G. Campbell
Chair, Advisory Committee on Civil Rules
United States District Court
623 Sandra Day O'Connor
United States Courthouse
401 West Washington Street
Phoenix, AZ 85003-2146

Dear Judge Campbell:

Lawyers for Civil Justice (LCJ), the Federation of Defense & Corporate Counsel (FDCC), the International Association of Defense Counsel (IADC) and DRI – The Voice of the Defense Bar (DRI), along with the undersigned, respectfully submit the enclosed comment for the Committee's consideration: *The Time is Now: The Urgent Need for Discovery Rule Reforms*.

We fully appreciate and support the Committee's goal to address the long-standing problems surrounding discovery and take this opportunity to submit our view that those problems can be alleviated through the adoption of clear, direct rule reforms that eliminate excessive preservation and discovery costs for plaintiffs, defendants and third parties. In this comment, we emphasize our belief that current inconsistent common law rules are inadequate to meet the challenges of exponentially increasing levels of information and that lack of guidance as to reasonable preservation conduct has resulted in undue costs and burdens in discovery. We believe that proposed rules governing trigger, scope and sanctions will save significant costs that the current rules are imposing on companies and others; and, we respectfully urge the Rules Committee to develop meaningful rules to address this urgent and immediate need.

We appreciate this opportunity to express our views and encourage you to call upon us if we can provide you with any additional information.

Respectfully submitted,

Barry Bauman
Executive Director
Lawyers for Civil Justice

Attachment: Comment: *The Time is Now: The Urgent Need for Discovery Rule Reforms*

cc: Honorable Steven M. Colloton
Honorable Paul S. Diamond
Honorable Paul W. Grimm
Honorable Arthur I. Harris
Honorable John G. Koeltl
Honorable Mark R. Kravitz
Honorable Michael W. Mosman
Honorable Solomon Oliver, Jr.
Honorable Gene E. K. Pratter
Honorable Lee H. Rosenthal
Honorable Randall T. Shepard
Honorable Tony West
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COMMENT

The Time is Now:
The Urgent Need for Discovery Rule Reforms

Submitted to the
Civil Rules Advisory Committee

On behalf of
Lawyers for Civil Justice
DRI – Voice of the Defense Bar
Federation of Defense & Corporate Counsel
International Associate of Defense Counsel

October 31, 2011

I. Introduction & Summary.

This Supplemental Comment is respectfully submitted to emphasize to the Civil Rules Advisory Committee our shared view that: (1) bold action is needed now to fix real problems related to the preservation of information and scope of discovery in civil litigation; (2) these problems exist for plaintiffs, defendants and third parties; (3) preservation and discovery costs and the non-quantifiable burdens they impose, are inappropriately disproportionate to the amounts in controversy; and (4) practical rule making solutions exist that are demonstrably within the rule makers' authority under the Rules Enabling Act.

In the face of unprecedented challenges, the American model – often touted as the premier legal system for the administration of civil justice – has witnessed the complete erosion of Rule 1. Hundreds of millions of dollars are being spent by corporate litigants in America on unnecessary discovery and preservation because that is the only rational response to the uncertainty created by unnecessarily broad and inconsistent standards that provide sparse guidance. Careful rulemaking essentially has been

relegated to *de facto* inconsistent common law rules arising from disparate court decisions that are inadequate to meet the challenges of exponentially increasing levels of information. 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 have left organizations and individuals "between a rock and a hard place," and have resulted in undue cost and burden that makes a mockery of meaningful access to "just, speedy and inexpensive" resolution of disputes in an increasingly global marketplace.

We submit that this Committee has the appropriate authority and responsibility to enact straightforward procedural rules to provide cost-efficient civil justice – clear, direct rules to help curb systemic excesses – that will reduce costs and eliminate unnecessary burdens in discovery.

A. The Time for Reform Is Now. Substantial real world information has been presented to the Committee about the serious harm that the lack of clear, concise preservation and discovery rules is causing businesses – even businesses at the pinnacle of the high technology community. Time has shown that these problems will not go away simply because the parties cooperate or meet with the court to mediate their differences. On the contrary, the issue is only likely to worsen with the ever increasing amount of electronically stored information ("ESI") and the new, diverse means with which it is transmitted and stored. The courts **and** the parties need clear rule-based guidance to navigate the often unknown territory of preservation and discovery. This need extends not only to domestic disputes, but also to an increasingly significant number of cross-border disputes brought before U.S. tribunals.

B. Data Suggest Rule Reforms Will Create An Economic Wellspring. LCJ's members are very familiar with the high costs of preservation and discovery under the current system and are beginning to investigate the benefits that would flow from rule reforms. This section preliminarily estimates the positive results that would follow from new rules in three areas: trigger, scope, and sanctions. It concludes that if new bright line rules were adopted in these three areas, there could be potential cost savings of several billions of dollars. Reducing the high burden and cost of over-preserving, over-collecting, and over-processing ESI—both domestically and globally—will provide a general economic and societal benefit and preserve scarce judicial resources.

C. The Rules Must Include A Clear Trigger for the Duty to Preserve. One of the most significant problems regarding the preservation of ESI is that determining when the preservation duty arises is incredibly difficult. It may sound very simple, but it can literally be a billion dollar issue. Preserving information relating to too many events, too early may cost millions in storage; saving too little, too late can cost even more in sanctions and damage to reputation. In the absence of guidance in the rules about when and what to save, the duty to preserve is a very expensive guessing game. A better, uniform standard is needed: one that more pragmatically articulates the events and times that trigger the duty to preserve information. A bright line rule that triggers the duty to preserve only when there is a "reasonable expectation of the certainty of litigation" substantially lessens the uncertainty surrounding the commencement of the duty to preserve. Even modest clarification as to the standard by which preservation conduct will be judged will provide substantial benefit in terms of U.S. and global cost and risk reduction.

D. The Scope of Preservation Needs Clear, Concise Boundaries. The time to end the Era of Endless Preservation is here. Specific limitations are needed to combat the expansion of the preservation obligation and the unacceptable burdens and costs it imposes on parties involved in or anticipating litigation. Failure to adopt clear, concise rules on the scope of the preservation obligation will only

prolong the injustice and expense that litigants experience today. We would surely also regret the failure to take this unique opportunity to inform the global preservation and sanctions dialogue, and to impact the development of global preservation and sanctions standards. The time has come for definitive action to identify clear boundaries on the scope of preservation and to focus on the evidence that really matters, namely information that is relevant and material to the claims and defenses in the case. Guidance also is required to define when holds end – when a party is no longer subject to a retention obligation.

E. A Sanctions Rule Should Require Willful, Prejudicial Conduct. Sanctions for failing to preserve or produce relevant and material information should be determined by intent to prevent use of the information in litigation, not by the inadvertent failure to follow some procedural step. Therefore, our proposed rule permits sanctions to be imposed by a court only if information relevant and material to claims or defenses as to which no alternative source exists is willfully destroyed for the purpose of preventing its use in litigation and which demonstrably prejudiced the party seeking sanctions.

II. Discovery Reform Is Needed Now.

The need for revision of the discovery provisions of the rules is urgent and immediate.[1] In particular, parties need clear rule-based guidance to responsibly comply with unnecessarily broad and inconsistent preservation obligations. The problems are not symptomatic of changing technology or records management inefficiencies. In the past, memories faded, documents were lost and the administration of justice continued. Parties that destroyed evidence for the purpose of keeping it out of the hands of an opponent were duly punished. Now, however, potential litigants are forced to preserve information that may be only remotely relevant to the case of a yet unnamed putative class member. Courts have presided over ancillary litigation simply to determine if reasonable efforts were taken to prevent the loss of a single email – often without regard to the efforts and costs expended to preserve significant amounts of highly probative, still available evidence. Parties (particularly business litigants), seek to comply with their legal expectations. The current lack of clear and consistent rules results in uncertainty and hugely wasteful over-preservation.

Hoping that the parties work together to agree on self imposed evidentiary boundaries or waiting for silver bullet technology tools are not the answers. Rule 26(f) conferences can be beneficial in some cases, but are no substitutes for clear guidelines in the rules. In fact, many decisions, especially concerning preservation, must be made long before there are opposing counsel who may meet and confer. Continuing education and more active judicial management are also not the answer. *Ad hoc* individual court rules and disparate developing case law have created additional uncertainty. Companies are forced to spend millions of dollars to meet varying and rapidly evolving requirements of the most stringent preservation rulings and individual court rules. This is particularly true in the international context, where additional guidance as to preservation standards and sanctions criteria would significantly reduce a burgeoning area of legal risk and cost of compliance.

Contrary to unsupported assertions from some in the plaintiff bar, corporate litigants are **not** looking for permission to hold "shredding parties" to willfully destroy evidence to keep it out of the hands of

[1] *See* LCJ White Paper, Reshaping the Rules of Civil Procedure for the 21st Century: The Need for Clear, Concise, and Meaningful Amendments to Key Rules of Civil Procedure (May 2, 2010) ("White Paper"); LCJ Comment, A Prescription for Stronger Medicine: Narrow the Scope of Discovery (September 1, 2010) ("Stronger Medicine"); LCJ Comment, A Prescription for Stronger Discovery Medicine: The Danger of Tinkering Change and the Need for Meaningful Action (August 18, 2011) ("Danger of Tinkering") and authorities cited therein.

opponents. To the contrary, they are looking for guidance from the rules of procedure that will bring some relief from astronomical costs associated with a civil justice system gone astray. The current system seems preoccupied with preserving all potentially relevant evidence and permitting discovery of ESI that appears to have little relation to outcome determinative litigation facts or the conduct of potential litigants' businesses and activities. Leaving these challenges entirely to case by case adjudication is adding to the problems, not helping to solve them. In our view, the rule making process is best suited to providing the missing guidance desperately sought by well intentioned litigants.[2]

A. Tinkering Change Cannot Keep Up With Exponentially Expanding Levels of ESI.

Opponents of meaningful rule amendments have argued that only modest efforts are necessary to tackle current problems. Suggestions have included 1) mandating more cooperation among counsel; 2) "putting teeth" in the meet and confer process; 3) expansion of meet and confer pilot projects requiring submission of detailed preservation and e-discovery plans; 4) expansion of pilot projects similar to the 7th Circuit and the U.S. District Court for the Southern District of New York; 5) increased reliance on judicial management and more proactive, earlier court involvement; and 6) application of the proportionality test of Rule 26 to ease unreasonable burdens placed on litigants as suggested by The Sedona Conference®[3] and Judges Rosenthal[4] and Grimm[5] in recent opinions. Each of these efforts is appropriate and LCJ is not suggesting that any of them be discontinued. Instead, we contend that in practice these efforts, in themselves or as a whole, have failed to address the underlying problem. The collective experience of Corporate America and its defense counsel is that these efforts have not, cannot, and will not significantly alleviate the enormous costs, burdens and unintended consequences that unnecessary preservation has imposed on them.

One very recent case, clearly demonstrates that only meaningful rule amendments will change the current state of uncertainty and lack of national uniformity. *Pippins v. KPMG*[6] highlights the urgent need for rule amendments that will supply guidance on a national scale. Absent a paradigm shift in the approach to preservation and discovery issues, the problems articulated by LCJ here and in prior submissions will only worsen.

In *Pippins*, KPMG sought to narrow the scope of its preservation obligations regarding a very broad and expensive category of ESI – whether it was required to retain the physical hard drive for every former employee who might be a putative member of the alleged class action (composed of current and former KPMG auditors). KPMG was not asking for permission to halt all preservation.[7] At the time of the motion, KPMG was preserving just under three-quarters of a *billion* pages of potentially relevant ESI, not including potentially relevant ESI being preserved elsewhere at KPMG.[8] KPMG first conferred with

[2] *See* LCJ Comment, Preservation—Moving the Paradigm to Rule Text, (April 1, 2011) ("Preservation—Rule Text"); LCJ Comment, *Preservation—Moving the Paradigm* (Nov. 1, 2010) ("Moving the Paradigm").
[3] The Sedona Conference® Commentary on Proportionality in Electronic Discovery (2010).
[4] *Rimkis Consulting Group, Inc. v. Cammarata*, 668 F.Supp.2d 598, 613 (S.D.Tex. 2010) (Rosenthal, J.).
[5] *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497, 522-23 (D.Md. 2010) (Grimm, J.).
[6] *Pippins v. KPMG LLP*, 2011 WL 4701849 (S.D.N.Y. Oct. 7, 2011) (Cott, J.).
[7] KPMG also feared potential exorbitant e-discovery costs relating to the large volume of ESI stored on the hard drives. KPMG estimated discovery costs per hard drive in an approximate range of $7,368 – $11,255 (if data is reduced using agreed search terms) to $45,414 – $74,562 (if search terms are not used). These costs were related to the average hard drive yielding 1 GB of potentially relevant data (if search terms were used) to 5 GB of potentially relevant data (if search terms were not used). 1 GB of data would yield 37,500 pages of data and 5 GB would yield 281,250 pages of data.
[8] 281,250 pages multiplied by 2,500 hard drives results in 703,125,000 pages of ESI.

plaintiffs' counsel to reach a compromise on the extent of the preservation. No agreement could be reached (plaintiffs' counsel sought to sample the hard drives which would have involved KPMG disclosing confidential client related information).

After multiple unsuccessful counsel conferences and mediation sessions with the court, KPMG moved for a protective order that would permit it to preserve a representative sample of the hard drives. Magistrate Judge Cott determined that every potential plaintiff (current and former KPMG audit staff) across the country may be a "key player" in the litigation. Therefore, KPMG was required to preserve more than 2,500 hard drives of departing employees at a cost of $600 each[9] because the hard drives *might* contain information related to the hours worked by these individuals.

The expense of preserving the information was estimated to exceed the value of the case. The Order noted that: "relevance" in the context of discovery is "an extremely broad concept…." and that proportionality did not apply in the preservation context of the case absent a specific rule requiring its application. The court also refused to shift costs because there was no proof that the hard drives were of marginal relevance or that the expense of preservation could be considered an undue burden.

Judge Cott was critical of applying proportionality to preservation decisions in the absence of a specific rule:

> However, courts have recognized that in the context of preservation, "this [proportionality] standard may prove too amorphous to provide much comfort to a party deciding what files it may delete or backup tapes it may recycle." *Orbit One Commc'ns, Inc. v. Numerex Corp.*, 271 F.R.D. 429, 436 (S.D.N.Y. 2010) (considering numerous preservation failures in the context of sanctions). ***Accordingly, "[u]ntil a more precise definition [of proportionality] is created by rule," prudence favors retaining all relevant materials.*** *Id.* (citing *Zubulake IV,* 220 F.R.D. [212,] 218 [S.D.N.Y. 2003]).[10]

Here a well intentioned company engaged in extensive negotiations and participated in court supervised mediation in an effort to narrow the scope of preservation. Some advocates for little or no reform have suggested that this is the very path that is the solution to problems associated with the current state of the rules and case law. Many commentators would agree that this was an appropriate response to plaintiffs' failure to agree to reasonable limits on the scope of preservation – court intervention to determine the scope of preservation in a pending lawsuit. Yet, the court felt constrained to adhere to a "save everything" mentality.

We respectfully suggest that *Pippins* is not an outlier. Unfortunately, it is representative of the severe preservation burdens faced by corporate litigants in America. Faced with the mere possibility of sanctions (or a preservation order like *Pippins*) corporations are spending millions to ensure that everything remotely related to a potential lawsuit is saved. *Pippins* is based on the absence of rule based guidance to govern preservation of enormous amounts of ESI. It is also based on current case law that is focused on preventing the loss of a single potentially relevant piece of ESI, no matter the cost. This paradigm must be changed - or the problems faced by KPMG and other companies will be experienced by virtually every

[9] KPMG's preservation efforts totaled 1.5 million dollars, a cost that would continue to rise because 7,500 additional employees fit the putative class. See Declaration of Thomas Keegan, Case 1:11-cv-00377-CM-JLC, ECF No. 92, Filed August 12, 2011("Keegan Dec.").

[10] *Pippins*, 2011 WL 4701849 at p. 6 (emphasis added).

civil litigant in the not too distant future.

In *Pippins*, KPMG had expended more than $1,500,000 towards the preservation of a relatively finite number (2800) of hard drives, at the time it sought relief (undoubtedly that figure was increasing on a daily basis) not including costs to process and review these items. Each of these hard drives (plus another 1000 units, which plaintiffs were demanding be preserved) was estimated to yield up to 5 gigabytes of data, depending on search terms, which would cost up to $300 per gigabyte to properly process, for a further total of $5,700,000. Review to ensure compliance with confidentiality requirements and avoid privileged material could cost up to approximately $70,000 per hard drive.[11]

Thus, KPMG's potential costs, utilizing the most conservative estimates in the record, would amount to almost $21,000,000 simply to preserve, process, and review the hard drives (with only remote prospects that the drives would result in the discovery of meaningful data).[12] This burden was disregarded by the *Pippins* court as unworthy of consideration, all in the interests of avoiding loss of any *potentially* relevant piece of data. Again, this was a case in which a finite, although rather large, universe of data was involved. The costs that could be required in a case in which much larger collections of data were implicated would literally be beyond belief.

B. The Problem Is Not The Technology; It Is The Absence Of Guidance In The Rules.

As repeatedly articulated by LCJ, the rules' paradigm must be shifted from saving every piece of potentially relevant information to only saving information that is both relevant and material to the litigation claims and defenses. Vast quantities of potentially relevant ESI are reaching incomprehensible volumes and every potential litigant will be affected. In the not too distant future individual *pro se* litigants and small mom and pop businesses will be struggling with ESI just as the largest multinational companies are struggling now. Indeed, as personal devices such as cellular phones and personal computers become more ubiquitous along with the emergence of social media and cloud computing, the volume of ESI will continue to grow, even for individual or unsophisticated litigants. We are headed for even larger icebergs and a change in course is necessary to avoid total disaster. This is particularly true as "Cloud Computing" and mobile computing blur traditional legal notions of "care, custody and control," resulting in new challenges for managing cross-border conflicts between data privacy and discovery.[13]
For these reasons, the concept of materiality has an important role to play in the rules. It is no longer enough that ESI might be relevant; it must also be material. Put another way, it is not enough for ESI to have a possible relationship to the issues of the litigation. The ESI must be necessary to the case; the outcome of the litigation must depend on it.

For example, the extraordinary storage capabilities of a common array of consumer electronic devices is staggering. By owning one iPhone™, one iPad™ and one laptop computer, a single individual litigant may own, need to preserve, and struggle with electronic discovery of the equivalent of 27,072 banker

[11] *See* Keegan Dec.., *supra* note 9.
[12] *Id.* at ¶ 30.
[13] M. James Daley, "Information Age 'Catch 22': The Challenge of Technology to Cross-Border Discovery and Data Privacy," The Sedona Conference Journal, v. 12, Fall 2011.

boxes of information.[14] This equals approximately 135 *million* pages of information.[15] The amount of ESI an individual is capable of storing is continuing to increase at an alarming rate. As the cost of storage goes down and the amount of ESI goes up all litigants will be faced with increased costs associated with over preservation and e-discovery.

Most businesses cannot survive without a basic level of computer technology. A small "mom and pop" business using just one entry level server, two iPhones™ and two laptop computers is faced with approximately nine times the storage capacity of the single pro se litigant example above. One mom and pop company may own, need to preserve and struggle with electronic discovery of the equivalent of 243,072 banker boxes of information.[16] This equals approximately 1.2 *billion* pages of information.[17]

Concern has been expressed that problems with information retention for litigation purposes may be but one part of a more generalized information management issue in this technological age that cannot adequately be addressed by rule. Viewing preservation problems as but one symptom of society's apparent inability to deal with a deluge of information is a myopic view of the preservation and discovery problems facing companies doing business in America. As discussed in other LCJ submissions, preservation is not as simple as flicking a switch. Many businesses invest millions of dollars (and for some businesses, tens of millions of dollars) to design and implement efficient and cost effective information management systems to support the work of their employees. These carefully designed systems however often must be compromised and contorted to meet the vague and illogical preservation requirements imposed by the *de facto* rules currently in place. Businesses are perfectly capable of managing their records unfettered by the current overly broad and burdensome preservation and discovery requirements.

As detailed by Microsoft[18] and LCJ, in fact, preservation is a huge and expensive burden that is stifling innovation, influencing business driven decision making, and limiting access to our civil justice system. As the Committee also heard during the Mini Conference, the costs being imposed by the lack of clear and uniform standards is forcing many corporations to spend millions of dollars on preservation activities in lieu of real jobs and improved and less expensive products and services. Dealing with ESI under current discovery principles is truly an example of the tail wagging the dog.

[14] Owning a 64 GB iPhone™, 64 GB iPad™ and a laptop containing a 1 TB hard drive, equals a total of 1,128 GB of potentially relevant information. Microsoft's August 29, 2011 letter to the Advisory Committee equates 1 GB of data with 24 banker boxes. Multiplying 24 banker boxes by 1,128 GB of data equals 27,072 banker boxes. Assuming 5,000 unstapled pages fit into a banker box, this amount of ESI is equivalent to 135,360,000 pages of potentially relevant ESI. As of October 21, 2011 the cost of a 1 TB internal hard drive for a laptop was $139.99 at a popular online retailer. http://www.newegg.com/Product/Product.aspx?Item=N82E16822136545

[15] *Id.*

[16] One small company owning two 64 GB iPhones™, two laptop computers containing a 1 TB hard drive each, equals a total of 2,128 GB of potentially relevant information. Adding an entry level small business server holding 8 TB of data, equals a total of 10,128 GB of potentially relevant information. Using Microsoft's figures: 1 GB of data equates to 24 banker boxes; multiplying 24 banker boxes by 10,128 GB of data equals 243,072 banker boxes. Assuming 5,000 unstapled pages fit into a banker box, this amount of ESI is equivalent to 1,215,360,000 pages of potentially relevant ESI. As of October 21, 2011, an "entry level" server for small businesses containing 8 TB of storage capacity cost $3,534.05 at a popular computer retailer. http://configure.us.dell.com/Dellstore/config.aspx?c=us&ccc=true&cs=04&dm=true&fb=1&l=en&oc=BESW5T2&prod=false&vw=classic

[17] *Id.*

[18] *See* Microsoft Corp. Letter to Hon. David G. Campbell (*Aug. 31,* 2011) ("Microsoft Letter").

The problem is not records management. Record keeping principles[19] and practices are not the issue. The problem is that preservation requires the suspension of records management and it is the suspension of these principles that is the issue. Preservation, by definition, is an exception to usual business practices.[20] Businesses typically seek to minimize the retention of records to support a well-managed records retention program. However, preservation expectations frustrate this goal. As a result, companies are now preserving records that no longer serve the business needs of the company – but for the remote possibility that a yet unknown opponent will argue someday that the record should have been kept. It is an unfortunate consequence of the current state of the rules that companies are unable to deploy new technology and software because the legal department deems the risk of inadvertent destruction of potentially relevant evidence too high. In the absence of uniform guidance, rather than evolving to meet the challenges, courts are clinging to the notion that it is better to be safe than sorry, regardless of cost.

It is certainly true that the information explosion, discussed elsewhere in this submission, has dramatically altered the ways companies and individuals keep records. However, retention in the context of litigation has necessarily created distinct challenges, and different consequences, from those encountered in other business and regulatory situations.

Thus, whatever issues may confront a party with respect to information retained for business purposes, retention for litigation must of necessity be treated differently. For one thing, as pointed out in the Memorandum on Preservation/Sanctions issues in the November meeting materials, consequences of failure to retain information may be inconvenient or even expensive in a business context, but these pale in comparison with the possibly devastating sanctions imposed by a court. For another, retention procedures in business contexts seldom involve keeping everything about a given subject or transaction, while this is a common requirement in lawsuits. Litigation information must be specially identified, processed, reviewed and ultimately produced, all at significant expense. Preservation activity, therefore, requires significant separate resources to meet the differing preservation duties and obligations established by myriad courts across the country. Retention methods for litigation purposes are often very different from those used for business purposes.

Concern also has been voiced that in view of the rapid changes in technology, rule changes at present would be counterproductive. This is incorrect. What truly would be counterproductive would be to maintain the current discovery system, which many authorities agree is in great need of repair. Ongoing improvements in information technology should not serve as an excuse for failure to deal with a critical situation now. Rather, clarification of standards by which preservation will be judged—both domestically and abroad—would provide a significant benefit in terms of cost and risk reduction. This is particularly critical as new systems and technologies develop; clear rules are needed to ensure that this technology moves in concert with legal obligations.

Rather than focusing judicial attention on the merits of an action, the lack of specific rules addressing preservation combined with the current expansive scope of discovery, has resulted in an *ad hoc* patchwork

[19] "Records are created, received and used in the conduct of business activities. To support the continuing conduct of business, comply with the regulatory environment, and provide necessary accountability, organizations should create and maintain authentic, reliable and useable records, and protect the integrity of those records for as long as required. To do this organizations should institute and carry out a comprehensive records management programme [sic]…." ISO15489-1:2001, 7.1 Principles of records management [programs].

[20] "Records pertaining to pending or actual litigation or investigation should not be destroyed." ISO 15489-1:2001, 9.9 Implementing disposition.

of individual solutions to the complex problems created by large volumes of ESI. The explosive growth of the volume of potentially relevant ESI cries out for a policy based solution at the national level. Rule based solutions as proposed by LCJ are designed to provide real world relief to costly real world problems. National uniformity relating to preservation and discovery should be restored through the rule making process and implemented as soon as practical.

C. Meaningful Discovery Amendments and New Preservation Rules Are Necessary to Solve Existing Problems.

For the last several decades, courts and commentators have noted the increasing inability of federal discovery rules to keep pace with technological advances, and the concomitant increase in expense and delay in the litigation process. LCJ has long supported reform of the discovery rules to render the process more efficient, less costly, and less time-consuming. LCJ's White Paper pointed out that numerous prior rule amendments unfortunately failed to achieve meaningful progress towards alleviating discovery problems.[21] Thus, the White Paper called for significant changes in the scope of discovery, preservation requirements and sanctions provisions, as well as amendments to the pleading and cost allocation rules.

Noted commentators agreed:

> *A pattern has developed. The discovery rules are continually tweaked . . . but they are never subject to a complete overhaul. The amended rules then fall victim to the siren song of liberal discovery. Ultimately, the amendments intended to result in discovery containment are rendered wholly ineffective. Then, the process starts over because the courts, practitioners, and the rulemakers remain concerned about the cost and burden of discovery.*[22]

LCJ respectfully urges, as others have, that the time has come to break this pattern by narrowing the scope of discovery.[23] LCJ also pointed out the problems resulting from the lack of consistent standards governing preservation of information and why excessive and unreasonable preservation requirements are burdening both civil litigants and the court system itself.[24] The White Paper laid out a comprehensive program for improvements in the discovery process, including narrowing the scope of discovery to matters supporting proof of claims or defenses, comporting with the proportionality requirement currently in the rules, and clarifying provisions for preservation of information.[25]

As corporate and defense counsel practicing throughout the nation, it is puzzling to hear concerns being voiced as to whether the problems in discovery are really serious enough to warrant immediate and significant changes to the rules. At least in part, some of this concern stems from reports by district judges that they see discovery disputes and sanctions motions only rarely. The question has been raised

[21] *See* White Paper, *supra* note 1.
[22] Henry S. Noyes, Good Cause is Bad Medicine for the New E-Discovery Rules, 21 HARV. J.L. &TECH. 49, 63-64 (2007); Richard Esenberg, A Modest Proposal for Human Limitations on Cyberdiscovery, (January 4, 2011), available at: http://ssrn.com/abstract=1735122 (forthcoming in Fla. L. Rev.)
[23] *See* sources cited at note 1 *supra*.
[24] *Id.*
[25] "Preservation of ESI is an unfortunate consequence of the information explosion and unfettered discovery that the 2006 E-Discovery Amendments have not addressed. Ancillary litigation involving preservation has risen at an alarming rate. Court-by-court, district courts have created ad hoc "litigation hold" procedures that have destroyed national uniformity. Preservation issues are decided on a case-by-case basis, with little guidance for parties in federal court." White Paper at xii-xiii.

whether the relative infrequency of these disputes is an indication that the discovery system is in fact working reasonably well. Some judges report that discovery disputes and sanctions motions are filed in only about 1% of the cases before them. We believe that statistic supports the existence, rather than the non-existence, of the problem. The problem is that the current system drives over preservation and over production of information. Discovery disputes and sanctions motions typically involve alleged failures to produce information. We believe it would be erroneous to conclude that there is no problem with over preservation and over production based on the fact that there are very few motions complaining of, in effect, under production.

It would be a serious mistake to use the frequency of filing of sanctions motions as an indicator of the effectiveness of the discovery provisions of the federal rules. Preservation problems begin well before the cases ever appear on the dockets of district courts, let alone before they appear before district judges on motions for sanctions. Careful parties must set up comprehensive and expensive programs even before litigation commences to protect themselves from the risk endemic in the current model.

Consider the details, the minutiae, of the preservation of ESI. Preservation plagues parties to civil lawsuits, particularly corporate parties, although this discomfort probably never becomes apparent to a court. Many businesses engage in millions of transactions and receive myriad customer communications. These include inquiries, claims, and even lawsuits, all with varying degrees of information about the source of the complainant's concern. Given the differing standards for preservation among the district courts, and the difficulty applying the standards that do exist, companies preserve much more information than actually turns out to be necessary. This is done, of course, at significant expense. This is especially true in the global arena. In fact, the mere fact of preservation pursuant to a legal hold is considered "processing" of information by the European Union, and most other countries with data protection and privacy regulations.[26] Therefore, any additional guidance as to the standard by which preservation conduct will be judged and consequences in the form of sanctions for failure to meet such standards will provide a substantial level of predictability and guidance that currently cannot be articulated in an international context.

Responsible companies are risk averse. Thus, when confronted with the choice to preserve or not to preserve, with even the slightest possibility of sanctions as a result of non-preservation, companies will choose to over-preserve, even though the vast majority of information will never be needed for litigation, much less for business purposes. The time for reform is now. Litigants and the legal system will benefit substantially by adoption of the rule amendments advocated by LCJ.

III. Rule Reforms Have the Potential to Be an Economic Wellspring.

Typically rule makers ask how much rules will cost as part of the routine rulemaking process. Here, the question is "How much will discovery rule reforms reduce the costs of civil litigation in the federal courts?" The answer: the savings of adopting meaningful preservation rules could be measured in the billions of dollars for business and individual litigants.

[26] *See* Directive of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (95/46/EC), available at: http://ec.europa.eu/justice/policies/privacy/index_en.htm

While it is impossible to perfectly predict the cost savings that proposed rules could achieve, there are some strong indications in the data made available at the Dallas mini-conference that the cost savings could be very large. Below, the effect of each aspect of the LCJ rule proposals -- trigger, scope, and sanctions -- is considered and cost savings from adoption of these rules are conservatively estimated. Although there are many versions of each rule proposal, this analysis uses the language proposed in LCJ Comments. The most conservative estimate for the savings from a single rule change is $500 million; another estimate for a single rule change is $5 billion; and for some rules changes the savings may be larger, but are harder to quantify. Thus, savings of $5 billion or $10 billion would represent the most conservative estimate.

A. Savings From a Preservation Trigger Rule.

> **LCJ proposed Rule 26.1** " The duty to preserve information relevant and material to the claims and defenses in civil actions and proceedings in the United States district courts applies only if the facts and circumstances create the reasonable expectation of the certainty of litigation."[27]

A rule governing the "trigger" of the preservation duty would provide much needed guidance for companies that currently are forced to preserve vast amounts of data, even in the absence of litigation, because of uncertainty about whether the preservation duty applies in a given situation. There are at least two ways to attempt to quantify the benefits of a rule that provides clear guidance on the question of trigger.

The first method is to consider the percentage of preservation costs that could be avoided under the proposed rule for the trigger. Some evidence of the potential cost savings was provided in a letter from Microsoft Corporation submitted to the Discovery Subcommittee.[28] In this letter, counsel for Microsoft explained that only about one-third of their litigation holds are for active litigation. This implies that about two-thirds of Microsoft's litigation holds are done out of a decision to "over preserve" because of uncertainty about whether preservation is required, even though no litigation has begun. The proposed rule, which would require preservation only when there is a "*reasonable* expectation of the *certainty* of litigation" (emphasis added), could reduce preservation costs by up to 67 percent.[29]

While different companies may be affected differently by such a proposed rule, all should be affected by a large amount. A different company at the Dallas mini-conference stated that about 40% of their holds are not for active litigation.[30] For this company, a clear trigger rule could reduce preservation costs by up to 40%. Regardless of whether the savings are 40% or 67%, a clear trigger rule would have dramatic impact in reducing the costs of preservation.

The second method is to estimate the dollar value of savings. One company at the Dallas mini-conference gave the example of one matter for which there was no litigation currently pending, and thus there was no adverse party with which to negotiate the scope of preservation. The company has already spent $5 million and is spending $100,000 per month on an ongoing basis for preservation.[31] Under the proposed

[27] *See* text *infra* at 16-17, notes 49-52.
[28] *Microsoft Letter, supra* note *18*.
[29] Some preservation costs, for example the cost of new litigation-hold-management software, will not be affected by the reduction in litigation holds. But all the costs of identifying and interviewing custodians, issuing holds, complying with holds, storing and collecting data for preservation purposes, and so on will be reduced by up to two-thirds.
[30] Richard Marcus, *Notes: Mini-Conference on Preservation and Sanctions, Dallas, Texas, Sept. 9, 2011*.
[31] *Id*.

trigger rule above, these disproportionate expenses would not be incurred because there is no reasonable expectation of the certainty of litigation. This single matter has cost one company over $5 million. If just 100 of the largest 1000 companies have only *one* matter like this one, the total savings from these matters alone would be *$500 million*.

B. Savings From Preservation Scope Rules.

> **LCJ proposed Rule 26.1(b)(2)** "The duty to preserve information extends to information in the person's possession, custody or control used in the usual course of business or conduct of affairs of the person."
>
> **LCJ proposed Rule 26.1(b)(3)** "... a person need not preserve the following categories of electronically stored information, absent an order or agreement based on a showing by the person requesting preservation of substantial need and good cause:
>
> (a) deleted, slack, fragmented, or other data accessible only by forensics;
> ...
>
> (f) backup data that are substantially duplicative of data that are more accessible elsewhere;
>
> (g) physically damaged media; or
>
> (h) legacy data remaining from obsolete systems that is unintelligible on successor systems."[32]

A rule governing the scope of the preservation duty would generate substantial cost savings as well. Because companies are uncertain about what scope of preservation is required, they are forced to preserve ESI that is costly to preserve and collect, but of little or no potential value to any litigation. One area where this is a particularly acute problem is with legacy data and other forms of ESI from which it is hard to access, search, and retrieve data. Companies report that a disproportionate amount of their time and money spent on preservation is devoted to these forms of ESI.[33] A rule that makes clear that these disproportionate expenses are not necessary would save many companies millions of dollars each.

C. Savings From Limits On Key Custodians Of Information.

> **LCJ proposed Rule 26.1(b)(6)** "The duty to preserve information is limited to information under the control of a reasonable number of key custodians of information not to exceed ten."

Another example of significant cost savings would be a rule clarifying the maximum number of key custodians whose information would be required to be preserved. As the Microsoft letter discussed above explained, "Microsoft is overly-inclusive when it comes to selecting custodians and placing them under hold."[34] This over-preservation is the result of uncertainty about the scope of preservation.

[32] *See* Preservation—Rule Text, *supra* note 2.
[33] William H.J. Hubbard, Preliminary Report on the Preservation Costs Survey of Major Companies (Civil Justice Reform Group 2011).
[34] Microsoft Letter, *supra* note 18.

In Microsoft's case, it has 14,805 separate custodian litigation holds in 329 matters, which amounts to 45 custodians per matter.[35] If preservation was limited to 10 custodians per matter, the cost savings would be very large. If each custodian spends a total of 3 hours responding to a litigation hold and preserving ESI, the proposed rule would save 34,545 hours of employee time. This is time saved by employees in Microsoft's business units, not even including the time that lawyers and paralegals would save. In monetary terms, if employees make $50 per hour on average, the costs saved would exceed $1.7 million, not including the time of lawyers and paralegals, for a single company.

Other companies may have even higher savings. In a recent preservation cost report, one company's five year sample of litigation holds contained 43,011 holds for 390 distinct matters.[36] This averages to 110 holds per matter, which means this company's savings would be even higher than Microsoft's. A survey of Global 1000 companies in 2008 found that on average each company had 980 new matters initiated each year.[37] Among these companies, who have on average more new matters than Microsoft, the savings would again be greater. If Microsoft saves $1.7 million on 329 matters, then 1000 companies, each of which has 980 new matters in a year, could save over *$5 billion*.[38]

There may be cases where it is appropriate to preserve ESI from more than 10 custodians. Nonetheless, most cases will not have these exceptional circumstances, and the proposed rule will create major cost savings. A good example was given at the Dallas mini-conference. A company described a case with less than $4 million at stake. The company had identified 57 custodians and had spent $3 million on the case, but the other side had not even reviewed most of the documents produced.[39] Clarity on the scope of preservation would avoid cases like this one with preservation costs totally out of proportion to the case.

D. Savings From A Preservation Sanctions Rule.

> **LCJ proposed Rule 26.1(e)** "The sole remedy for failure to preserve information is under Rule 37(e)."
>
> **LCJ proposed Rule 37(e)** "Absent willful destruction for the purpose of preventing the use of information in litigation, a court may not impose sanctions on a party for failing to preserve or produce relevant and material information. ..."[40]

By requiring willful destruction before a court can issue sanctions, this proposed rule would clarify one of the biggest sources of uncertainty and fear that companies face even though they are continually engaged in good-faith, diligent efforts to preserve relevant information for litigation. The savings from this rule are harder to quantify, because the threat of sanctions permeates every part of the preservation process, as well as the discovery process as a whole. A recent report on preservation costs provides some evidence of overbroad preservation that is caused by uncertainty about sanctions. A surveyed company reported that data is collected in only 14% of matters with preservation, and fewer than 10% of custodians with holds have data collected from them.[41] Similarly, in the case of Microsoft, only 27% of custodians with holds

[35] *Id.*
[36] Hubbard, *supra* note 33.
[37] *Moving the Paradigm*, *supra* note 2.
[38] Saving $1.7 million on 329 matters is saving over $5,150 per matter. 1000 companies times 980 matters times $5,150 per matter equals $5.05 billion.
[39] Marcus, *Notes, supra* note *30*.
[40] *See* Preservation—Rule Text, *supra* note 2.
[41] Hubbard, *supra* note 33.

have data collected from them.[42] New rules that protect companies that make responsible, good-faith judgments about preservation should allow companies to scale back the over-preservation that currently occurs.

Also, the ratio of preserved data to data used as evidence in litigation is about 340,000 to 1.[43] Clarity in the rules governing sanctions could reduce this ratio. For example, a new ratio of 200,000 to 1 (still a huge ratio) would mean a reduction in the costs of preservation of about 40%. This should also reduce the costs of later stages of discovery, such as collection, processing, and review if less ESI is entering the discovery process because of less over-preservation.

E. Huge Savings Are Possible from LCJ's Suggested Rule Changes.

The costs of discovery are large, both domestically and globally. A 2008 survey of litigation costs of Fortune 200 companies found that in large cases that went to trial, the average cost of discovery in these cases varied across companies, but ranged from $621,880 to $2,993,567—not including preservation costs.[44] Given the billions that companies and individuals spend on discovery every year, the savings could be billions as well. Internationally, sanctions imposed by foreign entities for violations relating to unauthorized processing (i.e., preservation) of ESI have been increasing, and even minor violations are receiving fines of $450,000 per occurrence in Spain and Italy. Dialogue with the Data Protection Commissioners from such countries as part of The Sedona Conference® Working Group 6 on International Disclosure and Data Privacy suggest that any additional clear guidance in the form of U.S. rules—even in recognizing a need to balance competing international data privacy interests—would be helpful in reducing risk and cost in this area.

Proposed rules governing trigger, scope, and sanctions will save significant costs that the current rules are imposing on companies and others. The proposed rules quoted above each will lead to large cost savings, which are projected to total in the billions of dollars. Clear and specific rules governing the duty to preserve are the key to achieving these savings.

Finally, it is worth noting that although these proposed rules will greatly reduce some costs of preservation, the proposed rules will not affect all of the costs that parties must bear to preserve information and collect it for discovery. A previous submission has noted that one company's data vault system for some but not all types of ESI cost $12,000,000 to implement and maintain in 2010. Another company's system for collecting data at the outset cost $4,800,000 to implement.[45] Thus, even with rules reform, large companies will still have to spend millions on systems to preserve and collect information within the scope of their preservation obligations. Nonetheless, meaningful rule reforms will create billions in cost savings per year for companies. These billions of dollars represent money that can be invested in new jobs, new and improved products, and savings that can be passed on consumers.

Accordingly, rules on preservation should address three issues: the time at which the duty to preserve begins; the scope of material to be preserved; and the application of (and standard by which) sanctions should be imposed for spoliation of evidence. The next section will address an appropriate standard for determining when the preservation obligation should commence.

[42] Microsoft Letter, *supra* note 18.
[43] *Id.*
[44] LCJ *Comment Supplementing the White Paper Submitted to the 2010 Litigation Conference* (Lawyers for Civil Justice 2010).
[45] Hubbard, *supra* note 33.

IV. The Rules Must Include A Clear Trigger for the Duty to Preserve.

Unfortunately, the earliest actions taken in a judicial matter – preservation of potential evidence (or, put another way, proactive efforts to prevent spoliation) – are not addressed by the rules of procedure. Instead, an *ad-hoc* judge-made framework currently provides a set of obligations designed to police the preservation of materials that may be needed for litigation. This inconsistent provision of obligations in the common law has made it impossible to comply with the laudable goal of Rule 1. Not too long ago, the rule in this area was simply "do not destroy material relevant to a dispute." In the past decade, however, that rule somehow shifted into an affirmative duty to preserve material that may become relevant to a dispute and to prevent the inadvertent disposal of material due to otherwise appropriate recycling efforts. The system had shifted from a system of professionalism – in which litigants and attorneys were presumed to have acted in good faith and not destroyed material pertinent to a dispute – to a system of suspicion and monitoring – in which it is presumed that litigants and their attorneys, unless constantly monitored, reminded, overseen and policed, will engage in regular spoliation.

The current body of law relating to the preservation and spoliation of ESI undermines "the just, speedy, and inexpensive determination of every action and proceeding" and is crafted without sufficient evidence that such a substantial shift in the law is necessary. In fact, the Federal Judicial Center's own data indicates that spoliation is not a problem in the vast majority of cases. [46] Thus, the evidence does not justify the far-reaching and expensive preservation obligations in 99.985% of the cases that result in the over-preservation that companies are driven to in an effort to comply with amorphous common law standards.

Indeed, as the Committee heard in Dallas, two-thirds of the matters currently on "litigation hold" at one preeminent technology company are not even related to active litigation.[47] Another company noted that 40% of their litigation holds were not related to active litigation.[48] By tailoring their preservation efforts to the "lowest common denominator," companies tend to preserve much more material than is necessary in many more matters than will ever result in active litigation, and for greater cost and burden than is appropriate for the benefit gained – if there is any benefit at all.

As a result, cases are being settled, discontinued or not brought in the first place. The cost of preservation is too high. The risk of spoliation sanctions is too great. The impact of ancillary litigation proceedings on discovery disputes is too debilitating. The few high profile sanctions decisions have forced litigants to spend billions of dollars to address an undefined and largely non-existent spoliation risk.

A. A Proposed Trigger Rule.

> **Rule 26.1. Duty to Preserve Information.** The duty to preserve information relevant and material to the claims and defenses in civil actions and proceedings in the United

[46] In the FJC's study, out of 131,992 cases examined, motions for spoliation of evidence were filed in only 209 cases: a paltry occurrence rate of 0.15%. These motions were related to ESI only 53% of the time, and sanctions were granted in only 23% of the ESI spoliation motions. In other words, sanctions for spoliation of ESI were granted in only 20 cases out of 131,992: sanctions for ESI spoliation were warranted in only 0.015% of the cases examined. Report to the Judicial Conference, Advisory Committee on Civil Rules, "Motions for Sanctions Based Upon Spoliation of Evidence in Civil Cases," Federal Judicial Center, 2011.

[47] *See* Microsoft Letter, *supra* note 18.

[48] *See* text *supra* at note 30.

States district courts applies only if the facts and circumstances create the reasonable expectation of the certainty of litigation.

Although the generally accepted standard for determining the time at which the duty to preserve exists (the trigger) is easily stated – upon "reasonable anticipation of litigation" – it is an almost impossible task to confidently determine the commencement of the preservation obligation under the current varying interpretations of that standard. A better standard is needed that more pragmatically articulates the events and time at which the duty to preserve information is triggered. We propose a "bright line" standard based on the reasonable expectation of the certainty of litigation.

This proposal strikes an appropriate balance between specific and general provisions, avoiding the extremes of language which are so general as to be essentially meaningless, and those that are so specific that they risk becoming obsolete even before they are given effect. The proposed Rule 26.1 aims to create a general standard for the start of the duty to preserve while at the same time providing concrete guidance with specific instances defining and exemplifying what "reasonably certain" might mean in a given situation that should be explained in the Committee Note to the Rule.[49]

As stated in our earlier Preservation Comments, the *ad hoc* patchwork of preservation obligations created by individual district courts creates burdens on litigants far beyond what could be considered reasonable. The first goal of the proposed rule is to eliminate the current practice by which each district court formulates its own standards concerning what constitutes a trigger of the duty to preserve information, replacing it with a standard applicable to all federal civil actions generally.

The statement that the duty to preserve information commences when litigation may be "reasonably anticipated" [50] can be subject to many interpretations. The reported cases provide many different understandings of which circumstances may or may not give rise to a reasonable anticipation of litigation.[51] Potential defendants face the immediate reality that they will not know the definition of "reasonable anticipation" unless and until they are sued and a Judge appointed to the case, events that may be several years away and occur in more than one jurisdiction. In today's litigious environment, virtually any action or absence of action, particularly on the part of a company or individual conducting a wide-ranging business, could possibly subject that company or individual to a lawsuit or threat of a lawsuit. In this context, a standard that litigation be "reasonably anticipated" loses meaning, becomes almost impossible to apply, and creates great uncertainty.

Our proposed Rule 26.1 would replace this uncertainty with a more definite, objective standard, related to the *reasonable* expectation of the *certainty* of litigation. Then – within the commentary to the rule – we

[49] For example: The facts and circumstances enumerated below may often, but will not always, give rise to the reasonable expectation of the certainty of litigation. For instance, receipt of a written notice of a cognizable claim will not give rise to a duty to preserve absent an indication that litigation is reasonably certain to occur. (1) Service of a complaint or other pleading; or (2) Receipt by the party against whom the claim is made of a written notice of a cognizable claim setting out specific facts supporting the claim [or other reproducible communication indicating an intention to assert a claim]; or (3) Service of a CID or similar instrument; or (4) Receipt of a written notice or demand to preserve information related to a specifically enumerated notice of a cognizable claim; or (5) The occurrence of an event that results in a duty to preserve information under a statute, regulation, or rule.

[50] *See Victor Stanley, Inc. v. Creative Pipe, Inc*, MJG-06-2662, 2010 WL 3530097 at pp. 22-23 (D. Md. Sept. 9, 2010).

[51] *See Zubulake v. UBS Warburg LLC* ("Zubulake IV"), 220 F.R.D. 212, 216 (S.D.N.Y. 2003); *see also, Fujitsu Ltd. v. Federal Express Corp.*, 247 F.3d 423, 436 (2d Cir. 2001); *Sylvestri v. General Motors Corp*., 271 F.3d 583 (4th Cir. 2001); *Pension Committee of Univ. of Montreal Pension Plan v. Banc of America LLC*, 685 F. Supp. 2d 456, 465 (S.D.N.Y. 2010). *But see*, *Goodman v. Praxair Services, Inc.*, 2009 U.S. Dist. LEXIS (D. Md. July 17, 2009); *Treppel v. Biovail Corp*., 233 F.R.D. 363, 371 (S.D.N.Y. 2006).

seek to clarify the existence of and the beginning point of a duty to preserve. The commentary provides five specific examples of events that may "create the reasonable expectation of the certainty of litigation" and trigger the duty to preserve.

B. A Reasonable Expectation of the Certainty of Litigation.

As indicated in example (1), the receipt of a complaint in most instances is an event that triggers the commencement of a duty.[52] In example (2), receipt of a claim which specifically says what the source of the complainant's dissatisfaction is, could give rise to notice that litigation is reasonably certain. Example (3) reflects the reality that service of a CID or similar instrument can also trigger the duty to preserve. However, complaints, claims, production requests and the like which are vague, unclear and indefinite should not automatically trigger the duty. Example (4) concerns the receipt of a written demand to preserve information. Such a demand must provide clear indications that the filing of an action is imminent, describe the nature of the claims and the information sought to be preserved, and give an indication that litigation is reasonably certain to occur. Example (5) makes reference to the numerous requirements for record-keeping imposed by statutes, regulations, local ordinances and the like.

We believe that the standard "reasonable certainty" is much more definite and provides a "bright line" by which parties, particularly businesses generating large volumes of data, can evaluate their business practices, ascertain their litigation responsibilities, and determine whether or not a preservation duty has been triggered. Requiring that there be a "reasonable certainty" of litigation would at least reduce, if not eliminate, the proliferation of costly, and in many cases unnecessary, holds in matters which do not actually result in litigation. Such a change would certainly and substantially reduce risk and cost with respect to processing and transfers of information in the context of cross-border discovery.

V. The Scope of Preservation Needs Clear, Concise Boundaries.

> *Although some cases have suggested that the definition of what must be preserved should be guided by principles of "reasonableness and proportionality," this standard may prove too amorphous to provide much comfort to a party deciding what files it may delete or backup tapes it may recycle.* ***Until a more precise definition is created by rule,*** *a party is well-advised to "retain all relevant documents (but not multiple identical copies) in existence at the time the duty to preserve attaches. In this respect, "relevance" means relevance for purposes of discovery, which is "an extremely broad concept."*[53]

A. The Rules Should Define Specific Preservation Responsibilities.

There is no doubt that the cost of preservation is a major contributor to the rising costs of civil litigation generally and of discovery in particular. These costs, in turn, contribute greatly to the now familiar conclusions that our discovery system is broken and our civil justice system is in serious need of repair. Moreover, experience has shown that left unchecked, the problems will only grow. Indeed, for almost twenty years this Committee has recognized the danger the

[52] *See* Letter from Robert D. Owen to Hon. David G. Campbell, October 24, 2011 available at: http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/DallasMiniConf_Comments/RobertOwenAdvCommSubmissionfinal.pdf.

[53] *Orbit One Commc'ns, Inc. v. Numerex Corp.*, 271 F.R.D. 429, 436 (S.D.N.Y. 2010) (citations omitted, emphasis added). *See also Pippins, supra* at note 6.

information explosion presents to our civil justice system.[54] In that time the problems of discovery have worsened to a dramatic degree. As technology rapidly evolves and the amount of digital information grows, so too do the problems of discovery and more specifically, the problems associated with the preservation of ESI potentially available in discovery. Unless specific guidelines are provided to define the proper preservation of the expanding universe of ESI that must be saved for discovery, the "proper purpose of discovery—the gathering of ***material*** information"[55] — will soon be obscured by the process.

The problems are not just the product of the post-modern age and evolving technology. The problems with preservation, notably its significant costs and burdens, are greatly exacerbated by the lack of identifiable boundaries on which parties may rely when analyzing the scope of their preservation obligations. Currently the only codified guidance for the appropriate scope of preservation is the scope of discovery[56] — an ambiguous standard that has plagued practitioners and the Committee for many years.[57] Faced with the prospect of preserving all information relevant to the subject matter of potential litigation, parties are forced to rely on "amorphous" principles and widely divergent court opinions[58] in order to narrow their preservation obligation. Litigants are essentially caught between the "rock" of ambiguous standards and the risk of sanctions for failure to adequately preserve; and the "hard place" of expending incredible resources to preserve information which often has no business purpose and which is unlikely to be used in litigation.[59] This has been described by The Sedona Conference as a "Hobson's choice:"

> A producing party can face a Hobson's choice between the burden of the costs of preservation and the risk of sanctions for failing to do so. Parties engaged in ongoing, recurrent litigation can also face a serial preservation duty dilemma in

[54] FED. R. CIV. P. 26 Advisory Committee Note (1993) ("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 of delay and oppression.").

[55] Introduction, Model Order Regarding E-Discovery in Patent Cases, 2 (2011) (emphasis added) available at*:* http://www.cafc.uscourts.gov/announcements.

[56] FED. R. CIV. P. 26(b)(1) "**Scope in General.** Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense *** For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action *** or reasonably calculated to lead to the discovery of relevant matter."

[57] *See* Stronger Medicine *supra* note 1

[58] *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497, 523 (D. Md. 2010) ("Case law has developed guidelines for what the preservation duty entails. Unfortunately, in terms of what a party must do to preserve potentially relevant evidence, case law is not consistent across the circuits, or even within individual districts. This is what causes such concern and anxiety, particularly to institutional clients such as corporations, businesses or governments, because their activities-and vulnerability to being sued-often extend to multiple jurisdictions, yet they cannot look to any single standard to measure the appropriateness of their preservation activities, or their exposure or potential liability for failure to fulfill their preservation duties. A national corporation cannot have a different preservation policy for each federal circuit and state in which it operates. How then do such corporations develop preservation policies? The only "safe" way to do so is to design one that complies with the most demanding requirements of the toughest court to have spoken on the issue, despite the fact that the highest standard may impose burdens and expenses that are far greater than what is required in most other jurisdictions in which they do business or conduct activities.").

[59] Recall the startling statistic that that, on average, only one tenth of one percent (0.1%) of pages *produced* in litigation are used as exhibits at trial. *See* Lawyers for Civil Justice et. al. *Litigation Cost Survey of Major Companies*, App. 1 at 16 (2010); *see also* Microsoft Letter, *supra* note 18 (explaining that in an average case at Microsoft, 48,431,250 pages are preserved, 141,450 pages are produced and only 142 are actually used and noting that because much of the information currently subject to preservation concerns matters that "have not yet matured . . . the ratio of data *preserved* to data *used in litigation* is actually far greater than 340,000 to 1.").

> which preserved data sources ***that would not be kept for any other reason*** may become subject to preservation duties in subsequent litigation.[60]

As has been discussed in prior comments to this Committee, the right to discovery is not absolute.[61] In this post-modern age, even if the right to discovery were absolute, it would be an impossible obligation to fulfill; there is simply too much data. Despite this widely acknowledged fact, the myth of full disclosure is consistently reinforced by the courts through the imposition of sanctions where information has become unavailable, even, for example, through automatic document retention programs. Consequently, parties often default to drastic over-preservation at great expense.

Unfortunately, the same ambiguity in the rules that causes those directly involved in specific litigation to engage in such over-preservation has expanded its zone of influence to affect the judgment of those making everyday *business* decisions for a given company or organization. For example, Microsoft has reported to the Committee that it's "preservation obligations also have a negative impact on the company's ability to implement new systems and technologies."[62] It reports that "[e]ach new technology or system must be evaluated for its potential impact on the company's preservation obligations," that "[i]n some cases, legacy systems must be maintained to ensure that no data is lost," and that "ever-changing case law can sometimes hamper the implementation of sound business decisions."[63] Similarly, it was reported by unidentified "corporate general counsel" at the Dallas mini-conference that "[i]t has gotten to the point where the tech. people want to design efficient systems and the legal people tell them they can't use the most efficient setups because of preservation demands."[64] Other comments at the mini-conference echoed a similar sentiment:

- "The existence of so many litigation holds means that the information management activity is sometimes hobbled by litigation imperatives."[65]
- "[T]he risk of sanctions is driving his handling of what should be business problems."[66]
- "All companies may be deterred from adopting innovative business methods because of preservation imperatives."[67]
- "The legal department shouldn't dictate IT standards."[68]
- "Right now, preservation complications are affecting hiring and firing at companies that are unable to be efficient in producing the goods and services we need because of the difficulties caused by preservation."[69]

Such comments illustrate the failure of modern discovery to achieve the clear goals of Rule 1. It is neither just nor inexpensive to require a party to preserve large volumes of information, much of

[60] The Sedona Conference, Commentary On: Preservation, Management and Identification of Sources of Information that are Not Reasonably Accessible 4, n. 10 (July 2008) (emphasis added).
[61] *See* Preservation Rule Text, *supra* note 2 at 14-16.
[62] *See* Microsoft Letter, *supra* note 18 at 6.
[63] *Id.*
[64] Marcus, *Notes, supra* note *30*.
[65] *Id.* at 8.
[66] *Id.*
[67] *Id.* at 14.
[68] *Id.* at 16.
[69] *Id.* at 24.

which is no longer of use to the business and most of which is unlikely to be used in "reasonably anticipated" litigation. Instead, parties on "both sides of the 'v'" should focus on the information most likely to be useful in the litigation, that is, *information that is relevant and material to the claims and defenses in the case.*

B. The Proposed Preservation Rule Focuses on Material Information.

The preservation rule that has been proposed by LCJ, for example, identifies the subject matter to be preserved as "any information that is relevant and material to a claim or defense to a claim" and proceeds to specifically identify categories of electronically stored information that need not be preserved, absent a showing of substantial need and good cause. Such a rule allows litigants to maintain their focus on the subject of the litigation at hand, rather than on ensuring that masses of largely useless data are maintained.[70]

The severe and unjustified impact of the preservation obligation on businesses involved in litigation cuts deeply in favor of the adoption of a rule that puts identifiable boundaries around the scope of preservation. A rule is needed to provide *specific, affirmative* guidance to parties regarding what should and should not be preserved. Moreover, as LCJ has previously commented, the adoption of a general rule which merely codifies the current amorphous standards of reasonableness and proportionality would do little to address the problems of preservation. Indeed, as Magistrate Judge Grimm has acknowledged, "courts have tended to overlook the importance of proportionality in determining whether a party has complied with its duty to preserve evidence in a particular case . . . ."[71] More generally, since 1983 the Federal Rules have, with little success,

[70] The proposed new Rule 26.1(b) would provide:
(b) Scope of Duty to Preserve. A person whose duty to preserve information has been triggered under Rule 26.1(a) must take reasonable and proportional steps to preserve the information as follows:
(1) Subject matter. The person must preserve any information that is relevant and material to a claim or to a defense to a claim;
(2) Sources of information to be preserved. The duty to preserve information extends to information in the person's possession, custody or control used in the usual course of business or conduct of affairs of the person;
(3) Types of information to be preserved. The duty to preserve information extends to all documents, electronically stored information, or tangible things within Rule 34(a)(1), but a person need not preserve the following categories of electronically stored information, absent an order or agreement based on a showing by the person requesting preservation of substantial need and good cause:
(a) deleted, slack, fragmented, or other data only accessible by forensics;
(b) random access memory (RAM), temp files, or other ephemeral data that are difficult to preserve without disabling the operating system;
(c) on-line access data such as temporary internet files, history, cache, cookies, and the like;
(d) data in metadata fields that are frequently updated automatically, such as last-opened dates;
(e) information whose retrieval cannot be accomplished without substantial additional programming, or without transforming it into another form before search and retrieval can be achieved;
(f) backup data that are substantially duplicative of data that are more accessible elsewhere;
(g) physically damaged media; or
(h) legacy data remaining from obsolete systems that is unintelligible on successor systems.
(4) Form for preserving electronically stored information. A person under a duty to preserve information must preserve that information in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms. The person need not preserve the same electronically stored information in more than one form.
(5) Time frame for preservation of information. The duty to preserve information is limited to information created during the two years prior to the date the duty arose.
(6) Number of key custodians whose information must be preserved. The duty to preserve information is limited to information under the control of a reasonable number of key custodians of information not to exceed ten.

[71] *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497, 523 (D. Md. 2010).

mandated the consideration of the principle of proportionality, as currently articulated in Rule 26(b)(2)(C). Rather, courts have continued to cling to the traditional notion of broad and liberal discovery.[72]

Pippins v. KPMG LLP,[73] discussed in depth earlier in this Comment, illustrates the urgent need for a rule setting forth a particularized scope or boundary for the preservation obligation. *Pippins* clearly illustrates two key aspects of the preservation problem. First, courts are reluctant to apply the principle of proportionality to preservation, despite the mandate of Rule 26(b)(1) that "[a]ll discovery is subject to the limitations imposed by Rule 26(b)(2)(C)." This reluctance is also seen in the context of the scope of discovery more generally, as discussed in LCJ's Comment, *A Prescription for Stronger Medicine: Narrow the Scope of Discovery*. Second, cooperation, though necessary to a successful exchange of discovery, is not the silver bullet it is often made out to be. As noted by the court, extensive negotiations between the parties failed to resolve the issue. This is often the case. While the reasons for this are varied and complex, the parties' inability to agree on limitations to the scope of preservation and to the scope of discovery more generally can be traced, in many cases, to one or the other's mistaken belief that the right to discovery is absolute or that discovery is easily accomplished. This is particularly true, as shown in *Pippins*, where one party has little to preserve, relative to the obligations of their adversary.[74]

Accordingly, a rule outlining specific limitations to the boundaries of preservation must be adopted. Specific limitations will no doubt garner opposition among those who are convinced that any restriction on discovery will result in their inability to prove their claims and defenses — a position directly contradicted by the widely accepted premise that the right to discovery is not absolute. Proposed limits on the number of custodians or the age of materials subject to preservation have been called unworkable, or even "impossible" to define. Similar concerns were voiced in years past when limits were imposed on the number and length of depositions and on the number of interrogatories. As Chief Judge Randall R. Rader observed in recent comments at the Eastern District of Texas Judicial Conference, "[w]hen default numbers with limits on depositions were first included in the Federal Rules, veteran lawyers panicked that these limits were arbitrary and would prevent the discovery of critical information."[75] However, Judge Rader went on to point out that "[a]fter two decades of experience, few question the wisdom of these limits" and that the "era of the endless deposition is fortunately over."[76] Recalling the success of such limitations, the Federal Circuit recently recommended presumptive limitations on the number of email custodians from whom discovery may be requested, as well as the number of search terms that may be employed as to each custodian.[77]

[72] *See* Stronger Medicine, *supra* note1.
[73] *See* text *supra* at note 6 *et seq.*
[74] *See also, Hopson v. The Mayor and City Council of Baltimore*, 232 F.R.D. 228, 245 (D. Md. 2005) ("The days when the requesting party can expect to 'get it all' and the producing party to produce whatever they feel like producing are long gone. In many cases, such as employment discrimination cases or civil rights cases, electronic discovery is not on a level playing field. The plaintiff typically has relatively few electronically stored records, while the defendant has an immense volume of it. *In such cases, it is incumbent upon the plaintiff to have reasonable expectations as to what should be produced by the defendant*." [emphasis added]).
[75] Honorable Randall R. Rader, Chief Judge, U.S. Court of Appeals for the Federal Circuit, Remarks at the E.D. Texas Judicial Conference: The State of Patent Litigation (Sept. 27, 2011).
[76] *Id.*
[77] An E-Discovery Model Order, (CAFC 2011), available at: http://www.cafc.uscourts.gov/images/stories/announcements/Ediscovery_Model_Order.pdf

More generally, critics of a particularized rule have argued that "substantial preservation would still be necessary." They have questioned whether the fact specific nature of the preservation duty coupled with its pre-litigation implications (i.e., preservation decisions are often made before a case has been filed) will inevitably result in over-preservation, regardless of the specificity with which reasonable boundaries are outlined. "Thus, even if the scope of preservation were narrowed by rule, potential litigants would face difficult issues about the appropriate amount of information to preserve. If they are as risk-averse as some have suggested, they most likely would still err on the side of over-preservation."[78] Such arguments are red herrings. They seek to make the perfect the enemy of the good. Indeed, the implication underlying these objections is that because perfection is unobtainable, failure is acceptable. Such reasoning cannot be allowed to derail efforts in favor of much needed and widely supported change.

The time to end the *Era of Endless Preservation* is here. Specific limitations are needed to combat the expansion of the preservation obligation and the unacceptable burdens and costs it imposes on parties involved in or anticipating litigation. Moreover, as illustrated in *Pippins* proportionality is too "amorphous" to be helpful as a rule. Indeed, the court in *Pippins* specifically indicated the need for "a more precise rule"—one more precise than the principle of proportionality that was contemplated and then rejected as inapplicable *because of its lack of specificity.* Failure to act, or perhaps worse, to take insufficient action to provide the much needed *specific guidance* as to the appropriate scope of preservation will only prolong the injustice and expense that litigants report today. The time has come for definitive action to identify clear boundaries on the scope of preservation and to focus on the evidence that really matters, namely information that is *relevant and material to the claims and defenses in the case.*

VI. The Power to Award Sanctions Needs National Consistency and Clarity.

One of the clearest messages to emerge from the corporate attendees at the Dallas Mini-Conference was the highly negative *in terrorem* effect that the possibility of a sanctions order has on most responsible American corporations and the individual employees who are internally responsible for making preservation decisions. One global head of litigation explained that the mere existence of an order awarding "sanctions" against his company – regardless of the monetary costs embedded in the award – would do irreparable damage to his company's standing and brand, and so massive efforts and expense are devoted to avoiding even the possibility of such an award. Left unsaid but implied was the damage to the careers of in-house individuals responsible for making preservation decisions that would result were the company to suffer a sanctions award for failing to preserve.

Opponents of any change point to the low number of reported sanctions motions and decisions as evidence that no change is necessary and the claim of an increased flux of spoliation motions and decisions is unfounded. The numbers reported, however, in the FJC Study do not capture the threats of spoliation that are common place in today's litigation. Those threats are made in letters and "meet and confers" – not necessarily formal motions.

As a result, regardless of the infrequency of sanctions motions and awards, and regardless of the financial impact and costs of the sanctions awards themselves, the companies spend millions of dollars on over-preserving merely "potentially" relevant material. Two major corporations

[78] Agenda Materials for the November 7-8 Meeting of the Advisory Committee on Civil Rules, Tab 3, at 63, *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2011-11.pdf.

represented at the Mini Conference told the Committee that two-thirds and 40%, respectively, of their litigation holds pertained to matters where actions had not been commenced. Although it is difficult to quantify precisely how much is wasted on over-preservation, it is clear and irrefutable that the number is massive and the costs are staggering.[79]

This present state of the common law in the sanctions area is a classic example of the injustice than can result when the law's commands are inconsistent and unclear. Questions of trigger, scope, duration and manner of preservation are currently either unresolved or inconsistent across jurisdictions, sometimes even within a single jurisdiction. Our present preservation regimen is, of course, the common law result of individual decisions rendered in singular cases at the district court level. Thus, rulings are not only inconsistent from circuit to circuit, they are inconsistent even within single districts.[80] There are no Supreme Court cases on preservation. Circuit Court cases on the issue are rare. Because of the nature of discovery disputes, this condition is unlikely to change in the future.

The same condition exists with respect to sanctions rulings. The Second Circuit allows sanctions to be awarded for mere negligence, while the Fifth Circuit does not. A company operating in both circuits will not know in which court it might face an accusation of spoliation and request for a sanctions award. The inconsistency among jurisdictions only compounds the difficulties companies currently face when instituting pre-litigation holds, when no attorney with whom negotiations might take place has definitively stepped forward to speak for the plaintiffs and when no court is vested with jurisdiction to resolve disputes over preservation.

The core point is that negligence should not support an award of terminating sanctions, spoliation instruction, or indeed any "sanction" at all. In this era of exploding data volumes, proliferating mobile and web-based storage devices, and the ease with which electronic information is disseminated, the number of potential sources of data has literally exploded and it is increasingly easy innocently to overlook sources of data that in hindsight can be made to appear purportedly relevant to a court. If parties pursue their preservation obligations diligently, competently and in good faith, the fact that they make a mistake should not create an inference that the lost material was prejudicial to their case. The common law of spoliation presumed that someone who destroyed evidence had a reason to do so, and rightly allowed or instructed juries to conclude that what was destroyed was helpful to the spoliator's adversary. But while that presumption was reasonable when an obviously important piece of evidence was destroyed, the presumption is not reasonable in the present day with its vast quantities of data spread over innumerable devices in the context of a radical affirmative duty to preserve everything possibly relevant to a lawsuit that has not yet been filed.

Parties who are trying to game the system by attempting to wipe their hard drives with Evidence Eliminator, or systematically destroying all documents related to patent litigations shortly to be

[79] See *supra* at 10-14.

[80] For example, one decision holds that standing alone the failure to issue a written litigation hold notice is "at a minimum, grossly negligent," *Pension Committee,* 685 F. Supp.2d 456, 477 (S.D.N.Y. 2010), while another decision in another court sanctions oral litigation hold notices, *Steuben Foods, Inc. v. Country Gourmet Foods, LLC,* No. 08-CV-561S(F), 2011 WL 1549450, at *4 (W.D.N.Y. Apr. 21, 2011)("Nor will the court find that the failure to issue a written litigation hold justifies even a rebuttable presumption that spoliation has taken place."). Judge Scheindlin has stated publicly that "there are enormous differences" among the federal circuits and as between state and federal courts. "Panel Urges Caution on Sanctions for Failure to Preserve Data," New York Law Journal, Oct. 13, 2010, available at http://tinyurl.com/NYLJ-Sanctions (last visited Oct. 22, 2011). That the law on preservation is inconsistent across the country is by now not even arguable.

filed, do deserve punishment. We have no quarrel with the results in those cases. Our point is that the present state of the law lumps people who make simple mistakes in with the bad actors. Our proposed rules on sanctions would move the law towards clarity and consistency, punishing the bad actor but not the document manager acting in good faith.

Inherent power to sanction real abuses is an appropriate tool for the one-off cases that have no precedent, but the preservation area is far from a one-off case, and the rattling consequences of a few "inherent power" rulings in bad facts cases have been felt in every American company that has any litigation docket at all. Therefore, we believe that the power of courts to use their amorphous "inherent power" to sanction parties should be cabined by rule. Allowing inherent power cases to define corporate conduct and determine corporate budgets in every corner of America is a misuse of that power, and is antithetical to the American system of justice. Thus, we believe it is entirely appropriate to require that sanctions, if awarded at all, be awarded only pursuant to clear and consistent rules.

Sanctions on a party for failing to preserve or produce relevant and material electronically stored information should be determined by intent to prevent use of the information in litigation, not by the inadvertent failure to follow some procedural step such as failing to issue a written notice, to identify a key custodian, to identify an electronic storage location or to anticipate a specific request for ESI. Therefore, we have proposed a sanctions rule that permits sanctions to be imposed by a court only if information relevant and material to claims or defenses as to which no alternative source exists is willfully destroyed for the purpose of preventing its use in litigation and which demonstrably prejudiced the party seeking sanctions.[81]

Rule 37(e) should embody the principle that sanctions awards be permitted only upon proof, by the movant, of deliberate destruction of material information by the producing party. The duty of care in this area is too ill-defined to support sanctions for negligent conduct. In light of the proliferation of digital data and fantastic growth of technological innovation, any "duty of care" is just going to get increasingly difficult to define and to apply.

What is urgently needed, then, is what we propose: a rule that subjects only deliberate and willful acts to sanctions. Individuals know – without any need for extensive or complex training – when they are deliberately destroying information for the purpose of denying its use to an adversary in litigation. In such a case, the law would be clear and its application to those who transgress it would be just.

[81] Proposed Rule 37**: (e) Sanctions for failure to preserve information.** Absent willful destruction for the purpose of preventing the use of information in litigation, a court may not impose sanctions on a party for failing to preserve or produce relevant and material information. The determination of the applicability of this rule to sanctions must be made by the court. The party seeking sanctions bears the burden of proving the following: **(1)** a willful breach of the duty to preserve information has occurred; **(2)** as a result of that breach, the party seeking sanctions has been denied access to specified information, documents or tangible things; **(3)** the party seeking sanctions has been demonstrably prejudiced; **(4)** no alternative source exists for the specified information, documents or tangible things; **(5)** the specified electronically stored information, documents or tangible things would be relevant and material to the claim or defense of the party seeking sanctions; **(6)** the party seeking sanctions promptly sought relief in court after it became aware or should have become aware of the breach of duty.

Draconian discovery requirements are unreasonable, and often do not comport with the operating needs of the company involved, or with good business practices. Our recommendations have the aim of restoring a measure of balance and fairness to discovery procedures. Predictability, rationality, and a lessening of the burden on the courts should result from their adoption. This promises substantial risk and cost reduction, both domestically and abroad, and more fully achieves our common goal of "just, speedy, and inexpensive" resolution of disputes.

CONCLUSION

LCJ, DRI, FDCC, IADC, and the many defense trial lawyers and corporate counsel who contributed to the preparation of this Comment respectfully urge the Rules Committee to develop meaningful rules governing discovery and preservation to address the urgent and immediate need to control the excessive and unnecessary litigation costs and burdens faced by American businesses. We look forward to continued participation in the Committee's efforts.

Respectfully submitted,

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November 6, 2011

VIA E-MAIL TO RULES_COMMENTS@AO.USCOURTS.GOV

Honorable David G. Campbell
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Re: Discovery Subcommittee's Consideration of Rule Changes Regarding Sanctions

Dear Judge Campbell:

As two of the plaintiffs' bar practitioners who appreciated the opportunity to actively participate at the recent mini-conference in Dallas, as well as the Duke conference in May 2010, we write to preliminarily respond to the recent flurry of letters submitted to the Advisory Committee on Civil Rules and the Discovery Subcommittee by those who seek comprehensive revisions to the civil rules regarding preservation and sanctions for spoliation. We also wish to reiterate the view we expressed in the paper we submitted for the Duke conference, entitled, *E-Discovery Today: The Fault Lies Not In Our Rules . . .*, which has since been published in the Federal Courts Law Review, and the substance of which we believe is directly relevant to the issues that the Advisory Committee is confronting today.[1] In that paper, we advocated that "it is far too early, and the current data too flawed, inconsistent, or inconclusive to begin efforts to

[1] Milberg LLP and Hausfeld LLP, "E-Discovery Today: The Fault Lies Not in Our Rules…," 2011 Fed. Cts. L. Rev. 4 (February 2011) available at http://www.fclr.org/fclr/articles/html/2010/Milberg-Hausfeld.pdf.

revise the Rules" and advocated that the system "give litigants, lawyers and judges time to catch up. Give the Rules a chance."[2]

After careful consideration of the most recent positions asserted by others who support significant rule changes, our views have not changed.[3] We do not deny that preservation in modern litigation is sometimes expensive. Similarly, we also recognize that on some occasions, there have been different standards imposed by courts regarding preservation and spoliation. Our observation of the Discovery Subcommittee's deliberations since we published our paper makes clear, however, that revising the rules to achieve bright-line guidance will inevitably lead to increased litigation about discovery rather than the merits, be extremely difficult to achieve, may (as pointed out by the Department of Justice and others) lead to unintended consequences,[4] and will almost certainly result in unfairness to some litigants in an effort to lower litigation costs for others - often in the very circumstances where the litigants who suffer the consequences are those that have been aggrieved by some alleged misconduct and are precluded from having their day in court by reason of the now nonexistence of evidence necessary to making their case.

Tellingly, some commentators, like Lawyers for Civil Justice ("LCJ"), have used this latest "crisis" as an opportunity to propose rule amendments that would go far beyond rule guidance on these topics and would, instead, scale back discovery in a way that would be unprecedented since the adoption of the Rules in 1938. However, the Federal Rules are not intended to serve the interests of any particular group or litigants of a particular size, but rather are to be "construed and administered to secure the just, speedy, and inexpensive determination of *every* action and proceeding."[5] Indeed, effective implementation and application of the Rules serves to ensure the *equitable* administration of justice.

Following the Duke Conference in May 2010, the Discovery Subcommittee was assigned to investigate possible changes to the rules governing preservation of discoverable information and sanctions for failing to preserve. For over a year, the Discovery Subcommittee has been studying possible rules amendments. The Subcommittee has reviewed submissions,

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[2] *Id*. at 2. ("Those who are educated about the rules and creative in their use will save themselves, their clients and the courts a great deal of time and money. Those who are not will continue to blame the rules, never realizing that 'the fault lies not in our rules, but in themselves.'" (citing, with apologies, to WILLIAM SHAKESPEARE, JULIUS CAESAR act 1, sc. 2)).

[3] *See also* Ariana J. Tadler and Henry J. Kelston, "Working Toward Normalcy in E-Discovery," New York Law Journal (October 3, 2011).

[4] *See* Letter to The Honorable David G. Campbell from Tony West, Assistant Attorney General, Department of Justice, dated September 7, 2011.

[5] Fed. R. Civ. P. 1 (emphasis added).

studies and surveys, and at least six different rules proposals.[6] The Subcommittee also convened a mini-conference in September 2011 "to educate the Discovery Subcommittee and assist it in developing possible recommendations for the full committee on preservation and sanctions issues."

In advance of the November 7-8 Advisory Committee meeting, the Discovery Subcommittee published a 31-page Memorandum (the "Subcommittee Memorandum") detailing the work it has done and describing the "difficulties and promises of rulemaking to address the widespread concerns" about preservation and sanctions. The Subcommittee Memorandum clearly conveys the Subcommittee's conclusion that revisions to the rules governing preservation should *not* be considered at this time:

- "In sum, the Subcommittee has reached a consensus that the difficulties that would attend trying to devise a preservation rule outweigh its likely usefulness."[7]
- "The Subcommittee's current thinking has reached a consensus on the proposition that it should continue work, but focusing on a sanctions rule rather than a preservation rule."[8]
- "The focus of the discussion at the [November 7-8 meeting of the Advisory Committee] will largely be *whether* the Subcommittee should pursue the general approach it has identified as presenting the most promise and the fewest difficulties -- some change to Rule 37 designed to guide use of sanctions rather than a rule explicitly addressing the specifics of preservation obligations. Beyond that, the November discussion could address the sort of approach to sanctions that seems most promising."[9]

The Subcommittee has outlined the intended path of pursuit at this time. There can be no doubt that exercised focus on that path - regardless of whether those who wish to comment agree or disagree with this path - will be most productive at this point.

Regarding a possible amendment on the subject of sanctions, the Subcommittee's "initial consensus [is] that work should continue to design a sanctions 'back end' rule."[10] However, the Subcommittee Memorandum also acknowledges that a considerable range of issues will confront

[6] Notes of Conference Call, Discovery Subcommittee, Advisory Committee on Civil Rules, Sept. 13, 2011 at 1.

[7] Subcommittee Memorandum at 14.

[8] Subcommittee Memorandum at 1.

[9] Subcommittee Memorandum at 3-4 (emphasis added).

[10] Subcommittee Memorandum at 14.

the Subcommittee if it proceeds to attempt to draft a sanctions rule, including uncertainty as to what the word "sanction" even means. The Memorandum presents four versions of potential amendments on sanctions, along with dozens of footnotes identifying "preliminary questions that have already emerged." Answers to those questions and issues attendant to the pros and cons of such a proposed rule change must be treated as the task at hand.

In stark contrast to the careful consideration of the Discovery Subcommittee, the recent submissions to the Advisory Committee by several corporations and members of the corporate defense bar continue to urge immediate and sweeping rule amendments that focus on preservation and would go so far as to reduce the scope of discovery and largely extirpate the longstanding prohibition against spoliation of evidence. The retrogressive amendments proposed in these submissions go far beyond anything the Discovery Subcommittee has recommended or, indeed, even considered. In particular, submissions by Microsoft, Robert Owens, LCJ and others advocate for rule amendments that would, among other things:

(a) allow discovery of ESI only where the material is "necessary to the case; the outcome of the litigation must depend on it;"[11]
(b) jettison fundamental principles of fairness and justice that have been embodied in law of spoliation since well before the age of ESI;[12] and
(c) permit the destruction of relevant evidence -- even intentional destruction -- unless the party prejudiced by the destruction can prove (i) that the *outcome* of the litigation *depended* on the evidence that no longer exists, AND (ii) the state of mind of the spoliating party, specifically, that the evidence was destroyed with the "intent to prevent use of the information in litigation."[13]

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[11] Lawyers for Civil Justice et al., "The Time is Now: The Urgent Need for Discovery Rule Reforms," submitted to Civil Rules Advisory Committee on October 31, 2011 at 6.

[12] Letter to The Honorable David G. Campbell from Robert D. Owens, October 24, 2011 at 2, 9 (asserting that the "radical … new assumption that affirmative steps to preserve [are] legally required" should be overturned); Letter to The Honorable David G. Campbell from Microsoft, August 31, 2011 at 2 (advocating a "bright-line rule that provides sanctions for spoliation only in the case of 'willful destruction' and prejudice to the requesting party.").

[13] "The Time is Now," *supra* n.11 at 24 ("Sanctions on a party for failing to preserve or produce relevant and material electronically stored information should be determined by intent to prevent use of the information in litigation.") and at 7 ("It is no longer enough that ESI might be relevant; it must also be material. Put another way, it is not enough for ESI to have a possible relationship to the issues of the litigation. The ESI must be necessary to the case; the outcome of the litigation must depend on it.").

Some of these submissions have been published only within the past week, effectively precluding a full response in advance of the November 7-8 meeting, and, in many instances, repeat points previously made and considered by the Subcommittee in reaching its *consensus* to focus on *whether* it should pursue some amendment to *Rule 37* to provide some guidance in the context of sanctions.

Although we continue to plow through the submissions and are determining whether to submit a more substantive response, in the interim, we feel bound to note that some of the arguments contained in the recent submissions are built on hyperbole, faulty premises, factual distortions, and misstatements of the history and present state of the law of spoliation.[14] For example, LCJ and Mr. Owens repeatedly suggest that the duty to take affirmative steps to preserve relevant evidence is the recent creation of a few misguided district court judges. Mr. Owens refers to a "radical … new assumption that affirmative steps to preserve [are] legally required," and opines that "[t]he regime of affirmative preservation and oversight that ***Zubulake*** and its progeny launched is overkill and ... should be overturned." The LCJ writes: "In the past decade, however, that rule somehow shifted into an affirmative duty to preserve material that may become relevant to a dispute." This is just not so. Spoliation has long been defined as "the destruction or material alteration of evidence or the *failure to preserve property* for another's use as evidence in pending or reasonably foreseeable litigation." *See West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2d Cir.1999) (citing Black's Law Dictionary 1401 (6th ed.1990)) (emphasis added).

In sum, we urge the Advisory Committee and the Subcommittee to remain focused on the path they have now set based on its review and consideration of discussion and submissions made to date. We remain of the mind that any rule amendments regarding preservation and spoliation sanctions are premature for the reasons that we shared in our paper and at the mini-conference. And we continue to believe that the current Rules are more than adequate to address these issues, and given time, the courts will harmonize much of the common law on preservation and sanctions, just as they have done for other e-discovery issues.[15] We understand, however, that the Advisory Committee and Subcommittee are determined to address whether they should pursue some change to Rule 37 regarding the use of sanctions. Although we are not proponents of such a change, we welcome the opportunity to participate in the process for we are reminded of this admonition about amending the Rules:

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[14] The overheated rhetoric of certain participants in the process is often amplified to near-hysteria in the echo chamber of the blogosphere, a phenomenon that does not contribute to meaningful dialogue or constructive solutions. For example, a recent article on the "Inside Counsel" website contained this lead: "According to a cacophony of surveys, reports and anecdotal evidence, the American litigation system is teetering on the brink of collapse, due in large part to complex electronic discovery issues."

[15] *See* Ariana J. Tadler and Henry J. Kelston, "Working Toward Normalcy in E-Discovery," New York Law Journal (October 3, 2011).

> The pervasive and substantial impact of the [R]ules on the practice of law in the federal courts demands exacting and meticulous care in drafting [R]ule changes.[16]

These words are particularly apt here, and we respectfully urge the Advisory Committee and the Discovery Subcommittee to proceed with caution as they consider proposals that would have a far-reaching effect on how discovery is conducted and justice is achieved.

Respectfully submitted,

s/ Ariana J. Tadler

Ariana J. Tadler
Milberg LLP

s/ William P. Butterfield

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AJT:sm

[16] Thomas F. Hogan, Admin. Office of the U.S. Courts, Summary for the Bench and Bar (Oct. 2011), http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/RulemakingProcess/SummaryBenchBar.aspx .

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11-CV-I

November 3, 2011

Via electronic mail to Rules_Comments@ao.uscourts.gov

Honorable David G. Campbell
Chair, Advisory Committee on Civil Rules
Administrative Office of the United States Courts
Washington, D.C. 20544

Re: Civil Rules Advisory Committee Meeting Nov. 7-8;
Preservation Rule and *Erie*

Dear Judge Campbell:

I wanted to comment briefly before the meeting on a matter on which I have commented before: the application of the *Erie* doctrine in the context of sanctions or curative instructions for violations of a duty to preserve. I will illustrate my concerns using the subcommittee's draft text (Category 3 approach, Bates stamped pp. 70-74 of materials for upcoming meeting, http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2011-11.pdf) and recent case law from Minnesota.

In *Miller v. Lankow*, 801 N.W.2d 120, 128 (Minn. 2011), the Minnesota Supreme Court in August declared as follows:

> Here, we specifically reaffirm our rule that custodial parties have a duty to preserve relevant evidence for use in litigation. Id. at 116. We also reaffirm our previously stated rule that, even when a breach of the duty to preserve evidence is not done in bad faith, the district court must attempt to remedy any prejudice that occurs as a result of the destruction of the evidence. Id.

The court was citing its 1995 decision in *Patton v. Newmar Corp.*, 538 N.W.2d 116 (Minn. 1995). In that case, the court had approved striking the testimony of a plaintiffs' expert in a design and manufacturing defect case because the testimony was based on the examination of a vehicle that the plaintiffs' negligently had failed to preserve for examination by the defendant. In that case, the court had noted:

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> Because the critical item of evidence no longer exists to speak for the plaintiffs' claims or to the defendant's defense, the trial court is not only empowered, but is obligated to determine the consequences of the evidentiary loss.

Id. at 119.

These cases do not illuminate a distinction the subcommittee has rightfully recognized between curative measures, which these cases seem to address under the subcommittee's nomenclature, and sanctions, a term better reserved for punitive measures. They do, however, establish rules of Minnesota law that must be respected by a federal court sitting in diversity, and cannot be supplanted by federal rule. *Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co.*, 130 S.Ct. 1431, 1442 (2010) ("What matters is what the [federal] rule itself regulates: If it governs only 'the manner and the means' by which the litigants' rights are 'enforced,' it is valid; if it alters 'the rules of decision by which [the] court will adjudicate [those] rights,' it is not.")

The Category 3 approach would not permit a court sitting in diversity to reach the same result as the Minnesota court reached, as the conduct at issue is merely negligent and the sanction appears to be addressed under Rule 37(b)(2)(A)(ii). *See* Discussion Draft of Rule 37(g)(2), p.71. The LCJ approach, Proposed Rule 37(e), p. 74, suffers a similar problem, assuming the action is a "sanction" for purposes of the proposed rule.

A rule such as Rule 37(b)(2)(A) proposed by Tom Allman, p. 81, which prescribes sanctions for violations of a duty separately owed to the federal court, could co-exist with the Minnesota rule, provided it did not preclude the federal court from following Minnesota law with regard to breach of any duty imposed by Minnesota law.

Thank you for the opportunity to clarify and amplify my prior comments. I look forward to seeing you next week.

Very truly yours,

John Vail
Vice-President and Senior Litigation Counsel

Cc: Judge Campbell, chambers, via electronic mail
Magistrate Judge Grimm, chambers, via electronic mail

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RULE 23 SUBCOMMITTEE REPORT

The Rule 23 Subcommittee was formed in 2011 to evaluate the desirability of considering further changes to Rule 23 in light of developments since the last episode of rule changes in 2001-03. Based upon its initial review of issues at that time, it presented a list of issues for possible later consideration during the Advisory Committee's March 2012 meeting. A copy of the agenda memorandum for that meeting -- including an introduction of the issues identified there -- should be included in this agenda book.

After the March 2012 meeting, work on the package of amendments that was recently approved by the Judicial Conference occupied the Committee's attention. During that time, the Rule 23 Subcommittee had a meeting after the public hearing on that package of amendments in Phoenix on Jan. 9, 2014, and held a further meeting/conference call on May 19, 2014. Also included in these agenda materials should be copies of the notes of the Jan. 9 and May 19 Subcommittee activities. Since May 19, the Subcommittee has met twice more by conference call to plan for outreach efforts to gain insights on what others think would be useful potential rule changes.

The purpose of this report is to invite full Committee reaction to the tentative list of topics the Subcommittee has identified. It hopes to explore topics so identified -- and to invite yet other possible additions to its list -- by soliciting the participation of experienced lawyers and judges, either at mini conferences or by telecommunications.

By the time the Advisory Committee meets, the Subcommittee will have had its first opportunity to seek input from outside the Committee. On Oct. 23, the Subcommittee is scheduled to appear as a "Showcase Program" during the ABA National Institute on Class Actions in Chicago. A main goal of that activity is to get reactions to the Subcommittee's current list of topics for consideration and suggestions for additional topics.

In addition, since March 2012 the Committee has received two submissions from the Lawyers for Civil Justice about Rule 23:

14-CV-F
13-CV-G

Copies of these submissions should also be included with these agenda materials. The Subcommittee intends to include consideration of these suggestions as it moves forward. Prof. James Grimmelman of the University of South Carolina has also submitted his very thorough article Future Conduct and the Limits of Class-Action Settlements, 91 N.C.L. Rev. 389 (2013), with the suggestion that rule changes be considered to deal with the issues it identifies.

The Subcommittee's goal during this meeting is to engage the other members of the Committee in a discussion of the issues the Subcommittee has identified and other issues that might be added to the list. After the Committee's meeting, the Subcommittee intends to convene either an actual or a "virtual" mini-conference to pursue the question of focus further. Given the variety of issues involved and the fluidity of the situation, it seems inappropriate to close the door too soon on what issues might best be considered. Based on this sort of outreach, the Subcommittee hopes to be in a position to put more focused proposals before this Committee during 2015.

A further goal during the meeting will be to discuss topics on which the help of the FJC Research people might assist the Committee in evaluating Rule 23 issues. On this topic, as so many others, the FJC assistance has often been invaluable. But the amount of time needed to complete research projects means that any such project should begin soon if it will yield results in time for consideration in connection with any amendment proposals the Subcommittee may have.

As was done in March 2012, it seems that the most helpful way to proceed is to identify briefly the various issues that have caught the Subcommittee's attention to date. Though this memo will attempt a brief introduction of the issues, it certainly cannot attempt anything approaching a full examination. As to some of these issues, the prior agenda materials offer more background.

I. "Front burner" issues

The list of front burner issues has evolved since March 2012, but retains several of those originally listed:

A. Settlement class issues

The reality is that few certified class actions are tried, and most are settled. The reality may well also be that more cases are certified for settlement only than for litigation. The Supreme Court said in *Amchem* that the fact there is a proposed settlement is relevant to whether a case should be certified. The settlement proposal may ease or eliminate manageability concerns, but the fact there is a proposed settlement may also call for more exacting scrutiny of some certification criteria. It added that Rule 23(e) "fairness" evaluation of a settlement is no substitute for full analysis of whether to certify under Rules 23(a) and (b).

Whether this state of affairs erects too many barriers to certification for purposes of settlement has long been an issue the Committee has known about. One possible measure of these difficulties may be the growth of MDL centralization, which (by

some counts) now includes more than one third of the pending civil cases in the federal judicial system. At least the following considerations have emerged:

1. Settlement approval criteria

Rule 23(e) was extensively expanded in 2003. The ALI Aggregate Litigation Project has suggested that it be revised further because the actual present experience has shown that the criteria are too abstruse and are interpreted in very different ways in different courts. The current criteria were drawn from case law, adopting the "fair, reasonable, and adequate" standard that was generally recognized in the cases. But many courts had their own "laundry list" criteria for approval (e.g., the "Gerst factors" in the Third Circuit), and these lists were not identical. They may also have been sufficiently long and varied so that they actually provide district judges with no guidance. Perhaps more guidance could be provided, although narrowing the list might well be accompanied by rather broad description of the remaining factors.

2. *Cy pres* treatment

The *cy pres* phenomenon is a matter of settlement, particularly in cases with small individual harms. There is no specific provision of Rule 23 that bears on this possibility. Some states do have specific provisions as a matter of state law. See Cal. Code Civ. Proc. § 384. But the absence of a rule provision has not prevented use of this technique on occasion. And at least sometimes this sort of activity attracts criticism. For an example, see Chief Justice Roberts' opinion regarding denial of cert. in Marek v. Lane, 134 S.Ct. 8 (2013), observing that "[i]n an appropriate case, this Court may need to clarify the limits on the use of such remedies." Maybe a rule change would be a way to do so as well. The ALI Aggregate Litigation provision on cy pres treatment has received considerable support in the cases and might provide a model.

3. Settlement certification

As noted above, the Supreme Court held in *Amchem* in 1997 that settlement was relevant to class certification but also said that the propriety or attractiveness of a proposed settlement (as measured by Rule 23(e)) was not a substitute for certification analysis. The Committee then had a pending rule-amendment proposal to add a new Rule 23(b)(4) to address such certification even in cases that could not satisfy the requirements of Rule 23(b)(3). In light of the decision in *Amchem*, it decided not to proceed with the proposal, which had generated many comments during the public comment period. It is possible that something along this line should be examined again. At least one suggestion has been that an amended rule could direct that the

contents of the settlement (fairness and adequacy, etc.) be considered pertinent to certification as well, a change from the *Amchem* interpretation.

4. Addressing misbehavior by certain settlement objectors

The 2003 amendments specifically recognized in Rule 23(e)(5), as the courts had previously, that members of the class may object to a proposed settlement. The Supreme Court held in 2002 that objecting class members could appeal the rejection of their objections. At the time the 2003 amendments were developed, there was much discussion of the tension between ensuring that "good" objectors had an adequate opportunity to contest the attractiveness of the settlement and preventing "bad" objectors to using the objection process as a way to extract tribute from the settling parties, whose deal might be put on hold for years by objections in the district court, followed by an appeal. In 2003, the rule was amended to direct that objections, once made, could be withdrawn only with the permission of the court. The goal was to prevent hold-up behavior by objectors who would offer to drop their objections for a payment to them. But that approval requirement may not have solved the problem, as it seems not to apply to a settlement reached only after the objector has filed a notice of appeal. The Appellate Rules Committee has received a proposal to build some sort of approval process into appellate practice to deal with this concern, but the logistics of such a response present some difficult questions.

B. Issues classes

Rule 23(c)(4) says that "[w]hen appropriate, an action may be brought or maintained as a class action with respect to particular issues." But Rule 23(b)(3) authorizes class certification under its provisions only when the court finds that common questions predominate and a class action is superior to other available methods for adjudicating the dispute. Arguably, these two provisions are not entirely in synch. Is predominance to be required only with regard to the issues specified, or must the entire case present predominant common questions? Why would plaintiffs be satisfied with limited certification if they could have full certification? Can they achieve predominance simply by dumping individual issues off the table?

Perhaps the existence of such questions explains the longstanding division in the courts about whether 23(c)(4) can be used in cases in which 23(b)(3) cannot be satisfied. At least some courts seem to think that is not permissible. But a different interpretation of the current rule might be that -- at least with regard to manageability -- Rule 23(c)(4) offers a technique that facilitates certification under Rule 23(b)(3). In

any event, it is clear that there is a division among the courts about how the current rule should be interpreted, and that it has existed for some time. It is also reasonably clear that in some courts issue certification is quite popular. It may be that a reconciliation of these two parts of the current rule is possible, perhaps by recognizing in 23(b)(3) that its requirements are subject to the alternative and more limited certification authority in 23(c)(4). It is also possible that 23(c)(4) might be amended to elaborate on when use of issue certification is "appropriate." It is unnerving to have such a blatant division in the circuits about what the rules permit.

C. Notice issues

In *Eisen*, the Supreme Court ruled in 1974 that only first-class mail notice of class certification in 23(b)(3) cases satisfies the rule. It seemed to have due process concerns in mind as well as interpreting Rule 23. It is clear that many regarded this ruling as unfortunate at or near the time it was made.

It is now clear that methods of notice not imagined in 1974 exist and might significantly facilitate the giving of effective, rapid, and much cheaper notice of class certification in 23(b)(3) actions. Similarly, notice of certification of Rule 23(b)(1) and (b)(2) class actions might much easier than previously. In 2001-02, a proposed amendment to require some sort of notice in (b)(1) and (b)(2) cases was vigorously opposed on the ground that the cost would drive away lawyers who might otherwise be willing to take such cases. Perhaps that has also changed.

Attention has therefore returned to the notice topic. Committee members might share their experiences with use of notice by means other than by first-class mail for class actions (perhaps in state court or with regard to settlement approval in federal court), and more general views on the attractiveness of softening the *Eisen* command.

II. Additional issues

Other issues that do not seem as suitable for study as the "front burner" issues have nonetheless appeared important enough to include on a list of possible topics for this meeting.

A. Merits issues in connection with certification

The Supreme Court's 1974 *Eisen* decision said that courts could not shift the cost of giving notice to defendant on the basis of a prediction that plaintiffs were likely to win on the merits. It also appeared to reject suggestions that certification should only be granted when the plaintiffs seemed likely to win on the merits, perhaps somewhat like the

preliminary injunction standard of probability of success.

After 1974, lower courts often said that they could not consider the merits at all until the certification issue was resolved. That attitude led to "certification discovery" that was regarded as distinct from "merits discovery."

For more than a decade, the lower courts have recognized that merits and certification can't really be hermetically sealed from one another. How can a court determine, for example, whether there are common issues, and whether those will predominate, without some attention to the merits and what the proof of those merits will look like?

The 2003 amendments may have contributed to this new orientation of the lower courts. They require the court to define the class issues and suggest in the Committee Note that the parties submit a trial plan, which would call for considerable attention to the actual evidence to be presented. The Supreme Court has several times recognized that merits scrutiny is often necessary to make class-certification decisions.

These developments place considerable stress on the prior notion that there is a useful dividing line between "class discovery" and "merits discovery." They also may call for greater scrutiny of expert opinion evidence that is designed to show that all class members have been affected similarly by a common course of defendant conduct. Even a full-fledged *Daubert* evaluation of that proposed testimony may be necessary at the class-certification stage. At least in some circuits, it is said that when the party seeking certification and the party opposing it offer expert evidence, the court may have to choose between the contending expert views.

In terms of cost and effort, then, this relatively-recent development is clearly important. And it appears to relate somewhat to rule changes that occurred in 2003. But it is not clear what rule change would be appropriate to react to these developments, or that rule changes played a large role in bringing about the courts' evolving attitude toward merits scrutiny in connection with certification. And there is an argument that, even without something like a probability of success inquiry, there is a value to stricter scrutiny of the merits before cases are certified.

B. Rule 68 and mootness

Class actions for relatively small individual sums but large aggregate amounts are fairly common, particularly under statutes that assure a minimum recovery for those who enforce the statutory mandate by suing for violations. In recent years,

defendants facing proposed class actions based on such statutory claims have sometimes sought to defeat the actions by making Rule 68 offers to moot the individual plaintiff's claims, and argued that class certification cannot then be granted because the case is moot. This is sometimes called "picking off" the named plaintiff. In at least some circuits, this tactic has appeared to work. See Demasco v. Clearwire Corp., 662 F.3d 891 (7th Cir. 2011). In others, it has been rejected. See Weiss v. Regal Collections, 385 F.3d 337 (3d Cir. 2004).

To some extent, this development may rely on a rule change made in 2003. Before 2003, Rule 23(e) was interpreted to require court approval for any settlement of a proposed class action. The 2003 amendments changed that, requiring court approval only for settlements of claims, issues, or defenses of a certified class. They therefore left the way open for settlement of the individual claims of the class representative and dismissal of the suit. The ALI Aggregate Litigation Project urged that court approval be required for such individual settlements, but not notice to the class, to guard against abuse of the class-action device to extract "individual" settlements in which the dismissal of the proposed class action results in a considerably enhanced payment to the named plaintiff (and perhaps also to the lawyer). See ALI Principles of Aggregate Litigation § 3.02(a).

Rule 68 seems on its face to be about something quite different -- it is not specifically designed to provide a vehicle to make cases moot, but instead to change the otherwise-applicable rule on cost shifting if an offer is not accepted and the plaintiff wins but does not do better at trial. A Rule 68 offer may provide stronger support for a mootness argument, however, because a judgment is what plaintiffs seek, and a judgment (on specified terms) is what Rule 68 calls for the defendant to offer. And the rule also contains specifics on entry of judgment if the offer is accepted that may provide further support for mootness arguments.

So one approach to this problem might be to amend Rule 68 to say that it may not be used in actions brought under Rule 23. Whether that would entirely solve the problem is not clear; it may be that mootness can result from offers not covered by Rule 68. Indeed, to exclude class actions from the operation of Rule 68 might do no more than alter the cost-bearing consequences of the rule; a defendant could still make a "non Rule 68" offer of judgment that might have the same mootness consequences.

It may be that the more basic question, then, is whether there should be some provision in the rules that would prevent defendants from "picking off" proposed class actions by satisfying the (often small) named plaintiff's claim.

The Supreme Court has dealt with related issues. In Deposit

Guaranty National Bank v. Roper, 445 U.S. 326 (1980), it held that proposed class representatives could appeal denial of certification even though defendant offered to pay them the full amount of their individual claims. In part, the Court emphasized the stake the named plaintiff has in class certification as a method of spreading the costs of litigation, including attorney fees.

But in a proposed "opt-in" collective action under the Fair Labor Standards Act, the Court held in 2013 that a Rule 68 offer could moot the case. Genesis Healthcare Corp. v. Symczyk, 133 S.Ct. 1523 (2013). In this 5-4 decision, the majority observed that the continuing validity of *Roper* might be questioned in light of Lewis v. Continental Bank Corp., 494 U.S. 472 (1990), which said that an interest in attorney fees is "insufficient to create an Article III case or controversy." But it distinguished class actions from FLSA collective actions and stressed "the unique significance of certification decisions." 133 S.Ct. at 1532. The dissenters argued that an unaccepted Rule 68 offer is "a legal nullity, with no operative effect," and argued that permitting such offers to terminate an FLSA collective action would "frustrate Congress's decision to give FLSA plaintiffs 'the opportunity to proceed collectively.'" Id. at 1533 & 1536 (per Kagan, J.).

What remains, then, is an ongoing division in the lower courts on whether Rule 68 offers can moot class actions. Restoring the pre-2003 requirement for court approval of dismissal might also restore the pre-2003 notion that a proposed class action was to be treated as such until the court rejected class certification. Courts holding that a Rule 68 offer can moot a class action often say also that plaintiffs can prevent that from happening by moving promptly for class certification. Given the need for fuller presentations to support certification, however, that may be difficult. And if Rule 23 now means that a case is not a class action until a court certifies a class, it is not clear why filing a motion to certify is critical for mootness purposes.

For present purposes, the question is whether this is a topic of sufficient importance to warrant further work by the Rule 23 Subcommittee. Other Rule 68 issues are presented elsewhere in the agenda book, but this one seems distinctive from them and more pertinent to class action practice than to Rule 68 practice.

C. "Ascertainability" and class definition

Rule 23 already says a fair amount about class definition: As amended in 2003, Rule 23(c)(1)(A) directs that "[a]n order that certifies a class action must define the class and the class claims, issues, or defenses . . ." Rule 23(c)(2)(B) says the

court "must direct to class members the best notice that is practicable." For (b)(1) and (b)(2) classes, Rule 23(c)(3)(A) says the class-action judgment must "include and describe those whom the court finds to be class members." Rule 23(c)(3)(B) says that in (b)(3) class actions the judgment must "include and specify those to whom the Rule 23(c)(2) notice was directed." Rule 23(e)(1) says that when there is a proposed settlement, the court must "direct notice in a reasonable manner to all class members who would be bound by the [settlement] proposal." Rule 23(h)(1) says that notice of class counsel's application for attorney fees must be "directed to class members." And Rule 23(a) says that "members of a class" may sue or be sued if Rule 23 is satisfied.

Although class definition thus looms large in current Rule 23, issues not precisely addressed in the rule have arisen in the cases. One of these is "ascertainability" -- whether the court can determine who should be included in the class. Recently, four judges of the Third Circuit, including the Chief Judge, urged in a dissent from denial of a petition for rehearing en banc, that this Committee look at this question. See Carrera v. Bayer Corp., 2014 WL 3887938 (3d Cir., July 2, 2014). Brief background may suffice to introduce the general issue.

In Marcus v. BMW of North America, LLC, 687 F.3d 583 (3d Cir. 2012), the court held that class certification was an error because there was no "reliable, administratively feasible" way to identify class members. The suit charged that BMW misled consumers about the reliability of Bridgestone "run flat" tires and the cost of replacing them. BMW argued that there was plenty of information about those issues readily available (essentially a merits argument), but on appeal argued that the class was not properly defined. It seemed to the court of appeals (though this was not entirely clear) that plaintiff sought to sue on behalf of a class of all persons who bought or leased certain BMW makes with such tires in New Jersey.

The court of appeals found that the class definition was not sufficient. BMW was not certain it could identify owners or lessees of BMW vehicles, and added that it could not be certain that BMW vehicles actually had Bridgestone run flat tires. For example, some cars delivered to the dealership with Bridgestone tires had different tires when they were sold. Beyond that, BMW records would not indicate whether all potential class members' tires had in fact gone flat; if they did not, those class members would not have a claim for compensation. So the court remanded for further proceedings, adding the following admonition: "We caution, however, against approving a method that would amount to no more than ascertaining by potential class members' say so. * * * Forcing BMW and Bridgestone to accept as true absent persons' declarations that they are members of the class, without further indicia of reliability, would have serious due process

implications." Id. at 594.

The court explained its focus on ascertainability as follows (id. at 593, citations omitted):

> The ascertainability requirement serves several important objectives. First, it eliminates "serious administrative burdens that are incongruous with the efficiencies expected in a class action" by insisting on the easy identification of class members. Second, it protects absent class members by facilitating the "best notice practicable" under Rule 23(c)(2) in a Rule 23(b)(3) action. Third, it protects defendants by ensuring that those persons who are bound by the final judgment are clearly identifiable.

In Carrera v. Bayer Corp., 727 F.3d 300 (3d Cir. 2013), another panel of the court applied *Marcus* to reject a class definition in a suit alleging that defendant had misled consumers about the health benefits of a multivitamin product. After some litigation in the district court, plaintiff obtained certification of a class of all who purchased this product in Florida, where the consumer fraud suit does not require proof of reliance to support a claim. Judge Scirica explained for the panel that the plaintiff must, under Wal-Mart v. Dukes, demonstrate factually that Rule 23 has been satisfied, adding that "[t]he same standards apply to ascertainability." Id. at 306. Assurances that the problem will later be solved are not enough. He explained the objectives as follows (id. at 307):

> Ascertainability mandates a rigorous approach at the outset because of the key roles it plays as part of a Rule 23(b)(3) class action lawsuit. First, at the commencement of a class action, ascertainability and a clear class definition allow potential class members to identify themselves for purpose of opting out of the class. Second, it ensures that a defendant's rights are protected by the class action mechanism. Third, it ensures that the parties can identify class members in a manner consistent with the efficiencies of a class action.

Even without a need for proof of reliance, then, the class definition presented problems. Only those who could prove they bought the product in question could recover in individual actions. Defendant would have a due process right to challenge that claim, and the class action mechanism should not deprive defendant of the same right with regard to class members. So "[a]scertainability provides due process by requiring that a defendant be able to test the reliability of the evidence submitted to prove class membership." Id. Plaintiff would, therefore, have to demonstrate that any record-keeping method of purchases be reliable and checking to verify administratively

feasible.

Measured by these standards, plaintiff's proposed methods of identifying class members did not suffice. One was to use retailers' records of purchases using the retailers' membership cards, but the court found that the evidence plaintiff proffered did not show that those records would identify class members in this case. Plaintiff also proposed to rely on affidavits from alleged class members to establish that they purchased defendant's challenged product. But plaintiff's proposed auditing method was not specifically described and therefore did not satisfy Rule 23. Because the *Marcus* decision came out only after the district court originally certified the class, the court remanded to give plaintiff to satisfy its ascertainability requirements.

Plaintiff sought rehearing en banc but that was not granted. Judge Ambro, joined by Chief Judge McKee and Judges Rendell and Fuentes, dissented from denial of rehearing en banc, quoting the view of a California district judge that the panel decision "eviscerates low purchase price consumer class actions in the Third Circuit." McCrary v. Elations Co., LLC, 2014 WL 1779243 (C.D. Cal., Jan. 13, 2014). "Rule 23's implied requirement of ascertainability is judicially created" and "is a creature of the common law." Accordingly, Judge Ambro argued, the court "should be flexible with its application, especially in instances where the defendant's actions cause the difficulty." He concluded:

> In this context, I suggest that the Judicial Conference's Committee on Rules of Practice and Procedure look into this matter. Rule 23 explicitly imposes limitations on the availability of class actions. *Marcus* adds another -- that class membership is reasonably capable of being ascertained. If the Committee agrees with that, how easy (or how hard) must the identification be?

Some other courts have seemed much less concerned about precise class definition. Consider Judge Posner's views in Parko v. Shell Oil Co., 739 F.3d 1083, 1084-85 (7th Cir. 2014):

> To require the district judge to determine whether each of the 150 members of the class has sustained an injury -- on the theory that if 140 have not, and so lack standing, and should be dropped from the class, certification should be denied and the 10 remaining plaintiffs be forced to sue (whether jointly or individually) -- would make the class certification process unworkable; the process would require, in this case, 150 trials before the class could be certified. The defendants are thus asking us to put the cart before the horse. How many (if any) of the class members have a valid claim is the issue to be determined *after* the class is certified.

Continuing in somewhat the same vein, consider also his opinion in Arnold Chapman and Paldo Sign & Display Co. v. Wagener Equities, Inc., 747 F.3d 489, 492 (7th Cir. 2014):

> [A] class can be certified without determination of its size, so long as it's reasonable to believe it large enough to make joinder impracticable and thus justify a class action suit. "How many (if any) of the class members have a valid claim is the issue to be determined *after* the class is certified." Parko v. Shell Oil Co., 739 F.3d 1083, 1085 (7th Cir. 2014).

Devising a rule provision that would replace the "implied requirement of ascertainability" and would provide useful guidance on class definition (a prime feature of ascertainability) might prove difficult. One concern might be the "fail safe" class concern. An example is provided by Genenbacher v. Century-Tel Fiber Co., 244 F.R.D. 485 (C.D. Ill. 2007), a proposed class action on behalf of landowners against a fiber optic cable company for trespass in installing cable on their lands. The company had easements to lay cable on some parcels but not on others, and plaintiff's class definition excluded landowners who had granted an easement or otherwise consented to laying the cable. The court rejected this definition:

> If LightCore proves that (1) a particular parcel is subject to a valid easement, or (2) the property owner of a particular parcel consented to LightCore's use of that parcel, then LightCore should be entitled to a judgment in its favor with respect to the owners of that particular parcel. The court, however, could not enter judgment against that particular owner because the owner would no longer fit within the class definition. This type of class definition is called a "fail safe" class because the class definition precludes the possibility of adverse judgment against class members; the class members either win or are not in the class.

For a contrast to *Carrera*, consider Fitzpatrick v. General Mills, Inc., 635 F.3d 1279 (11th Cir. 2011), a suit also brought under the Florida Deceptive and Unfair Trade Practices Act on behalf of purchasers of Yo-Plus yogurt, claiming that ads touting its probiotic ingredients made false claims about the health-giving features of this yogurt. Plaintiff defined the class as "all persons who purchased Yo-Plus in the State of Florida to obtain its claimed digestive health benefit." The court said this definition would not work because of the state-of-mind element, but also said that "if the definition of the class had been in accord with the legal analysis [about the 'reasonable consumer' standard under the Act], we would have readily affirmed," and noted that, in its view, a satisfactory definition

would be "all persons who purchased YoPlus in the State of Florida." Id. at 1283 & n.1. True, this decision did not focus on the problem of identifying those purchasers, which seems to be the heart of the Third Circuit's decision in *Carrera*, but it does seem to suggest that other courts might not reach the same conclusion as the Third Circuit on comparable facts.

For current purposes, in light of the likely difficulty of drafting rule provisions on class definition, the question is whether the problems described warrant making the effort.

* * * * *

The Subcommittee invites suggestions about further topics bearing on Rule 23 that might profitably be added to its list. Note that the materials in the agenda book identify several other issues the Subcommittee has considered in the past. Those issues are surely ripe for further consideration, and any other issues that seem to warrant serious attention could profitably be identified now. At some point, the focus will have to narrow, but we have not yet reached that point.

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TAB 11B

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Notes on Meeting and Conference Call
Rule 23 Subcommittee
Advisory Committee on Civil Rules
May 19, 2014

On May 19, 2014, the Rule 23 Subcommittee held a conference call/meeting. Judge Robert Dow (Chair) and John Barkett participated by phone, and Elizabeth Cabraser, Robert Klonoff, Edward Cooper (Reporter to Advisory Committee) and Richard Marcus (Reporter to Subcommittee) participated from a conference room in Washington, D.C.

Judge Dow circulated an agenda in advance of the meeting listing the following "front burner" topics:

A. Settlement class issues
    1. Settlement approval criteria
    2. *Cy pres* provisions
    3. Settlement certification
    4. Settlement objectors (coordinated with Appellate Rules)
B. Issue classes
C. Notice issues

An initial question was whether all these should be considered front burner matters now. An initial reaction was that they all belong. "There are not many advocates of *Amchem*." And the ALI Aggregate Litigation principles address several of these issues. Indeed, the *cy pres* section in the Principles is the one that has gotten the most activity in the courts. On that subject, another reaction was that *cy pres* can be very useful in cases with small individual losses but large aggregate harms. Another reaction was that the whole subject nonetheless causes nervousness. It would be useful to develop a standard or guidelines on proper use of this power. Another consequence might be to reduce unwarranted objections that settlements involve something like *cy pres* and therefore should be rejected.

The question of appellate review of objections seems worthy of attention. It was noted that the ALI Principles recommended allowing appeals from rejection of a settlement. Of course, that often occurs in conjunction with an application for settlement class certification that would be an appealable order under Rule 23(f), but it might be good to expand that, and ensure that the terms of the settlement could be reviewed as well as the certification decision. See ALI Principles §3.12. It was noted that another problem that can arise is when objectors try to appeal from preliminary approval (or review) of the settlement before notice is sent to the class. This should not work under Rule 23(f).

On issues classes, it was noted that §2.09 of the ALI Principles recommends immediate review of decisions resolving the issue for which the class action was certified. This sort of

treatment interacts with the Rule 23(c) provision added in 2003 requiring that the certification order identify the issues on which certification has been granted. That observation prompted the reaction "This is where we should focus. The Supreme Court has not resolved this problem."

It also prompted the observation that these topics relate to topic II.B -- predominance and superiority. That topic may be about whether to rewrite those provisions of Rule 23(b)(3), but the entire question of what "predominance" means relates to use of issues classes as well. The Seventh Circuit has made a number of helpful decisions about these issues in the last year or two. But the issues are likely to be divisive. Possibly the way to come at the questions is "backwards" -- see how Rule 23(c)(4) can be made to work well and then consider how that should be worked into the overall rule. But a caution on that score was that there may really be an inherent tension with the "predominance" requirement of (b)(3).

Regarding notice, the reality is that we now have a "whole different world" from the way things were in the 1960s and 1970s, when the notice requirement now in Rule 23(c) was added to the rule and interpreted in the *Eisen* case, which is now "out of touch."

The discussion turned to ascertainability, raised in section III.B of the agenda. Giving notice does turn on identifying class members at some point. But often courts are addressing this problem early, which is expensive and may not be useful. At least for purposes of monitoring (as opposed to opt out), it was suggested that notifying "enough" members of the class should suffice, unless notice can easily be provided to all using information in defendant's records.

Another question would be adding a notice requirement for (b)(1) and (b)(2) cases. When that was proposed in 2001, it prompted strong opposition from civil rights groups. Maybe changes in methods of communication would alter that attitude.

Part II of the outline identified other possible topics:

A. Merits at certification stage
B. Predominance and superiority in (b)(3)
C. Monetary relief under (b)(2)
D. Opt-in classes
E. *Wal Mart* and common questions under other FRCPs
F. *Shady Grove* issues

On A, one reaction was that "there's not much a rule could do." But there is a good deal of unresolved uncertainty and tension about how to satisfy the *Hydrogen Peroxide* requirement of proof by a "preponderance" to satisfy the Rule 23 requirements.

How does that relate to proof required for the claim itself? Perhaps that just means proof that there is a class-wide manner of proving the issues raised by the underlying claim. It seemed that this was worth trying to address. It might properly be moved up to the front burner, but there was expressed uncertainty about whether there was a rule-based way to solve these problems.

Another possibility that was mentioned was adopting something like the "probability of success" standard used on motions for a preliminary injunction. Actually, that was what the district court judge in *Eisen* was doing in the 1960s, borrowing an idea from a recent Judge Weinstein decision. Perhaps that idea deserves another look.

Regarding D, support was expressed for continuing to consider the possible utility of such an opt-in approach. The Second Circuit decision rejecting its use did so on the ground that the rule did not authorize this practice. But the courts have much experience with opt-in arrangements in FLSA cases, so perhaps there is a model. This might be some sort of middle ground between certifying an opt-out class and refusing class treatment altogether. It's actually, perhaps, more like the old "spurious" class action, and a species of "invited joinder." The consensus was that this topic was "down the list."

Part III raised other issues:

A. LCJ proposal to amend Rule 23(f) to allow appeals of right from class certification determinations

B. "Ascertainability" issue arising out of Judge Ambro's opinion dissenting from denial of petition for rehearing en banc in *Carrera v. Bayer Corp.*, No. 12-2621 (3d Cir., May 2, 2014)

C. Can the rules address the ubiquitous premature class certification motion filed by plaintiff to prevent the defendant from picking off the named plaintiff under FRCP 68 -- See *Damasco v. Clearwire Corp.*, 662 F.3d 891 (7th Cir. 2011)?

An initial reaction was unfavorable to the automatic appealability idea. It would magnify appellate work and slow down district court proceedings.

Ascertainability, on the other hand, is a "really important issue." Some courts seem to have gone too far on this issue. The problem of class definition is important, but it has morphed into a concern with an overly precise identification of all injured people and nobody else. Perhaps a rule change would improve things; this is really part of class definition, which Rule 23(c) now requires.

At the same time, the "fail safe" class definition problem could perhaps be addressed in the rule. The rule might say that the court need not verify at the outset that every member of the class as defined would have a justiciable claim for relief to satisfy the class definition requirements.

The Rule 68 issue has been a major headache for district judges in the 7th Circuit. It may be, however, that the 7th Circuit view is a minority view. One solution that was proposed was to amend Rule 68 to exclude actions under Rule 23 and 23.1 from its operation. But that rule really only affects allocation of costs of litigation and not mootness. Another approach might be to revisit the decision in 2003 to make settlement approval necessary only for settlement of certified class claims. Before 2003, courts routinely treated cases filed as class actions to be class actions for purposes of Rule 23(e), and perhaps restoring that provision would bolster the argument that they remain viable for the class even if the named plaintiff is offered an individual settlement. The ALI Principles urged restoring that feature of Rule 23. More generally, it does not seem that Rule 68 is an essential ingredient of the mootness argument; some cases involve settlement offers not made as Rule 68 offers of judgment. A bottom line reaction was that a rule change would be desirable to stop this attitude from spreading.

Another topic that arose briefly was whether it would be desirable to suggest to the FJC that it consider developing a Manual for Complex Litigation (5th). The fourth edition was prepared somewhat in tandem with the consideration of what became the 2003 amendments to the rule. Maybe if we go forward something like that could happen again.

Discussion shifted to the best method of getting better informed about the issues and which seem most pressing. There is definitely a need for more input, both to identify additional issues and evaluate the ones already identified, and to assess what looks like a promising focus for rule change. There is a major conference at NYU in the fall, and may be other such events. It would be good to try to capitalize on these opportunities to learn from experienced lawyers.

But eventually the Subcommittee should expect to hold its own mini-conference. There are many talented lawyers who could assist in such an event. The ALI Aggregate Litigation Advisors and Consultative Group could be one starting point in developing a list. It might be good to try to organize such an event by early next year. It might be premature to have draft rule texts at that time; this could be more in the nature of issue identification and outreach. But much will depend on various flexibility factors. It may be that holding two mini-conferences would be ideal, the first to complete the issue outreach stage and the second to focus on specific and concrete possible rule

change ideas. But the feasibility of such an approach is not clear at present.

It was resolved the continue this discussion during a conference call in June or July, when perhaps more could be known about the flexibility about mini-conferences.

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Notes of meeting
Rule 23 Subcommittee
Jan. 9, 2014
Phoenix, Az.

On Jan. 9, 2014, the Rule 23 Subcommittee of the Advisory Committee on Civil Rules met briefly in Phoenix, Az. Participating were Judge Robert Dow (Chair, Rule 23 Subcommittee), Judge David Campbell (Chair, Advisory Committee), Elizabeth Cabraser, Dean Robert Klonoff, Prof. Edward Cooper (Reporter, Advisory Committee), and Prof. Richard Marcus (Reporter, Rule 23 Subcommittee).

Judge Dow introduced the purpose of the meeting as considering both the topics that might most appropriately be the initial focus of the Subcommittee's work and the timing and manner of proceeding of the Subcommittee once it begins its work.

Topics for focus

Discussion focused on the general nature of topics for initial study. Ideally, the topics should be those that are of most importance and also seem suitable for a potential solution by rule change. The starting point is the list of "front burner" and "back burner" topics developed by the Subcommittee in early 2012. Since then, the Supreme Court has made further decisions, and there has been more experience in dealing with these topics. This meeting is an initial opportunity to begin possible further screening of topics; expanding the list must also remain in view. Eventually it will be necessary to move beyond this group, and beyond the Advisory Committee, in screening and augmenting the topic list. This will accordingly be an ongoing task.

Having reviewed the 2012 list of potential factors, the Subcommittee members identified several individual factors or clusters of factors as seeming to hold the most promise, and offered some reactions about others:

(1) Settlement classes: Ever since the Supreme Court decided the Amchem case, there has been a concern with whether the question of certification for purposes of settlement should be addressed explicitly in the rule. The decision in 1997 was to shelve direct attention in the rules in order to determine whether Amchem was producing major effects. Meanwhile, the problem of settlement approval come to the fore. Thus, this topic seems to have two dimensions:

(a) Settlement approval criteria: There seem to be a wide variety of multifactor tests emerging in different circuits about evaluating proposed settlements. The ALI Aggregate Litigation project also addressed this question. It may be that something approaching consensus could emerge about this set of issues. One aspect might be to address the role of cy pres provisions. The ALI approach to that topic has gotten a great deal of attention

in the courts.

(b) Settlement certification: In 1996, the Committee proposed the addition of a new Rule 23(b)(4) to provide rule-based direction about certification for purposes of settlement only. That proposal partly responded to Third Circuit decisions saying that certification for settlement must be evaluated in exactly the same way as certification for litigation. The Supreme Court's Amchem decision definitely said that settlement certification was different, but also emphasized that a Rule 23(e) analysis of settlement fairness is no substitute for application also of the 23(a) and (b) factors at the settlement stage. It may therefore be that the time has come for revisiting the question whether a separate provision for settlement certification could profitably be added to the rule, both to provide guidance on handling such issues and to make clear that settlement certification is a different activity.

The 1996 Rule 23(b)(4) proposal noted that, whatever its modification of Rule 23(b), all requirements of Rule 23(a) must be satisfied before settlement certification. That conclusion might be revisited in light of recent treatment of Rule 23(a)(2) commonality, particularly in Wal-Mart v. Dukes.

(2) Issue classes: The possible tension between the predominance requirement of Rule 23(b)(3) and the issue class possibility in Rule 23(c)(4) has long perplexed some. Perhaps they can be reconciled, although it seems odd to consider that plaintiff lawyers would want to have half a loaf (issue certification) if they could have a full loaf. Perhaps the reconciliation is that 23(c)(4) is only a management technique for cases that separately qualify for certification pursuant to 23(a) and 23(b). It is not clear that the Committee worked through all the issues when the rule was revised in 1966.

It is clearer that issue classes have been employed with some frequency in recent years. In the Seventh Circuit, for example, there have been a number of cases in which issue class techniques have been employed. (Mullen v. Treasure Chest Casino, 186 F.3d 620 (7th Cir. 1999), was identified as one example of a court regarding (b)(3) and (c)(4) as working hand in hand.)

One possible integration suggested was that courts might, under (c)(4), have discretion to choose between retaining resolution of all claims of all class members or resolving only certain issues, leaving the remainder for resolution in further proceedings, possibly in other courts. A reaction was that the handling of the Florida state court resolution of certain tobacco issues in Engle fits that mold; the federal courts have gradually moved toward recognizing that issue preclusion from the state court class action resolves issues in subsequent federal court individual litigations.

(3) The Hydrogen Peroxide issue: There was also discussion of whether it would be useful now to address the problem of merits decisions regarding certification. That was extensively evaluated in the Third Circuit's Hydrogen Peroxide case, and received mention in Wal-Mart v. Dukes. A feature of this issue is the handling of Daubert challenges to expert opinions offered to support certification; should courts do a "full Daubert" or "partial Daubert" analysis at the class certification stage, or should that be a "Daubert free" zone? Is certification a time for the judge to decide which expert opinions look more forceful, and certify only if the stronger ones support certification? The Supreme Court initially seemed to want to address this issue in its Comcast case, but eventually concluded that the issue was not properly presented.

All agreed that this cluster of issues is important, but there was serious concern that undertaking rulemaking on the subject now would be very ambitious. To some extent, the courts' focus on these matters connects to provisions in the rule, including some from the 2003 amendment package. But the retreat from the "no merits consideration" view attributed to the Supreme Court's 1974 Eisen decision really began with the Court's 1982 Falcon decision and did not depend on rule provisions. This issue does not seem as promising as the first two clusters of issues.

(4) Revisiting notice: The basic holding of Eisen in 1974 was that individual mailed notice to all class members who can be identified with reasonable effort is required by Rule 23. The Court did not reach the further question whether due process requires such notice. Much has happened in the 40 years since Eisen, particularly regarding means of communication. It may be almost quaint in the era of smartphones to say that only first class mail will do. The "best notice practicable" now is probably something very different from 1974. So the question of notice in (b)(3) actions might be a desirable topic to revisit, and seems ripe for action now.

A related concern is notice in (b)(1) and (b)(2) actions. In 2001, the Committee published a proposed requirement that some effort at notice be required for those cases. It certainly did not call for individual mailed notice, but nonetheless encountered severe resistance on grounds of cost and scaring away lawyers who might otherwise take such cases. Perhaps the same technological changes noted above would also support revisiting this question. On that score, it was noted that giving notice need not lead to a right to opt out (one goal of the (b)(3) notice).

There may be resistance based on the "digital divide" between those with access to electronic devices and those who don't have that access, but the minority without access is

getting rather small. And for those outside the mainstream it is not clear that first class mail is better. For the "homeless living under the bridge," first class mail may not be useful either, but some improvised method might be found that would be effective though not spelled out in Rule 23.

(5) Reconsidering the requirements of predominance and superiority in (b)(3): Another possible focus would be on whether it is necessary to require both predominance and superiority in (b)(3). For example, could a superiority requirement alone suffice, particularly since (a)(2) already requires a common question and Wal-Mart v. Dukes may have strengthened that requirement? Alternatively, if predominance is established, is there ever need to hesitate about superiority? If so, should the recommended solution be the (c)(4) option? A caution was injected that retreating from the dual requirements could seem unduly aggressive. Moreover, the factors in (b)(3) supposedly relate to both inquiries. Perhaps research would show that courts often find one satisfied but not the other, but it would be worth asking whether the removal of one would produce advantages.

(6) Rule 23(b)(2) and monetary relief: Wal-Mart v. Dukes says that monetary relief can be afforded in (b)(2) class actions only if it is "incidental," and that Title VII back pay is "individual" and not "incidental." One possibility would be to have a (b)(2) class action with regard to injunctive or declaratory relief and allow opting out for monetary relief. Alternatively, one might regard this (perhaps somewhat on the model of the Engle litigation in Florida) of establishing certain issues as a predicate to further litigation in other courts seeking monetary relief. This might tie in with the (c)(4) questions mentioned above.

(7) Opt-in classes: The Second Circuit held that the current rule does not authorize an opt-in class. FLSA cases, on the other hand, rely on exactly that sort of method (called a "collective action") because the statute prescribes it. Rule 24 intervention might be another way to engineer such a solution. Indeed, after opting in has happened in an FLSA action, one view might be that those who opted in are intervenors if the court later decides the "decertify" the collective action. But there does not seem to be much need for a rule change however; except for the one case in which the Second Circuit scotched the district judge's plan, there seem to be no other examples of problems of this sort.

(8) Effect of Wal-Mart v. Dukes on handling of common questions under other rules: Given that this is the Rule 23 Subcommittee, it may be that consideration of other rules is somewhat beyond its purview. But it is worth noting that Rules 20, 24, and 42 all make important decisions turn on whether there

are "common questions," as does 28 U.S.C. § 1407. Does the Supreme Court's decision have ramifications for those topics? For example, do parties argue after JPML transfer that the common question issue has been resolved for Rule 23(a)(2) purposes? The initial reaction was that there is little indication of such consequences, and that this set of problems does not seem pressing.

(9) "Fixing" Shady Grove: The Court's opinion in Shady Grove said that courts have no discretion on whether to grant class certification in cases in which the rule's requirements are satisfied. The decision was based entirely on the wording of the rule. Changing the wording would therefore alter the result. Is that worth pursuing? An initial reaction was that the criteria themselves offer sufficient latitude for district courts so that they have latitude to make suitable decisions. Perhaps the main effect is on 23(f) appeals; if appellate courts regard these matters as non-discretionary they may feel they have more latitude to scrutinize district courts' resolution of Rule 23 issues. It might be objected that a rule change could erode the value of 23(f) review.

Logistics and timing for Subcommittee activities

The free-ranging discussion summarized above identified a number of issues and offered some initial reactions to some of them. The question arose about where to go next. The full Committee is likely to be fully occupied reacting to the public commentary on the current amendment package during the April meeting. Trying to get something done about Rule 23 during this time is too ambitious.

At the same time, valuable further initial work can be done to specify topics for further discussion. Accordingly, Subcommittee members can reflect on the discussion in Phoenix and consider which issues seem most worthy. An initial reaction is that the first three identified above -- settlement classes, settlement evaluation, and issues classes (issues 1(a), 1(b), and 2) seem more promising, probably along with notice issues (issue 4), and that some of the others are less so.

Tentatively the Subcommittee could point toward touching base again in Dallas at the time of the final hearing on the current amendment package. In the mean time, members are invited to react to the list above either by proposing additions or indicating that some don't seem to be promising topics for proceeding presently.

Then after April the Subcommittee should probably expect to be in a position to make a report to the full Committee at the Fall meeting on how best to proceed. One issue is when and

whether to hold a mini-conference to gather views on selecting and focusing issues for further work.

TAB 11C

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RULE 23 ISSUES

During the Nov., 2011, Advisory Committee meeting, there was an initial discussion of possible issues for consideration concerning class-action practice. Since then, a Rule 23 Subcommittee has been formed and has begun work both to identify possible issues for further analysis and to perform triage on issues so identified. The goal of the discussion at the full Committee meeting is to carry that process further.

The purpose of this memorandum is to introduce the questions that have emerged so far. During the March 2012 meeting, the Subcommittee hopes to receive the reactions of the full Committee to this list of possible issues, both regarding additional questions that might be added to the list and the relative importance and appropriateness of focusing on various issues.

After receiving the Committee's feedback, the Subcommittee expects to reconvene to consider which issues seem most suitable for action. At some point, it is likely it will want to hold at least one mini-conference involving experienced judges and practitioners to shed additional light on these questions. The reality is that Rule 23 questions raise both important and controversial issues; obtaining broad input will likely pay dividends if the Committee eventually proposes rule amendments. Making any such proposals will depend on doing much more work than has been done to date.

For background, several other items should be included in the agenda book:

Notes on Jan. 27, 2012, conference call of the Discovery Subcommittee

Notes on the Jan. 5, 2012, class action panel during the Standing Committee meeting

Jan. 16, 2012, memo from Rick Marcus to the Rule 23 Subcommittee on possible amendment ideas contained in the ALI Aggregate Litigation Principles -- This analysis of the ALI Principles contains substantial detail about provisions in those Principles that might be mined for possible rule provisions. The Principles were drafted by a body comprised of a host of prominent people from the rules process, including two members of the Rule 23 Subcommittee. Below, references to specific sections of the Principles will point to the places where they address the ideas initially identified as possible subjects of Rule 23 reform. The Principles memo is organized as a section-by-section review of the ALI work product, and should be consulted for more information about the pertinent sections of the Principles.

Edited versions of several cases that bear on these

questions:

Wal-Mart Stores v. Dukes, 131 S.Ct. 2541 (2011) (excerpts on both the Rule 23(a)(2) common questions issue and the 23(b)(2) issue)

Amchem Products, Inc. v. Windsor, 521 U.S. 591 (1997)

In re Hydrogen Peroxide Antitrust Lit., 552 F.3d 303 (3d Cir. 2008)

American Honda Motor Co. v. Allen, 600 F.3d 813 (7th Cir. 2010)

Sullivan v. DB Investments, Inc., ___ F.3d ___ (3d Cir., Dec. 20, 2011) (en banc) (referred to as DeBeers)

The Rule 23 Subcommittee has attempted so far to try to identify the issues that seem most significant and also susceptible to improvement through rule change. Whatever the significance of the Supreme Court's evolving jurisprudence on applying the Federal Arbitration Act to require arbitration and also preclude class-action arbitration, for example, that concern seems to be about a statute and not a result of anything in Rule 23.

Background sketch on evolution of Rule 23

For class action mavens, the evolution of Rule 23 may be as familiar as the back of the hand, but for others a bit of background may prove helpful in approaching the issues now before the Committee.

The original Civil Rules included class-action provisions in Rule 23, but they were drafted in a very different way from the current rule. The original rule distinguished three types of class actions in Rule 23(b) -- "true," "hybrid," and "spurious" class actions. The third category -- "spurious" class actions -- was an opt-in arrangement; class members were included only if they affirmatively sought to be included.

For a variety of reasons the "true" and "hybrid" categories presented courts with great difficulty. As the 1966 Committee Note put it, "the basis of the Rule 23 classification proved obscure and uncertain." And the "spurious" class actions did not seem particularly effectual, although some courts began to allow class members to defer deciding whether to join until the outcome was known -- leading to the notion of "one way intervention." The concern was that class members could hang back and decide whether to join only after the court decided the merits against the class opponent. If the class opponent won, the class members would remain on the sidelines and wait to sue another day. If

their side won, they would join after decision of the merits -- the "one-way" intervention -- and share in the spoils of victory. Particularly in an era when nonmutual collateral estoppel was not permitted, this possibility was unnerving to many.

In the early 1960s, the Committee reexamined the joinder provisions -- Rules 13, 14, 19, 20, 23, and 24 -- and revised them along more functional lines. Although that revision of other joinder rules has sometimes presented courts with challenging problems of application, it was the revision of Rule 23 that generated the most controversy.

The Rule 23 revision in 1966 was designed to do several things. One was to reformulate Rule 23(b) to be more functional, and in keeping with the orientation of the revisions to the other joinder rules. Thus, rather than embracing categorical notions like distinguishing between "joint" rights (for the "true" class action) and "several" rights to specific property (as in the "hybrid" class action), Rule 23(b)(1) serves a purpose akin to the "required party" provisions of Rule 19(a) -- to permit a class action in some instances when proceeding individually as to some members of the class appears likely to affect the interests of the others or to put the class opponent at a risk of incompatible or inconsistent judicial directives.

Rule 23(b)(2) might have been encompassed within 23(b)(1), but it was thought necessary to make clear that class actions for injunctive relief were permitted, a matter of considerable consequence in connection with civil rights discrimination suits. The rule therefore says that a class action is available when:

> the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the classes as a whole.

The Committee Note explained that "[t]he subdivision does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages." But the Note also included the following illustration:

> [A]n action looking to specific or declaratory relief could be brought by a numerous class of purchasers, say retailers of a given description, against a seller alleged to have undertaken to sell to that class at prices higher than those set for other purchasers, say retailers of another description, when the applicable law forbids such a pricing differential.

It would seem that such a case would not "predominantly" seek money damages relief, but might include monetary relief to reimburse class members, determined on the basis of past

overcharges, in addition to enjoining future price discrimination.

Rule 23(b)(3) broke significantly with the "spurious" class action of the original rule. As the Supreme Court put it in Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999), in adopting (b)(3) the Committee was "forward-looking," and "anticipating innovations." One major goal was to make the resulting judgment binding on all class members. This binding effect was accomplished in part by requiring that the decision to certify the class be made at the outset, and that class members then be given an opportunity to opt out, failing which they would be bound by the outcome in the case. "One-way intervention" (which had sometimes been permitted before 1966, enabling class members to defer decision whether to join the class until after the court decided the merits against the class opponent) would thus be stymied. This directive led in part to the notion that discovery about the merits should be postponed until after class certification was resolved, in part because the 1966 version directed that certification had to be decided "as soon as practicable."

Rule 23(b)(3) used a flexible standard to determine whether certification should be granted. The court could certify the class only if it found that common questions predominated and that the class action would be superior to other available methods for adjudicating the controversy.

The 1966 amendments were followed by a somewhat rollercoaster experience with class-certification decisions, particularly in (b)(3) cases. Until the mid-1970s, it was said, courts frequently certified classes with rather limited scrutiny whether they really satisfied the rule's requirements. From the late 1970s to the late 1980s, judicial receptiveness to class certification waned, and by the late 1980s a New York Times story reported (with a quotation from the Committee's Reporter at the time) that the class action had its day in the sun and was passing from the scene.

The class action did not pass from the scene; instead, it has become extremely important in a variety of legal areas, including mass torts (although mass tort class actions seem to have receded), securities fraud, consumer claims and wage and hour claims. It has also prompted legislation on two occasions -- the Private Securities Litigation Reform Act in 1995 and the Class Action Fairness Act in 2005.

After 1966, the Committee did not return to Rule 23 for a quarter century. In 1991, however, the Judicial Conference (in part prompted by a study of the impact of asbestos litigation on the federal courts) urged the Committee to reexamine Rule 23 and consider whether it should be changed. Initially, considerable

work focused on whether Rule 23(b) should be rewritten entirely into functional terms, abandoning the categorical approach of the 1966 rule and emphasizing instead the discretion of the district court to determine whether class certification should be granted based on a balance of various factors. Eventually, that path was not followed.

After five years work, the Committee published a set of proposed amendments in 1996. The preliminary draft of rule changes proposed several revisions to Rule 23(b)(3) (new matter underlined, matter to be removed overstricken):

> (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:
>
> > (A) the practical ability of individual class members to pursue their claims without class certification;
> >
> > (B~~A~~) ~~the interest of members of the class in individually controlling the prosecution or defense of~~ class members' interests in maintaining or defending separate actions;
> >
> > (C~~B~~) the extent, ~~and~~ nature, and maturity of any related litigation ~~concerning the controversy already commenced by or against~~ involving class members ~~of the class~~;
> >
> > (D~~C~~) the desirability or undesirability of concentrating the litigation of the claims in the particular forum;
> >
> > (E~~D~~) the difficulties likely to be encountered in the management of a class action; and
> >
> > (F) whether the probable relief to individual class members justifieS the costs and burdens of class litigation.

The preliminary draft amendments also introduced a new category in Rule 23(b). It was prompted in part by Third Circuit decisions holding that settlement classes could be certified only in circumstances that would support litigation class certification. Those decisions threatened to end a practice that many courts and litigants had found desirable, certification for purposes of settlement in cases that might not qualify for full litigation certification. Proposed (b)(4) was as follows:

(4) the parties to a settlement request certification under subdivision (b)(3) for purposes of settlement, even though the requirements of subdivision (b)(3) might not be met for purposes of trial.

Finally, the 1996 proposed amendments added Rule 23(f), to provide for interlocutory review of class-certification decisions at the discretion of the court of appeals.

The 1996 proposals generated a great deal of interest and controversy. Eventually, the Rules Committees Office published the resulting materials in a four-volume set. Meanwhile, the Supreme Court granted cert. in Amchem and, in mid-1997, rejected the Third Circuit's rule that settlement certification could only be permitted when litigation certification would also be justified. After considering the public comments, and making an initial review of the Amchem decision, the Committee decided to proceed with only the Rule 23(f) proposal for interlocutory appellate review. That amendment became effective on Dec. 1, 1998.

In 2000, the Committee returned to Rule 23. This time, it did not focus on the standards for certification but rather the procedure for handling class actions. In 2001, it published proposed amendments that changed the timing provisions for certification decisions under Rule 23(c) to "[a]t an early practicable time," removed prior authorization for "conditional" class certification, and directed the court to "define the class and the class claims, issues, or defenses" if it certified the class. Rule 23(e) was substantially expanded regarding review of proposed settlements. And Rules 23(g) and (h), regarding appointment of class counsel and award of attorney's fees, were added.

Some additional mention of CAFA is also in order, even though it did not emerge from the rules process. Bills like CAFA had been introduced several times in Congress, and had been opposed by the Judicial Conference, in part at the urging of the Conference's Federal-State Jurisdiction Committee. As the 2003 Rule 23 amendments were proceeding through the rules process, the attitude of the Judicial Conference shifted after the rules committees suggested that some expansion of federal-court jurisdiction over state-law class actions could fit with the evolution of Rule 23. For a while, it seemed that CAFA and the 2003 amendments to Rule 23 might proceed in tandem. Thus, CAFA included a provision accelerating the effective date of those amendments should the legislation go into effect before Dec. 1, 2003, the effective date for the rule amendments. As it happened, CAFA did not go into effect until Feb. 18, 2005, but due to the sensitivity of the topic in Congress amendments were not allowed, even to remove moot provisions like the one about accelerating the effective date of the 2003 amendments. That

provision remained in CAFA when it was finally signed into law in 2005.

The point of remembering CAFA while focusing on Rule 23 is to appreciate that the 2003 amendments to the rule adopted provisions that Congress may have regarded as valuable tools for handling the multistate class actions the legislation was designed to move to federal court. CAFA itself included provisions bearing on settlement approval like special provisions for "coupon" settlements (28 U.S.C. § 1712) and notice to federal and state officials regarding proposed settlements, assuring those officials time to decide whether to object on behalf of their citizens. (28 U.S.C. § 1715) CAFA can be seen as designed to benefit class members while also guarding against perceived abuse of the class-action device, general goals consonant with the 2003 amendments, and possibly goals that would justify consideration of further changes to the rule.

This is the rulemaking background for the current consideration of Rule 23; knowing what has been proposed in the past may be useful as we consider what might be proposed in the future.

"Front burner" issues

The following list results from an initial cull of a large variety of possible issues, and builds on the brief Rule 23 discursion during the Committee's Nov. 2011 meeting. Besides identifying these issues, the memorandum will try to introduce them briefly, sometimes tying the current issues to the history sketched above. This does not presume to rank these issues, but does convey the initial impression that these issues seem more weighty than the "back burner" issues included in the following section. The discussion refers frequently to the ALI Aggregate Litigation Principles; more details about those provisions is included in the memo about them that should be in the agenda book.

Besides discussing the specific issues listed, a question is whether they are properly classified as "front burner" matters. Beyond that, it would be most helpful to know if Committee members feel that other issues not yet identified by the Subcommittee should be included on its list of possible topics. On that subject also, the memo on the ALI Aggregate Litigation Principles may be a useful resource, as it contains a wealth of ideas about potential improvements of class-action practice.

Settlement class certification

In 1996, the Third Circuit decisions noted above made it seem that settlement class certification might pass from the scene. In proposing the adoption of Rule 23(b)(4) as then

proposed, the Committee recognized the wide adoption of settlement classes. The Committee Note gave voice to some of the reasons for permitting that to continue, as well as limitations contemplated for the new (b)(4):

> As with all parts of subdivision (b), all of the prerequisites of subdivision (a) must be satisfied to support certification of a (b)(4) settlement class. In addition, the predominance and superiority requirements of subdivision (b)(3) must be satisfied. Subdivision (b)(4) serves only to make it clear that implementation of the factors that control certification of a (b)(3) class is affected by the many differences between settlement and litigation of class claims or defenses. Choice-of-law difficulties, for example, may force certification of many subclasses, or even defeat any class certification, if claims are to be litigated. Settlement can be reached, however, on terms that surmount such difficulties. Many other elements are affected as well. A single court may be able to manage settlement when litigation would require resort to many courts. And, perhaps most important, settlement may prove far superior to litigation in devising comprehensive solutions to large-scale problems that defy ready disposition by traditional adversary litigation. Important benefits may be provided for those who, knowing of the class settlement and the opportunity to opt out, prefer to participate in the class judgment and avoid the costs of individual litigation.

The Supreme Court's 1997 Amchem decision (excerpted in the agenda book) recognized that "settlement is relevant to class certification." It said that Rule 23(e) "was designed to function as an additional requirement, not as a superseding direction" taking the place of the Rule 23(a) and (b) requirements. In the asbestos personal injury case before it, it held that "[t]he benefits asbestos-exposed persons might gain from the establishment of a grand-scale compensation scheme is a matter fit for legislative consideration," but that the predominance requirement precluded class certification because it "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." The Court added that "it is not the mission of Rule 23(e) to assure the class cohesion that legitimizes representative action in the first place. If a common interest in a fair compromise could satisfy the predominance requirement of Rule 23(b)(3), that vital prescription would be stripped of any meaning in the settlement context."

After the Amchem decision was rendered, the Committee determined that settlement class certification might operate effectively under it, and that rather than proceeding with something like proposed (b)(4) it should monitor developments.

Thereafter, with the assistance of the Federal Judicial Center, it received reports indicating that settlement class certification had continued to be available in some circumstances. There have been reports, however, that in some instances settlement class certification is not a workable option, and that "work-arounds" have been devised. Use of MDL procedures, in particular, has gained popularity as a way of confecting settlement regimes that might instead of have been implemented through a class action. Some judges, indeed, have said that they regarded these situations as "quasi class actions" and borrowed class-action principles in handling them, particularly in relation to attorney's fees collected by plaintiff lawyers, and also in regard to oversight of settlement claims administration to ensure transparency and fair treatment of claimants.

§ 3.06 of the ALI Principles proposes a series of substitute criteria for approval of a settlement class, in place of the criteria for certifying a litigation class, and it might provide a starting point for drafting a settlement-class provision. The goal of these provisions is to focus attention on adequacy of representation and fair treatment of class members, moving the court's attention away from a hypothetical trial scenario. Also possibly of interest is § 3.12, which proposes immediate appellate review of a decision rejecting a proposed class-action settlement. Whether rule changes are needed to achieve this objective is not clear. It may be that Rule 23(f) would authorize such review to the extent the decision refusing to approve the proposed settlement also rejects class certification. It could be that review of the certification decision would be entwined with the settlement review itself so that the current rule is sufficient.

For the present, the question is whether revisiting the settlement class question would be a useful topic for the Subcommittee to pursue. If so, the 1996 experience with (b)(4) would certainly be a valuable piece of background, but it is not necessarily the only, or perhaps the best, model for dealing with these issues. At least some seem to think it would be useful to reconsider the Supreme Court's attitude that Rule 23(e)'s fairness review is no substitute for full application of Rule 23(a) and (b) analysis of the cohesiveness of the class. On that score, it might be noted that Rule 23(e) was significantly strengthened in the 2003 amendments, and also that settlement review is affected by some provisions of CAFA, particularly the requirement of notice to state attorneys general or comparable state authorities. At the same time, there may be an issue of whether a rule can itself become a device for implementing a "grand-scale compensation scheme," desirable as such a scheme might be from some perspectives. And the question whether nationwide solutions to nationwide problems should be preferred to less ambitious solutions may also prove important.

Class certification and merits scrutiny

The 1966 version of Rule 23 said that certification should be resolved "as soon as practicable." Coupled with the aversion to "one-way intervention," that directive led in some courts to the view that in proposed (b)(3) actions no "merits" decisions could be made until certification was resolved and class members had made their opt-out decisions. Some even refused to consider Rule 12(b)(6) motions before certification, and more would not entertain summary-judgment motions. The Supreme Court's decision in Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974), was read by many courts to forbid any consideration of the merits in connection with class certification. Routinely, courts would insist on postponing "merits" discovery until after certification was resolved. Altogether, these developments tended to expedite but simplify the certification decision, although there was a possibility that once "merits" discovery had been done the certification decision would have to be revisited.

That early resistance to considering the merits before certification weakened over time. In 1982, the Supreme Court emphasized in General Telephone Co. of the Southwest v. Falcon, 457 U.S. 147 (1982), that courts should do a "rigorous" scrutiny of the likely proofs in deciding whether to certify classes. In Wal-Mart Stores, Inc. v. Dukes, 131 S.Ct. 2541 (2011), the Court confirmed the need to address the merits in some cases (id. at 2551-52):

> Rule 23 does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with the Rule -- that is, he must be prepared to prove that there are in fact sufficiently numerous parties, common questions of law or fact, etc. We recognized in *Falcon* that "sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question," 457 U.S., at 160, and that certification is proper only if "the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied," Frequently that "rigorous analysis" will entail some overlap with the merits of the plaintiff's underlying claim. That cannot be helped. "'[T]he class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action.'" *Falcon* at 160.

The lower courts had already focused on the need to do such scrutiny before the Supreme Court spoke. A leading example is Chief Judge Scirica's opinion in In re Hydrogen Peroxide Antitrust Lit., 552 F.3d 305 (3d Cir. 2008), which reversed class certification granted by the district court in reliance on the opinion of plaintiffs' expert witness. An excerpt from this

decision is included in these agenda materials.

The district judge in Hydrogen Peroxide had determined that the testimony of plaintiffs' expert witness would be admissible under Daubert, but refused to weigh the opinion of plaintiffs' expert against the opposing opinion of defendant's expert. This failure led to reversal (id. at 323):

> Expert opinion with respect to class certification, like any matter relevant to a Rule 23 requirement, calls for rigorous analysis. It follows that opinion testimony should not be uncritically accepted as establishing a Rule 23 requirement merely because the court holds the testimony should not be excluded, under Daubert or for other reasons. Under Rule 23 the district court must be "satisfied" or "persuaded' that each requirement is met before certifying a class. Like any evidence, admissible expert opinion may persuade its audience, or it may not. * * * Weighing conflicting expert testimony at the certification stage is not only permissible; it may be integral to the rigorous analysis Rule 23 demands.

More generally, the Hydrogen Peroxide court directed that (id. at 320):

> Class certification requires a finding that each of the requirements of Rule 23 had been met. Factual determinations necessary to make Rule 23 findings must be made by a preponderance of the evidence. In other words, to certify a class the district court must find that the evidence more likely than not establishes each fact necessary to meet the requirements of Rule 23.

It cautioned, however, that "[a] court's determination that an expert's opinion is persuasive or unpersuasive on a Rule 23 requirement does not preclude a different view at the merits stage of the case."

Hydrogen Peroxide relied in significant part on the 2003 amendments in reaching its conclusions. It appears that various circuits have at least somewhat different attitudes toward the issues addressed in that case. See, e.g., Ellis v. Costco Wholesale Corp., 657 F.3d 970, 982-93 (9th Cir. 2011) ("the district court seems to have confused the Daubert standard it correctly applied to Costco's motion to strike with the 'rigorous analysis' standard to be applied when analyzing commonality. Instead of judging the persuasiveness of the evidence presented, the district court seemed to end its analysis of the plaintiffs' evidence after determining that such evidence was merely admissible.")

The need to support findings regarding the Rule 23 criteria

-- particularly predominance -- tends to front-load cases. With regard to expert testimony, it may require that parties prepare their experts almost as fully at this point as for trial. Relatedly, it may in effect therefore require that the whole expert-preparation effort (and related discovery and disclosure) occur early in the case even though Rule 26(a)(2) seems to contemplate that they will occur only after other discovery is done. It is not presently clear what rule amendments might be considered to respond to these concerns, or whether any should be considered. But it is clear that the collection of concerns summarized above has drawn much attention and generated much concern.

Issue classes

Since 1966, Rule 23(c)(4) has existed in uneasy proximity to Rule 23(b)(3). The latter, of course, permits certification only if the court finds that common issues "predominate." That can mean that, even though there are important common issues, the individual issues predominate and certification is not permitted. Rule 23(c)(4) says that "[w]hen appropriate, an action may be brought or maintained as a class action with respect to particular issues." Is Rule 23(c)(4) treatment only possible when the action also satisfies Rule 23(b)(3)'s predominance requirement? Should the court contemplating use of Rule 23(c)(4) focus only on the issues on which it intends to certify under (c)(4) in determining whether there is predominance under (b)(3)? If that's so, is use of (c)(4) a method of undermining the predominance requirement by permitting the court to disregard all issues other than those issues to which it intends to limit certification?

The 1966 Committee Note did not provide extensive guidance. On this subject, it said, in its entirety:

> This provision recognizes that an action may be maintained as a class action as to particular issues only. For example, in a fraud or similar case, the action may retain its "class" character only through the adjudication of liability to the class; the members of the class may thereafter be required to come in individually and prove the amounts of their respective claims.

The lower courts have divided on how these questions are to be resolved. The Fifth Circuit declared in Castano v. The American Tobacco Co., 84 F.3d 734, 745-46 n.21 (5th Cir. 1996):

> A district court cannot manufacture predominance through the nimble use of subdivision (c)(4). The proper interpretation of the interaction between subdivisions (b)(3) and (c)(4) is that a cause of action, as a whole, must satisfy the predominance requirement of (b)(3) and that (c)(4) is a

housekeeping rule that allows courts to sever the common issues for a class trial.

The Second Circuit has rejected the Fifth Circuit reading, and held that "district courts may employ Rule 23(c)(4) * * * to certify a class on a designated issue regardless of whether the claim as a whole satisfies the predominance test." In re Nassau County Strip Search Cases, 461 F.3d 219, 230 (2d Cir. 2006). Other courts of appeals have reached other conclusions.

The existence of this divergence among the courts of appeals is one reason for focusing on this rule. Another is that (c)(4) could introduce desirable flexibility into the certification decision in some cases, perhaps simplifying the task described in the prior section above. Focusing on (c)(4) does not ensure that there will be a good resolution of its seeming tension with the predominance requirement.

The ALI Principles favor use of issues classes. See § 2.08. They also propose, in § 2.09, that there be immediate appellate review of the court's resolution of the common issue.

In thinking about these issues, it may be useful to separate two somewhat discrete topics. First, one might focus on realizing the potential of Rule 23(c)(4) to advance the resolution of complex litigation by enabling binding determination of significant common questions, possibly without regard to whether other issues pertinent to the claims of individual class members are also resolved within the class proceeding. Facilitating such resolution might emphasize the functional utility of issues certification by ensuring that the collective litigation results are binding on individual litigants. One means of doing so might be to provide for immediate appellate review of the decision of those common issues.

Second, one could focus on unraveling the relationship between (b)(3) and (c)(4), which have coexisted in the rule since 1966. One view might be that (c)(4) can only be used if (b)(3) predominance is satisfied, which might be said to mean that (b)(3) "predominates" over (c)(4) within the rule. Another view might be to calibrate the (b)(3) predominance requirement so as to delineate the respective function of these two provisions in Rule 23. As noted above, it is not clear that this relationship received close scrutiny in the drafting of the 1966 amendments, and it may now be time for such attention.

Criteria for settlement review

Until 2003, Rule 23(e) commanded that no class action be dismissed unless the court so ordered, but provided no guidance about how the court was to decide whether to permit the

dismissal. More specifically, it provided no guidance about the standard a court should use in deciding whether to approve a proposed settlement. The courts filled this gap by developing the standard that settlements could be approved only if fair, reasonable, and adequate. They also developed a common procedure for settlement review -- initial inspection by the court before notice of the settlement was sent to the class, a time when the district judge could determine that it was flawed and, as a consequence, notice should not be given. If the judge did not disapprove the proposed settlement, notice could be given and class members could object. At least some lawyers gained reputations for representing objectors frequently; this recurrent activity received baleful attention from others in the class-action bar.

The 2003 amendments strengthened the rule in the settlement context. Not only did they adopt the standard that had emerged from the cases (Rule 23(e)(2)), they also said that decision should come "after a hearing." Rule 23(e)(3) requires the parties to the proposed settlement to file a statement identifying any side agreements made in connection with the proposal. In (b)(3) cases in which notice of certification has already been given and the time to opt out has expired, Rule 23(e)(4) alerts the judge that the court may refuse to approve the settlement unless it affords a second opportunity for class members to opt out. And Rule 23(e)(5) permits class members to object, but permits those objections to be withdrawn only with the court's permission.

The current Rule 23(e) criteria were developed from a variety of possibilities through considerable discussion and debate. One tension was an effort to balance the rights of objectors and the risks that they (or their lawyers) may attempt to profit disproportionately by holding up the settlement. For a time, there was discussion of whether objectors could be prevented from appealing the rejection of their objections unless the court granted them leave to intervene, but this idea was dropped and Devlin v. Scardelletti, 536 U.S. 1 (2002), later held that any class member who objects may appeal denial of the objection. There was discussion of whether objectors should be assured some right of discovery, and the question whether the emphasis should be on allowing discovery or assuring a right to opt out was also discussed. Making the second opt-out mandatory was seriously considered but eventually not included.

Experience has now developed under the Rule 23(e) criteria. Given the centrality of settlement, it may be timely to return to those criteria and the procedure for court approval of proposed settlements. The ALI Principles object that the array of factors used in reviewing settlements is too large, and that the courts' handling of them is in disarray. §§ 3.03 and 3.05 propose more focused review and findings that might provide a starting point

for a rulemaking effort. In addition, § 3.11 addresses the second opt-out issue, and states that Rule 23(e)(4) has had minimal effect in practice.

One feature that deserves separate mention is the use of cy pres provisions in class action settlements. § 3.07 of the ALI Aggregate Principles proposes an approach for handling cy pres treatment of class-action settlements. It has been adopted by some courts already. See, e.g., Klier v. Elf Autochem North America, Inc., 658 F.3d 468, 474-75 (5th Cir. 2011) (per Higginbotham, J.). Whether that would be suitable for inclusion in a rule is uncertain.

Another abiding concern is the handling of future claims. § 3.10 of the ALI Principles addresses the handling of this problem. But the ALI Reporters were uncertain about whether any rule change would be necessary to adopt the approach they endorse.

§ 3.12 proposes immediate appellate review of the court's rejection of a proposed settlement. As noted above, Rule 23(f) might seem to authorize review in some instances, but further rulemaking might be considered.

An issue of settlement procedure that emerges from the ALI Principles is the "preliminary approval" that many courts perform before notice is sent to the class. § 3.03 urges that this activity should be a "preliminary review" and not an "approval" because the latter might tend to deter objections and to make a court unduly resistant to them when they do occur. The "preliminary approval" method is nowhere spelled out in the current rule, but perhaps it could be addressed, perhaps in Rule 23(e)(1), which already deals with notice to the class.

Rule 23(b)(2) and monetary relief

Whether or not foreseen in 1966, Rule 23(b)(2) became quite popular in a variety of kinds of cases, particularly employment discrimination cases. Some suggested this provision appealed to lawyers because they did not have to satisfy the (b)(3) predominance test and did not have to arrange for individual mailed notice to class members, as is required in (b)(3) actions. Monetary relief was often included in actions certified under (b)(2). In particular, backpay claims under Title VII were regularly found to fit within (b)(2) as "equitable" relief intrinsically linked to injunctive or declaratory relief in such cases.

The Civil Rights Act of 1991 complicated the picture, as it permitted Title VII claimants to seek compensation for discrimination. In Allison v. Citgo Petroleum Corp., 152 F.3d 402 (5th Cir. 1998), the Fifth Circuit invoked the 1991 Act to

hold that a Title VII employment discrimination action could not be certified under (b)(2) to the extent it sought monetary relief. Instead, said the Fifth Circuit, "[m]onetary relief predominates in (b)(2) class actions unless it is incidental to requested injunctive or declaratory relief, damages that flow directly from liability to the class as a whole on the claims forming the basis of the injunctive or declaratory relief." This decision prompted another Fifth Circuit judge to observe that the Allison court had found "a Title VII exception to Rule 23." Smith v. Texaco, Inc., 263 F.3d 394, 419 (5th Cir. 2001) (Reavley, J., dissenting). But the Fifth Circuit did recognize that monetary relief, individually determined, could nonetheless be included in some (b)(2) actions. See In re Monumental Life Ins. Co., 365 F.3d 408 (5th Cir. 2004) (upholding (b)(2) certification of action on behalf of victims of racial discrimination in marketing of life insurance policies, including monetary relief for disparities in charges or benefits).

In Wal-Mart Stores, Inc. v. Dukes, the Supreme Court held that Title VII backpay is not properly included in a (b)(2) action. Although it recognized that "incidental" monetary relief might still be included, it also said that "individualized" monetary relief could not be included under that section of the rule. Relief under (b)(2), it added, was typified by cases in which the class "seeks an indivisible injunction benefitting all its members at once." It declined to hold that (b)(2) applies only to claims for injunctive relief, but said that the 1966 Committee Note about cases in which final relief relates "exclusively or predominately to money damages" does not support a negative inference that (b)(2) actions may include monetary relief that does not "predominate." Justice Scalia also observed that the Rule controls, and that the Committee Note cannot add to the rule.

Before the Wal-Mart decision, there had been some disagreement among the courts of appeals on how one would decide whether monetary relief "predominates" for purposes of inclusion in a (b)(2) action. If the Committee wants to consider opening the possibility of such certification, amending the rule might be worth considering. Additionally, it is worth noting that the ALI principles (§ 2.04) contain language regarding "indivisible" remedies that might be considered to replace the "injunctive or corresponding declaratory relief" language now in the rule.

Certainly the 23(b)(2) feature of the Supreme Court's decision has prompted much comment. The question here is whether it should also result in consideration of amending the rule.

"Back burner" issues

The Subcommittee could also focus on a variety of other issues. They are "back burner" issues because they have, to

date, received less attention than the ones listed above. One service that the full Committee could provide would be to consider which of these issues might properly be moved to the front burner.

Fundamental revision of Rule 23(b)

As noted above, twenty years ago there was some serious consideration of developing a more functional and flexible arrangement of Rule 23(b), but that was ultimately not pursued. Since then, one could say that the decisions have somewhat supported the notion that the various Rule 23(b) provisions meld together in ways that warrant reorganizing the subdivision. Increasingly, claims for money are classed as covered by (b)(3), with its opt-out requirements, where they formerly were often included under (b)(2). Increasingly, similar arguments may be made for alleged (b)(1) situations in which some or all class members have monetary claims. In short, the 1966 arrangement -- while it was a major improvement over the formalistic 1938 definition of categories -- may nevertheless no longer be as useful as a new approach, whether similar to the one considered twenty years ago or not.

Revisiting Rule 23(a)(2)

A core holding in Wal-Mart Stores v. Dukes is that common questions did not exist under Rule 23(a)(2), and that certification was therefore improper. That provision in Rule 23(a) coexists with other similar provisions in Rule 20(a) (permissive joinder of parties) and Rule 42(a) (consolidation of separate actions). It most certainly does not require that all questions be common, or that the common questions predominate.

There may be concern that the Wal-Mart interpretation of Rule 23(a)(2) makes it too great a barrier to certification. In Amchem, the Supreme Court said that "the predominance criterion is far more demanding" than the (a)(2) common question requirement. It also said that "[p]redominance is a test readily met in certain cases alleging consumer or securities fraud or violations of the antitrust laws."

One could therefore be concerned that the Court's holding could have very broad ramifications. On the other hand, it could also be interpreted as limited to the remarkable facts before the Court -- an immense class action (against the largest private employer in the nation, perhaps the world) alleging that individual managers across the country exercised discretion in their promotion and salary decisions. If one takes the outcomes of those decisions (allegedly gender-skewed) as not proving a violation of Title VII, the case may simply hold that there is no other question in common among all the class members from across the country. All the case may mean, then, is that such

employment discrimination claims will have to be brought with regard to smaller employers, or smaller units of large employers.

Some guidance might be found in § 2.01 of the ALI Principles, which speaks of "those legal or factual issues that are the same in functional content across multiple civil claims, regardless of whether their disposition would resolve all contested issues in the litigation." But this formulation may be more directed to predominance than to whether there are common questions at all (although that topic seems to be addressed in the ALI's § 2.02, not this provision).

If attention focuses on Rule 23(a)(2), it might also focus on other rules with similar provisions, such as Rules 20(a), 24(b), and 42(a). It might also be noted that 28 U.S.C. § 1407 -- the Multidistrict litigation statute -- speaks in terms of common questions.

Requiring court approval for "individual" settlements

Until 2003, the courts held pretty uniformly that a plaintiff who filed a case as a class action could not just dismiss it at will in return for an "individual" settlement. Instead, Rule 23(e) was interpreted to require that the judge ensure that the settlement did not involve an abuse of the class action by which the individual plaintiff profited and the class effectively lost out. The 2003 amendments were revised after the public comment period to remove this feature of Rule 23(e); now court approval is only required for settlement of certified classes.

The ALI Principles urge that the pre-2003 rule be restored. § 3.02(a) says that court approval should normally occur if the settlement "does not involve any payment or other special consideration to class counsel or the named representative." It also recognizes that the court may find itself in a somewhat difficult position if it refuses the dismissal request, but the attorney or the proposed class representative is unwilling to proceed with the case.

Revisiting the "predominance" or "superiority" language in Rule 23(b)(3)

The "predominance" finding required by Rule 23(b)(3) has often been challenging for courts. It certainly does not require that all issues affecting all class members be common. For example, in a case involving a plane crash, even if the cause of the crash were clearly the predominant issue in litigation, the extent of individual damages would also need to be resolved.

§ 2.02(a) of the ALI Principles says that certification should occur only if resolution of common questions is feasible

and will "materially advance the resolution of multiple civil claims." The comment to this section says that the goal of the section as a whole is to "delineate * * * the multifaceted inquiries presently encapsulated under the predominance concept."

§ 2.02(b) of the ALI Principles lists "realistic procedural alternatives" that might be considered for inclusion in Rule 23(b)(3) to focus the "superiority" analysis.

Revisiting the notice requirements

Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974), interpreted Rule 23 to require individual mailed notice of class certification to each member of a (b)(3) class who could be identified with reasonable effort. This notice requirement could impose heavy costs on class counsel, who usually would have to front the costs. It might also spur settlement, since the notice could be combined with Rule 23(e) notice of the settlement, and then the defendant would usually pay for it. For a long time, commentators have derided the notice requirement as unnecessary and unnecessarily costly.

In the current era, there seems to be considerable reason for alternative means of notice in (b)(3) cases -- often Internet-based -- to receive more respect. Whether there could be constitutional objections to substituting such means would have to be considered.

Another notice issue that could be revisited is whether to require some notice in (b)(1) and (b)(2) actions. In the preliminary draft of amendments published in 2001, there was a provision calling for notice in such cases. It did not specify the method, and certainly did not require mailed notice. But there was strong opposition to any required notice in (b)(2) actions, and the provision was modified to note that the court could direct notice. Of course, it could direct notice under the unamended rule, so the addition of this provision did not add much.

Particularly in contrast to the current requirement of mailed notice in (b)(3) actions, the absence of any requirement of any notice at all in (b)(1) and (b)(2) actions may see odd. True, those are "mandatory" class actions, and class members have no right under the rule to opt out. Some cases have, however, permitted opting out despite certification under (b)(1) or (b)(2), perhaps suggesting that a rule revision on this score is worthy of attention. More generally, the fact there is no right under the rule to opt out need not lead inexorably to the conclusion that class members in (b)(1) or (b)(2) classes have no legitimate interest in notice. Indeed, it is possible that the members of a (b)(2) class could be affected in more profound ways by the resulting judicial relief (e.g., by a judicial decree

affecting pupil assignment in schools) than the members of a (b)(3) class (who reportedly often get relatively minor monetary payouts).

The ALI Principles address notice partly in terms of when there is a right to opt out; § 2.07 calls for notice unless "the aggregate proceedings should be mandatory in order to manage indivisible relief fairly and efficiently." But § 2.07(a)(3) proposes that individualized mailed notice may not actually be the best, referring to the alternative of Internet-based notice.

Responding to Shady Grove

In Shady Grove Orthopedic Assoc. v. Allstate Ins. Co., 130 S.Ct. 1431 (2010), the Court said that once the requirements of Rule 23(a) and (b) are satisfied a district judge has no discretion to refuse to certify the class. This pronouncement stands in contrast to many lower court decisions saying that district court class certification is "discretionary." It also refused to honor New York's limitation on class actions in actions for penalties even though the claims were based on New York law.

Whether Shady Grove significantly constrains district-court consideration of certification is unclear. Certainly other factors can be cited as having a real impact on the latitude district judges exercise when making certification decisions. Rule 23(f), for example, permits disappointed litigants to seek immediate appellate review. That review, of course, will often be handled under an "abuse of discretion" standard. But a growing body of appellate case law may narrow district courts' actual discretion. One goal for 23(f) was to facilitate a body of appellate law on certification; surely the district judge's failure to follow the appellate court's stated views on class actions would be viewed as an abuse of discretion. Moreover, it may be that appellate scrutiny of the district judge's scrutiny of the class certification motion under such cases as Hydrogen Peroxide imposes a further constraint on the district judges' actions.

The other feature of Shady Grove -- holding that Rule 23 creates a right to file a class action even though the state-law claims being asserted are subject to an explicit prohibition on class actions unless the statute creating the penalty claim also authorizes class actions for penalties -- arguably fails to give appropriate attention to the remedial purposes of the lawgiver. This outcome could also be revised by rule amendment.

The agenda materials for the November meeting (at pp. 643-45) had relatively simply methods of restoring this discretion and forbidding class actions in federal court where "prohibited by the law that governs the claim." But it may be that making

either change is not really an important undertaking.

Addressing choice of law

For class actions based on federal law, choice of law issues should not arise. But when the claims are based on state law, those problems can be extremely important. And CAFA has increased the number of class actions making state-law claims in federal court.

Rule 23 does not now address the choice-of-law question explicitly. The common questions provisions implicitly involve choice-of-law determinations because the framing of the questions depends on the legal principles that apply. That reality is true of other common issue questions (such as permissive party joinder under Rule 20), but it achieves much greater importance under Rule 23.

The ALI Principles place considerable stress on the resolution of choice-of-law issues as part of the aggregation decision. § 2.03 says that the underlying substantive law must inform the application of aggregation criteria. § 2.05(a) says that the court "must ascertain the substantive law" governing the allegedly common issues. That may be included within in the determinations that Rule 23(c)(1)(B) now requires the court to make. § 2.05(b) addresses the techniques courts might adopt to handle divergent substantive regimes in class actions.

Whether these issues -- important though they certainly are in class certification decisions -- could be handled more effectively by a rule amendment is not clear. As a starting point for discussion, one might refer to a proposed amendment to CAFA by Sen. Feinstein which said:

> the district court shall not deny class certification, in whole or in part, on the ground that the law of more than one State will be applied.

S. 5, 109th Cong., Amend. 4, 151 Cong. Rec. S1215 (Feb. 9, 2005). Choice-of-law rule provisions along this line might raise a wide variety of challenges, such as calibrating the role of choice of law in evaluating predominance of common questions. Whether to include choice of law as a topic for possible rulemaking is therefore an issue.

Attorney's fees

Rule 23(h) was added in 2003 to provide the court with directions about attorney's fees. But the closest thing to substantive direction about measurement of fees is advice in the Committee Note. That Note emphasizes the importance of fees to the proper functioning of class actions. Rule 23(g) also invited

the court to specify the method for awarding fees to class counsel in its order appointing class counsel.

§ 3.13 of the ALI Principles goes beyond this beginning and proposes principles for determining fee awards, displaying a clear preference for a percentage rather than a lodestar measure, although it also regards the lodestar as a suitable cross-check in some cases.

The Principles also address other fee-award issues. § 3.08(a) authorizes the court to award fees out of the settlement pot to objectors who improved it, something contemplated by the Committee Note to Rule 23(h). § 3.08(b) discusses the situation when objectors succeed in persuading the court to reject a proposed settlement. If a classwide recovery is later obtained, it proposes that the objectors could seek a fee award by demonstrating that their efforts contributed to an improved outcome. Comment (c) to § 2.09 deals with a fee award for attorneys representing a class in an issues-only class action. Because such cases might often not lead to the entry of a final judgment for monetary relief, that would create obstacles to a fee award. The Principles suggest that a "quasi-class action" approach might be employed to handle the problem.

The question for now is whether fee-award principles that go beyond what was done in Rule 23(h) should be considered; at least one concern would be whether rulemaking is an appropriate way to address these issues.

Binding effect of denial of certification
or rejection of a proposed settlement

In 2000-2001, the Committee spent considerable time and effort on whether it could devise useful rule provisions that would limit the ability of other courts (mainly state courts, it was thought) to "second guess" a federal court's considered judgment that a certain class could not be certified, or to reject a certain settlement. There was concern about lawyers traipsing across the country searching for a judge somewhere who would approve what another judge had rejected.

Eventually, the Committee did not propose publishing proposed amendments along this line, but did produce an extensive memorandum about the possibilities it had considered that was extensively discussed at a class action conference the Committee organized at the University of Chicago in late 2001. During that conference there was fairly intense academic debate about whether the rulemaking power would extend far enough to authorize such measures.

In Smith v. Bayer Corp., 131 S.Ct. 2368 (2011), the Supreme Court held that a federal court has limited authority to enter an

injunction against later efforts to obtain certification in a state court. The Court held that the Anti-Injunction Act invalidated the injunction before it. It did include one footnote that recognized that different legislation -- or perhaps even a rule -- could affect the result in the future. See id. at 2382 n.12. It should be noted that the sequence of events could be the other way around -- the federal court could be asked to approve something a state court had rejected. For a recent example in which objectors argued that was happening, see Faught v. American Home Shield Corp., 661 F.3d 1040 (11th Cir. 2011), in which a district court in Alabama approved a class-action settlement somewhat like one previously rejected by San Diego Superior Court in California. The Eleventh Circuit rejected the objectors' arguments, finding at least five differences between the settlement rejected in San Diego and the one approved by the federal court in Alabama.

The ALI Principles touch on similar issues, but do not seem to urge any rule changes. § 2.11 (quoted by the Court in Smith v. Bayer Corp., 131 S.Ct. at 2381 n.11) proposes that there be "a rebuttable presumption against" certification of the same class by another court if one court has denied it. § 3.14 addresses collateral challenges to settlements. Whether there is reason again to consider rule provisions on the binding effect of rejection of certification or a proposed settlement could be on the Subcommittee's agenda.

Aggregation by consent
Opt-in classes

§ 2.10 of the ALI Principles authorizes aggregation by consent in exceptional circumstances. In a sense, this might be seen as similar to the "spurious" class action under original Rule 23. But the Second Circuit held that an opt-in class is not authorized under the current rule in Kern v. Siemens Corp., 393 F.3d 120 (2d Cir. 2004). Whether adding such a provision to the rule would be useful is debatable.

Additional issues --
suitable for a Manual?

The memorandum analyzing the ALI Principles points to a large number of additional issues that the ALI process brought to light. Any suggestions of issues mentioned there that should be on the Committee's agenda is most welcome. Besides that, reviewing that memo may assist in identifying issues that might be suitable for some sort of manual on class action practice. When the 2003 amendments were proceeding through the Committee's review, for example, the Manual for Complex Litigation (4th) was also being drafted. It may be that some similar compilation of guidance for district courts and lawyers could be developed to address issues that are not thought suitable for Committee

action. The rules process does not produce such documents, but its activity may provide sustenance for such an effort.

TAB 11D

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COMMENT

TO RESTORE A RELATIONSHIP BETWEEN CLASSES AND THEIR ACTIONS: A CALL FOR MEANINGFUL REFORM OF RULE 23

to

THE CIVIL RULES ADVISORY COMMITTEE
and its
RULE 23 SUBCOMMITTEE

On Behalf of
LAWYERS FOR CIVIL JUSTICE
FEDERATION OF DEFENSE & CORPORATE COUNSEL
DRI – THE VOICE OF THE DEFENSE BAR
INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL

August 9, 2013

Lawyers for Civil Justice (LCJ), the Federation of Defense & Corporate Counsel (FDCC), DRI – The Voice of the Defense Bar (DRI) and the International Association of Defense Counsel (IADC) respectfully write to urge the Advisory Committee on Federal Rules of Civil Procedure ("Committee") and its Rule 23 Subcommittee to examine how the relationship between class members and their cases have changed since 1966, and to take much-needed action to reform Rule 23 in light of modern practices.

INTRODUCTION

Rule 23, and particularly subsection (b)(3), has become something that was not envisioned when adopted. The class action mechanism was intended to be a device for efficient litigation when the rights of the parties could be fully adjudicated in a single binding lawsuit, with representative members serving as the champions of the class members' interests. Today, however, a significant fraction of class action cases demonstrates that the Rule has fostered a type of lawsuit that differs in fundamental ways from what existed in our legal culture prior to 1966. Some common features of today's class action cases include: (1) very large classes whose members may not even know whether they have been injured; (2) class members who, despite receiving notice, have very little if any idea what is happening to their legal rights; (3) lawyers who make decisions about prosecuting and resolving cases without any meaningful input from any actual client; (4) lawyers whose focus is trained on the entrepreneurial aspects of their cases rather than on the objective of making their clients whole; (5) sparse and inconsistent judicial review (and therefore case law) concerning class certification decisions, which are often the most important legal determination in the case; (6) insufficient judicial scrutiny of settlements and fee requests to

protect the interests of the absent class members; and (7) settlements containing constitutionally suspect but feel-good transfer payments from defendants to non-party entities that have never been harmed by the defendants.

These elements, which are particularly common in cases involving mass torts and consumer-based claims, are symptoms of a more profound fact: Rule 23 has fostered a system in which class members lack any meaningful relationship to their cases. As the Rule 23 Subcommittee reviews possible reforms for its agenda, we urge it to keep this fundamental observation in mind and look for reforms that improve this situation while ruling out changes that would exacerbate it.

Some practitioners and commentators justify today's usage of Rule 23 as comprising a "private attorneys general" system that forces compliance with legal standards that would otherwise escape punishment. But our legal system already has public attorneys general and many other avenues for bringing about the outcomes that are preferred by those who justify Rule 23 in that way. More importantly, the Committee is bound to view the purpose of the Federal Rules of Civil Procedure to "secure the just, speedy, and inexpensive determination of every action and proceeding" as Rule 1 sets forth. The Rules Enabling Act does not provide the power to create new systems to impose punishment (as opposed to provide compensation) for alleged wrongdoing.

Comparing the history of Rule 23 to its meaning and usage today reveals some much-needed reforms to re-establish a relationship between class members and their cases. We propose four: (1) prohibiting or restricting cy pres payments to non-class members who have not been injured; (2) providing a right to interlocutory appeal of decisions to certify, modify or de-certify a class; (3) adopting an "opt-in" rule for Rule 23(b)(3) actions; and (4) clarifying that judicial estoppel does not apply to class action settlement negotiations.

I. Rule 23 Has Become Something Much Different than Originally Envisioned.

A. The History, Purpose and Adoption of Rule 23

From its inception, Rule 23, particularly with its adoption of categories of class actions, has created controversy.[1] The class action device, with its origins in equity, was intended to deal effectively with litigation involving large numbers of persons. It was characterized as a "bold and well-intentioned attempt to encourage more frequent use of class actions."[2] The original Rule 23, which had been adopted in 1938, created categories of class actions including "the so-called 'true' category [which] was defined as involving 'joint, common, or secondary rights'; the 'hybrid' category, as involving 'several' rights related to 'specific property'; and the 'spurious' category, as involving 'several' rights affected by a common question and related to common relief."[3] The rule's divisions were based upon the character of the right to be asserted for or

[1] *See* Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure*, 81 HARV. L. REV. 356, 375-401 (1967).
[2] 7A CHARLES ALAN WRIGHT ET AL, FEDERAL PRACTICE AND PROCEDURE § 1752, at 15 (footnote omitted).
[3] FED. R. CIV. P. 23 advisory committee's note; *see also* James William Moore, *Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft*, 25 GEO. L.J. 551, 57-576 (1937).

against a class. If it was "joint," the class was characterized as "true."[4] If the right was "several," but "the action was directed to the adjudication of claims affecting specific property," it was deemed to be "hybrid."[5] If the right was "several," but "a common question of law or fact" affected the right and "a common relief" was sought, then it was deemed to be "spurious."[6]

These initial categories created confusion both in classification and in the determination of the proper scope of any judgment. In other words, it was unclear to what extent a judgment in these various categories would bind the participants. The "spurious" class, for example, was not supposed to amount to a class since any judgment was not supposed to bind absent class members who had not opted in or become a member of the litigation. The "judgment in true actions was conclusive on the class; in hybrid actions, conclusive upon the appearing parties and upon all claims whether or not presented insofar as they affected the property; and in spurious actions, conclusive only upon the appearing parties."[7] Eventually, it became clear that the doctrines purporting to apply and explain the rules were inadequate and reform was sought. Because the rule lacked a requirement to provide notice to class members in hybrid or spurious class actions, judgments from those actions were subject to attack and raised due process issues for litigants.

These and other problems prompted calls for reform. Professor Charles Wright, then a member of the Advisory Committee, argued that a new rule should be drafted, noting that "[a]n average of some ten class actions a year in federal court is not very many, and the bulk of these, I should imagine, have been integration suits where Rule 23 poses no real problem except for the aberrational case where it is held inapplicable."[8] The key question before the drafters was "whether a procedure could be developed to distinguish which actions were suitable for class treatment and whether proper safeguards could be fashioned to control its application."[9] At that time, the drafters were divided about the proper treatment of spurious class actions, with some members of the Rules Committee vigorously opposed to the use of class actions in tort cases because it interfered with the "principle that each person has a right to litigate his or her own case, that enforcing a judgment against an absent class member would be contrary to fundamental principles of fairness."[10]

To address these problems, the rule was amended with the focus on the "well-agreed proposition that there is no basis for a class action unless the class is so numerous as to make individual joinder impracticable, questions of law or fact exist common to the class, and the representative parties are proper champions of the class."[11] Out of this general focus, the current Federal Rule

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[4] Kaplan, *supra* note 1, at 377.
[5] Kaplan, *supra* note 1, at 377.
[6] Kaplan, *supra* note 1, at 377.
[7] Kaplan, *supra* note 1, at 378.
[8] Letter from Charles Alan Wright, Professor of Law, Univ. of Texas, to Benjamin Kaplan, Reporter to the Advisory Committee on Civil Rules & Professor of Law, Harvard Law Sch., 5 (Feb. 6, 1963) (on file with the Rules Committee Support Office, Administrative Office of the U.S. Courts).
[9] John K. Rabiej, *The Making of Class Action Rule 23 – What Were We Thinking*, 24 MISS. C. L. REV. 323, 334 (Spring 2005).
[10] *Id.* at 335 (citing Advisory Committee on Rules of Civil Procedure Meeting Minutes, Oct. 31 – Nov. 2, 1963 at 9-10 (on file with the Rules Committee Support Office, Administrative Office of the U.S. Courts)).
[11] Kaplan, *supra* note 1, at 378

of Civil Procedure 23, with its three categories of class actions, was born. But there is a rough correspondence between class actions described in today's Rule 23(b)(1) and true class actions, 23(b)(2) and hybrid class actions, and 23(b)(3) and spurious class actions. Strong debate occurred about whether spurious class actions, the (b)(3) category, should be continued or entirely abolished.

Concerns were expressed that this category of class actions "'invites treating these mass accident and negligence cases as class actions'[,] a result surely to be avoided."[12] Advocates for the (b)(3) category insisted that "a 'mass accident' situation resulting in injuries to numerous persons is on its face not appealing for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses to liability, would be present, affecting the individual in different ways. In these circumstances, an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried."[13] Eventually, the rule adopted added more specific notice requirements and a series of threshold tests intended to divide those actions suitable for class treatment from the rest, and to assure adequate protections for the rights of class litigants. The idea was that "where the criteria are satisfied, fundamental safeguards are respected, and adequate representation is assured, the device of the class action should be used to the full extent."[14]

According to John P. Frank, a well-known lawyer, legal commentator and member of the 1966 Advisory Committee, in adopting Rule 23, the Committee assumed the largest class would be about 100 people injured by an airplane crash or fire.[15] The use of Rule 23 to include increasingly large class actions that cover thousands and thousands of people was beyond the anticipation of the Committee.[16] To the extent there was any such concern, the Committee concluded that class notice and opt-out requirements would keep large classes from being certified and prevent class counsel from resolving cases in ways that favor counsel, but not the class members they represent.[17] In the years since that 1966 modification, class sizes have grown exponentially, class members' overwhelmingly common response to the distribution of class notice has been inaction, even when they receive and read it (which is often not the case).[18]

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[12] Advisory Committee on Rules of Civil Procedure Meeting Minutes, Oct. 31-Nov. 2, 1963 (on file with the Rules Committee Support Office, Administrative Office of the U.S. Courts).

[13] Memorandum from Benjamin Kaplan, Reporter to the Advisory Committee on Civil Rules & Professor of Law, Harvard Law Sch., to the Advisory Committee on Civil Rules, *Modification of Rule 23 on Class Actions*, at EE-18 (Feb. 21-23, 1963) (on file with the Rules Committee Support Office, Administrative Office of the U.S. Courts).

[14] Tentative Proposal to Modify Provisions Governing Class Actions – Rule 23 EE-31 (May 28-30, 1962) (on file with the Rules Committee Support Office, Administrative Office of the U.S. Courts).

[15] *See* Statement of John P. Frank to Courts Subcommittee on Senate S.B. 353, May 4, 1999, p. 52.

[16] *Id.*

[17] *Id.* at pp. 63-64, 70.

[18] *Id.*; *see also, e.g.,* Martin H. Redish, *Comments of Martin H. Redish* (submitted at the request of Lawyers for Civil Justice to The Federal Rules Advisory Committee), Feb. 15, 2002, at 9, 12-14 (class counsel, acting like bounty hunters, are enabled by the failure of Rule 23(b)(3) class members to respond to class notice by affirmatively filing an opt-out through inadvertence, rather than due to a conscious decision to participate in the class); MARTIN REDISH, WHOLESALE JUSTICE: CONSTITUTIONAL DEMOCRACY AND THE PROBLEM OF THE CLASS ACTION LAWSUIT (2009); Charlotte S. Alexander, *Would an Opt In Requirement Fix the Class Action Settlement? Evidence from the Fair Labor Standards Act*, 80 MISS. L.J. 443, 453 (Winter 2010) (studies reveal that opt out rates in class actions are exceedingly low); Theodore Eisenberg & Geoffrey Miller, *The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues*, 57 VAND. L. REV.. 1529, 1532, 1546 (2004) (a study of 143 class

The change of the "spurious" action – binding only on those who appeared – into the current (b)(3) damages class – binding on all within the class definition but often remunerative only for class counsel and the small percentage of class members who make claims – has drawn less-than-laudatory comments from the U.S. Supreme Court:

> Classes certified under (b)(1) and (b)(2) share the most traditional justifications for class treatment—that individual adjudications would be impossible or unworkable, as in a (b)(1) class, FN11 or that the relief sought must perforce affect the entire class at once, as in a (b)(2) class. For that reason these are also mandatory classes: The Rule provides no opportunity for (b)(1) or (b)(2) class members to opt out, and does not even oblige the District Court to afford them notice of the action. Rule 23(b)(3), by contrast, is an "adventuresome innovation" of the 1966 amendments, Amchem, 521 U.S., at 614, 117 S.Ct. 2231 (internal quotation marks omitted), framed for situations "in which 'class-action treatment is not as clearly called for'," id., at 615, 117 S.Ct. 2231 (quoting Advisory Committee's Notes, 28 U.S.C.App., p. 697 (1994 ed.)).

Wal-Mart Stores, Inc. v. Dukes, ___ U.S. ___, 131 S.Ct. 2541, 2558 (U.S. 2011) (emphasis added).

In 1991, the Advisory Committee began additional study of Rule 23 to determine whether to enact further reforms. During this process, the Committee became aware that the rule was being used for mass torts.[19] Complaints were raised about the use of 23(b)(3) to provide plaintiffs with unfair leverage to coerce settlements in meritless class actions. Debate began to be heard about the propriety of using the class action device as a means of prosecuting actions to enforce various laws as opposed to its original purpose of serving as a procedural device to aggregate claims for judicial efficiency. Various amendments were published for comment in 1998 to control or eliminate inappropriate class actions, but the Committee deferred taking action on most of them. The only amendment actually approved after being published for comment in 1996 was the change adding Rule 23(f) to provide for a highly discretionary interlocutory appeal. Rule 23 was later amended in 2003 "to enhance judicial supervision of class counsel, the deliberateness of the certification decision, and the judicial review of settlements."[20] Other reform came with the enactment of the Class Action Fairness Act (CAFA)[21], which created special diversity jurisdiction and other reforms.

B. Lessons Learned Since 1966

The "adventuresome innovation" of 23(b)(3) is not working as planned. Instead of nine or ten class actions a year as Professor Wright envisioned, millions of persons each year who likely have no idea that they are part of a damages "class" have their rights preclusively adjudicated on no more notice than publications and mass mailings largely indistinguishable from junk mail.

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action cases found the median percentage of class members opting out was a mere 0.1 percent).

[19] Rabiej, *supra* note 9,at 349.

[20] Rabiej, *supra* note 9, 386.

[21] Pub. L. No. 109-2, 119 Stat. 4 (codified as 28 U.S.C.A. § 1711).

They receive coupons, or the ability to obtain de minimis payments upon submission of time-consuming claim forms. The percentage of persons bound by settlements of (b)(3) classes who do not bother to claim payments is legendary; so much so that courts have developed constitutionally suspect methods for allocating unclaimed settlement funds to charities.[22] It would seem that, particularly with respect to (b)(3), what is being "vindicated" is often something that very few people other than class counsel care very much about. Yet this is being done at great public and judicial expense. And all of this takes place within a setting that the Supreme Court has described as one in which "class action treatment is not as clearly called for."

Rule 23(b)(3) in particular seems to be without economic justification. Typically, it escalates to justiciability damages claims that no individual would find worth making. The supposed theory is that aggregating many worthless claims together creates something worthwhile, but there is no judicial free lunch. Individual claimants find very little in this process worthy of the most minimal time expenditure in returning a claim form. Only class counsel receive anything of value in the process. This is often justified as employment of "private attorneys general" to coerce compliance with various legal norms, the violation of which would otherwise escape prosecution.[23] Yet – leaving aside for the moment the questionable public interest in vindicating claims on behalf of "victims" who take no notice of their supposed victimhood – this country has no shortage of actual, public attorneys general, all of whom are empowered by a wide variety of laws and regulations to enforce compliance with consumer protection legislation. The idea that what is vindicated in the typical (b)(3) class action would go unvindicated if not for (b)(3) is plainly wrong. Numerous tools exist for prosecuting violations of law and regulation if indeed those violations are actually causing harm. In this context, Rule 23(b)(3) does not provide a return that justifies its enormous expense. Indeed, it is inflicting a great cost on the judicial system, both in time and reputation, as well as effectively taxing entities that provide goods and services widely in the economy. The simplest test of Rule 23(b)(3) is this: look at the low rate at which persons whose claims are being adjudicated take advantage of settlements made on their behalf. More profoundly, look at the purpose behind cy pres awards – finding an uninjured non-party to receive funds as a means of justifying not only the lawsuit itself but also the failure to deliver compensation to the class members.

C. Rule 23 Today – The Current Problems With Class Action Lawsuits

The problems with "damages" ((b)(3)) class actions became apparent early in the life of the "adventuresome innovation." Even commentators who enthusiastically endorsed the ostensible goals of "large-scale, small claim" litigation (i.e., "the private enforcement of law"), and who were willing to propose extremely non-traditional mechanisms for making (b)(3) deliver better results – such as auctioning off class claims to the highest-bidding consortium of lawyers and delivering the proceeds directly to the class at the outset, leaving the lawyers to keep any gain to the upside – nonetheless recognized that (b)(3) classes were plagued by: (1) lawyers acting without any meaningful monitoring by any real client; (2) lawyers serving their own interests at

[22] *See* Jennifer Johnston, *Cy Pres Comme Possible to Anything is Possible: How Cy Pres Creates Improper Incentives in Class Action Settlements,* 9 J.L. ECON & POL'Y (forthcoming Winter 2013).
[23] William B. Rubenstein, *On What a "Private Attorney General" is – and Why it Matters*, 57 VAND. L. REV. 2129, 2150 (2004); John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter is Not Working,* 42 MD. L. REV. 215, 223, 225 (1983).

the expense of those of the supposed client; (3) judicial review of settlements and fee requests that "is often haphazard, unreliable, and lacking in administrative standards"; (4) "lodestar" (based on hourly rate) fee awards for class counsel that remove any incentive for class counsel to maximize recovery for the ostensibly deserving class claimants; (5) named plaintiffs in class actions who often have little control over how the suit is conducted; and (6) the lure of large awards causing class counsel to circumvent applicable ethics rules, "with only the thinnest veer of compliance."[24]

These problems are not merely theoretical. Examples abound. Here are a few:

- In *In re: Nutella Mktg. & Sales Practice Litig.*, No. 11-086, 2012 U.S. Dist. LEXIS 181913 (D.N.J. July 30, 2012) (order approving class settlement and attorneys fees), class claims regarding labeling of sugar and oil content were settled by providing class members with ability to claim reimbursement for up to five jars of Nutella at $4 per jar. Attorneys fees of $1.2 million, plus administrative costs of up to $498,000 were approved.

- In *Smith v. William Wrigley, Jr. Co.*, No. 09-60646, 2010 U.S. Dist. LEXIS 67832 (S.D. Fla. June 15, 2010) (order approving class settlement and attorneys fees), a minimum $6 million settlement fund was created to address the claim that a gum manufacturer touted unproven, antibacterial characteristics of magnolia bark extract. The settlement entitled individual class members attesting to a gum purchase to submit a claim form for $10.00. Any funds remaining in the settlement fund at end of the claims period go to a charity under the cy pres doctrine.

- In *In re: Dry Max Pampers Litig.*, No. 1:10-cv-00301 (S.D. Ohio June 7, 2011) (order approving class settlement), a settlement of an unsubstantiated claim of diaper rash resulting from gel in diapers contained attorney's fees of $2.7 million for achieving injunctive relief requiring the implementation of a 1-800 line to answer questions about diaper rash. A cy pres monetary award of $250,000 was earmarked to fund pediatric residencies and a research program on skin care.

- In *Gamelas v. Dannon Co.*, No. 1:08 CV 236, 2010 U.S. Dist. LEXIS 99503 (N.D. Ohio Aug. 31, 2010 (order approving class settlement and attorney's fees), a settlement of claims concerning the effectiveness of Activia and DanActive yogurt lines established a settlement fund of $35 million. Claimants

[24] John R. Macey & Geoffrey R. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform,* 58 U. CHI. L. REV. 1, 3-6 (1991). *See generally* John C. Coffee, Jr., *Rethinking The Class Action: A Policy Primer on Reform,* 62 IND. L. J. 625 (1987); John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877 (1987); John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions,* 86 COLUM. L. REV. 669, 676 (1986); John C. Coffee, Jr., *The Unfaithful Champion: The Plaintiff as Monitor in Shareholder Litigation,* 48 LAW & CONTEMP. PROBS. 5, 12 (Summer 1985); John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter Is Not Working,* 42 MD. L. REV. 215, 235-36 (1983).

with receipts for yogurt purchases during the class claim period could submit proof for up to $100 in reimbursement. Claimants without receipts could attest under oath to purchasing yogurt and receive between $15 and $30. Claimants unwilling to attest under oath could receive $15. The settlement provided attorneys fees of $10 million plus expenses, and it directed the unclaimed settlement funds to charities to help feed the poor.

Rigorous empirical studies of the rate of occurrence of the above abuses are hard to come by: "No one has been able to compile a representative database of class actions that would enable the sort of objective cost-benefit analysis that ought to be the basis for public policy reform."[25] But the 1966 amendments inadvertently altered public policy without any warrant and without any significant empirical evidence as a basis. The job of the federal courts when making rules of civil procedure is to ensure the just, speedy and inexpensive determination of every action, not to create new actions and then justify the outcome with new theories about the role of private litigation on public policy. It would be ironic indeed if the federal courts were to insist on "a representative database of class actions that would enable the sort of objective cost-benefit analysis that ought to be the basis for public policy reform" in order to address a past instance of public policy reform enacted without benefit of such evidence.

II. Rule 23 Should Be Amended to Prevent the Award of Cy Pres Funds to Non-Class Members.

Perhaps the most profound symptom of the often remote relationship between putative class members and the purported classes to which they belong is the rise of "cy pres" payments in lieu of awards of actual damages. "Cy pres" is a legal doctrine with roots in equity that is being employed in the class action context to allow awards to non-class members, almost always when actual class members have not been damaged in a reasonably calculable manner. Controversy has erupted about the use of cy pres because it has led a number of courts in recent years to discount the rights of absent class members and to permit class actions for damages to proceed despite the impossibility of contacting, or even identifying, those actually injured. Because this practice creates tension with Rule 23's protections for class members and encourages pursuit of tenuous class actions, we respectfully suggest the Committee review how cy pres is employed today and amend Rule 23 to bar or at least restrict cy pres awards.

A. Background: The History of Cy Pres.

Cy pres (in full: "cy pres comme possible") originated in cases involving testamentary bequests as a solution for bequests that no longer corresponded to changed circumstances, such as a

[25] Deborah R. Hensler, *Goldilocks and the Class Action* (Response to Margaret H. Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 HARV. L. REV. 486 (2012) (posted on Harvard Law Review's Online Forum), http://www.harvardlawreview.org/issues/126/december12/forum_984.php. Ms. Hensler is the author of numerous articles and books on class actions, including: DEBORAH R. HENSLER ET AL., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN (Rand Corp. 2000); Deborah Hensler, *Has the Fat Lady Sung? The Future of Mass Toxic Torts*, 26 REV. LITIG. 883 (2007) (presenting data showing the use of MDL to resolve mass claims); Deborah R. Hensler, *The Future of Mass Litigation: Global Class Actions and Third-Party Litigation Funding,* 79 GEO. WASH. L. REV. 306, 309 (2011); and Deborah R. Hensler, *As Time Goes By: Asbestos Litigation After Amchem and Ortiz,* 80 TEX. L. REV. 1899, 1910 (2002).

donation to a charity that no longer exists. The concept was exported to the class action field in the 1970s, first proposed by a 1972 student comment in a law review.[26] Since that time, cy pres has become a mechanism for class counsel to pursue class action litigation on behalf of purported classes whose remotely situated members either cannot possibly be identified or whose identification would be more expensive than any potential recovery would warrant.[27]

Cy pres has been invoked in federal court class actions with increasing frequency in recent years.[28] The doctrine dictates that where the best relief is not possible, the "second best" relief may be given. The doctrine has been invoked in class actions where it is impossible, for whatever reason, to reach a portion of an attenuated absent class in order to compensate them as the result of either a successful judgment or a settlement. In these situations, the court-awarded funds are donated to a charity deemed to be relevant in some way to the basis of the lawsuit. In certain instances, the relief is given in the form of what is known as "fluid class recovery," where compensation is made in the form of either future reductions in costs or the provision of future benefits to those situated similarly to the injured victims. Both cy pres and fluid class recovery are linked by the fact that relief is given to individuals or institutions other than those who were allegedly injured by the defendant's allegedly unlawful behavior. The class attorneys are compensated on the basis of the total amount awarded or agreed upon in settlement, regardless of whether a significant portion of that amount is given to recipients who were never injured by the defendants' behavior.

Cy pres and fluid class recovery are controversial doctrines in the class action context.[29] They find no basis in the substantive laws enforced in the class action proceeding. "Rule 23(e) does not mention the district court's discretion − or even its authority − to extinguish the right of recovery of identified class members through a later cy pres order."[30] Courts resorting to cy pres do so either in reliance on vague "equitable" judicial powers or resort to the tautology that cy pres powers exist because the settling parties created them by contract, even though disadvantaged class members were not party to the negotiations that transferred their property to others. Cy pres is thus at least as much an unauthorized extension of judicial power as the procedures at issue in *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*.[31]

B. Cy Pres Should Not Circumvent Rule 23 Class Certification Standards.

Use of cy pres distributions raises significant constitutional questions regarding Article III's case-or-controversy requirement by compensating entities that have suffered no legally cognizable injury. The potential availability of a cy pres award invites certification of class action proceedings where the supposed class members are so remotely situated that all can recognize at the outset that meaningful relief to injured victims is impossible even if the action is

[26] Stewart R. Shepherd, Comment, *Damage Distribution in Class Actions: The Cy Pres Remedy,* 39 U. CHI. L. REV. 448 (1972).
[27] *See generally,* Martin H. Redish, et al., *Cy Pres Relief & the Pathologies of the Modern Class Action: A Normative and Empirical Analysis,* 62 FLA. L. REV. 617 (2010).
[28] *Id.* at 620 (documenting the "dramatic turn in modern class actions toward the use of cy pres relief").
[29] *See* concurring opinion of Chief Judge Jones in *Klier v. Atochem North America, Inc.,* 658 F.3d 468, 480 (5th Cir. 2011).
[30] *All Plaintiffs v. All Defendants,* 645 F.3d 329, 333-34 (5th Cir. 2011).
[31] 523 U.S. 26 (1998) (previously common MDL practice of trying cases in transferee courts held ultra vires).

successful. Whenever a court resorts to "fluid recovery" or cy pres, it is a tacit admission that the suit, in class form, is incapable of achieving its goal of compensating actually injured victims. Cy pres is also an indicator that a damages class cannot be certified. For a class action seeking damages, common issues must "predominate" over case-specific ones, so cy pres is employed where it is impossible or too expensive to prove causation and damages as to the absent class members. By definition, such causation and damages cannot be proven on a class-wide basis with proof as to the class representatives serving as proof as to the rest of the class. In these circumstances, due to the expense or impossibility of proving causation and damages individually, those individualized issues necessarily predominate and preclude class certification. Cy pres should not be used as a stratagem for allowing attenuated class action litigation that Rule 23 otherwise prohibits. Such non-class member awards permit the class action device to relax the restrictions of substantive law in contravention of the Rules Enabling Act.[32]

C. Cy Pres Raises Questions about Separation of Powers.

Cy pres raises foundational questions of separation of powers which were codified in the Rules Enabling Act, pursuant to which all of the Federal Rules of Civil Procedure, including Rule 23 authorizing class action proceedings, have been promulgated. When used to distribute funds from settlements involving the rights of class members to entities (including charities) who are not members of the class, cy pres is an exercise of undue judicial power without any check or balance from the other co-equal branches of government. Under our tripartite system of government, the legislature is supposed to enact the laws and the executive to enforce them. There are few, if any, statutes that permit a private entity to be liable to another private entity in the absence of injury or causation. The government can impose civil or criminal fines for illegal conduct, but such fines ordinarily are owed to the government. In the absence of statutory authorization, courts should have no power to redistribute money between private entities without proof of causation and damages. Such potentially boundless judicial power is inconsistent with our system of limited government.

In this fashion, cy pres poses a grave risk to the judiciary encouraging courts to transgress boundaries that are inherent in our system of checks and balances. By putting judges in the role of making policy judgments about how to allocate the funds of private parties without judicial standards, cy pres facilitates judges becoming what Justice Cardozo once called knights errant, believing that through litigation they can solve societal problems that neither the legislature nor the executive branch have seen fit to address in the manner selected by the court.[33]

D. Cy Pres Should Not Be a Back Door to Punitive Damages.

Most civil litigation is based upon the notion of compensation for injury suffered. Some statutory claims add a legislatively authorized punitive element, such as an award of treble damages, but since these remedies require actual damages to be multiplied, they remain limited by the necessity of proving that the defendant actually harmed the plaintiff in some way. Cy pres

[32] 28 U.S.C. § 2072. *See* Redish, *supra* note 57, at 664-67 (discussing substantive effects of cy pres on the underlying law).
[33] *See* BENJAMIN N. CARDOZO, NATURE OF THE JUDICIAL PROCESS, 141 (1921).

awards, however, are often justified not by compensation but by punishment.[34] They involve a judicial determination that the defendant allegedly acted illegally and should not be allowed to profit from that wrongdoing. In the absence of statutory authorization, imposing punishment for private wrongs is not a proper power of the judicial branch. Punishment is a creature of the criminal or administrative law, and such fines are paid to the government, not to uninjured private entities.

Cy pres payments, because they are made to persons who are not members of the class and because they are employed for punitive reasons, do not benefit class members. Thus they do not fall within the "common fund" rationale for awarding fees to class counsel. A cy pres payment cannot be a "common fund" that provides benefits to the class when it, by definition, is paid to other persons.

In civil litigation, to receive an award under a purely punitive rationale requires a plaintiff to meet strict standards for proof of punitive damages. Punitive damages are constrained, both constitutionally and as a matter of substantive law, by the requirement of a ratio to compensatory damages. Cy pres awards circumvent that requirement by allowing what can only be categorized as punishment, but in situations where plaintiffs cannot prove damages or causation.

E. Cy Pres Awards Risk Conflicts of Interest.

Cy pres awards pose a potential for conflicts of interest between class counsel and inaccessible class members.[35] For example, cy pres settlements have been proposed where identification of absent class members and calculation of their damages is possible, but expensive because of negligible ties to the litigation. A cy pres remedy in such a case could create financial incentives for class counsel not to incur the expense of proving causation and damages, but instead to assert that such proof is too difficult or to erect barriers to class members' participation in settlement programs. The victims are the injured members of the class, the very people who are entitled to collect their damages.[36] Cy pres settlements thus run the risk of cheating unknown class members by paying settlement proceeds to entities who are not members of the class and who were not adversely affected by the conduct that was the subject matter of the litigation.[37] The availability of a cy pres remedy therefore causes tension with class counsel's obligation to provide legal representation to the entire class.

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[34] *E.g., In re Baby Prods. Antitrust Litig.,* 708 F.3d 163, 172 (3d Cir. 2013) (excusing cy pres on the basis of "deterrent effect"); Mirfasihi v. Fleet Mortg. Corp., 356 F.3d 781, 784 (7th Cir. 2004) ("There is no indirect benefit to the class from the defendant's giving the money to someone else. In such a case the "cy pres" remedy . . . is purely punitive").

[35] *Baby Prods.,* 708 F.3d at 173 ("inclusion of a cy pres distribution may increase a settlement fund, and with it attorneys' fees, without increasing the direct benefit to the class"); *Id.* at 179 ("class counsel, and not their client, may be the foremost beneficiaries of the settlement").

[36] *Mirfasihi,* 356 F.3d at 785 (cy pres settlement to avoid litigation expense and gain a fee "sold [the class] claimants down the river").

[37] *Baby Prods.*, 708 F.3d at169; Dennis v. Kellogg Co., 697 F.3d 858, 863 (9th Cir. 2012) (8% of settlement to be paid to actual class members); *Mirfasihi,* 356 F.3d at 783-84 (none of settlement funds paid to members of one class).

Cy pres payments to non-class members also create potential conflict situations in the selection of the recipients of such payments. Courts have generally required that non-class member recipients of such payments have some logical nexus to the subject matter of the litigation, but the only current avenue for enforcing this limitation is the uncertain course of judicial review. Nothing in Rule 23 governs cy pres distributions, which invites questionable or improper behavior on the part of both lawyers and judges encouraging lawyers to find charities of special interest to themselves or the judge in charge of the class action proceeding.[38] Thus, there are currently no mandatory conflict-of-interest provisions concerning the selection of non-class-member recipients, and thus no institutional impediments to the misuse of such awards as a form of patronage. The Committee should consider reforming Rule 23 to prohibit awards to any entity affiliated with any party to the litigation, with counsel, or with the court itself.

Finally, some court decisions permitting non-class member payments have allowed, or even required, such payments to be made to organizations that encourage additional litigation, that pursue "research" intended for use in future litigation, or, even, for political advocacy purposes.[39] The class action mechanism should not be used as transfer payments for public policy purposes absent congressional action.

F. Proposed Alternative Amendments to Reform Cy Pres.

Rule 23 is an appropriate mechanism for reforming cy pres distribution of settlement funds because Rule 23 should embody the jurisprudential limitations inherent in the Rules Enabling Act and other limits on judicial authority. The proposed amendments to Rule 23 attached as Exhibit 1 seek to reform cy pres either by prohibiting, or in the alternative restricting, the use of cy pres relief or fluid recovery in a class action proceeding in federal court, in the form of either an award or settlement approved by the court, except where the substantive legislation enforced in the class proceeding expressly provides for the possibility of such relief. The first alternative would, consistently with enumerated grants of judicial authority by the Constitution and by Congress, recognize that there is no authority to transfer funds belonging to remote members of a putative class action to persons who are not members of the class. It would prohibit settlements that would distribute funds to non-class members. As enforcement, class counsel proposing transfer of class members' property to non-class members would be deemed inadequate representatives of the class and would be replaced. An exception allowing cy pres payments where specifically provided by statute would recognize the possibility that Congress or state legislatures might grant cy pres authority to the courts in particular instances.

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[38] *See Kentucky Bar Ass'n v. Chesley,* 393 S.W.3d 584, 598 (Ky. 2013) (disbarring attorney in part for diverting class settlement funds to phony cy pres charity controlled by attorney); *Nachshin v. AOL, LLC,* 663 F.3d 1034, 1040 (9th Cir. 2011) (cy pres distribution to Federal Judicial Center Foundation reversed as unrelated to litigation); *cf. In re Pharm. Indus. Average Wholesale Price Litig.,* 588 F.3d 24, 36 (1st Cir. 2009) (allowing cy pres distribution despite class counsel sitting on the board of the recipient charity).

[39] *See In re Agent Orange Prod. Liab. Litig.,* 818 F.2d 179, 186 (2d Cir. 1987) (reversing cy pres arrangement that would have allowed use of cy pres funds for "political advocacy"); Jones v. Nat'l Distillers, 56 F. Supp.2d 355, 359 (S.D.N.Y. 1999) (donating cy pres funds to legal aid to "help[] those needing legal assistance"); *In re Wells Fargo Sec. Litig.,* 991 F. Supp. 1193, 1198 (N.D. Cal. 1998) (distributing cy pres funds to a "clearinghouse" for publicizing securities litigation).

The second alternative addresses the controversy over cy pres settlements by ensuring judicial attention to the issues that could pose the most danger. Such settlements would be available only in cases of impossibility, not merely impracticability due to cost. Recognizing that funds transferred to non-class members are not "common funds" that benefit the class, the second alternative precludes consideration of cy pres payments in the calculation of attorneys' fees under Rule 23(h).[40] Because governments acting in their formal parens patriae capacity are typically recognized as acting on behalf of the public, such as members of a putative class, an exception is provided for payments to such governmental entities. Finally, the second alternative incorporates conflict-of-interest provisions to ensure that entities chosen to receive cy pres payments are not selected due to their ties to the parties or to the court and that cy pres funds are not diverted to the facilitation of future litigation. We respectfully suggest the Committee review these proposals.

III. Rule 23(f) Should Be Amended to Provide a Right to Interlocutory Appeal of Decisions to Certify, Modify or De-Certify a Class.

The current Rule 23(f) was adopted in 1998 to provide increased opportunity for an immediate appeal to supplement the previously existing mechanisms (mainly mandamus) for obtaining appellate review of the all-important decision to certify a class action.[41] Rule 23(f) has now been in existence long enough that it would be appropriate for the Committee to consider whether it has achieved its intended goal of increasing uniformity of district court practice regarding certification decisions.

Analytical data indicates that the number of petitions filed is relatively modest and that the number of actual written opinions is very small.[42] For instance, one study indicates that only 476 petitions required decision over the almost seven years of data (thus an average of 5.2 petitions per Circuit per year).[43] Only a fraction of those petitions accepted for review ultimately result in opinions (a total of 47 opinions over almost 7 years – or, on average, less than a single opinion per Circuit). Notably these numbers indicate that only 28 percent of those petitions actually accepted result in an opinion (47 opinions out of 169 petitions granted over all Circuits over the nearly 7 year time period). These data demonstrate not only how little judicial review is occurring, but also indicate why there is a paucity of meaningful case law being developed to provide clear and uniform standards.

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[40] *See Baby Prods.,* 708 F.3d at 178 ("awarding attorneys' fees based on the entire settlement amount rather than individual distributions creates a potential conflict of interest between absent class members and their counsel").

[41] Certification decisions, although vitally important, are not subject to immediate appellate review. The courts have deemed "final" only a slim set of "collateral orders" that share these characteristics: They "are conclusive, [they] resolve important questions separate from the merits, and [they] are effectively unreviewable on appeal from the final judgment in the underlying action." *Mohawk Indus., Inc. v. Carpenter*, 130 S. Ct. 599, 601 (2009) (quoting *Swint v. Chambers Cnty Comm'n*, 514 U.S. 35, 42 (1995)). "[O]rders relating to class certification" in federal court, it is settled, do not fit that bill. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 470 (1978).

[42] Barry Sullivan & Amy Kobelski Trueblood, *Rule 23(1): A Note on Law and Discretion in the Courts of Appeal*, 246 F.R.D. 277, 290 (2008).

[43] *Id.*

A. The Committee's Purpose in Drafting Rule 23(f) Was to Provide Greater Uniformity in Certification Decisions.

During the early 1990s, the Advisory Committee proposed reform to permit interlocutory appeals because it recognized that the certification ruling is often the crucial ruling in a case filed as a class action.[44] According to the Committee Note submitted with the proposed rule change to the Standing Committee in May of 1993, the severe consequences to be expected from a certification decision "justify a special procedure allowing early review of this critical ruling."[45] The Committee's proposal was limited because of concern over "the disruption that can be caused by piecemeal reviews."[46] But the initial proposal required certification by the trial court, as well as agreement to hear the case by the appellate court.

In 1995, after further discussion and study, the Advisory Committee revised the initial proposal to eliminate the requirement that the district court certify the request for an immediate appeal. The Partial Draft Advisory Committee Note of December 12, 1995, noted that the expansion of "appeal opportunities affected by subdivision (f) is indeed modest."[47] The note further mentioned the drafters' view that the most suitable questions for immediate appeal would be those turning on "novel or unsettled" questions of law.[48] And in the drafters' view, "[s]uch questions are most likely to arise during the early years of experience with new class-action provisions as they may be adopted within Rule 23 or enacted by legislation."[49] The drafters also thought that permission would likely be denied when "certification decisions turn on case-specific matters of fact and district court discretion."[50]

In a 1997 report of the Advisory Committee, Chair Niemayer noted that the proposed Rule 23(f) "has persisted virtually unchanged through the many alternative Rule 23 drafts that have been prepared by the Advisory Committee over the last six years."[51] Chair Niemayer explained that the rule was intended to address the "widespread observations that it is difficult to secure

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[44] Scholars and courts have regularly characterized the decision whether to certify a class as a key turning point in litigation. Such rulings "have enormous practical impact; a grant may impel the defendant to settle and a denial leaves only the named plaintiff's claim which often saps the plaintiff's lawyer of incentive to proceed." Richard D. Freer, *Interlocutory Review of Class Action Certification Decisions: A Preliminary Empirical Study of Federal and State Experience*, 35 W. ST. U. L. REV. 13, 13 (2007-2008). Few decisions are more significant to the litigants than a district court decision granting or denying class certification.

[45] Letter (and attachments) from Sam C. Pointer, Jr., Chairman, Advisory Committee on Civil Rules, to Honorable Robert E. Keeton, Chairman, Standing Committee on Rules of Practice and Procedure (May 17, 1993) (citing (attached) Proposed Amendments to the Federal Rules of Civil Procedure, at 11 (May 1993)), *available at* http://www.uscourts.gov/RulesAndPolicies/rules/archives/advisory-committee-reports/advisory-committee-rules-civil-procedure.aspx.

[46] *Id.*

[47] Letter (and attachments) from Patrick E. Higginbotham to Members of the Standing Committee on Rules of Practice and Procedure (Dec. 13, 1995) (citing Partial Draft Advisory Committee Note Draft Rule 23 at 10), *available at* http://www.uscourts.gov/RulesAndPolicies/rules/archives/advisory-committee-reports/advisory-committee-rules-civil-procedure.aspx.

[48] *Id.*

[49] *Id.*

[50] *Id.*

[51] Memorandum from Paul V. Niemayer, Chair, Advisory Committee on Civil Rules, to Honorable Alicemarie H. Stotler, Chair, Standing Committee on Rules of Practice and Procedure (May 21, 1997).

effective appellate review of class certification decisions and that increased appellate review would increase the uniformity of district-court practice."[52]

B. Rule 23(f) Has Not Delivered Uniformity in Certification Decisions Because It Is Highly Discretionary.

Interlocutory review is available under Rule 23(f) in the "sole discretion of the court of appeals."[53] The Committee Note characterizes the discretion vested in the courts of appeals about whether to hear the appeal as "unfettered."[54] The Note suggests that the appellate courts would likely "develop standards for granting review that reflect the changing areas of uncertainty in class litigation."[55] But no standards were included in the rule – the appellate courts could grant or deny petitions for leave to appeal on "any consideration that the court of appeals finds persuasive."[56]

The federal appellate courts have, as the drafters of Rule 23(f) anticipated, sought to cabin their completely free discretion by adopting lists of criteria for determining whether or not to grant certification appeals. But the criteria adopted continue to be so "flexible" as to allow for virtually "unfettered" decision-making as is evident from review of the following cases:

Blair v. Equifax Check Services, Inc., 181 F.3d 832, 834-35 (7th Cir. 1999) (Declining to adopt a bright-line approach, but instead focuses on whether an appeal is important because class certification is likely to be outcome-determinative or "may facilitate the development of the law. . . .")

Waste Mgmt. Holdings, Inc. v. Mowbray, 208 F.3d 288, 293-94 (1st Cir. 2000) (Recognizing three categories of cases that warrant the exercise of discretionary appellate jurisdiction: (1) when a denial of class status effectively ends the case; (2) when the grant of class status raises the stakes of the litigation so substantially that the defendant likely will feel irresistible pressure to settle; (3) when granting class status will permit the resolution of an unsettled legal issue that is important to the particular litigation as well as important in itself and likely to escape effective review if left hanging until the end of the case.)

Prado-Steiman ex rel. Prado v. Bush, 221 F.3d 1266, 1274-76 (11th Cir. 2000) (In determining whether to grant interlocutory appellate review of class certification, a court should consider, (1) whether the district court's ruling is likely dispositive of the litigation by creating a "death knell" for either plaintiff or defendant; (2) whether the petitioner has shown a substantial weakness in the class certification decision, such that the decision likely constitutes an abuse of discretion; (3) whether the appeal will permit the resolution of an unsettled legal issue that is important to the particular litigation as well as important in itself; (4) the nature and status of

[52] *Id.*
[53] FED. R. CIV. P. 23(f) advisory committee's note (1998).
[54] *Id.*
[55] *Id.*
[56] *Id.*

litigation before the district court; and (5) the likelihood that future events may make appellate review more or less appropriate.)

Sumitomo Copper Litig. V. Credit Lyonnais Rouse, Ltd., 262 F.3d 134 (2d Cir.2001) (petitioners seeking leave to appeal pursuant to Rule 23(f) must demonstrate either (1) that the certification order will effectively terminate the litigation and there has been a substantial showing that the district court's decision is questionable, or (2) that the certification order implicates a legal question about which there is a compelling need for immediate resolution.)

Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 164 (3d Cir. 2001) (although not entirely restricting grant of class status to these three categories, the Court cited "(1) when denial of certification effectively terminates the litigation because the value of each plaintiff's claim is outweighed by the costs of stand-alone litigation; (2) when class certification places inordinate or hydraulic pressure on defendants to settle, avoiding the risk, however small, of potentially ruinous liability; and (3) when an appeal implicates novel or unsettled questions of law; in this situation, early resolution through interlocutory appeal may facilitate the orderly development of the law.")

Lienhart v. Dryvit Sys., Inc., 255 F.3d 138, 145-46 (4th Cir. 2001) (The court adopted the five-factor of *Prado-Steima,* adding that "the 'substantial weakness' prong operates on a sliding scale to determine the strength of the necessary showing regarding the other factors.")

In re Lorazepam & Clorazepate Antitrust Litig., 289 F.3d 98, 105 (D.C. Cir. 2002) (Interlocutory review of class certification decisions is appropriate when (1) when there is a death-knell situation for either the plaintiff or defendant that is independent of the merits of the underlying claims, coupled with a class certification decision by the district court that is questionable, taking into account the district court's discretion over class certification; (2) when the certification decision presents an unsettled and fundamental issue of law relating to class actions, important both to the specific litigation and generally, that is likely to evade end-of-the-case review; and (3) when the district court's class certification decision is manifestly erroneous."); *In re Delta Air Lines*, 310 F.3d 953, 959 (6th Cir. 2002) (The Sixth Circuit "eschew[s] any hard-and-fast test in favor of a broad discretion," but is guided by the relevant factors articulated in other circuits.)

Chamberlan v. Ford Motor Co., 402 F.3d 952, 959 (9th Cir. 2005) ("Review of class certification decisions will be most appropriate when: (1) there is a death-knell situation for either the plaintiff or defendant that is independent of the merits of the underlying claims, coupled with a class certification decision by the district court that is questionable; (2) the certification decision presents an unsettled and fundamental issue of law relating to class actions, important both to the specific litigation and generally, that is likely to evade end-of-the-case review; or (3) the district court's class certification decision is manifestly erroneous.")

Vallario v. Vandehey, 554 F.3d 1259 (10th Cir. 2009) (Interlocutory review of district court's class certification order is generally appropriate: (1) in "death knell" cases, when questionable class certification order is likely to force either party to resolve case based on considerations independent of the merits; (2) certification decision involves unresolved issue of

law relating to class actions that is likely to evade end-of-case review, significant to instant case as well as class action cases generally; or (3) decision is manifestly erroneous.)[57]

These cases demonstrate that the criteria applied in numerous appellate decisions continue to be so "flexible" as to allow for virtually "unfettered" decision-making.

C. Unfettered Decision-Making Has Resulted in Seemingly Arbitrary and Highly Inconsistent Results.

The empirical data on immediate appeals under Rule 23(f) raises grave concerns about how it is working. One scholar commented that "between the courts' 'unfettered discretion' and their opaque decision-making processes, what happens behind the courts' closed doors has been something of a mystery…."[58] After examining available data, Sullivan and Trueblood concluded that "[a]t best, the circuits may be described as inconsistent – in terms of petition volume, as to whether the court of appeals adheres to an articulated standard of review, the frequency with which the circuits publish their opinions explaining why they accept or deny Rule 23(f) petitions, and of course, the frequency with which Rule 23(f) petitions are granted."[59] In fact, as of the date of their data (December, 1998 - October 2006), one Circuit had failed to grant even a single Rule 23(f) petition and another Circuit had granted only five. The grant percentages for the Circuits varied wildly from 0% to 86% even though the data covered almost seven total years. Further, there was not much middle ground – six Circuits were 28% or below and four Circuits were 54% or higher.[60]

Even more troubling, available data suggested inconsistent success rates between plaintiffs' petitions and those brought by defendants.[61] These inconsistencies raise concern about whether litigants are being provided a process that conforms to traditional notions of due process and judicial decision-making. Those concerns are necessarily heightened by the staggering consequences that flow from the decision to certify or deny certification. The importance of this decision point was acknowledged when Rule 23(f) was enacted. But the reform made interlocutory appellate review so discretionary as to invite arbitrary decision-making. Unlike the Supreme Court's certiorari discretion to which it has been analogized, Rule 23(f) does not empower a single national body to accept cases to establish national law; it empowers twelve circuits to decide complex, and often fact-based decisions about whether a case will proceed as a class or not. And further, unlike the Supreme Court's certiorari discretion, Rule 23(f) considerations are not examining whether there is a circuit split to ensure a consistent national rule of law but are "at least as much concerned with deciding actual disputes as with clarifying the law…."[62] These distinctions are important, and they underscore the necessity for appeals of certification decisions as a matter of right.

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[57] Neither the Fifth Circuit, *see, e.g. Anderson v. U.S. Dept. of Hous. & Urban Dev.*, 554 F.3d 525, 527 (5th Cir. 2008), nor the Eighth Circuit, *Liles v. Del Campo*, 350 F.3d 742, 746 n, 5 (8th Cir. 2003), has adopted specific standards regarding when the court will hear an interlocutory appeal of a class certification order.
[58] Barry Sullivan & Amy Kobelski Trueblood, *supra* note 32, at 280-81.
[59] Barry Sullivan & Amy Kobelski Trueblood, *supra* note 32, at 284.
[60] Barry Sullivan & Amy Kobelski Trueblood, *supra* note 32, at 290.
[61] Barry Sullivan & Amy Kobelski Trueblood, *supra* note 32, at 286.
[62] Barry Sullivan & Amy Kobelski Trueblood, *supra* note 32, at 288.

D. Uncertainty About Class Certification Decision Standards Creates Difficulty for Bench and Bar, and It Undermines the Litigants' Faith in the Judicial System.

The inconsistency in certification decisions creates uncertainty for the parties, renders it difficult for lawyers representing the parties to properly advise their clients, and undermines respect for the judiciary as an institution adhering to the rule of the law. For many years, great jurists and scholars of the past criticized the equitable courts for equitable power resulting in rulings as uncertain as the length of the Chancellor's foot, which might be long, or short, or somewhere in between.[63] The lack of predictability that made equity a "roguish thing" exists today in class certification decisions.[64] When judges employ different standards for the right of appellate review – let alone the standards for such review – the process inevitably departs from what has traditionally been considered the rule of law. Like cases are not treated alike. Litigants find it impossible to navigate such unpredictability, and frustration feeds the pressure to settle a case, not because it is weak on the merits, but to avoid the costs and vagaries of judicial system.

E. Amending Rule 23(f) to Provide Immediate Appeal Would Remove Uncertainty.

Adoption of a rule allowing for an immediate appeal of decisions to certify, de-certify or modify a class would end the arbitrary "unfettered" decision-making about when an interlocutory appeal can be taken and would foster the development of more case law on certification standards. Many states have adopted legislation providing for an immediate right of appeal from the certification decision of the trial court.[65] Ample precedent exists for the Committee's power to provide exceptions to the "final-decision" rule.[66] For the parties, the certification decision can

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[63] John Seldon's oft-quoted comment about the problems created by unfettered discretion in the courts of equity applies here with even more force. He said:

> Equity is a roguish thing. For Law we have a measure, know what to trust to; Equity is according to the conscience of him that is Chancellor, and as that is larger or narrower, so is Equity. 'T is all one as if they should make the standard for the measure we call a "foot" a Chancellor's foot; what an uncertain measure would this be! One Chancellor has a long foot, another a short foot, a third an indifferent foot. 'T is the same thing in the Chancellor's conscience.

John Bartlett, *Familiar Quotations,* (10th ed, rev. and enl. by Nathan Haskell Dole. Boston: Little, Brown, 1919; Bartleby.com, 2000) (quoting John Selden) *available at* http://www.bartleby.com/100/155.html .

[64] *See generally*, Freer, *supra* at 20-22 (showing that different circuits accept review at different rates and on appeal affirm or reverse certification decisions at different rates).

[65] *See, e.g.,* ALA. CODE § 6-5-642 (1975) ("court's order certifying a class or refusing to certify a class action shall be appealable in the same manner as a final order to the appellate court which would otherwise have jurisdiction over the appeal from the final order in the action"); GA. CODE ANN. § 9-11-23 (g) (West 2012) ("court's order certifying a class or refusing to certify a call shall be appealable in the same manner as a final order to the appellate court which would otherwise have jurisdiction over the appeal from a final order in the action"). Some states have embodied this right of immediate appeal in court rules. *See, e.g.,* N. D. R. CIV. P. 23; OHIO REV. CODE ANN. § 2505.02(B)(5) (West 2012); Pa. R. Civ. P. 1710; TEXAS INS. CODE ANN. Art. 541.259. Florida's appellate rules likewise permit an appeal as a matter of right by an aggrieved party of orders either granting or denying class certification. Fla. R. App. P. 9.130. *See also* I.C.A. Rule 1.264/1.264(3)(making an order certifying or refusing to certify an action as a class action as appealable); LSA-C.C.P. Art. 592 (Louisiana's provision allowing for an appeal to be taken as a matter of right from an order that an action should be maintained as a class action). Many other states provide for discretionary appeals of certification decisions.

[66] *See* FED. R. CIV. P. 23(f) (pursuant to § 1292(e), accords Courts of Appeals discretion to permit appeals from district court orders granting or denying class-action certification); FED. R. CIV. P. 54(b) (providing for "entry of a

mean the death knell of the litigation – either because a denial makes the lawsuit too expensive to pursue or because a grant threatens litigation costs or risks that will be ruinous to the defendant thus forcing settlement. In either case, under our current system, the party who has been unsuccessful at the certification stage of the lawsuit is relegated to an extraordinary discretionary process that does not offer sufficient safeguards to assure that the decision is correct. It is time to re-write the rule.

IV. The Committee Should Adopt an "Opt-In" Rule for Rule 23(b)(3) Class Actions to Ensure a Meaningful Connection Between Class Members and the Case.

Rule 23(b)(3) permits representative plaintiffs to seek damages on behalf of all plaintiffs who have been certified as class action members. Because Rule 23(b)(3) actions are governed by Rule 23(c)(2)(B)(v)'s "opt-out" mechanism, the legal rights and interests of millions of people are determined in Rule 23(b)(3) cases each year where they are represented, often without their knowledge or consent, by attorneys they do not choose. The dramatic expansion of classes and the resulting changing nature of class action cases has led to a widespread view that many class members are so unconnected to the action that they have no idea whether class attorneys are conducting the action and handling the terms and conditions of settlement in the best interests of the class members. To address these problems, the Committee should consider amending Rule 23 by replacing the "opt-out" provision found in Rule 23(c)(2)(B)(v) and (vi) and 23(c)(3)(B) with an "opt-in" provision to ensure that every individual that becomes a certified class member has a meaningful right to decide whether to join a class action and choose his or her own lawyer.

The 1966 amendments authorized courts to certify as a class all persons who received actual or constructive notice of a certain type of class action (a Rule 23(b)(3) class action) and failed to take affirmative steps to withdraw from the class upon receipt of class notice. Under this system, unless a person within that class takes affirmative action to "opt-out" of the class, they are deemed class members and are bound by the outcome of the case. This is true regardless of whether they received or understood the class notice, and regardless of whether they wanted to be a member of the class.

To recipients, a class notice can be a complex legal document whose implications are unclear. As a result of this uncertainty, the common response of doing nothing has the incongruous effect of converting the recipient of the notice into a class member, often unwittingly. The effect is the creation of massive classes comprised of many members who do not understand the implications of class membership. These class members often do not understand that they have consented to be represented by class counsel who will effectively make all key decisions in the case, including the terms and conditions of any settlement that, if approved by the court, will be binding on all class members.

Equally important, a class member who passively fails to "opt-out" often does not understand the relationship between his or her inclusion in the class and class counsel's compensation. As a

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final judgment as to one or more, but fewer than all, of the claims or parties"). Congress has authorized the promulgation of rules defining finality and allowing for immediate appeal. Prescriptions in point include 28 USC § 1292 (immediately appealable "[i]nterlocutory decisions"); 28 USC § 2072(c) (authorizing promulgation of rules defining when a district court ruling is final for purposes of appeal under § 1291).

general rule, compensation of class counsel is related to the size of the class. The larger the Rule 23(b)(3) class, the greater the potential damages that can be assessed against the defendants and, therefore, the greater the settlement and attorney's fees. (The relationship between the class members and the settlement is even more complicated by the ability of courts to order cy pres payments to non-class members – see II., above.)

Class members are often unaware that any settlement negotiated between class counsel and the defendants in a Rule 23(b)(3) class will include payment to class counsel, which can be in the millions of dollars or more. Class members frequently fail to understand that class counsel and the defendants have their own financial interests in any settlement, with class counsel benefiting from a settlement that maximizes counsel fees and defendants benefiting from one that minimizes their payout. While a court is required to approve the fairness of any class settlement, when its primary proponents are the class counsel and defendants that negotiated it, and the opposition, if any, comes from isolated class members seeking greater compensation for the class, the process can be weighted in favor of the proposed settlement. As commentators have noted, parties to a class action can frequently "find a variety of means by which to trade a low settlement for a high attorney's fee, once the client becomes only a distant bystander to the litigation."

To preserve the benefits of the class action while correcting these deficiencies, the Committee should amend the applicable rules to ensure that a person can become a class member only if, after a class is certified, he or she affirmatively seeks that status in writing after being fully informed of his or her rights and obligations and those of the class counsel, and to specifically select his or her attorney in the pending class action litigation. Among the rule changes the Committee might consider in implementing a change from an opt-out to an opt-in system for Rule 23(b)(3) class certifications are:

a. requiring an attorney claiming to represent any certified class member in a Rule 23(b)(3) class action to provide to the federal court that potential class member's express written authorization to be so represented and to become a class member, stating that the person:

   - intends to retain a specifically named attorney or firm;
   - is aware of the legal consequences of joining that litigation, including the rights a class member will lose or waive by joining the action, the person's right to enter an appearance through his or her own counsel, and the person's right not to be included in the class action; and
   - was provided by the designated attorney a good faith estimate of the dollar amount of any attorneys' fee, an explanation of how any attorneys' fee will be calculated and funded, and an explanation of the relative recoveries that the attorney or firm and such person would receive if the claim is settled or decided favorably.

b. permitting the federal court, in its discretion, to direct notice to potential Rule 23(b)(3) class members of information that would reasonably provide them with information sufficient to make an informed decision as to whether to join the class while protecting them from undue or inappropriate influence by a class action attorney or his or her agent or representative that could dilute the effect of the full disclosure provision in paragraph a. above.

c. confirming that any person who did not affirmatively consent in writing to join any putative or certified class described in paragraph a. above is not bound by any settlement of that action or any decision or judgment of that court and remains free to file a separate action using counsel of his or her choice as to the same subject matter without having his or her rights affected by the prior class action.

Changes such as these will go a long way towards restoring a relationship between class members and their actions, as well as remedying many of the controversial problems with Rule 23(b)(3) actions.

V. The Committee Should Clarify that Judicial Estoppel Does Not Apply to Class Settlement Negotiation Positions.

Class action defendants have historically utilized settlement classes to reach global resolution of claims brought against them.[67] A controversial decision of the United States Court of Appeals for the Seventh Circuit, however, put a significant restriction on settlement class negotiations when it applied the doctrine of judicial estoppel to defendants whose agreed-upon class had been disapproved.[68] In an unprecedented decision, the Seventh Circuit judicially estopped the defendants from subsequently challenging the adequacy of a settlement class on the ground that earlier conflicting positions could lead to "fraud in the legal process."[69] The Committee should draft a rule to avoid the harm that this holding could produce.

The doctrine of judicial estoppel traditionally has been limited to instances where a proposed argument or position of a party has been accepted by a court and the party subsequently benefited from the court's decision.[70] Other courts have also applied the doctrine to instances where a party negotiated in less than good faith or played "fast and loose" with the court.[71] But where a settlement class has not been approved, and the parties are operating in good faith, there is no risk of judicial fraud or any perception that a court has been misled. Nor is there any risk of inconsistent court determinations if the original proposed settlement has never been adopted.

The potential application of judicial estoppel to an unsuccessful class settlement may have a detrimental effect on negotiations to resolve class certification disputes. Defendants would be wary of seeking to resolve claims which, if rejected or reversed, could bind them in future proceedings. Application of judicial estoppel could encourage defendants instead to engage in

[67] *See* Jon B. Nelsen, Note, *Fast and Loose Litigants and Courts: Carnegie v. Household International, Inc. and the End of Settlement Classes*, 84 TEX. L. REV. 541 (2005).
[68] *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656 (7th Cir. 2004) (Posner, J).
[69] *Id.* at 660.
[70] *New Hampshire v. Maine*, 552 U.S. 742, 750-51, 755, 121 S. Ct. 1808, 1815, 1817 (2001).
[71] *See* Nelsen, *supra* note 71, at 549 and cases cited.

protracted litigation, "wars of attrition," or to adopt more aggressive individual litigation strategies. Global settlements may also be viewed as too risky for defendants to seek if a disapproving court could judicially estop a defendant from arguing against certification of the class in the future. Accordingly, we propose the following rule:

> If a proposed settlement class is not approved either by a trial court or on appeal, or if negotiations between the parties fail to reach agreement on a settlement class, then no statements, representations, or arguments made by the proponents of the settlement in the settlement context may be used against the proponent making the statement in any subsequent litigation of class certification or merit issues.

A rule such as this would make clear that positions taken during an ultimately unsuccessful settlement stage will not be used against a party in future class certification or merit proceedings.[72] This proposed rule would not prohibit a court from imposing sanctions on any party if the proponents of a settlement have taken positions in bad faith or misrepresented to the court the benefits of the proposed settlement.

We respectfully suggest the Committee consider a rule to ensure that parties attempting to negotiate a final resolution of a dispute through the class process can do so without fear that their positions could be applied to their detriment if the class is not ultimately certified.

CONCLUSION

Rule 23, and particularly (b)(3), has become something that was not envisioned. Class action cases have grown significantly since the FRCP created them in 1938 and modified Rule 23 in 1966. They serve an important function in our judicial system, but their abuse poses great risks. The exponential increase in the size of classes – and the corresponding lack of any meaningful relationship between class members and their cases – is a fundamental cause of many of the issues that have created controversy. Accordingly, we respectfully suggest that the Committee and its Rule 23 Subcommittee take much-needed action to reform four key areas of class actions: prohibit or restrict cy pres payments to non-class members; provide a right to interlocutory appeal on class certification decisions; adopt an "opt-in" rule for Rule 23(b)(3) actions; and clarify that judicial estoppel does not apply to class action settlement negotiations.

Respectfully submitted,

Lawyers for Civil Justice
Federation of Defense & Corporate Counsel
DRI – The Voice of the Defense Bar
International Association of Defense Counsel

[72] The proposed rule is adopted in part from Section 3.06 of the PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION as adopted by the American Law Institute in 2009.

EXHIBIT 1 − Cy Pres Amendments to Rule 23

Alternative Proposal #1 – Prohibition of Cy Pres

New section to be added to Fed. R. Civ. P. 23 (e)

(6) (A) Except as provided in Rule 23(h), no settlement under this Rule shall allow any payments to charitable organizations or to other persons who are not members of the class as defined in the final settlement. No settlement proposal providing for payments in violation of this subsection may be approved by the court.

(B) Notwithstanding subsection (6)(A), a settlement under this Rule may allow payments to governmental entities responsible for the enforcement of any statute or regulation that the settling defendant(s) allegedly violated.

New section to be added to Fed. R. Civ. P. 23 (g)

(5) ***Inadequacy of class counsel.*** Class counsel proposing a settlement in violation of Rule 23(e)(6) shall be deemed inadequate to represent the class under Rule 23(a) and shall be replaced. Pursuant to this subsection, the Court may replace counsel on its own motion, or upon motion by any party or by any member of the putative class. Replacement counsel shall not be a member of the same firm or contractual consortium as counsel who were thereby removed. Class counsel removed pursuant to this subsection shall have no right to receive any fee, or quantum meruit award.

Alternative Proposal #2 – Cy Pres As A Last Resort

New section to be added to Fed. R. Civ. P. 23(e)

(6) No settlement providing for payments to charitable organizations or to other persons who are not members of the class as defined in the final settlement order, excepting governments acting in their official capacity, including as *parens patriae*, may be approved by the court except upon written findings that: (1) it is impossible, and not merely impractically expensive, to direct all settlement funds to members of the class; (2) a direct relationship exists between all non-members of the class proposed to receive payment and the subject matter of the litigation; (3) no non-member of the class proposed to receive payment is in any way affiliated with any party to the litigation, with either class or defense counsel or their relatives, or with the court; and (4) no non-member of the class proposed to receive payment is involved in the maintenance of, research for, or encouragement of future litigation.

(7) The court may refer issues related to findings required by Rule 23(e)(6) to a special master or a magistrate judge, as provided in Rule 54(d)(2)(D)

New section to be added to Fed. R. Civ. P. 23(h)

(5) No claim for an award under this Rule shall take into account any payments made to charitable organizations or to other persons who are not members of the class as defined in the final settlement and provided by Rule 23(e)(6). Only payments made to members of the class, or to governments acting in their official capacity, including as *parens patriae*, shall be considered the award of attorney's fees under this Rule.

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LAWYERS FOR CIVIL JUSTICE

COMMENT
to the
ADVISORY COMMITTEE ON CIVIL RULES
and its
RULE 23 SUBCOMMITTEE

REPAIRING THE DISCONNECT BETWEEN CLASS ACTIONS AND CLASS MEMBERS: WHY RULES GOVERNING "NO INJURY" CASES, CERTIFICATION STANDARDS FOR ISSUE CLASSES AND NOTICE NEED REFORM

August 13, 2014

Lawyers for Civil Justice ("LCJ")[1] respectfully submits this Comment to the Advisory Committee on Civil Rules ("Advisory Committee" or "Committee") and its Rule 23 Subcommittee (the "Subcommittee") to supplement LCJ's August 9, 2013, Comment "To Restore a Relationship Between Classes and Their Actions: A Call for Meaningful Reform of Rule 23."[2]

I. Introduction and Summary

LCJ's previous Comment highlighted how the relationship between class members and their cases has changed since 1966 and urged the Subcommittee to take much-needed action to reform four key areas of class actions: prohibit or restrict cy pres payments to non-class members; provide a right to interlocutory appeal on class certification decisions; adopt an "opt-in" rule for Rule 23(b)(3) actions; and clarify that judicial estoppel does not apply to class action settlement negotiations.

[1] Lawyers for Civil Justice ("LCJ") is a national coalition of defense trial lawyer organizations, law firms, and corporations that promotes excellence and fairness in the civil justice system to secure the just, speedy and inexpensive determination of civil cases. For over 25 years, LCJ has advocated for reform of the federal civil rules in order to: (1) promote balance and fairness in the civil justice system; (2) reduce costs and burdens associated with litigation; and (3) advance predictability and efficiency in litigation.

[2] LAWYERS FOR CIVIL JUSTICE, TO RESTORE A RELATIONSHIP BETWEEN CLASSES AND THEIR ACTIONS: A CALL FOR MEANINGFUL REFORM OF RULE 23 (Aug. 9, 2013), *available at* http://www.lfcj.com/documents/LCJ%20Comment%20-%20Class%20Action%20Reform%208.9.13.pdf.

In this Comment, LCJ builds upon those recommendations by describing another area of disconnect between class members and class actions: so-called "no injury" class actions, which are cases filed on behalf of class members who have suffered neither an actual out-of-pocket financial injury nor actual physical injury. Separately, we also strongly urge the Subcommittee to amend Rule 23 to resolve an ambiguity that has led to a circuit split on standards for "issue classes"—a situation that has allowed cases to proceed despite the inability to comply with Rule 23(a) and (b) standards. Finally, we ask the Subcommittee to reform the notice provision to allow for the possibility of electronic notice to potential class members when appropriate.

II. The Subcommittee Should Examine the Role of Rule 23 in Allowing "No Injury" Class Actions.

The Rules Enabling Act requires that the Federal Rules of Civil Procedure "shall not abridge, enlarge or modify a substantive right."[3] Because Rule 23's purpose is to provide the procedural mechanism for aggregating claims, the Subcommittee should take action where Rule 23 is being used to modify the substantive rights that exist absent aggregation. As the American Law Institute outlined in its *Principles of Aggregate Litigation*:

> Aggregate treatment is . . . possible when a trial would allow for the presentation of evidence sufficient to demonstrate the validity or invalidity of all claims with respect to a common issue under applicable substantive law, *without altering the substantive standard that would be applied were each claim to be tried independently* and without compromising the ability of the defendant to dispute allegations made by claimants or to raise pertinent substantive defenses.[4]

"No injury" class actions violate this principle because they change the substantive standard courts apply. Instead of complying with the long-standing requirement that juries look at the specific facts of a specific incident requiring proof of duty, breach of duty, causation, and resulting injury, courts in "no injury" cases consider only—at most—duty and breach of duty. As one trial court described the difficulty in trying a proposed "no injury" class action: "A personal injury case is . . . tethered to the discrete facts of an identifiable accident involving specific individuals"[5] but a "no injury" case "presents a more difficult and amorphous case for the jury."[6] The difficulty is caused when plaintiffs use "composite" or "averaged" evidence to prove their case instead of focusing on actual incidents or actual claims.[7]

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[3] 28 U.S.C. § 2072 (2014).
[4] AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 2.02 cmt. d, at 89 (2010) (emphasis added).
[5] Lloyd v. Gen. Motors Corp., No. L-07-2487, 2011 U.S. Dist. LEXIS 63436, at *26-27 (D. Md. June 16, 2011).
[6] *Id.*
[7] Gates v. Rohm & Haas Co., 655 F.3d 255, 266 (3d Cir. 2011) (disapproving use of "composite" or averaged evidence).

A. Background: The Definition of a "No Injury" Case

A "no injury" class action is a case in which the class members (or at least a majority) have not actually experienced the harm alleged in the complaint. It is a longstanding principle of the American legal system that courts decide actual cases or controversies, and, as the Seventh Circuit Court of Appeals stated more than a decade ago in reversing a problematic certification of a "no injury" class, "No injury, no tort, is an ingredient of every state's law."[8] "No injury" class actions contravene this principle under the guise of Rule 23.

An emerging trend among plaintiffs' lawyers has been to obscure the "no injury" nature of these cases within the broader class-action context. Increasingly, cases are framed in terms of exposure to future injury (which in most cases would require dismissal on ripeness grounds) and allege an unspecified "diminution in value" or "premium paid" for an allegedly defective product. Some feature a named plaintiff with an idiosyncratic "actual injury" to represent a class that includes a large number of non-injured class members. Such classes are rarely certified for trial purposes and are almost never litigated to a final judgment. Nonetheless, allowing allegations like these to proceed even to the certification stage can cost significant resources for both the court and the defendant. Such resources would undeniably be better spent protecting against *actual harms* suffered by present and future plaintiffs.

B. "No Injury" Class Actions Alter Substantive Rights, Offending Due Process and the Rules Enabling Act.

"No injury" class actions alter the substance of state law by removing one or more of the elements of their state law causes of action.[9] If each class member does not have to prove she

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[8] *In re* Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig., 288 F.3d 1012, 1017 (7th Cir. 2002).

[9] One type of "no injury" class action that leads to particularly distorted results is that involving statutory damages. Statutory damages "set a fixed dollar amount as a floor on the recovery that a harmed litigant can recover; they are usually coupled with the capacity for an attorney to recover fees so as to enable individuals to pursue small and ineffable harms." WILLIAM RUBENSTEIN ET AL., NEWBERG ON CLASS ACTIONS § 4.83 (2014). Consumer protection acts of about 18 states allow consumers to recover actual or the statutorily prescribed damages, whichever is greater, and there are about a dozen federal statutory damages codified within consumer protection statutes or intellectual property laws. The expressed rationales for such laws include the vindication of individual plaintiffs' rights, judicial expediency, and deterrence. *Emerging Issues in Statutory Damages,* JONES DAY, 1 (2011), *available at* http://www.jonesday.com/emerging_issues_in_statutory_damages/. In the product liability context, allowing class recovery of statutory damages claims potentially permits recovery of the same damages twice – once for the theoretical predicted future loss, and again later when plaintiffs suffer actual harm or damage. Because the purpose of statutory damages is to provide remedies and deterrence in individual cases, aggregation of statutory damages claims into class actions can produce absurd results. The Fair and Accurate Credit Transactions Act (FACTA), for example, requires retailers to redact all credit card numbers except the last five digits, as well as the expiration date, from all receipts. Failing to do so can result in statutory damages of "not less than $100 and not more than $1,000" per violative receipt. In the class action context, this "create[s] devastating liability that would put the defendant out of business simply for failing to redact information from a retail receipt."
A recent example of this is *Kesler v. Ikea U.S. Inc.*, 2008 WL 413268, in which an Ikea store gave the plaintiff a merchandise receipt that included the expiration date of plaintiff's credit card. Less than a month after this occurrence, Ikea corrected its then-faulty credit card machines. Regardless, plaintiff brought a class action for "all consumers in the United States" who received such a receipt. The resulting class included 2.4 million members and resulted in statutory damages ranging from $240 million to $2.4 billion. While the court observed that "the available statutory damages are minimal" for individuals, and thus, a class action was still a justiciable mechanism, it placed the blame for the absurdity of the suit on political actors: "Maybe suits such as this will lead Congress to

was actually injured, then she is absolved of demonstrating injury or damages, and may also be absolved of demonstrating causation as well. This departure from the most fundamental elements of a cause of action offends due process. To the extent Rule 23 allows class actions that ignore a requirement to allege or prove those elements, it violates the proscriptions of the Rules Enabling Act.[10]

Eliminating required elements of a cause of action under the guise of a procedural rule deprives defendants of due process through the pretrial stage of a class action. During that time, the defendant faces liability for actions for which valid individualized defenses may exist. For example, a manufacturer could face nationwide class liability for an idiosyncratic manufacturing defect despite not having an opportunity to expose the plaintiff's lack of evidence that the defect reached any further than the named plaintiff herself.

Moreover, the class-wide pleadings can mask the fact that a plaintiff does not have an actual theory of the case: something that may become clear only when class certification is finally briefed. For example, the plaintiff may have no sound theory of how an alleged defect actually causes any harm to a class member.[11] While this may ultimately result in the dismissal of the case, it does not repay the resources expended by a defendant in responding to the complaint, briefing a motion for dismissal or taking other action to defend its position.

From a policy standpoint, such deprivation of due process can lead to a number of bad outcomes. For instance, compensation for "no injury" cases may deter legitimate behavior by the defendant. Indeed, a number of scholars have pointed out that private enforcement of regulation tends to overdeter legitimate behavior and can hamstring governmental attempts to regulate public risks.[12] Such private enforcement can also disrupt the balance that regulatory agencies strive to achieve through their own regulation and enforcement. In addition, it can create windfall income for uninjured claimants (much of which may be absorbed into attorneys' fees) which needlessly increases costs for consumers.[13]

C. "No Injury" Class Actions Create Confusion about Certification Standards.

Because of the amorphous nature of "no injury" class actions, courts have not been able to agree on how to apply Rule 23 in these cases, leading to a split among appellate circuits. Moreover, the disagreement goes deeper than a mere circuit split: even courts that agree on outcomes—i.e., whether a "no injury" class should be certified or not—disagree on the justifications for those outcomes. Courts tend to classify such cases into three categories: (1) standing; (2) federalism concerns; and (3) no-causation types of classes.

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amend the [FCRA]; maybe not. While the statute remains on the books, however, it must be enforced." Unfortunately, Ikea is not the only victim of these laws.

[10] Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 546 (2011) (quoting 28 U.S.C. § 2072(b)); Corder v. Ford Motor Co., No. 3:05-CV-00016, 2012 U.S. Dist. LEXIS 103534, at *20 (W.D. Ky. July 24, 2012) (Rules Enabling Act requires "a full litigation of [element] of the cause of action, and for each putative class member no less").

[11] *See, e.g.*, Burton v. Chrysler Group LLC, No. 8:10-00209-MGL, 2012 U.S. Dist. LEXIS 186720, at *13 (D.S.C. Dec. 21, 2012).

[12] David Freeman Engstrom, *Agencies as Litigation Gatekeepers*, 123 YALE L.J. 616, 633-37 (2013).

[13] *See, e.g.*, Willett v. Baxter Int'l, Inc., 929 F.2d 1094, 1100 n. 20 (5th Cir. 1991).

Courts in the Second, Third, Fifth, Eighth, and Eleventh Circuits generally hold that "no injury" class actions cannot be certified under Rule 23. However, they rely on different reasons to reach that conclusion. Some courts have held that "no injury" class actions lack commonality because all class members must possess Article III standing.[14] Others have pointed out that "no injury" claims would be treated differently under different states' laws.[15] A number of district courts have instead focused on the fact that it is next to impossible to ascertain who rightfully belongs in a class when the court cannot look at how they were injured.[16]

By contrast, courts in the Sixth, Seventh, and Ninth Circuits have all recently ratified the certification of "no injury" class actions.[17] Notably, however, these courts do not agree on their reasons either. The Sixth and Ninth Circuits treat the question of whether absent class members suffered an injury as a merits issue not appropriately addressed when debating certification.[18] The Seventh Circuit treats the question as one of "efficiency,"[19] a concept that, while important, should not trump the substantive law.

The widely varying treatments of "no injury" class actions—not just the differing outcomes, but the differing justifications—demonstrate that the Rule 23 Subcommittee should amend the rule to provide clarity.

D. Relief to Class Members is Difficult in "No Injury" Cases.

It is extremely difficult for courts to assign a proper value to the relief that class members should receive in "no injury" cases. This problem is particularly acute in cases that involve both class members who were actually injured and those who were not.[20]

In the product liability context, for example, if relief is split between monetary damages and injunctive relief (e.g., a judicially ordered repair), it is very likely that uninjured class members will opt for money over the repair. In doing so, they may preclude themselves from receiving

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[14] *See* Avritt v. Reliastar Life Ins. Co., 615 F.3d 1023, 1034 (8th Cir. 2010).
[15] Cole v. Gen. Motors Corp., 484 F.3d 717, 730 (5th Cir. 2007).
[16] Walewski v. Zenimax Media, Inc., No. 6:11-cv-1178-Orl-28DAB, 2012 U.S. Dist. LEXIS 33181 (M.D. Fla. Jan. 30, 2012) (rejecting class defined to include purchasers with "no complaints" about the allegedly defective product); *In re* Canon Cameras, 237 F.R.D. 357, 359 (S.D.N.Y. 2006) (rejecting certification where less than 1% of class members reported a malfunctioning camera); *see also* Payne v. FujiFilm U.S.A., Inc., No. 07-385 (GEB), 2010 WL 2342388, at *5 (D.N.J. May 28, 2010); Lewis v. Ford Motor Co., 263 F.R.D. 252, 264 (W.D. Pa. 2009); Sanneman v. Chrysler Corp., 191 F.R.D. 441, 451 (E.D. Pa. 2000); Chin v. Chrysler Corp., 182 F.R.D. 448, 455 (D.N.J. 1998); Feinstein v. Firestone Tire & Rubber Co., 535 F. Supp. 595, 603 (S.D.N.Y. 1982).
[17] *See* Glazer v. Whirlpool Corp. (*In re* Whirlpool Corp. Front-loading Washer Prods. Liab. Litig.), 722 F.3d 838, 854 (6th Cir. 2013) (question of injury is question of "damages," and not necessary before deciding merits of claim) *cert. denied,* 134 S. Ct. 1277 (2014); Butler v. Sears, Roebuck & Co., 727 F.3d 796, 799 (7th Cir. 2013) (large number of unharmed class members "was an argument not for refusing to certify the class but for certifying it and then entering a judgment that would largely exonerate Sears") *cert. denied,* 134 S. Ct. 1277 (2014); Wolin v. Jaguar Land Rover N. Am., LLC, 617 F.3d 1168, 1173 (9th Cir. 2010) (certification was proper regardless of whether any class members actually experienced premature tire wear caused by alleged defect).
[18] *Glazer*, 722 F.3d at 854; *Wolin*, 617 F.3d at 1173.
[19] *Butler*, 727 F.3d at 798.
[20] Purported classes containing both injured and uninjured plaintiffs should be denied certification under the "typicality" requirement of Rule 23(a)(3).

further relief should they become injured later.[21] This practice, which is referred to as "claim-splitting," is very common in "no injury" cases.

The United States Supreme Court has long recognized that mixing injured and uninjured class members in the same case frequently creates insurmountable conflicts within the class. Those class members with manifest current injuries will have different incentives in pursuing relief than those class members who face only the possibility of future harm, yet both are often represented by the same named plaintiffs and the same counsel.[22]

E. The Subcommittee Should Reform Rule 23 to Curtail Abuses Inherent in "No Injury" Cases.

The problems posed by "no injury" class actions stem from the effects that aggregation pursuant to Rule 23 has on the underlying legal claims. Contrary to the Supreme Court, the Rules Enabling Act and the American Law Institute, aggregation under Rule 23 often allows changes to the underlying substantive merits of the claims. Because one justification for class actions is to aggregate low-value claims until they are worth trying, some courts have concluded that class actions also may allow for the aggregation of *no*-value claims. Given the muddied doctrinal justifications for both certifying and refusing to certify "no injury" class actions, there are a number of clarifications to Rule 23 that would both unify the law in this important area and make class actions more effective when they are actually needed. Such clarifications include:

- The Subcommittee should clarify the role of the merits inquiry in class certification. In particular, it should amend Rule 23 to reflect the Supreme Court's holding in *Wal-Mart Stores v. Dukes* that a court must engage with the merits of a claim if it will affect certification, and that a class in which some class members will recover because they were actually injured, but others will not, lacks the required commonality.

- The Subcommittee should clarify the standard applied in the "rigorous analysis" of Rule 23. Currently, the Supreme Court has stated, albeit in dicta, that this standard is "stringent" and "in practice exclude[s] most claims."[23] Nonetheless, various lower courts have held that Rule 23 should be applied in a "liberal" manner that errs on the side of certification.[24] Clarifying that the "rigorous analysis" required by Rule 23 is "stringent," rather than "liberal," would help guide courts' discretion when faced with the complexities of "no injury" litigation.

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[21] Lloyd v. Gen. Motors Corp., No. L-07-2487, 2011 U.S. Dist. LEXIS 63436, at *26-27 (D. Md. June 16, 2011) (allowing uninjured class members to collect monetary relief for alleged automotive defect would defeat purpose of exception to economic loss doctrine for safety defects).

[22] Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 625-26 (1996); *see also* Dewey v. Volkswagen Aktiengesellschaft, 2012 U.S. App. LEXIS 10932, at *45-46 (3d Cir. May 31, 2012) (rejecting class settlement because of intra-class conflict).

[23] Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2310 (2013).

[24] *See, e.g.*, Johnson v. Nextel Commc'ns, Inc., 293 F.R.D. 660, 668 (S.D.N.Y. 2013) (certifying issues class after noting that "Rule 23 should be given liberal rather than restrictive construction and has demonstrated a general preference for granting rather than denying class certification.") (internal quotations omitted).

- The Subcommittee should clarify the standard used to determine when individualized issues predominate over common issues. Even after the Supreme Court's guidance in *Comcast Corp. v. Behrend,* courts continue to debate the proper application of the predominance standard. The majority view holds that if an essential element of the class members' claims cannot be proven with class-wide evidence, then individualized issues predominate.

- The Subcommittee should clarify Rule 23(c)(1)(B), which requires that a court enumerate the issues, claims, and defenses that have been certified for class treatment. Among other possible clarifications, the Subcommittee could require that the order contain a trial plan explaining how these claims would be tried before a jury.

III. Rule 23(c)(4) Should be Amended to Clarify that the Prerequisites of Subsections (a) and (b) Must First be Met Before an Issue Class is Considered.

Rule 23(c)(4) currently states:

> (4) *Particular Issues*. When appropriate, an action may be brought or maintained as a class action with respect to particular issues.

The ambiguous language of Rule 23(c)(4) has led to a circuit split on how the Rule applies to issue class certification. The circuit split, in turn, creates ambiguity and fosters an environment in which some courts have allowed creative plaintiffs to abuse the Rule to create "issues classes" where they otherwise would not be able to maintain a class action. For example, in *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith,* 672 F.3d 482 (7th Cir. 2012), the Seventh Circuit interpreted Rule 23(c)(4) to allow plaintiffs to sever off common issues for class treatment even though the whole cause of action did not qualify for such treatment. The Second Circuit followed the same approach in *In re Nassau County Strip Search Cases*, stating, "courts may use subsection (c)(4) to single out issues for class treatment when the action as a whole does not satisfy 23(b)(3)."[25] The Ninth Circuit concurred with this reasoning, noting that "Rule 23 authorizes a district court in appropriate cases to isolate the common issues under Rule 23(c)(4) and proceed with class treatment of these particular issues."[26]

In contrast, the Fifth Circuit has found that a district court cannot "manufacture predominance through nimble use" of Rule 23(c)(4) and instead construed the rule as nothing more than a "housekeeping" tool that was to be applied only after the action as a whole satisfied the Rule 23(a) prerequisites (numerosity, commonality, typicality, adequacy of representation) and Rule 23(b) type.[27] The Fifth Circuit recognized the inevitable outcome if issues could be certified without the action as a whole first satisfying the requirements of subsections (a) and (b):

[25] 461 F.3d 219, 227 (2d Cir. 2006).
[26] Valentino v. Carter-Wallace, Inc., 97 F.3d 1227, 1234 (9th Cir. 1996).
[27] *See, e.g.*, Castano v. Am.Tobacco Co., 84 F.3d 734, 745 n. 21 (5th Cir. 1996).

> Reading rule 23(c)(4) as allowing a court to sever issues until the remaining common issue predominates over the remaining individual issues would eviscerate the predominance requirement of 23(b)(3); the result would be automatic certification in every case where there is a common issue, a result that could not have been intended.[28]

A. Clarifying Rule 23(c)(4) Would Resolve the Circuit Split.

To resolve the split among the circuits and stop the proliferation of issue classes when the action as a whole cannot be maintained as a class action, Rule 23(c)(4) should be amended to clarify that the prerequisites of subsections (a) and (b) must first be met before an issue class is considered. This could be done by adding the language in italics:

> (4) **Particular Issues**. When appropriate, an action may be brought or maintained as a class action with respect to particular issues *if Rule 23(a) and (b) are first satisfied.*

B. The Structure of Rule 23 and the History of the 1995/1996 Amendments Support Amending Rule 23(c)(4) to Require Compliance with Rule 23(a) Prerequisites.

The structure of Rule 23 and subsection (c)(4)'s location within it supports the proposed amendment. Subsection **(c)** contains provisions pertaining to (and is therefore titled) "**Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses."** These are all tools or instructions for managing class actions that a court must be mindful of when presiding over existing class actions.

Rule 23 follows a natural and logical progression, first establishing the prerequisites for a class action in subsection **(a) Prerequisites**, then describing the types of permissible class actions in subsection **(b) Types of Class Actions**, and then moving in subsection **(c)** to administrative or managerial matters for classes that have already been certified (**Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses**).[29] The structure of Rule 23 continues to follow the typical life of a case with subsection **(d) Conducting the Action; (e) Settlement, Voluntary Dismissal or Compromise; (f) Appeals; (g) Class Counsel** and then **(h) Attorney's Fees and Nontaxable Costs**. If the drafters of Rule 23 intended 23(c)(4) to be a means around the certification prerequisites of Rule 23(a), as some of the courts are applying it today, it is more likely they would have placed such a caveat in the actual text of Rule 23(a) and not buried as a single statement within a subsection that deals with various administrative matters pertaining to actions that have already been certified. The Advisory Notes for Rule 23(b)(3) and others address a similar issue, but there is no mention in the Advisory Notes as to Rule 23(c)(4)'s role in circumventing certification prerequisites.[30]

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[28] *Id*.
[29] Laura J. Hines, *The Unruly Class Action*, GEO. WASH. L. REV. (forthcoming [date]), *available at* http://ssrn.com/abstract=2327377.
[30] *See* FED. R. CIV. P. 23(b)(3) advisory committee's note (1966).

This interpretation is strengthened by proposed changes that were never effectuated. The 1995 Advisory Committee proposed a change to Rule 23(a) to include the word "issues" in regards to prerequisite class treatment:

> "[I]f, with respect to the claims, defenses, or *issues* certified for class action treatment [the numerosity, commonality, typicality, adequacy are satisfied] and a class action is superior to other available methods for the fair and efficient adjudication of the controversy."[31]

This shows that the Advisory Committee specifically acknowledged the possibility of issue classes used in the beginning stages of a Rule 23(a) analysis. However, the amendments were never effectuated.[32] In fact, in 1996 a new set of amendments were effectuated, not including the 1995 Advisory Committee's proposal.[33] The rule still does not include any such language.[34] Had the Committee intended to allow issue classes before Rule 23(a) application, they would have included such an amendment.

IV. The Subcommittee Should Modernize the Rule 23(c)(2) Notice Requirements to Allow for Modern Electronic Communications as Part of "Best Notice Practicable."

Rule 23(c)(2) provides that "for any class certified under Rule 23(b)(1) or (b)(2), the court may direct appropriate notice to the class," and if a class is certified, "the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort."[35] The purpose of the "best notice practicable" requirement of Rule 23(c)(2) is to maximize the likelihood that absent class members whose rights will be determined by the judgment of the court will receive notice of proceedings and their rights in accordance with Due Process principles.[36] In *Eisen v. Carlisle & Jacqueline*,[37]the Supreme Court held that individual notice must be provided to those class members identifiable through reasonable efforts, yet failed to define a more prescriptive rule for determining if a party has successfully met this requirement.

Over time, "best notice practicable" has included traditional forms of notice, such as direct mail; however, our modern age undeniably poses additional practicable options. Where notice is necessary to reach members of a class not individually identifiable, the many advantages of the Internet "virtually mandate that cyberspace should be used" as a means of providing the best notice practicable.[38] Courts, in turn, are increasingly allowing parties to include webpages or emails within an overall scheme for providing the "best notice practicable," as on a practical level, this is increasingly a "reasonable effort" for reaching potential class members.[39]

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[31] Laura J. Hines, *Challenging the Issue Class Action End-Run*, 52 EMORY L.J. 709, 762 (2003) (citing Edward H. Cooper, *Rule 23: Challenges to the Rulemaking Process*, 71 N.Y.U. L. REV. 13, 44 (1996)) (emphasis added).
[32] *Id*. at 762-763.
[33] *Id*.
[34] *See* FED. R. CIV. P. 23.
[35] FED. R. CIV. P. 23(c)(2).
[36] Brian Walters, *"Best Notice Practicable" in the Twenty-First Century*, 7 UCLA J.L. & TECH., 1, 4 (2003).
[37] 417 U.S. 156 (1974).
[38] Walters, *supra* note 49, at 4 (citing Greenfield v. Villager Indus., Inc., 483 F.2d 824, 831 (3d Cir. 1973)).
[39] 84 A.L.R. FED. 2D 103 (2014).

Proactively addressing ways to incorporate modern technology into notice issuance is a mission LCJ believes benefits both plaintiffs and defendants in future class actions.[40]

We note that the Subcommittee has mentioned its interest in addressing this issue.[41] We encourage these efforts and look forward to the Committee's proposals.

V. Conclusion

As highlighted in our previous Comment, Rule 23 has evolved well beyond the vision of its original architects and, as a consequence, the rule has allowed the relationship between class members and their cases to deteriorate in many cases. So-called "no injury" class actions, filed on behalf of class members who have not been injured, demonstrate the perils of Rule 23's expansiveness. To the extent that Rule 23 allows aggregated "no injury" cases to proceed despite the fact that those claims could not proceed independently, the procedural rule is beyond its scope and should be revised. Similarly, ambiguous language of Rule 23(c)(4) that is allowing litigation to proceed as "issue classes," despite the inability to satisfy the prerequisites for class actions, should be clarified not only to resolve the circuit split but also to prevent circumvention of standards. Reform in these areas, and a modernization of the notice rules, are much-needed changes that will help restore a proper connection between the underlying claims and the members of the class.

[40] *See, e.g.,* Robert H. Klonoff, et al., *Making Class Actions Work: The Untapped Potential of the Internet*, 69 U. PITT. L. REV. 727, 750 (2008).

[41] The March 2012 Subcommittee notes stated, "There seems to be considerable reason for alternative means of notice in (b)(3) cases – often Internet-based – to receive more respect."