UNCOVERING DISCOVERY

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I. INTRODUCTION

For as long as anyone now practicing can remember, lawyers have complained of and judges have condemned the rising cost and increasing delay of civil litigation. As the process has gained in length and cost, it has lost in terms of respect and satisfaction. Every rule has been exploited for loopholes, and bent, broken, or honored in the breach. Civil litigation, it seems, has devolved into a miserable experience, and "civil procedure" has become an oxymoron. Civility marked a lost and longed-for golden age, while carping, sniping and carrying on are the (dis)order of our day.

Is the protraction and frustration of the discovery process a cause and/or effect of the unholy trinity of attrition, subversion and incivility? Is there a procedural vaccine to inoculate against these litigation dis-eases, or, failing prevention, at least a cure?

The key players in a civil litigation process marked by an ever-expanding pretrial "discovery" period view it with a jaundiced eye. Plaintiffs' lawyers view discovery resistance as an unnecessary evil, an endless and costly prelude to the real event—the trial—and often have little patience (or aptitude) for nuances of discovery arts-and-crafts. Defense lawyers fear that abjuring attrition tactics, and actually producing relevant information, amounts to malpractice or may at least cost them key clients. Judicial officers have sparse patience for discovery disputes, tend to blame both parties equally (thereby incentivizing the bad acts they condemn), and too often adopt the passive/aggressive stance of just wishing discovery abuse would go away.

As a result, an escalating spiral of cost seems to have become embedded in the litigation process, evidenced by protracted discovery activity fed in turn by ever more elaborate pretrial proceedings, heightened pleading standards, an expert witness explosion, and added opportunities for interlocutory appellate review. Most of these accretions were intended as improvements, and some were, ironically, designed specifically to reduce or avoid costs and

delay. Discovery is not the sole offender in the process of turning civil litigation into a crime against due process, but it is a prime suspect.

None of this is news. The past forty years have been marked by ongoing, ambitious, and carefully designed civil procedure reform initiatives, many expressly focused on improving discovery. Yet, over the same period, despite the best efforts of many, the cost and delay of civil litigation seem to have steadily increased, imposing economic barriers to meritorious claims, rendering larger and larger claims cost-ineffective, reducing access to the courts and decreasing the incidence of justice and widening and deepening attitudes of frustration, dissatisfaction and cynicism with respect to the process itself.

Indeed, the very term "discovery" has taken on a decidedly Orwellian cast: it seems primarily to describe the hiding of relevant information. The process of obtaining "discovery," as currently practiced, would have amused Lewis Carroll. More and more activity masks less and less substance; the most important documents are produced last (if at all); and the more relevant a document is, the more likely it is to be sequestered by claims of privilege, or destroyed altogether.

If justice delayed is justice denied, then our generation of lawyers and judges has practiced and presided over the legal profession in a manner that has failed to ameliorate the problem at the core of our civil justice system: it does not deliver, in a reasonably cost-effective, efficient, or fair manner, the civil justice that all Americans have the constitutional right to expect. Perversely, it exacerbates rather than rectifies the imbalance of resources between parties and rewards those willing and able to overspend on disproportionate process to block adjudication. That is a harsh assessment, but we must acknowledge it, and be heartened that we

are committed to a system that has not stopped promising, and strives ever more intensely to deliver justice.

This paper summarizes a number of the recent projects devoted to solving the discovery problem. The reports and data from these initiatives speak most completely and eloquently for themselves, and should be studied for the many promising recommendations they contain. It also explores, in somewhat greater depth, a growing trend: the recently redoubled efforts of the federal judiciary to identify discovery problems and stem discovery abuse by invoking and applying the venerable first principle of the Federal Rules of Civil Procedure: Fed. R. Civ. P. 1, which, in its current iteration, provides:

> These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 8.1, they should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.

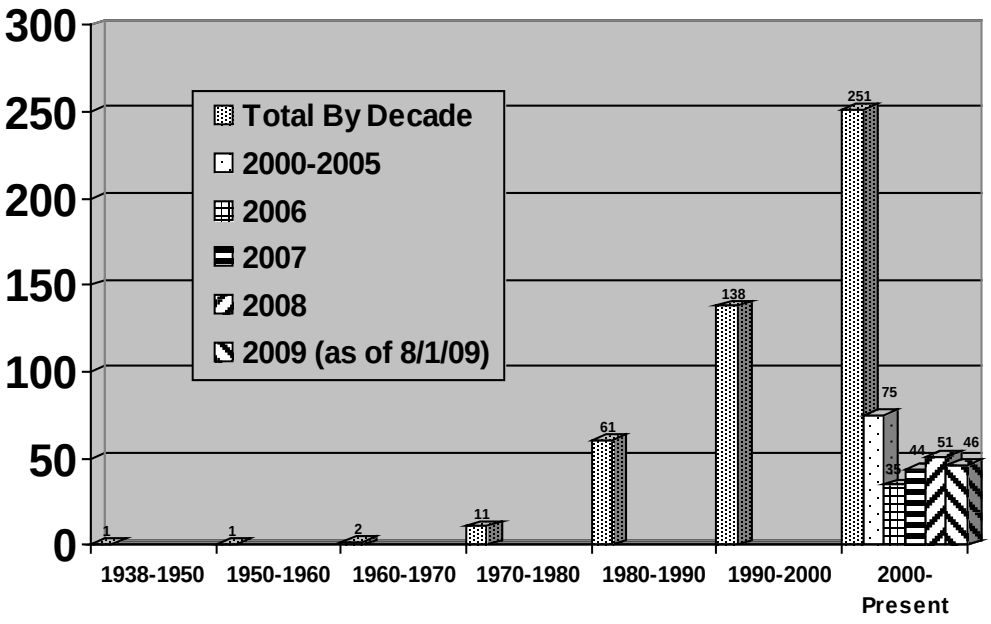
II. RETURN TO FIRST PRINCIPLES: FEDERAL COURTS AND THE PHILOSOPHY OF FED. R. CIV. P. 1

The courts have always enjoyed the inherent authority to govern all proceedings, and all who practice, before them. Rule 1 codifies this authority and defines its purpose: to safeguard the due process rights of all litigants, and the public interest in the accessibility and integrity of the litigation process itself, by ensuring that litigants are burdened primarily with the burden of proof on the substantive merits, not high costs or untenable delays that serve as arbitrary barriers, barring worthy claims. Rule 1 provides the "why" rationale of controlling discovery, while articulating three conclusory "hows": by making the discovery process "just, speedy, and inexpensive."

This paper highlights a handful of particular Rule 1-invoking decisions that arose from specific discovery disputes: problems that reached the point, in specific cases, of raising judicial

ire, or at least concern. The Appendix summarizes sixty-six (66) such decisions, spanning the past four decades but emphasizing the period of most intensive activity (2006-2009), to provide additional examples. An attempt at empirical research into trends in the invocation and application of Rule 1 by the federal courts from the 1970s through the present, summarized in the chart below, yielded 465 instances of Rule 1 analysis, and confirms the perceived trend toward increased judicial recognition and use of this Rule.

Instances of Federal Court Citation to Fed. R. Civ. P. 1 to Limit Cost and Delay in Civil Litigation, by Decade and Year[1]



Based on the sharp increase in Rule 1 citation from 2000 onward, and its intensive citation (100 instances) in the 2008-2009 timeframe, Rule 1 is either enjoying a distinct revival, or has finally been discovered as a working component of the Federal Rules, rather than a mere precatory or aspirational preface to the "real" Rules. What is most noteworthy about this

[1] This graph displays the combined results of Lexis and Westlaw searches. Results are current through August 1, 2009.

discovery (or revival) of Rule 1 is the judicial insight that "just, speedy, and inexpensive" are inextricably intertwined, or at least interdependent, concepts. Prior to this synthesis, courts concerned with due process in a vacuum, that is, solely with the "just" variable of this equation (as if it must, or even could, be delivered in isolation) may have actually diminished the net amount of due process delivered by the system, as they ignored, or actively aided and abetted, practices that have deteriorated into tactics of attrition designed to fend off claims by making them too costly to pursue, or prolonging the procedural defense long past the point of utility.[2] The perspective, contradicted by the express terms of Rule 1, that each party should have all the process it can or chooses to afford, instead illustrates an observation all too familiar to experienced judges and lawyers alike: just as the best is the enemy of the good, perfection in process has been the enemy of due process.

We are all the victims of our experiences, and litigators' perspectives are influenced by the anecdotes they survive, and their positions on either side of the "v.". As a plaintiffs' advocate, I have experienced most viscerally frustration and disappointment in the imperfections of the civil justice system when these manifest as judicial innocence of, apathy toward, or even collusion in, discovery abuses and stonewalling by defendants. In our discovery system, the party who begins the game in possession of the crucial information (usually the defendant) has a distinct and usually game-winning advantage. The scales are not balanced at the outset, and too often the implementation of the discovery rules is distorted by the misapprehension that they are. But plaintiffs' counsel, who are generally compensated on a contingent basis, not by the hour, frequently forgive the time-consuming tasks of honing or enforcing their discovery requests. We

[2] Section IV of this article highlights a few such past examples, notably from the *Tobacco* litigation, in which attrition ascended into art form.

rarely get the discovery we ask for, but we may get some of what we insist upon—at a cost that often discourages the process that has become necessary.

As the Rule 1 examples highlighted below demonstrate, however, plaintiffs' counsel are not blameless, and their lack of preparation or focus can also result in discovery failures, greater costs, and more delay. In searching for the culprits behind the failure of our existing discovery procedures to promote informed adjudications and reasonable settlements (in a way that is proportional to the matters at stake, the resources of the parties, and the interest of the public), legal professionals must, with chagrin, accept mutual and reciprocal responsibility. It is not always the "other guy." In the war on discovery resistance and discovery abuse, "we have met the enemy, and he is us."[3]

III. FEDERAL COURT DECISIONS DISCUSSING KEY ASPECTS OF THE PHILOSOPHY OF RULE 1

The following decisions, from the 1970s through the present, illustrate, anecdotally, a range of instances in which courts have imposed, or at least threatened, consequences for discovery practices or failures that frustrate Rule 1 ideals.

- *Mixing Equipment Co. v. Innova-Tech, Inc.*, Civ. A. No. 85-0535, 1987 WL 14511 (E.D. Pa. July 24, 1987).

In a succinct memorandum and order, the court in *Mixing Equipment Co. v. Innova-Tech, Inc*. emphasized Fed. R. Civ. P. 1's role in promoting the serious administration of justice and basic fairness of the legal system.[4] *Mixing Equipment Co. v. Innova-Tech, Inc*. was before the court on parties' cross-motions for sanctions after the case had "regressed into a seemingly

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[3] This most famous observation of Walt Kelly's un-possumlike "Pogo" is quoted, *inter alia,* in *Johnson v. United States,* 208 F.R.D. 148, 152 (W.D. Tex. 2001).

[4] *Mixing Equipment Co. v. Innova-Tech, Inc.*, Civ. A. No. 85-0535, 1987 WL 14511 (E.D. Pa. July 24, 1987).

endless volley of discovery disputes."[5] After noting that these disputes had forced the parties to incur the costs of fifteen separate filings, the court referred counsel to Judge John J. Parker's admonition that litigation "is not a children's game, but a serious effort on the part of adult human beings to administer justice."[6] The court then stated that Fed. R. Civ. P 1 requires practitioners on both sides to "strive for 'the just, speedy and inexpensive determination of every action.'"[7] Quoting Justice Louis Powell, the court emphasized that the "burgeoning costs of civil litigation" cast "a lengthening shadow over the basic fairness of our legal system,"[8] and instructed "all those associated with the practice of law" to conduct litigation "with [Fed. R. Civ. P. 1] as their goal" in order to contain costs.[9] After repeating Judge Parker's admonition to take seriously the administration of justice, the court denied both parties' motions for sanctions.[10]

- *Foxley Cattle Co. v. Grain Dealers Mut. Ins. Co.*, 142 F.R.D. 677 (S.D. Iowa 1992).

In *Foxley Cattle Co. v. Grain Dealers Mut. Ins. Co.*, the district court addressed the role Fed. R. Civ. P. 1 plays in ensuring access to justice.[11] *Foxley Cattle* was before the court on defendant's request for costs and fees following its successful motion to compel discovery.[12] In reversing this application, the court held that defense counsel spent more time on certain tasks

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5 *Id.* at *1.

6 *Id.* at *2 (quoting *United States v. A. H. Fischer Lumber Co.*, 162 F.2d 872, 873 (4th Cir. 1947)).

7 *Id.* at *2 (quoting Fed. R. Civ. P. 1).

8 *Id.* (quoting AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE, 85 F.R.D. 521, 523 (1980) (Powell, J., dissenting)).

9 *Id.* at *2.

10 *Id.*

11 *Foxley Cattle Co. v. Grain Dealers Mut. Ins. Co.*, 142 F.R.D. 677, 682 (S.D. Iowa 1992).

12 *Id.* at 682.

than was reasonably necessary and that certain claimed time was not compensable.[13] To support its holding, the court elaborated upon concerns that the "escalating cost of civil litigation runs the grave risk of placing redress in the federal courts beyond the reach of all but the most affluent."[14] The court then quoted *Anthony v. Abbott Lab* for the proposition that the "effective administration of justice" depends on "maintenance and enforcement of a reasoned cost/benefit vigil by the judiciary."[15] Congress's concern over rising litigation costs was evident, the court stated, from the Civil Justice Reform Act of 1990 ("CJRA") requirement that federal district courts "implement a plan to reduce the expense and delay in civil litigation" by "providing for just, speedy and inexpensive resolution of civil disputes."[16] The court indicated that these concerns provided further justification for limiting compensation for fees defendant incurred in preparing its Fed. R. Civ. P. 37 motion. After expounding upon the importance of keeping federal court redress within public reach, the court stated that "the Federal Rules of Civil Procedure, including Rule 37(a)(4), 'shall be construed to secure the just, speedy, and *inexpensive* determination of every action.'"[17] In conclusion, the court stated that "these judicial and legislative concerns regarding the escalating costs of civil litigation in federal courts should not be ignored here" and limited defendant's fees to less than half the amount requested.[18]

- *Scheetz v. Bridgestone/Firestone, Inc.*, 152 F.R.D. 628 (D. Mont. 1993).

In the context of an individual products liability suit, the district court in *Scheetz By and Through Handeland v. Bridgestone/Firestone, Inc.* discussed the role that Fed. R. Civ. P. 1 plays

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13 *Id.* at 681.

14 *Id.*

15 *Id.* (citing *Anthony v. Abbott Lab*, 106 F.R.D. 461, 465 (D.R.I. 1985)).

16 *Id.* (citing 28 U.S.C. § 471).

17 *Id.* (citing Fed. R. Civ. P. 1) (emphasis in original).

18 *Id.* at 682.

in ensuring access to the federal courts.[19] *Scheetz* was before the court on plaintiff's motion to compel a pre-discovery disclosure statement required by a local rule adopted to implement the CJRA. Defendant argued that further disclosure was unnecessary because plaintiff's counsel already possessed the requested information, by virtue of having litigated prior cases against defendant regarding the same product.[20] The court held that plaintiff's counsel's involvement in prior litigation did not relieve defendant of the obligation to comply with the local rule, noting that the District of Montana adopted the disclosure requirement in furtherance of the principles reflected in the CJRA: the "[e]ncouragement of cost-effective discovery through voluntary exchange of information among litigants and their attorneys and through the use of cooperative discovery devices."[21] The CJRA, in turn, was enacted "to formulate proposals that would effectively bridge the growing distance between the promise of Fed. R. Civ. P. 1 - 'the just, speedy, and inexpensive determination of every action'- and the reality of a system becoming increasingly inaccessible to the average citizen."[22] Interpreting the Montana local rule in light of these goals of Fed. R. Civ. P. 1 and the CJRA, the court granted plaintiff's motion to compel.[23]

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19 *Scheetz By and Through Handeland v. Bridgestone/Firestone, Inc.*, 152 F.R.D. 628 (D. Mont. 1993).

20 *Id.* at 630.

21 *Id.* at 630.

22 *Id.* at 630 n.2.

23 Nowadays, information obtained via disclosure or discovery would be shared more efficiently across similar cases via document depositories (once paper, now increasingly electronic) to which all plaintiffs' counsel would have access under a mechanism, often in an MDL court's case management order, that spreads the cost of obtaining, maintaining, and analyzing such information for the common benefit via an assessment (either an "up front" payment of actual costs, or a contingent, "back end" payment of a modest percentage of any recovery) of any and all cases. This frees defendants from the expense and logistical burden of re-disclosing or producing relevant information in multiple cases. For examples of such orders, *see* [reserved].

- *Boe v. Lane & Co.*, 428 F. Supp. 1179 (E.D. La. 1977).

The insight that due process must also reflect the public interest in fairly allocating limited institutional and judicial resources has been remarked upon rarely, but perceptively in federal published decisions. The court in *Boe v. Lane* discussed the complementary nature of each of Fed. R. Civ. P. 1's mandates, underscoring that providing "just" resolution for some litigants often comes at the expense of a speedy resolution for others. *Boe v. Lane* was a personal injury suit before the court on plaintiff's motion for new trial after a jury verdict in his favor. Plaintiff's motion was based on defendant's mention at trial of workers compensation. The court held that plaintiff was not entitled to a new trial, relying primarily on case law that required "more than a passing mention" of workers compensation to warrant a new trial.[24] Additionally, the court noted that plaintiff's attorney refused a proposed jury instruction to disregard the comment and instead moved for a new trial.[25] Given plaintiff's counsel's trial strategy, the court cited Rule 1 to bolster its decision to deny plaintiff's motion. The court explained that "granting a new trial in response to every minor flaw in a proceeding may be 'just' to the litigants involved, if they can bear the additional expense," but "imposes delay on litigants queuing for federal trial time."[26] After noting that these attributes of Fed. R. Civ. P. 1—just, speedy, and inexpensive determination—are complementary, the court emphasized that "each litigant is entitled only to a fair, not a perfect trial."[27]

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24 *Boe v. Lane & Co.*, 428 F. Supp. 1179, 1180-1181 (E.D. La. 1977).

25 *Id.*

26 *Id.* at 1183.

27 *Id.*

- *Frederick v. UNUM Life Ins. Co. of Am.*, 180 F.R.D. 384; 1998 U.S. Dist. LEXIS 11272 (D. Mont. 1998).

In *Frederick v. UNUM Life Ins. Co. of Am.*, the court relied almost exclusively on Fed. R. Civ. P. 1's goals of limiting cost and delay to deny defendant's motion for a trial continuance.[28] Defendant submitted (and plaintiff joined) a motion to continue trial for at least six months to resolve discovery delays. The court found that defendant itself had caused the delays, by implementing a business plan for litigation designed to limit its payments to retained counsel.[29] Given that defendant caused the delays, the court considered its motion in light of the "one salutary purpose" served by the rules of discovery and the rules of procedure: "to secure the just, speedy, and inexpensive determination of every action."[30] After expounding upon Rule 1's purpose, the court stated that "the 1993 amendments to Rule 1 emphasized the District Court's affirmative duty to exercise the procedural authority granted under the rules so as to ensure that civil litigation in the federal courts is resolved fairly and without undue cost or delay."[31] Because defendant's "corporate policies antagonistic to retained counsel" caused the discovery delays, the court exercised its authority under Fed. R. Civ. P. 1 to deny defendant's motion to for continuance.[32]

- *In re: Phenylpropanolamine (PPA) Litigation*, 460 F.3d 1217 (9th Cir. 2006).

Although *In re: PPA Litigation* did not explicitly apply Fed. R. Civ. P. 1 to its holdings, the Ninth Circuit's language in citing the rule is noteworthy because it acknowledged the non-monetary costs of delay in civil litigation and emphasized that Fed. R. Civ. P. 1 reflects the

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28 *Frederick v. UNUM Life Ins. Co. of Am.*, 180 F.R.D. 384 (D. Mont. 1998).

29 *Id.* at 385-86.

30 *Id.* at 386 (citing Fed. R. Civ. P. 1).

31 *Id.*

32 *Id.*

public interest in efficient litigation. Further, this language is significant because it has been quoted in numerous federal court decisions to limit cost and delay. In this Multidistrict Litigation (MDL) case alleging injuries from ingesting phenylpropanolamine (PPA), *In re PPA* was before the court on thirteen consolidated appeals from the district court's dismissal for plaintiffs' failure to comply with case management orders (CMOs). The court cited Fed. R. Civ. P. 1 in articulating the first of five *Malone* factors used to determine whether to dismiss a case for failure to comply with court orders: the expeditious resolution of litigation.[33] The court discussed the relevance of Fed. R. Civ. P. 1 to the first *Malone* factor:

> "As the first of the Federal Rules of Civil Procedure reflects, the public has an overriding interest in securing 'the just, speedy, and inexpensive determination of every action.' [citation omitted] Orderly and expeditious resolution of disputes is of great importance to the rule of law. By the same token, delay in reaching the merits, whether by way of settlement or adjudication, is costly in money, memory, manageability, and confidence in the process."[34]

The court then declared its deference to the district court's judgment regarding the point at which delay becomes unreasonable.[35] It determined that the expeditious resolution of litigation weighed in favor of dismissing eleven cases, where plaintiffs' failure timely to provide fact sheets and other documents caused many cases to remain "pending for close to, or over, a

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33 *In re: Phenylpropanolamine (PPA) Litigation*, 460 F.3d 1217, 1227 (9th Cir. 2006) (citing *Malone v. U.S. Postal Serv.*, 833 F.2d 128, 130 (9th Cir. 1987) (internal citations omitted)).

34 *Id.* at 1227.

35 *Id.*

year without forward movement."[36] Ultimately, the court held that the district court had not abused its discretion in dismissing the eleven cases.[37]

- *Avnet, Inc. v. Gulf Ins. Co.*, No. CV-05-1953-PHX-LOA, 2006 U.S. Dist. LEXIS 2377 (D. Az. Jan. 23, 2006).

Avnet, Inc. v. Gulf Ins. Co. discussed the time-saving goals of Rule 1 as expressed through the Civil Justice Reform Act (CJRA), and cited Rule 1 to admonish plaintiffs for filing an unnecessary document. *Avnet* was before the court on plaintiff's Notice and Motion To Maintain the Action, and on the parties' motion to continue a scheduling conference. The court first cited Fed. R. Civ. P. 1 in stating that it was unnecessary for plaintiff's counsel to file a Notice in addition to its Motion.[38] Addressing the motion to continue, the court reasoned that ongoing settlement negotiations did not constitute "good cause" for a Fed. R. Civ. P. 16 continuance because "the docket reflects that little, in anything, has been done to prosecute this case to a reasonably expeditious conclusion consistent with the Civil Justice Reform Act."[39] Explaining the purposes and requirements of the CJRA, the court noted in particular that each federal district court must "implement techniques and strategies designed to dispose of cases in

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[36] *Id.* at 1234.

[37] *Id.* The use of "fact sheets" to streamline discovery by replacing formal interrogatories with supposedly less onerous, more fact-oriented formats is now a common practice in mass tort multidistrict litigation. "Fact sheets" can range in length and complexity from a few pages to 20 pages or more, and the fact sheet's obligation may be reciprocal: both plaintiffs and defendants may be ordered to provide case-specific information by this means. In some cases, however, it appears to plaintiffs that the "fact sheet" process does not save them time or money, as defendants have seized and developed fact sheets as a weapon of attrition, using shotgun "deficiencies" (including typographical errors, failure to provide information as to questions marked "N/A," missing middle initials, etc.) to prolong the process and, as in PPA, to set up motions for dismissal as the ultimate sanction.

[38] *Avnet, Inc. v. Gulf Ins. Co.*, No. CV-05-1953-PHX-LOA, 2006 U.S. Dist. LEXIS 2377, at *1 n.1 (D. Ariz. Jan. 23, 2006).

[39] *Id.* at *2.

an efficient and inexpensive manner."[40] The CJRA was enacted, the court explained, "to formulate proposals that would effectively bridge the growing distance between the promise of [Rule 1]—the just, speedy, and inexpensive determination of every action—and the reality of a system becoming increasingly inaccessible to the average citizen."[41] Further, the court stated that the discovery provisions of Arizona's CJRA Plan, like the Federal Rules, "are subject to the injunction of Rule 1 that they be construed to secure the just, speedy and inexpensive determination of every action."[42] The court commended the parties for engaging in "less-expensive, voluntary mediation," but concluded that a two month delay was unacceptable in light of the goals of the CJRA and, by implication, those of Fed. R. Civ. P. 1.[43]

- *Dondi Properties Corp. v. Commerce Savings and Loan Assoc.*, 121 F.R.D. 284 (N.D. Tex. 1988).

In *Dondi Properties Corp. v. Commerce Savings and Loan Assoc.*, the Northern District of Texas, *en banc*, adopted standards for attorney conduct in civil litigation to satisfy Fed. R. Civ. P. 1's goals of reducing litigation costs and expediting resolution of civil actions.[44] The court was prompted to take this unusual action by alleged attorney misconduct in two consolidated cases: *Dondi* and *Knight*. The court began by stating that the judicial branch, "in the spirit of Fed. R. Civ. P. 1," attempts "to carry out [its] responsibilities in the most prompt and

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40 *Id.* at *2 n.2 (citing *Schwarzkopf Technologies Corp. v. Ingersoll Cutting Tool Co.*, 142 F.R.D. 420, 423 (D. Del. 1992)).

41 *Id.* at *2 n.2 (quoting *Equal, Accessible, Affordable Justice Under Law: The Civil Justice reform Act of 1990*, Joseph R. Biden, Jr., CORNELL JOURNAL OF LAW AND PUBLIC POLICY, Vol. 1, pg. 1 (1992); *Scheetz v. Bridgestone/Firestone, Inc.*, 152 F.R.D. 628, 630 n.2 (D. Mont. 1993) (internal quotation marks omitted)).

42 *Id.* at *3 n.2 (citing *Herbert v. Lando*, 441 U.S. 153, 177 (1979).

43 *Id.* at *4.

44 *Dondi Properties Corp. v. Commerce Savings and Loan Assoc.*, 121 F.R.D. 284, 291 (N.D. Tex. 1988).

efficient manner, recognizing that justice delayed, and justice obtained at excessive cost, is often justice denied."[45] In furtherance of these principles, the court addressed the growing problems of "unnecessary contention and sharp practices between lawyers" that "threaten[] to delay administration of justice and to place litigation beyond the financial reach of litigants."[46] Emphasizing that scarce judicial resources should not be devoted to supervising such matters, the court adopted the Dallas Bar Association's "Guidelines of Professional Courtesy" and "Lawyer's Creed" for the Northern District of Texas.[47] Applying these principles to the cases before it, the court denied *Dondi* defendant's motion for sanctions because discovery disputes could be resolved with further communication; denied *Dondi* defendants' separate motion for sanctions because alleged misconduct was properly left to grievance committees; denied *Knight* plaintiff's motion to strike a reply brief that defendant filed without permission, because the reply would not interfere with the court's decisional process; and declined to permit plaintiffs to file further responses.[48]

- *City of Aurora v. P.S. Systems, Inc.*, No. 07-cv-02371-WYD-BNB, 2008 U.S. Dist. LEXIS 5944 (D. Colo. Jan. 14, 2008).

In *City of Aurora v. P.S. Systems, Inc.*, the court based its ruling primarily on concerns over a substantial delay in litigation, and discussed both the practical and social impacts of delay. The issue in this non-securities case was before the court on defendant's motion to stay discovery pending resolution of its motion to dismiss. The court began its analysis by stating that the Federal Rules of Civil Procedure do not provide for a stay while a motion to dismiss is

45 *Id.* at 286.

46 *Id.*

47 *Id.*

48 *Id.* at 290-291.

pending.[49] Rather, Fed. R. Civ. P. 1 requires the rules to "be construed and administered to secure the just, speedy, and inexpensive determination of every action."[50] Noting the five factors[51] courts apply when considering a stay, the *Aurora* court concluded that a stay was not warranted.[52] The court reasoned that because the average time required to resolve a dispositive motion in this district was 7.5 months, a stay "could substantially delay the ultimate resolution of the matter, with injurious consequences."[53] Quoting a law review article on the topic of delay in civil litigation, the court emphasized both the social costs and practical concerns caused by delay:

> "Delay is an element indigenous to many systems, and one that can have significant implications unless recognized and accounted for . . . In the litigation context, delay is not only of practical concern, as it results in a decrease in evidentiary quality and witness availability, but also of social concern, as it is cost prohibitive and threatens the credibility of the justice system.[54]

After noting that there was "no special burden on defendants in this case," the court denied the motion to stay in order to avoid delaying the proceedings.[55]

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49 *City of Aurora v. P.S. Systems, Inc.*, No. 07-cv-02371-WYD-BNB, 2008 U.S. Dist. LEXIS 5944, at *3 (D. Colo. Jan. 14, 2008).

50 *Id.*

51 These factors are: "(1) the interests of the plaintiff in proceeding expeditiously with the civil action and the potential prejudice to plaintiffs of a delay; (2) the burden on the defendants; (3) the convenience to the court; (4) the interests of persons not parties to the civil litigation; and (5) the public interest." *Id.* at *3 (citing *Federal Deposit Ins. Corp. v. Renda*, 1987 WL 348635 at *2 (D. Kan. Aug. 6, 1987).

52 *Id.* at *3-4.

53 *Id.* at *3.

54 *Id.* at *3-4 (quoting Mariel Rodak, *It's About Time: A Systems Thinking Analysis of the Litigation Finance Industry and Its Effect on Settlement*, 155 U. PA. L. REV. 503, 528 (2006)).

55 *Id.* at *3-4.

- *In re FLSA Cases*, No. 6:08-mc-49-Orl-31GJK, slip op., 2009 WL 129599 (M.D. Fla. Jan. 20, 2009).

In *In re FLSA Cases*, the court relied on the expediting purpose of Fed. R. Civ. P. 1 to affirm sanctions on plaintiffs' attorneys for failure to abide by scheduling orders. The case was before the court on objections to the Magistrate's recommended sanctions after plaintiffs' law firms were issued over one hundred show cause orders in a little over one year.[56] The court found that attorneys' conduct violated Rule 1's direction to "counsel to avoid delay and facilitate an expeditious resolution of disputes."[57] After reciting Fed. R. Civ. P. 1, the court emphasized that "the principle function of procedural rules should be to serve as useful guides to help, not hinder, persons who have a legal right to bring their problems before the courts."[58] Although the court found that noncompliance was "largely attributable to the high volume nature of an FLSA practice," it emphasized that attorneys' duty "to abide by pretrial orders that are designed to promote the fair and efficient administration of justice" is not diminished by having a voluminous clientele.[59] Given attorneys' "inexcusable pattern of noncompliance," the court exercised its discretion under Fed. R. Civ. P. 16(f) to sanction counsel for failure to abide by scheduling orders.[60]

Courts frustrated by delay, makework, incompetence, gamesmanship, or sheer cluelessness have thus invoked Rule 1, with increasing frequency, to bring litigation practice into line with due process and public policy. The hope seems to be that lawyers sanctioned, or at

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56 *In re FLSA Cases*, No. 6:08-mc-49-Orl-31GJK, slip op., 2009 WL 129599, at *5 (M.D. Fla. Jan. 20, 2009).

57 *Id.* at *6.

58 *Id.* (quoting Schiavone v. Fortune, 477 U.S. 21, 27 (1986)).

59 *Id.* at *7.

60 *Id.*

least scolded, for wasting litigant and public time and resources will be sufficiently chastened to repent and reform. Certainly, judicial displeasure—engraved for all time in a published decision—is an effective punishment and deterrent for those unfortunate attorneys within the zone of danger. For those innocent (or at least uncaught) regarding the specific transgression for which punishment is threatened or imposed, *schadenfreude* may—or may not—translate into best practice. Were the foregoing examples of judicial discipline sufficient, reform would have happened by now. Yet, concurrently with these decisions describing, decrying, and disciplining isolated discovery infractions, discovery abuse was proving successful—and hence irresistible—in high stakes complex litigation, exemplified by the "tobacco litigation." It is difficult to forego a litigation strategy that works.

IV. FEDERAL COURT DECISIONS INVOKING RULE 1 IN THE EPICENTER OF LITIGATION BY ATTRITION: TOBACCO LITIGATION

The tobacco litigation of the early 1980s through the mid 1990s is a disturbing demonstration of the evolution and effectiveness of the strategy of attrition in discouraging civil suits by rendering them cost-ineffective regardless of merit. The window that the tobacco litigation provides into the attrition strategy at work is illuminating, yet incomplete, as the published decisions both identifying and attempting to proscribe or disincentivize it, are remarkably few. Instead, most courts that diagnosed the problem bemoaned it, but did not publish their critiques or impose effective sanctions. As a result, the strategy of attrition continued to flourish, because it worked.

The cigarette industry's successful litigation history derives from an early decision to fight all lawsuits at any cost. The industry considered that if any case were settled, the news of settlement would generate an endless stream of potential claimants as to whom payment – no

matter how small in each case – could be cumulatively prohibitive.[61] The industry thus demanded that its lawyers "[v]igorously defend any case; look upon each as being capable of establishing dangerous precedent and refuse to settle any case for any amount."[62] This strategy was no secret. Its efficacy depended, in part, on the fact that it was widely publicized in the media and entered the popular culture, but also on its consistent deployment to exhaust plaintiffs before the point of trial. A "never surrender" strategy that insists on trial, not settlement, is legitimate and may even be noble. Exploiting the system to render such trials unreachable or unaffordable through discovery abuse is neither.[63] As the federal court presiding over the Department of Justice ("DOJ") tobacco litigation recently found, the industry engaged in a 50-year scheme in violation of racketeering laws – "with little, if any, regard for individual illness and suffering . . . *or the integrity of the legal system*" – and further found that such "racketeering" (including fraud on the legal system itself) continues to this day.[64]

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[61] *See, e.g.*, E.J. Jacob & Jacob Medinger, *Report Prepared by RJR Outside Legal Counsel Transmitted to RJR Executives for the Purpose of Rendering Legal Advice Concerning Smoking and Health Issues and Litigation*, http://tobaccodocuments.org/bliley_rjr/504681987-2023.html, at 50468-1997 (June 27, 1980).

[62] J.F. Hind, *Report Concerning Smoking and Health Prepared by RJR Employee Providing Confidential Information to RJR In-House Legal Counsel, to Assist in the Rendering of Legal Advice, and Transmitted to RJR Managerial Employee*, http://tobaccodocuments.org/bliley_rjr/505574976-4977.html, at 50557-4977 (June 29, 1977).

[63] Hill & Knowlton, *Background Material on the Cigarette Industry Client* (Dec. 15, 1953), http://legacy.library.ucsf.edu/tid/wvc34c00. A central strategy for the cigarette industry's approach to litigation "is a lavishly financed and brutally aggressive defense that scares off or exhausts many plaintiffs long before their cases get to trial." Patricia Bellew Gray, *Legal Warfare: Tobacco Firms Defend Smoker Liability Suits With Heavy Artillery*, Wall St. J., Apr. 29, 1987, at 25. Those plaintiffs who proceed with their cases "are vastly outgunned," encountering the tobacco industry's "overwhelming strength and prowess at every turn." *Id.*

[64] *United States v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 1, 852 (D.D.C. 2006) [emphasis supplied].

- *Thayer v. Liggett & Myers Tobacco Co.*, 1970 U.S. Dist. LEXIS 12796 (D. Mich. 1970).

The strategy of attrition via discovery abuse surfaced early in tobacco litigation. In 1970, the *Thayer* case, brought by an individual smoker, ended in a jury verdict for defendant Liggett & Myers. Afterwards, the trial court – disturbed by the defendant's "overwhelming superiority in resources" and "insatiable appetite for procedural advantage" – detailed abuses that, in its view, rendered the trial a mockery. *Id.* at 18, 19. Among other things, the court noted that the defendant was evasive in discovery, *id.* at 5-6, 9-10; "confidently risk[ed] tactics" knowing that the plaintiff "could not afford the luxury of a mistrial," *id.* at 18, and obtained a sweeping protective order, "on grounds which later proved largely illusory," to isolate plaintiff's counsel. *Id.* at 16; *see also id.* at 10-14. Meanwhile, defense counsel freely engaged in extensive cooperation with other industry attorneys. *Id.* at 15 & n.8, 16, 17 n.10, 101-02.

As the *Thayer* court concluded:

> The court is convinced that the magnitude of the impact of the disparity in resources between these parties, plus the sophisticated and calculated exploitation of the situation by the defendant, approaches a denial of due process which would compel the granting of a new trial.
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> This question, unfortunately, is now moot because plaintiff cannot afford further proceedings.

Id. at 59.

- *Cipollone v. Liggett Group, Inc.*, 106 F.R.D. 573 (D.N.J. 1985).

In *Cipollone v. Liggett Group, Inc.*, the court relied in part on the time- and cost-saving purposes of Fed. R. Civ. P. 1 to hold that plaintiffs' counsel could use discovered information in subsequent cases. *Cipollone* was before the court on plaintiffs' appeal of a protective order that prohibited them from making public, or using in other litigation, any information obtained through discovery in that case. The court first held that this order was not justified by "good

cause" under Fed. R. Civ. P. 26(c) and therefore violated the First Amendment.[65] Noting that "the public has a right to know about the risks of cigarette smoking," the court modified the order to require defendants to show good cause for designation of confidential materials.[66] The court went on to hold that plaintiffs' counsel could use even confidential materials in other cases in which counsel participate.[67] In so holding, the court cited several cases that permitted use of discovered information in related litigation. The court quoted extensively from one such case that stated: "[i]n this era of ever expanding litigation expense, any means on minimizing discovery costs improves the accessibility and economy of justice."[68] Given such precedent, the court found that permitting counsel to utilize discovered materials in other cases "prevent[s] the kind of duplication that would undermine the purpose of the Federal Rules of Civil Procedure 'to secure the just, speedy, and inexpensive determination of every action.'"[69] These rulings augered well for counteracting litigation by attrition. Yet the strategy was not defeated.

- *Haines v. Liggett Group, Inc.*, 814 F. Supp. 414 (D. N.J. 1993).

Despite an imbalance of resources, plaintiffs did not *always* lose on the merits. The *Cipollone* case survived pretrial costs and delays, and reached trial. The result was the first verdict for a plaintiff in a smoker's case. The judgment survived, in part, on review by the Supreme Court, and was remanded for further proceedings. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992).

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65 *Cipollone v. Liggett Group, Inc.*, 106 F.R.D. 573, 587 (D.N.J. 1985).

66 *Id.* at 587.

67 *Id.* at 586.

68 *Id.* (citing *Ward v. Ford Motor Co.*, 93 F.R.D. 579, 580 (D. Colo. 1982)).

69 *Id.* at 586.

In *Haines v. Liggett Group,* the *Cipollone* case on remand from its victory in the Supreme Court, the district court again discussed the cost-saving purpose of Fed. R. Civ. P. 1, this time in the context of a motion by plaintiff's counsel to withdraw after 8 years of litigation, due to the unreasonable financial burden caused by litigating on a contingency fee/advanced costs basis.[70] Plaintiffs' counsel (a well-respected and experienced firm) cited exhaustion by interminable delays and mounting expenses, including $1.2 million in out-of-pocket expenses, $5 million in lawyer and paralegal time, and $500,000 in deposition transcript costs alone.[71] Plaintiff opposed the motion, suggesting that the court instead "[limit] defendants' discovery and use of expert witnesses pursuant to Fed. R. Civ. P. 1, 26 and 83."[72] To focus judicial attention on the cause of the problem, plaintiff introduced defense counsel's outside statement boasting of its strategy of attrition:

> "The aggressive posture we have taken regarding depositions and discovery in general continues to make these cases extremely burdensome and expensive for plaintiffs' lawyers, particularly sole practitioners. To paraphrase General Patton, the way we won these cases was not by spending all of [RJR Tobacco's]'s money, but by making that other son of a bitch spend all of his."[73]

The *Haines* court stated that to the extent this statement reflected defendants' attitude, "it is at odds with the purposes of the Federal Rules of Civil Procedure and is intolerable."[74] After

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70 *Id.* at 418.

71 *Id.*

72 *Id.* at 422.

73 *Id.* at 421 (citing Opposition Brief at 8, *Haines v. Liggett Group, Inc.*, 814 F. Supp. 414, No. 84-678(AJL) (D.N.J. 1993).

74 *Haines v. Liggett Group, Inc.*, 814 F. Supp. at 423.

emphasizing "the design of the Federal Rules to ensure the 'just, speedy, and *inexpensive* determination' of this action,"[75] the court quoted the U.S. Supreme Court:

> "Delay and excessive expense now characterize a large percentage of all civil litigation. The problems arise in significant part….from abuse of the discovery procedures….[A]ll too often, discovery practices enable the party with greater financial resources to prevail by exhausting the resources of the weaker opponent. The mere threat of delay or unbearable expense denies justice to many actual or prospective litigants…Litigation costs have become intolerable, and they cast a threatening shadow over the basic fairness of our legal system.[76]

In spite of these concerns and its previous recognition of the imbalance caused by defendants' attrition tactics, the *Haines* court did not explicitly address plaintiff's proposals to streamline litigation, and did not restrict defendants' litigation conduct: instead, it denied the motion to withdraw because plaintiff's counsel had not demonstrated that it expended significant resources in this case particularly, because plaintiff was unable to find substitute counsel, and because it found the contingency fee agreement binding on both client and counsel.[77]

Thus, following a Supreme Court decision which vindicated their claims, the *Cipollone* plaintiffs, after a decade of litigation, faced a dismissal with prejudice. *See Haines,* 814 F. Supp. at 417 n.4. Their attorneys—recognized at the time as "the leading law firm" in tobacco litigation—also moved to withdraw from other tobacco cases, citing the "unreasonable financial burden." *Id.* at 418, 425. In 10 years, not a single of the firm's tobacco cases had been resolved on the merits. *Id.* at 421 n.14. Given this record, no lawyer was willing to take over these cases. *Id.* at 425.

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75 *Id.* at 423 (emphasis in original).

76 *Id.* at 423 (quoting Order Amending Federal Rules of Civil Procedure, 446 U.S. 997, 1000 (1980) (Stewart, J., dissenting)).

77 *Haines v. Liggett Group, Inc.*, 814 F. Supp. at 424, 425, 427.

The decade-long odyssey of *Cipollone/Haines* describes a familiar journey. As two other attorneys from this era wrote:

> The reality for most cigarette disease victims and their families is that they cannot find a lawyer to handle their case, no matter how hard they look. . . . [B]y making the cost of litigation so high, the cigarette manufacturers have closed the courthouse doors to most people who have gotten sick or died from using their products.
>
> They have done this by resisting all discovery aimed at them. . . . They have done it by getting confidentiality orders attached to the discovery materials they finally produce, . . . forcing each plaintiff to reinvent the wheel. They have done it by taking exceedingly lengthy oral depositions of plaintiffs and by gathering . . . every scrap of paper ever generated about a plaintiff, from cradle to grave. And they have done it by taking endless depositions of plaintiffs, expert witnesses, and by naming multiple experts of their own for each specialty, such as pathology, thereby putting plaintiffs' counsel in the position of taking numerous expensive depositions or else not knowing what the witness intends to testify at trial. And they have done it by taking dozens and dozens of oral depositions, all across the country, of trivial fact witnesses, particularly in the final days before trial.[78]

Other plaintiffs' lawyers described similar tactics: "[T]he Defendants then began noticing depositions and subpoenaing witnesses for depositions virtually all over the United States. Defendants deposed anyone and everyone remotely connected with Plaintiff, including childhood friends, former spouses, former spouses of family members, neighbors and store owners in the neighborhood where Plaintiff lived," "[T]he cigarette company defendants took 107 depositions, many of out-of-state persons, and used only two of them at trial," "Elementary school records from the 1930s from a small town in Kentucky were obtained. When an

[78] William E. Townsley & Dale K. Hanks, *The Trial Court's Responsibility to Make Cigarette Disease Litigation Affordable and Fair*, 25 CAL. W. L. REV. 275, 276-77 (1989).

objection was made, the explanation was that he might have had a health course in the elementary grades."[79]

In the end, this era of individual smokers' litigation concluded with the tobacco industry's undefeated record intact. After almost 40 years of litigation, and 300 cases filed since the 1950s, there still had not been a single judgment – or penny paid – to plaintiffs. *Haines*, 814 F. Supp. at 428 n.31. A "no defeat" record is impressive, and such a record achieved through skilled advocacy at communicating a meritorious defense is admirable. But such a result obtained by insisting on trial and ensuring the other side cannot afford one offends due process and devolves advocacy.

- *Blue Cross & Blue Shield of New Jersey, Inc. v. Philip Morris, Inc.*, 178 F. Supp. 2d 198 (E.D.N.Y. 2001).

Some courts did take bold initiatives to counteract the prohibitive costs of discovery in tobacco litigation, often by invoking other rules or procedures to counteract discovery cost by introducing savings (or at least economies of scale) elsewhere. For example, in *Blue Cross & Blue Shield of New Jersey v. Philip Morris*, the court cited Fed. R. Civ. P. 1 to support its holding that aggregated statistical and sampling evidence was a proper alternative to individualized proof of smokers' injuries.[80] *Blue Cross and Blue Shield* was before Judge Jack Weinstein on defendant's motion for judgment as a matter of law following a jury verdict for plaintiff insurer on claims that tobacco companies deceived its insureds concerning the hazards of smoking. Defendants argued that the use of aggregated proof to determine the insurer's economic losses violated their Constitutional rights and was contrary to New York law.[81] The

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[79] *Id* at 297-299.

[80] *Blue Cross & Blue Shield of New Jersey, Inc. v. Philip Morris, Inc.*, 178 F. Supp. 2d 198 (E.D.N.Y. 2001).

[81] *Id.* at 247.

court began its analysis by citing Fed. R. Civ. P 1, and stating that the Federal Rules of Civil Procedure grant district court judges "flexibility to shape the type and scope of information available before and during a complex trial."[82] In order to expeditiously resolve mass cases, the court noted, "some discovery necessarily must be foregone."[83]

The *Blue Cross* court concluded that scientific evidence such as the sampling and statistical extrapolations admitted at trial were "well suited to mass tort actions" and warned that resolving mass tort disputes on a case-by-case basis "may create a systemic bias against plaintiffs."[84] The court held that use of aggregated evidence did not violate defendants' due process rights, because the expense of litigating individual claims was not in the financial interest of defendants, plaintiff, or insureds; because the statistical procedures were accurate; and because aggregated proof promoted efficient use of judicial resources.[85] Defendants' jury trial right was not violated because use of aggregated proof enhanced rather than limited the jury's role as fact-finder.[86] Finally, the court held that New York state substantive law did not prohibit use of aggregation forensic tools to support an action under the state consumer protections statute.[87]

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82 *Id.* at 249 (citing MANUAL FOR COMPLEX LITIGATION, 3d ed. § 21.422 (2000), Fed. R. Civ. P. 1, Fed. R. Civ. P. 16(b), Fed. R. Civ. P. 26(b)(2), Fed. R. Civ. P. 30(a), Fed. R. Civ. P. 33).

83 *Id.* at 249.

84 *Id.* at 248.

85 *Id.* at 254-255.

86 *Id.* at 258.

87 *Id.* at 260.

- *Falise v. Am. Tobacco Co.*, No. CV-99-7392 (JBW), 2000 U.S. Dist. LEXIS 19574 (E.D.N.Y. Dec. 27, 2000).

In *Falise v. Am. Tobacco Co.*, the court applied the time- and cost-saving mandates of Fed. R. Civ. P. 1 in the context plaintiffs' motion to exclude defendants' depositions. The court reasoned that Fed. R. Civ. P. 1 supported a decision to exclude depositions from defendant's six experts, where the court had previously "directed both sides to reduce the number of experts in order to limit the scope and complexity of a trial scheduled to take over two months."[88] In furtherance of Fed. R. Civ. P. 1's mandate to "limit the cost and time necessary to complete the trial," the court excluded the depositions as an exercise of its "inherent power to control the litigation in the interest of fair and prompt disposition on the merits."[89]

- *Simon v. Philip Morris, Inc.* (*In re Simon II Litigation*), 200 F.R.D. 21 (E.D.N.Y. 2001).

In *Simon II*, Judge Weinstein looked beyond discovery to its historical goal—trial—to determine whether and how to determine important issues without the cost, delay and inconsistency of multiple repetitive trials of the same conduct of the same actors, with respect to the determination of a permissible level of punitive damages liability, in the challenging context of the tobacco "mass tort." The court found that Fed. R. Civ. 1 supported a conclusion that severance of issues and trials before the same and separate juries was appropriate. In this class action seeking classwide determination of punitive damages for the conduct of the tobacco industry, the court considered whether severance of the punitive damages issues would violate the Seventh Amendment right to jury trial.[90] The court began by discussing trial judges' broad

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88 *Falise v. Am. Tobacco Co.*, No. CV-99-7392(JBW), 2000 U.S. Dist. LEXIS 19574, at *2 (E.D.N.Y. Dec. 27, 2000).

89 *Id.*

90 *Simon v. Philip Morris, Inc.*, 200 F.R.D. 21, 24 (E.D.N.Y. 2001).

discretion to sever issues for trial. Relying heavily on the language of Fed. R. Civ. P. 1, the court stated that "the language and spirit of the Federal Rules of Civil Procedure provide trial judges with the authority to structure trials efficiently and fairly."[91] The court concluded that severance of issues is "one of the trial judge's most useful trial management devices to ensure the just and efficient determination of civil actions as required by Rule 1."[92]

Additionally, the district court in *Simon* reasoned that severance was supported by the "public policy favoring the efficient and fair determination of mass torts on the merits, utilizing flexible class actions where they are appropriate,"[93] explaining that modern adjudicatory tools such as severance "must be adopted to achieve the original framers' goal of 'securing the just, speedy, and inexpensive determination of every action.'"[94] After citing several secondary sources that encourage adjudicatory innovation, the court stated that "adjudicating mass torts as class actions instead of on a case-by-case basis helps fulfill the dictates of Rule 1."[95] In turn, the court reasoned, mass tort class actions lend themselves to severance because "the very nature of injuries arising from mass production and mass marketing efforts makes trial judges' discretion to sever issues for trial one of the most necessary and natural" tools for efficient adjudication.[96] After examining the Seventh Amendment's history and case law, the court held that it did not substantially inhibit severance of these issues and trials because the amendment is only

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91 *Id.* at 26.

92 *Id.*

93 *Id.* at 24.

94 *Id.* (citing Fed. R. Civ. P. 1).

95 *Id.* at 44 (citing Mary J. Davis, *Toward the Proper Role for Mass Tort Class Actions*, 77 OR. L. REV. 157, 168 (1998)).

96 *Id.* at 44.

implicated where a severed issue is presented to a subsequent jury in a confusing or uncertain manner.[97]

Simon II was a counterpoint to another smokers' class action, the *Engle* litigation.[98] The *Engle* jury verdict of $146 billion in punitive damages was widely viewed as excessive under U.S. Supreme Court standards, was beyond even the tobacco industry's ability to pay, and would have benefited the citizens of only a single state. The *Simon* action sought a nationwide class to determine the maximum punitive damages award (if any) that could constitutionally be imposed against the industry for its conduct. Injured smokers within the *Simon* class definition would share equitably in any such award, if and when they proved their own actual damages. The *Simon* class certification decision was reversed by the Second Circuit.[99] The *Engle* punitive damages verdict was likewise reversed, as was class certification, but with a pragmatic difference which at least partially erased the attrition advantage of the tobacco defendants: In *Engle* the Florida Supreme Court granted *res judicata* to eight key liability findings of the trial jury, enabling members of the defined class who timely filed individual suits carried these findings with them, and proceed to proof of individual medical causation and damages, without re-trying (or re-discovering) these classwide findings.[100] Approximately 7,000 Floridians within the *Engle* class definition thereafter filed individual damage suits, which are pending in Florida

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97 *Id.* at 51.

98 The *Engle* litigation history is summarized in *Engle v. Liggett Group, Inc.*, 945 So.2d 1246 (Fl. 2006).

99 *Simon II Litig. v. Philip Morris USA, Inc.* (*In re Simon II Litig.*), 407 F.3d 125 (2005).

100 945 So.2d at 1257, n.4, and 1277-78.

state and federal courts. A handful have already gone to trial, with victories for both smokers and tobacco companies.[101]

- *Woods v. R.J. Reynolds Tobacco Co.*, No. 5:07-cv-130(DCB) (JMR), 2009 U.S. Dist. LEXIS 51565 (S.D. Miss. June 18, 2009).

Tobacco defendants have sometimes been seen as victims of litigation costs and delay. In *Woods*, an individual suit regarding defendant tobacco companies' cigarette marketing, the court stated that Fed. R. Civ. P. 1 reflects the primary goals of the judiciary. Defendants moved for summary judgment on plaintiffs' claims for deceptive advertising, fraudulent misrepresentation, negligent misrepresentation, fraudulent concealment, and negligent concealment, while plaintiffs moved for voluntarily dismissal of two claims under Rule 41. Defendants argued for dismissal with prejudice because plaintiff filed her dismissal motion only after the case had progressed substantially.[102] After listing the four factors that the Eighth Circuit applies when considering a motion for voluntary dismissal, the court stated that "adherence to progression order deadlines is critical to achieving the primary goal of the judiciary: 'to serve the just, speedy, and inexpensive determination of every action.'"[103] The court found that plaintiff had diligently prosecuted her case, but concluded that all other factors weighed in favor of denying plaintiff's motion "in order to prevent plain legal prejudice to the

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[101] One federal district court rejected the *Engle* Supreme Court *res judicata* ruling. *See Brown v. R.J. Reynolds v. Tobacco Co.*, 576 F. Supp. 2d 1328 (M.D. Fl. 2008) The *Brown* decision is on appeal to the Eleventh Circuit.

[102] *Woods v. R.J. Reynolds Tobacco Co.*, No. 5:07-cv-130(DCB)(JMR), 2009 U.S. Dist. LEXIS 51565 at *5 (S.D. Miss. June 18, 2009).

[103] *Id.* at *5 (citing *Marmo v. Tyson Fresh Meats, Inc.*, 457 F.3d 748, 759 (8th Cir. 2006) (quoting Fed. R. Civ. P. 1)).

defendant."[104] The court then turned to the merits of plaintiffs' claims and granted summary judgment for defendant on each.[105]

- *In re Tobacco Litigation (Personal Injury Cases)*, 218 W. Va. 3016 (2005).

Procedural innovations have come, belatedly, to tobacco litigation. As Justice Starcher of the West Virginia Supreme Court noted in applying his state's adoption of Rule 1 to affirm as constitutional a bifurcated trial process that included a mandatory determination of punitive damages liability, no court is "constitutionally mandated to deny the plaintiffs a just, speedy and inexpensive resolution of their claims in order that the defendants' property rights may be fully protected." *In re Tobacco Litig*. (Personal Injury Cases), 218 W. Va. 301, 624 S.E.2d 738, 744 (W. Va. 2005) (Starcher, J., concurring). In a judicial system of finite resources, the due process rights of any litigant cannot be absolute, lest opponents or others be shortchanged of their due process. Like it or not, due process is allocated on a "sliding scale." Each side must get its due, each is due something, and what process is due must be decided – carefully – as the circumstances and nature of each case. *Id.* at 748.

As the most recent developments in tobacco mass tort litigation demonstrate, courts have finally determined to apply time and cost saving procedures to render these cases feasible for plaintiffs to prosecute, defendants to defend, and courts to manage, consistent with proportional due process. The tobacco industry's record of attrition is neither an isolated example of discovery abuse, nor merely a matter of historical interest. The attorneys who learned how to litigate during this era, in cases large and small, learned negative lessons about appropriate discovery behavior and internalized a cynical and paranoid attitude toward the process. These lessons were incentivized and encouraged by success, and they were passed on to, and inculcated

104 *Id.* at *6.

105 *Id.* at *10-19.

in, the current generation of litigators. Most lawyers did not participate in smokers' litigation, and most of those who did were not affirmative proponents of discovery abuse, even when they practiced it. Like those affected by "second-hand smoke," lawyers who grew up as litigators during the past three decades were harmed, surely yet imperceptibly, by proximity to, and acceptance of, the tactics of those tobacco litigators who, as true believers, acted upon the principle that the ends justify the means. The reward for such conduct was palpable: to the most ruthless warriors went the spoils of repeat business.

Our litigation system has, unfortunately, failed to incentivize the reforms it urges. To the contrary, cooperation is disincentivized. Defense lawyers and law firms are punished with fewer billings and lost clients if they litigate in the spirit of Rule 1. Plaintiffs' lawyers like to believe that they are superior avatars of Rule 1, but it is simply far easier for them to litigate economically in accord with Rule 1. Indeed, if they are to earn a living, they have no choice: the contingent fee system does not reward hours spent. For plaintiffs' lawyers who must advance the costs of suit, as well as await the uncertain prospect of recovery for their time, every discovery procedure and every discovery dispute has a price tag. A cost-benefit analysis must thus be conducted for every plaintiffs' discovery initiative. Plaintiffs' lawyers have no choice, however, as to the level of discovery cost, once discovery resistance becomes entrenched on the defense side. Discovery procedures have thus been used, with extremely effectiveness, as an offensive weapon, not simply a defensive shield, by defendants, who can financially exhaust their opponents in the initial discovery stages of a complex case long before ever reaching the point at which discovery of key material information becomes imminent and inevitable.

The most frustrating aspect of judicial decision making—especially at the appellate levels—for those who labor in the trenches is an amazing ability to disregard cost and delay in

the due process analysis. It is assumed that litigants possess an infinite level of financial resources, and enjoy eternal life, such that justice long delayed and insensibly priced could still deserve the name. Some cases do deserve, and require, more time, and more resources, than others, to adjudicate fairly, and no one would suggest an elimination of reasonable appellate review. We have, as in other aspects of our government, "a check and balance" system in litigation where mistakes and oversights can be corrected, and the initial adjudication is not the final one. But, despite this system, discovery abuse has gone unchecked, and discovery costs have gone unbalanced, threatening to diminish civil litigation into a game for the rich. The interest of the public in due process has been under acknowledged, and under-served. This interest exists not only because members of the public deserve cost-effective access to the courts as litigants themselves, but because the public as a whole has a right to expect that the system will expend its own resources wisely, and allocate them fairly.

V. THE KUMBAYA CAMPAIGN: CAN WE WIN THE CIVILITY WARS?

Courts have long identified unnecessary contentiousness, bickering, nastiness, and nit-picking as direct causes or indirect sources of costs and delay. Of course, it is quite possible to conduct a devastating (and Rule 1-violative) scorched earth campaign with utmost civility, and we have all seen it done. Nonetheless, there is truth to the observation that incivility, rudeness, even the frustrating behavior we label "passive-aggressive" is inimical to the process, and, over time, leads to the professional fatigue and burn-out that diminish procedural efficiency. Civility is indisputably preferable to not-niceness of any degree, and the battle for civility has been waged incessantly for decades.[106] The campaign has recently intensified.

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[106] Of course, every era of our profession has bemoaned an increasing lack of civility, and none has spoken out for less. What brings this civility deficit to the level of a due process denial is, arguably, the sheer volume of information potentially available via e-discovery, coupled with

The RECORDER's Autumn 2009 Litigation Supplement included an article entitled "*Let's Play Nice: Lawyers Are Urged To Cooperate More Closely During Discovery*."[107] What's new here is the promotion of The Sedona Conference's Cooperation Proclamation, which challenges lawyers to "work more collaboratively during the discovery phase so that greater time and attention (and money) can be spent on litigating the merits of the underlying dispute."[108] In three pages of text, the Cooperation Proclamation declares war on the "costs associated with adversarial conduct in pre-trial discovery" as detrimental to the focus on "substantive resolution of legal disputes." The Proclamation revives the neglected duty of lawyers toward the court and the public, by printing out that:

> Lawyers have twin duties of loyalty: While they are retained to be zealous advocates for their clients, they bear a professional obligation to conduct discovery in a diligent and candid manner. Their combined duty is to strive in the best interests of their clients to achieve the best results at a reasonable cost, with integrity and candor as officers of the court. Cooperation does not conflict with the advancement of their clients' interests—it enhances it. Only when lawyers confuse advocacy with adversarial conduct are these twin duties in conflict.[109]

The Cooperation Proclamation does not shrink from high-mindedness, but is likewise grounded in the inescapable fact that our system can no longer afford and should no longer tolerate the hardball tactics of yore:

> Over-contentious discovery is a cost that has outstripped any advantage in the face of ESI [electronically stored information] and the data deluge. It is not in anyone's interest to waste

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the ability (soon converted into a necessity) to litigate, via phone, fax, and email, on a "24/7" basis. The sleep-deprived are not infrequently uncivil.

107 The author, Jason Krause, likewise carries this article on Law.com.

108 Krause, *id.*, citing, The Sedona Conference® Cooperation Proclamation. The full text of the Proclamation can be found at the sedonaconference.org/content/tsc_cooperation _proclamation.

109 Cooperation Proclamation, at 1.

> resources on unnecessary disputes, and the legal system is strained by "gamesmanship" or "hiding the ball," to no practical effect.
>
> The effort to change the culture of discovery from adversarial conduct to cooperation is not utopian.[110] It is, instead, an exercise in economy and logic. Establishing a culture of cooperation will channel valuable advocacy skills toward interpreting the facts and arguing the appropriate application of law.[111]

The Cooperation Proclamation knows it is calling for new behavior and new attitudes in the service of venerable principles that have long been honored in the bench: it admits its goal is a "paradigm shift for the discovery process."[112] To implement this shift, the Proclamation sketches a three part process (Part I: Awareness / Part II: Commitment / Part III: Tools) that will require simultaneous (or at least reciprocal) leaps of faith by adversaries and courts; leaps to be taken to fulfill our "'officer of the court' duties" to effectuate the mandate of Rule 1, and "the fundamental ethical principles governing our profession."[113] Everyone would wish this leap to succeed, no one who deserves to be a lawyer or judge would wish to be seen subverting it, and everyone would volunteer to be the second to jump. What holds us back from the willingness to jump first? In a word (or two), internalized wimpophobia. It's difficult to put aside the macho attitude, and even harder to put down the weapons of attrition that have been condoned—and thus incentivized—for so long.

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110 Cartner RAS Core Research Note G00148170, *Cost of eDiscovery Threatens to Skew Justice System*, 1D#G00148170, (April 20, 2007), at http://www.h5technologies.com/pdf/gartner0607.pdf. (While noting that "several . . . disagreed with the suggestion [to collaborate in the discovery process] . . . calling it 'utopian,'" one of the "take-away's" from the program identified in the Gartner Report was to "[s]trive for a collaborative environment when it comes to eDiscovery, seeking to cooperate with adversaries as effectively as possible to share the value and reduce costs.").

111 *Id.*

112 *Id.*

113 *Id.*

However, "[t]his is not about holding hands and signing Kumbaya or being a wimp," says Jason Baron, director of litigation for the U.S. National Archives and Records Administration. "It's not about helping the other side. That's crazy. It's about fighting over the substantive matters of law and not spending all of the client's money on discovery."[114] The point is thus made that cooperation and civility to not disarm advocates, but simply re-focus that advocacy on the issues that matter—the merits.

Sedona Conference executive director Richard Braman, a procedural visionary, has acknowledged the magnitude of the challenge, while rejecting the "utopian" label critics have placed on the effort. As to rejection of the proposal that lawyers be taught active cooperation in the discovery process, Braman has said "I really didn't think I was being utopian or unrealistic but I understand that's not the way most lawyers view the way things work." He adds, "That experience stuck with me, and I decided it was time to put a stake in the ground and say that unless we find a way to solve the dispute over discovery the legal system will in fact break."[115] Braman also offers some metrics for this goal. "If in 10 years 50 percent of lawyers pursue discovery in a cooperative way, this will be a smashing success. I am not Pollyannish. This will require a generational shift to come about."[116]

On the margins, techniques short of Rule changes can prod lawyers to experiment with cooperation in discovery. Some very practical approaches to fostering cooperation and redressing disputes have proved effective on a local level.[117] The threat of proportional

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114 "*Let's Play Nice*," *supra*.

115 *Id.*

116 *Id.*

117 "In the U.S. District Court for the Eastern District of Texas, lawyers were given a hotline to call judges directly to settle procedural disputes, Judges there initially worried that it would be a nuisance, but it seems that just the threat that a judge could be called in at any moment has

sanctions, swiftly and severely imposed, and the disincentive of judicial ire works wonders—so long as counsel are more concerned about avoiding judicial displeasure, damage to their professional reputations or credibility, than they are about losing a lucrative client. It is a disturbing fact that large corporate defendants are not overly impressed or attentive to judicial authority, because the consequences of adverse rulings can be ignored or delayed, and the sting, when belatedly delivered, does not outweigh the benefit of the misconduct.

Lawyers thus fear, not without evidence, that if they do not conceal or delay the production of relevant yet unfavorable information by gaming the system, they will be fired and replaced by lawyers who will. Only courts can counteract this perception by making it clear that lawyers cannot aid their clients in lying or cheating, and that discovery abuse is precisely that. This lesson must be taught, if all else fails, by imposing consequences upon the client: dismissing a defense, entering summary judgment, or other real-world sanctions.

Monetary sanctions mean little to a client who has already calculated that it can afford protracted litigation, and prefers to invest in a scorched earth defense rather than paying claims. Increasing transaction costs through the imposition of a less-than-disabling monetary sanction can backfire in this situation, further incentivizing the very conduct it aims to punish. The loss of a defense; the inadmissibility, in the hider's case, of documents or information hidden from an opponent; the inference that concealed or destroyed evidence is inculpatory; and the admissibility of discovery abuse as a reprehensibility factor in assessing punitive damages, are harsher – and more effective – than all but the most onerous monetary sanctions. Each of these

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made parties more willing to hash out details on their own. Judges 'thought it would open them up to hours of whining on every little disagreement,' says Ken Withers, director of Judicial Education and Content at the Sedona Conference. 'But the last time I talked to them, they were down to three calls a month. It seems to help to have active adult supervision.'" *Let's Play Nice, supra.*

remedies is available under Rule 1, and each, embodied in a published decision, would serve as a high profile, widely disseminated, object lesson in what lawyers cannot do to "protect" clients, and the consequences to clients of such conduct when it is caught.

VI. A HIGH ROAD NOT TAKEN, AND A DISTRACTING DETOUR

The American Law Institute's 1993 Report, Complex Litigation: Statutory Recommendations and Analysis (Arthur B. Miller and Mary Kay Kane, Reporters; with the assistance of a stellar roster of judicial, academic, and practitioner advisors), a *tour de force* of procedural innovation, approached the cost-and-delay problem by systematizing the consolidation of multiple similar suits across state lines and across the federal/state court divides, even proposing a choice-of-law selection system that addressed the problem still bedeviling federal courts struggling with multistate mass torts and class actions today. If these recommendations had been implemented by Congress, they could have delivered massive savings by eliminating repetitive litigations (and much of the attendant repetitive discovery). The ALI's Complex Litigation project was, regrettably, both before and after its time; it arrived 3 years after the CJRA, and 12 years before the Class Action Fairness Act. At the very least, the project's completion missed a point of convergence (perhaps never to arrive) with a Congressional felt need for procedural reform.

Part of the project's vision has been realized. In the most massive of mass torts, *ad hoc* informal coordination between federal MDL courts and state courts is now considered a best practice, and many judges make the effort to accomplish it, with some notable successes.[118] As a

[118] For example, the *Vioxx* (MDL 1657) and *Bextra*/*Celebrex* (MDL 1699) pharmaceutical products liability MDLs were marked by a high degree of communication, coordination, and cooperation among the federal and state judges, at every stage of the litigation. The joint work of MDL Transferee Judge Eldon Fallon and New Jersey mass tort judge Carol Higbee in the effective co-management of discovery, trials, and finally settlement is now legendary. In *Bextra/Celebrex*, MDL Transferee Judge Charles Breyer and New York state Justice Judith

byproduct, discovery savings are delivered because discovery product is shared, depositions are utilized in multiple cases, and document depositories (now usually in e-depository form) are developed. Yet redundancy, and resulting waste in the process, remain, and the level of transaction costs (discovery costs, expert costs, and attending fees) remains too high to be consistent with current expectations of efficiency and economy in other public institutions.

Two non-specific yet pervasive trends accelerated during the 1990s to mask the need for discovery reform and cost reduction. Each was a reaction to rising cost and an attempt to counteract defendants' strategy of attrition, not by reducing cost or disabling the attrition tactic, but by consolidating plaintiffs' resources attempt to match those of defendants. The first was the rise of the "entrepreneurial" plaintiffs' lawyer or firm—a phenomenon remarked upon by judges and academics.[119] Recognition of the lawyer-as-entrepreneur is now reflected in the Federal Rules themselves: for example, the most recent anecdote to Rule 23, the Rule 23(g) factors a court "must consider" in appointing class counsel, include "the resources that counsel will commit to representing the class."[120] Adequate resources to perform the task at hand are essential, of course, but attorneys sometimes competed for class counsel by demonstrating the ability to throw more resources at the prosecutor of class claims, than of working to assure that such prosecution was cost-effective. In short, plaintiffs' counsel sometimes responded to the

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Kornreich created a formal nexus of federal/state coordination by jointly appointing retired federal judge (and former Federal Judicial Center Director) Fern M. Smith as Special Master for both federal and state proceedings. She managed federal and state discovery, made recommendations on pretrial and Bellwether trial selection matters, and participated in the mediation of comprehensive settlements of federal and state personal injury and economic loss claims.

[119] *See, e.g., White v. Sundstrand Corp.*, 265 F.3d 580, 586 (7th Cir. 2001) (Easterbrook, J.); Stephen B. Burbank and Lindon J. Silberman, "*Civil Procedure Reform in Comparative Context: The United States of America*," 45 AM. J. COMP. L. 675 (Fall 1997); Jack B. Weinstein, "*Some Reflections on United States Group Actions*," 45 AM. J. COMP. L. 833 (Fall 1997).

[120] Fed. R. Civ. P. 23(g)(1)(A)(iv).

defense attrition tactic by aping, rather than attacking it. Infatuation with the notion of "lawyers as entrepreneurs" has, most recently, played a role in landing some prominent plaintiffs' lawyers in prison.

A second response to attrition is more constructive and benign. Lawyers banded together as consortia or committees, acting essentially as *ad hoc* law firms, to prosecute a particular piece of complex litigation. This occurred in the tobacco litigation itself: the *Castano* plaintiffs' lawyers committee is a notable example. By banding together, plaintiffs' lawyers overcame the limitations of the contingent fee economic model (small firm size/litigation underfunding) to achieve economies of scale, and amass a sizeable costs fund with which to counteract attrition tactics. This model persists in complete litigation as an essential tool to counteract litigant resource imbalance, as well as assist the court in case management, and is reflected in the *Manual for Complex Litigation*'s prescription for the appointment of lead counsel, liaison counsel, steering committees and other plaintiffs' leadership structures.[121] The battle for designation as court-appointed Lead Counsel and Steering Committee members has often dominated the initial stage of many MDL litigations, and courts have been urged to control this process by not simply acceding to the leadership structure proposed by plaintiffs counsel (which would be too reflective of coercion or influence by dominant "entrepreneurs," or by "pay to play" requirements) but by borrowing Rule 23(g) criteria and other factors to assure a functional structure that reflects and is responsive to the judge's case management style and preferences.[122]

Designated counsel structures increase organization and concentrate resources, and are thus essential for the fair and efficient progress of complex litigation, even were such cases

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121 *See Manual for Complex Litigation, Fourth* (Federal Judicial Center 2004) ("*MCL 4th*"), §§ 10.22; 10.223; 14.215.

122 *MCL 4th*, § 10.224.

currently functioning on a cost-proportional basis. Reliance on such structures has, however, masked the steady spiraling of discovery costs (by spreading it among the major players), and deferred recognition of the costs crisis. In short, plaintiffs' counsel and courts inadvertently cooperated in a process that responded to rising costs by enabling plaintiffs to afford (apparently or temporarily) rising costs, rather than by controlling or reducing the costs themselves. The very system that could reasonably be expected and predicted to reduce per-transaction costs through economies of scale has actually increased such costs, and condoned the strategy of attrition.

VII. OTHER COMPLICATING ACCRETIONS IN CIVIL LITIGATION HAVE INCREASED COST AND HEIGHTENED THE NEED FOR DISCOVERY REFORM

The early 1990s saw ambitious initiatives aimed at reducing costs, delay and repetition, and increasing coordination, consistency and predictability in complex litigation, including the above-noted CJRA and the ALI Complex Litigation project. However, the mid-1990s to the present have been punctuated by a series of judicial decisions, legislation and rule changes that have, inadvertently yet demonstrably, increased cost, delay, repetition and confusion in both complex litigation (notably class actions and mass torts, although settled conventions in securities litigation were disrupted by the 1995 Private Securities Litigation Reform Act, and antitrust litigation was complicated by the recent *Twombly* decision)[123] nearly all individual tort cases (any cases requiring experts or seeking punitive damages).

These consequential events included, in class action litigation, a series of decisions to heighten pleading and proof burdens; increase the delay of and impose appellate review upon the class certification process; push the determination of class certification from the pleading to the trial stage; engage extensive formal discovery and experts in the class certification process;

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123 *Bell Atlantic Corp. v. Twombly*, 554 U.S. 544 (2007).

consider the merits in the context of a formerly purely procedural motion; delay the class certification decision to the point of trial; create the need for a class certification hearing that costs as much, and consumes as much time and resources, as many bench trials; and provide an opportunity for immediate appellate review of all class certification orders. The significant milestones along this path, the *Amchem*[124] and *Ortiz*[125] decisions, the addition of Rule 23(f) interlocutory appeal, and the ongoing convergence of class certification criteria and merits determination exemplified by the *Szabo*[126] and "*IPO*"[127] decisions, all have both supporters and detractors. The need for improvements in class action practice is widely acknowledged, but specific changes as well as the overall direction of change remain controversial. The plaintiffs' community has perceived many of these events as hostile activity. Regardless of intent, it is undeniable that the judicial trends of this most recent era have gifted defendants with procedures and standards that are deployed to render class action efforts, regardless of merit, social import, or amount at stake, cost-prohibitive to prosecute.

The 2005 Class Action Fairness Act[128] presented the federal judiciary with the opportunity to implement true reform by vesting federal courts with original or removal jurisdiction over most class actions, recognizing that goods, services and conduct that gave rise to nationwide injuries and damages could and should most fairly and effectively be litigated in a national system. The explicit goal of the CAFA was not only to rid class action practice of perceived abuses, but to promote the prompt compensation of legitimate claims—to finally

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124 *Amchem Prods. Corp. v. Windsor*, 521 U.S. 591 (1997).

125 *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999).

126 *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672 (7th Cir. 2001).

127 *In re Initial Public Offering Securities Litigation*, 471 F.3d 24 (2d Cir. 2006).

128 Codified as, *inter alia*, 28 U.S.C. § 1332(d).

achieve the economies of scale in delivering justice that is the animating purpose and procedural potential of the class mechanism.[129] Congress' failure to include an express choice of law rule in CAFA has hampered the courts, at least to date, in the process of organizing masses of state-law-based claims into coherent classes.[130]

The Supreme Court's 1995 *Daubert* decision cuts across all substantive and procedural boundaries to multiply the cost of presenting expert testimony in virtually every tort, financial, and commercial case.[131] Regardless of the Supreme Court's intent, *Daubert* in practice has added motions, depositions, and evidentiary hearings to the pre-trial phase of countless cases, has created a cottage industry of expert discovery (and a new world of discovery disputes) and may have done little or nothing to improve the real quality of expert testimony. The "junk science"

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[129] Section 2(_) of CAFA states that:

> "[t]he purposes of this Act are to (1) assure fair and prompt recoveries for class members with legitimate claims; (2) restore the intent of the framers of the United States Constitution by providing for federal court consideration of interstate cases of national importance under diversity jurisdiction; and (3) benefit society by encouraging innovation and lowering consumer prices."

28 U.S.C. § 1711 note, as quoted in *Morgan v. Gay*, 471 F.3d 469, 473 n.3 (3d Cir. 2006). *See also Grimsdale v. Kash n' Karry Food Stores, Inc.*, 564 F.3d 75, 80 (9th Cir. 2009) quoting *Amoche v. Guar. Trust Life Ins. Co.*, 556 F.3d 41, 47 (1st Cir. 2009):

> "In enacting CAFA, Congress was responding to what it perceived as abusive practices by plaintiffs and their attorneys in litigating major interstate class actions in state courts, which had 'harmed class members with legitimate claims and defendants that had acted responsibly,' 'adversely affected interstate commerce,' and 'undermined public respect for our judicial system.'"

[130] For purposes of satisfying Constitutional due process concerns in cases potentially involving multiple states' laws, the choice-of-law standard articulated for class actions in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985) and reaffirmed generally in *Franchise Tax Board v. Hyatt*, 538 U.S. 488 (2003) continue to suffice, although courts seem reluctant to deploy them. This may be changing, at least in economic injury tort cases. *See, e.g.*, *In re Mercedes-Benz Tele Aid Contract Litigation* (MDL No. 1914) 257 F.R.D. 46 (D.N.J. 2009) (applying *Shutts* choice-of-law analysis to certify nationwide class); Rule 23(f) review denied, 2009 U.S. App. LEXIS 12478 (3d Cir. 2009).

[131] *Daubert v. Merrell Dow Pharmaceuticals*, 516 U.S. 869 (1995).

campaign that led to the elaborate *Daubert*-based expert discovery and motions system that now seems entrenched in federal practice has, ironically, been at least partially revealed as partisan propaganda that would not itself pass *Daubert* muster. Judges, many no more qualified that the average juror to evaluate scientific or technical qualifications or arguments, have conflated expertise with orthodoxy and morphed from "gatekeepers"[132] to censors. Politically and ideologically flavored "junk science" turned out not to be the exclusive province of the plaintiffs' bar, but, as exemplified by heated debate in the global warming controversy, the purported policy of an entire administration.[133]

The elaborate *Daubert*-derived expert discovery and hearing superstructure should arguably be scaled back to the level of judicial common sense that *Daubert* itself intended. It is no exaggeration to state that *Daubert* has contracted federal jurisdiction even more dramatically than CAFA expanded it. Despite the statutory promise of federal diversity jurisdiction for claims of $75,000 or more, *Daubert*-justified expert discovery costs have effectively pushed all claims in the $1 million-or-less range, regardless of merit, out of court. The expert costs themselves in even the simplest one plaintiff/one defendant tort case can exceed this amount, transforming every winnable case for which provable damages are $2 million or less into a sure financial loser that will not be bought.

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132 *See, e.g., Daubert*, 516 U.S. at 597.

133 *See, e.g.*, "*Battle Over Climate Change Legislation Heats Up*," THE OREGONIAN (Portland, Oregon) July 2, 2009; "*Attorney General Brown Announces Victory Against Weak Bush-Era Air Pollution Standards*," U.S. FED. NEWS, March 3, 2009 ("'Yet the Bush Administration callously ignored the facts and put forward a standard justified by nothing more than junk science', Attorney Brown said.") If science is partisan, and "junk science" is that invoked by one's potential opponent, than judges applying the *Daubert* (or *Frye*) tests must be doubly vigilant not to inject personal political philosophy—or a predilection for particular theories, much less a predetermination of the merits—into the process. Orthodoxy (which may be quickly discredited as knowledge accrues or political fashions change) is not proof of reliability.

The Supreme Court has contributed to increased cost and delay in two additional areas: pleadings and punitive damages. The recent *Twombly* and *Iqbal* decisions are causing widespread judicial and practitioner consternation.[134] Whether the pleading standards somewhat murkily expounded in these decisions will improve defendants' ability to prepare their defenses and enhance judges' ability to understand, narrow and adjudicate the complex cases before them is unclear. What is evident is that these decisions increase the number, complexity and cost of pleadings, motions, and hearings involving challenges to the pleadings, and the amendment of pleadings.

The Supreme Courts' 2001 *Leatherman Tool*[135] decision, which provides for appeal of right, on a *de novo* review standard, of all punitive judgment verdicts, has exponentially increased the delay of finality of punitive damages decisions, and increased the number and costs of appeals. High profile examples include the *Exxon Valdez*[136] class action litigation, in which the repetitive appeals cycle made possible by *Leatherman Tool* caused a 15-year delay between trial verdict and full judgment, and the *Philip Morris v. Williams* individual smoker's wrongful death case, which spanned a decade and involved two trips each, to the Oregon and United States Supreme Court, until the punitive damages determination was final.

These decisions and trends have overloaded litigation with additional motions, appeals, hearings, and complications. Each adds cost and delay, and each has been attended by its own additional discovery issues and disputes, in a seemingly unending feedback loop. Discovery reform will not, of itself, eliminate the added protraction of these additional procedures, but their

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134 *Ashcroft v. Iqbal*, ___ U.S. ___, 129 S.Ct. 1937 (2009).

135 *Cooper Indus. v. Leatherman Tool Group*, 532 U.S. 924 (2001).

136 *See, e.g.*, *Exxon Shipping Co. v. Bates*, ___ U.S. ___, 128 S.Ct. 2605 (2008); *In re Exxon Valdez*, 490 F.3d 1066 (9th Cir. 2007).

proliferation does place discovery reform at an absolute premium. If expert challenges are inevitable after *Daubert*, then expert discovery must be conducted in a focused manner, and in the spirit of scientific inquiry. If the merits now matter in the class certification context, then the parties, and the court, are entitled to a discovery process that cost-effectively and efficiently reveals the facts that most matter to the merits. If seemingly endless appeals are the rewards of parties who seek and obtain punitive damages, with an inevitable alteration of the awards' deterrent impact as time passes without imposition, then expediting the pretrial and trial processes—which courts can do—may partially restore the balance.

In short, because of these non-discovery developments, meaningful discovery reforms, designed to reveal all important information more quickly, and less expensively, may be the last and best platform from which to launch comprehensive civil procedures reform that will realize the promise of Rule 1.

VIII. THE IAALS/ACTL DISCOVERY PROJECT: A TRIAL-CENTRIC MODEL

On March 11, 2009, the Institute for the Advancement of the American Legal System ("IAALS") Task Force on Discovery and the American College of Trial Lawyers ("ACTL") issued the *Final Report* on their joint project to explore problems associated with discovery, and to propose practical reforms ("Joint Project").[137] Drafts of pattern Rules and Case Management Protocols to implement these proposals are currently in progress. The project's discovery reform recommendations are informed by an exploration of the discovery experience and recommendations of ACTL's fellows, obtained via a detailed, 50-question Civil Litigation Survey. The survey generated a broad response. As the *Final Report* recounts:

[137] On September 8, 2008, the Task Force and IAALS published a joint *Interim Report*, describing the results of the survey in much greater detail. Both *Reports* can be found on the websites of both the American College of Trial Lawyers, www.actl.com, and IAALS, www.du.edu/legalinstitute.

> The survey was conducted over a four-week period beginning April 23, 2008. It was sent electronically to the 3,812 Fellows of ACTL, excluding judicial, emeritus and Canadian Fellows, who could be reached electronically. Of those, 1,494 responded. Responses of 112 not currently engaged in civil litigation were not considered. The response rate was a remarkably high 42 percent.
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> On average, the respondents had practiced law for 38 years. Twenty-four percent represent plaintiffs exclusively, 31 percent represent defendants exclusively and 44 percent represent both, but primarily defendants. About 40 percent of the respondents litigate complex commercial disputes, but fewer than 20 percent of them litigate primarily in federal court (although nearly a third split their time equally between federal and state courts).[138]

The survey attempted to study discovery problems in the larger context of the civil litigation experience. As the *Interim Report* explained:

> The survey consisted of 13 sections and asked questions about most aspects of the civil justice system. The Task Force and the Institute had decided that if the survey were to be limited only to questions relating to discovery, it might miss the context in which discovery abuse occurs and risk missing the true source of any problems that might be identified. Thus, the survey included questions about the Federal Rules of Civil Procedure in general and about pleadings, dispositive motions, the role of judges in litigation, costs and alternative dispute resolution.[139]

The survey, resulting *Interim Report* and *Final Report*, and proposed discovery rules and judicial protocol now in progress, grew from the pervasive concerns of civil litigants:

> The joint study grew out of a concern that discovery is increasingly expensive and that the expense and burden of discovery are having substantial adverse effects on the civil justice system. There is a serious concern that the costs and burdens of discovery are driving litigation away from the court system and forcing settlements based on the costs, as opposed to the merits, of cases. Recalling that one of the original purposes of the discovery rules was to avoid surprises and to streamline trials, many are now concerned that extensive and burdensome discovery jeopardizes the goal of Rule 1 of the Federal Rules of Civil Procedure and of the rules in

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138 *Final Report*, p. 2.

139 *Interim Report*, at p. 3.

> those jurisdictions that have adopted similar procedures: a "just, speedy, and inexpensive determination of every action and proceeding.[140]

The results regarding considerable cost and delay were not surprising: 81% of the respondents said the civil justice system was too expensive and 69% said it took too long to resolve cases.[141]

As summarized in the *Final Report*, three major themes emerged from the survey of seasoned litigators and trial lawyers:

> 1. Although the civil justice system is not broken, it is in serious need of repair. In many jurisdictions, today's system takes too long and costs too much. Some deserving cases are not brought because the cost of pursuing them fails a rational cost-benefit test, while some cases of questionable merit and smaller cases are settled rather than tried because it costs too much to litigate them.
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> 2. The existing rules structure does not always lead to early identification of the contested issues to be litigated, which often leads to a lack of focus in discovery. As a result, discovery can cost far too much and can become an end in itself. As one respondent noted: "The discovery rules in particular are impractical in that they promote full discovery as a value above almost everything else." Electronic discovery, in particular, needs a serious overhaul. It was described by one respondent as a "morass." Another respondent stated: The new rules are a nightmare. The bigger the case the more the abuse and the bigger the nightmare."
>
> 3. Judges should have a more active role at the beginning of a case in designing the scope of discovery and the direction and timing of the case all the way to trial. Where abuses occur, judges are perceived not to enforce the rules effectively. According to one Fellow, "Judges need to actively manage each case from the outset to contain costs; nothing else will work."[142]

As the *Final Report* summarized:

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140 *Interim Report*, at p. 9.

141 *Id.*

142 *Id.* at pp. 2-3.

> In short, the survey revealed widely-held opinions that are serious problems in the civil justice system generally and that the discovery system, though not broken, is badly in need of attention. Judges increasingly must serve as referees in acrimonious discovery disputes, rather than deciding cases on their merits. From the outside, the system is often perceived as cumbersome and inefficient. The emergence of various forms of alternative dispute resolution emphasizes the point.[143]

The perspective of the survey participants as trial lawyers is reflected in the *Interim Report*'s statement that "the system works best when experienced lawyers are involved (they use discovery less or work out disputes themselves), when collegiality is encouraged and when competent, experienced judges play an active supervising role."[144] The *Final Report* is more explicit in its call for the renewed centrality of trial:

> "*Trials, especially jury trials, are vital to fostering the respect of the public in the civil justice system. Trials do not represent a failure of the system. They are the cornerstone of the civil justice system.* Unfortunately, because of expense and delay, both civil bench trials and civil jury trials are disappearing."[145]

Despite the ability to make the present system work, at a level of marginal functionality, by dint of civility and application of common sense, the *Interim Report* acknowledges that the respondents desired "major changes made with respect to discovery," and that "the 'tinkering around the edges' approach to changes to discovery rules in the past have been a failure,"[146] and that "more radical changes are required."[147]

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143 *Id.*

144 *Id.* at p. 5.

145 *Final Report* at p. 3 [emphasis in original].

146 *Id.* 53% of respondents declared that the cumulative effect of discovery rule changes since 1967 have not reduced discovery abuse. As to electronic discovery, 87% agreed it is too costly and 76% agreed that judges do not understand it well. *Id.*

147 *Id.*

The *Final Report* sets forth a series of "principles" and corresponding practical prescriptions. These are:

> *The Purpose of Procedural Rules: Procedural rules should be designed to achieve the just resolution of every civil action. The concept of just resolution should include procedures proportionate to the nature, scope and magnitude of the case that will produce a reasonably prompt, reasonably efficient, reasonably affordable resolution.*
>
> - **The "one size fits all" approach of the current federal and most state rules is useful in many cases but rulemakers should have the flexibility to create different sets of rules for certain types of cases so that they can be resolved more expeditiously and efficiently.**
>
> *The Purpose of Pleadings: Pleadings should notify the opposing party and the court of the factual and legal basis of the pleader's claims or defenses in order to define the issues of fact and law to be adjudicated. They should give the opposing party and the court sufficient information to determine whether the claim or defense is sufficient in law to merit continued litigation. Pleadings should set practical limits on the scope of discovery and trial and should give the court sufficient information to control and supervise the progress of the case to trial or other resolution.*
>
> - **Notice pleading should be replaced by fact-based pleading. Pleadings should set forth with particularity all of the material facts that are known to the pleading party to establish the pleading party's claims or affirmative defenses.**[148]

As the *Final Report* explains:

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[148] The *Report*'s call for "fact-based" pleading is not limited to complaints:

> Fact-based pleading must be accompanied by rules for responsive pleading that require a party defending a claim to admit that which should be admitted. Although it is not always possible to understand complex fact situations in detail at an early stage, an answer that generally denies all facts in the complaint simply puts everything at issue and does nothing to identify and eliminate uncontested matters from further litigation. Discovery cannot be framed to address the facts in controversy if the system of pleading fails to identify them.

Final Report, p. 6.

This Principle replaces notice pleading with fact-based pleading. We would require the parties to plead, at least in complaints, counterclaims and affirmative defenses, all material facts that are known to the pleading party to support the elements of a claim for relief or an affirmative defense.[149]

The Purpose of Discovery: Discovery should enable a party to procure in admissible form through the most efficient, nonredundant, cost-effective method reasonably available, evidence directly relevant to the claims and defenses asserted in the pleadings. Discovery should not be an end in itself; it should be merely a means of facilitating a just, efficient and inexpensive resolution of disputes.

- **Proportionality should be the most important principle applied to all discovery.**

- **Shortly after the commencement of litigation, each party should produce all reasonably available nonprivileged, non-work product documents and things that may be used to support that party's claims, counterclaims or defenses.**

- **Discovery in general and document discovery in particular should be limited to documents or information that would enable a party to prove or disprove a claim or defense or enable a party to impeach a witness.**

- **There should be early disclosure of prospective trial witnesses.**

- **After the initial disclosures are made, only limited additional discovery should be permitted. Once that limited discovery is completed, no more should be allowed absent agreement or a court order, which should be made only upon a showing of good cause and proportionality.**[150]

The *Final Report* suggests the following possible areas of discovery limitation for further consideration:

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149 *Final Report*, p. 6.

150 *Final Report*, pp. 7-9.

1. limitations on scope of discovery (*i.e.*, changes in the definition of relevance);

2. limitations on persons from whom discovery can be sought;

3. limitations on the types of discovery (*e.g.*, only document discovery, not interrogatories);

4. numerical limitations (*e.g.*, only 20 interrogatories or requests for admissions; only 50 hours of deposition time);

5. elimination of depositions of experts where their testimony is strictly limited to the contents of their written report;

6. limitations on the time available for discovery;

7. cost shifting/co-pay rules;

8. financial limitations (*i.e.*, limits on the amount of money that can be spent—or that one party can require its opponent to spend—on discovery); and

9. discovery budgets that are approved by the clients and the court.[151]

The *Final Report* makes these proposals in a context that presumes—and urges—good faith in exchanging relevant information:

> "We hasten to note again that this Principle should be read together with the Principles requiring fact-based pleading and that each party forthwith should produce at the beginning of litigation documents that may be used to support that party's claims or defenses. We expect that the limited discovery contemplated by this Principle and the initial-disclosure Principle would be swift, useful and virtually automatic.
>
> We reiterate that there should be a continuing duty to supplement disclosures and discovery responses."[152]

The *Final Report* continues with a series of bullet points that echo, and seek to implement, Rule 1 principles, and emphasize cost-proportionality:

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151 *Final Report*, p. 10.

152 *Id.* at p. 11.

- **All facts are not necessarily subject to discovery.**

- **Courts should consider staying discovery in appropriate cases until after a motion to dismiss is decided.**

- **Discovery relating to damages should be treated differently.**

- **Promptly after litigation is commenced, the parties should discuss the preservation of electronic documents and attempt to reach agreement about preservation. The parties should discuss the manner in which electronic documents are stored and preserved. If the parties cannot agree, the court should make an order governing electronic discovery as soon as possible. That order should specify which electronic information should be preserved and should address the scope of allowable proportional electronic discovery and the allocation of its cost among the parties.**

- **Electronic discovery should be limited by proportionality, taking into account the nature and scope of the case, relevance, importance to the court's adjudication, expense and burdens.**

- **The obligation to preserve electronically-stored information requires reasonable and good faith efforts to retain information that may be relevant to pending or threatened litigation; however, it is unreasonable to expect parties to take every conceivable step to preserve all potentially relevant electronically stored information.**

- **Absent a showing of need and relevance, a party should not be required to restore deleted or residual electronically-stored information, including backup tapes.**

- **Sanctions should be imposed for failure to make electronic discovery only upon a showing of intent to destroy evidence or recklessness.**

- **The cost of preserving, collecting and reviewing electronically-stored material should generally be borne by the party producing it but courts should not hesitate to arrive at a different allocation of expenses in appropriate cases.**

- **In order to contain the expense of electronic discovery and to carry out the Principle of Proportionality, judges should have access to, and attorneys practicing civil litigation should be encouraged to attend, technical workshops where they can obtain a full understanding of the complexity of the electronic storage and retrieval of documents.**

- **Requests for admissions and contention interrogatories should be limited by the Principle of proportionality. They should be used sparingly, if at all.**

- **Experts should be required to furnish a written report setting forth their opinions, and the reasons for them, and their trial testimony should be strictly limited to the contents of their report. Except in extraordinary cases, only one expert witness per party should be permitted for any given issue.**

The *Final Report*'s prescriptions acknowledge that active judicial supervision will be essential in making them work:

- **A single judicial officer should be assigned to each case at the beginning of a lawsuit and should stay with the case through its termination.**

- **Initial pretrial conferences should be held as soon as possible in all cases and subsequent status conferences should be held when necessary, either on the request of a party or on the court's own initiative.**

- **At the first pretrial conference, the court should set a realistic date for completion of discovery and a realistic trial date and should stick to them, absent extraordinary circumstances.**

- **Parties should be required to confer early and often about discovery and, especially in complex cases, to make periodic reports of those conferences to the court.**

- **Courts are encouraged to raise the possibility of mediation or other form of alternative dispute resolution early in appropriate cases. Courts should have the power to order it in appropriate cases at the appropriate time, unless all parties agree otherwise.**

Mediation of issues (as opposed to the entire case) may also be appropriate.

- **The parties and the courts should give greater priority to the resolution of motions that will advance the case more quickly to trial or resolution.**
- **All issues to be tried should be identified early.**
- **These Principles call for greater involvement by judges. Where judicial resources are in short supply, they should be increased.**
- **Trial judges should be familiar with trial practice by experience, judicial education or training and more training programs should be made available to judges.**[153]

Holistically, the *Final Report* program seems balanced, with a potential to improve the quality, and reduce the cost, of civil litigation. It is the product of extensive study, thoughtful reflection, discussion and compromise among those with opposing viewpoints, and it reflects the practicality gained through the litigation experience of seasoned practitioners on both sides of the "v."

The danger is that the project's recommendations will be implemented piecemeal. Discovery limitations on their own spell disaster for the process of fact-finding. In any discovery limitation program, the defense has the clear advantage: it has the information, and it can hide or destroy the information, without plaintiffs being the wiser. Punishment depends on detection, and discovery limitations make concealment easier and detection less likely. An honor system depends upon the honor of the participants—and this is the crux of the problem, perceived or real.

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153 *Final Report*, pp. 12-23.

The *Final Report*'s call for a return to "fact-based" pleading is intriguing, but would depend upon a universal understanding and fair application of that term. In reality, good pleadings are theory-based, not fact-based. A plaintiff in possession of the material facts necessary to establish a claim has proved her case, not simply pleaded it. Even after *Twombly*, a viable complaint articulates a plausible theory, not admissible facts. The facts to support a "facially plausible" theory[154] must continue to be adducible through discovery.

IX. RETURNING TO THE CENTRALITY OF TRIALS AND THWARTING THE THREAT OF SUBVERSION

Many of the IIALS/ACTL *Final Report* proposals invoke quantitative limits (number, times) on discovery, and pivot around a renewed emphasis on trial. From the standpoint of trial lawyers, such proposals make obvious good sense.

The call for restoration of trials as the centerpiece of civil litigation could serve as the cornerstone for real discovery reform. All trial lawyers respect juries. A healthy fear of juries is essential to honing disjointed ideas into a coherent theory, and a compelling theme, at trial. Juries cannot be co-opted. They are not partisans, they are not loyal to clients' interests, and, because they are not repeat players, they have no institutional interests. They are unpredictable. These independence characteristics are precisely why the jury trial is essential: it alone can guarantee the ongoing integrity of the civil litigation process, and in turn its vitality in enforcing the social contract. Our Declaration of Independence demands trial by jury, not by lawyers, and our Constitution guarantees it. As lawyers, we advocate and intercede for our clients with juries, but juries decide our cases, and are entitled to the facts.

Yet litigators' essential respect for the jury's role appears to have curdled into a fear and loathing of juries, that in turn may drive, and justify, discovery abuse. The goal of the discovery

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154 *Iqbal*, 129 S.Ct. at 1948; *Twombly*, 550 U.S. at 555.

process sometimes appears to be anti-discovery: to successfully withhold facts from the trier of fact in an effort to influence the fact-finding outcome. It is the one way in which, we seem to believe, juries can be "controlled." But fear of juries does not translate into a civil right or professional obligation to fool jurors by withholding facts from them. The jury is the trier of fact, but more accurately it is the *ad hoc* body, convened from the community, that makes policy-inflected, community-reflective judgments regarding fault, responsibility, and the penalties therefor. This judgment, in turn, is based on the law, applied to the relevant facts, viewed (the lawyers hope) through the unsightful perspective supplied by skilled advocacy. If any material facts are missing, the judgment of the jury will be skewed, and the system will have been subverted.

The facts surrounding products sold to the public (especially by publicly traded companies) belong, with the narrow exceptions of trade secrets and privileged communications—to the public. In what aspect of advocacy does misrepresenting or concealing such facts reside? Ideally, litigation is a contest of persuasive skills, in which each party holds the same cards: the facts. It is, in some respects, still a game, but not of hide-and-seek.

Plaintiffs' lawyers dread that all discovery limitations will incentivize the concealment of crucial information—potential evidence—and will serve not to save costs and reduce delay, but which will subvert the process by fostering injustice when such tactics are successfully concealed, and by exponentially increasing costs and delay in the effort to expose them. An extreme and current example from the product liability field demonstrates that such fears have some basis in reality. As an August 31, 2009 news item reported that one of Toyota's former lawyers filed a federal racketeering suit against it on July 24, 2004. The lawyer worked for Toyota from 2003 through 2007 defending it against rollover lawsuits that blamed injuries and

deaths on the alleged instability and weak roof structures of the company's SUVs and pickups. The suit alleges that Toyota withheld electronic evidence (including emails) in over 300 rollover cases, and that evidence was destroyed by the company in spite of his efforts to secure the data. The suit also alleges that Toyota withheld design and test data for vehicle roofs. The disgruntled lawyer-plaintiff claims that he was forced to resign in 2007 after lodging several complaints to his supervisors, and claims that conflicts resulting from his complaints ultimately led to his mental breakdown (along with a $3.7 million severance payout from Toyota). Toyota has worked to seal the complaint due to what it calls privileged and confidential information. As the news story reports:

> The legal skirmish has, rather predictably, caught the eye of lawyers around the country. If the lawsuit gains traction and has a favorable outcome for Biller, dozens of Toyota legal victories could be called into question. Denver lawyer Stuart Ollanik of Gilbert, Ollanik and Komyatte has reportedly settled dozens of cases against Toyota and he told CBS News that he wondered if the cases "were resolved based on honest information! or not." San Jose lawyer James McManis, who lost a case involving a plaintiff who became a quadriplegic after rolling over in a Toyota 4Runner, told CBS News that everything "was a big fight – and I mean everything," and he wonders if he ever got all the information he was entitled to receive.[155]

X. THE POTENTIAL OF F.R.E. 502 TO REDUCE COST AND COUNTERACT CONCEALMENT

The game of withholding information was inadvertently assisted by the Rule requirement of a "discovery log," produced with objections to discovery requests, that identified documents withheld on grounds of privilege or work product protection, sufficient to enable opponents to challenge, and judges to rule on, the protected status of such documents. Privilege logs became

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[155] AP "REPORT: Toyota Accused Of 'Ruthless Conspiracy' To Conceal, Destroy Evidence By Former Attorney." Federal lawsuits by "a slew" of 4Runner accident "victims," accusing Toyota (and its in-house counsel) of "deliberately covering up evidence in prior rollover litigation" have now materialized. *See* "Victims Accuse Toyota of Hiding Rollover Evidence," Law 360, New York (September 11, 2009).

discovery sanctuaries, in which vast troves of vaguely described documents hid, the production of discovery logs itself delayed, judges burdened with the task of reviewing thousands of withheld documents *in camera* turned over the task to magistrate judges or special masters (thus further increasing the delay, and often the cost, of the process)[156] and the entire system was fueled by a system in which privilege was the default: when in doubt, leave it out of the production, and place it (months later) on a privilege log.

Newly-enacted Federal Rule of Evidence 502 (signed into law on September 19, 2008) may cut the Gordian knot of withholding-for-privilege. Rule 502 adopts a national standard that an inadvertent disclosure of privileged information does not waive the privilege if the holder of the privilege took reasonable steps to prevent the disclosure, and to rectify the error.[157]

The Rule provides:

> **Rule 502. Attorney-Client Privilege and Work Product; Limitations on Waiver**

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[156] *See, e.g., In re Vioxx Prods. Liab. Litig.*, 235 F.R.D. 334 (E.D. La. 2006); *In re Vioxx Products Liability Litigation Steering Committee v. Merck & Co.*, 2006 U.S. App. LEXIS 27587 (5th Cir. 2006). In an ongoing dispute over 30,000 documents comprising nearly 500,000 pages withheld on privilege, the Fifth Circuit ordered the district court or its designee to conduct a statistically random *in camera* review of at least 2,000 documents to inform its privilege rulings. On remand, the *Vioxx* MDL transferee court appointed law professor Paul R. Rice as Special Master (at the parties' joint expense) to review the 2000 document sample. The Special Master issued an exhaustive report and recommendations on privilege, essentially adopted by the court. Most of the documents were determined not to be privileged. The court commented that the process had delayed discovery of these documents for more than a year. The process is detailed in *In re Vioxx Prods. Liab. Litig.*, 501 F. Supp. 2d 789 (E.D. La. 2007).

[157] *See Rhoads Indus. v. Bldg. Materials Corp. of America*, 254 F.R.D. 216 (E.D. Pa. 2008). In *Rhoads*, Judge Baylson, a liaison from the Advisory Committee on Civil Rules to the Advisory Committee on Rules of Evidence that produced FRE 502, employed a balancing test in a dispute over more than 800 privileged documents produced by plaintiffs, finding non-waivers as to all except those as to which notification on a privilege log had been unduly delayed. At the time of production, Rule 502 had not been enacted, and it was not retroactive. However, the court concluded "it would be just and practicable to apply Rule 502 . . . because it sets a well defined standard, consistent with existing mainstream legal principles on the topic of inadvertent waiver." 254 F.R.D. at 218.

The following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work-product protection.

(a) Disclosure Made in a Federal Proceeding or to a Federal Office or Agency; Scope of a Waiver

When the disclosure is made in a Federal proceeding or to a Federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a Federal or State proceeding only if:

1. the waiver is intentional;

2. the disclosed and undisclosed communications or information concern the same subject matter; and

3. they ought in fairness to be considered together.

(b) Inadvertent disclosure.

When made in a Federal proceeding or to a Federal office or agency, the disclosure does not operate as a waiver in a Federal or State proceeding if:

1. the disclosure is inadvertent;

2. the holder of the privilege or protection took reasonable steps to prevent disclosure; and

3. the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B).

(c) Disclosure Made in a State Proceeding

When the disclosure is made in a State proceeding and is not the subject of a State-court order concerning waiver, the disclosure does not operate as a waiver in a Federal proceeding if the disclosure:

1. would not be a waiver under this rule if it had been made in a Federal proceeding; or

2. is not a waiver under the law of the State where the disclosure occurred.

(d) Controlling Effect of Court Orders

A Federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court—in which event the disclosure is also not a waiver in any other Federal or State proceeding.

(e) Controlling Effect of a Party Agreement

An agreement or the effect of a disclosure in a Federal Proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.

(f) Controlling Effect of This Rule

Notwithstanding Rules 101 and 1101, this rule applies to State proceedings and to Federal court-annexed and Federal court-mandated arbitration proceedings, in the circumstances set out in the rule. And notwithstanding Rule 501, this rule applies even if State law provides the rule of decision.

(g) Definitions

In this rule:

1. "attorney-client privilege" means the protection that applicable law provides for confidential attorney-client communications; and

2. "work-product protection" means the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial.

Rule 502 solves the problem of nonenforcement of waiver rules between federal and state courts, or any states, by enabling federal courts to grant waiver protection that "applies to State proceedings."[158]

It is too early to determine whether FRE 502 will substantially reduce the volume of documents withheld from discovery on privilege grounds, the size of privilege logs and the

[158] *See* FRE 502(d), (f).

delays in compiling them, or the number and frequency of discovery disputes. The notion of Rule 502 as a safe haven from inadvertent waiver - indeed, as protection from any waiver of a truly privileged document – is still unfamiliar to most practitioners, and the incorporation of Rule 502(d) provisions into case management orders is still a novelty.

XI. IMMODEST PROPOSALS: NEW RULES FOR THE REVOLUTION

You way you want a revolution? When it comes to civil litigation, we all want to change the world. Initiatives like the IAALS/ACTL proposals could change the discovery paradigm, but will work only if we all transform our attitudes toward our professional duties and goals. We need, first and last, to change our heads. A little "Revolution" is indeed in order:

> You say you'll change the constitution
> Well, you know,
> We all want to change your head.
> You tell me it's the institution
> Well, you know,
> You better free your mind instead.[159]

Perhaps to accompany the Rule proposals described above, we could use some federal rules of civil demeanor.

Herewith some suggestions:

- The courts belong to the people. All of them—not just the rich, powerful or corporate ones.
- *No posturing*: Litigators, unlike supermodels, do not excel at pout-and-strut. Posturing is unattractive and off putting in each instance, and cumulatively exhausting and alienating. If posturing were to disappear from the litigators' inventory, no one would miss it.[160]
- Lawyers are officers of the court—without cool uniforms but with an iron code of professional conduct.

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[159] *Revolution* (Lennon/McCartney, copyright 1969). Thank you, John Lennon.

[160] One may take a strong and effective position without posturing. Position is substance; posturing is theater.

- Yes, the law is a profession. Not a business. Love it or leave it.

- *No lying*. Not to the judge, not to opposing counsel, not to the client.

- Follow the Golden Rule.[161]

- There are at least two sides to every story. You are entitled and obligated to tell your client's side, as perceptively and persuasively as you can.

- You must promptly produce all non-privileged or protected potentially relevant facts.

- You must promptly identify documents withheld from production and explain why, so the judge can decide the issue during the discovery period—not after discovery is closed or trial is underway.

- There is a duty of candor toward the court. This mean, *inter alia*, disclosing related litigation and relevant rulings promptly. It means supplementing discovery. It does not mean "don't ask, don't tell."

- No yelling. No swearing.

- Neither a snob, a racist, nor a sexist be.

- A sense of humor is essential.[162]

- Respect the time and resources of the court.[163]

- Courtesy will not kill you.[164]

- Don't worry that following these rules will ruin your career. The best lawyers obey all of them.

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[161] No, not "Them That's Got The Gold, Makes The Rules." The other one.

[162] A gentle, self-deprecating sense of humor is preferred. Think Bob Newhart, not Don Rickles.

[163] Do as I say, not as I do. This article, like most summary judgment motions and many briefs, is way too long.

[164] As your parental unit(s) (and the Sedona Conference's Richard Braman) would remind you: "Be nice. It couldn't hurt."

Don't, don't, don't. Is there anything lawyers *can* do? Yes. Be curious, be bold, be daring. Prosecute your claim, or defend your client, to the limit of the law. Where the law falls short, call for its improvement, correction, or extension. We have a common law system. You can argue to change the law. Be honest about what you are asking the Court to do. You can't hide or change the facts. What you make of them is the province of the advocate: your turf. The facts may be constants, but the equation of a verdict or judgment depends as much on the variables; which facts matter most, which least, and why. So here is the final rule for advocates: The law belongs to the Court, the facts belong to the jury, and what they make of them depends on you.

XII. CONCLUDING REFLECTIONS

We live with the problem of discovery cost and delay every day. The professional frustration that is its frequent byproduct corrodes our spirits, diminishes our effectiveness as advocates, and depletes the energy of judges. We have identified the enemy. Now, what to do? The Federal Rules themselves have undergone a continuing process of evolution, and, for the most part, improvement. Judges pay increasing attention to discovery abuse, and judicial officers (including magistrate judges and special masters) spend increasing chunks of time and energy in adjudicating discovery disputes, and devising case-specific discovery systems and procedures. They are currently considering whether additional quantitative limits on discovery, stricter sanctions, and/or even more active judicial control, more active judicial supervision, are either necessary or useful.

This paper has offered a few suggestions, and repeats this self-evident proposition, a prescription offered from the uncomfortable position of a would-be procedural physician who has not healed herself: we need to change. To call the past generation of attempted discovery reforms "tinkering around the edges" demeans the efforts and the dedication of those engaged in

them. They have done, and continue to do, heroic work. But all such work is in vain, so long as our legal culture resists the necessary transformation of attitude. We need to accept the inevitability of discovery of material fact, as essential for the delivery of due process, both to those who seek, and those who hold, such facts. The trier of fact must have such material information in order to discharge its duty and deliver justice at trial. The fact that most cases are not tried does not reduce the need for essential discovery. Settlement is rightly seen as oftentimes less costly, more attractive to the litigants, and more creative in fashioning effective remedies than a trial could be. But no fair and reasonable settlement can be fashioned without an appreciation of the facts.

A generation of lawyers has practiced under the assumption, mostly wrong, that it is a professional duty to defend information against discovery, and that cooperation in the discovery process is tantamount to malpractice. While this has never been the case, the current generation of plaintiffs' lawyers at believes and fears it to be so, rendering any efforts to limit the quantum of discovery suspect and likely to fail. We do not yet act as if we understand the truth: it is neither ethically mandatory or permissible to withhold relevant information from discovery, or to evade, or delay, the disclosure of evidence.

If the present generation of lawyers cannot make this profound and necessary change, then our goal must be to look ahead and to change, now, the values and ethics taught to our future generation of lawyers: those presently in law school, and those just starting their practices. Because we have not yet done so, the calls for discovery reform of the 1970s, 1980s, 1990s, and early 21st Century will become increasingly desperate, and remain in vain.

The reduction of discovery abuse requires, at least in the near term, increased and sustained levels of judicial supervision. A party, or its law firm, that decides that a strategy of

attrition is in its best interests, and that discovery resistance and exploitation of the complexities of the discovery process are the most efficacious means to deploy this strategy, must see the prospect of immediate deterrence as a looming dis-incentive. Otherwise, the strategy of attrition will continue to flourish, as those attorneys and law firms who decline to deploy it, will simply be fired, or not retained, in favor of those who do and will. This is the story of litigation in the 1990s and 2000s, at least at the gut level of many who have been involved in it. It must be condemned, or it will not stop. Many plaintiffs' advocates will not support or implement discovery reforms that set additional limits on the quantum of data, the number of depositions, or the time allowed within which to complete discovery, if they do not first see that judges are serious about punishing the withholding, hiding, or destruction of material information that such limitations can allow.

This presents a quandary. All of us must change, and most of us acknowledge the need or desirability of this change, but each of us (plaintiffs' lawyers, defense lawyers, and judges) would prefer to see the others change first. Because neither plaintiffs' lawyers nor defendants' lawyers are eager, as a matter of reality or even perception to risk sacrificing their clients' interests on the altar of professional transformation and discovery reform, there may be few to lead the charge in the discovery and demeanor revolutions that are needed. The burden of "firstness" falls upon the judiciary.

Appendix: Federal Courts' Citation to and Application of Fed. R. Civ. P. 1 in the Discovery/Pretrial Context

CASE NAME	YEAR OF DECISION	PROCEDURAL POSTURE	TYPE OF CASE	HOW RULE 1 APPLIED	OTHER FED. RULES APPLIED TO EFFECTUATE RULE 1 PURPOSE	MOST RELEVANT LANGUAGE	HOLDING/DISPOSITION
Young v. Demick, Civil Action No. 08-4648, 2009 U.S. Dist. LEXIS 53729 (E.D. Pa. June 25, 2009).	2009	*Pro se* plaintiff's request that the Court provide him with detailed description of 1,100 pages of materials plaintiff submitted to court	Unspecific constitutional claims against unspecified persons	FRCP 1 required court to order *pro se* plaintiff to resubmit complaint and exhibits. *Pro se* plaintiff submitted 1,100 pages of disorganized documents that did not conform to Fed. R. Civ. P. 8(a) or 10 requirements. Court acknowledged difficulties *pro se* plaintiffs face in complying with court rules, but held that court's duties under FRCP 1 required plaintiff to resubmit complaint and exhibits in conformity with Federal Rules.	Court ordered plaintiff to submit complaint and exhibits that conform with Fed. R. Civ. P. 8(a) and 10.	"The Court is mindful of the difficulties in complying with Court rules and Orders faced by a litigant [*4] who is appearing without counsel. However, the underlying fundamental duties of the Court are to (a) maintain justice, (b) avoid **delay**, and (c) improve the efficiency of dispute resolution. *Fed R. Civ. P. 1*: *see also Brown v. City of Philadelphia, 2009 U.S. Dist. LEXIS 31947, 2009 WL 1011966 at * 14*. Accordingly, if Plaintiff wishes to proceed in this civil action he must submit an Amended Complaint that adheres to the Federal Rules of Civil Procedure. The Court will grant Plaintiff an additional thirty (30) day extension from the date of this Order to file an Amended Complaint which complies with this Memorandum and Order. If Plaintiff fails to submit an Amended Complaint in compliance with this Memorandum and Order, the Court will consider dismissing the case with prejudice." (*1)	Court denied plaintiff's request for court to provide detailed description documents and ordered plaintiff to resubmit complaint and exhibits in conformity with Federal Rules of Civil Procedure in order to avoid dismissal with prejudice.

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CASE NAME	YEAR OF DECISION	PROCEDURAL POSTURE	TYPE OF CASE	HOW RULE 1 APPLIED	OTHER FED. RULES APPLIED TO EFFECTUATE RULE 1 PURPOSE	MOST RELEVANT LANGUAGE	HOLDING/DISPOSITION
Polesky v. Morrison, No. CV-07-42-BLG-RFC, 2009 WL 117365 (D. Mont. Jan. 16, 2009).	2009	Defendants' motion for summary judgment and plaintiff's response requesting additional discovery	Claims under 42 U.S.C. §§ 1985, 1983 and related MT state laws re: state government investigation and prosecution of plaintiff	Court relied upon FRCP 1 to deny plaintiff's request to allow additional discovery before ruling on motion for summary judgment. Plaintiff claimed additional discovery needed to gain information to create genuine issue of material fact to avoid summary judgment.		"The Court will reach the summary judgment motion without allowing additional discovery. The Federal Rules of Civil Procedure are in place to assure the just, speedy, and inexpensive resolution of disputes. Fed.R.Civ.P. 1. Here, Polesky had ample opportunity to request additional discovery within the bounds of the rules, but did not do so. Polesky has already received numerous continuances which have significantly delayed resolution of this matter. The Court must consider fairness to all parties, including the defendants. Polesky's disagreement with the facts as declared by Bloom and Gunlock is, as he admits, supported only by speculation. Thus, the Court must proceed to the merits of Bloom and Gunlock's motion." (at 6)	Motion for summary judgment denied. Plaintiff's request for additional discovery denied because plaintiff had ample opportunity to request discovery and delay caused by additional would prejudice defendant.

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CASE NAME	YEAR OF DECISION	PROCEDURAL POSTURE	TYPE OF CASE	HOW RULE 1 APPLIED	OTHER FED. RULES APPLIED TO EFFECTUATE RULE 1 PURPOSE	MOST RELEVANT LANGUAGE	HOLDING/DISPOSITION
Rhodes v. Dalton, No. 6:07-cv-731-Orl-22KRS, 2009 WL 789922 (M.D. Fla. Mar. 23, 2009).	2009	Defendant's motion to dismiss	*Pro se* prisoner's complaint alleging false arrest in violation of 42 U.S.C. § 1983.	Court applied F.R.C.P. 1 to encourage parties to consent to proceeding before Magistrate Judge. Court noted that consent to proceed before Magistrate may reduce litigation time and fulfill purpose of Fed. R. Civ. P. 1 to secure the just, speedy and inexpensive determination of every action.		"Consent to proceed before a United States Magistrate Judge may reduce litigation time and costs, and secure the just, speedy, and inexpensive determination of this action. *See* Fed.R.Civ.P. 1. The parties are free to withhold consent without adverse substantive consequences, in which case a United States District Judge will enter final adjudication." (*5)	Motion to dismiss denied; Court ordered case to proceed before a Magistrate Judge, upon consent of parties.
Pritchard v. Dow Agro Sci., 255 F.R.D. 164 (W.D. Pa. 2009).	2009		Toxic torts suit	Court applied Fed. R. C. P. 1 to enlarge time for plaintiff to file expert causation reports, where delay in filing reports was attributable to plaintiff's counsel's delay in finding co-counsel with expertise. Court appears to have relied on FRCP 1's mandate that rules be applied to secure "just" resolution of every action.	Court also exercised its discretion "concerning whether to dismiss the instant motion for failure to file the proper certification" of consultation with opposing party. Delay in filing reports was attributable to plaintiff's counsel and not plaintiffs.	"4. Conclusion Based on the foregoing reasons, the fact that Plaintiffs are not personally responsible for the delay, and taking into consideration that the purpose of the Federal Rules is to "secure the just, speedy, and inexpensive *179 determination of every action," the Court finds that Plaintiffs are permitted to enlarge the time to file their expert causation reports. FED. R. CIV. P. 1." (at 179)	Court permitted plaintiffs' to enlarge the time to file their expert causation reports.

Appendix: Federal Courts' Citation to and Application of Fed. R. Civ. P. 1 in the Discovery/Pretrial Context

CASE NAME	YEAR OF DECISION	PROCEDURAL POSTURE	TYPE OF CASE	HOW RULE 1 APPLIED	OTHER FED. RULES APPLIED TO EFFECTUATE RULE 1 PURPOSE	MOST RELEVANT LANGUAGE	HOLDING/DISPOSITION
In re FLSA Cases, No. 6:08-mc-49-Orl-31GJK, slip op., 2009 WL 129599 (M.D. Fla. Jan. 20, 2009).	2009	Court heard objections to Magistrate Judge's Report and Recommendation to impose attorney sanctions.	Unclear	Court relied in part on Rule 1 to impose sanctions upon attorneys for failure to abide by scheduling orders. Attorneys' conduct disobeyed Rule 1's direction to "counsel to avoid delay and facilitate an expeditious resolution of disputes." (6) Court found that noncompliance was "largely attributable to the high volume nature of an FLSA practice" (1, FN 5)	Court also exercised its discretion under Fed. R. Civ. P. 16(f) to sanction counsel's failure to abide by scheduling orders.	"Rule 1 of the Federal Rules of Civil Procedure provides: 'These rules govern the procedure in all civil actions and proceedings in the United States district courts ... They should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.' Fed.R.Civ.P. 1 (2008). According to the Supreme Court, "the principle function of procedural rules should be to serve as useful guides to help, not hinder, persons who have a legal right to bring their problems before the courts." *Schiavone v. Fortune*, 477 U.S. 21, 27, 106 S.Ct. 2379, 91 L.Ed.2d 18 (1986) ... Rule 1 directs courts and counsel to avoid delay and facilitate an expeditious resolution of disputes. *See Dussouv v. Gulf Coast Inv. Corp.*, 660 F.2d 594, 600 (5th Cir. 1981)." (6) "An attorney has the duty to the Court and to his client(s) to abide by pretrial orders that are designed to promote the fair and efficient administration of justice. All lawyers have the inherent obligation to avoid accepting more responsibility than they can properly manage. Having a voluminous clientele does not diminish that obligation.FN37 The conduct of some of the attorneys outlined above shows an inexcusable pattern of noncompliance. Their conduct plainly falls within the ambit of Rule 16(f) and given the extensive history of noncompliance, sanctions are warranted.FN38." (7)	Court imposed sanctions for failure to comply with scheduling orders, where law firms were issued over 100 show cause orders by the district court in a little over one year.

Appendix: Federal Courts' Citation to and Application of Fed. R. Civ. P. 1 in the Discovery/Pretrial Context

CASE NAME	YEAR OF DECISION	PROCEDURAL POSTURE	TYPE OF CASE	HOW RULE 1 APPLIED	OTHER FED. RULES APPLIED TO EFFECTUATE RULE 1 PURPOSE	MOST RELEVANT LANGUAGE	HOLDING/DISPOSITION
AT & T Corp. v. Dataway Inc., No. C-07-02440 EDL, 2008 WL 4291515 (N.D. Cal. Sept. 18, 2008).	2008	Plaintiff's motion for attorneys' fees following judgment in its favor	Claims for payment due for telecommunication services	Court relied in part on FRCP 1 to deny plaintiff attorneys fees. Held that even if fees were warranted under F.C.C. tariff, such fees were unreasonable because fees far exceeded damages; AT&T attorneys failed to cite key authority; failed to timely answer counterclaims; refused to produce discovery, thus prolonging proceedings; and failed to engage in meaningful meet and confer efforts with opposing counsel due to personal animosity.	Court also denied fees because customer did not have prior notice of tariff and its attorneys fees provision and because customer claimed that third party was responsible for charges.	"Furthermore, throughout this litigation, counsel were unable to engage in meaningful meet and confer efforts with one another about any aspects of the case. Counsel themselves acknowledged at the case management conference that their difficult relationship prevented effective communication in this case. On April 15, 2008, the Court reminded counsel that "they should set aside their personal animosity, which is counterproductive to the just, speedy, and inexpensive resolution of this matter, in the best interests of their respective clients, and as required by Federal Rule of Civil Procedure 1." *See* April 15, 2008 Order. (*2) … "The Court again raised its concern that the parties were not litigating the case in the spirit of Federal Rule of Civil Procedure 1, noting that AT & T failed to meet and confer with Dataway's counsel over the telephone or in person as required by the local rules. *See* May 21, 2008 Order. While the Court certainly does not believe that opposing counsel was blameless, AT & T also brought unnecessary expense on itself. In addition, AT & T filed its complaint in the Northern District of California, yet chose counsel from Southern California, incurring extra travel costs." (*2)	Motion for attorneys fees denied; fees not warranted where plaintiff's counsel failed to engage in meaningful meet and confer efforts, prolonged discovery, failed to timely answer, and otherwise "brought unnecessary expense upon itself," all contrary to "the spirit of Fed. R. Civ. P. 1." (at 2)

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CASE NAME	YEAR OF DECISION	PROCEDURAL POSTURE	TYPE OF CASE	HOW RULE 1 APPLIED	OTHER FED. RULES APPLIED TO EFFECTUATE RULE 1 PURPOSE	MOST RELEVANT LANGUAGE	HOLDING/DISPOSITION
Allstate Ins. Co. v. Palterovich, No. 04-21402-CIV, 2008 WL 2741119 (S.D. Fla. July 12, 2008).	2008	Plaintiff's motion for sanctions against defendant	Action for fraud on automobile insurance companies	Court applied FRCP 1 to grant motion for sanctions against defendant. Defendant repeatedly failed to attend depositions and ignored court orders to do so.	Fed.R.Civ.P. 37(b) & (d) default judgment entered against defendant as sanction.	"Moreover, Plaintiffs have suffered prejudice by having been denied the ability to promptly resolve their claims against Mr. Shteyman. *See* Fed.R.Civ.P. 1 ("These rules ... should be construed and administered to secure the just, *speedy,* and inexpensive determination of every action") (emphasis added). In some cases, the speedy resolution of a case may be compromised for the sake of ensuring a just result or sparing some expense; in this case, however, Mr. Shteyman's unreasonable and unjustified refusal to attend deposition and comply with the Court's Orders *hindered* the just resolution of this cause and *increased* the cost of the proceedings to all concerned. In addition to the monetary costs associated with Mr. Shteyman's gamesmanship, the effort and human resources that Plaintiffs have invested in attempting to cajole Mr. Shteyman into complying with the Federal Rules and the Orders of this Court could surely have been spent on more fruitful endeavors, such as preparing their case against one of Mr. Shteyman's many co-defendants (DE # 512 at 9)." (at 4).	Motion for sanctions granted; Fed.R.Civ.P. 37(b) & (d) default judgment entered against defendant as sanction.

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CASE NAME	YEAR OF DECISION	PROCEDURAL POSTURE	TYPE OF CASE	HOW RULE 1 APPLIED	OTHER FED. RULES APPLIED TO EFFECTUATE RULE 1 PURPOSE	MOST RELEVANT LANGUAGE	HOLDING/DISPOSITION
Johnson v. Bd. of Police Comm'rs, No. 4:06CV605 CDP, 2008 WL 2437963 (E.D. Mo. June 13, 2008).	2008	Plaintiff's motion for leave to supplement expert report	Unknown	Court relied in part on FRCP 1 to deny motion for leave to supplement expert report. In denying plaintiff's motion to supplement his expert report after close of discovery, court cited a case that states that adherence to progression order deadlines is critical to "primary goal of judiciary" as express in F.R.C.P. 1 (at. 1). Plaintiff failed to meet numerous deadlines under court's progression order. Plaintiff's delay prejudiced defendant, which had already formed a trial strategy based on evidence submitted during discovery period.		" 'Adherence to progression order deadlines is critical to achieving the primary goal of the judiciary: 'to serve the just, speedy, and inexpensive determination of every action.'" *Marmo v. Tyson Fresh Meats, Inc.*, 457 F.3d 748, 760 (8th Cir. 2006) (quoting Fed.R.Civ.P. 1)."	Motion denied because plaintiff failed to establish that failure to timely disclose the information was substantially justified or harmless.

Appendix: Federal Courts' Citation to and Application of Fed. R. Civ. P. 1 in the Discovery/Pretrial Context

CASE NAME	YEAR OF DECISION	PROCEDURAL POSTURE	TYPE OF CASE	HOW RULE 1 APPLIED	OTHER FED. RULES APPLIED TO EFFECTUATE RULE 1 PURPOSE	MOST RELEVANT LANGUAGE	HOLDING/DISPOSITION
Crystal Imp. Corp. v. Avid Identification Sys., Inc., Civil No. 05-2527 (DSD/SRN), 2008 WL 2120998 (D. Minn. Apr. 28, 2008).	2008	Defendant's renewed motion to stay proceedings pending resolution of post-judgment proceedings and any appeal in separate action between same parties.	Antitrust action	Court relied in part on FRCP 1 to deny motion to stay proceedings. Court reasoned that Defendant faced no prejudice from denial of stay, because separate action "could resolve at most only one of twelve claims." In contrast, plaintiff would be prejudiced because it filed this action several years ago alleging all of its products had been excluded from market by Defendant's anti-competitive activity. Basic principles of securing "the just, speedy and inexpensive determination" of this action weigh against any further delay. *See* Fed.R.Civ.P. 1." (*4).		"In contrast, granting a stay would unduly prejudice Crystal, which filed this action several years ago alleging that all of its products have been excluded from the relevant market by Defendants' anti-competitive practices. Although there has been much delay already, any fault cannot be attributed predominantly to Crystal. Basic principles of securing "the just, speedy and inexpensive determination" of this action weigh against any further delay. *See*Fed.R.Civ.P. 1. In sum, there is insufficient basis to halt this action now in the hope that one possible outcome of an appeal-that the Federal Circuit would reverse or vacate the Texas court's inequitable conduct decision as an abuse of discretion-would simplify the issues or otherwise facilitate the efficient resolution of this action. This is certainly true at least through the completion of discovery here." (*4)	Motion for stay denied, where resulting delay would unduly prejudice plaintiff.

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CASE NAME	YEAR OF DECISION	PROCEDURAL POSTURE	TYPE OF CASE	HOW RULE 1 APPLIED	OTHER FED. RULES APPLIED TO EFFECTUATE RULE 1 PURPOSE	MOST RELEVANT LANGUAGE	HOLDING/DISPOSITION
Hensley v. Irene Wortham Ctr., Inc., No. 1:07cv403, slip op., 2008 WL 2183946 (W.D. N.C., Apr. 04, 2008).	2008	Plaintiff's motion to remand to state court	Title VII sex discrimination and harassment, hostile work environment, and retaliation; Age discrimination claim under ADEA	Court applied FRCP 1 to support denial of plaintiff's motion for remand to state court after removal to federal court on defendant's motion. Plaintiff's own delay in serving co-defendant and filing proof of service was responsible for the untimely filing of notice of removal. Court stated that remanding case would penalize the removing defendants for plaintiff's delay, in violation of FRCP 1.		"Second, by waiting 41 days to file the proof of service, plaintiff failed to put the removing defendants on notice that they had in fact obtained service upon Renzi [co-defendant]. Indeed, this court knows of no other way than reviewing the docket for proof of service to determine if a defendant has been served, and plaintiff's arguments that would penalize the removing defendants for plaintiff's delay would violate Rule 1, Federal Rules of Civil Procedure, which requires this court to construe the rules "to secure the just, speedy, and inexpensive determination of every action and proceeding." Fed.R.Civ.P. 1." (*7)	Motion for remand denied in part because penalizing the removing defendants for plaintiff's delay in filing proof of service would violate FRCP 1.
Gordon-Smith v. Baldwin, Civil Action No. 05-cv-02541-WYD-MEH, slip op., 2008 WL 511404 (D. Colo. Feb. 22, 2008).	2008	Defendants' Motion to Dismiss with Prejudice for Failure to Prosecute	Constitutional claims based on allegations of sexual harassment and sexual assault in prison	Court applied FRCP 1 as further justification for dismissal of case for plaintiff's failure to prosecute. Plaintiff lost contact with all parties and the court.	Court applied 10th Circuit test under FRCP 41(b) for dismissal of cases based on failure to prosecute or comply with court orders.	"Second, Plaintiff's failure interferes with the judicial process by impeding the Court's ability to bring a speedy and just resolution to this matter for the Defendants or the other Plaintiffs, as required by the Federal Rules of Civil Procedure. Fed.R.Civ.P. 1."	Granted motion to dismiss with prejudice for failure to prosecute, where plaintiff lost contact with all parties and the court.

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CASE NAME	YEAR OF DECISION	PROCEDURAL POSTURE	TYPE OF CASE	HOW RULE 1 APPLIED	OTHER FED. RULES APPLIED TO EFFECTUATE RULE 1 PURPOSE	MOST RELEVANT LANGUAGE	HOLDING/DISPOSITION
Commerce Benefits Group, Inc. v. McKesson Corp., No. 1:07-CV-2036, slip op., 2008 WL 239550 (N.D. Ohio Jan. 28, 2008).	2008	Plaintiff's motion to file a third and fourth amended complaint (one adding claim, one adding party defendant)	Claims for breach of contract, promissory estoppel, unjust enrichment	Court applied FRCP 1 in stating the legal standard for considering motions to amend, and as further justification for granting leave to add third party defendant. Court noted the general standard for FRCP 15(a) leave to amend should be examined "in light of the directive of Rule 1 of the Federal Rules of Civil Procedure." (*2) Court granted leave to file third complaint adding party defendant because (1) plaintiff otherwise would be materially prejudiced and (2) amendment will not delay lawsuit because third-party defendant already had knowledge of case.		"The Supreme Court has articulated the general standard for Rule 15(a): In the absence of any apparent or declared reason-such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.-the leave sought should, as the rules require, be freely given. *Foman v. Davis*, 371 U.S. 178, 182 (1962). A court must examine the Foman factors in light of the directive of Rule 1 of the Federal Rules of Civil Procedure that the rules "are to be construed to secure the just, speedy, and inexpensive determination of every action." FED.R.CIV.P. 1; *Foman*, 371 U.S. at 182." (*2) … "The amendment will also not delay this proceeding because Per-Se presumably has knowledge of this lawsuit and will merely join in Defendant McKesson's summary judgment motion. The just and speedy resolution of this lawsuit will be enhanced by the addition of Per-Se as a third party defendant and will not create additional expense or prejudice towards the parties." (*4)	Court granted leave to file third complaint adding party defendant because (1) plaintiff otherwise would be materially prejudiced and (2) amendment will not delay lawsuit because third-party defendant already had knowledge of case. Court also denied motion to add new claims, because factual basis for new claim existed at beginning of lawsuit and wasn't raised by plaintiff.

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CASE NAME	YEAR OF DECISION	PROCEDURAL POSTURE	TYPE OF CASE	HOW RULE 1 APPLIED	OTHER FED. RULES APPLIED TO EFFECTUATE RULE 1 PURPOSE	MOST RELEVANT LANGUAGE	HOLDING/DISPOSITION
Escobar v. Reid, Civil Action No. 06-cv-01222-CMA-KLM, slip op., 2008 WL 4877009 (D. Colo. Nov. 12, 2008).	2008	*Pro se* Plaintiff's motion to supplement complaint	*Pro se* prisoner civil rights case brought pursuant to 28 U.S.C. § 1331, 42 U.S.C. § 1983	Court relied on Rule 1 to deny plaintiff's motion to amend complaint six months after case remanded this court. Court previously granted first supplemental complaint because plaintiff made motion promptly and it concerned facts that occurred after filing of original claim.		"Six months have passed since Plaintiff's Complaint was remanded to the jurisdiction of this Court. The Court is mindful of the admonition that the Federal Rules of Civil Procedure "be construed and administered to secure the just, speedy, and inexpensive determination of every action." Fed.R.Civ.P. 1. As such, Plaintiff's case will never be resolved if Plaintiff is permitted to continuously update his claims and add additional parties. Moreover, allowing Plaintiff to file a second supplement to his Complaint at this date, after a Scheduling Order has been entered and when deadlines for discovery and dispositive motions have been set for March 18, 2008 and April 18, 2008, respectively [Docket No. 79], would unreasonably delay resolution of this matter and unduly prejudice the Defendants." (*8)	Court denied motion to supplement, where plaintiff filed motion six months after case was remanded and denial served the purpose of securing "just, speedy and inexpensive determination of every action." (*8)

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Envtl. Tectonics Corp. v. Walt Disney World Corp., No. 05-6412, 2008 U.S. Dist. LEXIS 47123 (E.D. Pa. June 13, 2008).	2008	Plaintiffs' motion for reconsideration under FRCP 59(c), after summary judgment for Defendant	Claims for breach of contract and unfair competition	FRCP 1 cited in footnote as additional support for court's denial of Plaintiff's motion for reconsideration. Plaintiff's motion for reconsideration denied because it "rests its arguments on the record as presented on summary judgment" rather than raising new facts or law. (3) FRCP 1 supported this disposition. Court noted that Plaintiff "persisted in litigating for several years alongside another case that is also before this court," which have "lent plaintiff ample occasion to bring the arguments it now attempts to raise for the first time here, in a post-judgment motion." (4)	Court rejected argument that Fed. R. Civ. P. § 15(c)(1)(B) allowed Plaintiff to amend its complaint, citing philosophy favoring finality of judgment and inability to raise new arguments in post-judgment motions. ("See also *Ahmed v. Dragovich, 297 F.3d 201, 208 (3d Cir. 2002)*." (4)	"Plaintiff takes the liberty of pointing out that *Rule 15(c)(1)(B)* allows it to amend its complaint because the dispute over title blocks was set out in ETC's original pleading. Any attempt to amend the complaint at this stage would be an abuse of [HN4] the Rules of Civil Procedure, which are designed "to secure the just, speedy, and inexpensive determination of every action and proceeding." *FED. R. CIV. P. 1*" (4, FN 2)	Motion for reconsideration denied, where plaintiffs did not raise new facts or law had several years to raise these arguments. (4; FN 2)

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CASE NAME	YEAR OF DECISION	PROCEDURAL POSTURE	TYPE OF CASE	HOW RULE 1 APPLIED	OTHER FED. RULES APPLIED TO EFFECTUATE RULE 1 PURPOSE	MOST RELEVANT LANGUAGE	HOLDING/DISPOSITION
Lancelot Investors Fund v. TSM Holdings, No. 07-C-4023, 2008 U.S. Dist. LEXIS 34471 (N.D. Ill. Apr. 28, 2008).	2008	Plaintiff's motion to exclude defendant's late disclosed evidence.	Counterclaims for fraud in inducement of loan agreement and fraud in inducement and breach of post-foreclosure contract	Court cited FRCP 1 as additional support for granting motion to exclude late disclosed evidence.	Caselaw cited for same proposition; see Most Relevant Language	(at *13) "The long accepted view that once regarded [*13] discovery as an intolerable form of prying has been replaced by the modern attitude toward discovery that regards secrecy as uncongenial to truth-seeking and trial by ambush as destructive of the overarching goal that cases be justly determined on their merits. *See Swierkiewicz v. Sorema N. A., 534 U.S. 506, 512, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002)*; *NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 253, 98 S. Ct. 2311, 57 L. Ed. 2d 159 (1978)* (Powell, J., concurring and dissenting); *Hickman, 329 U.S. at, 500*; ***Rule 1, Federal Rules of Civil Procedure***. [5] The defendants' non-compliance with two court orders regarding the deadlines for production -- three if the initial disclosure date is counted-- cannot be squared with the desideratum of the federal discovery rules. 5 *See also,* Vanderbilt, Introduction to Cases And Materials On Modern Procedure And Judicial Administration, 42 (1952)(" The fundamental premise of the federal rules is that a trial. . . is an orderly search for truth in the interest of justice rather than a contest between two legal gladiators with surprise and technicalities as their chief weapons....")."	Court granted plaintiff's motion to exclude late disclosed evidence.

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Collins v. Wilkerson, No. 2:05-cv-0367, 2008 U.S. Dist. LEXIS 32919 (S.D. Ohio Apr. 22, 2008).	2008	Two cross-motions for Summary judgment	*42 U.S.C. §1983* action alleging that prison conditions violated Plaintiff-inmate's Eighth Amendment rights	Court quoted *Celotex* court's quotation of FRCP 1 in articulating the Summary Judgment Standard. Court did not explicitly address FRCP 1 in its reasoning.		"Accordingly, although summary judgment should be cautiously invoked, it is an integral part of the Federal Rules which are designed 'to secure the just, speedy and inexpensive determination of every action.' *Celotex, 477 U.S. at 327* (quoting *Fed. R. Civ. P. 1*)." (4)	Plaintiff's motion for summary judgment denied, defendant's granted.
Lockridge v. HBE Corp., 543 F. Supp. 2d 1048 (E.D. Mo. 2008).	2008	Defendant's Summary Judgment motion	Employee's Title VII and § 1981 claims	Court quoted *Celotex* court's quotation of FRCP 1 in articulating the Summary Judgment Standard. Court did not explicitly address FRCP 1 in its reasoning.		"The Supreme Court has noted that "[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to 'secure the just, speedy and inexpensive determination of every action.'" *Id. at 327* (*quoting Fed. R. Civ. P. 1*)." (at 1055)	Court granted summary judgment for defendant employer.

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GameTech Intern., Inc. v. Trend Gaming Sys., L.L.C., No. CV-01-540-PHX-LOA, 2008 WL 4571424, (D. Ariz. Oct. 14, 2008).	2008	District Court's consideration of Magistrate Judge's Report and Recommend ation that Magistrate judge's jurisdiction continued after parties' appeal to 9th Circuit	Unclear	Court stated that policy underlying Rule 1 supported its holding that magistrate judge's jurisdiction encompasses entire civil suit; contrary holding would thwart Rule 1's purposes.		"V. Conclusion In summary, the language of 28 U.S.C. § 636(c), Fed.R.Civ.P. 73, the Consent Form, and the Order of Assignment (docket # 23) all contemplate that magistrate judge jurisdiction encompasses the entirety of a civil suit before the district court, including a remand for a retrial and entry of judgment following an appeal. To find otherwise thwarts the efficient use of limited judicial resources, promotes judge shopping in the hopes of obtaining more favorable rulings, and adds unnecessary costs and delay to civil litigation contrary to Fed.R.Civ.P. 1 and the Civil Justice Reform Act of 1990, 28 U.S.C. 473.[FN2] The undersigned has spent years working on the issues in this matter and that familiarity lends itself to a more expeditious resolution of this matter on remand. Time and effort would be wasted were this complicated case assigned to new judge at this late date. FN2.Federal Rule of Civil Procedure 1 provides that the Rules of Civil Procedure "should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding." *Id.*	Held - "[M]agistrate judge jurisdiction encompasses the entirety of a civil suit before the district court, including a remand for a retrial and entry of judgment following an appeal." (12)

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Silvaggio v. Clark County, No. 2:05-cv-00128-RCJ-RJJ, slip op. 2008 WL 901192 (D.Nev. Mar. 31, 2008).	2008	Plaintiff's Motion in Opposition to Local Rule 41-1 and Fed R Civ P 41(b) Dismissal for lack of Plaintiff's prosecution	Title VII and ADEA case alleging race and age discrimination	Public policy reflected in FRCP 1 supported the dismissal of this case due to Plaintiff's unreasonable delay in complying with discovery requests. Plaintiff took no action in her case for a period of almost one year. (2) Public policy favoring disposition of cases on their merits was outweighed by public policy favoring just and speedy determination of every action.	Civil Justice Reform Act of 1990	"4. The Public Policy Favoring Disposition of Cases on Their Merits *3 The Ninth Circuit holds that "public policy favoring disposition of cases on their merits strongly counsels against dismissal." *In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, 460 F.3d 1217, 1226 (9th Cir. 2006). However, resolution on the merits cannot occur if the case is staled or unreasonably delayed by a plaintiff's failure to comply with discovery obligations. *Id.* at 1228. If the plaintiff is the party causing the delay, dismissal is the appropriate sanction, because it is the plaintiff's responsibility to move the case toward disposition on the merits. *In re Exxon Valdez*, 102 F.3d at 433. In the present matter, Silvaggio's delay has stalled this case. Public policy favors the disposition of cases on the merits but it also favors the just and speedy determination of every action. FED. R. CIV. P. 1. The Court will not allow Silvaggio's irresponsibility to frustrate the Court's attempt to facilitate the disposition of this case on the merits. Therefore, although public policy disfavors dismissal in most circumstances, here, public policy supports the dismissal of this case due to Plaintiff's unreasonable delay." (*2-3)	Complaint dismissed with prejudice due to Plaintiff's failure to prosecute (District Court approved Magistrate Judge's Report and Recommendation to this effect).

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CASE NAME	YEAR OF DECISION	PROCEDURAL POSTURE	TYPE OF CASE	HOW RULE 1 APPLIED	OTHER FED. RULES APPLIED TO EFFECTUATE RULE 1 PURPOSE	MOST RELEVANT LANGUAGE	HOLDING/DISPOSITION
Paluch v. Dawson, No.. 1:CV-06-01751, slip op., 2007 U.S. Dist. LEXIS 91191, (M.D. Pa. Dec. 12, 2007).	2007	Plaintiff's motion to compel discovery (plaintiff requested responses to request for production of documents)	Prisoner's civil rights action against prison employees, pursuant to 42 U.S.C. § 1983	Court relied on FRCP 1 to justify hearing the merits of plaintiff's motion to compel, rather than determining that defendants waived their objections to motion by submitting their response one day late.		"Defendants contend that this 1-day delay [in submitting their responses to motion to compel] is *de minimis,* and should be excused in light of *Rule 1 of the Federal Rule of Civil Procedure*'s admonition that "These rules . . . should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding." The court agrees. As such, the court rejects Paluch's argument here, and will address the merits of the motion to compel." (at 6)	Holding that was relevant to application of FRCP 1: Court ruled that it would hear merits of motion rather than finding defendant's objections were waived by one-day delay in filing response. Disposition: Motion to compel granted in part, deferred in part, and denied in all other respects.

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In re: Methyl Tertiary Butyl Ether ("MTBE") Prod. Liab. Litig., 510 F. Supp. 2d 299 (S.D.N.Y. 2007).	2007	Defendants' motion to remand action to state court	Multi-district products liability litigation	Rule 1 cited in footnote as additional support for denial of motion to remove case to state court.		(at 319) "In sum, after three and a half years of intense and complex litigation, scores of formal and informal court conferences, and many opinions, I conclude that plaintiffs' voluntary amendment, which added an unmistakable federal claim before the defect in removal was identified, is sufficient to confer subject matter jurisdiction upon this Court despite what now appears to have been an improvident removal. Any other result would ignore the years of effort by the Court and the parties -- a critical factor specifically recognized by the Supreme Court and several circuit courts. [92] 92 Moreover, such a result would frustrate the purpose of [HN14] the Federal Rules of Civil Procedure, which "shall be construed and administered to secure the just, speedy, and inexpensive determination of every action." *Fed. R. Civ. P. 1*."	Defendant's motion to remand denied. Removing from federal court a complex MDL case after three and a half years of litigation and multiple opinions would ignore the years of effort by the Court and the parties and frustrate purpose of Rule 1.

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Martin v. BNSF Ry. Co., Civil Action No. 9:07-CV-154, 2007 WL 4333341 (E.D. Tex., Dec. 10, 2007).	2007	Defendant's motion to transfer venue (brought under 28 U.S.C. § 1404(a))	Personal injury claim brought under Federal Employer Liability Act (FELA)	Court applied Rule 1 to support its denial of defendant's late motion for transfer to new venue. In weighing the public interest factors relevant to determination of motion to transfer, court stated that Rule 1 reflects the public's interest in speedy and inexpensive determination of every action.		"The public and the court have an interest in the speedy and inexpensive determination of every action. Congressional intent in this regard is expressed in Fed.R.Civ.P. 1 and Fed.R.Evid. 102. Allowing a party, which knows it could ask for a § 1404(a) transfer for convenience, to wait for months until the last possible moment serves only to delay resolution and increase expenses. Clearly expressed Congressional intent in favor of efficient disposition of cases coupled with an equally clear legislative intent to allow an FELA Plaintiff greater latitude in choice of forum weighs heavily against transfer in this case."	Motion to transfer denied. Transfer is against private and public interest, where defendant filed motion to transfer four months after filing its answer, case was already set for trial, plaintiff and his witness reside in current jurisdiction and defendant easily can bring its witnesses to this jurisdiction.
Coachmen Indus. v. Royal Surplus Lines Ins. Co., No. 3:06-cv-959-J-HTS, 2007 U.S. Dist. LEXIS 46134 (M.D. Fla. June 26, 2007).	2007	Plaintiffs' motion to amend complaint	State law claims against insurer for malicious prosecution. Insurer removed case to federal court.	Court applied Rule 1 to determine that Plaintiff's abuse of process claim was compulsory counterclaim, and therefore declined to amend complaint. After noting Rule 1 concerns for efficiency, court held that "in light of the purposes served by the applicable Rules, it is held Coachmen and GBM's counterclaim for abuse of process was compulsory and so cannot be reasserted herein." (27)		"In regard to the proper definition of "transaction or occurrence[,]" "[c]ourts generally have agreed that these words should be interpreted liberally in order to further the general policies of the federal rules [13] and carry out the philosophy of *Rule 13(a)*." 6 Charles Alan Wright, et al., Federal Practice and Procedure § 1410 (2d ed. 1990). FN 13 [HN20] *Rule 1*, for instance, highlights concerns for efficiency by stating the Rules "shall be construed and administered to secure the just, speedy, and inexpensive determination of every action." (at *27)	Plaintiffs' motion to amend granted in part, denied in part.

Appendix: Federal Courts' Citation to and Application of Fed. R. Civ. P. 1 in the Discovery/Pretrial Context

CASE NAME	YEAR OF DECISION	PROCEDURAL POSTURE	TYPE OF CASE	HOW RULE 1 APPLIED	OTHER FED. RULES APPLIED TO EFFECTUATE RULE 1 PURPOSE	MOST RELEVANT LANGUAGE	HOLDING/DISPOSITION
Rilley v. Twp. of Brimfield, No. 5:07-CV-494, 2007 WL 2908010, (N.D. Ohio Oct. 03, 2007).	2007	Plaintiffs' motion for leave to amend their complaint (by dismissing §1983 claim)	Unclear, but included §1983 claims against city officials	Court applied FRCP 1 in stating the legal standard for considering motions to amend. Court noted that the general standard for FRCP 15(a) (granting leave to amend complaint after defendant files responsive pleading) should be examined "in light of the directive of Rule 1 of the Federal Rules of Civil Procedure." (*1) Court did not provide further reasoning on its application of FRCP 1.	Court considered other factors relevant to determination of motion to amend.	"The Supreme Court has articulated the general standard for Rule 15(a): In the absence of any declared reason-such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.-the leave sought should, as the rules require, be 'freely given.' *Foman v. Davis,* 371 U.S. 178, 182 (1962). A court must examine the *Foman* factors in light of the directive of Rule 1 of the Federal Rules of Civil Procedure that the rules "are to be construed to secure the just, speedy, and inexpensive determination of every action." Fed.R.Civ.P. 1; *Foman,* 371 U.S. at 182. The decision whether "justice so requires" the amendment is at the district court's sound discretion. *See Zenith Radio Corp. v. Hazeltine Research, Inc.,* 401 U.S. 321, 331 (1971)." (*1)	Court granted plaintiff's motion for leave to amend complaint, where plaintiff's motion was not in bad faith, plaintiff had not previously amended complaint, amendment would conserve judicial resources by eliminating litigation over § 1983 claims, amendment would not unduly prejudice defendants, and in the "interests of justice, amendment is necessary to support the Sixth Circuit's preference for adjudicating cases on their merits and not based upon technicalities." (*2)

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CASE NAME	YEAR OF DECISION	PROCEDURAL POSTURE	TYPE OF CASE	HOW RULE 1 APPLIED	OTHER FED. RULES APPLIED TO EFFECTUATE RULE 1 PURPOSE	MOST RELEVANT LANGUAGE	HOLDING/DISPOSITION
The Waggoners Trucking v. AIG Claim Servs., Inc., No. CV 07 82 BLG RFC CSO, 2007 WL 1991538 (D. Mont. July 2, 2007).	2007	Parties' stipulation to stay proceedings	Claims that defendant did not properly handle and pay insurance claims	Court relied on Rule 1 to deny parties' stipulation to stay, because stay could delay pending cases contrary to requirement that courts construe rules "to secure the just, speedy and inexpensive determination of every action." Court instead set pretrial conference and noted that parties then could be fully heard on case scheduling and "facilitating the settlement of the case." Fed.R.Civ.P. 16(a)(5). (*1)		"Stays, even when stipulated, are not routinely granted. Once an action is filed, the court must construe the rules "to secure the just, speedy and inexpensive determination of every action." Fed.R.Civ.P. 1. The court is generally required to apply the proper tests and articulate a reasoned analysis before granting a stay. *See generally Blue Cross and Blue Shield of Alabama v. Unity Outpatient Surgery Center, Inc.*, --- F.3d ----, 2007 WL 1519608 (9th Cir.)(May 25, 2007). Here, the parties have articulated no reason supporting a stay other than their laudable desire to work together toward resolving the dispute. This reason, however, could apply to delay many cases now pending in this court. If a stay is granted and the matter is not resolved, the delay could be lengthy due to the court's and counsels' scheduling. Accordingly, the motion to stay will be denied." (*1)	Parties' stipulation to stay proceedings, construed as motion to stay, denied because it could cause undue delay in case resolution and parties have other options to resolve the dispute without litigation.

Appendix: Federal Courts' Citation to and Application of Fed. R. Civ. P. 1 in the Discovery/Pretrial Context

CASE NAME	YEAR OF DECISION	PROCEDURAL POSTURE	TYPE OF CASE	HOW RULE 1 APPLIED	OTHER FED. RULES APPLIED TO EFFECTUATE RULE 1 PURPOSE	MOST RELEVANT LANGUAGE	HOLDING/DISPOSITION
New Mexico ex rel. State Eng'r v. Aamodt, 582 F. Supp. 2d 1313 (D.N.M. 2007).	2007	Motion of Settlement Parties to Establish Procedures for (1) Approval of Settlement Agreement, (2) Entry of a Partial Final Decree, (3) Entry of Interim Administrative Order, and (4) Entry of a Final Decree; and Objections to Settlement	New Mexico filed suit regarding water rights	Court applied FRCP 1 to reject the argument of one objector to proposed settlement procedures that motion was premature. Court noted that case had been pending for 41 years, and that court and attorneys had duty to ensure that case is "resolved not only fairly, but without undue cost or delay. FED.R.CIV.P. 1, advisory committee notes (1993 Amendments)." (at 1318) For these reasons, objector's argument lacked merit.		"The Motion is not premature. This case has been pending since 1966. There is no reason for the Court to delay ruling on the Motion. The Court, and the attorneys as officers of the Court, have an affirmative duty to ensure that this case is resolved not only fairly, but without undue cost or delay. FED.R.CIV.P. 1, advisory committee notes (1993 Amendments). Consequently, there is reason for the settlement approval procedure to be in place before the Settlement Parties present the settlement agreement to the Court for approval. While Mr. White's arguments may be relevant to approval of the settlement agreement, they are not relevant to the timeliness of establishing the approval procedure." (at 1318)	Court held that motion to establish settlement procedures was not premature, where case had been pending for 41 years and court and attorneys had duty to ensure that case is "resolved not only fairly, but without undue cost or delay. FED.R.CIV.P. 1, advisory committee notes (1993 Amendments)." (at 1318). Court granted motion to establish settlement procedures, with instructions.

Appendix: Federal Courts' Citation to and Application of Fed. R. Civ. P. 1 in the Discovery/Pretrial Context

CASE NAME	YEAR OF DECISION	PROCEDURAL POSTURE	TYPE OF CASE	HOW RULE 1 APPLIED	OTHER FED. RULES APPLIED TO EFFECTUATE RULE 1 PURPOSE	MOST RELEVANT LANGUAGE	HOLDING/DISPOSITION
Sierzega v. Ashcroft, Civil No. 05-1338-HU, 2007 WL 682510 (D. Or. Feb. 27, 2007).	2007	Defendant's motion to dismiss, pursuant to Fed. R. Civ. P. 37(b)(2)(C), for plaintiff's failure to obey court order to appear for deposition	Unclear; Civil rights action	The court cited a case that quotes FRCP 1 in stating the rule that the expeditious resolution of litigation is a factor considered on a motion to dismiss. Court held that this factor supported dismissal, where plaintiff repeatedly failed to appear for deposition. Court did not explicitly apply FRCP 1, but dismissed the case in part because it "anticipate[d] continued problems with the efficient resolution of this case." (*8)	Court held that five factors, and plaintiff's willfulness, supported dismissal for violation of order requiring appearance. Factors: (1) public's interest in expeditious resolution of litigation; (2) court's need to manage docket; (3) risk of prejudice to defendants; (4) public policy favoring disposition of cases on merits; (5) availability of less drastic sanctions.	"The first factor is the expeditious resolution of litigation. "[T]he public has an overriding interest in securing 'the just, speedy, and inexpensive determination of every action.' "In re PPA Prods. Liab. Litig., 460 F.3d at 1227 (quoting Fed.R.Civ.P. 1). When delay becomes unreasonable, dismissal may be appropriate. *See Id.*(noting that delay in reaching the merits is "costly in money, memory, manageability, and confidence in the process[,]" and deferring to the district court's judgment about when delay becomes unreasonable). Plaintiff has twice failed to appear for his deposition. … At this point, the case has been pending for more than one year and at the time the Rule 37 motions to dismiss were filed by defendants in early September 2006, discovery had still not been completed. Based on my experience as a jurist, I anticipate continued problems with the efficient resolution of this case and thus, conclude that dismissal provides the most expeditious resolution of the litigation. This conclusion is based at least in part on the fantastic claims plaintiff has made during this case to explain his conduct, all without any supporting evidence." (*8)	Case dismissed with prejudice, because five factors from In re Phenylpropanolamine (PPA) Prods. Liab. Litig., 460 F.3d 1217, 1226 (9th Cir. 2006), combined with plaintiff's willfulness in disobeying court order to appear for deposition, supported dismissal.

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CASE NAME	YEAR OF DECISION	PROCEDURAL POSTURE	TYPE OF CASE	HOW RULE 1 APPLIED	OTHER FED. RULES APPLIED TO EFFECTUATE RULE 1 PURPOSE	MOST RELEVANT LANGUAGE	HOLDING/DISPOSITION
Rouse v. Caruso, No. 06-CV-10961-DT, slip op., 2007 WL 209922, (E.D. Mich. Jan. 24, 2007).	2007	Plaintiff's motion to add parties and motion to amend complaint	Prisoners' *pro se* civil rights action re: conditions of confinement at facilities	Court stated that FRCP 15(a) should be interpreted in light of FRCP 1 when considering motion for leave to amend. Court did not explicitly apply FRCP 1 beyond incorporating it into legal standard for deciding motion to amend complaint.		"Ordinarily, leave to amend a complaint or other pleading 'shall be freely granted when justice so requires.' FED. R. CIV. P. 15(a). As with all of the Federal Rules of Civil Procedure, this rule "shall be construed and administered to secure the just, speedy, and inexpensive determination of every action." FED. R. CIV. P. 1. Generally, courts have shown "a strong liberality ... in allowing amendments under Rule 15(a)." (*2)	Motion to add parties denied. Leave to amend complaint denied in part, granted in part for plaintiff to add cognizable claim against one additional defendant.
Calhoun v. Volusia County, No. 6:04-cv-106-Orl-31DAB, 2007 U.S. Dist. LEXIS 4357 (M.D. Fla. Jan. 22, 2007).	2007	Motion to strike defendant's answers and defenses to complaint; motion to dismiss claim as to two defendants	*Pro se* prisoner's § 1983 civil rights claim	Court stated in its order that party consent for Magistrate Judge to conduct further proceedings may secure the just, speedy, inexpensive determination of the action (citing FRCP 1).		"Consent to proceed before a United States Magistrate Judge may reduce litigation time and costs, and secure the just, speedy, and inexpensive [*6] determination of this action. See Fed. R. Civ. P. 1." (*6)	Motion to strike denied; motion to dismissed as to two defendants granted (FRCP 1 not discussed with respect to either outcome).

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CASE NAME	YEAR OF DECISION	PROCEDURAL POSTURE	TYPE OF CASE	HOW RULE 1 APPLIED	OTHER FED. RULES APPLIED TO EFFECTUATE RULE 1 PURPOSE	MOST RELEVANT LANGUAGE	HOLDING/DISPOSITION
Finazzo v. Hawaiian Airlines, No. CV 05-00524 JMS LEK, slip op., 2007 WL 1876072 (D. Haw. June 27, 2007).	2007	Defendant's motion for dismissal and Rule 37 Sanctions against Plaintiff and/or her Counsel based on Plaintiff's failure to appear for deposition; Plaintiff's cross-motion appealing denial of her motion for continuance.	Individual sexual harassment, retaliation, discrimination, and hostile work environment case, including state law claims for intentional infliction of emotional distress	Court relied in part on FRCP 1 to deny Plaintiff's motion for continuance. Court applied Rule 1 in reviewing one factor used to consider motions to continue: "inconvenience the continuance would have caused the court and the opposing party, including its witnesses." (7). Noting that case had been pending for almost 2 years, Court ruled that public has overriding interest in securing "just speeding and inexpensive determination of every action," and that Defendant was entitled to prompt resolution of the claim.		"The third factor weighs in favor of denying the Cross-Motion. The instant case has been pending in federal court since August 17, 2005. Further delay in this action is against the public interest. As the first of the Federal Rules of Civil Procedure reflects, the public has an overriding interest in securing "the just, speedy, and inexpensive determination of every action." Fed.R.Civ.P. 1. Orderly and expeditious resolution of disputes is of great importance to the rule of law. By the same token, delay in reaching the merits, whether by way of settlement or adjudication, is costly in money, memory, manageability, and confidence in the process. We defer to the district court's judgment about when delay becomes unreasonable "because it is in the best position to determine what period of delay can be endured before its docket becomes unmanageable." *Moneymaker v. CoBen (* *In re Eisen),* 31 F.3d 1447, 1451 (9th Cir. 1994); *In re Phenylpropanolamine (PPA) Prods. Liab. Litig.,* 460 F.3d 1217, 1227 (9th Cir. 2006). Defendant has the right to the timely resolution of the claims against it and, as more time lapses, it will become increasingly difficult for Defendant to secure witnesses to defend its case. If the Court grants Plaintiff's request for a continuance, Defendant will be prejudiced. (8)	Motion for continuance denied.

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Geer v. Challenge Fin. Inv. Corp., No. 05-1109-JTM, 2007 WL 1341774 (D. Kan. May 4, 2007).	2007	Two Plaintiffs' Motions for Protective Orders Quashing Deposition Notices	FLSA collective action	Court ordered parties to reach discovery agreement that complies with FRCP 1.		"If the parties are unable to reach an agreement concerning these discovery issues that complies with the dictates and goals of Fed.R.Civ.P. 1, i.e., a just, speedy and inexpensive determination of the issues, the Court will deal with the number, timing and procedure for depositions of opt-in plaintiffs and/or Rule 23 "absent class members" by ruling on specific motions by Defendants to take certain specified depositions of opt-in plaintiffs and/or Rule 23 "absent class members."" (*5)	Court granted both of Plaintiffs' Motions for Protective Orders quashing defendants' deposition notices, because defendants failed to show that deposing all 272 plaintiffs was necessary or, if necessary, that the "proposed manner for taking the depositions is relatively cost-effective." (*4)

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Roberts v. Sony Corp., No. 2:04-CV-673 TS, slip op., 2006 WL 3469591 (D. Utah, Nov. 30, 2006).	2006	*Pro se* Plaintiff's Objection to Magistrate's Order Denying Plaintiff's Motion to Reconsider and Vacate Scheduling Order.	Unclear	Court affirmed Magistrate's decision to enter scheduling order in part reliance on FRCP 1. Court here found that Magistrate was complying with the "philosophical mandate" of FRCP 1 in entering a scheduling order to advance the action.		"Second, Plaintiff objects to the Magistrate's ruling under Fed.R.Civ.P. 1 which states that the 'rules shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.' More specifically, Plaintiff contends that compliance with the current scheduling order precludes him from having time to consolidate this action with the related action filed in the Southern District of New York. Plaintiff's argument is unconvincing. Fed.R.Civ.P. 1 provides a philosophical mandate with which the Magistrate was complying when he entered a scheduling order to advance this action. That rule is not meant to compensate for litigants' limitations in the manner suggested by Plaintiff." (*2)	Court affirmed Magistrate Judge's issuance of scheduling order. Court approved of Magistrate's ruling that issuance of the order advanced the action in compliance with mandate of FRCP 1.

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Reserve Solutions, Inc. v. Vernaglia, 05 Civ. 8622 (VM) (RLE), 2006 U.S. Dist. LEXIS 46948, (S.D.N.Y. July 7, 2006).	2006	Defendant's application for order directing plaintiff to proceed with deposition of third-party defendants	Action for conversion of funds	Court applied Rule 1 as further justification for ordering defendant to comply with original deposition schedule. Defendant failed to proceed in accordance with agreed-upon deposition sequence without explanation. Court ordered defendant to comply with original deposition schedule, noting that compliance with schedule will insure "just, speedy, and inexpensive determination" of this action. Rule 1." (*3).	Court also noted its broad discretion in managing discovery, Wills v. Amerada Hess Corp., 379 F.3d 32, 41 (2d Cir. 2004), and that depositions may be conducted in any order under Rule 26(d).	"Compliance with the original [deposition] schedule will insure the "just, speedy, and inexpensive determination" of this action. Rule 1." (*3).	Court granted Defendant's application for order directing plaintiff to proceed with deposition of third-party defendants, where defendant's "failure to submit a response and to communicate with the Court constitutes a default on the pending application." (*2)

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CASE NAME	YEAR OF DECISION	PROCEDURAL POSTURE	TYPE OF CASE	HOW RULE 1 APPLIED	OTHER FED. RULES APPLIED TO EFFECTUATE RULE 1 PURPOSE	MOST RELEVANT LANGUAGE	HOLDING/DISPOSITION
Arnold v. Ariz. Dep't of Pub. Safety, No. CV-01-1463-PHX-LOA , slip op., 2006 U.S. Dist. LEXIS 53315 (D. Az. July 31, 2006).	2006	Plaintiffs' Motion for Approval of Proposed Settlement Agreement	Class action against Arizona DPS alleging racial profiling under *Fourth* and *Fourteenth Amendments*, *42 U.S.C. § 1983*, and Title VI of the Civil Rights Act of 1964, *42 U.S.C. 2000d, et seq*	Court concluded that the mandate of Rule 1 heavily favored approval of settlement agreement.		"1. Risk and Expense of Further Litigation The likelihood and expense of continued litigation weighs in favor of approving the Settlement Agreement. The parties have advised the Court that if the Settlement Agreement is not approved, they will continue litigating this matter before the Ninth Circuit. If this matter were reversed at the appellate level and remanded, the parties agree that this matter would involve numerous depositions, additional discovery, dispositive motions, and possibly a trial. In view of the number of named Plaintiffs, the enormous size of the proposed class, the significant cost of continued [*24] litigation, and the inordinate delay that has already occurred in this matter, the mandates of Federal Rule of Civil Procedure 1 heavily favor approval of the Settlement Agreement. HN9clscc9 clscc9Fed.R.Civ.P. 1 (encouraging the "just, speedy, and inexpensive determination of every action.") Additionally, the "compromise of complex litigation is encouraged by the courts and favored by public policy." *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96 (2nd Cir. 2005)." (*23-24)	Court held that the Settlement Agreement is fair, adequate and reasonable and therefore approved the Settlement Agreement.

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Mickalis Pawn Shop, LLC v. Bloomberg, 465 F. Supp. 2d 543 (D.S.C. 2006).	2006	Defendants' motion for enlargement of time to respond to plaintiff's motion to remand to state court	Several claims against New York City, mayor, others in connection with litigation initiated against plaintiff pawn shop and public statements made by mayor	Court relied in part on Rule 1 to deny defendant's motion for enlargement. Court first stated that FRCP 6(b) governing enlargement of time is to "be construed and administered to secure the just, speedy, and inexpensive determination of every action." (at 545). Court then denied defendants' motion in part because defendants' requested enlargement until "forty-five days after an unfavorable decision" in a related case amounted to a request for indefinite delay. (at 545)	Court also cited *Koehler,* 215 F.3d 1319, at 2000 WL 709578, *3; 4B WRIGHT & MILLER§ 1165 for proposition that FRCP 6(b) must be construed to secure just, speedy, and inexpensive determination of this action.	"Like the other Federal Rules of Civil Procedure, Rule 6 is to "be construed and administered to secure the just, speedy, and inexpensive determination*546 of every action." Fed.R.Civ.P. 1; *see also Koehler,* 215 F.3d 1319, at 2000 WL 709578, *3; 4B WRIGHT & MILLER§ 1165." (at 545-546) … "Defendants will incur some expenses in responding to Plaintiffs' Motion to Remand and in filing a motion to dismiss, but this court believes such expenses are consistent with the purpose of the Federal Rules of Civil Procedure. *See* Fed.R.Civ.P. 1." (at 546).	Court denied defendants' motion to enlarge time.
Powell v. Henry, No. 05-CV-70435-DT, 2006 WL 2160896 (E.D. Mich. July 28, 2006).	2006	Plaintiff's motion for leave to amend	Former prisoner's civil rights case against prison employees, pursuant to 42 U.S.C. § 1983, Eight Amendment	Court cited FRCP 1 in articulating the legal standard for granting leave to amend complaint. FRCP 1 supported liberality in granting motions to amend. Court nonetheless denied motion because plaintiff's claims against proposed defendants could not survive summary judgment and amendment therefore would be futile.		"Ordinarily, Rule 15(a) mandates that leave to amend 'shall be given when justice so requires.' As with all of the Federal Rules of Civil Procedure, this rule "shall be construed and administered to secure the just, speedy and inexpensive determination of every action." Fed.R.Civ.P. 1. Generally, the courts have shown "a strong liberality ... in allowing amendments under Rule 15(a)." *Tahir Erk v. Glenn L. Martin Co.,* 116 F.2d 865 (4th Cir. 1941). The Supreme Court has supported this trend. *Foman v. Davis,* 371 U.S. 178, 182 (1962). The decision to grant leave to amend is within the sole discretion of the district court. *Id."* (*1)	Motion for leave to amend denied. Because proposed defendants had no knowledge of alleged assault, there exists no genuine issue of material fact regarding proposed defendants' liability and addition of defendants therefore would be futile. (FRCP 1 not discussed in holding)

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Haines v. Nelson Tree Serv., Inc., No. 06-C-095-S, 2006 WL 6102591 (W.D. Wis. June 08, 2006).	2006	Consideration of Plaintiff's itemization of attorneys' fees previously awarded	Unknown	Court relied in part on FRCP 1 as justification for approving plaintiff's itemization of attorneys' fees, and considered sanctions against defendant for dilatory conduct in contravention to FRCP 1.		"The failure of defendant Schmidy's Machinery Company to comply with Rule 1, Federal Rules of Civil Procedure, is considered by the Court. The delay caused by said defendant was inappropriate and unnecessary. The concerns of plaintiffs continue and relate to additional sanctions which are requested to include striking all affirmative defenses of defendant Schmidy's Machinery Company. Significant judicial resources have been wasted with defendant's dilatory conduct during the pendency of this action." (*1)	Plaintiff's itemization of attorneys' fees granted as reasonable and fair, in part because of delay caused by defendant in contravention to FRCP 1.
Ayers v. SGS Control Serv., No. 03 Civ. 9078 RMBRLE, 2006 WL 1519609 (S.D.N.Y. Apr. 3, 2006).	2006	Plaintiffs' application for production of discovery records in electronic form	Fair Labor Standards Act collective action for overtime compensation	FRCP 1 was basis for court's order that defendants must produce discovery documents in electronic form. Defendants' production of its electronic payroll database would facilitate just, speedy, and inexpensive resolution of case, where defendants demanded that plaintiffs calculate damages based on these records and plaintiffs would need 300 hours to re-create electronic database.		"This Court is charged with securing the "just, speedy, and inexpensive determination of every action." Rule 1, Federal Rules of Civil Procedure. Defendants do not challenge plaintiffs' estimate of the time needed to create the database. Given the inherent delay and added costs, and the need to reconcile separately developed databases, the production of timekeeping and payroll records in electronic format is appropriate." (*2)	Court ordered defendants to produce payroll records in electronic form in order to facilitate the just, speedy and inexpensive determination of the case, pursuant to FRCP 1.

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Greeley Pub. Co. v. Hergert, 233 F.R.D. 607 (D. Colo. 2006).	2006	Defendant's motion to stay discovery; Plaintiff's motion to sanction defendant for frivolous motion to stay	Newspaper's claims for infringement of free speech rights, deceptive trade practices	Court denied defendant's motion to stay discovery, noting that it had considerable discretion to manage discovery to promote just, speedy, inexpensive resolution of case, pursuant to FRCP 1. Nonetheless, Defendant's motion to stay was not frivolous, because defendant sought to avoid duplicative or bifurcated discovery that it believed would streamline the court's docket.	Court also cited FRCP 26(c) as granting the court considerable discretion to manage discovery.	"In weighing Plaintiff's request for sanctions, I am also mindful that Defendant's motion for stay of discovery raises issues of pretrial management and judicial efficiency that fall within this court's discretion. Rule 11 sanctions have several purposes, including streamlining court dockets and facilitating case management. *See White v. General Motors Corp., Inc.*, 908 F.2d 675, 683 (10th Cir. 1990). Defendant Hergert cited those same objectives in her motion for stay. The Federal Rules of Civil Procedure give the court considerable discretion to manage the discovery process in a way that promotes the "just, speedy, and inexpensive determination of every action." *See* Fed.R.Civ.P. 1. Rule 26(c) permits the court to enter any order "which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." *See* Fed.R.Civ.P. 26(c)…In this case, Defendant argued that the court should exercise its discretion to avoid potentially duplicative or bifurcated discovery. While I declined to stay discovery, Ms. Hergert's concerns were not "frivolous" for purposes of Rule 11, particularly given the escalating costs associated with civil litigation." (at 611)	Court denied defendant's motion to stay discovery. Court denied plaintiff's motion for sanctions because defendant also sought to streamline to court's docket and facilitate case management, and therefore its motion to stay was not frivolous.

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Marmo v. Tyson Fresh Meats, 457 F. 3d 748 (8th Cir. 2006).	2006	Plaintiff's appeal from final judgment entered on jury verdict in her favor	State law claims (removed to federal court) for nuisance, negligence, strict liability, asserting damage from emission of hydrogen sulfide gas	Court declined to modify the progression order deadlines, emphasizing that adherence to progression orders is critical to the primary goal of the judiciary, as expressed in FRCP 1.		"Adherence to progression order deadlines is critical to achieving the primary goal of the judiciary: "to serve the just, speedy, and inexpensive determination of every action." Fed.R.Civ.P. 1; *see also Bradford v. DANA Corp.*, 249 F.3d 807, 809 (8th Cir. 2001) ("As a vehicle designed to streamline the flow of litigation through our crowded dockets, we do not take case management orders lightly, and will enforce them.") (citation omitted). Accordingly, the district court has broad discretion in establishing and enforcing the deadlines. Fed.R.Civ.P. 16, 37. To modify a progression order, a party must show good cause for the modification. *Bradford*, 249 F.3d at 809. To establish good cause, a party must show its diligence in attempting to meet the progression order. *Id.* (citation omitted). A district court may also consider the existence or degree of prejudice to the party opposing the modification. *Id.*" (769)	Final judgment on jury verdict affirmed; award of costs affirmed. Court held that district court did not abuse its discretion in refusing to re-designate Plaintiff's expert as a witness for case-in-chief, where Plaintiff introduced expert two years after the deadline under the district court's progression order, Plaintiff did not show good cause to modify order, and re-designation would have prejudiced defendant by requiring the court to "re-progress the case and practically start anew." (760).

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Vidrine v. Taylor Energy Co., No. 04-0685 Section K(4), 2005 U.S. Dist. LEXIS 777 (E.D. La. Jan. 19, 2005).	2005	Defendant's motion to file supplemental answer	Individual personal injury claim	Court acknowledged that FRCP 1 requires "just, speedy, and inexpensive determination of every action," but granted defendant's motion to supplement answer because amendment would not delay discovery and there was no evidence of defendant's dilatory conduct.		"Specifically, [plaintiff] claims that the proposed amendment is untimely, would force him to expend funds on depositions and other discovery to respond to this defense, would delay the trial date, and that to do so would violate *Federal Rule of Civil Procedure 1* which states that the rules "shall be construed and administered to secure the just, speedy, and inexpensive determination of every action." (*5) … But "pursuant to *Federal Rule of Civil Procedure 15(a)* and *(d)*, the fact that no prior amendments have been requested, and the absence of evidence that the proposed amendment is a result of dilatory conduct on the party of the defendant, the proposed amendment should be allowed." (*6)	Defendant's motion to file supplemental answer granted, where amendment would not delay discovery and there was no evidence of defendant's dilatory conduct.

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CASE NAME	YEAR OF DECISION	PROCEDURAL POSTURE	TYPE OF CASE	HOW RULE 1 APPLIED	OTHER FED. RULES APPLIED TO EFFECTUATE RULE 1 PURPOSE	MOST RELEVANT LANGUAGE	HOLDING/DISPOSITION
U.S. Kiewit Const. Co., No. A99459CVJWS , 2005 WL 1277953 (D. Ala. Jan. 03, 2005).	2005	Plaintiff's motion to preclude admission of damages summary not disclosed in discovery	Contract dispute	Court cited FRCP 1 in support of its decision to limit defendant's damages to the amount defendant disclosed in initial discovery.	FRCP 26(e). Court found that defendant failed to fulfill its duty under FRCP 26(e) to update discovery, and therefore damages should be limited to those initially disclosed.	"Based on the record available, it must be concluded that Kiewit did not comply with its duty to update its discovery responses under Rule 26(e). To allow Kiewit to proceed to trial seeking damages not properly disclosed would frustrate the scheme of the federal rules and the court's efforts at case management. Moreover, to allow Kiewit to change its claim at this stage would sanction a bait and switch tactic depriving Macomber of the benefit of the discovery rules. Kiewit's damage claim will be limited to the $518,586 set out in, and specifically calculated in, the attachment to its interrogatory answers.FN12 FN12.*See* FED. R. CIV. P. 1." (at 3)	Plaintiff's motion to preclude admission of damages summary granted, where defendant did not update its disclosure of damages as required by FRCP 26(e).
Garner v. Dreyer, 1:02-cv-1928-RLY-WTL , 2004 U.S. Dist. LEXIS 5913 (S.D. Ind. Feb. 2, 2004).	2004	Defendant's and plaintiff's motions for summary judgment	Action for damages against and order compelling prosecution of state court judge for issuance of bench warrant for plaintiff's arrest	Court stated that summary judgment is the "favored mechanism" to serve FRCP 1's purpose of ensuring "just, speedy, and inexpensive determination of civil claims in federal courts," and then granted summary judgment for defendant. (*1)		"As noted above, both Mr. Garner and Judge Dreyer seek resolution of the claims in the complaint through the entry of summary judgment. The *Federal Rules of Civil Procedure* are designed to ensure the just, speedy, and inexpensive determination of civil claims [*3] in federal courts. *FED. R. CIV. P. 1*. The summary judgment process is favored as a mechanism to do just that, in appropriate cases, because the outcome is to avoid the cost of trial. *Celotex Corp. v. Catrett, 477 U.S. 317, 327, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986)*." (at 1)	Summary judgment for defendant granted, because plaintiff father in state court custody dispute could not sue state court judge under § 1983 in federal court because judge had judicial immunity and Indiana constitutional immunity and because the Rooker-Feldman doctrine barred the claim.. Summary judgment for plaintiff denied.

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Nehls v. Hillsdale Coll., No. 1:03-CV-140, 2004 U.S. Dist. LEXIS 8588 (W.D. Mich. Feb. 20, 2004).	2004	Defendants' motion to dismiss for lack of service	Breach of contract and libel	Court denied discretionary extension of time for service in part because it would cause significant delay that would undermine the "just, speedy, and inexpensive determination of [this] action." (*18)		"Third, granting even a 30-day extension for service would result in a significant delay, as the 120-day period expired over six months ago. Further delay would only serve to undermine the "just, speedy, and inexpensive determination of [this] action." *Fed. R. Civ. P. 1*." (*18)	Case dismissed without prejudice. Discretionary extension of time denied, where 120-day period for service expired six months ago and extension would undermine goals of FRCP 1.

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In re Combustion Eng'g, Inc., 391 F.3d 190 (3d Cir. 2004).	2004	Twelve consolidated appeals of District Court order approving bankruptcy reorganization plan (bankruptcy induced by asbestos class action litigation)	Asbestos litigation (Cancer claimants and insurers appealed approval of bankruptcy plan extending proposed asbestos liability shield to two non-debtor affiliates)	In its case overview, the court noted the long-standing difficulty courts have faced in achieving FRCP 1's goals of achieving the "just and efficient resolution" of legitimate asbestos personal injury claims. (at 200). Court did not explicitly apply FRCP 1 in rejecting the bankruptcy plan.		"For decades, the state and federal judicial systems have struggled with an avalanche of asbestos lawsuits. For reasons well known to observers, a just and efficient resolution of these claims has often eluded our standard legal process-where an injured person with a legitimate claim (where liability and injury can be proven) obtains appropriate compensation without undue cost and undue delay. *See*Fed.R.Civ.P. 1 (goal "to secure the just, speedy and inexpensive determination of every action"). The difficulties with asbestos litigation have been well documented by RAND and others.FN3 FN3. See, e.g., Stephen J. Carroll et al., Asbestos Litigation Costs and Compensation: An Interim Report (RAND 2002); Deborah Hensler et al., Asbestos in the Courts: The Challenge of Mass Toxic Torts (RAND 1985); James Kakalik et al., Costs of Asbestos Litigation (RAND 1983)." (at 200)	Judgment approving bankruptcy reorganization vacated and remanded.

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Byrne v. Liquid Asphalt Sys., Inc., 250 F. Supp. 2d 84 (E.D.N.Y. 2003).	2003	Plaintiffs' request for reconsideration, or alternatively, for leave to retain another liability expert	Unknown	Court stated that the instructions of FRCP 1 supported granting plaintiff's alternative motion for leave to retain another expert. Leave to retain another expert was in the interest of fairness to individual plaintiffs, where plaintiffs' counsel had failed to respond to Defendant's Motion to Exclude Expert Testimony.		"Notwithstanding Plaintiffs' counsel's failure to respond to Defendant's Motion to Exclude the Expert Testimony Alfred Harmon, in the interest of fairness to the individual Plaintiffs, Plaintiffs' request for leave to retain another liability expert is granted. In granting Plaintiffs' request, the Court is guided by the instructions contained in *Rule 1 of the Federal Rules of Civil Procedure*: "These rules ... shall be construed and administered to secure the just, speedy, and inexpensive determination of every action. [**16] " *FED. R. CIV. P. 1*." (at 90)	Plaintiffs' alternative request for leave to retain another liability expert granted in the interest of fairness to individual plaintiffs. Plaintiffs' motion for reconsideration denied, where plaintiffs did not present any factual matter or controlling precedent that affected court's original decision.

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Gunnells v. Healthplan Serv., Inc., 348 F.3d 417 (4th Cir. 2003).	2003	Defendants' appeal of conditional class certification	Class action brought by purchasers and beneficiaries of multi-employer health care plan for claims growing out of plan's collapse	DISSENT: In concluding that the majority erred in affirming class certification against TPCM, the dissent implied that the "numerous claims" brought against TPCM could not be adjudicated "to secure the 'just, speedy, and inexpensive determination'" of each claim." (at 468)		"Although the district court's efforts in patching together a certifiable class against TPCM may be well-intended, energetic, and indeed, even creative, the class is nonetheless far too adventuresome simply to resolve a few common issues, seriously risking the creation of procedural unfairness. Predict as we can how this case might be tried as it is now structured, I see only a queue of problems that sacrifice procedural fairness and have the potential for creating legal error. Without forecasting how the numerous claims might be adjudicated to secure the "just, speedy, and inexpensive determination" of each claim, Fed.R.Civ.P. 1, I conclude that the plaintiffs' effort to proceed against TPCM under Federal Rule of Civil Procedure 23(b)(3), as certified by the district court in its order of September 28, 2001, is neither "convenient" nor "desirable," *Amchem,* 521 U.S. at 615, 117 S.Ct. 2231, and that such a structure amounts to an adventuresome embrace that is too enthusiastic for Rule 23's possibilities." (at 468)	Affirmed in part, reversed in part, and remanded. Court affirmed decision to certify class action against health care plan administrator, but held that district court erred in certifying class against individual agents. RULE 1 APPLIED BY DISSENTING JUDGE.

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American Chiropractic Ass'n. v. Trigon Healthcare, Inc., 54 Fed. R. Serv.3d (West) 1057 (W.D. Va. 2002).	2002	Defendants' motion to compel discovery	Suit for alleged anti-competitive actions of insurance companies	Court applied FRCP 1 in resolving discovery dispute to prevent inequity in discovery process. Court interpreted interrogatory that requested same information from five plaintiffs as being one interrogatory within meaning of scheduling order, in part because a different reading would result in inequity in discovery process contrary to the intention of FRCP 1.		"The plaintiffs stress that the reason the parties agreed to limit the number of interrogatories to twenty-five per side, rather than per party as provided in Rule 33, was to ensure fairness. However, the plaintiffs' reading of the scheduling order would cause an inequity in the discovery process. For example, assuming that there were twenty-five plaintiffs in this case, the defendants would be limited to serving one interrogatory per plaintiff, while the plaintiffs could serve five interrogatories per defendant. This result was not intended by the Rules of Civil Procedure nor by the scheduling order. *See* Fed.R.Civ.P. 1." (at 2)	Defendants' motion to compel discovery granted.
Ramirez v. Elgin Pontiac GMC, Inc., 187 F. Supp. 2d 1041 (N.D. Ill. 2002).	2002	Plaintiff's motion for recusal	Claims for violation of Truth In Lending Act (TILA) and various state law claims	FRCP 1 supported court's finding that recusal was not required. The judge acted to effectuate purpose of FRCP 1 when it directed defendants' attention to summary judgment, and as such recusal for bias or prejudice was not required.		"Additionally, directing the litigants' attention to summary judgment serves to effectuate the purpose [**15] of the Federal Rules of Civil Procedure, "to secure the just, speedy, and inexpensive determination of every action." *Fed. R. Civ. P. 1*." (at 1047) "Judges, by the way, are not wallflowers or potted plants," *Tagatz v. Marquette University, 861 F.2d 1040, 1045 (7th Cir. 1988)*, but rather, are active participants whose roles it is "to secure the just, speedy, and inexpensive determination of every action." *Fed. R. Civ. P. 1*." (at 1049).	Motion for recusal denied because inviting litigants to address summary judgment is no different than granting summary judgment *sua sponte* and serves purpose of FRCP 1.

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Andallo v. Fed. Express Corp., No. 01-17007.D.C., No. CV-99-05234-CW, 2002 WL 31819694 (9th Cir. Dec. 13, 2002).	2002	Appeal of summary judgment in favor of defendant employer	Employee's state tort claims against former employer arising from termination	Court relied on FRCP 1 as one of the grounds for affirming grant of summary judgment. Court held that District Court acted to promote goals of FRCP 1 when it continued the hearing date, and therefore did not abuse its discretion to warrant reversal of summary judgment.		"The facts establish that the district court applied its local rules to continue the hearing date for purposes of allowing a timely reply to be filed, and to clarify inadvertent confusion that resulted from two apparently conflicting case management orders. The district court's decision facilitated development of a full factual and legal record, ensured that Andallo had sufficient notice of Federal Express' arguments before the hearing, and did not result in undue delay. In short, the district court's order promoted "the just, speedy, and inexpensive determination" of the case, Fed.R.Civ.P. 1, and did not constitute an abuse of discretion." (*1).	Summary judgment affirmed. Held that: (1) District Court did not abuse its discretion by allowing separate statements of undisputed facts and accepting late-filed reply, and (2) employee failed to establish reliance for purposes of fraud claim. (FRCP 1 discussing with respect to first holding).
Berg v. Popham, No. A00-151 CV (JWS), 2001 WL 36161391 (D. Ala. Mar. 16, 2001).	2001	Plaintiff's Motion for Leave to File Third Amended Complaint (Also before the court was Defendant's Motion to Dismiss Second Amended Complaint, but court did not apply FRCP 1 in analyzing this motion).	Federal and state claims re: contamination of property by dry cleaning materials	Court relied in part on FRCP 1 in denying plaintiff's motion for leave to file third amended complaint. In denying plaintiff's motion, Court stated that third amendment would prejudice defendants by forcing them to incur unnecessary legal fees, and that such prejudice would violate court's obligation to administer rules pursuant to FRCP 1.		"The prejudice to Maytag is apparent. Maytag is forced to incur legal fees and costs simply to keep an eye on an ever-shifting picture which is constantly being repainted by plaintiff's counsel. The court has an obligation to administer all of the Civil Rules in a fashion which will "secure the just, speedy and inexpensive determination of every action." FN40 If a court ignores that responsibility, it prejudices the legitimate interests of the litigants. FN40.Fed.R.Civ.P. 1."	Plaintiff's Motion For Leave to File Third Amended Complaint denied, where permitting plaintiffs repeatedly to alter their claims would prejudice defendant; repeated amendments suggest plaintiff's bad faith; amendment may be futile because amended claims do not differ substantially; and plaintiff had previously sought leave to amend.

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JKC Holding Co. LLC v. Washington Sports Ventures, Inc., 264 F.3d 459 (4th Cir. 2001).	2001	Defendant's appeal of summary judgment granted to plaintiff	Declaratory judgment action and counterclaims for breach of contract, fraudulent inducement re: prospective purchase of professional football team	Court cited FRCP 1 to support its affirmation of summary judgment. In articulating the *de novo* standard of review for grants of summary judgment, the court stated that summary judgment may be particularly appropriate here because it is a favored method "to secure the just, speedy and inexpensive determination of a case" and avoid trial costs. (at 465) Court ultimately affirmed grant of summary judgment.		"Consequently, although we still review the grant of summary judgment de novo, as a practical matter, we recognize that summary judgment may be particularly appropriate given the circumstances, because it is favored as a mechanism to secure the just, speedy and inexpensive determination of a case, where its proper use can avoid the cost of a trial. *See* *Thompson Everett,* 57 F.3d at 1322-23 (quoting Fed.R.Civ.P. 1). "One of the principle purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses." *Celotex Corp. v. Catrett,* 477 U.S. 317, 323-24, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)." (at 465)	Summary judgment for plaintiff affirmed, where defendant relied on speculative evidence.

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Cordius Trust v. Kummerfeld, 45 Fed. R. Serv. 3d (Callaghan) 1151 (S.D.N.Y. 2000).	2000	Plaintiff's application for order authorizing alternative service of subpoena by certified mail	Unknown	Court held that interpretive principle reflected in FRCP 1 supported a rule permitting alternative service of subpoena by mail in order to avoid further cost and delay. Because plaintiff had made repeated unsuccessful attempts to personally serve defendant, permitting service by mail was in accordance with the "just, speedy, and inexpensive determination" of the action.	FRCP 45(b)(1). Textual ambiguity of FRCP 45(b)(1)'s delivery requirement also supported court's holding that service of subpoena by certified mail is permissible.	"This Court thus joins those holding that effective service under *Rule 45* is not limited to personal service. In accordance with the interpretative principle that the rules "be construed and administered to secure the just, speedy, and inexpensive determination of every action", *Rule 1, Fed.R.Civ.P.*, and given the textual ambiguity of *Rule 45* combined with the repeated attempts [*6] of the plaintiff to effectuate personal service, and the cost and delay that would result by requiring further attempts at such service, plaintiff is permitted to serve Kummerfeld by certified mail. The Federal Rules of Civil Procedure should not be construed as a shield for a witness who is purposefully attempting to evade service." (at 1153)	Plaintiff's application for alternative service by certified mail granted, where such service would avoid further cost and delay consistent with interpretive principle of FRCP 1, and given ambiguity of FRCP 45(b)(1)'s delivery requirement.

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Regents of the Univ. of N.M. v. Knight, No. CIV 99 577 JC/WWD , 2000 U.S. Dist. LEXIS 22376 (D.N.M. Sept. 20, 2000).	2000	Plaintiff's motion for summary judgment. (Also before the court were Defendants' three motions for declarations, but court did not apply FRCP 1 in connection with these motions).	Breach of patent assignment contract	Court cited FRCP 1 in discussing its "Summary Judgment Considerations," noting that courts favor summary judgment as "a vehicle to implement the objectives of Rule 1" in addressing concerns over cost and delay in civil litigation. (*14)	Rule 56 (see Most Relevant Language)	"Summary judgments recently have achieved greater receptivity among the courts. 'Growing concern over cost and delay in civil litigation has focused increased attention on *Rule 56* as a vehicle to implement the objectives of *Rule 1* -- the just, speedy, and inexpensive resolution of litigation.' 11 *Moore's Federal Practice*, § 56.03[1] (Matthew Bender, 3d ed.)." (*14)	Plaintiffs granted partial summary judgment, holding that defendants breached agreement to assign patents and applications to plaintiff.

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Healthtrust, Inc. v. Usher, No. 3:96-0486, 2000 U.S. Dist. LEXIS 22783, (M.D. Tenn. Aug. 23, 2000).	2000	Class A counsel's request for recusal.	Breach of contract	Court applied Rule 1 as additional justification for denying Class counsel's request for recusal. After noting that the case had been pending for four years, the Court stated that assigning case to new judge would unduly delay case resolution.		"Moreover, this action has been pending for over four years and counsel have generated a substantial record that complicates a relatively straightforward issue of contract construction and legal analysis. Since Judge Higgins' Transfer Order, considerable resources have been expended to expedite a decision on all matters in this four year old case. The transfer of this action to yet another judge will unduly delay further the resolution of this action. Such a transfer would also increase costs for the parties, including [*9] attorney fees. To disqualify myself without cause would defeat the purpose of *Fed.R.Civ.P. 1* that calls for a "just speedy and inexpensive determination of every action." (at 8-9).	Class counsel's request for recusal denied, where Magistrate Judge's prior review of pending motions were only recommendations that District Judge reviewed *de novo*, and where assignment to new judge would unduly delay case resolution.

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Falise v. Am. Tobacco Co., No. CV 99-7392 (JBW), 2000 U.S. Dist. LEXIS 19574 (E.D.N.Y. Dec. 27, 2000).	2000	Plaintiffs' motion to exclude deposition testimony defendants sought to offer	TOBACCO litigation	Court reasoned that Fed. R. Civ. P. 1 justified decision to exclude deposition testimony from defendant's six experts, where court had previously "directed both sides to reduce the number of experts in order to limit the scope and complexity of a trial scheduled to take over two months." (*2)	Fed. R. Evid. 102 (see Most Relevant Language)	(at *2) "Rather, in the exercise of the trial court's inherent power to control the litigation in the interest of fair and prompt disposition on the merits, these depositions are excluded as part of the effort to limit the cost and time necessary to complete the trial. See *Fed. R. Civ. P. 1*, *16*; *Fed. R. Evid. 102*."	Motion to exclude deposition testimony granted, where court had previously directed both sides to reduce the number of experts in order to limit scope and complexity of trial.

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Frederick v. UNUM Life Ins. Co. of Am., 180 F.R.D. 384; 1998 U.S. Dist. LEXIS 11272 (D. Mont. 1998).	1998	Defendant's Motion for continuance of trial (joined by plaintiff)	Unclear	Court relied on Rule 1 almost exclusively to deny continuance. Court denied continuance of at least 6 months to resolve discovery delays, because delays were caused by defendant's bottom line business plan for litigation. Defendant's plan placed 'in-house' paralegals and lawyers in control of discovery and limited the role of retained counsel. (386) The court stated "It may be more costly to implement corporate policies antagonistic to retained counsel than it is to meaningfully participate in the effort to arrive and a just, speedy and efficient resolution of the dispute." (386)	Court also relied upon the Local Court Rule 110-1(f) (providing that a MT lawyer shall be designated as the person "with whom the Court and opposing counsel may readily communicate;" Defendant's in-house counsel was out-of-state) (387).	At pp. 385-86: "C. Rule 1, F.R.Civ. P. Litigation is not a game in which counsel are paid only where they "advance the ball." The rules of discovery and the rules of procedure serve one salutary purpose: "They shall be construed and administered to secure the just, speedy, and inexpensive determination of every action." Rule 1, F.R.Civ.P. The 1993 amendments to Rule 1 emphasize the District Court's affirmative duty to exercise the procedural authority granted under the rules so as to ensure that civil litigation in the federal courts is resolved [*386] fairly and without undue cost or delay. See also, Active Prods. Corp. v. AH Choitz & Co., 163 F.R.D. 274, 277-78(N.D.Ind. 1995). The Rules of Civil Procedure, the public interest and the interests of both parties to this litigation, demand a seemly and efficient use of judicial resources to achieve the goals articulated in Rule 1. Johnson v. Board of County Comm'rs for County of Fremont, [**5] 868 F. Supp. 1226 (D. Colo. 1994). As I read the materials before me two things are clear. Counsel of record are vigorously representing their respective clients while simultaneously making an effort to comport with the rules. The problem on the horizon stems from UNUM's apparent bottomline based litigation policy." (385-86) (see also language in philosophy section)	Motion for continuance denied, where discovery delays were caused by defendant's "bottom line business plan for litigation" designed to limit payments to retained counsel.

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Price v. Pinnacle Brands, Inc., No. 3:96-CV-2150-T, slip op., 1997 U.S. Dist. LEXIS 11698 (N.D. Tx. Apr. 2, 1997).	1997	Motion to dismiss (for lack of standing or failure to state a claim)	Purported RICO class action (against sports card company, alleging illegal gambling, brought by class of parents)	FRCP 1 cited as further justification for dismissal of case. Defendant "should not be subjected to any further costs of litigation in this lawsuit. See Fed. R. Civ. P 1" (at *7)		(at *7) "Although the Court generally disfavors motions pursuant to *Rule 12(b)(6)*, Plaintiffs are represented by able counsel and have had three opportunities to articulate their damage theory--in the complaint, the RICO case statement, and brief in response of the motion to dismiss. Pinnacle should not be subjected to any further costs of litigation in this lawsuit. *See FED. R. CIV. P. 1*; *Castano v. American Tobacco Co., 84 F.3d 734, 746 (5th Cir. 1996)* (discussing potential for abuse of Rule 23); Janet Cooper Alexander, Do the Merits Matter? A Study of Settlements in Securities Class Actions, *43 STAN. L. REV. 497 (1991)*.	Motion to dismiss granted, where plaintiffs had three opportunities to articulate damages theory and where plaintiffs lacked standing because alleged damages were mere conclusory allegations.

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Castano v. Am. Tobacco Co., 889 F. Supp. 904 (E.D. La. 1995).	1995	Plaintiffs' motion for modification of court order to proceed with discovery (previous order stayed proceedings pending class certification)	TOBACCO CASE - Class action (certification pending) against tobacco company for fraud and deceit, negligence, breach of warranty, and violation of consumer protection statutes	FRCP 1 cited to support court's modification of stay to allow narrowly tailored discovery to proceed. Delaying individual plaintiffs in their proceedings would be contrary to parties' entitlement to prompt adjudication. Fed. R. Civ. P. 1 cited to support this proposition. (907)		(At 907) "While some redundancy in discovery may occur if class certification is affirmed, the Court believes that a limited lifting of the stay will allow discovery to progress so that the entire case will have traveled much farther down the road toward trial than had the stay remained in place completely and no discovery been undertaken. Additionally, modification of the stay will result in more efficient, not less efficient, use of the resources of both the Court and the litigants. As it now stands, the stay is "immoderate," considering that the three plaintiffs have a case pending in this Court whether it proceeds as [**7] a class action or not. As the Fifth Circuit recognized in *Itel,* [HN3] the parties are entitled to "prompt adjudication." Federal courts exist to decide controversy. Those who have, in the common parlance, a "federal case" deserve its prompt adjudication. *Therefore, it is the duty of a district court not to sidestep or delay decision. Itel, 710 F.2d at 202* (emphasis added). *See Fed.R.Civ.P. 1* ("[The Federal Rules of Civil Procedure] shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.")	Motion to modify stay of proceedings granted. Named plaintiffs who planned to pursue case regardless of class certification are entitled to proceed with discovery, so long as discovery is tailored narrowly to these named plaintiffs.

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Haines v. Liggett Group, Inc., 814 F. Supp. 414 (D. N.J. 1993).	1993	Motion by Attorneys for Plaintiff- to withdraw from representation, because costs of pursuing litigation on contingency fee basis had become unreasonable financial burden (at 418)	TOBACCO CASE - Action against cigarette manufacturer for lung cancer death	Court noted that Defendant's strategy of attrition is at odds with FRCP 1 and acknowledged plaintiff-administrator's suggestion to "limit[] Defendants' discovery and use of expert witnesses pursuant to Fed. R. Civ. P. 1, 26 and 83" rather than allowing attorney's withdrawal. (at 422-424) However, Court did not address Administrator's proposal to limit Defendant's discovery and use of expert witnesses based on Fed. R. Civ. P. 1 concerns. (423-424).	Fed. R. Civ. P 26, 83	(423-24) "To the extent Jordan's paraphrase of General Patton correctly reflects the attitude of Defendants, [23] it is at odds with the purposes of the Federal Rules of Civil procedure and is intolerable. The design of the Federal Rules, to ensure the "just, speedy, and *inexpensive* determination" of this action or any matter, *Fed. R. Civ. P. 1* (emphasis added), cannot be ignored. It must be recognized: 'Delay and excessive expense now characterize a large percentage of all civil litigation. The problems arise in significant part, as every judge and litigator knows, from abuse of the discovery procedures available under the Rules. We may assume that discovery usually is conducted in good-faith. Yet all too often, discovery practices enable the party with greater financial resources to prevail by exhausting the resources of the weaker opponent. The mere threat of delay or unbearable expense denies justice to many actual or prospective litigants. Litigation costs have become intolerable, and they cast a threatening shadow over the basic fairness of our legal system.' Order Amending Federal Rules of Civil Procedure, 446 U.S. 997, 1000 (1980) (Stewart, J., dissenting); *see also Fed. R. Civ. P. 26(b)* Advisory Comm. Note (noting *Rule 26(b)* should be used to "prevent use of discovery to wage a war of attrition or as a device to coerce a party, whether financially weak or affluent").	Motion to withdraw from representation denied. Court declined to allow withdrawal because counsel demonstrated that it expended significant resources in 8 consolidated cigarette cases generally, but not in this case particularly (424); because administrator was unable to find substitute counsel (425); and because contingency fee agreement was binding on client and attorney was required to perform it as well (427).

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Misek-Falkoff v. Intl. Bus. Mach. Corp., 829 F. Supp. 660 (S.D.N.Y. 1993).	1993	Plaintiff's attorney's motion for retaining lien on client's files, charging lien against judgment or settlement, and reconsideration of order postponing determination of attorney's fees until resolution of case (upon attorney's withdrawal)	Disability discrimination claim under Rehabilitation Act & possibly ADA	Court denied attorney's application for retaining lien on client's files because to do so would unduly delay litigation contrary to "the objectives of Fed. R. Civ. P. 1." (at 663) Court noted this was "four-year-old litigation" involving "over 33 deposition days and production of approximately 6,000 pages of documents." (662)	Court also relied on caselaw establishing that federal courts may determine whether retaining liens are "in such conflict with important principles that it must be relinquished when balanced against considerations of public policy. *Jenkins v. Weinshienk*, 670 F.2d 915, 919 (10th Cir. 1982); see *Elman*, 949 F.2d at 629." (664)	"Authorizing a retaining lien in this case would entail undue delay of the litigation. Such delay would prolong the adjudication of the merits of the plaintiffs' discrimination claim, and thus I must consider the application of federal law in this federal question case, and the objectives of Fed.R.Civ.P. 1 applicable to all cases brought in federal court." (663) … "Furthermore the weight of the objectives of Fed.R.Civ.P. 1, sentence 2 is enhanced by the proposed amendments of 1993 which appear to be uncontroversial. The amended Rule 1 calls for the courts to construe and administer the Federal Rules of Civil Procedure to enable federal litigation to proceed without undue delay. See also Judicial Improvements Act of 1990, Pub Law 101-650, 104 Stat. 5089, enacting 28 U.S.C. § 473.[FN7]." (664)	Application for retaining lien denied because it would unduly delay litigation. (Court did not apply FRCP 1 in its holdings on other issues).

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Scheetz By and Through Handeland v. Bridgestone/Firestone, Inc., 152 F.R.D. 628 (D. Mont. 1993).	1993	Plaintiff's objection to Magistrate Judge's denial of Plaintiff's Motion to Compel pre-discovery statement	Individual Products liability suit	Court relied in part on FRCP 1 in granting plaintiff's motion to compel and ordering defendant to file pre-discovery disclosure statement. Court stated that mandatory pre-discovery disclosure requirement of MT Local Rules was enacted to meet the goals of the Civil Justice Reform Act "to formulate proposals that would effectively bridge the growing distance between the promise of [Fed.R.Civ.P. 1]-'the just, speedy, and inexpensive determination of every action'-and the reality of a system becoming increasingly inaccessible to the average citizen." (FN 2).	Court also relied upon the Civil Justice Expense and Delay Reduction Plan of the District of Montana, implemented in response to the mandate of the Civil Justice Reform Act of 1990 (28 U.S.C. §§ 471*et seq.*).	"FN2. Enactment of the [Civil Justice Reform Act of 1990] was prompted by the delay and excessive cost attendant to civil litigation in the federal courts. As noted by [Joseph R. Biden], the legislative challenge presented by the problems of delay and excessive cost was "to formulate proposals that would effectively bridge the growing distance between the promise of [Fed.R.Civ.P. 1]-'the just, speedy, and inexpensive determination of every action'-and the reality of a system becoming increasingly inaccessible to the average citizen." *Equal, Accessible, Affordable Justice Under Law: The Civil Justice Reform Act of 1990,* Joseph R. Biden, Jr., CORNELL JOURNAL OF LAW AND PUBLIC POLICY, Vol. 1, pg. 1 (1992). The discovery provisions of the Montana Plan, like the discovery provisions of the Federal Rules of Civil Procedure, "are subject to the injunction of Rule 1 that they 'be construed to secure the just, *speedy* and *inexpensive* determination of every action.' " *Herbert v. Lando,* 441 U.S. 153, 177, 99 S.Ct. 1635, 1649, 60 L.Ed.2d 115 (1979)." (630) "Bridgestone/Firestone shall not be allowed to effectively defeat the goal of the Plan, and necessarily the CJRA, through the mere expediency of declaring that counsel for the adverse party is aware of the information falling within the purview of Rule 200-5(a)(1)(iii) and (iv)." (633)	Court granted plaintiff's motion to compel and ordered defendant to file supplemental pre-discovery disclosure statement that satisfies the prescriptions of Local Rule 200-5 (providing that a party may not seek discovery from another party before serving that party with an appropriate pre-discovery disclosure statement).

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Foxley Cattle Co. v. Grain Dealers Mut. Ins. Co., 142 F.R.D. 677 (S.D. Iowa 1992).	1992	Defendant's request for costs and fees following its successful motion to compel	Unclear	"Judicial and legislative concerns regarding the escalating costs of civil litigation in federal courts," as expressed in FRCP 1 and Civil Justice Reform Act, required court to limit Defendant's compensation for fees and costs to a reasonable amount.	Court also cited Civil Justice Reform Act of 1990, which aims to reduce expense and delay in litigation to address concerns for citizens' access to justice.	"The escalating cost of civil litigation runs the grave risk of placing redress in the federal courts beyond the reach of all but the most affluent. Judge Selya [FN5] eloquently stated this position nearly seven years ago in *Anthony v. Abbott Lab,* 106 F.R.D. 461, 465 (D.R.I.1985): 'Our citizens' access to justice, which is at the core of our constitutional system of government, is under serious siege. Obtaining justice in this modern era costs too much. The courts are among our most treasured institutions. Those costs are made up of bits and pieces, and relaxation of standards of fairness in one instance threatens further escalation across the board. The effective administration of justice depends, in significant part, on the maintenance and enforcement of a reasoned cost/benefit vigil by the judiciary.' The concerns articulated by Judge Selya in 1985 are even more acute now.[FN6] Indeed, Congress recently passed the Civil Justice Reform Act of 1990. This legislation mandates that each federal district court…implement a plan to reduce the expense and delay in civil litigation in federal courts by providing for just, speedy and inexpensive resolution of civil disputes. 28 U.S.C. § 471. Additionally, the Federal Rules of Civil Procedure, including Rule 37(a)(4), "shall be construed to secure the just, speedy, and *inexpensive* determination of every action." Fed.R.Civ.P. 1. (682)	Court granted 3 hours of attorneys fees (as opposed to 8.8 requested). Court held that Defense counsel spent more time on various tasks than was reasonably necessary, the time claimed for tasks unrelated to the actual preparation of the motion to compel was not compensable, and that time expended on behalf of the Defendants' attempt to obtain dismissal is likewise not compensable. (681)

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Herbert v. Lando, 441 U.S. 153 (1979).	1979	Interlocutory appeal to SCOTUS on Appellate Court's grant of Petitioner's motion to compel discovery	Defamation action brought by public figure	SCOTUS stated that applying Rule 1 to limit Rule 26(b)(1) discovery requests should provide a sufficient safeguard against excessive litigation costs in defamation suits, where Plaintiffs' high burden of proof encourages extensive discovery and a corresponding escalation of costs		"The Court has more than once declared that the deposition-discovery rules are to be accorded a broad and liberal treatment to effect their purpose of adequately informing the litigants in civil trials. *Schlagenhauf v. Holder, 379 U.S. 104, 114-115 (1964)*; *Hickman v. Taylor, 329 U.S. 495, 501, 507 (1947)*. But the discovery provisions, like all of the Federal Rules of Civil Procedure, are subject to the injunction of *Rule 1* that they "be construed to secure the just, *speedy*, and *inexpensive* determination of every action." (Emphasis added.) To this end, the requirement of *Rule 26 (b)(1)* that the material sought in discovery be "relevant" should be firmly applied, and the district courts should not neglect their power to restrict discovery where "justice requires [protection for] a party or person from annoyance, embarrassment, oppression, or undue burden or expense . . . ." *Rule 26 (c)*. With this authority at hand, judges should not hesitate to exercise appropriate control over the discovery process. BUT – whether the "trial judge properly applied the rules of discovery was not within the boundaries of the question certified under *28 U. S. C. § 1292 (b)* and accordingly is not before us.[27]" (177)	Discovery question to which SCOTUS applied FRCP 1 was not before the court. Court held that where member of the press is alleged to have circulated damaging falsehoods and is sued for injury to reputation of a "public figure" plaintiff, who is required to prove "actual malice," First Amendment does not bar plaintiff from inquiring into editorial process and state of mind of those responsible for publication.

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Boe v. Lane & Co., 428 F. Supp. 1179 (E.D. La. 1977).	1977	Plaintiff's motion for new trial after jury verdict in his favor	Personal injury suit brought under Jones Act and general maritime law. (Plaintiff's motion was based on Defendant's mention at trial of workers compensation).	Rule 1 applied to bolster judge's decision to deny new trial. Bulk of reasoning for denial of motion was based on substantive caselaw. Court stated that most personal injury cases granting new trials for mention of workers compensation involved "more than passing mention," and most still were decided against plaintiff. (1180-81) Here, there was only one mention of the subject and Plaintiff's attorney decided as strategy to move for new trial and refused judge's proposition of jury instruction to disregard the comment.	Bulk of court's reasoning for denying motion was based on substantive caselaw. Unlike this case, most personal injury cases granting new trials for mention of workers compensation involved "more than passing mention" and most still decided against plaintiff. (1180-81)	"Rule 1, Fed.R.Civ.P., provides for 'the just, speedy, and inexpensive determination of every action.' These attributes are complimentary. Each case must be considered; in addition the impact of punctilio on a court's docket must be taken into account. It is a cliche because it is both true and oft-repeated that each litigant is entitled only to a fair, not a perfect trial. 5 Granting a new trial in response to every minor flaw in a proceeding may be "just" to the litigants involved, if they can bear the additional expense, but it imposes delay on litigants queuing for federal trial time. FN 5 Even in the context of criminal trials, the Supreme Court has recognized: 'Not every admission of inadmissible hearsay or other evidence can be considered to be reversible error unavoidable through limiting instructions; instances occur in almost every trial where inadmissible evidence creeps in, usually inadvertently. 'A defendant is entitled to a fair trial but not a perfect one.' Lutwak v. United States, 1953, 344 U.S. 604, 619, 73 S. Ct. 481, 490, 97 L. Ed. 593." (1183)	Motion for new trial denied, where Defendant mentioned workers compensation only once and Plaintiff's attorney refused judge's proposed jury instruction to disregard this comment and instead moved for new trial.