Civil Procedure in the 21st Century
Some Proposals

April 24, 2010

This document was prepared by members of a Special Committee of the American Bar Association Section of Litigation. It does not express the official policy of the ABA or the Section. It reflects the views the Committee members, and the members of the Section of Litigation Council who agreed to be named at the conclusion of the report.

The individual members of the Special Committee on the Future of Civil Litigation of the Section of Litigation of the American Bar Association respectfully submit the following proposals and comments for consideration. They are focused on federal civil procedure, but could also be adapted to state courts.

The ballpoint pen was invented in 1938, the same year the Federal Rules of Civil Procedure were adopted. Although the basic framework has remained the same, the Rules have both dramatically expanded and more recently contracted discovery practice as technological advances have created a vast and complex digital world that records or memorializes nearly every aspect of our lives today. While computers and the internet have streamlined everyday communication and commerce, the ability to share information easily and quickly in a paperless environment leaves an extensive digital footprint for even the most trivial conversations.

While these advances in recorded communication and information storage have enhanced the ability to reconstruct events at issue in litigation, they also have increased exponentially the costs and burdens on the litigants, particularly defendants who must preserve, identify, review for privilege and produce relevant electronic data. A number of respected organizations, including the Advisory Committee for Civil Rules of the Federal Judicial Conference, have called for a thorough review of how litigation in the 21st Century is conducted.

In Fall 2009, the Litigation Section of the American Bar Association distributed a survey to its membership requesting feedback on the federal civil litigation system. Over 3,300 lawyers responded, representing both the plaintiff and defense bar, as well as both public and private practice. In a series of questions, a majority of respondents expressed general satisfaction with the system; over 60 percent of respondents agreed that the Rules are adequate as written. However, despite their general satisfaction, over 53 percent of respondents believe that the Rules need minor adjustments to make them work, and almost 25 percent believe that the Rules must be re-written in their entirety to address the needs of today's litigants.

In common with the majority of our survey respondents, we generally believe that the existing Federal Rules of Civil Procedure continue to provide a sound framework for the conduct of civil litigation. Like the ballpoint pen, they have survived the test of time and remain serviceable and well-adapted for everyday use. The Rules also provide tools that, properly employed, can help judges and litigants advance the goal of streamlining and expediting the litigation process.

Accordingly, the following is intended not to supplant the existing Rules, but to set forth proposals for how to preserve the best parts of federal civil procedure while making the Rules more responsive to the needs of litigation today.

A number of these proposals may require simply enforcing or implementing an existing Rule. Others may require amending the current Rules. Other proposals could be adopted as "best practices" or as local court rules as appropriate. Some of them may be too granular. But they are an effort to put meat on (and carve some fat off) the bones of the existing system

rather than to articulate broad, general aspirations.[1]

These recommendations represent our best efforts to reach a consensus among a group of lawyers with markedly different views on many issues. In the course of our discussions, members of the Committee at times set aside their individual preferences to arrive as much as possible at a consensus or compromise position. As a result, the recommendations represent the collective output of a group, and not necessarily in every respect the views of each of its members.

In at least one instance, a member of the Committee asked that it be noted that there was a dissent, but the absence of dissent elsewhere does not indicate perfect unanimity of views. Particularly as to some of the more difficult issues, such as the question of pleading standards, we expect that much further discussion will take place, and the views of individual members as well as the Committee as a whole may continue to evolve.

BASIC WORKING PRINCIPLES

I. Core Principle: Just, Speedy, and Inexpensive

As Federal Rule of Civil Procedure 1 provides, the procedures for resolving a civil action should be just, speedy, and inexpensive. According to the ABA Survey, fewer than two-thirds of lawyers believe that the current federal civil litigation system is conducive to meeting these goals. Any procedural system should provide for the following:

1. Cases should be resolved as quickly as practicable, consistent with fairness.

2. Litigation costs should be proportionate to the nature and importance of the controversy.

3. The outcome should turn on the merits, not the relative wealth of the parties.

4. The procedural system should facilitate all parties obtaining justice.

5. The procedural system should facilitate judicial efficiency.

6. The procedural system should facilitate the search for truth through reasonable, targeted disclosure and discovery.

7. The procedural system should encourage and reward civility, transparency and reason.

[1] These proposals necessarily would not apply if and to the extent the litigation process itself is subject to statutory or other constraints (e.g., the Private Securities Litigation Reform Act of 1995).

II. The IAALS "Civil Caseflow Guidelines"

The Institute for the Advancement of the American Legal System and the American College of Trial Lawyers prepared a Final Report on Civil Litigation (Mar. 11, 2009). In conjunction with that report the IAALS prepared a set of Civil Caseflow Management Guidelines. Although we have reservations about certain aspects of the Final Report, we agree with the Guidelines, except numbers 8 and 11 as noted below:

1. Caseflow management should be tailored to the specific circumstances of the case and the parties.

2. Judges should manage civil cases so as to ensure that the overall volume and type of discovery and pretrial events are proportionate and appropriate to the specific circumstances of the case.

3. Judicial involvement in the management of litigation should begin at an early stage of the litigation and should be ongoing.

4. A single judge should be assigned to each case at the beginning of litigation and should stay with the case through its disposition.

5. Judges should be consistent in the application and enforcement of procedural rules and pretrial procedures, particularly within the same types of cases, and within the same courts.

6. Unless requested sooner by any party, the court should set an initial pretrial conference as soon as practicable after appearance of all parties.

7. Additional pretrial conferences should be held on request by one or more parties or on the court's own initiative.

8. In the initial pretrial order, or at the earliest practicable time thereafter, the court should set a trial date, and this date should not be changed absent extraordinary circumstances.

   [Our Section of Litigation committee concurs with setting dates early in the case to provide milestones and frame the end of the litigation. However, we believe that the early setting of an inflexible trial date is inefficient and unnecessary. Dates for discovery and dispositive motions should be set early in the litigation, and the trial date should be set and proceed reasonably quickly after a decision on all summary judgment motions. This is detailed in Parts VIII and XII below and is already part of ABA policy.]

9. Judges should play an active role in supervising the discovery process and should work to assure that the discovery costs are proportional to the dispute.

10. Judges should rule promptly on all motions.

11. When appropriate, the court should raise the possibility of mediation or other form of alternative dispute resolution early in the case. The court should have the discretion

to order mediation or another form of alternative dispute resolution at the appropriate time, unless all parties agree otherwise.

> *The term "other forms of alternative dispute resolution" would include arbitration. We agree that the parties should be encouraged to discuss settlement but disagree that courts should have the discretion to order alternative binding proceedings, such as arbitration, without the consent of all parties.*

III. Consensus from the Section of Litigation Survey of its Members

Respondents to the ABA Survey were asked a variety of questions regarding the Federal Rules of Civil Procedure, pleadings, discovery, expenses and general case management. Although plaintiffs' and defendants' lawyers did not agree on many subjects, among the areas of consensus were the following:

1. Early case management by judges helps to narrow the issues and limit discovery.

2. When lawyers are collaborative and cooperative the case costs less for clients.

3. Lawyers and judges could more often avail themselves of existing means to set limits on discovery that is unduly burdensome or costly.

4. Electronic discovery increases the cost of litigation, but also enhances the ability of the parties to discover relevant information.

5. Over 65 percent of plaintiffs' lawyers and 87 percent of defense and mixed practice lawyers believe litigation is too expensive.

6. Shortening the time to final disposition reduces costs.

7. All groups cited the time required to complete discovery as the biggest cause of delay.

We believe our proposals would reduce cost and delay in a manner consistent with these views.

IV. The Special Committee's Consensus on Working Principles

We believe that a responsible mechanism for resolving legal disputes of any kind should identify early on:

1. What are the undisputed facts,

2. What legal principles apply,

3. What disputed facts need to be resolved,

4. How best to go about resolving them cost-effectively.

To do this, the parties and the court need to ask:

1. What documents or data are mostly likely to be useful in resolving the disputed facts?

2. What additional documents or data might be helpful but not essential in resolving disputed facts?

3. What is the cost of retrieving and producing these documents or data?

4. What additional types of evidence – e.g., oral testimony – and how much of it, is necessary to resolve disputed issues of fact? What is the cost of obtaining this evidence?

5. At bottom, what is the overall cost-benefit calculus of resolving the dispute, taking into account the nature of the case, its importance and the complexity of the issues?

A responsible procedural system should:

1. Set reasonable, but reasonably short, time limits.

2. Tailor the discovery to the issues, importance and complexity of the dispute.

3. Make sure a judge, magistrate judge and, if necessary, a jury are available at the appropriate times in the case.

4. Ensure overall fairness, and a sense of fairness, based on the nature, complexity and importance of the case.

The following proposed procedural principles are intended to fulfill these goals.

PROPOSED PROCEDURAL PRINCIPLES

Time is money in civil litigation. The longer it takes to bring a case to a final resolution – whether by motion, by settlement or by trial – the more it is going to cost. Over 75 percent of ABA Survey respondents believe that the longer a case goes on, the more it costs.

Any meaningful reform will require that all participants – courts, lawyers and clients alike – understand that a lawsuit is not an open-ended proposition. A lawsuit does not provide unlimited access to information, unlimited time to formulate a case or defense, nor unlimited opportunities to petition the court.

The three key elements in giving Rule 1 meaning are to (a) apply the principle of proportionality and tailor discovery to the nature of the case and the stakes at hand, (b) have reasonable time limits, and (c) hold the litigants to those time limits.

We would extend the Rule 26(f) requirement to confer on motions for a protective order to most other motions. We believe (with one dissent) that every motion, other than summary judgment motions and stipulated motions, should be accompanied by a certificate of the

moving party that counsel have conferred in good faith or attempted to confer to resolve or narrow the issues in dispute and have been unable to do so.

Although currently one of the core principles of federal litigation is that one set of rules should govern every case, our Committee agreed that "one size does not fit all."[2] For that reason, the proposals below often except the complex case, which may have to be addressed in a manner specifically designed for the particular case. The Committee also was open to the idea that different standard timelines might be applied depending on the nature or size of the matter, as in the case of the New Jersey state court rule changes known as "Best Practices." Those rules provide for specifying one of four tracks when a case is filed, with different presumptive periods for discovery, and provisions for trial dates, disclosures for trial and other issues. (A memorandum summarizing these rules is attached as **Appendix A**; however we did not discuss and do not endorse those rules beyond the idea of the four track system, which seemed interesting and worth investigating.)

V. Pleadings

A. Fact vs. Notice Pleading

A complaint shall allege facts based on knowledge or on information and belief that, along with reasonable inferences from those factual allegations, taken as true, set forth the elements necessary to sustain recovery.

> *In the wake of the Supreme Court's decisions in* Iqbal *and* Twombly*, there has been much debate over what a complaint should contain. The above proposal is intended to capture the concept of "notice plus" pleading – something less than* Iqbal *and* Twombly*, but more than the immediately preceding pre-*Twombly *standard.*
>
> *Plaintiffs' and defense lawyers who responded to the ABA Survey disagreed about the merits of notice pleading versus fact pleading. Almost 70 percent of defense lawyers believe that notice pleading has become a problem because extensive discovery is needed to narrow the issues, while only about 20 percent of plaintiffs' lawyers agreed. Similarly, 76.7 percent of defense lawyers, but only 32.2 percent of plaintiffs' lawyers, believe that fact pleading helps to narrow the scope of discovery. ABA Survey respondents also were asked whether fact pleading can help to narrow the scope of discovery. Over 77 percent of defense lawyers, but only 32 percent of plaintiffs' lawyers, agreed.*

2 The Special Committee was more in agreement on this point than the survey respondents. Although a slim majority (52.8 percent) of lawyers believe that one set of rules is sufficient to accommodate every type of case, over 35 percent of plaintiffs' lawyers and nearly 40 percent of defense and mixed practice lawyers agree that one set of rules cannot sufficiently accommodate every case.

B. Curative Post-Complaint Discovery

Rather than dismissing the case, the court may permit focused post-complaint discovery in those limited cases where, because of the nature of the case, the plaintiff does not have access to sufficient information to satisfy the above pleading standard (for example, in antitrust or discrimination cases where intent is an element of the cause of action).

The Committee unanimously agreed that increasing the burden on the plaintiff to plead detailed facts at some point in the interest of fairness requires that the plaintiff be given an opportunity to conduct discovery of facts required to be pled that otherwise could not be known. However, we could not reach unanimous agreement (we had one dissent) as to whether the above standard raised the pleading standard sufficiently as to warrant curative discovery.

C. Pre-Complaint Discovery

The only pre-complaint discovery should be to determine the identity of the defendant.

VI. Preliminary Motion Practice Addressed to the Merits

A. Prompt Ruling on a Motion to Dismiss

Except in complex cases, the court will rule promptly on a motion to dismiss, not more than 60 days after the motion has been fully briefed.

B. Discretion Whether to Stay Discovery Pending a Motion to Dismiss

The decision on whether discovery should be stayed while motions to dismiss are pending should remain within the discretion of the trial court.

We discussed whether discovery should be stayed while motions to dismiss are pending. Almost all of the Committee members believe that current law should not be changed, essentially leaving the issue to the court's discretion [under Rule 26(c)(1)], except as otherwise required, for example, under the PSLRA.

Seventy-seven percent of defense lawyers believe that discovery should be stayed pending the outcome of motions to dismiss, while over 82 percent of plaintiffs' lawyers believe that it should not be stayed. Mixed practice lawyers were evenly divided.

VII. Responsive Pleadings

Courts should enforce Rule 8 as written. Complaints should contain "a short and plain statement of the claim." The answer should "admit or deny the allegation," and denials should "fairly respond to the substance of the allegation."

There is a sense that responsive pleading has become an expensive game. Answers are uninformative because plaintiffs sometimes file complaints with long

paragraphs that contain characterizations of facts, which defendants necessarily must deny, and defendants are often loathe to make concessions early in the case, particularly when their significance is still unclear. Defendants are able to avoid admissions and still comply with the letter of Rule 8 when the complaint consists of long and complex paragraphs or "loaded" language. Defendants often deny entire sentences or paragraphs based on disagreements with argumentative words or statements, or by asserting that documents "speak for themselves" rather than responding to allegations concerning their contents, or by labeling allegations as legal conclusions to which no response is required.

The result, except in the most simple cases, is that an answer is often an opaque, uninformative document. Many ABA Survey respondents agree. Over 73 percent of them believe that the answer to the complaint is not helpful in narrowing the issues, although, strangely, plaintiffs' lawyers who receive the answer were much more likely to believe that it is useful than defense lawyers who draft it (40 percent to 19.5 percent).

Given the Committee's view that many of the admissions and denials in an answer typically are unhelpful in narrowing the issues, and that the preparation of the answer nevertheless can be expensive, the Committee discussed adopting California's procedure, which uses a general denial with affirmative defenses. However, we concluded that as a matter of fairness, the pleading standard should not be lowered for defendants at the same time that it is raised for plaintiffs.

Moreover, if factual allegations were made in short factual sentences, and the answer genuinely came to grips with the allegations, the pleadings could identify for the parties and the court what really is in dispute early in the case and provide a basis for more focused discovery and motion practice.

VIII. Case Management Procedures

Except in complex cases requiring more extensive discovery and interim motion practice, the following case management procedures should apply.

A. Plaintiff's Initial Disclosures

Within 30 days of filing the complaint, the plaintiff will disclose:

1. the name and, if known, the address and telephone number of each individual likely to have significant discoverable information about facts alleged in the pleadings, identifying the subjects of the information for each individual; and

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

We propose eliminating the current requirement that the parties' disclosures include documents upon which their claims or defenses are based. The Committee members, like the ABA Survey respondents, believe that most initial disclosure is not very useful.

Of the ABA Survey respondents, only 33 percent believe that initial disclosure under Rule 26(a)(1) reduces discovery, and fewer respondents (26 percent) believe that

initial disclosure saves the client money. More than half (52 percent) believe that initial disclosure adds to the cost of litigation. Respondents report that over 95 percent of cases require discovery beyond initial disclosure.

Instead of initial disclosure on the merits, we propose, as discussed below, that as part of their preparation for the initial pretrial conference, the parties would be required to discuss and attempt to agree on what documents, including electronically stored information, they would exchange.

B. Other Parties' Initial Disclosures

No later than 30 days after a party's answer, unless the time is extended by stipulation or court order, that party will disclose the information in items (1) and (2) above.

Rule 26(a)(1)(C) generally requires the parties to make initial disclosures within 14 days after the Rule 26(f) conference. Although the conference might occur promptly after service of the complaint, it also could occur as late as 99 days after service, or 69 days after any defendant has appeared, whichever is earlier. Thus our proposal may shorten or lengthen the time by which initial disclosures should be made. In any event, we believe the time should be tied to the filing of the answer rather than the parties' conference. Requiring a party to make initial disclosures before that party has had a chance to investigate its case, and particularly while a motion to dismiss is pending, unnecessarily adds to the cost and burden of litigating.

C. Continuing Duty to Provide Information

The duty to provide this information will be a continuing one pursuant to Rule P. 26(e)(1). These additional or amended disclosures will be made seasonably, but no more than 30 days after the information is revealed to or discovered by the disclosing party. A party seeking to use information that it first disclosed later than 60 days before trial must seek leave of court to extend the time for disclosure.

D. No Initial Disclosure in Complex Cases

In complex cases, initial disclosure will not be required. Instead, the parties will meet and confer to prepare a joint case management statement, followed by an early initial case management conference with the Court, to set the parameters and timing for disclosures and discovery. Further conferences will be held if necessary to modify the case management plan.

E. Joint Case Management Statement and Initial Pretrial Order

The existing requirements of Rules 26(f) and 16 provide for the early preparation of a pretrial order comprehensively addressing discovery and the overall schedule for the case. The use of these tools to set ambitious but reasonable deadlines and hold the parties to them should be the centerpiece of efforts to streamline litigation. Similarly, the ABA Standards for Final Pretrial Submissions and Orders (August 2008) include the following as Standard 1:

1. As soon as practicable after the complaint is filed, the court will set a date for an initial conference at which it will enter an order setting the dates for milestones in the case. The order may (i) include the dates for motions to dismiss, the close of fact and

expert discovery, motions for summary judgment, final pretrial submissions and the final pretrial conference and/or (ii) set the dates for certain of these events followed by further conferences. (This is subject to Standard 2, which provides that "The parties' final pretrial submissions will not be due until a reasonable time after the court has ruled on all pending summary judgment motions.")

2. If the court does not hold an initial conference, the court will set these dates by order as soon as practicable after the complaint is filed.

3. Where discovery is stayed pending resolution of motions to dismiss, the court will not set subsequent dates until the motions are decided.

F. Electronic Discovery

Over 97 percent of ABA Survey respondents believe that e-discovery is important and almost 78 percent believe that e-discovery has enhanced the ability of counsel to discover all relevant information, but respondents disagree on the cost-effectiveness and burdens of e-discovery. Over 77 percent of plaintiffs' lawyers believe that requests for production of e-discovery are cost effective, while only 57 percent of defense lawyers agree. Over 90 percent of defense and mixed practice lawyers believe that e-discovery has added to the costs of litigation, while only 59 percent of plaintiffs' lawyers agree. Similarly, almost 90 percent of defense lawyers and 82 percent of mixed practice lawyers believe that the costs of litigation have risen disproportionately due to e-discovery, while only 42 percent of plaintiffs' lawyers agree. Eighty-six percent of defense lawyers and 74 percent of mixed practice lawyers believe that e-discovery is overly burdensome. Only 27 percent of plaintiffs' lawyers agree.

1. Where e-discovery will occur, the parties should discuss specifically how e-discovery will be conducted. The discussion should take into account the needs of the case, the amount in controversy, and the cost of e-discovery. In appropriate cases, the discussion should include the subject areas that are relevant, the kinds of ESI that relate to those areas, the key custodians of relevant ESI, and the relevant time frames. The search-techniques that might be employed, the form of production, the relevance of metadata, whether the form of production will vary by type of ESI, and any expected or unusual challenges that might be posed by production of ESI are also candidates for discussion in appropriate cases. In appropriate cases, the parties should consider staging or prioritizing the requests, and evaluating after each wave of production how best to proceed. Communication and cooperation between counsel and with the court and active supervision by the court are essential elements of e-discovery rules if Rule 1's goals are to be satisfied.

To reap the benefits of e-discovery while avoiding excessive costs, it is critical that the parties discuss specifically how e-discovery will be conducted. By focusing on the sources and type of information sought – in particular, those persons whose e-mails and electronically stored information should be searched, and for what period of time – the parties can dramatically reduce the expense of e-discovery, and make more manageable and rational the tasks of document preservation, collection and production.

2. Document requests calling for all ESI relating to a broad subject should be avoided in

favor of narrower requests, including for example, specific search terms and custodians. Where broad requests are believed to be necessary, the parties should meet and confer to discuss ways to narrow them. In cases where large amounts of ESI will be the subject matter of production, parties should seek to reduce the ESI to a manageable volume to maintain control not only over retrieval and production costs but also on the costs of review by the requesting party.

3. A party should not have to preserve backup tapes absent exceptional circumstances. In rare cases where discovery obligations can be met only by recourse to backup tapes, the preservation of backup tapes should be the subject of early discussion between counsel and with the court.

4. Parties should not be required to attempt to restore deleted ESI where the ESI was deleted, in whole or in part, in good faith in the normal course of business.

As reflected in Rule 37(e), the case law, the Sedona Principles for Addressing Electronic Document Production (June 2007) and the Sedona Canada Principles Addressing Electronic Discovery (January 2008), 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 or require parties to take every conceivable step to preserve all potentially relevant electronically stored information.

5. The cost of preserving, collecting and reviewing electronically-stored material generally should be borne by the party producing it, but courts should assign a different allocation of costs in appropriate cases.

6. Intentional or reckless deletion of ESI that is subject to a litigation hold is not action taken in good faith.

7. The federal courts should adopt a uniform standard to address when sanctions may be imposed for the deletion of ESI after a duty to preserve ESI has attached.

G. Staged Proceedings

If there are threshold dispositive issues, the court may wish to stage the proceedings including discovery, either informally through case management orders specifically requiring staged discovery or summary disposition processes, or using Rule 42 bifurcation orders. Similarly, the court should consider whether a motion for partial summary judgment would significantly advance or resolve the case, or alternatively, whether summary judgment requests should be limited to a single motion per party, to be heard together at a particular stage of the case. The concept of staging, however, recognizes that summary judgment motions on particular issues may advance the resolution of an action in a cost-effective manner.

IX. Scope of Discovery

A. Scope in General

The Committee would like to give teeth to the2000 amendment to Rule 26(b)(1) narrowing the scope of discovery to "relevance to any party's claim or defense," in the absence of good cause to extend discovery to "the subject matter involved in the action." We were of two minds about how to accomplish this. Some committee members would leave the rule unchanged, but otherwise emphasize the need for heightened awareness. Others would eliminate the broader "subject matter" option entirely.

We agreed that the parties and the courts also should be encouraged to invoke the protections of Rule 26(b)(2)(C) when appropriate.

B. Enforcement of Existing Rules

Litigants and courts should use the tools already available in the federal rules to avoid unwarranted burden and expense and to assure that discovery is proportionate and appropriate to the case.

ABA Survey respondents acknowledged that there are mechanisms for limiting discovery, but that those limitations are rarely invoked or enforced by the courts. Over 65 percent of ABA Survey respondents believe that in general, counsel agree on the scope and timing of discovery. Over 60 percent believe that counsel typically do not request limitations on discovery, as provided in Rule 26(b)(2)(C), and 76 percent believe that judges do not invoke the Rule on their own initiative. When asked whether judges enforce limitations under Rule 26(b)(2)(C), 38 percent of plaintiffs' lawyers believe that judges do not enforce limitations, while 67 percent of defense lawyers agree.

C. Interrogatories

No party may propound any contention interrogatory unless all parties agree or by court order.

Contention interrogatories have become a tool of oppression and undue cost on both the proponent and the recipient. They rarely provide meaningful information.

D. Requests for Admission

A party may serve no more than 35 requests for admission, including subparts, under Rule 36 unless all parties agree or by court order.

Requests for admission have also become an instrument of oppression where the burden of responding to them often far outweighs their utility. Requests for admission should not be necessary to obtain agreement on the admissibility of proposed trial exhibits, which should be discussed prior to the final pretrial conference as provided below.

However, it should be noted that 79.1 percent of ABA Survey respondents believe

that requests for admission are somewhat or very important, while plaintiffs' lawyers were slightly more likely than defense or mixed practice lawyers to believe that they are cost-effective (81 percent of plaintiffs; 74.4 percent of defense lawyers; and 77.6 percent of mixed practice).

X. Discovery and Other Interim Motions

A key principle in moving the case forward and reducing delay and expense is that discovery and other interim motions must be decided promptly. Trial courts should be expected to put in place procedures to achieve an expeditious and practical result.

We commend either the prompt motion practice of some courts, the pre-motion letter practice of others or the telephonic conference with the court as ways to keep the case on schedule.

1. Counsel would be expected to meet and confer before bringing the matter to the court to attempt resolve it

2. The court would ordinarily be expected to resolve the dispute promptly (i.e., within 30 days after hearing from all sides).

3. A court's ruling on a discovery matter ordinarily should provide a limited but reasonable time within which to provide the answer, production, designation, inspection, or examination required by the court.

XI. Summary Judgment Motions

Under recent changes to Rule 56, summary judgment motions are now required to be filed within 30 days after the close of discovery. Except in cases previously designated as complex, the court would be expected to rule on the motion promptly, and in no case more than 90 days after the motion has been fully briefed.

Over 56 percent of plaintiffs' and over 60 percent of defense and mixed practice lawyers believe that judges routinely fail to rule on summary judgment motions promptly. Of those percentages, 18 percent of plaintiffs' lawyers, 17 percent of defense lawyers, and 18 percent of mixed practice lawyers strongly agree.

XII. Procedures for the Final Pretrial Conference and Trial

The following procedures for the final pretrial conference and trial have been adopted as the ABA Standards for Final Pretrial Submissions and Orders (August 2008).

They should be adopted for all courts:

1. Standard 1 is quoted above relating to the initial conference.

2. The parties' final pretrial submissions will not be due until a reasonable time after the court has ruled on all pending summary judgment motions.

3. Trial should be held reasonably soon but normally no more than four to six weeks after the final pretrial conference (in some courts referred to as the "docket call").

4. Counsel who will try the case will confer sufficiently in advance of the final pretrial conference to be able to prepare their final pretrial conference submissions.

   (A) In their conference(s), counsel will exchange:

      (i) a list and copies of the exhibits to be used at trial;

      (ii) objections to the other side's exhibits;

      (iii) a list of witnesses they genuinely expect to call (either in person or through deposition testimony), including a short description and estimate of the length of each witness' testimony;

      (iv) (1) designations of any deposition testimony they anticipate offering as part of their respective cases in chief, (2) counter-designations of deposition testimony and (3) objections to an opponent's designated testimony;

      (v) a brief description of any anticipated *in limine* motions (*e.g.,* to strike proposed experts under *Daubert* or similar state law standards); and

      (vi) the parties' disclosures, admissions, interrogatory answers or other written discovery responses they intend to offer into evidence.

   (B) Counsel should also try to agree on (i) proposed stipulations of uncontested facts and (ii) the anticipated length of the trial.

5. At a date at least five days before the final pretrial conference, to be agreed or set by the court, the parties will file with the court their:

   (A) list of witnesses they genuinely expect to call (either in person or through deposition testimony) in their respective cases in chief, including a short description and estimate of the length of each witness's testimony;

   (B) designations of all deposition testimony they anticipate offering as part of their respective cases in chief, (ii) counter-designations of deposition testimony and (iii) objections to an opponent's designated testimony, with objections not made being waived;

   (C) list of all proposed exhibits in their respective cases in chief;

   (D) written objections to proposed exhibits, with any objections not made being deemed waived and any exhibits not objected to being deemed admissible at trial;

   (E) anticipated *in limine* motions that have not already been filed or required by previous court order to be filed at a set time (including motions addressed to experts under *Daubert* or similar state law standards);

(F) admissions, interrogatory answers or other written discovery responses they intend to offer into evidence, together with any objections to these materials;

(G) stipulations of uncontested facts; and

(H) brief statements of the parties' respective claims and defenses and the relief sought, including (i) each element of damages and, other than for intangible damages (e.g., pain and suffering, mental anguish or loss of consortium), the monetary amount, including prejudgment interest, punitive damages and attorneys' fees, and (ii) other requested relief.

6. At a date at least two days before the final pretrial conference to be agreed or set by the court, the parties will submit any additional objections or points pertinent to the court's consideration of the submissions listed in Standard 5 above.

7. (A) The court will enter an order reciting the actions taken at the final pretrial conference, including

(i) any tentative or final rulings based on the parties' submissions,

(ii) date(s) for submitting any additional matters, including in limine motions, and

(iii) a date and time to begin trial and its anticipated length and daily schedule (e.g., from 9:00 a.m. to noon and 1:30 to 5:00 p.m., with one 20 minute break in the morning and afternoon).

ABA Survey respondents were asked whether they agreed that trial dates should not be continued except for extreme circumstances. Only 41 percent of plaintiffs' and mixed practice lawyers, and 36 percent of defense lawyers expressed agreement. Nearly half of defense lawyers, 38 percent of mixed practice lawyers and 28 percent of plaintiffs' lawyers believe that trial dates should not be set until summary judgment motions have been decided.

(B) The court's order also should provide that:

(i) only witnesses or exhibits listed will be permitted at trial, except for impeachment or rebuttal;

(ii) any objection to an exhibit not made will be deemed waived, any exhibit not objected to will be deemed admissible at trial and any party may introduce into evidence or otherwise use any other party's exhibits;

(iii) no person may testify whose identity, being subject to disclosure or timely requested in discovery, was not disclosed in time to be deposed;

(iv) any facts stipulated to by the parties will be deemed established; and

(v) the parties will identify to the opposing parties the witnesses they expect to testify on a given day no later than one hour after the

conclusion of trial on the day before that testimony.

(C) If the court sets time limits on the parties' trial presentations, the order will also set those limits and provide how they are to be determined.

8. Any party wishing to use a demonstrative exhibit (e.g., a chart based on other evidence or exhibits in the case) will provide it to the opposing party or parties at least 48 hours in advance of offering or using it in evidence.

9. At a date reasonably close to but no less than seven days before trial, to be set by the court based on the complexity of the case, the parties will submit their preliminary proposed voir dire questions, jury instructions and verdict forms, along with a short proposed description of the case and the parties' respective claims. If the parties cannot agree on the proposed jury instructions, they will submit separate jury instructions with supporting legal authority on any disputed issues.

SPECIAL COMMITTEE MEMBERS:

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Appendix A

New Jersey Best Practices

BEST PRACTICES

The New Jersey Court system underwent an operational overhaul through a number of changes to the Court Rules under the heading of "Best Practices." Best Practices were adopted on September 5, 2000, relaxed somewhat on July 2, 2001, and modified effective September 1, 2002. The goals of Best Practices are to help achieve uniformity, to attempt to establish reasonable and achievable case management, to expedite cases, and to reduce paperwork. Below are some of the more important changes to our system brought about by Best Practices.

Four Tracks for Discovery

Best Practices established four different discovery tracks, based on the nature of the action. The following chart lists each track, the time period during which discovery must be conducted, the type of case, case number (used for the CIS [Case Information Statement]), and where not obvious, a description of the type of case falling under each track:

Track I (150 days' discovery)

Case Type	CIS #	Description
Name change	(151)	
Forfeiture	(175)	Government action for ownership of property taken during a crime
Tenancy	(302)	Landlord/tenant action other than eviction or seeking a security deposit return of less than $15,000.
Real Property	(399)	Action involving real estate, such as devaluation due to nuisance, but not actions involving tenancy, contract, condemnation, complex commercial or construction actions.
Book Account (debt collection matters only)	(502)	
Other Insurance Claim (including declaratory judgment actions)	(505)	Dispute over insurance policy interpretations or coverage.
PIP [Personal Injury Protection] Coverage	(506)	Action by insureds or their healthcare providers against the insured's automobile insurer for unpaid medical bills or other insurance benefits.
UM [Uninsured Motorist] or UIM [Underinsured Motorist] Claim	(510)	Action by insureds against their own automobile insurer for damages from an automobile accident caused by an uninsured or underinsured driver.
Action on a Negotiable Instrument	(511)	
Lemon Law	(512)	Purchaser/lessee action against car dealer for faulty vehicle.
Summary Action	(801)	Action brought by special rule/statute permitting case to proceed under an expedited basis.
OPRA [Open Public Records	(802)	Appealing a governmental agency's refusal to disclose governmental records.

Act] Appeal		
Other	(999)	Action not otherwise designated under the track system

Track II (300 days' discovery)

Case Type	CIS #	Description
Construction	(305)	Construction agreement dispute
Employment (other than CEPA [Conscientious Employee Protection Act] or LAD [Law Against Discrimination])	(509)	
Contract/Commercial Transaction	(599)	
Auto Negligence - Personal Injury	(603)	
Personal Injury	(605)	
Auto Negligence - Property Damage	(610)	
Tort - Other	(699)	

Track III (450 days' discovery)

Case Type	CIS #	Description
Civil Rights	(005)	
Condemnation	(301)	Eminent domain actions
Assault and Battery	(602)	
Medical Malpractice	(604)	
Products Liability	(606)	
Professional Malpractice	(607)	Actions other than medical malpractice against a professional, including attorneys
Toxic Tort	(608)	
Defamation	(609)	
Whistleblower/Conscientious Employee Protection Act (CEPA)	(616)	Claim of employer's retaliatory acts against an employee.
Inverse Condemnation	(617)	Action for compensation from real property taken for public use.
Law Against Discrimination (LAD)	(618)	
False Claims Act	(620)	Action brought pursuant to N.J.S.A. 2A:32C-1 for fraudulently obtaining State government funds.

Track IV (Active Case Management by Individual Judge; 450 days' discovery)

Case Type	CIS #	Description
Environmental Coverage Litigation	(156)	

Zelnorm	(280)	Actions managed by Judge Jonathan N. Harris (Bergen County) regarding an anti-constipation pharmaceutical product claimed to be associated with heart attack/stroke.
Mt. Laurel	(303)	Action regarding allocation of the fair share of affordable housing to lower and moderate income families.
Complex Commercial	(508)	
Complex Construction	(513)	
Insurance Fraud	(514)	
Actions in Lieu of Prerogative Writs	(701)	Appeal from local governmental body's action/inaction (e.g., a planning board or zoning board of adjustment determination).

Mass Torts (Track IV) (450 days' discovery)

Case Type	CIS #	Description
Ciba Geigy	(248)	Actions managed by Judge Ann G. McCormick. (Middlesex County) regarding environmental contamination of the byproducts of chemical manufacturing in Toms River, New Jersey (damages or medical monitoring).
HRT [Hormone Replacement Therapy]	(266)	Actions managed by Judge Jessica R. Mayer (Middlesex County) regarding synthetic hormone pharmaceutical products claimed to be associated with breast cancer.
Accutane	(271)	Actions managed by Judge Carol E. Higbee (Atlantic County) regarding a prescription acne medication claimed to be associated with a variety of injuries.
Bextra/Celbrex	(272)	Actions managed by Judge Carol E. Higbee (Atlantic County) regarding an anti-inflammatory medication used to treat arthritis and menstrual pain claimed to be associated with cardiovascular injuries.
Risperdal/Seroquel/Zyprexa	(274)	Actions managed by Judge Jessica R. Mayer (Middlesex County) regarding anti-psychotic medication claimed to be associated with heart failure.
Ortho Evra	(275)	Actions managed by Judge Jessica R. Mayer (Middlesex County) regarding a birth control patch claimed to be associated with blood clots, strokes and heart attacks.
Depo-Provera	(276)	Actions managed by Judge Jonathan N. Harris (Bergen County) regarding a contraceptive product claimed to be associated with osteoporosis (damages or medical monitoring)
Mahwah Toxic Dump	(277)	Actions managed by Judge Brian R. Martinotti (Bergen County) regarding injuries or property damage claimed from alleged hazardous chemicals

		dumping of at the Ford Motor Plant, Ringwood Mines landfill, and adjacent sites in Mahwah and Ringwood New Jersey.
Zometa/Aredia	(278)	Actions managed by Judge Jamie D. Happas (Middlesex County) regarding medication used to treat osteoporosis, cancer, or multiple myeloma claimed to be associated with osteonecrosis of the jaw.
Gadolinium	(279)	Actions managed by Judge Jamie D. Happas (Middlesex County) regarding a gadolinium-based contrast agent injected into their veins during diagnostic medical procedures claimed to be associated with nephrogenic systemic fibrosis.
Bristol-Myers Squibb Environmental	(281)	Actions managed by Judge Carol E. Higbee (Atlantic County) regarding alleged environmental contamination, including arsenic, mercury, vinyl chloride and asbestos, from certain property of Bristol-Meyers Squibb in New Brunswick, New Jersey.
Fosamax	(282)	Actions managed by Judge Carol E. Higbee (Atlantic County) regarding medication used to treat osteoporosis, cancer, or multiple myeloma claimed to be associated with osteonecrosis of the jaw.
Digitek	(283)	Actions managed by Judge Brian R. Martinotti (Bergen County) regarding medication used to treat heart failure and abnormal heart rhythm claimed to be associated with renal failure (damages or medical monitoring).
NuvaRing	(284)	Actions managed by Judge Jonathan N. Harris (Bergen County) regarding a birth control product claimed to be associated with blood clots, strokes and heart attacks.
Asbestos	(601)	Actions managed by Judge Ann G. McCormick (Middlesex County) regarding injuries alleged to have been sustained as a result to inhalation of asbestos fibers.
Vioxx	(619)	Actions managed by Judge Carol E. Higbee (Atlantic County) regarding an anti-inflammatory medication used to treat arthritis and menstrual pain claimed to be associated with cardiovascular injuries.

Certain cases are excluded from the “track” system:

Case Type
Civil Commitment actions brought pursuant to R. 4:74-7
Probate
Foreclosure Actions
All other general equity actions

Each litigant is asked to place the corresponding case number on the Case Information Statement ("CIS"). The most recent version of the CIS (which is an interactive "fillable" form) may be found at: http://www.judiciary.state.nj.us/civil/forms/10517.pdf

The discovery period time begins from the date that the first answer is filed or from 90 days after the first defendant is served, whichever is first. *R*. 4:24-1(d).

Trial Assignment Notice

The day after a complaint is entered into the Court system, the clerk issues a Track Assignment Notice ("TAN") which is sent to the plaintiff with either the docketed copy of the complaint, or within ten days of the date when the complaint is filed. The TAN will identify the track, team, and judge to whom the case is assigned. The plaintiff is required to attach and serve the TAN, together with the summons, complaint and CIS, to all parties. *R*. 4:5A-2.

Changes to Track Assignments

Changes to track assignment may be made pursuant to the processes below:

1) by the plaintiff within 30 days of receipt of the TAN, upon the filing of a certification of good cause.

2) by any other party seeking a change of initial track assignment upon filing and serving a certification of good cause with its first pleading.

3) objections to the certification of good cause for change of track assignment must be made within 10 days by responding certification.

4) the managing judge (or pretrial designee) should respond in writing on the application for change of track assignment.

5) any party aggrieved by the Court's determination on such applications may seek relief by filing a formal motion within 15 days of the entry of the order.

6) subsequent applications to change a track assignment must be made on formal motion or on the Court's own motion only if the fundamental cause or causes of action have changed or if the case type or track was erroneously identified on a party's CIS or erroneously entered by staff into the Civil Automated Case Management System (ACMS). See *R*. 4:5A-2(b).

7) the procedure to change track assignment is not designed to accommodate a party's (or the parties') request for a longer discovery period or because of the alleged complexity of the case. Instead, the party(ies) must apply to the pretrial judge for an extension of the discovery end date, which may be granted in accordance with *R*. 4:24-1. See *R*. 4:5A-2.

8) orders directing track changes should also direct a change to the underlying case type in accordance with side 2 of the CIS.

Track I, II and III cases are assigned to a "pretrial judge" who will handle the case from filing through discovery. Track IV cases are assigned a "managing judge" from filing through trial, barring exceptional circumstances. See *R*. 4:5A-1, -2.

Involvement by Other Judges

Exceptional circumstances may warrant involvement by a different judge:

1) Track IV mass tort cases go back to the county of original venue for trial;

2) a different judge may be assigned for settlement conferences;

3) motions to extend discovery beyond the track time are handled by the Civil Presiding Judge (or designee) of the specific county);

4) the Civil Presiding Judge retains authority to assign a particular case/class of case (e.g., a judge handling all medical malpractice cases).

Certain Automatic Discovery

Service of a complaint to a defendant in a case where uniform interrogatories have been adopted is deemed to include service of those standard uniform interrogatories, and answers must be served within 60 days after service of the answer to the complaint. See *R*. 4:17-1.

Service of an answer to the plaintiff in a case where uniform interrogatories have been adopted is deemed to include service of those standard uniform interrogatories, and answers must be served within 30 days after service of the answer to the complaint. See *R*. 4:17-1.

Uniform interrogatories have been adopted for personal injury cases, with further interrogatories required in the following actions:

1) automobile accident cases (plaintiffs must answer one additional question, and another set if property damages are claimed; defendants must answer an additional set)

2) medical malpractice cases (each party must answer one additional set)

3) product liability cases other than pharmaceutical and toxic tort (each party must answer an additional set)

4) slip and fall (defendants must answer an additional set).

The Uniform Interrogatories may be found in Pressler's Rules Governing the Courts of the State of New Jersey at Appendix II.

Arbitration (*R*. 4:21A-1)

Certain Track I-III cases are subject to non-binding mandatory arbitration:

1) all automobile negligence cases, regardless of the amount in controversy;

2) all personal injury cases (including product liability cases, but excluding professional negligence cases), regardless of the amount in controversy;

3) all PIP cases;

4) all book account cases and actions on a negotiable instrument;

5) all other contract and commercial cases that, after screening by the teams, are deemed appropriate for arbitration; and

6) any action requested by the parties to be subject to voluntarily arbitration upon a written stipulation of all parties filed with the civil division manager.

Track IV cases may be assigned to arbitration within the discretion of the managing judge.

Removal from Arbitration (*R*. 4:21A-1(c))

A case may be removed from mandatory arbitration by following the procedure below:

1) prior to the notice of the scheduling of the case for arbitration or within 15 days thereafter;

2) submission of a certification to the arbitration administrator stating with specificity:

a) the controversy involves novel legal or unusually complex factual issues;

b) is otherwise ineligible for arbitration (the case has been mediated, remains unresolved and counsel believes that arbitration would be fruitless).;

3) if removal from arbitration is desired more than 15 days after the notice, the request must be made by a formal motion to the Civil Presiding Judge (or designee).

Trial Dates/Calls

The Court must provide at least ten weeks' notice of a trial (counted from the date of receipt of the trial notice). The trial notice cannot be sent prior to the discovery end date. See *R*. 4:36-3.

If attorneys desire to adjust the first, Court-generated trial date in order to accommodate an expert's scheduling conflict, they must notify the Court "timely" (e.g., no later than 30 days from the trial notice date). The Court's "adjustment" of the trial date upon such notice does not constitute an adjournment within the contemplation of *R*. 4:36-3(c).

At the trial call, attorneys should be released by early afternoon unless their cases are sent out, or can reasonably be expected to be sent out, for settlement discussion or trial that day. Thereafter, only if the case can reasonably be expected to be sent out for settlement discussion or trial on that subsequent date in the week, will attorneys be expected to appear at trial calls set for later in the trial week.

An attorney may have a conflict with more than one trial scheduled, and must, under such circumstances, advise the Presiding Judge as soon as possible. The attorney is must actually be before another judge in order to avoid the requirement of appearance before another trial judge, absent exceptional circumstances. Generally, if the same attorney has two trial ready cases on the same date, the older case has precedence. However, in some instances, such as when the younger case involves witnesses who traveled a considerable distance to testify, the younger case takes precedence. Such conflicts should be worked out by the Civil Presiding Judge or their designees. "Pre-assigning" cases for trial has been abandoned.

No vicinage has a blanket "on call" period, such as a "one-hour" call or a "half day call" for all cases being held. Rather, the length of an "on call" period should be worked out between the attorneys and Court staff before the attorneys leave the courthouse. Considerations for determining this period will be premised on a case by case basis depending on the needs of the particular case and the status of the calendar during the particular week.

Any case not going to trial during the initial trial date will be relisted for a trial date certain after consultation with counsel. Cases will be relisted no sooner than four weeks from the initial trial date unless there is agreement of counsel. Counsel will receive written notice of a new trial dates for relisted cases (there will no longer be a "telephone notice"). See *R*. 4:36-3.

Pretrial Information Exchange Form

In advance of trial, the parties must confer and exchange (unless waived in writing) certain information seven days prior to the scheduled trial date. *R*. 4:25-7; see Appendix XXIII to

the Court Rules. This and other information, as provided in R. 4:25-7, should be provided to the Court on the trial date. This rule is designed to compel counsel to review their files prior to appearing for trial and that the Court has all of the information need to try the case. The pretrial information required to be exchanged seven days in advance of trial comprise:

1) a list of witnesses;
2) a list of all exhibits;
3) a list of any proposed deposition or interrogatory readings;
4) any *in limine* or trial motions and any objections thereto;
5) a listing of all anticipated problems regarding the introduction of evidence (e.g., hearsay).

At the outset of the trial, prior to opening statement, each party shall also submit the following to the trial judge:

1) copies of any Pretrial Information Exchange materials exchanged as provided above, and any objections thereto;
2) stipulations reached on contested procedural, evidentiary, and substantive issues.

For jury trials, each party shall also submit the following (unless waived in writing) to the trial court and all other parties:

1) any special voir dire questions;
2) a list of proposed jury instructions;
3) any special jury instructions;
4) a proposed jury verdict form.