NINETEENTH CENTURY RULES FOR TWENTY-FIRST CENTURY COURTS?

An Analysis and Critique of

21ST CENTURY CIVIL JUSTICE SYSTEM:
A ROADMAP FOR REFORM PILOT PROJECT RULES

(Implementing The Final Report On The Joint Project Of The American College Of Trial Lawyers Task Force On Discovery And The Institute For The Advancement Of The American Legal System)

Analysis and Critique Prepared by

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Washington, DC
March, 2010

INTRODUCTION AND SUMMARY

> "The history of American freedom is, in no small measure, the history of procedure."

Malinski v. New York, 324 U.S. 401, 414 (1945) (Frankfurter, J., concurring).

We critique a proposal that would use procedures to curtail the ability of our nation to perform one of its most important functions: peacefully resolving the disputes of all its citizens.[1]

The Institute for the Advancement of the American Legal System (IAALS) and the American College of Trial Lawyers (ACTL) in 2009 published a study recommending what the organizations accurately called "radical" changes to the civil justice system.[2] The organizations subsequently made their recommendations concrete by proposing a set of "Pilot Project Rules (PPR)"[3] courts could use, initially in demonstration projects, to apply the principles set forth in the study.

The study was based on a survey of the feelings of lawyers whose primary business is representing defendants in civil litigation, and its results and recommendations reflect a systematic bias toward the interests of parties who repeatedly are defendants in civil actions.[4] The American College of Trial Lawyers is a prestigious

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[1] "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection." *Marbury v. Madison*, 5 U.S. 137, 163 (1803). *See also Downes v. Bidwell*, 182 U.S. 244, 282-283 (1901), in which the Supreme Court equated the right to "free access to courts of justice" with the rights of freedom of expression, freedom to worship, and freedom from unreasonable searches and seizures and noted that all of them were "indispensable to a free government."

[2] American College of Trial Lawyers, The Institute for the Advancement of the American Legal System, University of Denver *Final Report on the Joint Project of the American College of Trial Lawyers Task Force on Discovery and the Institute for the Advancement of the American Legal System* (Mar. 11, 2009; revised Apr. 15, 2009), *available at* http://www.du.edu/legalinstitute/pubs/ACTL-IAALS%20Final%20Report%20Revised%204-15-09.pdf, *also available at* http://www.actl.com/AM/Template.cfm?Section=Home&template=/CM/ContentDisplay.cfm&ContentID=4053 (hereinafter Final Report). The name of the Task Force was subsequently revised to the Task Force on Discovery and Civil Justice, reflecting an expansion in scope.

[3] American College of Trial Lawyers, The Institute for the Advancement of the American Legal System, University of Denver, *21st Century Civil Justice System; A Roadmap for Reform, Pilot Project Rules* (2009), *available at* http://www.actl.com/AM/Template.cfm?Section=Home&Template=/CM/ContentDisplay.cfm&ContentID=4509.

[4] J. Douglas Richards and John Vail, *A Misguided Mission to Revamp the Rules* (hereinafter Richards and Vail) TRIAL, Nov. 2009, at 52.

organization of prestigious lawyers, but its members who participated in the survey are highly skewed toward the interests of corporate parties.[5] The Institute for the Advancement of the American Legal System purports to be a viewpoint-neutral think tank dealing with civil justice issues, but its lack of transparency in funding makes assessment of that claim impossible and the highly disproportionate representation of repeat-defendant interests in its governing structure makes the claim dubious.[6]

Underlying the study is an unsupported assumption that is demonstrably incorrect: that discovery costs are out of control.[7] The best available data, gleaned by the Federal Judicial Center from a survey of closed cases, indicate that, in general, costs of discovery and attorney's fees in federal cases are quite modest.[8] Costs are high when stakes are high, but, in general, not disproportionately so.[9] Costs are problematic only on a small percentage of cases, generally those that involve clashes of corporate titans.[10]

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[5] *See Final Report* at 2. About seventy percent of respondents represent defendants or both plaintiffs and defendants, the latter a characteristic of commercial litigators. The differences between corporate litigants and human litigants are not trivial. As O'Melveny & Myers appellate chief and former Acting Solicitor General Walter Dellinger recently noted, "corporations do not have hearts and souls, do not revere grandparents, don't worry about their children, and do not have dreams for the future in the way that people do." Tony Mauro, *White House Said to Have Short List Ready for Justice Stevens' Slot*, National Law Journal, March 22, 2010, http://www.law.com/jsp/article.jsp?id=1202446568098&src=EMC-Email&et=editorial&bu =Law.com&pt=LAWCOM%20Newswire&cn=NW_20100322&kw=White%20House%20Said% 20to%20Have%20Short%20List%20Ready%20for%20Justice%20Stevens'%20Slot.

[6] IAALS was formed with $3 million in seed money from a family foundation affiliated with the Gates Rubber Company with additional money raised from "anonymous donors." Karen Abbott, *Kourlis Looks to 'Retool' Legal System*, ROCKY MOUNTAIN NEWS, Jan. 18, 2006, http://www.rockymountainnews.com/drmn/local/article/0,1299,DRMN_15_4395523,00.html. Its 18-member board of advisors (who are listed on the IAALS Web site but not mentioned in the Final Report) includes U.S. Chamber of Commerce president Thomas Donohue; Wal-Mart Associate General Counsel Walter Sutton; and Common Good chair and tort reform proponent Philip Howard. http://www.du.edu/legalinstitute/advisors.html.

[7] *See generally* Richards and Vail, *supra* n.4.

[8] Emery G. Lee, III & Thomas Willging, Federal Judicial Center, *National Case-Based Civil Rules Survey, Preliminary Report to the Federal Judicial Conference Advisory Committee on Civil Rules* (Oct. 2009), at 2. Reporting the preliminary results of a survey of closed federal civil cases, the FJC found that median costs, *including attorney fees*, were $15,000 for plaintiffs and $20,000 for defendants. In only 5 percent of cases do these costs reach about $300,000 per party, and in those cases the stakes were estimated at $4-5 million. Even in the highest value cases, total costs, including attorney fees, averaged well less than 10 percent of what was at stake.

[9] *Id*.

[10] Intellectual property disputes have particularly high costs, Thomas E. Willging and Emery G. Lee, III, *In Their Words: Attoreny Views About Costs and Procedures in Civil Litigation*, Federal Judicial Center, Mar. 2010, *available at* http://www.fjc.gov/public/pdf.nsf/ lookup/costciv3.pdf/$file/costciv3.pdf, and are among those that require the greatest amount of

IAALS/ACTL recommend that rules for all cases be based on these few cases. It is not advisable to create general rules adapted to unusual occurrences. Unusual occurrences are better handled by adapting general procedures to specific cases, as currently is possible under the federal rules; the Manual on Complex Litigation was written for exactly that purpose.

Our courts are open to everyone, and their rules well-adapted to the needs of the great bulk of litigants who inhabit them. They are not gated communities whose facilities are available only to the few. That is what the IAALS/ACTL rules would make them.

This critique has been prepared by a law firm that unapologetically represents the interests of plaintiffs, primarily of the human variety.[11] That perspective is evident, but we attempt to support our positions with references to empirical information and historical analyses. This critique demonstrates that certain proposals of IAALS/ACTL are, as IAALS/ACTL suggest, radical and do not serve the primary purpose of the civil justice system: to serve as the glue that holds together the body politic, a sound alternative to violence as a means of redressing harms.[12] While certain recommendations of IAALS/ACTL re-assert positions on which there has been widespread agreement, and offer sound alternatives to current practices, as a whole they serve the interests of a faction, not the interests of the nation as a whole.

The text of the PPRs and of the IAALS/ACTL commentary to the PPRs is set forth below in bold. Accompanying each section is an analysis and critique.

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court resources. *See* Federal Judicial Center, *2003–2004 District Court Case-Weighting Study*, at 5, tbl. 1, New 2004 District Court Case Weights (2005), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/CaseWts0.pdf/$file/CaseWts0.pdf.

[11] The Center for Constitutional Litigation, P.C., is a Washington, D.C. law firm with a practice focused on cases raising issues of the right of access to justice and the right to jury trial in courts. S*ee, e.g.*, *Lebron v. Gottlieb Mem. Hosp.*, Nos. 105741, 105745 (Ill. Feb 4, 2010); *Jones v. Halliburton*, 583 F.3d 228 (2009), *cert. dismissed* March 11, 2010; John Vail, *Comments to the Advisory Committee on Civil Rules Regarding Rule 56*, http://www.uscourts.gov/rules/2008%20Comments%20Committee%20Folders/CV%20Comments%202008/08-CV-046-Testimony-Center%20For%20Constitutional%20Litigation%20(Vail).pdf.

[12] John Vail, *Big Money v. The Framers*, Yale L.J. (The Pocket Part), Dec. 2005, http://www.thepocketpart.org/ylj-online/tort-law/26-big-money-v-the-framers.

ANALYSIS AND CRITIQUE

RULE ONE—SCOPE

1.1 These Rules govern the procedure in all actions that are part of the pilot project. They must be construed and administered to secure the just, timely, efficient, and cost-effective determination of such actions.

1.2 At all times, the court and the parties must address the action in ways designed to assure that the process and the costs are proportionate to the amount in controversy and the complexity and importance of the issues. The factors to be considered by the court in making a proportionality assessment include, without limitation: needs of the case, amount in controversy, parties' resources, and complexity and importance of the issues at stake in the litigation. This proportionality rule is fully applicable to all discovery, including the discovery of electronically stored information.

> "It is the daily; it is the small; it is the cumulative injuries of little people that we are here to protect . . . . If we are able to keep our democracy, there must be one commandment: Thou shalt not ration Justice."

Learned Hand, Address at the 75th anniversary celebration of the Legal Aid Society of New York, Feb. 16, 1951.[13]

PPR 1 threatens to ration justice. Cost is a legitimate concern in adjudicating disputes, but mandating cost-benefit analysis "at all times," PPR 1.2, is neither desirable nor practical.

PPR 1 replaces the admonition of Fed. R. Civ. P. 1, to seek "inexpensive" resolutions of disputes, in general, with a mandate for "cost-effective" determinations each piece of each individual action.[14] This emphasis can dilute the public function the civil justice system performs. Take, as an easy and clear example, litigation over the dangers of smoking. In a case dealing with harm to an individual smoker, the costs of proving the vast conspiracy we now know to have existed would have greatly exceeded the stakes in the individual case. But the public interest was served by exposure of that conspiracy when the value of individual cases was aggregated. Fed. R. Civ. P. 1 permits consideration of such public concerns. PPR 1 does not.

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[13] Ironically, Hand is among the first persons to apply economic analysis to tort law.

[14] PPR 1 mandates particular constructions ("must be construed"), eliminating the flexibility of Fed. R. Civ. P. 1 ("should be construed"). Curiously, the Message to Our Readers to the IAALS/ACTL characterizes Rule 1 as providing a "guarantee" of a "just, speedy and inexpensive determination of every action." at p. 1.

PPR 1.1 essentially calls for courts to employ cost-benefit analysis (CBA) in all aspects of all cases. CBA is difficult to apply even in regulatory contexts as it cannot reflect "soft values"—political values, not economic ones—that often are at stake in litigation.[15] As one proponent of CBA has noted with regard to a particular political value, "[i]f we value speech either as an intrinsic good or because it is instrumental to a well-functioning deliberative process, we will value it in a quite different way from toasters." Cass R. Sunstein, *Incommensurability and Valuation in the Law*, 92 Mich. L. Rev. 779, 831 (1994).

Our civil justice system adjusts both economic and political disputes, and even in adjusting economic disputes it reflects collectively held political values. These unquantifiable political values drive us, for example, to exclude certain evidence from criminal trials, despite "substantial social costs." *United States v. Leon*, 468 U.S. 897, 907 (1984). The inability of CBA to account for the benefits we gain from upholding our values can cause CBA to yield results that "may be inconsistent with the premise of

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[15] *See* Nicholas A. Ashford and Charles C. Caldart, *Environmental Law, Policy, and Economics*: *Reclaiming the Environmental Agenda* 147-69 (MIT Press 2008) (cost-benefit analysis tends to undervalue benefits, understate impacts on future generations, overvalue costs, and ignore potential for technological change). Distinguished scholars argued in the 1970s (and continue to argue today) that reliance on quantitative analysis tends to "squeez[e] out 'soft' but crucial information merely because it seems difficult to render commensurable with the 'hard' data in the problem." Laurence H. Tribe, *Ways Not to Think About Plastic Trees: New Foundations for Environmental Law*, 83 YALE L.J. 1315, 1318-19 & n25 (1974); Lisa Heinzerling, *The Clean Air Act and the Constitution*, 20 ST. LOUIS U. PUB. L. REV. 121, 149 (2001) ("Cost-benefit analysis tends to underrate those things that cannot be so quantified and monetized.") Thoughtful proponents of cost-benefit analysis acknowledge these problems. Robert W. Hahn and Cass R. Sunstein, *A New Executive Order for Improving Federal Regulation? Deeper and Wider Cost-Benefit Analysis*, 150 U. PA. L. REV. 1489, 1499-1500 (2002) ("Of course, it is possible that in practice, quantitative cost-benefit analysis will have excessive influence on government decisions, drowning out 'soft variables.'"); Frank Ackerman and Lisa Heinzerling, *Pricing the Priceless: Cost-Benefit Analysis of Environmental Protection*, 150 U. PA. L. REV. 1553, 1579-80 (2002) (unquantifiable benefits are often given lip service in CBA but ultimately ignored; citing arsenic CBA as example where "[s]ubsequent public discussion [of the CBA] inevitably referred only to the EPA's numerical analysis and forgot about the eases of avoided illness that could not be quantified"); Richard Parker, *Grading the Government*, 70 U. CHI. L. REV. 1345, 1348-49, 1404-06 (2003) (observing increasingly prevalent phenomenon of "regulatory score cards," which "reduce these hundreds of pages [in a CBA] to a few summary statistics"); Eric A. Posner, *Controlling Agencies with Cost-Benefit Analysis :A Positive Political Theory Perspective*, 68 U. CHI. L. REV. 1137, 1182 (2001) ("Agencies often provide implausible estimates of costs and benefits, use different discount rates and valuations across regulations, and even fail to monetize or quantify all the relevant costs and benefits."). *See also* David M. Driesen, *Distributing the Costs of Environmental, Health, and Safety Protection: The Feasibility Principle, Cost-Benefit Analysis, and Regulatory Reform*, 32 B.C. ENVTL. AFF. L. REV. 1 (2005).

The power to undertake cost-benefit analysis is not readily delegated and should not be lightly assumed. "When Congress has intended that an agency engage in cost-benefit analysis, it has clearly indicated such intent on the face of the statute." *American Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 510 (1981).

political equality." Sunstein, *Incommensurability and Valuation in the Law*, 92 Mich. L. Rev. at 828.

PPR 1.2 attempts to regulate by rule that which already is controlled by other means. University of Texas Law Professor Charles Silver has explained:

> [P]arties are already stripping litigation processes of most of their "fat." Most lawsuits settle; settlements are exchanges, and we usually expect exchange partners to minimize transaction costs. Because litigants have incentives to save money, they may already be making lawsuits as inexpensive as possible. If so, it would naturally be difficult to reduce dollar transfer costs further, at least without altering the numbers of dollars that change hands. To put the matter another way, procedural reforms have not reduced dollar transfer costs because adjudicatory procedures are not generating these costs. Costs instead reflect the need to figure out how much claims are worth and the difficulty of bargaining, which in turn reflect, respectively, properties of claims and of relationships between claimants and respondents. Empirical studies support this idea. They show that claim characteristics, party numbers, external interests, and other claim and relationship-related variables have real power to explain dollar transfer costs.

Charles Silver, *Does Civil Justice Cost Too Much*? 80 Tex. L. Rev. 2073, 2074 (2002).

PPR 1.2 applies "at all times," requiring "proportionality assessment" in every aspect of a case.[16] *See* discussion of cost benefit analysis, *supra*. While Congress chose to apply a proportionality principle in discovery[17] it never has applied one across all the federal rules. This Congressional inaction strongly militates against a finding that imposition of one by local rule is within permissible local authority. *See Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002) (Congressional decision to adopt a narrow rule disposes of any question of its intent to permit a broader reach for that rule.). *See also* discussion, *infra*.

[16] PPR 1.2 closely tracks existing language of Fed. R. Civ. P. 26 but omits a criterion related to proportionality in discovery: "the importance of the discovery in resolving the issues," Fed. R. Civ. P. 26(b)(2)(C)(iii). It is not clear that this consideration is incorporated into PPR 1.2.

[17] The Federal Rules regarding discovery have been amended in 2000, 2006, and 2007, each time providing the courts, and parties resisting discovery, with more tools to ensure that discovery is proportionate and cost-beneficial. *See Federal Civil Judicial Procedure and Rules, Advisory Comm. Notes to Fed. R. Civ. P. 26*, at 164-171 (Thomson-West 8th ed. 2008).

While the *idea* of proportionality is generally praised in the context of discovery,[18] application has proven difficult,[19] has led to inconsistent results,[20] and, most importantly, has precluded "discovery that meritorious cases need." Scott A. Moss, *Litigation Discovery Cannot Be Optimal but Could Be Better: The Economics of Improving Discovery Timing in a Digital Age*, 58 Duke L.J. 889, 889-90 (2009). Moss explains the difficulty of assessing the value of discovery:

> Assessing cost often is feasible; parties litigating discovery regularly detail the time and dollar costs of producing disputed evidence. Assessing the benefit of particular discovery is the tricky part . . . [F]or truly accurate judicial decisionmaking, a court must consider not only the probative value of the particular evidence and the size of the case (as the rules command), but also—contrary to the conventional wisdom on discovery decisionmaking—the likelihood that the case is meritorious, that the plaintiff will prevail at trial . . . .
>
> In economic terms, the court's proportionality determination bases on the following three variables . . . the size of the case, typically the amount in controversy but also possibly the value of nonmonetary relief; the

[18] These "cost-benefit proportionality limits . . . draw broad consensus among litigation scholars and economists," Scott A. Moss, *Litigation Discovery Cannot Be Optimal but Could Be Better: The Economics of Improving Discovery Timing in a Digital Age*, 58 DUKE L.J. 889, 889 (2009). While the principles of *Rowe* and *Zubulake* embodied in the rule "have been widely commended, . . . they have not been immune from criticism" and "they have not satisfactorily answered all questions." Sonia Salinas, *Electronic Discovery and Cost Shifting: Who Foots the Bill?*, 38 LOY. L.A. L. REV. 1639, 1661 (2005) (footnotes omitted). *See also* Henry S. Noyes, *Good Cause Is Bad Medicine for the New E-Discovery Rules*, 21 HARV. J.L. & TECH. 49, 78-86 (2007); Daniel B. Garrie & Matthew J. Armstrong, *Electronic Discovery and the Challenge Posed by the Sarbanes-Oxley Act*, 2005 UCLA J.L. & TECH. 2, 4-5 (2005).

[19] "Although the 2006 amendments incorporate broad proportionality principles like 'good cause,' courts have not figured out how to give the new standard meaning apart from the old 26(b)(2)(C) standard." Rachel Hytken, Note, *Electronic Discovery: To What Extent Do The 2006 Amendments Satisfy Their Purposes?* 12 LEWIS & CLARK L. REV. 875, 889 (2009). There is uncertainty about whether the seven-factor test proposed by *Zubulake* or the nine-factor suggested a year earlier in *Rowe Entertainment, Inc. v. William Morris Agency, Inc.*, 205 F.R.D. 421 (S.D.N.Y. 2002) should be adopted as paradigmatic. *See* Robert E. Altman & Benjamin Lewis, *Cost-Shifting In ESI Discovery Disputes: A Five Factor Test To Promote Consistency And Set Party Expectations*, 36 N. KY. L. REV. 569, 581 (2009) ("It is still unclear whether the *Rowe* or *Zubulake* multi-factor test will prevail.").

[20] *See* Hytken, *Electronic Discovery*, 12 LEWIS & CLARK L. REV. at 897-98, 901 ("courts have applied the proportionality standard unpredictably.") *See also* Moss, *Litigation Discovery Cannot Be Optimal but Could Be Better*, 58 DUKE L.J. at 889-90 (2009).

> probability that the plaintiff will win if the case goes to trial; and the probative value of the evidence (the difference the disputed evidence makes to [the probability that the plaintiff will win]).

Id. at 911. A review of the case law shows that "each of these three variables can be difficult or impossible for courts to assess during discovery," *id., see also id.* at 911-26, and can require a judge to tread on turf that the Constitution assigns to juries. Experience with proportionality in discovery does not support extension of the principle to all aspects of litigation.

PPR 1.2 systematically favors artificial corporate persons,[21] whose "memories" are stored on paper and in electronic files, the search of which imposes quantifiable costs, over human litigants, who simply can be asked the content of their memories. The burden of preserving and making accessible corporate memories is a consequence of "the privilege of being able to use the corporate form in order to conduct business." *United States v. Taylor*, 166 F.R.D. 359, 362 (M.D.N.C. 1996), *aff'd* 166 F.R.D. 367 (M.D.N.C. 1996). We can be sensitive to this burden, but we never should lose sight of the benefit—existence—that gives rise to it.

Because PPR 1 imposes requirements inconsistent with existing rules, it cannot be adopted as a local rule by any federal court. *Stern v. United States District Court for the District of Massachusetts*, 214 F.3d 4, 13 (1st Cir. 2000) ("local rules should cover only interstitial matters" and "may not create or affect substantive rights, *see* 28 U.S.C. § 2072(b), or institute 'basic procedural innovations.'") (citing *Miner v. Atlass*, 363 U.S. 641, 650 (1960)). *See also Tiedel v. Northwestern Michigan College*, 865 F.2d 88, 91 (6th Cir. 1988) (quoting 12 C. Wright & A. Miller, *Federal Practice & Procedure: Civil* 2D § 3152 (1979 and Supp.) ("The draftsmen of Rule 83 expected local rule making 'would be used only on rare occasions when the civil rules deliberately had left gaps to be filled in the light of recognized local needs.")

IAALS COMMENT TO PPR 1.2

The Federal Rules of Civil Procedure and many state rules already contain factors that—where applied—address proportionality in discovery. However, these factors are rarely if ever applied because of the longstanding notion that parties are entitled to discover all facts, without limit, unless and until a court says otherwise. It is the purpose of these PPRs that the default be changed—all facts are not necessarily subject to discovery. Because these rules reverse the default, the proportionality factors that are provided in existing rules and restated in the PPR can be applied more effectively to achieve the goals stated in PPR 1.1.

[21] A corporation is "an artificial being, invisible, intangible, and existing only in contemplation of law," *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819) (Marshall, C.J.).

Criticism of "the longstanding notion that parties are entitled to discover all facts, without limit" attacks a straw man. Discovery always has been limited to "nonprivileged matter that is relevant to any party's claim or defense, . . . subject to the limitations imposed by Rule 26(b)(2)(C)" or "otherwise limited by court order . . . " Fed. R. Civ. P. 26(b)(1). The grandparent of discovery cases, *Hickman v. Taylor*, 329 U.S. 495, 501, 507-08 (1947), noted that the notice pleading regime vested a "vital role in the preparation for trial" in the discovery process, but noted also that the discovery is limited "when the inquiry touches upon the irrelevant or encroaches upon the recognized domains of privilege" and when it "is being conducted in bad faith or in such a manner as to annoy, embarrass or oppress the person subject to the inquiry." *Id*. at 507-08.

Under the federal rules courts have been vested with great discretion to limit discovery, *Crawford-El v. Britton*, 523 U.S. 574, 598-99 (1998),[22] and that discretion has been expanded in amendments to the rules enacted in 2000, 2006, and 2007. *See Federal Civil Judicial Procedure and Rules, Advisory Comm. Notes to Fed. R .Civ. P. 26*, at 164-171 (Thomson-West 8th ed. 2008).

While IAALS/ACTL decry the private costs of discovery, discussion of benefits of discovery—both to plaintiffs in a particular case and society as a whole, benefits that regularly outweigh costs—is absent. Courts have "long recognized the importance of discovery in the successful prosecution of civil rights complaints," where "'much of the evidence can be developed only through discovery' of materials held by defendant officials." *Alston v. Parker*, 363 F.3d 229, 232 (3d Cir. 2004) (citations omitted). Courts have appreciated that broad discovery is not only necessary to vindicate the rights of individual plaintiffs but often is a vital tool for protecting the public's interest in deterring mass torts: "Discovery may well reveal that a product is defective and its continued use dangerous to the consuming public." *Cipollone v. Liggett Group, Inc*., 113 F.R.D. 86, 87 (D.N.J. 1986). *See In re Agent Orange Prod Liab. Litigation*, 104 F.R.D. 559, 572 (E.D.N.Y. 1985), *aff'd*, 821 F.2d 139 (2d Cir. 1987).

Tort suits, which cannot be successfully prosecuted without adequate discovery, not only "provide[] appropriate relief for injured consumers" but "further consumer

[22] Rule 26 vests the trial judge with broad discretion to tailor discovery narrowly and to dictate the sequence of discovery. On its own motion, the trial court "may alter the limits in [the Federal Rules] on the number of depositions and interrogatories and may also limit the length of depositions under Rule 30 and the number of requests under Rule 36. The frequency or extent of use of the discovery methods otherwise permitted under these rules . . . shall be limited by the court if it determines that . . . (iii) *the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.*" Rule 26(b)(2)(C).

Additionally, upon motion the court may limit the time, place, and manner of discovery, or even bar discovery altogether on certain subjects, as required "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Rule 26(c). And the court may also set the timing and sequence of discovery. Rule 26(d).

protection by motivating manufacturers to produce safe and effective drugs and to give adequate warnings." *Wyeth v. Levine*, 129 S. Ct. 1187, 1199-1200 (2009) (footnote omitted). "[T]ort law serves the instrumental function of creating safety incentives . . . for manufacturers to achieve optimal levels of safety in designing and marketing products." Restatement (Third) of Torts: Products Liability §2 cmt. a (1998).[23]

PPR 1.2 easily could render the judicial system unavailable to litigants with meritorious cases that serve important public functions, such as deterring discrimination or exposing the hidden dangers in defectively designed or manufactured products: Ford's exploding Pintos, Firestone's "exploding" tires, "light" cigarettes, or Vioxx. PPR 1.2 could thus simultaneously empower obstructionists and deprive plaintiffs of access to the courts.

RULE TWO—PLEADINGS AND CONTENT

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

The justice system seeks truth. Facts are building blocks of truth,[24] but they are slippery things, a proposition brilliantly explored in Anatomy of a Murder,[25] where different people see things in different ways. That is one reason why we entrust juries, and not judges, to discern what facts are, and what truths they tell. PPR 2.1 requires a plaintiff, at the outset of a dispute and before gaining the power to compel disclosure of facts, to define what facts are "essential" to a claim, and lays the groundwork for a judge to dismiss a claim because "essential" facts are absent, displacing a role we want jurors to perform.

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[23] *See* William M. Landes & Richard A. Posner, *The Economic Structure of Tort Law* 294 (1987); Sandra F. Gavin, *Stealth Tort Reform*, 42 VAL. U. L. REV. 431, 437-38 (2008); Jon S. Vernick, et al., *Role of Litigation in Preventing Product-Related Injuries*, 25 EPIDEMIOL. REV. 90, 93 (2003); William B. Schwartz & Neil K. Komesar, *Doctors, Damages and Deterrence: An Economic View of Medical Malpractice*, 298 NEW ENG. J. MED. 1282 (1978); Michelle J. White, *The Value of Liability in Medical Malpractice*, 13 HEALTH AFFAIRS. 75 (1994) (discussing medical litigation). *See generally* Mark P. Robinson Jr. and Kevin F. Calcagnie, *Product Liability: Catalyst for Safety*, TRIAL 32 (Nov. 2009).

[24] *See* "Truth." *Stanford Encyclopedia of Philosophy*, (1996 Rev. 2006) http://plato.stanford.edu/entries/truth-identity/

[25] The 1959 film, directed by Otto Preminger, was based on a novel by Michigan Supreme Court Justice John D. Voelker, who wrote under the pen name Robert Traver.

PPR 2.1 goes far beyond even the much-criticized[26] recent decisions of the Supreme Court in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009) in re-establishing nineteenth century pleading rules. Those cases interpret, without amending the text of, Fed. R. Civ. P. 8(a) and require pleading of sufficient facts to establish a plausible claim. Fed. R. Civ. P. 8(a)[27] requires only "a short and plain statement of the claim showing that the pleader is entitled to relief," the purpose of which is to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests."[28] By contrast, PPR 2.1 requires particularized factual pleading of

[26] *See, e.g.*, Kevin C. Clermont and Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. (forthcoming March 2010), *available at* http://ssrn.com/abstract=1448796, (*Twombly* and *Iqbal* "do more than redefine the pleading rules; by inventing a test for the threshold stage of a lawsuit, they have destabilized the entire system of civil litigation."); Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on Ashcroft v. Iqbal*, 85 NOTRE DAME L. REV. (forthcoming 2010), (*available at* http://ssrn.com/abstract=1467799) (decrying the way Iqbal screens complaints, criticizing the institutional competence of the Supreme Court to make rules of this kind, and suggesting that Congress or the Judicial Conference deal with these issues); Steven B. Burbank, *Pleading and the Dilemmas of "General Rules,"* 2009 WIS. L. REV. 535 (2009) (writing while *Iqbal* was pending in the Supreme Court, predicting its outcome, and noting that the Supreme Court "is ill-equipped to gather the range of empirical data, and lacks the practical experience, that should be brought to bear on the questions of policy, procedural and substantive, that are implicated in considering standards for the adequacy of pleadings . . . ")

Bills to reverse the effects of *Iqbal* and *Twombly* are pending in Congress.

[27] Fed. R. Civ. P. 8(a): Claims for Relief.

A pleading that states a claim for relief must contain:

(1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support;

(2) a short and plain statement of the claim showing that the pleader is entitled to relief; and

(3) a demand for the relief sought, which may include relief in the alternative or different types of relief.

[28] *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 545 (2007). "The liberal notice pleading of Rule 8(a) is the starting point of a simplified pleading system, which was adopted to focus litigation on the merits of a claim." *Swierkiewicz*, 534 U.S. at 514. Leading commentators have recognized that "Rule 8 is the keystone of the system of pleading embodied in the Federal Rules of Civil Procedure."

This especially is true of Rules 8(a)(2), 8(e), and 8(f). These provisions state that technical forms of pleading are not required, that pleadings are to be construed liberally so as to do substantial justice, and, most important of all, they substitute the requirement of "a short and plain statement of the claim showing that the pleader is entitled to relief" for the familiar formula "facts constituting a cause of action," which typified the codes that dominated civil practice at the time the federal rules were adopted. As a practical matter these provisions in Rule 8 have ramifications that transcend the pleading stage of federal practice. To some degree, the functioning of all the procedures in the federal rules for broad joinder of parties and claims, discovery, liberal amendment, judicial management, and summary judgment are intertwined inextricably with the pleading philosophy embodied in Rule 8.

each claim, defense, and *remedy*, a radical change from current federal practice. Professor Arthur Miller, testifying about the lesser changes made by *Iqbal* and *Twombly*, predicted that this kind of more burdensome pleading:

> will weigh heavily on under-resourced plaintiffs who typically contest with industrial and governmental Goliaths, often in cases in which critical information is largely in the hands of defendants that is unobtainable without access to discovery.[29]

PPR 2.1 undermines the idea that no person is above the law. It insulates persons with power from scrutiny they justly should undergo.

Prior to the adoption of the Federal Rules in 1938 pleading of the kind required in PPR 2.1 had been in effect and had been a nightmare.[30] Lawyers did great battle over the sufficiency of particular statements and filed multiple pleadings to assure that facts ultimately proved conformed to some pleading in the record, wasting large amounts of time and effort.[31] The Federal Rules were adopted with the purpose of ending this litigation by gamesmanship.[32] Pleading, in particular, was supposed to become simple.[33]

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5 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1202, at 69 (3d ed. 2004 & 2009 update). *See* Jack H. Friedenthal, et al., *Civil Procedure* § 5.7, at 253 (2d ed. 1993) ("[U]nder the federal rules the last vestiges of pleading technicalities are stripped away and the concept of 'notice' pleading is firmly established."); Fleming James, Jr. & Geoffrey C. Hazard, Jr., *Civil Procedure* §§ 3.3-.9, 3.11 (3d ed. 1985).

[29] Statement of Arthur R. Miller (former Reporter to the Advisory Committee of Civil Rules of the Judicial Conference of the U.S.), Testimony Before the U.S. House of Representatives, Committee on the Judiciary, Subcommittee on the Constitution, Civil Rights and Civil Liberties, Oct. 27, 2009, at 6, 7 (citing numerous examples of dismissal under what he calls "plausibility pleading"). See also Scott Dodson, *New Pleading, New Discovery* 109 MICH. L. REV. (forthcoming 2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1525642, at 26-30 (arguing that the plausibility standard both causes meritorious cases to be dismissed and fails to screen meritless cases).

[30] *See generally* Charles E. Clark, *The Complaint in Code Pleading*, 35 YALE L.J. 259 (1926). *See also* Charles E. Clark, *History, Systems, and Functions of Pleading*, 11 VA. L. REV. 517, 534 (1924). Yale Law School Professor Clark, later a Judge of the Second Circuit, is widely viewed as the guiding force behind adoption of the Federal Rules of Civil Procedure.

[31] *Id.*

[32] *See* Stephen B. Burbank, *Plausible Denial: Should Congress Overrule Twombly and Iqbal?*, 158 U. PA. L. REV. 141, 148 (2009).

> The drafters of the Federal Rules objected to fact pleading because it led to wasteful disputes about distinctions that they thought were arbitrary or metaphysical, too often cutting off adjudication on the merits. As Edgar Tolman, who bore major responsibility for explaining the proposed Federal

The only particularized pleading standards in the federal rules apply to pleading fraud or mistake.[34] The particularity requirements of Rule 9(b) are anomalies adapted to the peculiar circumstances of the "disfavored" claims to which they apply. 5A C. Wright & A. Miller, *Federal Practice and Procedure* § 1296 (3d ed. 2004 & 2009 Supp.) (footnotes omitted). The proponents of PPR 2.1 have advanced no reasons why all claims should be treated with the same disfavor. The Supreme Court has declined to impose heightened pleading requirements outside those mandated by Congress or outside of the rigorous analytical process for amending the federal rules. *Leatherman v. Tarrant County Narcotics Intelligence and Coordination*, 507 U.S. 163, 168 (1993). That stance strongly counsels against adoption of these radical standards absent the most rigorous vetting and the development of a rationale for why we should return to an era of legal formality that Dickens decried in *Bleak House*.

The likely effect of PPR 2.1 is not to resolve disputes more readily, but simply to focus disputation on what facts might be, rather than what they are. Thus, motions to dismiss will assert that claims have not been pleaded with sufficient "particularity"; that

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> Rules to Congress, put it, "In these rules there is no requirement that the pleader must plead a technically perfect 'cause of action' or that he must allege 'facts' or 'ultimate facts.'" *Rules of Civil Procedure for the District Courts of the United States: Hearings on H.R. 8892 Before the H. Comm. on the Judiciary*, 75th Cong. 94 (1938). They also believed that pleading was a poor means to expose the facts underlying a legal dispute, a role that could better be played by discovery. *See id*. at 98.

Another important underlying principle was "our 'deep-rooted historic tradition that everyone should have his own day in court.'" *Martin v. Wilks*, 490 U.S. 755, 762 (1989) (quoting 18 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 4449, p. 417 (1981)).

[33] The Supreme Court in *Hickman v. Taylor*, 329 U.S. 495, 501 (1947) observed that "the new rules . . . restrict the pleadings to the task of general notice-giving and invest the deposition-discovery process with a vital role in the preparation for trial." And the intended liberality of the federal rules regime was later confirmed by the Supreme Court in *Conley v. Gibson*, 355 U.S. 41, 45-46, *overruled by Bell Atlantic v. Twombly*, 550 U.S. 544 (2007) in which the court clarified that pleadings, to survive a motion to dismiss, need only "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests," and that courts should only grant motions to dismiss when it appears "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." The desire for simplicity in the new rules is well illustrated by form pleadings appended to the Rules and deemed sufficient under Rule 84: "The forms in the Appendix suffice under these rules and illustrate the simplicity and brevity that these rules contemplate."

[34] Fed. R. Civ. P. 9(b) provides: "In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." Congress has enacted heightened pleading standards, outside the Federal Rules, in other contexts, such as securities litigation. *See, e.g.,* Private Securities Litigation Reform Act (PSLRA), 15 U.S.C. § 78u-4(b) (2000)). *See Tellabs, Inc. v. Makor Issues & Rights, Ltd*., 127 S. Ct. 2499 (2007) (interpreting the pleading standard for PSLRA claims).

"material" facts have not been pleaded; that facts related to known monetary damages have not been pleaded, e.g., that a child disfigured by burns has not pleaded each known bill from a plastic surgeon for repair of each particular harmed body part. An analysis of Scottish pleading rules, which require some of the kind of detail required by PPR 2.1, concludes that this kind of detailed pleading requirement "skews the procedural system in favor of repeat institutional defendants and against individual plaintiffs in ways that can both prevent suits from being filed and prevent persons with legitimate claims from winning at trial." Elizabeth G. Thornburg, *Detailed Fact Pleading: The Lessons of Scottish Civil Procedure*, 36 Int'l Law. 1185, 1186 (Winter 2002). PPR 2.1, without supporting rationale, counsels return to precisely the world rejected by the 1938 Federal Rules.

Despite the nod in PPR 2.1 to fair and balanced rulemaking by imposing on affirmative defenses the same requirements imposed on complaints, every lawsuit involves a complaint; relatively few involve affirmative defenses; the real burden is on plaintiffs. PPR 2.1 reverses a fundamental idea in the law: that the person who has best access to facts is responsible for producing them. *See, e.g, U.S. v. Fior D'Italia, Inc.*, 536 U.S. 238, 257 n.4 (2002); 9 J. Wigmore, Evidence § 2486 (J. Chadbourn rev. ed.1981) (where fairness so requires, burden of proof of a particular fact may be assigned to a "party who presumably has peculiar means of knowledge" of the fact). Malefactors are not known for publishing with "particularity" the "material" facts that describe their misbehavior. *Grunewald v. U.S.*, 353 U.S. 391, 402 (1957) ("[E]very conspiracy is by its very nature secret; a case can hardly be supposed where men concert together for crime and advertise their purpose to the world. And again, every conspiracy will inevitably be followed by actions taken to cover the conspirators' traces.")

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

PPR 2.2, as with the other proposed rules, assumes that it is easy to discern what a "statement of fact" is.[35] The difficulty of that endeavor was a key motivating factor for adopting the 1938 Rules. There are facts; there are mixed questions of law and fact; there are ultimate facts. Defining what is, and what is not, a statement of fact is a vexing question in the law,[36] and the public interest is better served by allowing juries to decide what happened than by requiring judges to decide what pigeonhole an assertion should be routed to.

IAALS COMMENT TO PPR 2.1

PPR 2.1 expects that the pleading party will plead all material facts known to support a claim or affirmative defense. It is intended to revitalize the role that

[35] *See, e.g.*, Note, *Pleading—Summary Judgment—Law and Fact*, 38 YALE L. J. 548 (1929) (illustrating difficulty of characterizing phrase "with knowledge.")

[36] *See*, Clark, *supra* n.30.

pleadings play in narrowing issues at the earliest stages of litigation, by bringing salient facts to light in the hope that doing so will reduce the need for discovery. PPR 2.1 is not intended to resuscitate the technicalities associated with common-law pleading or foreclose access to the courts.

"[B]ringing salient facts to light in the hope that doing so will reduce the need for discovery" has a ring of virtue. But the idea was rejected in favor of a system that ultimately is less unwieldy: requiring pleading to give notice of what is at dispute, and depending on the parties to sharpen the issues as facts are revealed.

The material facts pleaded should provide the "who, what, when, where, and how" of each element of a claim or defense. Several examples follow. In a claim for breach of contract, the pleader should provide a description of the nature of the contract, identify the relevant signatories and date of signature, and for each provision alleged to be breached, state the provision and describe in detail the manner in which it was allegedly breached. In a claim for negligence arising from an automobile accident, the pleader should state in detail the time, date, and location of the accident, describe in detail the alleged negligent act, provide a precise description of the alleged physical injuries and property damage, and describe known monetary damages. In a claim for patent infringement, the pleader should provide facts identifying the patentee(s) and assignee(s), patent number, dates of application and issue, efforts to mark any products or processes covered by the patent, the specific products or processes that the defendants allegedly made, used or sold in violation of the patent, where and when those products or processes were made, used and sold within the United States, and the claims of the patent that are allegedly infringed.

These statements are recipes for disaster. The example regarding contracts suggests the following as a mode of dispute resolution:

Consumer: Hello, internet service provider? I have no service.

Voice on Phone: Before we can talk about this dispute, I need a few things from you. What is the date on contracted services from us? Which provisions of our contract do you allege we breached; and, in detail, how have we breached them?

Consumer: Well, actually, I've never seen the agreement between us. I just clicked "yes" on the box.

Take the automobile accident example. The pleader notes that the alleged negligent act is failure to maintain the brakes. The defendant first moves to dismiss, or, alternatively, for a more definite statement, asserting that the allegation is not made in detail. We now have the parties and a judge involved in resolving a dispute about what is on a piece of paper and not a dispute about whether brakes failed.

Assuming the statement survives, the pleader seeks discovery. He asks for all documents related to maintenance of "the brakes." The defendant provides information about brake surfaces, but not about connecting hydraulic lines and cylinders, because

those are not "brakes." Is discovery compelled, or not? Must the pleader seek leave to re-plead and name the brakes and the accompanying hydraulic system?

The discussion seems almost silly. But envision a products liability dispute, where the issue is adequacy of design of a vehicle rollover system. The pleader is unlikely to know, from public sources, why a rollover system failed. Its failure under particular conditions is the primary evidence known to the pleader. The standard here could preclude discovery from proceeding based on that allegation.

The pleading requirements apply equally to affirmative defenses. For example, for an affirmative defense alleging the running of the statute of limitations, the pleader should state which claims are time-barred and, for each such claim, the applicable statute of limitations and specific time that has elapsed since the claim accrued.

This seeming nod to "fair and balanced" rulemaking is of limited practical importance, as every case deals with allegations by a plaintiff; not every case deals with affirmative defenses.

If a pleading party cannot through due diligence obtain facts necessary to support one or more elements of the claim, the party may plead such facts on information and belief, again with as much detail as possible. However, this provision should not be used in a manner that evades the intent of the rule. Rather, the party should make use of the precomplaint discovery provision in PPR 3 to compile the facts to meet the burden.

The requirement that parties plead each remedy sought is not intended to preclude alternative remedies at the outset, and required damages are only those damages that can be quantified at the time of filing of the action.

RULE THREE—PRECOMPLAINT DISCOVERY

3.1 On motion by a proposed plaintiff with notice to the proposed defendant and opportunity to be heard, a proposed plaintiff may obtain precomplaint discovery upon the court's determination, after hearing, that:

a. the moving party cannot prepare a legally sufficient complaint in the absence of the information sought by the discovery;

b. the moving party has probable cause to believe that the information sought by the discovery will enable preparation of a legally sufficient complaint;

c. the moving party has probable cause to believe that the information sought is in the possession of the person or entity from which it is sought;

d. the proposed discovery is narrowly tailored to minimize expense and inconvenience; and

e. the moving party's need for the discovery outweighs the burden and expense to other persons and entities.

Several states have pre-complaint discovery procedures. IAALS/ACTL adduce no evidence suggesting that this procedure is preferable to the existing regime of notice pleading and academic literature suggests that it is not.[37]

3.2 The court may grant a motion for precomplaint discovery directed to a nonparty pursuant to PPR 3.1. Advance notice to the nonparty is not required, but the nonparty's ability to file a motion to quash shall be preserved.

3.3 If the court grants a motion for precomplaint discovery, the court may impose limitations and conditions, including provisions for the allocation of costs and attorneys' fees, on the scope and other terms of the discovery.

If the courts set a threshold that is broad enough to be truly useful, these PPRs may be largely ineffective in reducing costs to litigants and the courts. If the courts set a high threshold, plaintiffs may not be able to obtain the evidence needed to support their claims, which would allow defendants to easily defeat claims that could survive under notice pleading.

PPR 3.3 allows a court "to impose . . . costs and attorneys' fees on the scope and other terms of the discovery" but does not expressly permit a court to impose costs and fees on a defendant who unreasonably obstructs discovery.

IAALS COMMENT TO PPR 3

The Federal Rules do not presently permit precomplaint discovery, but it is permitted in some states, either after an action has been commenced by writ of summons (e.g., Pa. R .Civ. P 4003.8), or by a miscellaneous action brought for the sole purpose of seeking leave to conduct the discovery (e.g., Ohio Rev. Code § 2317.48; N.Y. CPLR Law § 3102(c)).

The Federal Rules do not permit presuit discovery in the same way some state rules do, but Fed. R. .Civ. P. 27(a) expressly allows "depositions to perpetuate testimony before an action is filed," and has been held to apply more broadly than merely to depositions. Wright and Marcus, *Federal Practice and Procedure: Civil* 2d § 2071 (courts have power to make orders under Rule 34 and 35 through a petition under Rule 27). Interestingly, limits to the scope of Rule 27 are based on the existence of notice pleading and post-suit discovery.

[37] *See*, Dodson, *supra* n.29.

RULE FOUR—SINGLE JUDGE

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

Both plaintiff and defendant interests have proposed this treatment of certain complex cases and certain principles are recognized in the Manual for Complex Litigation. *See, e.g., Manual for Complex Litigation, Fourth*, §10.11, recognizing need for judicial supervision of discovery. This proposal would likely yield efficiencies in complex cases but is likely unnecessary and unworkable in the bulk of cases, especially in jurisdictions in which judges ride circuit.

RULE FIVE—INITIAL DISCLOSURES

5.1 No later than (x) days after service of a pleading making a claim for relief, the pleading party must make available for inspection and copying all reasonably available documents and things that may be used to support that party's claims.

5.2 The date for each responsive pleading should be fixed to follow the due date of the applicable initial disclosures required by PPR 5.1 by (x) days.

PPR 5.1 and 5.2 allow a defendant to plead not on the basis of the defendant's knowledge and conduct, but on the basis of how much the plaintiff knows about the defendant's knowledge and conduct; not on the basis of what is true, but on the basis of what can be kept concealed. *Compare* Fed. R. Civ. P. 26(a)(1)(A)(ii), which requires all parties—not just plaintiffs—to disclose, without waiting for a request, "a copy—or a description by category and location—of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment."

Nothing in the IAALS/ACTL Final Report, especially Principle 5, or in IAALS Comment to these PPRs, explains why making the plaintiff disclose first would make litigation more efficient, and there is good reason to fear that making a plaintiff disclose first might make litigation less just.

5.3 No later than (x) days after service of a pleading defending against a claim for relief, the pleading party must make available for inspection and copying all reasonably available documents and things that may be used to support any defense of that party.

PPR 5.3 should require a defendant to disclose documents that not only support its defenses or contradict the facts alleged in the complaint but also "*Brady*"—like material that support the allegations of the complaint of that undercut defenses. Nothing in the IAALS/ACTL Final Report, especially Principle 5, or in IAALS Comment below,

explains why this PPR should be limited to requiring disclosure of documents that support a defense but not those that support a plaintiff's claims.

5.4 Each party has an ongoing duty to supplement the initial disclosures promptly upon becoming aware of the supplemental information.

5.5 A party that fails to comply with PPR 5.1, 5.3 or 5.4 may not use for any purpose the document or thing not produced, unless the court determines that the failure to disclose was substantially justified or was harmless.

PPR 5.5's sanction of not allowing nondisclosed documents to be used at trial is not applicable to, and thus provides no deterrence against, a party's nondisclosure of adverse evidence.

IAALS COMMENT TO PPR 5

The IAALS/ACTL Principles suggest that the plaintiff should be required to produce such documents very shortly after the complaint is served and that the defendant (who, unlike the plaintiff, may not be presumed to have prepared for the litigation beforehand) be required to produce such documents within a somewhat longer period of time. However, court rules on timing vary so these rules have left the times to be determined by the pilot project court. See FINAL REPORT ON THE JOINT PROJECT OF THE AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM 8 (Mar. 11, 2009).

RULE SIX—MOTION TO DISMISS/STAY OF DISCOVERY

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

RULE SEVEN—PRESERVATION OF ELECTRONICALLY STORED INFORMATION

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

Rule 7.1 does not acknowledge the existing, affirmative duty to identify and preserve documents, which arises *when litigation is reasonably anticipated*. *Pension Plan*

v. Banc of Am. Sec., LLC, No. 05-civ-9016, 2010 WL 184312, *12 (S.D.N.Y. Jan. 15, 2010) (Shira A. Scheindlin, D.J.).

RULE EIGHT—INITIAL PRETRIAL CONFERENCE

8.1 Unless requested sooner by any party, the judge to whom the case has been assigned must hold an initial pretrial conference as soon as practicable after appearance of all parties. Each party's lead trial counsel must attend this conference. At least three days before the conference, the parties must submit a joint report setting forth their agreement or their respective positions on the following matters, if applicable:

a. an assessment of the application to the case of the proportionality factors in PPR 1.2;

b. production, continued preservation, and restoration of electronically stored information, including the form in which electronically stored information is to be produced and other issues relating to electronic information;

c. proposed discovery and limitations on discovery, specifically discussing how the proposed discovery and limitations on discovery are consistent with the proportionality factors in PPR 1.2. Limitations on discovery may include:

i. limitations on scope of discovery;

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

iii. limitations on the types of discovery;

iv. limitations on the restoration of electronically stored information;

v. numerical limitations;

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

vii. limitations on the time available for discovery;

viii. cost shifting/co-pay rules, including the allocation of costs of the production of electronically stored information;

ix. financial limitations; and
x. discovery budgets that are approved by the clients and the court.

d. proposed date for the completion of discovery;

e. proposed date for disclosure of prospective trial witnesses;

f. dispositive motions;

g. the amount of time required for the completion of all pretrial activities and the approximate length of trial;

h. the issues to be tried;

i. the appropriateness of mediation or other alternative dispute resolution;

j. sufficiency of pleadings and compliance with PPR 2;

k. amendment of pleadings;

l. joinder of parties;

m. expert witnesses, including dates for the exchange of expert reports;

n. computation of damages and the nature and timing of discovery relating to damages; and

o. any other appropriate matter.

PPR 8.1 is modeled on Fed. R. Civ. P. 16 but focuses on addressing substantive issues set out elsewhere in the PPRs. Our comments to those rules are applicable here.

8.2 As soon as possible after that conference, the judge to whom the case is assigned must make an initial pretrial order with respect to each of the matters set forth above and set a trial date. The initial pretrial order must specifically include the court's own assessment of the applicability to the case of the proportionality factors in PPR 1.2. In arriving at that assessment, the court should consider, but is not bound by, the assessments made by the parties. Modifications to the initial pretrial order may be made only upon a showing of good cause. Except as otherwise provided by the PPR, continuances and stays must not be permitted.

PPR 8.2 requires early setting of a trial date; Fed. R. Civ. P. 16, does not. Such settings have been shown to speed the path to trial or settlement. Roselle L. Wissler & Bob Dauber, *Leading Horses to Water: The Impact of an ADR "Confer and Report" Rule*, 26 JUST. SYS. J. 253, 269 (2005) (summarizing empirical studies), and embedding the practice in the Fed. R. Civ. P. is worth consideration.

Limitations on the ability to modify initial pretrial orders unrealistically and unnecessarily constrain the capacity of judges to fashion orders appropriate for particular cases. Limitations discourage counsel from dealing with the vicissitudes of life that necessitate changes in schedule. Large firms representing corporations in large cases can adapt themselves to rigid schedules. Solo practitioners dealing with human clients often cannot.

IAALS COMMENT TO PPR 8.1

PPR 8.1(c)(viii) anticipates that the parties' joint report may include an allocation of the costs of producing electronically stored information. Unless directed otherwise by an order of the court, the cost of preserving, collecting and producing electronically stored information must be borne by the producing party. The court shall consider shifting any or all costs associated with the preservation, collection and production of electronically stored information if the interests of justice and proportionality so require.

RULE NINE—ADDITIONAL PRETRIAL CONFERENCES/SETTING THE TRIAL DATE

9.1 A party may request a special conference with the court to seek guidance on or the modification or supplementation of the court's outstanding pretrial orders.

9.2 The court may hold additional status conferences on its own motion.

9.3 A conference may be held in person or by telephone or videoconference, at the court's discretion.

9.4 If not already set in the initial pretrial order, the court must set a trial date at the earliest practicable time, and that trial date must not be changed absent extraordinary circumstances.

PPR 9 adds no authority not already exercised by federal courts. The imprecision built into the requirements of PPR 9.4–"earliest practicable time;" "extraordinary circumstances"–renders the rule more aspirational than mandatory. That is a good thing. These are worthy aspirations but potentially handcuffing mandates.

RULE TEN—DISCOVERY

10.1 Discovery must be limited in accordance with the initial pretrial order. No other discovery will be permitted absent further court order based on a showing of good cause and proportionality.

10.2 Discovery must be limited to matters that would enable a party to prove or disprove a claim or defense or to impeach a witness and must comport with the factors of proportionality in PPR 1.2, including the importance of the proposed discovery in resolving the issues, total costs and burdens of

discovery compared to the amount in controversy, and total costs and burdens of discovery compared to the resources of each party.

PPR 10 repeats much of what is problematic about the PPRs overall: the emphasis on speed, arbitrary limits, efficiency, and proportionality over every other need and value. Tellingly, the interests of justice are nowhere mentioned. PPR 10.2, applied literally, could impose an almost impossible burden on judges who would be required to resolve discovery disputes.

RULE ELEVEN—EXPERT DISCOVERY

11.1 Each expert must furnish a written report setting forth his or her opinions, and the reasons for them, and the expert's direct testimony will be strictly limited to the contents of the report. There must be no additional discovery of expert witnesses except as provided by the initial pretrial order.

11.2 Except in extraordinary cases, only one expert witness per party may be permitted to submit a report and testify with respect to any given issue.

Cases today depend on multiple experts whose opinions are altered by facts discovered as the case develops. A single expert with a single opinion or a discrete set of opinions is a thing of the past. Expert opinions are admitted into evidence for the purpose of assisting a jury in finding truth. That purpose is better served by allowing experts to render their opinions on the basis of current facts than it is by the essay contest created by the proposed rule.

IAALS COMMENT TO PPR 11

This rule is intended to apply to Federal Rule of Evidence 702 experts. It is not meant to address testimony of fact witnesses who, by virtue of their training and experience, would be qualified to express expert opinions but are not retained by any party for that purpose.

RULE TWELVE—COSTS AND SANCTIONS

12.1 The court may impose sanctions in addition to those set forth in PPR 5.5, as appropriate for any failure to provide or for unnecessary delay in providing required disclosures or discovery.

12.2 Sanctions may be imposed for destruction or failure to preserve electronically stored information only upon a showing of intent to destroy evidence or recklessness.

PPR 12 radically alters the standard by which spoliation of evidence is judged. Currently, a duty to preserve arises when litigation is reasonably anticipated, and even negligent breach of the duty can be sanctioned. *Pension Plan v. Banc of Am. Sec., LLC*, No. 05-civ-9016, 2010 WL 184312, *12 (S.D.N.Y. Jan. 15, 2010) (Shira A. Scheindlin,

D.J.) (emphasis added).[38] Under the existing regime, the level of culpability (negligence, recklessness, intentional conduct) affects the degree of sanction, not the possibility of it. *Id*. The existing regime is deeply grounded in the protection of the integrity of judicial processes. *Id*. at *12 & n.24.

PPR 12.2 would rob courts of the ability to demand from officers of the courts and from litigants the standards of conduct necessary to assure both the reality and the public perception of fair play in adjudication. It invites parties to ignore their affirmative duties to preserve evidence.

[38] *See* The Sedona Conference Working Group on Electronic Document Retention & Production (WG1), *The Sedona Principles: Best Practices, Recommendations & Principles for Addressing Electronic Document Production*, Second Edition 11, 28 (2007), *available at* http://www.thesedonaconference.org/content/miscFiles/TSC_PRINCP_2nd_ed_607.pdf.