Summary Comparison of Bar Association Submissions to the Duke Conference Regarding the Federal Rules of Civil Procedure

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American Bar Association Litigation Section
American College of Trial Lawyers/Institute for the Advancement of the American Legal System
New York City Bar Federal Courts Committee
Lawyers for Civil Justice
Lawyers for Constitutional Litigation (for The American Association for Justice)

I. Introduction

This is a summary of the proposals of each organization that has been invited to contribute to the Duke Conference discussion regarding suggested amendments to the Federal Rules of Civil Procedure. These five organizations are the ABA Litigation Section, the ACTL and the IAALS (which combined efforts to prepare recommendations), the Center for Constitutional Litigation on behalf of their client The American Association for Justice (formerly the Association of Trial Lawyers of America, ATLA), the Federal Courts Committee of the Association of the Bar for the City of New York ("NYC Bar Association Federal Courts Committee"), and the Lawyers for Civil Justice. This report excerpts and summarizes the commentary of each organization, and lists in full any proposed rule that organization offered.

This summary is organized by the topics below. Parts 1 through 12 are organized by the ACTL's pilot program rules, as both the ACTL report and the Center for Constitutional Litigation used this framework. Parts 13 through 16 were topics that were not addressed directly by the ACTL report, but were raised by the comments of other organizations.

Part 1. FRCP 1 – Construal of the Rules
Part 2. Pleadings
Part 3. Pre-Litigation Discovery
Part 4. Judicial Management
Part 5. Initial Disclosure
Part 6. Motion to Dismiss / Stay of Disclosure
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Part 10. Discovery
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Part 12. Sanctions
Part 13. Discovery and Interim Motions
Part 14. Summary Judgment
Part 15. Mediation & Settlement
Part 16. Class Certification

II. General Themes of Each Organization

Each organization prefaced its report with introductory statements describing its perspective on the Federal Rules as they stand, and where they should go. Below are excerpts from the introductions of each organization discussed in this summary.

A. American Bar Association Litigation Section

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 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.

B. American College of Trial Lawyers ("ACTL") / Institute for the Advancement of the American Legal System ("IAALS")

Although the civil justice system is not broken, it is in serious need of repair. In many jurisdictions, today's system takes too long and costs too much. Some deserving cases are not brought because the cost of pursuing them fails a rational cost-benefit test while some other cases of questionable merit and smaller cases are settled rather than tried because it costs too much to litigate them.

The existing rules structure does not always lead to early identification of the contested issues to be litigated, which often leads to a lack of focus in discovery. As a result, discovery can cost far too much and can become an end in itself.

Judges should have a more active role at the beginning of a case in designing the scope of discovery and the direction and timing of the case all the way to trial. Where abuses occur, judges are perceived not to enforce the rules effectively.

C. Center for Constitutional Litigation

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….The IAALS and the ACTL in 2009 published a study recommending what the organizations accurately called "radical" changes to the civil justice system.

The organizations subsequently made their recommendations concrete by proposing a set of "Pilot Project Rules (PPR)" 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.

The ACTL is a prestigious organization of prestigious lawyers, but its members who participated in the survey are highly skewed to toward the interests of corporate parties. The IAALS 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.

Underlying the study is an unsupported assumption that is demonstrably incorrect: that discovery costs are out of control. 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. Costs are high when stakes are high, but, in general, not disproportionately so. Costs are problematic only on a small percentage of cases, generally those that involve clashes of corporate titans.

D. NYC Bar Association Federal Courts Committee

As a fundamental principle guiding the adjudication of civil cases in federal courts, Rule 1 of the Federal Rules of Civil Procedure (the "FRCP") states that the rules should be construed and administered "to secure the just, speedy and inexpensive determination of any action." This mandate, however, may now be an empty promise. Civil litigation has become too cumbersome, expensive and time consuming, and the exponential growth of electronically stored information ("ESI") over the past decade has simply added strains to an already overburdened system.

In an effort to address the issues that arise when practicing in federal courts, the Federal Courts Committee of the New York City Bar Association (the "Association"), on behalf of the Association, engaged in a six-month process whereby the committee examined the issues and developed a number of recommendations to improve the federal civil litigation system. The Committee is comprised of federal practitioners with backgrounds representing both plaintiffs and defendants, in house counsel and government attorneys.

Some recommendations are aspirational, as they propose significant change for the purpose of highlighting the need for change in that particular area, while recognizing that such drastic change may not be feasible in the near future. However, the overarching goal of the recommendations is to encourage a more expedient resolution of cases without unnecessary expense to participants. The Association's recommendations thus endeavor to balance changes designed to improve the exchange of information for resolving disputes in a more cost-effective manner, with the realities associated with practicing in an adversarial system.

E. Lawyers for Civil Justice

The need for systemic reform of the Federal Rules is deeply felt by a diverse spectrum of stakeholders in the federal civil litigation process. The substantial reforms needed cannot be left to sporadic and potentially inconsistent ad hoc holdings by various courts deciding the cases that appear before them. Broad-based policy and rule reform is needed, as discussed more fully in this Whitepaper. Courts acting individually face practical and institutional limitations that prevent them from making the needed systemic changes to inter-related rules.

Recently, in *Twombly*, a decision that heralds the examination being undertaken by this Committee, the United States Supreme Court discussed the institutional limitations of the federal courts to manage, let alone reform, discovery through litigation on a case-by-case basis. More to the point here, the Supreme Court made a frank, and we submit accurate, assessment of the federal courts' inability to control discovery costs, even in meritless claims, through case management in individual cases. In short, the Supreme Court concluded that under the present system of "notice" pleading and broad discovery, the federal courts were failing, in key ways, to ensure the just, speedy and cost-effective determination of every action.

The Supreme Court and the ACTL/IAALS Report did not criticize the ability or dedication of the members of the federal judiciary. Rather, the statements were an acknowledgement of the institutional limitations facing courts. Major and systemic reform is required to attain the goals set forth in Rule 1, and the Rules as a whole. Such systemic reform cannot be made through litigation alone in the face of these institutional limitations. The need to overhaul the civil litigation system is real and immediate. While the precise fixes may engender vigorous debate, as have every prior effort to amend the Rules to deal with the problems presented by modern litigation in the information age, there is general and widespread agreement that the current system is not working as it should, costs too much, and produces too little.

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1. FRCP 1 - Construal of the Rules

A. ABA Litigation Section

As FRCP 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.

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.

B. ACTL / IAALS

The "one size fits all" approach of the current federal and most state rules is useful in many cases but rulemakers should have the flexibility to create different sets of rules for certain types of cases so that they can be resolved more expeditiously and efficiently.

Pilot Project Rules

1.1. The Rules...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 issue. 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.

IAALS Comment: The FRCP 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.

C. Center for Constitutional Litigation

ACTL 1.1 threatens to ration justice based on costs. Mandating cost/benefit analysis is neither desirable nor practical. Rather than "inexpensive," with a mandate for "cost-effective," the emphasis dilutes the public function the public civil justice system performs. ACTL 1.2 requires a proportionality assessment in every aspect of a case. While Congress applied a proportionality principle in discovery, it has not applied one across all the federal rules. Proportionality, even in discovery, is difficult to apply, leads to inconsistent results, and has precluded discovery in meritorious cases. This concept favors "corporate persons" whose "memories" are stored digitally, and the burden of preserving corporate memories is part of privilege of the corporate form. Discussion of the benefits of discovery is absent from the ACTL's proposed rules and the IAALS analysis.

D. NYC Bar Association Federal Courts Committee

No specific comment

E. Lawyers for Civil Justice

No specific comment

2. Pleadings

A. ABA Litigation Section

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.

[An] answer is often an opaque, uninformative document. 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

Responsive Pleadings:

The proposal below 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.

Proposed Principle: 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."

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.

Curative Post-Complaint Discovery:

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.

Proposed Principle: 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).

B. ACTL / IAALS

Notice pleading should be replaced by fact-based pleading. Pleadings should set forth with particularity all of the material facts that are known to the pleading party to establish the pleading party's claims or affirmative defenses.

A new summary procedure should be developed by which parties can submit applications for determination of enumerated matters (such as rights that are dependent on the interpretation of a contract) on pleadings and affidavits or other evidentiary materials without triggering an automatic right to discovery or trial or any of the other provisions of the current procedural rules.

Pilot Project Rules

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

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

IAALS Comment: 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 pleadings play in narrowing issues at the earliest stages of litigation, by bringing 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…. The material facts pleaded should provide the "who, what, when, where, and how" of each element of a claim or defense….The pleading requirements apply equally to 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 upon information and belief.

ACTL / IAALS Follow up Report: The overall goal of our Principles is faster resolution of cases with less expense. One way to achieve that, we suggest, is early disclosure of material facts.

[O]ur discussions for reform in general and about that Principle in particular began before *Twombly* and *Iqbal* were decided. Those cases did not influence our recommendation. Indeed, the fact-based pleading to which we refer is different from what those cases require. Our Principle does not address the issue of plausibility. We merely would require that all known material facts be disclosed. We all agreed on the proposition that early disclosure of known facts that will support claims and affirmative defenses is preferred, whether those facts appear in the initial pleadings, early exchanges between counsel or discussions with the court. The purpose of doing so is to inform and shape discovery obligations, especially in the digital age.

Requiring disclosure in complaints and answers is obviously one method—perhaps the best method—for such early disclosure, but it is only one way. Others could easily be devised to help inform and shape discovery obligations. It is the result, not the means, that was important to the Task Force, so long as the disclosure comes early and will not cause delay.

[O]ur Pilot Project Rules do not require fact-based pleading in the *Twombly / Iqbal* sense. Our Principle is being read by some as an endorsement of those opinions and, in particular, is seen as creating an additional pleadings hurdle for plaintiffs that does not exist under notice pleading. That was not our intention. Although our Principle is drafted in terms of pleadings, our intention was to require the pleading party to disclose early in the case all of the material facts known to

that party to establish its claims and affirmative defenses. Our rationale was that early disclosure of known material facts should not be difficult—we would require only disclosure of facts that are known—and should result in early narrowing of the issues and consequently in less discovery, not more.

Simply put, the Final Report is not meant to close the doors to litigants. On the contrary, our Principles are meant to encourage use of our civil justice system by those who currently are foreclosed due to excessive delay and expense.

C. Center for Constitutional Litigation

ACTL 2 prematurely asks the plaintiff to determine which facts are essential, and goes further than *Twombly* in re-establishing nineteenth century pleading rules. FRCP 8(a) requires only a short and plain statement of the claim, sufficient to give the defendant fair notice. ACTL 2 requires pleading each claim, defense, and remedy with particularity, especially for under-resourced plaintiffs. It would shift the focus of the lawsuit to battles over whether the pleadings were sufficient and whether the ultimate facts conformed with the pleadings. The FRCP were adopted to end this gamesmanship. This will focus disputes on what facts might be, not what they are. ACTL 2.2 assumes that it is easy to determine what a statement of fact is. That is a question for the jury, not the judge.

D. NYC Bar Association Federal Courts Committee

Rather than focus on pleadings, which results in the question of what is enough "to get in the courthouse door," the FCC has considered the use of motions, and "whether they can be better framed to allow parties to more expeditiously test whether their cases should continue throughout the litigation, instead of just at the beginning and then at then end, which seems to be the most common current usage."

Recommendation: Establish a new motion under the FRCP to expand the availability and nature of summary adjudication after the pleadings stage and prior to the summary judgment stage.

Summary of proposed rule: Upon the filing of a complaint, a defendant is presented with the following options:

1. The defendant may make a traditional motion to dismiss under Rule 12(b), in which case all discovery is stayed pending the resolution of that motion; or

2. The defendant may instead opt to exchange enhanced initial disclosures with the plaintiff, in which case the defendant would obtain the right to make a motion for summary adjudication ("Summary Adjudication Motion"), which it may combine with a Rule 12(b) motion.

3. With respect to the plaintiff, if the defendant files an answer, or makes and does not succeed upon a traditional 12(b) motion to dismiss, the plaintiff will have the right to opt to exchange enhanced initial disclosures with the defendant and make a Summary Adjudication Motion. The plaintiff can also bring such motion as a cross-motion to one brought by the defendant.

4. The enhanced initial disclosures shall include the right to take 14 total hours of deposition on each side;

5. If and to the extent that a party prevails on a Summary Adjudication Motion, no further discovery shall take place on the adjudicated issue(s) or claim(s), and the court's resolution that matter is law of the case;

6. In ruling upon a Summary Adjudication Motion the court shall apply the substantive standard applicable to summary judgment motions, but shall not include the option of deferring pending additional discovery.

7. A Summary Adjudication Motion must have a strict timetable for briefing and decision, determined at the outset of the motion.

E. Lawyers for Civil Justice

The Rules Must be Amended to Require a Short, Plain Statement of the Material Facts Supporting the Claims and Defenses. The Rules require fact pleading, not notice pleading.

Rule 8 was not adopted as a doctrinal choice in favor of notice pleading, which leaves issue identification and resolution to discovery and trial. Rather, the type of pleading required by Rule 8 was simply the most practical tool thought to be available at the time to resolve cases simply. In complex litigation, however, the consensus reaction has been to require more particular pleading standards for the same reason: so that discovery would not become the same sort of irrelevant, expensive time waster that common law and code pleading had become. The essence of our proposed amendment would codify the *Twombly-Iqbal* standard…

Proposed Rules:

Rule 8. General Rules of Pleading

(a) Claim 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, made with particularity, of all material facts known to the pleading party that support the claim, ~~showing~~ creating a strong inference that the pleader is plausibly entitled to relief; and

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

For the purposes of this section, a material fact is one that is essential to the claim and without which it could not be supported. As to facts pleaded on information and belief, the pleading party must set forth with particularity the factual information supporting the pleading party's belief.

(d) ~~Pleading to Be Concise and Direct~~; Alternative Statements; Inconsistency.
~~(1) In General. Each allegation must be simple, concise, and direct. No technical form is required.~~

(1) Alternative Statements of a Claim or Defense. A party may set out 2 or more statements of a claim or defense alternatively or hypothetically, either in a single count or defense or in separate ones. If a party makes alternative statements, the pleading is sufficient if any one of them is sufficient.

(2) Inconsistent Claims or Defenses. A party may state as many separate claims or defenses as it has, regardless of consistency.

(e) Construing Pleadings. Pleadings must be construed so as to do justice.

Rule 9. Pleading Special Matters

(b) Fraud or Mistake; Conditions of Mind. In accordance with Rule 8(a)(2), in alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake.

(c) Conditions Precedent. In pleading conditions precedent, so long as the pleading otherwise satisfies the requirements of rule 8(a)(2), it suffices to allege generally that all conditions precedent have occurred or been performed. But when denying that a condition precedent has occurred or been performed, a party must do so with particularity.

Rule 12. Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions; Waiving Defenses; Pretrial Hearing

(a) (4) Effect of a Motion.

(A) Alteration of time periods. Unless the court sets a different time, serving a motion under this rule alters these periods as follows:

(i) if the court denies the motion or postpones its disposition until trial, the responsive pleading must be served within 14 days after notice of the court's action; or
(ii) if the court grants a motion for a more definite statement, the responsive pleading must be served within 14 days after the more definite statement is served.

(B) Stay of Discovery. Upon the filing of a motion to dismiss under Rule 12(b)(6), a motion for judgment on the pleadings under Rule 12(c), or a motion for more definite statement under Rule 12(e), all discovery and other proceedings shall be stayed during the pendency of the motion unless the court finds upon the motion of any party that particularized discovery is necessary to preserve evidence or to prevent undue prejudice to that party.

Rule 65. Injunctions and Restraining Orders

(b) Temporary Restraining Order.

(1) Issuing Without Notice. The court may issue a temporary restraining order without written or oral notice to the adverse party or its attorney only if:

(A) specific facts in an affidavit or a verified complaint that comports with Rule 8(a)(2) clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition; and

(B) the movant's attorney certifies in writing any efforts made to give notice and the reasons why it should not be required.

3. Pre-Litigation Discovery

A. ABA Litigation Section

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

B. ACTL / IAALS

Pilot Project Rules

3.1 On motion by a proposed plaintiff with notice to the proposed defendant and opportunity to be heard, a proposed plaintiff may obtain precomplaint discovery upon the court's determination, after hearing, that: (a.) the moving party cannot prepare a legally sufficient complaint in the absence of the information sought by the discovery; (b.) the moving party has probable cause to believe that the information sought by the discovery will enable preparation of a legally sufficient complaint; (c.) the moving party has probable cause to believe that the information sought is in the possession of the person or entity from which it is sought; (d.) the proposed discovery is narrowly tailored to minimize expense and inconvenience; and (e.) the moving party's need for the discovery outweighs the burden and expense to other persons and entities.

3.2. The court may grant a motion for precomplaint discovery directed to a nonparty pursuant to PPR

3.1. Advance notice to the nonparty is not required, but the nonparty's ability to file a motion to quash shall 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.

IAALS Comment: 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…or by a miscellaneous action brought for the sole purpose of seeking leave to conduct the discovery.

C. Center for Constitutional Litigation

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. This will not reduce costs, and these rules will set too high a bar for plaintiffs.

The FRCP do not allow broad pre-complaint discovery, but provision is made in Rule 27(a) for pre-complaint depositions, and the rule is generally construed more broadly to allow additional types of discovery. These Rules apply based on the notice pleading and post-suit discovery.

D. NYC Bar Association Federal Courts Committee

No specific comment

E. Lawyers for Civil Justice

No specific comment

4. Judicial Management

A. ABA Litigation Section

No specific comment

B. ACTL / IAALS

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

Pilot Program Rules

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

C. Center for Constitutional Litigation

This proposed rule would be efficient for complex litigation, but would likely be unnecessary and unworkable in the bulk of federal court cases.

D. NYC Bar Association Federal Courts Committee

Strong and consistent judicial management is essential to an effective litigation process. Judges now have considerable latitude to ensure this goal [as embodied in FRCP 16]…Although the goals of Rules 1 and 16 are consistent with the aspirations of any program of reform, these goals have little chance of being realized unless the judicial officer establishes early and continuing control.

Recommendation No. 1: One-Case, One-Judge Civil Assignment - Strong and consistent judicial management is best achieved when one judicial officer oversees the case from its filing to its disposition. But there is now a shortage of Article III judges to carry out these responsibilities. There are currently 84 district court vacancies nationwide, and only 22 nominees pending. Further, there are 31 courts with "judicial emergencies." In the current climate, it is unlikely that Congress will create additional judgeships. To fill the gap at the district court level, we recommend that magistrate judges be given enhanced ability to participate in civil case assignments. We urge that all cases, except for those listed below, should be assigned to one district court or magistrate judge for all purposes upon the filing of the initial pleading. The names of magistrate judges will be included in the civil case assignment wheel and be drawn at the time and in the same manner as a district court judge. The proportion of cases directly assigned to magistrate judges may be adjusted from time to time to balance the workload of all judicial officers.

A case would be assigned to a magistrate judge, the would be asked to consent to the magistrate. If a party did not consent, the case would be randomly assigned to a district judge, who would refer certain matters to that district judge. In rem proceedings, TRO's, and bankruptcy appeals would be exempt from the magistrate assigning system.

E. Lawyers for Civil Justice

No specific comment.

5. Initial Disclosure

A. ABA Litigation Section

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.

Plaintiff's initial disclosures

[Except in complex cases] 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.

Proposed principles:

A. Plaintiff's Initial Disclosure: 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)-(D).

B. Other party's initial disclosure: 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.

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: <u>In complex cases</u>, 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.

B. ACTL / IAALS

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

Pilot Program Rules

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

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

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

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

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

C. Center for Constitutional Litigation

In the FRCP as they stand, both parties are required to provide parties "a copy—or description by category and location—of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, control and may use to support its claims or defenses, unless the use would be solely for impeachment." There is no reason why having the plaintiff disclose first would be more efficient, and there is reason to fear that it would make litigation less just.

With respect to ACTL 5.3, defendants should also be required to produce the civil equivalent of *Brady* material, that support the underlying allegations of the complaint.

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

D. NYC Bar Association Federal Courts Committee

Recommendation No. 1: In connection with a FRCP 26(f) and/or 16(b) conference, the parties exchange in advance, and then submit to the court not only their proposed schedule, but also their initial discovery requests for at least a high-level discussion about relevance and reasonableness. The initial discovery requests should be tailored to the key issues in dispute, rather than designed to turn over every rock, and the need to discuss the reasonableness of such proposed discovery with the court should encourage the parties to self-impose some discipline on the breadth of their demands and ensure that the discovery sought, and its concomitant burdens and costs, is proportionate to the matters in dispute.

E. Lawyers for Civil Justice

No specific comment

6. Motions to Dismiss / Stays of Discovery

A. ABA Litigation Section

Stays of Discovery

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.

Proposed Principles:

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.

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.

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.

B. ACTL / IAALS

Pilot Program Rules

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.

C. Center for Constitutional Litigation

No specific comments

D. NYC Bar Association Federal Courts Committee

Associated with their suggestion of a Motion for Summary Adjudication:

Recommendation No. 2 (No. 1 associated with initial disclosure): A motion to dismiss or for summary adjudication [*see supra, part 2*] should operate to stay full discovery absent a court order based on a showing of good cause. While we recognize that a stay of discovery might appear to provide an incentive for a non-meritorious motion just to slow the case down, the essence of a motion to dismiss or a motion for summary adjudication is a contention that there is not a sufficient

legal or factual basis for the case to move forward. In that context, we do not believe that the parties should continue to have to bear the burdens and costs of discovery until the court resolves that gatekeeping motion. However, as we have noted above in the context of discussing the procedures for such motions, protections need to be built in to ensure that those motions are not abused and that they are decided promptly.

E. Lawyers for Civil Justice

Proposed Rule:

Stay of Discovery. Upon the filing of a motion to dismiss under Rule 12(b)(6), a motion for judgment on the pleadings under Rule 12(c), or a motion for more definite statement under Rule 12(e), all discovery and other proceedings shall be stayed during the pendency of the motion unless the court finds upon the motion of any party that particularized discovery is necessary to preserve evidence or to prevent undue prejudice to that party.

7. E-Discovery

A. ABA Litigation Section

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.

…[T]he 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. *See Sedona Principles for Addressing Electronic Document Production (June 2007).*

Proposed Principles:

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.

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.

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.

B. ACTL / IAALS

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

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

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

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

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

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

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

Pilot Program Rules

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.

C. Center for Constitutional Litigation

ACTL 7.1 does not address the current affirmative duty to preserve documents, which arises when litigation is reasonably anticipated.

D. NYC Bar Association Federal Courts Committee

E-Discovery has become one of the most significant sources of expense for parties in litigation. Managing data taxes client resources, to the extent that it is cost-prohibitive. Expensive e-discovery is not always required, but in some cases the high and disproportionate costs are cause for concern. There should be closer judicial supervision of e-discovery, in addition to the following recommendations.

Recommendation No. 1: Preservation - The duty to preserve information potentially relevant to a litigation that arises under common law is triggered when a party becomes aware that materials in its possession, custody or control may be relevant to an actual or reasonably anticipated litigation. There is no bright-line rule for identifying reasonable anticipation, and courts have generally addressed this issue in broad terms. The vagueness of the "I know it when I see it" standard surrounding pre-litigation preservation duties creates great uncertainty for litigants, and forces courts to assess the conduct at a time when the once-fluid issues have long since crystallized.

(a) Define and limit preservation triggers and the scope of the duty to preserve

The duty to preserve would still arise upon the reasonable anticipation of litigation. However, a party could not be sanctioned for the loss of data occurring more than one year prior to the receipt of:

(i) a preservation demand letter; or
(ii) the filing of a complaint, whichever occurs first.

Where a preservation notice is the trigger, the duty should expire if the demand is not renewed or litigation does not commence within six months or some other specific period of time. By adhering to these standards in good faith, litigants would be protected from sanctions, including being eligible for Rule 37(e) safe harbor protection. We note that this does not mean that a party can move to destroy particular information once these deadlines expire. We would expect parties to act within their standard document retention policies, and not single out potential litigation-relevant material for destruction.

Recommendation No. 2: Cost Shifting - The wider use of ESI discovery cost shifting by courts has the potential to encourage parties to engage in more reasonable discovery conduct. Although the FRCP already encompass cost shifting, the provisions appear to be under-used and provide limited guidance to a court seeking to assess cost shifting requests. We propose revising the rules to incorporate current common law standards. Cost shifting should be available not only for overbroad production requests, including review, but also for overbroad preservation demands.

E. Lawyers for Civil Justice

The Rules Must Address Preservation of Information.

Preservation of electronically stored information (ESI) is a very serious adverse consequence of the information explosion and unfettered discovery that, unfortunately, has not been ameliorated by the 2006 E-Discovery Amendments. Ancillary litigation involving preservation has risen at an alarming rate.

Proposed Rule Amendments

26(b)(2)(B) Specific Limitations on Electronically Stored Information.

(i) A party need not provide discovery of the following categories of electronically stored information from sources, absent a showing by the receiving party of substantial need and good cause, subject to the proportionality assessment pursuant to Rule 26(b)(2)(C):

(a) deleted, slack, fragmented, or other data only accessible by forensics;
(b) random access memory (RAM), temp files, or other ephemeral data that are difficult to preserve without disabling the operating system;
(c) on-line access data such as temporary internet files, history, cache, cookies, and the like;
(d) data in metadata fields that are frequently updated automatically, such as last-opened dates;
(e) information whose retrieval cannot be accomplished without substantial additional programming , or without transforming it into another form before search and retrieval can be achieved;
(f) backup data that are substantially duplicative of data that are more accessible elsewhere;
(g) physically damaged media;
(h) data that reside outside of the producing party's immediate possession, such as data stored by Application Service Providers, including hosted email;
(i) legacy data remaining from obsolete systems that is unintelligible on successor systems; or
(j) any other data that are not available to the producing party in the ordinary course of business and that the party identifies as not reasonably accessible because of undue burden or cost and that on motion to compel discovery or for a protective order, if any, the party from whom discovery of such information is sought shows is not reasonably accessible because of undue burden or cost.

Proposed new Rule 26(h) would provide:

Rule 26 (h) Preservation

(1) Duty to Preserve Preservation of documents, intangible things and electronically stored information, unless otherwise ordered by the court, is limited to matters that would enable a party to prove or disprove a claim or defense, and must comport with the proportionality assessment required by Rule 26(b)(2)(C). All preservation is subject to the limitations imposed by Rule 26(b)(2)(C). The court may specify conditions for preservation.

(2) Specific Limitations on Electronically Stored Information. Absent court order demonstrating that the requesting party has (1) a substantial need for discovery of the electronically stored information requested and (2) preservation is subject to the limitations of Rule 26(h)(1), a party need not preserve the following categories of electronically stored information:

(A) deleted, slack, fragmented, or other data only accessible by forensics;
(B) random access memory (RAM), temp files, or other ephemeral data that are difficult to preserve without disabling the operating system;
(C) on-line access data such as temporary internet files, history, cache, cookies, and the like;
(D) data in metadata fields that are frequently updated automatically, such as last opened dates;

(E) information or databases whose retrieval cannot be quickly accomplished because the database software is not capable of extracting the information sought without substantial additional programming, or must be transformed into another form before search and retrieval can be achieved; (F) backup data that is substantially duplicative of data that are more accessible elsewhere;
(G) physically damaged media;

8. Initial Pre-trial conference

A. ABA Litigation Section

Pre-Trial Orders

The existing requirements of Rules 26(f) and 16 …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.

B. ACTL / IAALS

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

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

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

- Courts are encouraged to raise the possibility of mediation or other form of alternative dispute resolution early in appropriate cases. Courts should have the power to order it in appropriate cases at the appropriate time, unless all parties agree otherwise. Mediation of issues (as opposed to the entire case) may also be appropriate.

- The parties and the courts should give greater priority to the resolution of motions that will advance the case more quickly to trial or resolution.

- All issues to be tried should be identified early.

- These Principles call for greater involvement by judges. Where judicial resources are in short supply, they should be increased.

- Trial judges should be familiar with trial practice by experience, judicial education or training and more training programs should be made available to judges.

Pilot Program Rules

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.) 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;
(o.) any other appropriate matter.

8.2. As soon as possible after that conference, the judge to whom the case is assigned must make an initial pretrial order with respect to each of the matters set forth above and set a trial date. The initial

pretrial order must specifically include the court's own assessment of the applicability to the case of the proportionality factors in PPR 1.2. In arriving at that assessment, the court should consider, but is not bound by, the assessments made by the parties. Modifications to the initial pretrial order may be made only upon a showing of good cause. Except as otherwise provided by the PPR, continuances and stays must not be permitted.

IAALS Comment: [This suggestion] 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.

C. Center for Constitutional Litigation

[ACTL] 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.

Embedding the practice of setting an early trial date should be considered, as studies have shown that early trial dates speed the path to trial or settlement. However, limitations on the ability to modify pre-trial orders unrealistically and unnecessarily constrain the ability of judges to fashion appropriate orders for each case. Regarding this lack of flexibility, "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."

D. NYC Bar Association Federal Courts Committee

Recommendation No. 2: Mandatory Initial Pre-Trial Conference Followed by Periodic Conferences Strong and consistent judicial management will also be enhanced by requiring that the Rule 16(a) initial pre-trial conference be mandatory, rather than discretionary as it is now. If the defendant opts to answer the complaint and forgo a motion to dismiss or, as proposed above, forgo a Summary Adjudication Motion, the conference should be held shortly after the answer is filed. If the defendant instead decides to make a Rule 12(b) motion or a Summary Adjudication Motion or combine the two motions, the defendant should promptly advise the court and it should then schedule the conference in advance of the filing of the motion(s) to resolve whatever procedural and discovery issues the motion(s) may raise. We further recommend that the filing of the motion(s) should stay further full discovery pending resolution of the motion(s).

We further recommend that the court set periodic conferences following the initial conference to monitor the progress of the case and quickly resolve any disputes that arise. Frequent conferences help advance the goals of Rules 1 and 16 and may also lead to earlier settlement. We note that the court currently has discretion to do all of these things. Our suggestion is to encourage the court to more actively use its discretion to engage with the parties and actively assist in moving cases toward resolution.

E. Lawyers for Civil Justice

No specific comment

9. Trial Dates / Additional Pre-trial Conferences

A. ABA Litigation Section

Trial Dates

Our Section of Litigation committee believes in 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.

The existing civil rules, specifically Rules 16 and 26, already provide the means for federal courts to take all of these steps.

Final Pre-Trial Conference

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) [*see ABA Principles for full recommendation*].

B. ACTL / IAALS

Pilot Program Rules

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.

C. Center for Constitutional Litigation

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.

D. NYC Bar Association Federal Courts Committee

Recommendation No. 3: Case Significant Deadlines Not Be Extended Absent Compelling Circumstances Beyond the Parties Control - Strong judicial management also includes the setting, at a relatively early stage of the case, firm dates for:

(a) completion of discovery;
(b) filing dispositive motions; and
(c) for submission of the pretrial order and for trial.

The date for filing dispositive motions should be sufficiently in advance of the trial date so that the parties do not have to prepare for trial while dispositive motions are pending. Further, if a dispositive motion is filed, it should extend the trial date and the preparation of a pre-trial order until a reasonable time after the motion is decided. That is because it is often prohibitively expensive to litigate a dispositive motion while preparing for trial… We recommend that extensions be granted only on a showing of good cause…[but whatever standard is adopted] the district or magistrate judge will continue to have discretion to permit extensions in the interests of justice.

E. Lawyers for Civil Justice

No specific comment

10. Discovery

A. ABA Litigation Section

Discovery Standards

The Committee would like to give teeth to the narrowing of the scope of discovery with the 2000 amendment to Rule 26(b)(1 -- narrowing the scope 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 of 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.

Enforcement of Existing Rules

ABA Survey respondents acknowledged that there are mechanisms for limiting discovery, but that those limitations are rarely invoked or enforced by the courts. 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.

Interrogatories

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

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

Requests for Admission

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.

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

B. ACTL / IAALS

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

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

- There should be early disclosure of prospective trial witnesses.

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

- We suggest the following possible areas of limitation for further consideration:
  (1) limitations on scope of discovery (i.e., changes in the definition of relevance);
  (2) limitations on persons from whom discovery can be sought;
  (3) limitations on the types of discovery (e.g., only document discovery, not interrogatories);
  (4) numerical limitations (e.g., only 20 interrogatories or requests for admissions; only 50 hours of deposition time);
  (5) elimination of depositions of experts where their testimony is strictly limited to the contents of their written report;
  (6) limitations on the time available for discovery
  (7) cost shifting/co-pay rules;
  (8) financial limitations (i.e., limits on the amount of money that can be spent - or that one party can require its opponent to spend - on discovery); and
  (9) discovery budgets that are approved by the clients and the court.

- All facts are not necessarily subject to discovery.

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

- Discovery relating to damages should be treated differently.

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

Pilot Program Rules

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.

C. Center for Constitutional Litigation

The proposed ACTL Rule 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.

D. NYC Bar Association Federal Courts Committee

The desire of every litigant to discover every potentially relevant fact has caused the time and cost associated with discovery to grow, and can "excessively prolong the time required to bring a case to resolution."

Recommendation No. 3 (No. 1 under Initial Disclosure; No. 2 under Motion to Dismiss/Stay of Discovery): Adopt uniform definitions and instructions for discovery requests, similar to those embodied in the Joint Southern and Eastern District of New York Local Civil Rule 26.3. Many basic definitions and instructions are (or should be) substantially similar, regardless of the subject matter of the case. Using common definitions and instructions avoids unnecessary disputes over matters that tend to cause disagreement on what are, for the most part, trivial and collateral issues.

Recommendation No. 4: Modify the rule on interrogatories to limit their use, at the outset of a case, to determining the identity and location of witnesses and documents, and the basis for the calculation of damages. Experience has shown that interrogatories are tremendously burdensome to respond to, but until discovery is well underway or near completion, they rarely lead to much useful information. The costs and burdens associated with answering them generally outweigh their marginal utility. What is more, most of the information typically sought by interrogatories at early stages of discovery largely duplicate the information sought by means of document requests and depositions, which are generally more efficient means of obtaining needed information. Therefore, interrogatories are generally not only burdensome but cumulative. The use of interrogatories to elicit contentions and narrow areas of disagreement can be effective, but typically not until later in the discovery process.

E. Lawyers for Civil Justice

Discovery Rules Must be Clear, Concise, and Limited.

While the repeated attempts to address the catastrophic costs, burdens, and abuses of discovery through judicial intervention were commendable, the practical result of such intervention has not served to solve the problems. Rather, the problems have persisted and festered. It is time to change course. Instead of relying on judicial intervention, a method that arguably encourages excessive motions practice by requiring parties to seek out the assistance of the courts, practitioners should be bound by the rules to narrow the scope of discovery without judicial oversight. It is against this background that we propose a new Rule.

Proposed Rule Amendments

Rule 26(b)(1): Scope in General. The scope of discovery is limited to any non-privileged matter that would support proof of a claim or defense and must comport with the proportionality assessment required by Rule 26(b)(2)(C).

Rule 26(b)(2). Limitations on Frequency and Extent. (A) When Permitted. By order, the court may alter the limits in these rules on the number of depositions and interrogatories or on the length of depositions under Rule 30. By order or local rule, the court may also limit the number of requests under Rule 36, <u>or the number of requests, temporal scope of the requests, or number of custodial sources required to be searched for requests under Rule 34</u>.

Rule 26(b)(2)(C) **When Required**. On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:

(i): the discovery sought is [~~unreasonably~~] cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;
(ii): the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or

(iii): the burden or expense of the proposed discovery outweighs its likely benefit and is not proportional to the claims and defenses at issue considering the needs of the case, the amount in controversy, the parties' resources, the complexity and importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.

Rule 34. Producing Documents, Electronically Stored Information, and Tangible Things or Entering onto Land, for Inspection and Other Purposes

(b) Procedure.
(1) Contents of the Request. The request:

(A) must describe with reasonable particularity each item or category of items to be inspected;
(B) must be limited, unless otherwise stipulated or ordered by the court in a manner consistent with 26(b)(2), to:

(i) a reasonable number of requests, not to exceed 25, including all discrete subparts;
(ii) a reasonable time period of not more than two years prior to the filing date of the complaint;
(iii) a reasonable number of custodial or other information sources for production, not to exceed 10;

(C) must specify a reasonable time, place, and manner for the inspection and for performing the related acts; and
(D) may specify the form or forms in which electronically stored information is to be produced.

Runaway Discovery Costs Require Specific Cost Allocation Provisions

Rule26 in its current form does not provide a reliable method of curbing the negative impact of discovery costs on the parties' ability to carry on their businesses or on the ability of courts to determine cases on the merits. Judges are asked to manage the scope of discovery, but are unable to do so effectively because of institutional limitations on the courts. It is extremely difficult for judges, at the beginning of a case, to determine the proper scope of discovery, because they know less than the parties about the underlying facts of each side's position.

The proposed cost allocation amendment to Rule 26, to require that each party pay the costs of the discovery it seeks, will encourage each party to manage its own discovery expenses by shifting the cost-benefit decision onto the requesting party. A requester-pays rule will encourage parties to focus the scope of their discovery requests on evidence that is reasonably calculated to produce relevant information from the most cost-effective source. In addition to focusing discovery requests, proposed Rule 26 discourages a party from using discovery as a weapon to force settlements without regard to the merits of a case; a party that pays for discovery will have no incentive to make overly broad requests. Furthermore, proposed Rule 26 encourages cooperation between parties to control discovery costs.

Proposed New Rule

26(?) In General. A party submitting a request for discovery is required to pay the reasonable costs incurred by a party responding to a discovery request propounded under these Rules.

(1) Such costs include the costs of preserving, collecting, reviewing and producing electronic and paper documents, producing witnesses for deposition and responding to interrogatories.

(2) Each party is responsible for its own costs related to responding to Disclosure Requirements under Rule 26.

(3) Non parties responding to Subpoenas under Rule 45 shall be entitled to recovery of reasonable costs associated with compliance with the subpoena.

(4) The costs described in subsection (1) and (3) above shall be considered Taxable Costs under Rule 54(d).

11. Experts

A. ABA Litigation Section

No specific comment.

B. ACTL / IAALS

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

Pilot Program Rules

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.

IAALS Comment: 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.

C. Center for Constitutional Litigation

Limiting the expert's testimony to his or her report, as outlined in ACTL 11 is inappropriate, as facts are revealed over time. Since the expert's role is to assist the jury in finding the truth, that purpose is better served by allowing the experts to render opinions based on current facts than the "essay contest created by the proposed rule."

D. NYC Bar Association Federal Courts Committee

No specific comment

E. Lawyers for Civil Justice

No specific comment

12. Sanctions

A. ABA Litigation Section

No specific comment

B. ACTL / IAALS

Pilot Program Rules

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.

C. Center for Constitutional Litigation

[The ACTL rules are] a radical departure from the current standard on spoliation. Under the current duty to preserve regime, the level of culpability effects the degree of sanction, not the possibility of it. This new standard would prevent the courts from being able to demand the necessary standards of conduct to assure fairness.

D. NYC Bar Association Federal Courts Committee

No specific comment

E. Lawyers for Civil Justice

Proposed Amendment to Rule 37(e), Sanctions (to replace the current rule)

Rule 37 (e) Electronically Stored Information. Absent willful destruction, a court may not impose sanctions on a party for failing to provide relevant electronically stored information for the purpose of preventing its use in litigation.

13. Discovery and Interim Motions

A. ABA Litigation Section

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 (*e.g.*, the Eastern District of Virginia), the pre-motion letter practice of others (*e.g.*, the Southern District of New York) or the telephonic conference with the court (*e.g.*, the Southern District of Texas) as ways to keep the case on schedule.

Proposed principles:

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.

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.

B. ACTL / IAALS

No specific comment

C. Center for Constitutional Litigation

No specific comment

D. NYC Bar Association Federal Courts Committee

No specific comment

E. Lawyers for Civil Justice

No specific comment

14. Summary Judgment

A. ABA Litigation Section

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.

B. ACTL / IAALS

No specific comment

C. Center for Constitutional Litigation

No specific comment

D. NYC Bar Association Federal Courts Committee

No specific comment

E. Lawyers for Civil Justice

No specific comment

15. Mediation and Settlement

A. ABA Litigation Section

The parties should be encouraged to discuss settlement, that courts should not have the discretion to order alternative binding proceedings, such as arbitration, without the consent of all parties.

B. ACTL / IAALS

No specific comment

C. Center for Constitutional Litigation

No specific comment

D. NYC Bar Association Federal Courts Committee

Given the consistent references to the expenditure of significant financial resources and time associated with litigating in federal courts, opting for alternate dispute resolution methods such as settlement conferences and mediation may provide an option palatable to some parties…. Current federal court rules do not require parties to engage in meaningful settlement negotiations in the course of litigating their dispute. Although FRCP 16 does include the facilitation of settlement as a goal of the case scheduling conferences held pursuant to that Rule ("16(b) conferences"), anecdotal evidence suggests that settlement discussions at those conferences are frequently fruitless or perfunctory due to a widespread belief (warranted or not) that such discussions are premature before discovery is commenced. Moreover, judges seldom use the power afforded them under Rule 16 to summon the parties themselves to 16(b) conferences, even though the parties' participation may be vital to resolution.

Recommendation: In every civil action commenced in federal court, the clerk's office be required to send -- preferably electronically – a notice to all counsel, shortly after defendant's appearance in an action (whether by answer or motion to dismiss). The notice, which counsel would be required to transmit promptly to their respective clients, shall explain the availability and benefits of mediation and other dispute resolution processes, and describe the particular dispute resolution programs available in the district in which the case is pending. It should also require a return acknowledgment by the client of receipt and that they client understands available options.

To ensure that counsel transmit the notice to their clients, a statement of compliance with the notice transmittal requirement could be added to the Case Management Order, whether issued by the Court or submitted by counsel. If such transmittal had not occurred, counsel would be obliged to take corrective action.

E. Lawyers for Civil Justice

No specific comment

16. Class Certification

A. ABA Litigation Section

No specific comment

B. ACTL / IAALS

No specific comment

C. Center for Constitutional Litigation

In certain circuits a requirement that plaintiffs adduce, as a prerequisite to class certification, sufficient evidence to establish that each and every class member is harmed in the same way is giving rise to burdensome mini-trials and is impeding the just determination of claims.

A single-minded focus on a preliminary showing of uniform "common impact" is inconsistent with the language of Rule 23, which requires only that common issues "predominate." Rule 23 does not require a complete absence of individual issues.

This amendment would address only the need for such proof as a matter of class certification, and would not affect any individualized right to jury trial on a particular issue, in light of the right of all class members to receive notice of any class action settlement or judgment and to "opt out" under Rule 23 to pursue their individual rights.

Proposed Rule Amendments

Rule 23(b)(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. <u>The predominance of common questions should be determined solely based on issues that will be presented at trial. The fact or quantity of injury for individual class members need not be proven at trial and is not pertinent to predominance.</u>

Rule 23(c)(6) <u>Aggregate damages. The fact or quantity of injury for individual class members need not be determined at trial. An award of aggregate damages to the class by a factfinder is permitted. The trial court may allocate damages to individual class members after trial. Aggregate damages may be proved and assessed by statistical or sampling methods or by such other reasonable system of estimating aggregate damages as the court in its discretion may permit without the necessity of separately proving the individual claim of, or amount of damage to, persons on whose behalf the suit was brought.</u>

D. NYC Bar Association Federal Courts Committee

No specific comment

E. Lawyers for Civil Justice

No specific comment