

# ASSOCIATION OF AMERICAN LAW SCHOOLS

## SECTION ON

# CIVIL PROCEDURE

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## FALL 2005 NEWSLETTER

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### MESSAGE FROM THE CHAIR

*Nancy Marder  
Chicago-Kent College of Law*

With the AALS Annual Meeting fast upon us, its theme for this year, *Empirical Scholarship: What Should We Study and How Should We Study It?* has particular resonance for those of us who teach and write in the field of Civil Procedure. The past year has been marked by events in which procedural questions have dominated the headlines -- from Terry Schiavo to the Class Action Fairness Act.

teaching moments in the classroom, they also present great opportunities for those of us who teach and write in the area to try to make a difference, or at least to give our views to legislators and policy-makers considering changes in procedure. As academics, we can contribute to the debate in a variety of ways, such as sharing our empirical studies with legislators, explaining our views to journalists, or testifying at hearings. The optimistic message, then, is that procedure matters and that proceduralists can make a difference. The less optimistic message, though, is that oftentimes procedural changes seem to be shaped by politics, in spite of what our empirical studies show or what we, as experts in the field, suggest.

In this past year, for example, the American Bar Association adopted *Principles for Juries and Jury Trials*, which contains several cutting-edge guidelines for jury practices in federal and state courts (see page 17). Many of these principles were drawn from empirical studies, some conducted with actual jurors and others with mock jurors in an array of jurisdictions. From actual jurors in New York and Arizona, researchers learned that jurors feel more satisfied with their jury experience when they can take notes during trial. From actual jurors in Washington, D.C., Pennsylvania, and Arizona, researchers learned that judges and lawyers who initially opposed having jurors submit written questions to witnesses actually like the

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Newsletter Editor: Vikram Amar

This newsletter is a forum for the exchange of information and ideas. Opinions expressed here do not represent the position of the section or of the Association of American Law Schools.

Although these events present great

practice once they have experience with it. Now the Seventh Circuit is undertaking its own experiment as district judges there implement some of the *Principles* in their own courtrooms, albeit on a temporary basis. This is a positive example of how empirical studies can change policy and practice.

However, there are also examples where empirical studies have not received the attention they deserve and legislators have pursued a course in tension with the empirical evidence. My own state of Illinois provides such an example. The Illinois State Bar Association commissioned an empirical study of the medical malpractice "crisis" in Illinois. The study showed that there was no crisis--doctors were not fleeing the state, as newspapers had recounted, and damage awards for pain and suffering were not out of line, yet the legislature passed a cap of \$500,000 on pain and suffering damage awards. This is an example in which the agendas of different participants (doctors, insurance companies, and trial lawyers) were so strong that important empirical evidence was ignored.

Our section program this year, "The Civil Jury in the Shadow of Tort Reform," takes as its focus the jury in a time of turmoil.

Although the focal point of the panel will be the civil jury, and how it can best be equipped to survive current attacks, the broader questions will explore the intersection of empirical studies and policy-making: What role should empirical studies play in policy-making? Why are they sometimes ignored? And what can we, as academics, do about that?

### **The Civil Jury in the Shadow of Tort Reform**

**Thursday, January 5, 2006**

**4:00 - 5:45 p.m.**

The civil jury is under attack, particularly as politicians, doctors, and representatives of the insurance industry urge tort reform. They focus on high medical malpractice premiums and doctors who threaten to abandon their medical practices because they can no longer afford their premiums, and identify the civil jury as the culprit. The charge against civil juries is that they award excessive damages, particularly in frivolous lawsuits, and that this, in turn, drives up the cost of medical malpractice premiums. The quick-fix solutions that a number of states have adopted include capping non-economic damage awards and taking certain kinds of cases away from juries. The public debate, however, has proceeded with scant evidence that the jury is to blame and with little study as to the effects these quick-fix solutions, which wrest power from juries, will have on the jury over time.

This panel will focus on the health and survival of the civil jury in an era of tort reform. Panelists, drawn from academia and the bench, will address a number of issues, beginning with the empirical evidence, if any, that there is a crisis for which the civil jury is responsible. Much of the scholarship on the jury draws from empirical studies to offer reforms that will actually aid jurors in performing their tasks, rather than limiting their tasks. Yet, these proposals have failed to garner support from politicians, policy-makers, and the press. Thus, this panel also will address how empirical findings can play more of a role in informing public debate and shaping public policy so that the civil jury continues to serve a vital function in our democracy.

This panel, moderated by Nancy Marder (Chicago-Kent), will include Judge B. Michael Dann (a former Maricopa County, Arizona Superior Court Judge), Joseph Sanders (Houston), Suja Thomas (Cincinnati), and Neil Vidmar (Duke).

### Other Civil Procedure Related Programs

On Thursday, January 5, 2006, at 8:30 - 10:15 a.m., there will be a panel entitled "Gender, Race and Decisionmaking: New Perspectives on Summary Judgment and Damages," sponsored by the Section on Women in Legal Education and co-sponsored by the Section on Minority Groups. This panel will discuss new research on gender, race and decisionmaking in the context of summary judgment and damages. The panel will include speakers Martha Chamallas (Ohio State), Deseriee Kennedy (Tennessee), Elizabeth Schneider (Brooklyn), Lu-in Wang (Pittsburgh), commentator Pat Chew (Pittsburgh), and moderator Stephanie Wildman (Santa Clara).

On Friday, January 6, 2006, at 10:30 a.m. - 12:15 p.m., the Section on Litigation will present a panel called "Thinking Like a Juror." The panel will focus on the empirical work that academics and researchers have done on jury deliberations and in particular the studies that formed the basis for the ABA Principles for Juries and Jury Trials. The Principles were approved by the ABA in February 2005 and are now serving as the basis for jury innovations in a number of courts. The speakers include: Shari Seidman Diamond (Northwestern), Paula Hannaford-Agor (National Center for State Courts), Stephan Landsman (DePaul), Bradley Sexton (Quinnipiac), and moderator Timothy Wilton (Suffolk).

## SECTION ANNOUNCEMENTS

**Business Meeting.** There will be a business meeting at the conclusion of the Section's annual meeting program on January 5. The Executive Committee proposes to nominate the following for the 2006 Executive Committee:

<i>Chair</i>	Margaret Woo, Northeastern
<i>Chair-Elect</i>	Steve Gensler, Oklahoma
<i>Past Chair</i>	Nancy Marder, Chicago-Kent
<i>Exec. Comm.</i>	Vikram Amar, UC Hastings
<i>Exec. Comm.</i>	Robert Schapiro, Emory
<i>Exec. Comm.</i>	Cathie Struve, Pennsylvania

Special thanks are due to Howie Erichson, who served as Past Chair this year and provided invaluable institutional memory.

### Section Website and Mentoring Listserv .

The Section now has a website:

<<http://home.att.net/~slomansonb/AALSCivPro.html>>, and associated mentoring

listserv. To subscribe, send a message to <[listproc@chicagokent.kentlaw.edu](mailto:listproc@chicagokent.kentlaw.edu)>, leave

the Subject line empty, and type "SUBSCRIBE CIVPROMENTOR First

Last" [your name] in the text of your message. These resources were developed by Section member Bill Slomanson at Thomas Jefferson. Thanks to Radha Pathak at Whittier (Examination Archives), and Lisa Taylor at John Marshall (Syllabii Archives), our younger civil procedure faculty now have access to a variety of useful resources provided by the AALS Civil Procedure Section. The forty mentors (see above webpage) deserve credit as well, for their availability to assist new faculty members during their early years in the teaching academy. Section newsletters are also available on this webpage, dating from

2002 to the present. Should you have any questions or suggestions, please contact Bill at <slomansonb@worldnet.att.net>.

### **SUPREME COURT RULING ON §1367**

The Supreme Court in 2005 handed down at least one major civil procedure decision, resolving a long-running dispute situated at the intersection of supplemental jurisdiction under 28 U.S.C. §1367 and the rule that each plaintiff in a diversity case (even a diversity class action) independently satisfy the amount-in-controversy threshold under 28 U.S.C. §1332. Textual quirks in §1367 had led some lower courts to conclude that 1367 effectively overrules *Zahn v. Int'l Paper Co.*, 414 U.S. 291 (1973) (involving diversity-based class actions), and/or *Clark v. Paul Gray, Inc.*, 306 U.S. 583 (209) (involving multiple plaintiffs joined together under Rule 20). The Supreme Court granted cert. a few years ago to resolve these kinds of issues in *Free v. Abbott Labs, Inc.*, 529 U.S. 333 (2000), but ultimately split 4-4 and affirmed without opinion in that case. This past Term, in the consolidated cases of *Exxon Corp. v. Allapattah Services, Inc.*, (coming from the Eleventh Circuit and raising the question in the Rule 23 class action setting) and *Ortega v. Star-Kist Foods, Inc.*, (coming from the First Circuit and raising the question in the multiple-plaintiff Rule 20 setting), reported at 125 S.Ct 2611 (2005), the Court held 5-4 that §1367's text does effectively overrule *Zahn* and *Clark* by allowing plaintiffs who do not independently satisfy the amount-in-controversy requirement to nonetheless have their claims heard in federal court by joining their claims together with those of at least one plaintiff in the same case who satisfies the amount-in-controversy threshold.

Justice Scalia's opinion for the majority

concluded that a diversity case in which the claims of some, but not all, the plaintiffs satisfy the amount-in-controversy requirement qualifies as a "civil action of which the district courts have original jurisdiction" under §1367. A court with original jurisdiction over a single claim in the complaint has original jurisdiction over "a civil action" under the statute, even if there are other claims in the complaint that would not independently qualify for federal court. Once it has jurisdiction over the action, the court then has the power to decide whether supplemental jurisdiction over other claims in the case is appropriate.

Justice Scalia's opinion was careful to limit its generous holding to plaintiffs who failed to satisfy the amount-in-controversy requirement, and not to plaintiffs whose presence would destroy complete diversity, because "[i]ncomplete diversity destroys original jurisdiction with respect to all claims, [leaving] nothing to which supplemental claims can adhere."

Justices Stevens, O'Connor, Ginsburg and Breyer dissented, arguing that the text of §1367 makes most sense as an attempt merely to codify pre-existing caselaw concerning pendent and ancillary jurisdiction, and to overrule only *Finley v. United States*, 490 U.S. 545 (1989), where the Court had been unwilling to embrace pendent party jurisdiction in a federal question case. Justices Stevens and Breyer also argued that legislative history should be used and tended to confirm their reading.

The majority's resolution of this question provides at least some clarity for lower courts and litigants. The line between the amount-in-controversy and the complete diversity requirements that Justice Scalia's opinion draws makes some policy sense – in that incomplete diversity undermines the rationale for diversity jurisdiction more than

does the inclusion of some additional plaintiffs who haven't satisfied the amount-in-controversy threshold the way an anchor plaintiff has. But it is hard for some people to see where that line is drawn in the text of §1367 (on which the majority opinion so heavily relies), or why Justice Scalia's characterization of incomplete diversity as destroying original jurisdiction for all claims is so obviously analytically correct.

### **STATE, TRIBAL AND LOWER FEDERAL COURT DECISIONS OF INTEREST**

*Cathie Struve,  
Univ. of Pennsylvania*

#### **District Court, Having Ruled that Habeas Claim of Actual Innocence Waives Attorney-Client Privilege, Gets Mandamus by Sixth Circuit**

A federal district court's conclusion that a habeas petitioner's claim of actual innocence waived attorney-client privilege and work product immunity – and the district court's order that the petitioner's "trial counsel must provide any relevant information he has concerning whether [petitioner] is guilty of the murder and whether [petitioner] confessed the murder to the police" – led the U.S. Court of Appeals for the Sixth Circuit to issue a writ of mandamus. *In re Lott*, 424 F.3d 446, 448 (6th Cir. 2005) (holding that "[t]he District Court's order constitutes a departure from existing law for which we find no precedent" and that it "places the privileged relationship between a client and his attorney in jeopardy"). [Thanks to Adam Steinman, Cincinnati]

#### **Seventh Circuit Holds that Party Invoking Federal Jurisdiction Under CAFA Has Burden to Establish Existence of Jurisdiction**

In a case removed under the provisions of the Class Action Fairness Act, Pub.L. 109-2, 119 Stat. 4 (2005), the U.S. Court of Appeals for the Seventh Circuit applied the usual rule that the party invoking federal jurisdiction has the burden to demonstrate that the amount-in-controversy requirement is met. The plaintiff class representative had cited a Senate Judiciary Committee Report stating that "[i]f a purported class action is removed pursuant to these jurisdictional provisions, the named plaintiff(s) should bear the burden of demonstrating that the removal was improvident." S. Rep. 14, 109th Cong., 1st Sess. 42 (2005). The Court of Appeals brushed this language aside, reasoning that "when the legislative history stands by itself, as a naked expression of 'intent' unconnected to any enacted text, it has no more force than an opinion poll of legislators—less, really, as it speaks for fewer." *Brill v. Countrywide Home Loans, Inc.*, 2005 WL 2665602, \*2 (7th Cir. 2005). [Thanks to Adam Steinman, Cincinnati]

#### **District Court Sanctions Lawyers for Using Rule 41(a)(i) Dismissal to Judge-Shop**

A district court in the District of Puerto Rico refused to reconsider its imposition of monetary sanctions (of \$1,000

each) against plaintiffs' lawyers who dismissed under Rule 41(a)(i) and immediately re-filed. Based on the facts that the dismissal occurred the day after an adverse ruling by the district court, and that the plaintiffs re-filed "only one hour and fourteen minutes later seeking the exact same relief," the court sanctioned the plaintiffs' attorneys for judge-shopping. *Vaqueria Tres Monjitas, Inc. v. Rivera Cubano*, 230 F.R.D. 278, 281 (D.P.R. 2005). The court relied largely on its inherent power, but also cited Rule 11 and 28 U.S.C. § 1927. See *id.* at 280 n.1. [Thanks to <http://federalcivilpracticebulletin.blogspot.com/>, a blog by Ben Spencer, Richmond]

### **Navajo Nation Supreme Court Clarifies Navajo Common Law Approach to Prejudgment Interest**

The Navajo Nation Supreme Court held that the trial court abused its discretion in denying a tort claimant's request for prejudgment interest on a counterclaim against an insurer which had filed an interpleader action. See *Allstate Indem. Co. v. Blackgoat*, No. SC-CV-15-01 (Nav. 2005) (available at <http://www.tribal-institute.org/lists/decision.htm>). Finding the relevant statutory provision ambiguous, the Court interpreted the provision in the light of the Navajo common law concept of nályééh. The Court explained that nályééh has both procedural aspects – "the responsibility to respectfully talk out disputes" – and a substantive component – restoration of harmony through adequate compensation. Under these principles, the Court held that prejudgment interest was required, but that the determination of the amount of that interest lay within the trial court's discretion.

### **California Supreme Court Endorses Catalyst Theory for Attorneys' Fees**

The California Supreme Court "reaffirm[ed its] endorsement of the catalyst theory" for determining whether a plaintiff in public interest litigation "was successful, and therefore potentially eligible for attorney fees" under Cal.C.C.P. § 1021.5. *Graham v. DaimlerChrysler Corp.*, 101 P.3d 140, 148-49 (Cal. 2005); see also *Tipton-Whittingham v. City of Los Angeles*, 101 P.3d 174, 176-78 (Cal. 2005) (applying catalyst theory to certified questions in case involving public entity). Though the Court had endorsed the catalyst theory in a prior case, see *Westside Community for Independent Living, Inc. v. Obledo*, 657 P.2d 365 (Cal. 1983), that endorsement was dictum and it predated the contrary approach taken by the U.S. Supreme Court when interpreting federal fee-shifting provisions in *Buckhannon Board and Care Home, Inc. v. West Virginia Dept. of Health and Human Resources*, 532 U.S. 598 (2001). [Thanks to David Levine, UC Hastings]

### **\$1.45 Billion Verdict Follows Florida Court's Sanctions for Discovery Misconduct Concerning Emails**

A Florida jury awarded some \$ 1.45 billion (including \$ 850 million in punitive damages) to a holding company owned by Ronald Perelman, in a lawsuit against Morgan Stanley on claims arising out of Morgan's representation of Sunbeam Corp. in connection with Sunbeam's acquisition of a camping-gear company from Perelman's holding company. Prior to trial, as a sanction for what it found to be discovery misconduct by the defendant (concerning the production of emails requested by the plaintiff), the trial court issued an order shifting the burden of

proof on a central element of the plaintiff's claim – whether Morgan knew of (and colluded in) fraud by Sunbeam – and providing that the court would read to the jury a statement discussing aspects of Morgan's conduct during discovery. *See Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co., Inc.*, 2005 WL 679071, \*7 (Fla. Cir. Ct. 2005). [Thanks to Fabio Arcila, Touro]

## DEVELOPMENTS IN THE FEDERAL RULES OF CIVIL PROCEDURE

*Steve Gensler*  
*Univ. of Oklahoma*

It has been two years since the last amendments to the FRCP became effective (the Rule 23 amendments being the most notable of that group). After a year of no changes, this year brings just a small crop of modest and discrete changes. But don't let that fool you into thinking that the Advisory Committee has been slumbering. You will recall that the ordinary Rules Enabling Act process takes a minimum of three years, from the time a proposal reaches the Advisory Committee for study and drafting, through the publication and comment period, and until the United States Judicial Conference forwards a formal proposal to the Supreme Court for it to transmit to Congress. For the last several years, the Advisory Committee has been working feverishly on two major projects – the E-discovery Project and the Style Project. These amendment packages are still working their way through the pipeline, set to emerge in December 2006 and December 2007 respectively.

Due to space limits, I can only sketch the basics of the important rule

changes, and have omitted entirely any reference to rule changes that I consider technical or of narrow interest. However, complete information is available at the Federal Rulemaking website kept by the Rules Support Office of the Administrative Office of the U.S. Courts. It is at: [www.uscourts.gov](http://www.uscourts.gov).

This update is followed by a message from the Chair of the Advisory Committee on Civil Rules, Judge Lee H. Rosenthal (S.D. Tex.), who has graciously agreed to reflect on the Committee's efforts for the past several years and to share her vision of how the Committee might focus its attention in the next few years to come. We are deeply indebted to her for this peek into the future.

### I. Amendments that took effect on 12/01/05

The Supreme Court transmitted the following amendments to Congress. They took effect on December 1, 2005 unless Congress took any action after this Newsletter went to press.

#### 1. FRCP 6 (Time)

Under prior Rule 6(e), 3 days were added to the period for taking action when a party is served by mail (or one of the other methods of service listed in Rule 5(b) apart from personal delivery). Courts had calculated the "3-day rule" differently, however, leading to inconsistent results and ulcers for practitioners. Amended Rule 6(e) states that "3 days are added after the prescribed period would otherwise expire under subdivision (a)." This clearly signals that courts first should calculate when the period would expire on its own, and then

add the 3 days.

This clarification helps, but knottiness remains due to other aspects of Rule 6, like the “last day rule” and the “11-day rule.” Under Rule 6(a), weekends and holidays do not count as the last day of a period; the period thus extends until the next day that is not a weekend day or holiday. Also under Rule 6(a), weekends and holidays do not count at all if the period to take action is less than 11 days.

So, what happens when the 3 days added at the end under new Rule 6(e) overlap with weekend days or holidays? The Committee Notes explain that the “last day rule” applies but the “11-day rule” does not.

So, all days – including weekends and holidays – count against the added 3 days. But if the added 3-day period should end on a weekend or holiday, then the period is extended until the next day that is not a weekend or holiday.

For anyone reaching for the aspirin bottle, it bears mentioning that the Standing Committee is coordinating a global timing project among all of the Advisory Committees to see if it might be possible to simplify and standardize deadlines and the counting of days. One option under consideration – affectionately and eponymously known as the “Cooper Rule” – is to peg most deadlines in increments of 7 days. Stay tuned.

## **2. FRCP 45 (Subpoena)**

Amended Rule 45(a)(2) requires that a deposition subpoena state the manner in which the deposition will be taken. Prior Rule 30(b)(2) already required that the deposition notice state the manner of the taking of the deposition, but the deposition notice goes to the other parties and need not be served on the third-party witness. Now,

the witness will also know and can prepare and react accordingly.

## **II. Changes Scheduled to be Effective on 12/01/06**

The following amendments have been approved by the United States Judicial Conference and have been forwarded to the Supreme Court. The Supreme Court now has until May 1, 2006 to transmit the amendments to Congress.

### **1. Rule 5(e)**

Current Rule 5(e) says that courts may, by local rule, permit electronic filing. This amendment says that courts may, by local rule “permit or require” electronic filing. But if a local rule requires electronic filing, it must include reasonable exceptions.

### **2. New FRCP 5.1 (Constitutional Challenge); FRCP 24 (Intervention).**

By statute, federal courts must notify government officials when a lawsuit between private parties includes a challenge to the constitutionality of their laws. 28 U.S.C. § 2403. Current Rule 24(c) contains a reminder of that duty.

New Rule 5.1 moves that reminder to a more visible location. It also imposes a new duty to notify on the party who raises the challenge, supplementing the court’s statutory duty to notify. Subject to the enactment of new Rule 5.1, Rule 24(c) is amended to delete the existing notification provision.

### **3. E-discovery Package**

Rules 16, 26, 33, 34, 37 and 45 are



amended as part of the Advisory Committee's E-discovery Project. The Committee began studying electronic discovery over five years ago. Since then, it has held numerous conferences and solicited the expertise of lawyers, academics, judges, and experts in information technology.

This package of amendments reflects the Committee's conclusion that electronic discovery is sufficiently different from paper discovery to warrant special treatment. One fundamental difference is volume; businesses (and individuals) store an exponentially greater amount of information electronically than they did on paper. Electronic sources of information also differ from paper sources in that they are dynamic rather than static and may be incomprehensible when separated from the systems that created them.

The e-discovery package addresses several topics. One major topic, of course, is general discoverability. But issues of privilege and preservation duties rose to the forefront as well. If there is an overall theme to this package, it is that the best way to deal with e-discovery is for the parties and the court to address it early in the case and tailor solutions to the needs of the parties and the dispute.

#### **a. Rule 16(b)**

Proposed Rule 16(b) adds e-discovery to the list of topics that might be addressed in the scheduling order. It reflects the Committee's view that early attention will avoid many problems that might otherwise arise. The amendment specially raises the possibility of the parties reaching their own agreement on how to produce without waiving privilege and work-product

protection, though this language has been watered down a bit from the version published for comment out of concern that the language suggested a greater level of protection than the rules deliver.

#### **b. Rule 26(f)**

Proposed Rule 26(f) adds e-discovery to the list of topics to be discussed at the parties' discovery-planning conference. The Committee Notes suggest an initial discussion about the parties' respective information systems so that a discovery plan can be prepared with system capabilities in mind. The parties can then address specific issues like appropriate topics for discovery, sources of that information, whether those sources are "reasonably accessible" (see Rule 26(b)(2)(B)), the form of production (see Rule 34(b)), and preservation of discoverable information.

Rule 26(f) is also amended to direct the parties to discuss privilege and work-product protection, especially waiver. Reviewing e-discovery for privilege and work-product can be extraordinarily costly and time-consuming, especially if the scope of discovery includes "embedded data" (e.g., draft language not apparent on the screen or on a print-out but preserved in the electronic file) or "metadata" (tracking information about who did what with the document). One solution is for the parties to negotiate protocols that minimize the risk of waiver. Familiar examples include "quick peek" or "clawback" agreements. As with Rule 16(b), this language remains but in modified form due to concerns about whether private "non-waiver" agreements are wholly binding, especially when that information is sought by a non-party in a

different action.

**c. Rule 26(b)(2)(B)**

This amendment gives us “two tiers” of discovery for electronically-stored information. If it is “reasonably accessible,” it must be searched and produced. If it is not “reasonably accessible,” the court may order discovery of it for good cause and with conditions, including cost-shifting.

A few changes were made after publication for comment. One is organizational; the language now appears as its own subsection. Other changes clarify the process involved, adding a requirement that the non-producing party identify the sources deemed not reasonably accessible, specifically pegging reasonable accessibility to undue burden or cost, and explicitly allowing the non-producing party to raise the issue by way of a motion for protective order.

**d. Rule 26(b)(5)**

Proposed Rule 26(b)(5) creates a procedure for asserting a privilege or work-product claim as to information already produced. It allows the producing party to notify the recipient and state the basis for the claim of privilege or protection. After being so notified, the recipient may not use the information, must take reasonable steps to retrieve it if already disclosed, and then must return, sequester, or destroy it. The recipient, of course, may go to the court to get a ruling on the claim of privilege or work-product protection.

Importantly, Rule 26(b)(5) carefully avoids addressing the substantive questions of whether privilege or work-product protection has been waived. Indeed, several changes were made to the version published

for comment (e.g., deleting the requirement that the claim must be asserted within a “reasonable time”) out of concern that the provision might overlap with factors relevant to waiver.

**e. Rule 34(a)**

Proposed Rule 34(a) adds “electronically stored information” to the list of items discoverable through the Rule 34 device. Courts no longer need stretch the definition of “document” to reach new technologies.

**f. Rule 34(b)**

Proposed Rule 34(b) addresses the form in which electronically-stored information is produced. If the requesting party specifies a particular form of production, the producing party can either follow it or object and state the form it intends to use. If the requesting party does not specify a particular form of production, then (absent party agreement or a court order) the producing party must produce the information “in a form or forms in which it is ordinarily maintained” or “in a form or forms that are reasonably usable,” specifying that intended form in its response. This reflects a change from the published version, which allowed production in “an electronically searchable form”. Comments persuaded the Committee that levels of searchability can vary substantially and that parties might choose to produce at the lowest level of searchability even though higher levels were available at equal or lesser cost.

**g. Rule 37**

Proposed Rule 37(f) provides a

limited protection from sanctions when electronically-stored information is lost through the routine, good-faith operation of a computer system. It speaks only to sanctions under the Civil Rules; related matters like spoliation claims were deemed outside the rulemaking power.

The version transmitted to the Supreme Court changed the culpability standard. The Committee published Proposed Rule 37(f) in two versions, one that granted protection from sanctions if a party took reasonable steps to preserve and one that granted protection from sanctions for all but intentional or reckless failures to preserve. After reviewing the comments, the Committee settled on what it describes as an “intermediate” standard: absent exceptional circumstances, losses of electronically-stored information are protected from sanctions if they are the result of the “routine, good-faith operation” of an electronic information system.

One other change bears note. The published version specified that violations of court orders were not protected from sanctions. This was deleted – not because the Committee wanted to protect parties who disregard court orders but because of fear that it would encourage routine and overbroad applications for preservation orders.

#### **h. Various Parallel and Conforming Amendments**

Several rules are amended to conform to the core changes. Some are purely technical. Others take important “e-discovery” principles established in the rules discussed above and apply them in other rules. Rule 33, for example, is amended to address the option of producing

electronically stored information in lieu of answering interrogatories. Also, Rule 45 is amended to incorporate several important “e-discovery” principles – e.g., the “two tiers” of electronic information under Rule 26(b)(2) and the form of production standards under Rule 34(b) – into subpoena practice.

#### **4. FRCP 50 (Judgment as a Matter of Law)**

Amended Rule 50 eliminates a trap. Current Rule 50(a) allows a party to move for judgment as a matter of law after the plaintiff rests, but the text of Rule 50(b) only allows renewal of a motion made after the close of all evidence. So, most courts have held that if the trial court denies a mid-case motion and that party does not also move at the close of all evidence, then the party has nothing to renew after an adverse verdict.

Amended Rule 50(b) allows a party to renew any Rule 50(a) motion. As a result, the court could deny or defer a mid-case motion and hear a renewal of that motion after the jury’s verdict, without the need for a second motion made at the close of all evidence. The Committee concluded that policy supports the change and that the Seventh Amendment allows it.

#### **5. Supplemental Rule G (Forfeiture Actions in Rem)**

Civil forfeiture actions have been governed by the Supplemental Rules developed principally for admiralty cases. This proved to be a difficult marriage. Admiralty practice did not always meet the needs of civil forfeiture actions. And civil forfeiture rulings started to skew the meaning of the supplemental rules in ways

ill-suited to admiralty practice. More pressure was added when Congress passed the Civil Asset Forfeiture Reform Act of 2000. A separation seemed best for all.

At the urging of the Department of Justice, and with the participation (though not always the blessing) of the National Association of Criminal Defense Lawyers (NACDL), the Advisory Committee developed the comprehensive procedures governing in rem forfeiture actions that will appear in Supplemental Rule G. The result is a nearly complete separation of civil forfeiture procedure from Supplemental Rules A through F, invoking them for civil forfeiture only to address questions that are not covered by Rule G.

### **III. Changes Scheduled to Be Effective 12/01/07 or Later**

#### **1. The Style Project**

Over the past two years, the Advisory Committee worked with the Standing Committee's Style Subcommittee to re-style the civil rules from stem to stern.

The Style Project hopes to build on the success of similar projects completed recently to re-style the Appellate Rules and the Criminal Rules.

The goal of the Style Project is to clarify the civil rules, improve and modernize expression, and remove inconsistent uses of words and conventions. The Committee operated under strict orders not to change the meaning of the rules. That's a challenge in itself, requiring the Committee to discern their full meaning and preserve it. It also meant the Committee could not fix substantive problems. For all but the most minor of possible substantive problems, the Committee was required to preserve them in the re-styled rule, though it

did compile a list of such problems for possible later treatment. A handful of modest and non-controversial changes were submitted along with, but separately from, the Style Project.

The Standing Committee approved the Style Project for publication in March 2005 and set an extended period for public comment, set to expire on December 15, 2005. Professor Stephen Burbank (Penn) and Gregory Joseph of the New York Bar organized a group of law professors and practitioners to study the Style Project and presented the group's findings at the public hearing scheduled for November 18, 2005 in Chicago.

#### **2. New FRCP 5.2**

The E-Government Act of 2002 requires federal courts to make unsealed electronically-filed documents available on their websites. It also requires the Supreme Court to establish rules to address the privacy and security concerns raised by making court filings available over the internet. New Rule 5.2 serves that purpose.

Internet access to court records pits historical rights of access against heightened potential for abuse. Persons have long had the ability to rummage through court files in an attempt to mine information. But the sheer work required meant that, in most cases, information that might be exploited was protected by a practical obscurity. With remote access and powerful search engines, that is no longer the case.

In 2001, the Judicial Conference adopted a general policy that records access over the internet should be generally the same as it is at the courthouse. New Rule 5.2 assumes that to be the case and then builds in privacy and security protections in response. It presumptively requires filing

parties to redact “personal data identifiers”; for example, only the last four digits of a social security number or of a financial account number are to be used. Due to the volume of filings and the prevalence of sensitive information contained therein, New Rule 5.2 exempts social security and immigration cases from internet access by non-parties, though full access is still available at the courthouse.

New Rule 5.2 does not alter the court’s authority to place items under seal, and it specifically acknowledges court authority to issue protective orders limiting remote access or requiring additional redaction.

### **ADVISORY COMMITTEE UPDATE**

*By the Hon. Lee H. Rosenthal (S.D. Tex.)  
Chair, Advisory Committee on Civil Rules*

In keeping with one of the banner years for proceduralists (marked by statutory and decisional expansions of federal jurisdiction that will keep lawyers and professors of civil procedure occupied for years), the Civil Rules Committee has also marked a satisfying end to several projects, is in the middle of others, and has begun to explore a next set of promising opportunities for addressing problems that can be improved through changes to the Rules. Many of the projects that Professor Gensler (who is, much to my delight, the newest academic member of the Rules Committee) describes, and many of those that we are beginning, have a common theme. Changes to the discovery rules to accommodate electronic discovery, the modernization and clarification that the Style Project brings, the reorganization of the forfeiture rules and their revision to be consistent with

legislative and caselaw changes, all are intended to make sure that the Civil Rules keep up with profound changes in the civil litigation practice, without losing what has made the Rules so effective in regulating that practice in federal courts for almost seventy years. The next projects that the Committee is beginning strike the same dual theme.

The time project that the Civil Rules Committee is undertaking with the Advisory Committees for the Appellate and Bankruptcy Rules will make the rules governing the time within which lawyers and litigants must act clearer, more consistent, and more sensible. The first part of the project will result in a template for calculating time that will be consistent within each set of rules, lessening a perennial source of anxiety for lawyers. The second and related part of the project is for each of the Advisory Committees to look at the times and deadlines specified in its own set of rules, to see if they are appropriate and to suggest changes if they are not. This project is well-launched and promises to be of enormous help to the bar.

The Style Project was able to generate the proposed revisions out for public comment by adhering to the limits set by the earlier, successful Style Revisions to the Appellate and Criminal Rules – the changes are to the format and style of the rules only, not to the substantive meaning. The intense work revealed some major substantive problems in certain rules. Suggestions from members of the bar, the academy, and the bench for rules changes and reports about problems in the application of certain rules have also provided the impetus for the Committee's next set of projects. At its October meeting, the Committee approved taking preliminary

steps towards two sets of projects, one relatively discrete, and one longer range. The relatively discrete projects include looking at the rules governing depositions of corporate representatives, pleading amendments, indicative rulings, and the time for taking appeals. The more ambitious projects include the summary judgment rule -- one of the more frustrating to work on during the Style Project because its terms are often unclear, unrelated to the practice, and contain provisions such as those governing the timing of submitting affidavits that are unworkable -- and an examination of the standards set out in the pleading rules.

Although this description sounds like a veritable beehive of activity, it is not. The Rules Enabling Practice is itself a governor, making sure that the pace of rulemaking does not exceed the capacity of the bench and bar to absorb it. And the Committee is keenly aware of the importance not only of making just the right rule changes, but also the right amount of rule changes. There is much to do, but time to do what needs to be done, when it should be done, and to do it all well.

## **DEVELOPMENTS IN THE FEDERAL RULES OF APPELLATE PROCEDURE**

*Steve Gensler  
Univ. of Oklahoma*

### **I. Changes That Became Effective on 12/01/05**

The Supreme Court transmitted the following amendments to Congress. They took effect on December 1, 2005, unless Congress took any action after this Newsletter went to press.

#### **1. FRAP 4**

FRAP 4 clarifies when a district court may reopen the time to file an appeal when the clerk fails to send notice of entry of judgment per FRCP 77(d). Amended FRAP 4 makes clear that formal notice under FRCP 77(d) is required and that if a party does not receive it within 21 days of entry of judgment, then the party may move to reopen the time to appeal (1) within 180 days of entry of judgment, or (2) within 7 days after receiving formal notice, whichever is earlier.

#### **2. FRAP 28.1**

FRAP 28.1 is new. It establishes comprehensive briefing procedures for cross-appeals.

#### **3. FRAP 35**

FRAP 35(a) resolves a circuit split regarding votes for rehearing en banc. By statute, "a majority of the circuit judges who are in regular active service" must vote to hear a case en banc. 28 U.S.C. § 46(c). Half of the circuits included disqualified, recused, or otherwise unavailable judges in the base when determining if there was a majority voting for rehearing en banc. As a practical matter, these judges were de facto "no" votes, leading to several notable cases where a strong majority of the participating judges voted to rehear but rehearing was denied when the non-participating judges were added to the base. Amended FRAP 35(a) adopts the practice of the other half of the circuits, counting in the base only those judges participating in the case.

### **II. Changes Scheduled to Become Effective on 12/01/06**

The following amendments have been approved by the United States Judicial Conference and have been forwarded to the Supreme Court. The Supreme Court now has until May 1, 2006 to transmit the amendments to Congress.

### **1. FRAP 25**

This companion to amended FRCP 5 authorizes the courts of appeal to adopt local rules requiring electronic filing. One distinctive feature for the appellate rules is that the court may direct a party to also file a hard copy.

### **2. FRAP 32.1 (Citing Judicial Dispositions)**

The topic generating the most heat (and, on occasion, some new light) was the controversial proposal regarding the citation of unpublished opinions. For those of you already familiar with the debate, no background is necessary. For those of you new to this particular territory, I couldn't do it justice in the space allowed. Suffice it to say that the Appellate Advisory Committee met a substantial amount of resistance on this proposal as it worked its way through drafting, publication, and comment. This history is well-chronicled by Reporter Professor Patrick Schiltz (St. Thomas) in numerous Committee reports from 2003 through 2005, all of which are available at the Federal Rulemaking web-site.

So what is all the fuss about? New FRAP 32.1 would provide that a party may cite to an unpublished opinion. The fuss comes from two directions. First, nearly 80% of all appeals end in an unpublished decision, so a rule addressing unpublished opinions goes to the core of current

appellate practice. Second, the rule will alter the practice of several circuits which currently forbid parties from citing to unpublished opinions.

Two details must be emphasized. First, in stating that a party may "cite to" an unpublished opinion, the rule means only that the party may bring it to the court's attention. New Rule 32.1 takes no position on the precedential value of the unpublished opinion; that issue, as before, is left exclusively to the circuits to decide. Second, as adopted by the Judicial Conference, new FRAP 32.1 will be limited to dispositions issued on or after January 1, 2007. Citation to dispositions issued before then will continue to be governed by the local rules of the circuits.

## **STATUTORY DEVELOPMENTS**

*James Pfander  
Univ. of Illinois*

In February 2005, President Bush signed into law the Class Action Fairness Act (CAFA), codified at 28 U.S.C. §§ 1332(d) and 1453 (among others). The Act substantially revises the rules of diversity jurisdiction as they apply to class actions (and certain mass actions that the Act treats as if they were class actions for jurisdictional purposes). The most significant changes include the following: (i) the Act provides for the assertion of jurisdiction on the basis of minimal diversity with the citizenship of all members of the plaintiff class considered in determining

whether such diversity exists; (ii) the Act changes the rule for determining the amount in controversy, specifying an aggregate value of \$5,000,000 rather than a per claim value of \$75,000; (iii) the Act simplifies the task of removing class actions by permitting defendants to act individually rather than unanimously, by allowing removal without regard to the one-year bar for ordinary diversity proceedings, and by allowing removal even where one of the defendants has been sued in its own state of citizenship.

As a practical matter, the Act will shift nationwide class actions into federal court, and will bring into play the rules that govern the transfer of related cases for consolidated pre-trial treatment under 28 U.S.C. § 1407. Such consolidated treatment may address the problems associated with overlapping and duplicative nationwide class actions, including the problems of universal venue and the reverse auction that sometimes were thought to lead to quickie certification decisions and inadequate settlements. Apart from addressing problems with nationwide actions, the Act will also federalize some class actions with strong connections to a particular state. Even where 2/3s of the plaintiff class members come from a particular state and many of the defendants do as well, federal jurisdiction will attach to the proceeding so long as one of the “primary” defendants has its citizenship in another state.

A variety of legislative proposals remain pending. Senator Arlen Specter (Pennsylvania) continues to press for the adoption of asbestos reform legislation. The leading vehicle (the Fairness in Asbestos Injury Resolution Act, S. 852) would create an asbestos trust fund and establish a no-fault model of compensation along with scheduled awards for certain kinds of diseases. Interested stakeholders continue to

wrangle over the size of the fund, the amount of damages for particular disease categories, and the extent to which the federal government will stand behind the fund if claims exceed the assets of the trust. In April 2005, the House passed the “Multidistrict Litigation Restoration Act of 2005,” in an attempt to authorize a transferee district court to retain consolidated proceedings for trial and to fix certain problematic provisions of the multidistrict litigation act of 2002. So far, the Senate has taken no action.

Two other pending bills may deserve attention. The Lawsuit Abuse Reduction Act of 2005, H.R. 420, would take a number of steps to reduce frivolous litigation. First, it would directly amend Rule 11 to make the imposition of sanctions mandatory in federal court. Second, it would extend Rule 11 to certain state court proceedings that have been deemed to affect interstate commerce. Third, it would attempt to limit forum shopping by tightening venue rules for certain personal injury claims and make the new rules applicable in both federal and state court proceedings. The Federal Consent Decree Fairness Act, S. 489, would extend certain of the limitations that Congress previously applied in the context of prison litigation to other forms of federal consent decrees. Finally, patent reform legislation would attempt to ensure that all patent claims gain access to the US Court of Appeals for the Federal Circuit, even those that arise by way of counterclaim. The legislation responds to the Supreme Court’s decision in *Holmes Group v. Vornado Air Circulation Systems*, 535 U.S. 826 (2002).

## **UPDATE ON ABA’S AMERICAN JURY PROJECT**



*Nancy Marder*  
*Chicago-Kent College of Law*

In February 2005, the ABA approved its Principles for Juries & Jury Trials. The Preamble explains that the 19 principles express "the best of current-day jury practice in light of existing legal and practical constraints." The principles are meant to serve as aspirational goals for federal and state courts in the ways that they treat juries and the tools that they give jurors to perform their tasks.

Some of the highlights include:

**Principle 3** - calling for a return to the 12-person jury in civil trials;

**Principle 4** - urging that jury decisions in civil cases should be unanimous "wherever feasible";

**Principle 11** - recommending that jurisdictions establish grounds for and standards by which judges allow challenges for cause, and that courts make a record of the reasons for their rulings, including any factual findings that are appropriate;

**Principle 13** - encouraging courts to allow jurors to take notes, and in civil jury trials, to submit written questions for witnesses, which they would send to the judge who would then meet with the parties in order to decide whether the question should be posed to the witness; allowing jurors in civil trials to discuss the evidence among themselves in the jury room throughout the trial as long as all the jurors are present;

**Principle 16** - allowing the judge to meet with the jury if the jury has sent a note indicating that it has reached an impasse in its deliberations and seeing whether the judge can provide any assistance to the jury, such as clarifying instructions or allowing additional argument by the attorneys;

**Principle 18** - instructing the jurors after the verdict that they have the right to discuss or refuse to discuss the case with anyone, including counsel and members of the press.

Although many of these principles have not yet been put into effect by courts, there are a few courts that have been "early adapters." For example, Arizona has implemented many of these principles in their state courts and has allowed researchers to study the effects of these reforms. The Seventh Circuit is now experimenting with many of the principles during a six-month period. The experiences of these and other state and federal courts should lead others to move in the direction mapped out by the Principles.

For a copy of the Principles, with its useful commentary, contact the ABA or visit its website:  
<http://www.abanet.org/juryprojectstandards/principles.pdf>.

### **BOOKS OF INTEREST**

*Margaret Y.K. Woo*  
*Northeastern Law School*

For those interested in the intersection between international law and civil procedure, two books are worthy of attention: Yuval Shany's **The Competing Jurisdictions of International Courts and Tribunals** (Oxford University Press 2003), and John Norton Moore, ed.'s **Civil Litigation Against Terrorism** (Carolina Academic Press, 2004). **The Competing Jurisdiction** explores the proliferation of international courts and tribunals, and the emerging overlapping jurisdictional conflicts between these institutions. In the process, this book analyzes the underlying legal sources of jurisdiction-

regulating norms – ideas useful for anyone interested in civil procedure. **Civil Litigation Against Terrorism**, meanwhile, explores the perhaps novel idea of how the civil justice system might more effectively contribute to the deterrence of terrorism. It explores the possibility and obstacles to civil suits against terrorists or terrorists states and to the use of block assets of terrorist states to satisfy judgments.

Of the multiple books concerning the Supreme Court, three books stand out. Richard Davis' **Electing Justice** (Oxford University Press 2005) offers a fresh look at the Supreme Court nomination process. Through meticulous research, Davis offers a realistic and somber view of the present day Supreme Court nominations process to argue that the process is more akin to an election campaign than the ideal of nominations based on qualifications. In **Becoming Justice Blackmun** (Times Books, 2005), Linda Greenhouse applied her years of journalistic experience in covering the Supreme Court to document the life of Justice Harry Blackmun. The book is engaging and readable, due largely to the clarity of Ms. Greenhouse' writing style. Finally, Justice Stephen Breyer in **Active Liberty: Interpreting Our Democratic Constitution** (Alfred A. Knopf 2005) advocates that the Constitution be interpreted through the lens of "active liberty," that is, from the perspective of encouraging individuals to participate in their government, and statutes from the perspective of "reasonable legislator." He demonstrates this approach by applying this lens to several areas of the law, such as free speech and privacy. This book, which grew from a series of lectures, would appeal to a wide audience--from laypersons to law professors.

Several books add to the insight of the jury process. Nancy Marder's **Jury Process** (Foundation Press 2005), while designed

primarily for law students and law professors, is also suitable for laypersons, including those who have been called for or have just participated in the jury process. In **Jury Process**, Marder argues that the jury still plays a central role in the American judicial system--a role that must be critically studied and carefully protected. **The Jury Process** outlines the history, law, and policy issues about each key element of the jury system as an essential part of the American democratic experience. In **Blink** (Little, Brown & Co. 2005), Malcolm Gladwell explores how people make decisions. With lively examples, some empirical and some anecdotal, Gladwell shows how some decisions are best made quickly and intuitively, while others are best made after careful study. The problem, of course, is figuring out which decisions fit into which categories. Gladwell provides an eclectic group of examples from art experts to police officers. His conclusions are provocative and should lead proceduralists to revisit the ways judges and juries should or should not reach decisions.

Finally, if you missed last year's section program on *Secrecy in Litigation* at the AALS Annual Meeting, you will have another opportunity to find out what was said. The panelists have turned their presentations into essays, and these essays, along with those of several other experts in the field, can be found in volume 81 of the **Chicago-Kent Law Review**, which will be available in 2006.

## UPCOMING CONFERENCES

On April 7, 2006, UMKC School of Law will host a Class Action Symposium in honor of the 20th Anniversary of Phillips Petroleum v. Shutts. Judge Diane Wood, a judge on the U.S. Court of Appeals for the 7th Circuit, will be the Keynote Speaker. Other

participants include Deborah Hensler, Sam Issacharoff, Francis McGovern, Linda Mullenix, Richard Nagareda, Bill Rubinstein, and Ed Sherman. The moderator, Robert Klonoff (klonoff@usa.net), is also the person to contact for additional information.

a.htm. This list is maintained by Rick Bales and you can contact him at balesr@nku.edu if you have a symposium that you would like him to include.

On April 21-22, 2006, the University of Toledo College of Law will host a symposium entitled "Enhancing Worldwide Understanding through Online Dispute Resolution." Panels will cover the gamut from the history of online dispute resolution to future prospects for online dispute resolution. Papers presented at this symposium will be published in the University of Toledo Law Review. For additional details, contact ben.davis@utoledo.edu.

On June 10-14, 2006, the AALS Conference entitled "New Ideas for Law School Teachers: Teaching Intentionally" will be held in Vancouver, British Columbia, Canada at the Sheraton Vancouver Wall Centre Hotel. Although this conference does not focus on civil procedure in particular, it will focus on teaching methods that will have applicability to civil procedure courses. The conference will explore the relationship of learning theory to law school teaching, and will include various innovative approaches that faculty members have introduced into their classrooms and are willing to share with colleagues. The Planning Committee includes: Dorothy Brown, Marjorie Girth, Gerald Hess, Lauren Robel (Chair), and Arthur Best.

For a website that lists a number of upcoming law school symposia, some of which pertain to civil procedure, go to: [http://chaselaw.nku.edu/faculty\\_staff/symposi](http://chaselaw.nku.edu/faculty_staff/symposi)