

# ASSOCIATION OF AMERICAN LAW SCHOOLS

## SECTION ON

# CIVIL PROCEDURE

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## FALL 2006 NEWSLETTER

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### MESSAGE FROM THE CHAIR

*Margaret Y.K. Woo*

*Northeastern University School of Law*

Advances in technology as well as a global economy continue to challenge the traditional model of litigation as a process to settle disputes between individual parties. More than ever, technology renders a lawyer's search for information as a dive into an ever bottomless pool. Of greater concern, technology renders it easier to access not only information relevant to litigation but also personal and sensitive information contained in public filings and lawsuits. Lawyers and courts, increasingly, must balance the right to information with the right to privacy. The latest amendments to the federal civil

procedural rules, in regulating electronic discovery and filings, recognize that even simple lawsuits can reach beyond the depths of that particular lawsuit.

While technology has deepened the scope of an individual litigation, transnational litigation has broadened its reach. It is not coincidental that "group litigation" has commanded the attention of domestic as well as international legal reforms. While the U.S. is still adjusting to its most recent class action reforms, countries abroad are exploring the option of "group litigation" as a method to contain corporate misconduct. The upcoming World Congress on Procedural Law (International Association of Procedural Law) will hold its meeting in Salvador-Bahia, Brazil, September 2007 with a focus on "Standing, Res Judicata and Group Litigation."

Throughout these various developments, access to justice remains the central focus of civil procedure. From class action reforms to "vanishing trials," electronic discovery to the "Style Project" in the recent rules amendment, the efforts have been to allow access to courts and ease in procedure, but also to rein in litigation. The ABA's "Civil Gideon" project further reminds us that even as civil litigation becomes ever more complex, litigation itself may be within reach of only those few who can afford it, leaving a vast majority without recourse to the courts.

While it is still too early to say whether

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Newsletter Editor: Robert Schapiro

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.

electronic discovery and its amendments have increased or decreased access to justice, class action reform has undeniably narrowed the avenue of litigation for many litigants. The question is whether the balance has been appropriately struck. This year's AALS civil procedure section program will address this very question at its annual January meeting with a program on "The Politics of Class Actions." Panelists John Beisner, O'Melveny & Myers; Elizabeth J. Cabraser, Lieff Cabraser Heimann & Bernstein; Samuel Issacharoff, New York University School of Law; Linda S. Mullenix, University of Texas School of Law; and Ed Cooper, University of Michigan and reporter for the Civil Rules Committee, will share their thoughts about the difficulties of balancing these varying interests, the unintended consequences of class action reforms and their predictions for the future. We hope you will join us.

#### **2007 ANNUAL MEETING PROGRAM**

##### **The Politics of Class Actions Thursday, January 4, 2007 10:30 a.m. - 12:15 p.m.**

Class actions epitomize the American concept of the "private attorney general" in the enforcement of legal norms. Yet, increasing public antipathy toward class actions has resulted in a backlash. Efforts to reign in class actions take two forms—both challenging traditional divisions of political authority in our structure of government—federalism and separation of powers. First, increasingly, class actions in state court are being preempted by federal law. For example, a number of cases alleging misrepresentation in the sale of food and drug products (e.g. cough medicine) have been challenged on the grounds of preemption by federal regulation.

The recent Class Action Fairness Act takes cases out of state court and into the federal court by alleviating the jurisdictional amount requirement and allowing aggregation of damages. Second, legislatures are increasingly keeping categories of disputes from being brought as class actions (e.g. Securities Litigation Reform Act). We take a look at this issue from a global as well as a local perspective, hearing from academics as well as practitioners.

The panel, moderated by Margaret Y.K. Woo (Northeastern), will include John Beisner (O'Melveny & Myers), Elizabeth J. Cabraser (Lieff Cabraser Heimann & Bernstein) Samuel Issacharoff (N.Y.U.), and Linda S. Mullenix (U.T.-Austin).

##### **Policing Lawyers' Ethics in Class Action Litigation Saturday, January 6, 2007 10:30 a.m. - 12:15 p.m.**

Continuing the exploration of class actions, the Section on Civil Procedure is co-sponsoring a program with the Section on Professional Responsibility, focusing on the ethical issues facing lawyers in class actions. The passage of the Class Action Fairness Act of 2005 (CAFA) was yet another turning point in the debate over class actions. Who should police attorneys in class actions? The CAFA and the Federal Rules place most of the burden on judges. But are judges the best equipped to police the ethical lapses of class action attorneys? What is the role, if any, for the ethical rules in policing of class action attorneys? Should the parties police each other? What other avenues are available? Is this really a problem at all, or merely smoke and mirrors to push an anti-plaintiff agenda?

### Other Civil Procedure Related Programs

On Wednesday, January 3, 2007, from 8:45 a.m. - 5:15 p.m., there will be all-day workshop on remedies, entitled "Workshop on Remedies: Justice and the Bottom Line." Panels will cover a variety of topics, including aggregate litigation, structural injunctions, and efforts to limit remedies for violation of federal law.

On Friday, January 5, 2007, from 8:30 a.m. - 10:15 a.m. there will be a panel at the AALS entitled "The 50th Anniversary of '12 Angry Men.'" The panel will explore this classic jury film from a variety of perspectives and disciplines. The film continues to raise such questions as: Is this how a jury should deliberate? Is Henry Fonda an ideal juror? Is this fictional jury deliberation consistent with actual jury deliberations now that we have fifty years of empirical studies? Confirmed speakers include: Robert Burns (Northwestern), Valerie Hans (Cornell), Stephan Landsman (DePaul), and moderator Nancy Marder (Chicago-Kent).

On Friday, January 5, 2007, from 10:30 a.m. - 12:15 p.m., the Section on Litigation is sponsoring a session on "Experts in the Courtroom." The panel will discuss emerging patterns in rulings on the admissibility of expert testimony in civil and criminal litigation. They will offer prescriptions for dealing fairly with expert testimony. The panel will also address how law schools might become involved with the larger university to advance the admissibility of some fields of expertise. Participants include John M. Conley (U.N.C.), Frances Watson Hardy (Indiana-Indianapolis), Jane C. Moriarty, (Akron), Michael J. Saks (Arizona State) and moderator Novella L. Nedeff (Indiana-Indianapolis).

### SECTION ANNOUNCEMENTS

**Business Meeting.** There will be a business meeting at the conclusion of the Section's annual meeting program on January 4. The Executive Committee proposes to nominate the following for the 2007 Executive Committee:

<i>Chair</i>	Steve Gensler, Oklahoma
<i>Chair-Elect</i>	Catherine Struve, Pennsylvania
<i>Past Chair</i>	Margaret Woo, Northeastern
<i>Exec. Comm.</i>	Vikram Amar, U.C. Hastings
<i>Exec. Comm.</i>	Robert Schapiro, Emory
<i>Exec. Comm.</i>	Patrick Woolley, U.T.-Austin

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

### Section Website and Mentoring Listserv.

Just a reminder that the Section has a website at: <http://home.att.net/~slomansonb/AALSCivPro.html>, and an 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. The website also contains Section newsletters dating from 2002 to the present. These resources were developed by Section member Bill Slomanson at Thomas Jefferson. If you have any questions or suggestions, please contact Bill Slomanson at: [slomansonb@att.net](mailto:slomansonb@att.net).

Radha Pathak continues to maintain the Civil Procedure Exam Bank. If you would like instructions on how to obtain a password in order to access the exam bank or if you would like to contribute exams to the exam bank, you can contact Radha at [rpathak@ku.edu](mailto:rpathak@ku.edu).

Please let new Civil Procedure teachers know that these resources exist.

### **Civil Procedure Blogs**

On the blog front, the following blogs might be of interest to those who teach or write about Civil Procedure:

Benjamin Spencer (Richmond) maintains a blog called Federal Civil Practice Bulletin at: <http://federalcivilpracticebulletin.blogspot.com>.

Byron Stier (Southwestern) and Howard Erichson (Seton Hall) maintain a blog called Mass Tort Litigation that can be found at: [http://lawprofessors.typepad.com/mass\\_tort\\_litigation/](http://lawprofessors.typepad.com/mass_tort_litigation/).

### **SUPREME COURT DECISIONS**

*Vikram Amar*

*U.C. Hastings*

*(with significant contribution from Howard Wasserman, F.I.U.)*

The Supreme Court decided a number of noteworthy decisions in the field of civil procedure during the October 2005 Term. Perhaps the most interesting, and most needed in order to clarify an important and misunderstood point of federal court jurisdiction, was *Arbaugh v. Y&H Corp.*, 126 S. Ct. 1235 (2006). There the Court addressed the distinction between the “sometimes confused or conflated concepts” of federal subject matter jurisdiction and essential elements of federal statutory claims.

The case involved Title VII of the Civil Rights Act of 1964, which limits covered “employers” to those entities having fifteen or more employees. Lower courts had divided sharply as to whether employee-numerosity was a fact going to judicial subject matter

jurisdiction or to the merits of the plaintiff’s statutory claim. Justice Ginsburg, writing for a unanimous court (with Justice Alito not taking part), held that, in light of the procedural consequences flowing from defining an issue as jurisdictional, and absent a clear statement from Congress, employee-numerosity requirement is an element of the merits of a Title VII plaintiff’s claim.

Jenifer Arbaugh worked for nine months as a bartender and waitress at the Moonlight Café, a New Orleans restaurant owned and operated by Y&H Corp. Arbaugh alleged that she was sexually harassed, and suffered a constructive discharge, by one of Y&H’s corporate owners. Arbaugh’s complaint included claims under Title VII and Louisiana law and asserted general federal question jurisdiction under 28 U.S.C. § 1331 and supplemental jurisdiction under 28 U.S.C. § 1367. The parties consented to trial before a Magistrate and a jury rendered a verdict in favor of Arbaugh, awarding her \$ 40,000 in backpay, compensatory damages, and punitive damages. Following entry of judgment on the verdict, Y&H moved to dismiss for lack of subject matter jurisdiction, a timely motion under Fed. R. Civ. P. 12(h)(3). It asserted, for the first time, that it was not an “employer” for Title VII purposes because it did not have fifteen employees, and the court therefore lacked subject matter jurisdiction. The district court found that the company did not satisfy the employee-numerosity requirement (based on findings as to the employment status of the company’s delivery drivers and the spouses of the company owners) and granted the motion.

The Court emphasized the need to resolve the jurisdiction-or-merits question “mindful” of the procedural consequences of characterizing an issue as jurisdictional, given the potential unfairness and waste of judicial resources involved. First, an objection to subject matter jurisdiction cannot be waived

and can be raised by anyone at any point in the process, even after the entry of judgment. Y&H's motion was timely if employee-numerosity is jurisdictional and the parties would relitigate the entire action in state court. On the other hand, Y&H's argument that it was not an employer was waived if numerosity is an element and the verdict in Arbaugh's favor would be reinstated. Second, where subject matter jurisdiction turns on issues of fact, the court reviews evidence and resolves disputes, as the district court did here in determining that Y&H was not an employer because certain individuals were not employees. By contrast, factual disputes as to essential elements are resolved by the jury, which already rendered a verdict in Arbaugh's favor.

The Court ultimately emphasized Congress' control over what issues should count as jurisdictional. But it established a "readily administrable bright line," requiring that Congress clearly state its intent that a limitation within a statute be jurisdictional. Notably, a statute will be deemed jurisdictional when it speaks in "jurisdictional terms" or refer to the jurisdiction of federal courts. Absent such a clear statement of jurisdictional character, courts should treat a statutory restriction as an element of the plaintiff's claim. In this case, where Congress gave no textual or other indication that the employee-numerosity requirement should be jurisdictional, the Court held that it was an element of the plaintiff's claim for relief, not a jurisdictional issue.

In addition to *Arbaugh*, the Court handed down a few other civil procedure rulings worth quick mention. In *Lincoln Property Co. v. Roche*, 546 U.S. 81, 126 S.Ct. 606 (2005), the Court (in a unanimous opinion written by Justice Ginsburg) made clear that section 1441(b)'s requirement as a predicate to proper

removal that "none of the parties in interest properly joined and served as defendants" be a citizen of the state in which the action was brought does not require a properly sued removing defendant to point out to the federal court that it has local affiliates who are other potential defendants the plaintiffs could have joined but did not and whose presence in the action would defeat removal.

The Court in *Martin v. Franklin Capitol Corp.*, 546 U.S. 132, 126 S.Ct. 704 (2005) addressed another aspect of the basic removal statute, this time section 1447(c)'s provision regarding attorney's fees when a federal court remands a removed case back to state court. In *Martin*, Chief Justice Roberts' unanimous opinion for the Court held that absent unusual circumstances, courts may award attorney's fees under section 1447(c) only where the removing party lacked an objectively reasonable basis for seeking removal. When an objectively reasonable basis for removal exists, fees should be denied. Although courts may have discretion to depart from this "general rule," its reasons for departure should be guided by the basic statutory goal of deterring "removals sought for the purpose of prolonging litigation and imposing costs on the opposing party, while not undermining Congress' basic decision to afford defendants a right to remove as a general matter, when the statutory criteria are satisfied."

In *Jones v. Flowers*, 126 S.Ct. 1708 (2006), the Court applied and elaborated the due process notice principles articulated in the seminal case of *Mullane v. Central Hanover Bank & Trust*, 339 U.S. 306 (1950), to hold that when a state sent a certified letter to a homeowner at the home's address to notify him of an impending tax sale caused by delinquent property taxes, and the state was made aware that the letter went "unclaimed," the state was then under an obligation to

pursue other reasonable means of notice. Such other means might include sending a regular first class letter to the home, which letter (unlike the certified letter) might stay there long enough to be picked up by the property owner, or posting a notice of tax sale on the property itself. Due process does not, however, require the state to search the local phone book and other government records to locate the current residence of the property owner. *Jones* featured an unusual lineup of the Court, with Chief Justice Roberts writing the majority opinion for himself, Justice Stevens, Justice Souter, Justice Ginsburg and Justice Breyer. Justices Kennedy, Scalia and Thomas dissented, with Justice Alito taking no part in the consideration or decision of the case.

Finally, in *Marshall v. Marshall*, 126 S.Ct. 1735 (2006) – the “Anna Nicole Smith” case – the Court narrowed the so-called “probate exception” to federal court jurisdiction. The case is a bit involved, but for those who teach the “probate exception” or its cousin the “domestic relations exception” will find the case worth looking at.

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

*Cathie Struve*  
*Univ. of Pennsylvania*

#### **Courts of appeals address removal practice, under CAFA and otherwise**

The Class Action Fairness Act’s removal provision has spawned disputes concerning burden of proof and timing of appellate review. The Ninth and Eleventh Circuits have

now joined the Seventh in holding “that CAFA’s silence, coupled with a sentence in a legislative committee report untethered to any statutory language, does not alter the longstanding rule that the party seeking federal jurisdiction on removal bears the burden of establishing that jurisdiction.” *Abrego Abrego v. The Dow Chemical Co.*, 443 F.3d 676, 686 (9<sup>th</sup> Cir. 2006); *see also Miedema v. Maytag Corp.*, 450 F.3d 1322, 1330 (11<sup>th</sup> Cir. 2006). Courts of appeals have also redrafted CAFA’s time limit for seeking appellate review of a remand order, reading “not less than 7 days” in 28 U.S.C. § 1453(c)(1) to mean not *more* than seven days. *See, e.g., Miedema*, 450 F.3d at 1326; *Amalgamated Transit Union Local 1309, AFL-CIO v. Laidlaw Transit Servs., Inc.*, 435 F.3d 1140, 1146 (9<sup>th</sup> Cir. 2006). Non-CAFA removal practice generated a novel district court ruling in *Salazar v. Allstate Texas Lloyd’s, Inc.*, 455 F.3d 571 (5<sup>th</sup> Cir. 2006). A Texas plaintiff sued the Texas issuer of his homeowner’s insurance policy, but not the Illinois underwriter, in Texas state court. Defendant removed on grounds of diversity, and the district court denied plaintiff’s motion to remand; citing Civil Rules 17, 19 and 21, the district court substituted the Illinois underwriter for the Texas issuer. The Court of Appeals reversed, holding that “Rule 21 does not allow for substitution of parties to create jurisdiction.” [Thanks to Helen Hershkoff, NYU.]

#### **Seventh Circuit (per Judge Easterbrook) addresses notice pleading**

In *Doe v. Smith*, 429 F.3d 706 (7<sup>th</sup> Cir. 2005), the plaintiff sued under the federal wiretapping statute, asserting that her ex-boyfriend disseminated a videorecording he had surreptitiously made when the couple were having sex. The district court dismissed

the complaint for failure to allege “interception” within the meaning of the statute. The Court of Appeals reversed: “[P]leadings in federal court need not allege facts corresponding to each ‘element’ of a statute. . . . Usually they need do no more than narrate a grievance simply and directly, so that the defendant knows what he has been accused of.” In *Kolupa v. Roselle Park District*, 438 F.3d 713 (7<sup>th</sup> Cir. 2006), the Court of Appeals reversed the dismissal of a Title VII claim, holding that the complaint need merely “recite that the employer has caused some concrete injury by holding the worker’s religion against him.” The *Kolupa* court warned that “[a]ny decision declaring ‘this complaint is deficient because it does not allege X’ is a candidate for summary reversal, unless X is on the list in Fed.R.Civ.P. 9(b).” *Simpson v. Nickel*, 450 F.3d 303 (7<sup>th</sup> Cir. 2006), involved a prisoner’s Section 1983 claim for First Amendment retaliation. The district court had dismissed the complaint because it failed to demonstrate that the speech that triggered the retaliation was truthful. The Court of Appeals reversed, in part because the complaint need only contain “‘claims’ (which is to say, grievances) rather than legal theories and factual specifics.” [Thanks to Steve Burbank, Penn, and Tom Rowe, Duke.]

### **District courts address state secrets privilege in suits regarding NSA surveillance**

The U.S. has asserted “state secrets privilege” in suits arising from the government’s warrantless surveillance program. Some courts have permitted the suits to proceed, *see, e.g., Hepting v. AT&T*, 439 F.Supp.2d 974 (N.D. Cal. 2006) (reviewing information publicly revealed by the U.S. or by telecoms

companies and declining to dismiss customers’ proposed class suit); *ACLU v. NSA*, 438 F.Supp.2d 754 (E.D. Mich. 2006) (dismissing data-mining claim on ground of state secrets privilege, but declining to dismiss other claims); *Al-Haramain Islamic Foundation, Inc. v. Bush*, 2006 WL 2583425 (D. Or. Sept. 7, 2006) (due in part to plaintiffs’ knowledge of the contents of a classified document inadvertently disclosed by the government, holding that “plaintiffs should have an opportunity to establish standing and make a prima facie case, even if they must do so *in camera*”), while another dismissed a suit on the ground that the privilege prevented plaintiffs from obtaining discovery necessary to establish standing, *see Terkel v. AT&T Corp.*, 441 F.Supp.2d 899 (N.D. Ill. 2006) (holding that “there have been no public disclosures [concerning] AT&T’s claimed record turnover ... that are sufficient to overcome ... the state secrets privilege”). Courts declining to dismiss have contemplated special procedures, such as appointing an expert to help the court assess whether particular disclosures would endanger national security (*Hepting, Al-Haramain*); traveling to the location of classified materials rather than requiring them to be transported to the court (*Hepting*); and certifying the court’s decision for interlocutory review pursuant to 28 U.S.C. § 1292(b) (*Hepting, Al-Haramain*). [Thanks to Sheri Engelken, Gonzaga.]

### **Mashantucket Pequot Tribal Court criticizes method of service in state-court action but recognizes the resulting state-court judgment**

Citing principles of comity, the Mashantucket Pequot Tribal Court recognized a Connecticut state court judgment in a tort suit against tribe members. *See Baker v. Sebastian*, No.

MPTC-CV-GC-2004-145 (Mashantucket Pequot 12/07/2005) (available at <http://www.tribal-institute.org/lists/decision.htm>). The court questioned the state's provisions concerning service of process, finding them less stringent than analogous provisions under tribal law. For example, plaintiff's service by publication upon two of the defendants complied with Connecticut law but would not have sufficed under Mashantucket Pequot law because the latter requires the notice to contain more specific information about the nature of the suit and requires three separate publications in papers of local circulation. But after drawing upon *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), the tribal court concluded that recognition of the state-court judgment would not violate the defendants' due process rights under the Indian Civil Rights Act, 25 U.S.C. §§ 1301-03. [Thanks to Matthew Fletcher, MSU.]

### **Third Circuit adopts First Restatement view on preclusive effect of alternative findings**

In *Jean Alexander Cosmetics, Inc. v. L'Oreal USA, Inc.*, 458 F.3d 244 (3d Cir. 2006), the Court of Appeals followed the First Restatement's view "that independently sufficient alternative findings should be given preclusive effect." The Third Circuit noted that in so doing it joined the Second, Seventh, Ninth, and Eleventh Circuits, and parted company with the Tenth and Federal Circuits. *See id.* at 251-52 (citing cases). [Thanks to Tom Rowe, Duke.]

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

*Steve Gensler  
Univ. of Oklahoma*

The age of electronic discovery began years ago, but now it's official. After a long and (I think) very visible and interactive rulemaking process, the e-discovery amendments take effect on December 1, 2006. While Congress could still derail them, there is no reason to think that will occur. Thus, the Civil Rules will now reflect what practitioners have known for many years – that hard drives, e-mails, and back-up tapes have acquired at least an equal footing with paper documents in civil discovery. The e-discovery amendments strive to address some of the pressures associated with this vast (and constantly growing) new source of information.

Another new era is just a year away. In April 2006, the Civil Rules Advisory Committee completed its 3-year project to restyle the civil rules. From stem to stern, the civil rules were revised to clarify meaning, improve and modernize expression, and remove inconsistent uses of words and conventions. The U.S. Judicial Conference approved the restyled Civil Rules this September and forwarded them to the Supreme Court, which has until May 1, 2007 to transmit them to Congress. Assuming that occurs, and assuming Congress does not derail them, the restyled Civil Rules will take effect on December 1, 2007.

One other item warrants mention. Over the summer, Chief Justice Roberts extended through 2007 the term of the Honorable Lee Rosenthal as Chair of the Civil Rules Advisory Committee. Judge Rosenthal has been simply terrific as Chair, and we can expect that she will continue to maintain an active and visible presence in the civil procedure community.

### **A. Changes Scheduled to be Effective December 1, 2006**

The Supreme Court transmitted the following amendments to Congress. They will take effect on December 1, 2006 barring contrary action by 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. E-Discovery Package

Rules 16, 26, 33, 34, 37 and 45 are all amended to try to address discovery problems posed by the proliferation of electronic data. My guess is that this particular audience neither needs nor wants another primer on the e-discovery rules. For those who just can’t get enough, however, last year’s update is available at the Civil Procedure Section website at <http://home.att.net/~slomansonb/AALSCivPro.html>.

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

Amended Rule 50 eliminates a trap. Prior Rule 50(b) referred to renewing a motion for judgment as a matter of law “made after the close of all evidence.” As a result, most courts held that the defendant could not renew a motion made after the plaintiff rests. Defendants who made the mid-case motion but failed to renew it after the close of all evidence were stuck. Amended Rule 50(b) allows a party to renew any Rule 50(a)

motion. In other words, defendants may make a mid-case motion after the plaintiff rests and then renew it after verdict.

### 4. 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 new 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.

### **B. Changes Scheduled to be Effective December 1, 2007**

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, 2007 to transmit the amendments to Congress.

## 1. The Style Project

In previous years, the Appellate Rules and the Criminal Rules have been restyled to clarify meaning, improve and modernize expression, and remove inconsistent uses of words and conventions. The success of those projects emboldened the Standing Committee and the Civil Rules Committee to take up the larger and more daunting task of restyling the Civil Rules. The Civil Forms also have been restyled, as have the substantive amendments scheduled to go into effect in December 2006.

Unlike most other rule amendments, these amendments deliberately make no substantive changes. Rather, the restyled rules attempt only to take what the rules already say and say it better. Of course, the restyling process revealed many areas where the substance of the rules could be improved, and the Committee noted those areas for future substantive amendments.

The success of the Style Project likely will be measured by how quickly it is forgotten. If the new rules seamlessly take the place of the old – as it is hoped – then in a few years nobody will remember that there ever was a Style Project.

## 2. The Style-Substance Track

A handful of modest and non-controversial changes were submitted along with, but separately from, the Style Project. These are changes that make eminent sense and that do not materially alter the substance of the rules, but that also cannot be described as wholly stylistic. The Committee was concerned that these changes – though clearly beneficial – were too minor to warrant separate amendment projects, such that if they were not accomplished in connection with the Style Project they likely would not be made at all. To give an example, several amendments

require lawyers to include their e-mail addresses along with their addresses and telephone numbers.

## 3. 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 starts from that premise and then builds in various privacy and security protections. 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 allows courts to issue protective orders requiring additional retraction or further limiting remote access for

good cause.

### **C. Proposed Amendments Published for Comment**

For the first time in several years, there are currently no proposed Civil Rules amendments at the publish-and-comment stage. The Advisory Committee has been considering various amendments, including: (1) a cross-advisory committee project to adopt uniform time-computation rules, which for the Civil Rules would amend Rule 6(a); (2) proposed changes to Rule 12(e) to give courts greater power to request more detailed pleadings; (3) amendments to Rule 15 that would cut off the right to amend once as a matter of course within a certain period after the filing of a dispositive motion; (4) proposed changes to Rule 26(a)(2) to clarify who must supply an expert report and to revisit the duty to disclose all materials “considered” by the expert; and (5) amendments that would update Rule 56 to establish a nationally-uniform motion practice. At this time, however, the Advisory Committee has not asked the Standing Committee for permission to publish proposed amendments with respect to any of these projects.

### **BOOKS OF INTEREST**

*Nancy Marder  
Chicago-Kent College of Law*

Section members Margaret Woo and Steve Subrin recently published a book entitled **Litigating in America - Civil Procedure in Context** (Aspen 2006). The target audience includes law students, lawyers, judges, and professors from foreign countries, as well as

American law students and college students who want background in American law and American civil litigation. One of the authors used the book this past summer in Paris to teach law students from six different countries. The students, though from different countries and different backgrounds, all reported that the book gave them what they needed and wanted to learn about the American legal system and American civil litigation.

For books that recount how a particular civil case developed, consider reading Alexander Polikoff's **Waiting for Gautreaux** (Northwestern University Press 2006) and Brandt Goldstein's **Storming the Court** (Scribner 2005). Polikoff, the principal lawyer in *Gautreaux v. CHA and HUD*, takes readers through the development of the case, beginning with several lawyers meeting over pizza at Edwardo's in Chicago and learning about the Chicago Housing Authority's (CHA) program to put all new public housing in black neighborhoods. From that early meeting, they challenge that discriminatory practice by filing a lawsuit in federal district court. Polikoff offers an engaging and detailed account of how that lawsuit proceeds (how they chose the lead plaintiff, how they survived a motion to dismiss and a motion for summary judgment) as well as the politics of the time on both local and national levels.

In **Storming the Court**, Goldstein provides a fast-paced book in which he juxtaposes the stories of several Yale Law School students and their civil procedure professor, Harold Koh, with the stories of several Haitian refugees who end up at a detention camp at Guantanamo Bay, Cuba. The stories come together with the filing of a federal lawsuit, in which the law students, along with their law professor and several lawyers, initially challenge the federal

government's asylum hearings including the lack of lawyers for the refugees, and ultimately challenge the refugees' confinement. Goldstein takes readers through the various stages of the lawsuit--from TRO to preliminary injunction to trial, appeal, and settlement. Goldstein gives the reader a sense of the uphill battle the students faced. They are working around the clock in the midst of exams and papers and job interviews. It is a book that reminds law students, as well as their civil procedure professors, why they should care so passionately about procedure.

In thinking about whether a case should be tried before a judge or jury, one book that has insights to offer on this question is James Surowiecki's **The Wisdom of Crowds** (Anchor Books 2005). Surowiecki offers several interesting examples of when large groups of ordinary people tend to reach the right result. His examples span the gamut, from financial markets to election polls to guessing the correct weight of an ox. Groups of people--in other words, the wisdom of crowds--tend to reach a more accurate answer than an individual decision-maker when the groups are large and diverse and when the members can draw from their individual knowledge or perspective and can hold their views independently without feeling the need to succumb to peer pressure. Surowiecki's insights and examples are useful to readers who think about judges and juries and why our legal system resorts to both types of decision-makers. Some of the features that Surowiecki identifies to enhance the accuracy of the group are already built into the jury system, such as allowing for hold-outs, whereas other features, such as a diverse jury, remain more aspirational than real.

On a day when your civil procedure class has not gone quite as you planned, consider reading Frank McCourt's **Teacher Man** (Scribner 2005). McCourt, who is also the

author of **Angela's Ashes** and **'Tis**, recounts in this volume his experience as an English teacher in the New York City public schools. He has to struggle everyday to reach his students, to hold their attention, and to convince them that he has something useful to teach them. He tells them stories about his experiences growing up in Ireland; he gets them to write by creating innovative assignments ("An Excuse Note from Adam or Eve to God" after he noticed that they had no qualms about forging excuse notes from their parents to explain their absences from class); he recites poetry. Occasionally, he encounters a good student, who should continue with higher education but who comes from a family where that is not an option. At the same time that McCourt struggles with his teaching, he also tries to decide how to further his own education. Although McCourt's methods for reaching his students might not always be the same ones that we use, his trial-and-error approach in an effort to reach his students is one that all teachers can understand.

On another day, when you are wondering how you will ever get your article finished at the same time as you have to teach, do committee work, and meet all the other demands on your time, consider reading one of Henning Mankell's wonderful police detective books, which have been translated into English and are available in paperback. One of the more recent books is **Before the Frost** (Vintage Books 2006). Mankell, who is Swedish and whose books are set in Sweden, has created a police detective named Kurt Wallander. Wallander suffers from problems that most of us can identify with: he consumes too much coffee; he works too hard; and he feels that he does not give his daughter or the other people in his life enough time and attention. He is always under pressure to solve a crime before the murderer strikes

again. Although he feels inadequate to the task, and depressed that he cannot see the case more clearly at first (and the bleak weather always reflects his low spirits), he perseveres. So, if you do not have a conference in Sweden anytime soon, but have always wanted to learn more about its towns, countryside, and customs, this is a good way to do it. Mankell writes beautifully and has created a sympathetic, self-deprecating character in Kurt Wallander.

Finally, if you missed the Civil Procedure Section's program, "Secrecy in Litigation," at the AALS Annual Meeting in 2005, you can now obtain a copy of the papers, all of which have been published along with several other scholars' contributions on this subject, in volume 81 of the **Chicago-Kent Law Review**. This symposium issue has recently appeared in print. If you would like to receive a free copy, please contact Nancy Marder (nmarder@kentlaw.edu). A limited number of copies are available. In addition, the **Chicago-Kent Law Review** will be publishing the papers from the 2007 AALS program on "The 50th Anniversary of '12 Angry Men'" in a symposium issue that will bring together jury scholars, proceduralists, movie buffs, judges, and jurors.

### UPCOMING CONFERENCES

On December 14, 2006, the Centre for Socio-Legal Studies at Oxford University will host a conference on "Group Litigation." The conference will be held in the Manor Road Building from 9:30 a.m. - 4:30 p.m. The Chair of the conference is Sir Henry Brook. Additional information will soon be available on the conference website ([www.csls.ox.ac.uk](http://www.csls.ox.ac.uk)), but in the meantime, you can contact Dr. Christopher Hodges ([christopher.hodges@csls.ox.ac.uk](mailto:christopher.hodges@csls.ox.ac.uk)) or Dr.

Magdalena Sengayen ([magdalena.sengayen@socio-legal-studies.ox.ad.uk](mailto:magdalena.sengayen@socio-legal-studies.ox.ad.uk)) for details.

Throughout the spring of 2007, the Center for Socio-Legal Studies at Oxford will also hold one seminar a month on Access to Civil Justice 2006-2007, with such topics as "Evaluating courts and judges: value for money?" and "Small claims and alternative dispute resolution: do they deliver justice?" The seminar for June is entitled "Which country has the best access to justice? A comparison of UK, USA, Poland, and elsewhere," and the speaker will be Deborah Hensler (Stanford). For details, contact Drs. Hodges and Sengayen (listed above), who are the seminar facilitators.

On January 26, 2007, the Saltman Center for Conflict Resolution at the UNLV Boyd School of Law, located in Las Vegas, Nevada, will sponsor a conference on arbitration. The conference, which will bring together eighteen of the country's leading arbitration scholars, will focus on whether the Federal Arbitration Act should be revised. For additional information about the program, you can consult the website ([http://www.law.unlv.edu/saltman\\_Events.html](http://www.law.unlv.edu/saltman_Events.html)) or contact Mary Sondheim at (702) 895-0490 or [mary.sondheim@unlv.edu](mailto:mary.sondheim@unlv.edu).

In April 2007, Western State University College of Law (Orange County, CA) will hold a Symposium on State Civil Procedure. The tentative dates are April 20 - 21, 2007. The focus of the symposium will be state civil procedure issues, including civil discovery, complex litigation, and class actions and the role of state courts after CAFA. For additional information, contact Glenn Koppel ([gkoppel@wsulaw.edu](mailto:gkoppel@wsulaw.edu)).

The program of the XIIIth World Congress of the International Association of Procedural Law will be held in Salvador-Bahia from September 16 to 22 2007. This upcoming Congress will focus on "Class Action Standing and Res Judicata." For more information please contact Ada Pellegrini Grinover, the Brazilian Chair of the Congress at [adapell@pbrasil.com.br](mailto:adapell@pbrasil.com.br) or the International Association of Procedural Law's website at: <http://www.uni-regensburg.de/Fakultaeten/Jura/gottwald/internassprocedurallaw/>.

For a general listing of law school conferences, some of which pertain to civil procedure, see the website maintained by Rick Bales at: [http://chaselaw.nku.edu/faculty\\_staff/symposia.php](http://chaselaw.nku.edu/faculty_staff/symposia.php). Please note that the address has changed since last year. You can also contact Rick Bales at [balesr@nku.edu](mailto:balesr@nku.edu) if you have a symposium that you would like him to include.