

**Comments on the Proposals for the 2010 Duke Conference
Regarding the Federal Rules of Civil Procedure by the Federal
Courts Committee of the Association of the Bar of the City of New York**

Federal Courts Committee
New York County Lawyers' Association

May 4, 2010

The Federal Courts Committee of the New York County Lawyers' Association appreciates the opportunity to comment on the Proposals for the 2010 Duke Conference Regarding the Federal Rules of Civil Procedure by the Federal Courts Committee of the Association of the Bar of the City of New York (the "New York City Bar Proposals"), attached hereto.¹ We recognize the thought and effort that have gone into the New York City Bar Proposals and generally agree with many of the recommendations. We note below our general agreement with those recommendations and comment in more detail on other recommendations that we find problematic.

Pleadings and Dispositive Motions

We believe that the recommended new motion for summary adjudication (the "Summary Adjudication" motion) would not contribute to the efficient and timely resolution of cases. The types of issues that lend themselves to resolution prior to discovery on the merits can already be decided on a motion to dismiss for failure to state a claim under Rule 12(b)(6) or for judgment on the pleadings under Rule 12(c). In addition, if it were desirable in a particular case, a court can already in its discretion order that summary judgment motions be briefed after only limited discovery has taken place. *E.g., Nader v. Blair*, 549 F.3d 953 (4th Cir. 2008). There is no reason to believe that a summary judgment procedure with a seemingly arbitrary 14 hours of deposition time makes sense for all cases, no matter what their subject matter, no matter how complex, and no matter what parties are involved.

In addition, the assertion that motions under Rule 12(b)(6) are granted rarely is inconsistent with our experience in diverse types of federal civil litigation, including securities, antitrust and others. Indeed, recent data show that motions to dismiss are granted in over 35 percent of all cases, including 47 percent of antitrust cases, 40 percent of personal injury cases, and 68 percent of patent cases.² While we recognize

¹ The opinions expressed herein are solely those of the New York County Lawyers' Association's Federal Courts Committee.

² See Report of the Statistics Division of the Administrative Office of the United States Courts (Feb. 2010) (available at <http://www.uscourts.gov/rules?Motions%20to%20Dismiss.pdf>); Draft Report of the New York State Bar Association's Special Committee on Standards for Pleading in Federal Litigation, Apr. 2010, at 18 (providing percentages calculated from the Statistics Division data).

that the New York City Bar Proposals do not address pleading standards, we believe that the heightened pleading standards already imposed by the Supreme Court make the recommended Summary Adjudication motion unnecessary. Perversely, the existence of a Summary Adjudication motion could, in some cases, actually discourage courts from granting 12(b)(6) motions, on the theory that courts should routinely permit cases to proceed to the Summary Adjudication stage with its limited discovery rights.

The proposed Summary Adjudication motion could also exacerbate delays in resolving cases, because the proposed stay of all discovery pending resolution of a 12(b)(6) motion would give defendants an incentive to file motions to dismiss regardless of their merits. Again, if a stay of discovery is desirable, the District Courts already possess ample discretion to impose such a stay. There is no reason to believe that a stay makes sense in all cases, particularly those where it is apparent from the outset that factual issues pervade the case. In this regard, we note that at least some courts that imposed a mandatory stay of discovery pending motions to dismiss have departed from that regime. The Commercial Division of the New York Supreme Court previously adhered to a blanket rule in which discovery was stayed during the pendency of a CPLR 3211 motion. However, that Court now largely issues such stays on a case-by-case basis.³

Similarly, the stay of all but limited discovery upon filing of a Summary Adjudication motion would also give defendants an incentive to file such motions regardless of the merits, particularly because the scope of the stay would be determined by the scope of the motion. Except in rare cases where the relevant facts are unusually simple and the plaintiff's claims are exceptionally strong, we do not believe that plaintiffs would have an incentive to use the new type of motion. And in those exceptionally strong cases, plaintiffs could, under existing rules, already file a quick motion for summary judgment, meaning that the proposed new summary resolution motion would not meaningfully benefit even those plaintiffs with strong cases.

The proposed new motion would also exacerbate delays because a failed motion for Summary Adjudication presumably would not bar a subsequent motion for summary judgment under Rule 56 after completion of full discovery. In addition, it is likely that parties will seek to re-depose those witnesses who were initially deposed prior to the proposed summary resolution motion. Even if the witnesses' counsel attempt to shut down such re-depositions, the party seeking re-deposition could argue that it should be allowed a further opportunity for deposition in light of facts adduced in the full discovery process that were not available in the limited discovery process prior to the summary resolution motion.

The recommendation to require "a strict timetable for briefing and decision" would not prevent the proposed new motion from increasing delays, because the time that the parties' lawyers take to draft their briefs is not a major contributor to delays. The time that overburdened District Courts take to decide motions is, on the other hand, a very large factor in delays in Federal civil litigation. Deadlines for judges to decide motions are unenforceable and unrealistic and would not prevent the increased delays resulting from the new type of motion.

In cases where a partial Summary Adjudication was granted, the preclusion of further discovery on the summarily adjudicated issues would either artificially limit discovery into the remaining issues in the

³ See Letter from Barry Kamins, then-President of the Association of the Bar of the City of New York, to then-Chief Judge Judith Kaye, Apr. 27, 2007 (avail. at http://www.nycbar.org/pdf/report/Judith_Kaye042707.pdf).

case, or fail to meaningfully reduce the burdens of discovery. The facts relevant to various issues in a complex case cannot be neatly separated from each other; many facts are relevant to multiple issues. Thus, if full merits discovery were permitted on the issues remaining after Summary Adjudication, the discovery would likely not be significantly limited in complex cases. On the other hand, if the discovery were significantly limited, the party that opposed Summary Adjudication – usually the plaintiff – would be prevented from gaining full discovery into the merits of the remaining issues.

The proposed new motion could also result in unfair outcomes in cases where partial Summary Adjudication was granted, but subsequent discovery on the remaining issues uncovered evidence that the partial Summary Adjudication was erroneous.

Discovery

Recommendation No. 1:

We agree that increased judicial supervision of discovery is desirable. We believe, however, that it is unrealistic to expect District Judges or even Magistrate Judges to engage in detailed review of the initial discovery requests in complex cases, where there are often hundreds of document request categories. We also believe that if the Rules are revised to require judicial review of discovery requests, there should also be a mechanism to better ensure that the parties receiving the judicially reviewed requests fully comply with them and do not interpose further boilerplate objections to delay and limit their production of responsive documents.

Recommendation No. 2:

As discussed above, we do not believe that there should be an automatic stay of discovery upon filing of a motion to dismiss or the proposed new motion for Summary Adjudication. We also believe that there is no realistic and enforceable way to ensure that these motions are decided promptly.

While we agree that there should be protections to ensure that these motions are not abused, we do not believe that the proposal to expedite discovery if a Summary Adjudication motion or motion to dismiss is denied is sufficient in that regard. We would suggest that if the New York City Bar Proposals' recommendation regarding a discovery stay were adopted, the courts should be encouraged to grant sanctions against a party who files a baseless motion to dismiss or for Summary Adjudication. Such sanctions could include the costs of opposing the motion or a court-ordered presumption in favor of the non-moving party with respect to relevant issues.

Recommendations No. 3 and 4:

We generally agree with these recommendations regarding uniform definitions and instructions and limits on initial interrogatories.

Electronic Discovery

We generally agree with these recommendations on (i) preservation and (ii) more emphasis on cost-shifting, but we add a caveat that consideration should include a sensitivity towards the parties' financial wherewithal. In addition, we urge that any cost-shifting be imposed pursuant to clear standards.

Judicial Management of Process

Recommendations No. 1 and 2:

We generally agree with these recommendations on (i) one-case, one-judge civil assignment and (ii) mandatory initial pre-trial conference followed by periodic conferences.

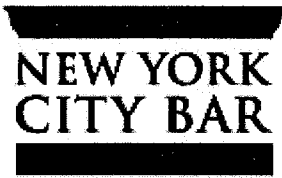
Recommendation No. 3:

We strongly disagree with this recommendation. Although the Courts and the public have an interest in prompt resolution of private federal civil litigation, the interests of the parties with respect to timing are far more important. We do not believe that there is any good reason for establishing a rule against granting extensions that are requested by all parties in a case without a showing of good cause. The proposal fails to take into account the challenging realities of practice, including small-firm practices, competing case loads, and even clients who perhaps cannot pay sufficiently to keep pace with the expedited case schedule, but who nevertheless deserve their chance at justice. We also believe that this recommendation fails to take into account the widely varying case loads and case-management practices of different District Courts. The Rules already empower a particular judge or District to enforce short schedules and to discourage or deny extensions, as many do.

Settlement

We generally agree with these recommendations to raise the profile of settlement.

Committee Chair: Gregg Kanter, Esq., Flemming Zulack Williamson Zauderer LLP
Subcommittee Chair: Jai Chandrasekhar, Esq., Bernstein Litowitz Berger & Grossmann LLP
Subcommittee Members: Vincent T. Chang, Esq., Wollmuth Maher & Deutsch LLP
Rolande R. Cutner, Esq., Cutner Law Firm
Brian D. Graifman, Esq., Gusrae, Kaplan, Bruno & Nussbaum PLLC
Evan Mandel, Esq., Mandel Bhandari LLP
Hae Sung Nam, Esq., Kaplan Fox & Kilsheimer LLP
Evan S. Rothfarb, Esq., Rothfarb Law, PLLC



**Proposals for the 2010 Duke Conference Regarding
the Federal Rules of Civil Procedure**

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The Association of the Bar of the City of New York**

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INTRODUCTION

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

In an effort to address the issues that arise when practicing in federal courts, the Federal Courts Committee of the New York City Bar Association (the “Association”), on behalf of the Association, engaged in a six-month process whereby the committee examined the issues and developed a number of recommendations to improve the federal civil litigation system. The Committee is comprised of federal practitioners with backgrounds as in house counsel, government attorneys and representing both plaintiffs and defendants. The Committee also liaised with a representative of the Federal Courts Committee of the New York County Lawyers’ Association (“NYCLA”), and these proposals include consideration of comments from the NYCLA Committee.

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

EXECUTIVE SUMMARY

1. Pleadings and Dispositive Motions

We propose that consideration be given to amending the FRCP to establish a new motion (a “Summary Adjudication Motion”) that will permit the court to control the scope of discovery and the breadth of the claims, counterclaims, and defenses by deciding substantive issues after the filing of the complaint and before summary judgment. The existing dispositive motion structure does little to curb the expense and length of litigation. If a Rule 12(b)(6) motion is granted, it is often accompanied by permission to re-plead; and Rule 56 motions are usually made after the parties have borne the burden of costly and time-consuming discovery. We believe that a Summary Adjudication Motion fills this gap.

We propose that the Summary Adjudication Motion be available to plaintiffs and defendants alike. For a defendant, the proposed new motion is to be available by election in lieu of a Rule 12(b)(6) motion. For a plaintiff, the Summary Adjudication is to be available (i) if a defendant answers the complaint or makes and loses a Rule 12(b)(6) motion; or (ii) as a cross-motion if a defendant elects to move for Summary Adjudication. In each instance, the Summary Adjudication Motion follows enhanced initial disclosures and no more than 14 hours of deposition from each side. We believe that this new motion will help to streamline the adjudicative process.

2. **Discovery**

In an effort to minimize common (and avoidable) discovery disputes and to bring potential disputes to a head earlier, we recommend the following:

- a. The parties must exchange their initial discovery requests, which should be tailored to the key issues in dispute, in advance of the Rule 16 or 26(f) conference. At the conference, the court will have the opportunity to review the requests for relevance and reasonableness.
- b. A Rule 12(b)(6) motion will suspend all discovery, and a Summary Adjudication Motion will suspend post-motion discovery until the motion is decided.¹ These motions permit the court to fulfill a valuable gate keeping function and, until they are decided, the parties should be relieved of the expense of discovery.
- c. The adoption of uniform definitions and instructions for discovery requests. Using common definitions and instructions avoids unnecessary disputes over matters that are, for the most part, trivial and collateral.
- d. Limiting the use of interrogatories at the outset of the case to determining the identity and location of witnesses and the calculation of damages.

3. **Electronic Discovery**

Although the duty to preserve information arises when a party reasonably anticipates litigation, there is no bright-line rule for identifying reasonable anticipation. We recommend this guideline: the duty to preserve electronic information will still be triggered as required by the common law standard, but sanctions cannot be imposed for data lost more than one year before the receipt of a preservation demand letter or the filing of a complaint, whichever occurs first.

We propose amending the FRCP to give courts the discretion to allow for cost shifting, not only for overbroad production requests, but also for overbroad preservation demands.

4. **Judicial Management of Process**

Effective litigation process requires strong and consistent judicial management. To enhance the strong management that already exists, we recommend:

- a. The adoption of a one-case-one-judge civil system. To provide additional resources for this system, we recommend that magistrate judges be included in the civil case assignment wheel and selected at the same time and in the same manner as district judges with the parties then being given a reasonable opportunity to

¹ As set forth below in greater detail, the proposed new Summary Adjudication Motion is to be preceded by enhanced initial disclosures followed by a stay of further discovery once the motion is made.

opt-in or consent to the increased dispositional authority of the assigned magistrate judge.

- b. Making the initial Rule 16 conference mandatory and also requiring that the court hold frequent conferences thereafter to monitor the progress of the case and deal with disputes as they arise.
- c. That at a relatively early stage of the litigation the court set firm dates for completion of discovery, the filing of dispositive motions, the submission of the pre-trial order and for trial and granting extensions only for good cause.

5. Settlement

Settlement is one of the goals of the Rule 16 conference. But settlement discussions at those conferences are often fruitless due to a widespread belief that they are premature. We believe that more focus on settlement at this early stage may bring beneficial results. We therefore propose that, when defendant appears in the action, the clerk send a notice to all counsel advising of the availability of the available dispute resolution processes, that counsel then be required to send that notice to their clients and that counsel then file a statement of compliance with the clerk reflecting a return acknowledgement by the client of receipt of the notice. We believe that this notice may encourage settlement because it will better educate the litigants of the available processes for settlement and its advantages.

