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Edward H. Cooper

University of Michigan Law School, coopere@umich.edu

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SIMPLIFIED RULES OF FEDERAL PROCEDURE?

Edward H. Cooper*

FOREWORD

Writing in 1924, seventy-eight volumes ago, Professor Edson R. Sunderland began *The Machinery of Procedural Reform* with this sentence: “Much has been said and written about the imperfections of legal procedure.”¹ Much of his article describes circumstances in which procedural reform occurred only in response to conditions that had become “intolerable.” A decade later, Congress enacted the Rules Enabling Act that still provides the framework for reforming federal procedure.² The Enabling Act establishes a deliberate and open process for amending the rules initially adopted under its authority. It may take longer today to consider and adopt a single rule amendment than the original rulesmakers took to create the original body of Civil Rules.³ The process surely provides the “close and pains-taking study

* Thomas M. Cooley Professor of Law, University of Michigan Law School. A.B. 1961, Dartmouth; LL.B. 1964, Harvard.

Professor Cooper is Reporter for the United States Judicial Conference Advisory Committee on the Federal Rules of Civil Procedure. The draft rules discussed here were prepared for consideration by the Advisory Committee. The Advisory Committee has begun work on the draft, but has not yet decided whether there is reason to pursue the project further. If the project is pursued, any rules that emerge will be strongly influenced by the designation of the cases that may be governed by the rules. The draft thus remains in its original form as an outline of one of many possible approaches to the task. It is a Reporter's draft and does not in any way represent the work or position of the Advisory Committee. — Ed.

1. Edson R. Sunderland, *The Machinery of Procedural Reform*, 22 MICH. L. REV. 293 (1924).

2. The core of the current version is 28 U.S.C. § 2072 (1994). The full scope of the enterprise is reflected in 28 U.S.C. §§ 331, 2071-77. Section 331 directs the Judicial Conference of the United States to:

carry on a continuous study of the operation and effect of the general rules of practice and procedure now or hereafter in use as prescribed by the Supreme Court for the other courts of the United States pursuant to law. Such changes in and additions to those rules as the Conference may deem desirable to promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay shall be recommended by the Conference from time to time to the Supreme Court * *

.*

3. A succinct summary of the creation of the Civil Rules is provided in 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE & PROCEDURE: CIVIL* § 1004 (2d ed. 1987). The original Advisory Committee — of which Professor Sunderland was a member — was appointed on June 3, 1935. The Committee submitted its third draft to the Supreme Court in May 1936. The final report issued in November 1937. After submission to Congress, the rules took effect on September 16, 1938.

of an intricate mechanism which is necessary for successful regulation” that Professor Sunderland hoped for.⁴ It is difficult to be as confident about the overall effect of the painstaking changes that have gradually accumulated since the Civil Rules first took effect in 1938.

It may be inevitable that a continuing revision process lengthens the rules and adds complexity to them. Doubts grow up around old solutions, and new problems appear. The Civil Rules have not escaped this effect. Yet time and again, the Rules adhere to a pervading characteristic. The effort is less to provide detailed controls and more to establish general policies that guide discretionary application on a case-specific basis. Many a district judge may view one provision or another as an unwarranted intrusion on the proper sovereignty of a trial court, but vast discretion remains at virtually every turn. It does not yet seem fair to charge the revision process with a descent into the niggling detail and sterile ossification that have overtaken earlier procedural systems.

Rigidity is not, however, the only danger to be avoided. Discretion is a useful rulemaking technique when it is difficult — as it almost always is — to foresee even the most important problems and to determine their wise resolution. Reliance on discretion is vindicated only when district judges and magistrate judges use it wisely most of the time and in most cases. The ongoing revisions of the Civil Rules time and again reflect an implicit judgment that confidence is well placed in the discretionary exercise of power by federal trial judges. In a wonderful way, there may be an interdependence at work — the very fact that there is discretionary authority to guide litigation to a wise resolution may enable us to attract to the bench judges who will use the authority wisely. It is not clear beyond dispute, but let us assume that the open-textured reliance on trial-judge discretion is working well. Even then, another set of questions remains.

Open-ended rules that call for wise discretion cannot depend on the wisdom of trial judges alone. The structure of our courts — considered in relation to the volume of litigation, the structure of the legal

Current consideration of Rule 23, the class-action rule, has been rather more deliberate. After a deliberate moratorium following the 1966 amendments, the Advisory Committee took the subject up again in 1991. An interim memorial of the project is provided by the four-volume ADMIN. OFF. OF THE U.S. CTS., WORKING PAPERS OF THE ADVISORY COMMITTEE ON CIVIL RULES ON PROPOSED AMENDMENTS TO CIVIL RULE 23 (1997). A related undertaking is reflected in ADVISORY COMM. ON CIVIL RULES & WORKING GROUP ON MASS TORTS, REPORT ON MASS TORT LITIGATION (Feb. 15, 1999). The only amendment yet to be adopted was the addition of a new Rule 23(f), effective on December 1, 1998, establishing a system for permissive interlocutory appeals from orders granting or denying class certification. The continuing work is reflected in proposed amendments to Rule 23 and 23(f) published for comment in August 2001. See 201 F.R.D. 586. The amendments also are available at <http://www.uscourts.gov/rules>. Still further amendments remain under consideration. This is not the work pace of the original rulemakers.

4. Sunderland, *supra* note 1, at 298.

profession, and the basic nature of an adversary system — requires reliance on the willingness of litigators to work within the general spirit of the rule structure. One cause for concern is doubt whether we have sufficiently contained the risks of inept misuse and the temptations of deliberate strategic over-use of the rules. There are some grounds for reassurance on that score, noted tangentially below, but also grounds for continuing concern. A different cause for concern is that the sheer power of the rules structure, with the concomitant complexity and cost, has grown out of proportion. Some litigation that might better be brought in federal court may be discouraged, either to go to state court or to vanish without filing.

This fear that the *Federal Rules of Civil Procedure* provide too much procedure for some cases underlies a current Advisory Committee project. The Simplified Rules project was launched at the suggestion of Judge Paul V. Niemeyer during his term as Advisory Committee Chair. Part of the inspiration for considering adoption of an alternative and simplified procedure was the ongoing work on The American Law Institute/UNIDROIT *Principles and Rules of Transnational Civil Procedure*.⁵ The evolving transnational rules model involves, among many other things, a paring back and simplification. This Introduction is a brief description of the general issues that surround a vaguely similar undertaking to simplify federal procedure for an uncertainly defined subset of cases. The pages that follow set out the first draft to be submitted to the Advisory Committee, (many) imperfections and all.

The basic character of the draft is easily described. The draft proposes more detailed pleading, enhanced disclosure obligations, and restricted discovery opportunities. Other provisions seek to reduce the burden of motion practice and establish an early and firm trial date. The core justification for this approach is that current reliance on notice pleading and searching discovery puts too much weight on time-consuming and expensive discovery. This justification deserves a few more words of examination, after a preliminary look at the question of choosing the cases that might come within the simplified rules.

Draft Rule 102 is no more than a preliminary sketch of the issues that must be addressed in determining the cases that might come within a set of simplified rules. It was drafted for purposes of illustrat-

5. Discussion Draft No. 2 of this project was circulated for discussion and comment on April 12, 2001. The basic purpose is to draft a set of procedure rules for transnational disputes, based on the common principles that underlie both "common" and "civil" law systems, as well as other legal systems that do not derive from either of those great traditions. The hope is that the rules could be adopted in many countries, providing a good procedure that is comfortably familiar to litigants from many different systems. Even as the project remains in midstream, it is apparent that it requires simplification, a stripping away of details to reveal a basic core procedure that is significantly different from any particular domestic system.

tion, suggesting the issues by seeming to resolve them. It would make application of the rules mandatory in an action "in which the plaintiff seeks only monetary relief and the amount is less than \$50,000." Rather complicated provisions contemplate application to other actions by consent of the parties and exclude certain categories of actions. All of the other rules depend on the choices made in determining which cases are covered. As one simple illustration, a decision to apply the rules only when all parties consent would open the possibility of discarding jury trial. Any attempt to discard jury trial without party consent would require such elaborate justification, and encounter such stiff resistance, as to impede seriously, if not fatally, any serious attempt at adoption.

The justification for attempting to frame a simplified procedure must withstand many challenges. Most of the challenges raise empirical issues. Two sets of empirical issues lead the list. One ties directly to the definition of cases covered by the rules — it makes little sense to create a set of rules for cases that do not, and should not, come to the federal courts. The other set goes directly to the underlying premise: are the present rules in fact too complex, too full of opportunities for excessive lawyering and strategic manipulation, to work well with some cases that do, or should, come before the federal courts?

The draft that applies the simplified rules to all actions that seek money only, and less than \$50,000, prompted the question whether such actions exist in the federal courts. The Federal Judicial Center — a constant source of valuable assistance in considering empirical rules-reform questions — undertook to examine the data currently available. Looking at all cases filed in federal courts from 1989 through 1998 — some 2,248,547 cases — they found that information about a stated money demand greater than \$0 was available for only 610,002, less than 28%. Of this reduced set of cases, 236,212 involved demands from \$1 to \$50,000. Another 103,326 involved demands from \$51,000 to \$150,000.⁶ It is not possible to assume that the same distribution would hold for all cases if the amount of the dollar demand were known for all. That more than one-half of the cases in this subset involved demands for less than \$150,000 is an interesting datum, but little more. That nearly a quarter of a million cases in ten years involved less than \$50,000 is more tangible. If there is otherwise reason to fear that the Civil Rules provide more procedure than is appropriate for relatively small-dollar litigation, there are cases enough to justify further consideration.

That observation leads directly to the empirical question whether general federal procedure is indeed too elaborate for many of the actions brought in federal court. There are many reasons to question the

6. Letter from Thomas E. Willging to Hon. Paul V. Niemeyer, Chair, Civil Rules Advisory Committee (Dec. 21, 1999) (on file with author).

premise that federal procedure often proves unnecessarily burdensome. Empirical studies of discovery have repeatedly disclosed that for most cases in federal court no discovery occurs, or only a few hours are devoted to it.⁷ Recent amendments have sought to reduce the burden of discovery still further by adopting and then modifying disclosure requirements and by providing for the Rule 26(f) meeting of the parties. Many practicing lawyers have reported that the Rule 26(f) meeting has proved useful. If lawyers actually confer about the realistic needs of the case, they commonly agree to behave reasonably.

The counterpoint to assertions that federal procedure is too elaborate for some cases commonly is that state procedure is more suitable. But many state systems are modeled on the federal rules, and outsiders are not likely to view the more distinctive state systems as more efficient. If there is a point in this comparison, the most likely support lies in the procedures adopted for state courts of limited, not general, jurisdiction.

Even if there is reason to fear that general federal procedure should not apply in all its sweep to every case in federal court, it is not clear that "general federal procedure" is as procrustean as the champions of simplified procedure may claim. The Civil Rules provide many opportunities for tailoring procedure to the realistic needs of individual actions. Judges are given general and discretionary authority to cabin discovery and to manage the litigation. Vigorous use of this authority can directly limit the dangers of excessive procedure. Indirect benefits may prove even greater as lawyers come to understand that they will be forced to behave reasonably.

The general power to shape procedure to specific cases has been elaborated in some districts by adoption of differentiated case management plans. Several courts have established tracking systems that are designed to provide expedited procedures for cases that do not require full utilization of all the tools the Civil Rules make available. The experience of these courts is important to the simplified procedure proposal for at least two reasons. The first is that these practices may provide all the relief that is needed. If so, reliance on these procedures may prove more effective than an attempt to generate special rules and to identify the categories of cases to be covered by special rules. The second is that if special rules remain a promising approach, local tracking systems may point the way toward the kinds of procedures that prove useful and the kinds of cases that benefit from them.

Examples of the more specific issues presented by local tracking systems are easy to provide. Several systems attempt to assign tracks by case categories only for cases that can be categorized with relative ease — cases involving review on an administrative record, bank-

7. See THOMAS E. WILLGING ET AL., *DISCOVERY AND DISCLOSURE PRACTICE, PROBLEMS, AND PROPOSALS FOR CHANGE* (1997).

ruptcy appeals, and so on. Other cases are assigned to tracks by a judge after a Rule 16 conference that considers such matters as the number of parties, the degree of contentiousness, the stakes, the level of agreement on what issues need to be resolved, and so on. Most cases wind up on the “standard” track. “Expedited” tracks seem not to draw many cases. All of this may suggest that case-by-case determinations by a judge who is actively involved in the early stages are better than an attempt to establish more abstract definitions and categories.⁸

Another example is provided by the common requirement in differentiated case management plans, similar to the Rule 26(f) meeting, that attorneys meet to prepare a joint statement before the first Rule 16 conference. This joint statement supports the track assignment. When approached in the proper spirit, the attorney conference and Rule 16 conference may provide a far more direct and effective method of identifying the nature of the dispute and the issues that need to be resolved than any method that relies on detailed pleading and unilateral disclosure.

Yet another alternative is possible. In 1992, the Advisory Committee proposed to amend Civil Rule 83 to authorize adoption, with Judicial Conference approval, of experimental local rules inconsistent with the national rules. The proposal was withdrawn in the June 1992 Standing Committee meeting. The proposal presented obvious statutory difficulties — 28 U.S.C. § 2071(a) authorizes district courts to prescribe rules “consistent with * * * rules of practice and procedure prescribed under section 2072 * * *.” It may seem circular to make an inconsistent local rule consistent with the national rules by adopting a national rule that authorizes inconsistent local rules. There also may be some hesitation about wishing the tasks of review and approval on the Judicial Conference. But as compared to the uncontrolled proliferation of local rules, more or less at random, there may be real advantages in facilitating well-designed and carefully monitored local experiments. Empirical data are hard to come by in the world of procedure. “Pilot” and “demonstration” programs may yield valuable insights. Rather than adopt national rules that apply to all federal courts at once, local experiments might better advance progress toward simplified procedure, whether for some distinctive portion of the federal docket or for all cases.

8. Information about differentiated case management plans remains diffuse. Two good sources provide information about general variations; although the details of specific court programs have surely changed, the overall picture remains useful. *See* DAVID RAUMA & DONNA STIENSTRA, *THE CIVIL JUSTICE REFORM ACT EXPENSE AND DELAY REDUCTION PLANS: A SOURCEBOOK* (1995); DONNA STIENSTRA ET AL., *REPORT TO THE JUDICIAL CONFERENCE COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT: A STUDY OF THE FIVE DEMONSTRATION PROGRAMS ESTABLISHED UNDER THE CIVIL JUSTICE REFORM ACT OF 1990* (1997). A summary of Judge Jean C. Hamilton’s description of the expedited track in the Eastern District of Missouri plan is provided in the Civil Rules Advisory Committee, Minutes (Oct. 16-17, 2000), available at <http://www.uscourts.gov/rules>.

These empirical questions, and the possibility of experimental local rules, point to another possible purpose in adopting simplified rules for a yet-to-be-defined portion of federal civil actions. The simplified rules could themselves be an experiment, designed to pave the way for gradual revision of the rules for all actions. The approach that combines notice pleading with sweeping discovery is deeply entrenched. But it is not inevitable. Discovery and the recently adopted and amended disclosure rules have been the subject of continual study by the Advisory Committee since the work that led to the 1970 discovery amendments.⁹ Should some form of simplified rules be adopted, it is possible that several years of developing experience would provide the foundations for simplifying the general rules as well.

SIMPLIFIED PROCEDURE

INTRODUCTION

Some of the persisting questions about the Federal Rules of Civil Procedure arise from the “one size fits all” character of the Rules. The Committee has struggled regularly with the “transsubstantive” character of the rules, ordinarily reaching the conclusion that serious Enabling Act questions are posed by any effort to create special rules for specific substantive problems. Perhaps the time has come to consider a different aspect of the Rules’ unvarying uniformity. As they stand now, and as they have been from the beginning, the Rules apply alike to all cases, no matter how complex or how simple. It has been common to wonder whether the inevitable compromises have produced rules that work well for most litigation in the middle range, but do not work as well for cases at the extremes. One extreme has been frequently studied. The recent discovery proposals are only the most recent in a long line of efforts to adapt the rules to the needs of complex or contentious litigation. Not as much has been done for simple litigation. It is possible to adopt special provisions for simple litigation without in any way departing from the transsubstantive principle. The purpose would not be to establish a second-class set of procedures for second-class litigation, but to provide procedures that provide more efficient, more affordable, and better justice for litigation that cannot reasonably bear the costs of unnecessarily complex procedures.

The simplified rules that follow are very much a first draft. Coverage is limited to actions demanding only money damages, and in relatively small amounts, unless all parties agree to adopt the rules. The central feature is a major transfer of pretrial communication away

9. A concise history of the discovery rules is provided in 8 CHARLES A. WRIGHT ET AL., *FEDERAL PRACTICE & PROCEDURE: CIVIL* §§ 2002-2003.1 (2d. ed. 1994).

from discovery and to fact pleading and disclosure. There also is a demand-for-judgment procedure that could accelerate and clarify disposition of many actions that today go by default. Use of Rule 16(b) scheduling orders is made optional. Finally, there is a beguiling proposal to require court permission for presentation of expert testimony under Evidence Rules 702, 703, or 705.

The draft is presented to stimulate thinking at several levels. The first is consideration of whether it is sensible to launch a project of this nature. It should be easier to consider this question in light of a model, however crude, of the core topics that are likely to be addressed in any effort to create a simplified procedure track.

A second set of questions goes directly to the topics addressed by the draft. Can we effectively restore fact pleading that achieves the hopes of the Field Code drafters, not the sorry legalisms that lawyers and judges conspired to inflict on the worthy Code provisions? Should we require pleading of law as well as fact — something not done by the draft? Should we at least provide limited law-pleading requirements for special situations? (One possibility would be to require a party to plead the source of the governing law — federal or state, which state or foreign country, and so on.) How far should initial disclosure be expanded beyond the 1993 26(a)(1) model? How far should discovery be restricted — an illustration is provided by the alternatives in Rule 106 that either allow three depositions as a matter of right or require court permission for any deposition?

A third set of questions goes to the questions that might be addressed outside the core. One possibility, for instance, would be to encourage the parties to agree to a partly paper trial, in which witness statements or deposition transcripts are used in place of direct testimony and live trial testimony focuses on cross-examination and, perhaps, rebuttal. Or, as a variation, trial could be integrated with summary judgment in a process by which the court first considers the paper record, then determines what witnesses should be heard in court and shapes the trial accordingly. The following list exemplifies, but does not begin to exhaust, the questions that might be addressed.

Finally, review of questions not addressed suggests a different issue. It is tempting to adopt in the simplified rules provisions that seem to be improvements for all actions but that also seem easier to move through the Enabling Act process if limited to actions that do not have an actively involved constituency. Summary judgment procedure is an illustration. Rule 56 could be substantially improved. A substantially improved Rule 56 failed in the Judicial Conference nearly a decade ago, and it has been difficult to muster enthusiasm for a renewed attempt. But it might be possible to adopt revisions for the simplified rules.

Should permissive Rule 13(b) counterclaims be permitted in a simplified action? Why not make optional counterclaims that arise out

of the same transaction or occurrence as the claim, and prohibit others? If counterclaims are permitted, should all claims be aggregated to determine whether the simplified rules apply? Should a counterclaim for injunctive relief automatically oust application of the simplified rules in the cases identified by Rule 102 for mandatory application?

It seems likely that a relatively high proportion of simplified procedure cases will be resolved by default. The Rule 104 demand for judgment is a beginning effort to expedite and clarify this outcome, but — even if something like Rule 104 is adopted — cannot resolve all default cases. Should we adopt an express requirement for proof of the claim by affidavit? Should the requirement be measured differently than the test that would justify summary judgment on the affidavits if there are no opposing affidavits? Is this an illustration of a reform that should be adopted as part of Rule 55 for all cases?

Direct attorney-fee provisions seem outside the scope of Enabling Act rules. But many people believe that the rules can affect implementation of fee statutes. One temptation is to revise the offer-of-judgment procedure so that a Rule 68 offer does not cut off the right of a prevailing plaintiff to recover statutory attorney fees. (An illustration: the rejected offer is for \$100,000; the plaintiff wins \$90,000. The offer now destroys the right of the plaintiff to recover statutory attorney fees if, but only if, the statute describes the fee recovery as “costs.” This wildly improbable result cries out for correction for all cases. But correction quickly becomes bogged down in the dismal swamp of Rule 68.) There may be a special justification for addressing this question in the simplified rules, since they will apply in many actions that will be feasible only if there is a realistic prospect of recovering attorney fees. Fear of the strategic gamesmanship inherent in Rule 68 may deter initial filing, and may easily distort the decision whether to accept an unfair Rule 68 offer.

Now that the rulemaking power includes determinations of appealability, it would be possible to seek out rules that impose particular burdens in small-stakes litigation. The most obvious candidate, official-immunity appeals, is likely to prove untouchable. The sorrily confused discussion in 15A Federal Practice & Procedure: Jurisdiction 2d, § 3914.10 (current supplement) reflects an even deeper confusion in the law. One suspicion, increasingly voiced by the courts of appeals, is that official defendants are using immunity appeals to inflict delay. There may be a substantial number of small-stakes § 1983 actions and potential actions that are deterred by the availability of (potentially multiple) interlocutory appeals. The deterrent effect is likely to be greater in small-stakes cases, affording some excuse to approach these problems in the simplified rules. One easy but partial remedy would be to provide that only one pretrial immunity appeal may be taken. A more effective remedy would be to expand the scope of the one permitted appeal, permitting direct review of a denial of summary judg-

ment. Official-immunity appeal doctrine, however, derives from the substantive perception that this form of immunity — unlike many other important protections, such as the rules of personal jurisdiction — affords a right to be protected against the burdens of pretrial and trial procedures. Even with the enthusiastic cooperation of the Appellate Rules Committee and staunch support of the Standing Committee, efforts to address these problems could undermine a simplified rules project.

As drafted, the simplified rules model does not address a set of scope problems that likely require consideration. If application of the rules is defined in terms of amount in controversy, what happens when cases are consolidated or claims are severed?

Would it be desirable to consider a majority-verdict rule for jury trials? (There is no possibility of ousting jury trial, and little point in making it more difficult to demand jury trial.)

Should the Rule 53 special masters Subcommittee be asked to consider a provision barring reference to a special master in a simplified rules case?

How about a rule that establishes presumptive time limits for trial — perhaps one day per “side”? (See this again with Rule 109.)

Traditionally the rules have left *res judicata* to be developed by decisional law. But the nature of simplified procedure raises at least one question. Is it fair to base nonmutual issue preclusion on a simplified-procedure judgment? How far should this question depend on the nature of the simplified rules: is it unwise to belittle the fairness and adequacy of the rules by providing that the results are acceptable to dispose of “small” claims but not to govern something that “really matters”?

If simplified rules are adopted, Rule 81 should be amended to recognize them.

There is another frustrating choice that also must be considered. The draft simply incorporates the Civil Rules for most questions. That approach makes the project much easier. But it also defeats one of the goals of a simplified procedure. A *pro se* party will not find any of the comfort that might be provided by a self-contained, short, and clearly stated set of rules. This draft does not address directly any of the questions that are raised by the proposal of the Federal Magistrate Judges’ Association that a special set of rules should be adopted for *pro se* actions.

Many other questions are likely to be raised as collective deliberation is brought to bear. The immediate questions are two: Should this project be developed? And if it is to be developed, what forms of support might be sought in developing a more polished model for publication?

A more general question might be added. What sorts of actions are likely to be encouraged by these rules? Will the result be to bring to

federal courts actions that otherwise would be brought in state courts — and is that a good use of federal judicial resources? Will the result be to encourage people to bring in federal court actions that otherwise would not be brought in any court? If the ceiling for mandatory application is set at \$50,000, is there something awkward about wishing on civil rights actions, or maintenance-and-cure claims, or proceedings that cannot readily be inflated above \$50,000, procedures that are not invoked for any diversity action?

XII. SIMPLIFIED PROCEDURE¹⁰

Rule 101. Simplified Rules

These simplified rules govern the procedure in actions described in Rule 102. They should be construed and administered to secure the advantages of simplified procedure to serve the just, speedy, and economical determination of these actions.

Committee Note

The Civil Rules have applied a single general form of procedure to all civil actions. Many changes have been made over the years to facilitate individualized adaptation of the general rules to the distinctive needs of complex litigation and to the need to provide increased judicial management when adversary contentiousness threatens to disrupt orderly disposition. Not as much has been done to adapt the rules to the needs of simple litigation that can be managed by the parties with little need for elaborate discovery or pretrial management. Often the parties meet this need on their own. Several studies have shown, for example, that no discovery at all is conducted in a significant portion of federal civil cases. See *Willging, Shapard, Stienstra, & Miletich, Discovery and Disclosure Practice, Problems, and Proposals for Change* (Federal Judicial Center 1997). The lack of discovery, and the limited use of formal discovery in another significant portion of cases, often reflects a low level of fact dispute. In other cases the parties recognize the need to hold the costs of litigation in sensible proportion to the stakes. Yet such restraint is not universal. Whether from excessive zeal, ineptitude, or deliberate motive to increase cost and delay, notice pleading and sweeping discovery practices can entail pretrial practice out of any sensible relationship to the stakes or needs of relatively simple litigation. These rules are designed to provide an improved package of pleading and discovery procedures that will enhance the opportunity to avoid costly discovery. More exacting pleading and dis-

10. The following is the Reporter's Draft, reproduced in its original form.

closure requirements are provided to reduce further the need for formal discovery.

Other changes are made to complement the alternative pleading, disclosure, and discovery practices. These changes, however, are modest. The core of the simplified procedure is the alternative pleading, disclosure, and discovery practice.

Rule 102. Application of Rules

(a) Except as provided in Rule 102(b), these simplified rules apply in an action:

- (1)** in which the plaintiff seeks only monetary relief and the amount is less than \$50,000; or
- (2)** in which the plaintiff seeks only monetary relief and the amount is less than \$250,000, if all plaintiffs elect [in the complaint] to proceed under these rules [and if no defendant objects to application of these rules by notice filed no later than 20 days after service of the summons and complaint {on the objecting defendant}].

(b) These simplified rules do not apply in an action described in Rule 102(a):

- (1)** for interpleader under Rule 22 or under 28 U.S.C. § 1335;
- (2)** under Rules 23, 23.1, or 23.2;
- (3)** under 28 U.S.C. §§ 1602-1611;
- (4)** for condemnation of real or personal property under Rule 71A;
- (5)** in which the United States is a party and objects to application of these rules
 - (A)** in the complaint, or
 - (B)** — if a defendant — by notice filed no later than
 - (i)** 30 days after service of the summons and complaint, or
 - (ii)** a motion to substitute the United States as party-defendant; or
- (6)** if the court, on motion or on its own, finds good cause to proceed under the regular rules.

(c) These simplified rules apply in an action in which:

- (1)** all plaintiffs offer in the complaint to proceed under these rules,

- (2) all defendants named in the complaint accept the offer by notice filed no later than 20 days after the last of these defendants is served, and
- (3) no party involuntarily joined after the offer is accepted shows good cause to proceed under the regular rules.

Committee Note

Determination of the actions that the simplified rules govern should be approached conservatively at the outset. Broader application may prove appropriate after experience with the rules determines their success and points the way to improvements.

Subdivision (a) establishes the basic core of application. The simplified rules apply to all actions in which the plaintiff seeks only monetary relief less than \$50,000. They apply also to actions for only monetary relief less than \$250,000 if the plaintiff elects to invoke them and no defendant makes timely objection. The rules do not apply if the plaintiff seeks specific relief such as a declaratory judgment, an injunction, specific performance, or habeas corpus, unless the parties agree to apply the rules under subdivision (c). The exclusion of actions for specific relief enables a plaintiff to impose the regular civil rules on a defendant who would prefer simplified procedures. The cost of attempting to measure the significance of the stakes in actions that seek more than money, however, seems too great to bear, at least while the simplified rules are new.

Subdivision (b) excludes specific categories of actions that do not seem amenable to simplified procedure because of the dignity of a party or the potential complexities of multiparty proceedings. Paragraph (6) allows the court to exclude any other action for good cause. The court may exercise this power at any time, and may act at the behest of a party or on its own.

Subdivision (c) allows the parties to any action to agree to follow the simplified rules. The agreement is made by the plaintiffs and defendants identified in the initial complaint; a party who is involuntarily joined after the agreement may move to have the action governed by the regular rules for good cause.

Reporter's Comment

The scope of the simplified rules is critical. The choice as to scope is bound up with the actual rules. The more curtailed the simplified rules, the narrower the scope of initial application. The more closely the simplified rules approach the regular rules, the broader the scope of application might be.

The brackets in Rule 102(a)(2) flag one of the issues that deserves attention: Should the plaintiff be given sole choice whether to invoke

these rules for an action seeking less than \$250,000? Or should the plaintiff be given only the power to invite the defendant to accept the rules? There is a powerful argument that allowing a defendant to opt back into the regular Civil Rules will lead many defendants to choose the more cumbersome, prolonged, and expensive procedure for wrong reasons — the hope is to harass and wear down the plaintiff, not to achieve a better disposition on the merits. On the other hand, few people would regard stakes between \$50,000 and \$250,000 as insignificant, and lawsuits are brought against real people as well as institutions that may view the loss of a quarter of a million dollars with equanimity. The issues may have a factual complexity beyond the dollars involved. In the end, the choice may turn on our level of confidence in the rules that emerge. If we believe that they will work well even in more complex cases, we might simply raise the mandatory threshold, or give the plaintiff — but not the defendant — a choice. Giving the plaintiff a unilateral choice may not be unfair — if the action is indeed one that requires resort to the regular rules, the plaintiff may be relied upon to choose them.

All of the exclusions in Rule 102(b) are tentative; perhaps none of them deserve adoption. The exclusion of the United States, for example, may be challenged; an accommodation is made in Rule 109 to allow an additional month before trial when the action involves the United States or a United States agency or employee.

Subdivision (c) is an effort to allow all parties to agree to proceed under the simplified rules, free from any of the limits in (a) or (b). The provision that allows later-added parties to defeat the initial election is limited in two ways. It does not apply to those who voluntarily become parties, as by an amended complaint or intervention. And it requires a showing of good cause. These limitations are suggested because of the risks of disruption that would follow if it were too easy to shift procedural tracks after the initial election. Perhaps it would be better to add a simpler alternative: “These simplified rules apply in an action in which all parties agree to proceed under these rules, or * * *.”

If we go down this road, consideration must be given to several complicating factors. Rule 81(c) applies “these rules” to removed actions, but requires repleading only if ordered by the court. Pleading a dollar amount may not be required, or even permitted, by state practice. Must we provide for this in the rule?

Another problem arises from Rule 54(c) — “every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party’s pleadings.” More than \$50,000 or \$250,000? Injunctive relief? Can we allow curtailed procedure to yield unrestricted judgments? To the extent that we make the simplified rules mandatory, we cannot rely on a waiver theory, unless it is waiver by choosing to go to federal court [and not be removed]. (A much smaller problem arises with

respect to declaratory judgments: there is no apparent reason to oust these rules in a “reversed parties” action in which the declaratory plaintiff seeks only to establish nonliability for less than \$50,000.)

Rule 103. Pleading

- (a) General Rules.** Except as provided in Rule 103(b), (c), (d), (e), (f), and (g), pleading in actions governed by these rules is governed by Rules 7 through 15.
- (b) Stating a claim.** A pleading that asserts a claim for relief must, to the extent reasonably practicable:

 - (1) state the details of the time, place, participants, and events involved in the claim; and
 - (2) attach each document the pleader may use to support the claim.
- (c) Answering a claim.** A pleading that answers a claim for relief must admit or deny the matters pleaded in asserting the claim under Rule 8(b) and also, to the extent reasonably practicable:

 - (1) state the details of the time, place, participants, and events involved in the claim to the extent those details are not admitted; and
 - (2) attach each document the pleader may use to support its denials or Rule 103(c)(1) statement.
- (d) Avoidances and affirmative defenses.** A pleading that asserts an avoidance or affirmative defense must:

 - (1) identify the avoidance or affirmative defense as an avoidance or affirmative defense; and
 - (2) plead the avoidance or affirmative defense under the requirements of Rule 103(b) for making a claim for relief[, including attachment of each document the pleader may use to support the avoidance or affirmative defense].
- (e) Reply.**

 - (1) A party must reply to an avoidance or affirmative defense identified under Rule 103(d)(1) by admissions, denials, and avoidances or affirmative defenses.
 - (2) A party must serve a reply no more than twenty days after being served with the pleading addressed by the reply.

- (f) **Length.** No pleading may exceed a limit of twenty pages, eight and one-half inches by eleven inches, with reasonable spacing, type size, and margins.
- (g) **Forms.** Forms 3 through 22 in the Appendix of Forms do not suffice under Rule 103.

Committee Note

The fact pleading required by Rule 103 is, with the expanded disclosure requirements in Rule 105, the foundation for the Rule 106 discovery limits and the core of the simplified rules. Fact pleading is adopted for these rules to encourage careful preparation before filing. The general system of notice pleading and sweeping discovery works well for most litigation, but can, when misused, impose undue costs. It is hoped that shifting part of the pretrial exchanges between the parties from discovery to more detailed pleading and disclosure can enhance the realistic opportunity of all parties to litigate effectively claims that involve amounts of money that are relatively small in relation to the costs that litigation can entail. Plaintiffs can better afford to pursue worthy claims, and defendants can better afford to resist rather than capitulate to unworthy claims.

Fact pleading cannot be successful if it is approached in a spirit of technicality, much less hypertechnicality. Neither can it be successful if it assumes the mien of detailed witness statements or deposition transcripts. The spirit that has characterized notice pleading should animate Rule 103 fact pleading. What is expected is a clear statement of the pleader's claim, denial, or defense in the detail that might be provided in proposed findings of fact, recognizing that the information available at the pleading stage often is not as detailed or as reliable as the information available at the trial stage.

The test for measuring attachment of a document as one a party "may use" to support a claim, denial, or defense is the same as the test used under Rule 26(a)(1)(A) and (B). The duty to supplement the initial attachments to reflect information gained after filing the pleading is not a matter of pleading but of disclosure under Rule 105.

A reply is required to respond to an avoidance or affirmative defense, but only if the avoidance or affirmative defense is identified under Rule 103(d). To the extent that a reply asserts an avoidance or affirmative defense, a reply to the reply is required, although it is expected that this situation will arise infrequently. The twenty-day period to reply is borrowed from Rule 12(a)(2) because it seems better to have a single period to reply to a pleading that states both an avoidance or affirmative defense and also a counterclaim.

A party who believes that its positions cannot be pleaded adequately in 20 pages may seek leave to amend under Rule 15.

Reporter's Comment

This rule really gets to the heart of the project.

The decision to invoke the general pleading rules has great and obvious advantages. One obvious question is whether to incorporate all of Rule 9, which includes particularity requirements not only in the oft-invoked provisions of Rule 9(b) but also in Rules 9(a) and 9(c). Rule 9(g) on pleading special damage may raise a similar question. On balance, it seems better to retain these familiar provisions. The fact pleading required by this draft should not be equated automatically to the "particularity" requirements attached to specific claims, and most especially should not be equated to the statutory pleading requirements in the securities laws.

Another question is whether to retain the time provisions of Rule 12. The 60-days to answer allowed the United States or its employees seems long, but the reasons for allowing the additional time seem compelling even in this setting. Compare the proposal that the United States be allowed to opt out of the simplified rules, Rule 102(b)(5). There also is a temptation to expedite matters by providing that the time to answer is not suspended by a Rule 12(b) motion. On balance, this temptation seems better resisted.

Perhaps the most important question is whether to retain without change the Rule 15 amendment provisions. A policy of free amendment might undermine the purposes of fact pleading. But easy amendment may be even more important in a system that requires the parties to state relatively detailed positions early in an action; this need may be enhanced by the prospect that expensive prefilings investigation may not make sense in low-stakes actions. The greatest temptation, indeed, is to use the simplified rules as the excuse for a change in Rule 15 that may well be warranted for all cases. There is much to be said for allowing a plaintiff to amend once, as a matter of course, after an answer points out defects in the complaint. The same is true when a reply points out defects in an answer. Present Rule 15(a) allows amendment once as a matter of course if a defect is pointed out by motion but not if it is pointed out by pleading. This question deserves further consideration.

The reply obligation is limited to an avoidance or affirmative defense identified as such. Too much grief would come from requiring a reply to "new matter."

The particularized pleading requirement raises interesting questions about compliance with Rule 11: is more careful investigation required to support more careful pleading? Is that backward — we make it more difficult to bring a small-stakes action, even though the burdens are less, than to bring a more complex action?

Rule 104. Demand for Judgment

- (a) Demand for judgment.** A party may attach a demand for judgment to a pleading that asserts a contract claim for a sum certain. The demand must be supported by:
- (1)** a verified copy of any writing that evidences the obligation, and
 - (2)** a sworn statement of
 - (A)** facts establishing any obligation that is not completely evidenced by a writing,
 - (B)** facts establishing total or partial nonperformance of the obligation, and
 - (C)** the amount due.
- (b) Response to demand for judgment.**
- (1)** Within the time provided for answering the pleading asserting the claim, a party served with a demand for judgment must admit the amount due stated in the demand or file a response.
 - (2)** The response must be sworn, and must respond specifically by admission, denial, avoidance, or affirmative defense to each matter set forth in the demand for judgment. The answer to the pleading asserting the claim may incorporate the response by reference.
- (c) Judgment.** Unless the court directs otherwise, the clerk must prepare, sign, and enter judgment for any amount admitted due under Rule 104(b). A judgment that does not completely dispose of the action is not final unless the court directs entry of final judgment under Rule 54(b).

Committee Note

The demand-for-judgment procedure is new. A substantial number of actions in federal court are brought by the United States to collect relatively small sums that are due on unpaid loans or overpaid benefits. The demand procedure is essentially a motion for summary judgment that is made with the pleading that states the claim, paving the way for efficient and inexpensive disposition of the cases in which the plaintiff sues only for the amount that in fact is due. This procedure also may be useful in other small claims brought under federal law, and in diversity actions that fall under these rules through Rules 102(a)(2) or 102(c).

Reporter's Comment

It may be asked why this procedure is not available to defendants as well as plaintiffs: an opportunity to confess judgment in a stated

amount. At least two observations may be offered. Defendants have summary judgment. And a competing offer-of-judgment procedure would be just that: a Rule 68-like device. Probably we do not want to go down that road with a simplified procedure. A defendant always can concede liability even if the plaintiff does not make a demand for judgment.

Rule 104A. Motion Practice

- (a) Rule 12 applies to actions under these simplified rules except as provided by Rule 104A(b), (c), and (d).
- (b) The times to answer provided by Rule 12(a)(1), (2), and (3) are not suspended by any motion; Rule 12(a)(4) does not apply to an action governed by these simplified rules.
- (c) The answer to a pleading stating a claim for relief must state any defenses described in Rule 12(b).
 - (1) A motion to dismiss based on any of the defenses enumerated in Rule 12(b)(2), (3), (4), (5), or (7) may be made in the answer or by separate motion filed no later than 10 days after the answer is filed.
 - (2) A motion under Rule 104A(c)(1) does not suspend any time limitation for further proceedings unless the court by order in the particular case directs a different time limitation.
- (d) A party seeking an order under Rules 12(b)(6), 12(c), 12(f), or 56 must combine the relief sought under any of those Rules into a single motion filed no later than 30 days after the filing of the answer or reply to the pleading stating the claim for relief addressed by the motion. If one party makes a timely motion under this Rule 104A(d), any other party may file a motion under this Rule 104A(d) no later than 20 days after being served with the first Rule 104A(d) motion.

Committee Note

Many lawyers and judges express frustration with the delays that arise from pretrial motion practice, and often note a suspicion that pretrial motions frequently are made for the purpose of inflicting delay and expense on an adversary. Rule 104A is designed to reduce the delay, while preserving the necessary functions served by Rules 12 and 56. Other pretrial motions are not affected by Rule 104A.

Subdivision (b) removes the delay that may be occasioned by Rule 12(a)(4). To make the meaning clear, the redundant clauses both state that Rule 12(a)(4) does not apply and that the time to answer is not suspended by any motion. It is important to establish the basic frame-

work of the pleadings as early as possible so that other pretrial activities can proceed.

Subdivision (c) sets outer limits on the time to move to dismiss on grounds that go to personal jurisdiction or venue. A motion based on failure to join a party under Rule 19 is included as well, but the court retains power to act on its own or on suggestion by a party when needed to protect the interests of an absent person. This subdivision further provides that a motion to dismiss under paragraph (1) does not suspend the time limitations for further proceedings; Rule 105 disclosures provide an immediate illustration.

Subdivision (d) combines into a single motion the motions to dismiss for failure to state a claim, for judgment on the pleadings, to strike matters from the pleadings, and for summary judgment. Because the time provided is short with respect to summary judgment, the moving party may add to the motion a request for additional time under Rule 56(f).

Reporter's Comment

This is a very rough first pass at a very complicated set of questions. The questions addressed seem likely candidates for discussion. It is possible that we will want to consider time limits on motion practice, or perhaps elimination of some motions, even if we decide to abolish the dramatic 6-month trial date proposed in Rule 109. But if we adhere to Rule 109 or anything much like it, we almost certainly will have to do something to prevent the use of motion practice to make a shambles of pretrial preparation.

It might be possible to add deadlines for ruling on motions. There are so many problems, however, that perhaps this question can be put aside.

Rule 105. Disclosure

- (a) General.** Disclosure requirements are governed by Rule 26(a), 26(e), 26(f), 26(g), [and 37(c)(1)], except as provided in Rule 105(b), (c), (d), and (e).
- (b) Plaintiff's disclosure.** No later than twenty days after the last pleading due from any present party is filed, each plaintiff must, with respect to its own claims, provide to other parties:
 - (1)** the name and, if known, the address and telephone number of each individual likely to have discoverable information relevant to facts disputed in the pleadings, identifying the subjects of the information *{, together with a sworn statement of relevant facts made by plaintiff, if the plaintiff has discoverable information, and by any other person whose sworn statement is reasonably available to the plaintiff}*;

- (2) a copy of all documents, data compilations, and tangible things in the possession, custody, or control of the party that are known to be relevant to facts disputed in the pleadings; and
 - (3) the damages computations and insurance information described in Rule 26(a)(1)(C) and (D).
- (c) **Other Parties' Disclosures.** No later than twenty days after a plaintiff's Rule 105(a) disclosures are due, unless the time is extended by stipulation or court order, each other party must provide to all other parties a disclosure that meets the requirements of Rule 105(a)(1), (2), and (3) {, *including a sworn statement made by the disclosing party, if the disclosing party has discoverable information, and by any other person whose sworn statement is reasonably available to the disclosing party and has not already been provided in the action*}.
- (d) **Disclosure of Expert Testimony.** If the court permits expert testimony under Rule 108, Rule 26(a)(2) governs disclosure unless the court limits or excuses the disclosure.
- (e) **Available Information; Obligation not Excused.**
- (1) A disclosure under Rule 105(a), (b), (c), or (d) must be based on the information then reasonably available to the disclosing party.
 - (2) The disclosure obligation is not excused because the disclosing party:
 - (A) has not fully completed its investigation of the case,
 - (B) challenges the sufficiency of another party's disclosure, or
 - (C) has not been provided another party's disclosures.

Committee Note

The disclosure obligation is expanded beyond Rule 26(a)(1)(A) and (B) obligations to disclose witnesses and documents in the belief that disclosure will prove more efficient than discovery for many of the actions governed by these simplified rules. Disclosure is required, however, only with respect to facts disputed in the pleadings. If a defendant defaults, or concedes liability under Rule 104, a plaintiff need not make any disclosure.

As to witnesses, it is required that a party provide the party's own sworn statement if the party has discoverable information, and also the sworn statement of any other witness that is reasonably available to the disclosing party. The test of reasonable availability is deliberately pragmatic, and is to be administered in the understanding that a party is not

always able to secure a statement from a person that seemingly would be willing to cooperate. If a person's sworn statement has already been provided in the action, another disclosing party need provide a supplemental statement by the same person only if the disclosing party wishes to elicit additional evidence from that person. Disclosure of these statements is an important support for the restrictions on deposition practice in Rule 106(d).

Disclosure requires copies of documents, not mere identification, but extends only to documents known to be relevant to facts disputed in the pleadings. A document is "known to be relevant" if a party, an agent of a party, or an attorney responsible for participating in the litigation is consciously aware of the document and its relevance. No duty is imposed to search for documents that a party does not seek out in its own investigation and preparation of the case.

Disclosures are sequenced, with plaintiffs going first, so that the plaintiffs' disclosures will provide a framework for more meaningful disclosures by other parties. Disclosures by other parties are due twenty days after plaintiffs' disclosures are due, whether or not plaintiffs have complied with their disclosure obligations. The parties may stipulate to a later date for disclosures after the first plaintiff's disclosure. The court likewise may order a later date; the best reason for deferring disclosure by other parties is a substantial failure of disclosure by the plaintiffs. A plaintiff who makes Rule 105(b) disclosures with respect to its own claims may make separate disclosures as to the claims of other parties under Rule 105(c), but may elect instead to combine those disclosures with its Rule 105(b) disclosures.

Rule 108 discourages the use of expert testimony in actions governed by these simplified rules. But if expert testimony is to be permitted at trial, Rule 26(a)(2) disclosure may be an important substitute for discovery. In determining whether to direct Rule 26(a)(2) disclosure, the court should consider whether the need for disclosure justifies the expense of securing a written report from the expert.

Reporter's Comment

Rule 105(e)(2) is taken from the final paragraph of Rule 26(a), as a matter of emphasis without cross-reference.

Rule 106. Discovery

- (a) General.** Discovery is governed by Rules 26 through 37, except as provided in Rule 106(b), (c), (d), (e), (f), and (g).
- (b) Discovery Conference.** A Rule 26(f) conference must be held only if requested [in writing] by a party. The request may be made before or after disclosures are due under Rule 105.

- (c) **Timing of Discovery.** A party may make discovery requests only after a Rule 26(f) conference, or on stipulation of all parties or court order.
- (d) **Depositions.**
- (1) **Number.** The number of depositions permitted under Rule 30(a)(2)(A) and Rule 31(a)(2)(A) without leave of court is three. *{Alternative: A deposition may be taken under Rule 30 or Rule 31 only on stipulation of all parties or court order.}*
- (2) **Duration.** The presumptive time limit for a deposition under Rule 30(d)(2) is one day of three, not seven, hours.
- (e) **Interrogatories.** The presumptive number of interrogatories permitted under Rule 33 is ten.
- (f) **Rule 34 Discovery.** A request for production or inspection of documents and tangible things under Rule 34 must specifically identify the things requested *{unless the court grants permission to identify the things requested by reasonably particular categories}*.
- (g) **Requests to Admit.** A party may serve more than ten Rule 36 requests to admit on another party only on stipulation of all parties or court order.

Committee Note

The Rule 106 limitations on discovery are made possible by the expanded pleading requirements of Rule 103 and the expanded disclosure requirements of Rule 105. Together, these rules seek to assure plaintiffs that an action for relatively small stakes can be brought without undue expense, and to provide comparable assurance to defendants contemplating the costs of defending rather than defaulting.

The Rule 26(f) discovery conference is made available on request by any party. The discovery conference is not made mandatory because it is expected that the pleading and disclosure requirements of Rules 103 and 105, supplemented by the Rule 104 demand for judgment, will greatly reduce the need for discovery. But if a party wishes to use any discovery device, it must request a discovery conference or obtain a stipulation or court order allowing discovery without the conference.

Limits on the numbers of depositions and interrogatories are reduced to match the predictable reasonable limits of discovery in cases governed by the simplified rules. Expansion in the numbers may be obtained in the same way as under Rules 30, 31, and 33. A parallel limitation has been created for requests to admit.

Rule 34 requests are subjected to an obligation to specifically identify the documents or tangible things requested. Rule 105 imposes an

obligation to produce, as disclosure, copies of all documents known to be relevant to facts disputed in the pleadings. Full and honest compliance with this obligation, including the duty to supplement initial disclosures under Rule 26(e)(1), will meet the reasonable needs of most litigation governed by these simplified rules. *{Although no express limit is built into the provision allowing a court to permit a request that identifies the things requested by reasonably particularized categories, permission should be granted only if there is some reason to suspect that a reasonable further inquiry will produce useful information.}*

Reporter's Comment

Rules 106(d) and (e) are drafted by reference. The intention is to incorporate, for example, all of Rule 30(a)(2)(A), substituting “three” for “ten.” That means all plaintiffs get three depositions, all defendants get three, all third-party defendants get three. It may be better to adopt a lengthier, but self-contained version that tracks the language of Rules 30, 31, 33, and 36.

Rule 107. Scheduling Orders

A rule 16(b) scheduling order is not required, but the court may, on its own or on request of a party, make a scheduling order.

Committee Note

Although Rule 16(b) scheduling orders may be useful in an action governed by the simplified rules, it is hoped that the shift in the balance between pleading, disclosure, and discovery will enable the parties to manage most actions without need for judicial administration.

Reporter's Comment

It is tempting to attempt to provide a firm discovery cutoff and a firm trial date by uniform rule. It seems likely, however, that the obstacles that persuaded the Advisory Committee not to adopt that approach for all civil actions will be found even with simplified actions. There may be a significant number of districts where it is not possible to provide a meaningfully firm trial date even for small-claims actions. In addition, it may be wondered whether it is wise to introduce an indirect docket priority for these actions by way of a firm trial date.

Rule 108. Expert Witnesses.

A party who wishes to present evidence under Federal Rules of Evidence 702, 703, or 705 must move for permission no later than the time for serving its initial disclosures under Rule 105, ten days after another party has moved for permission to present such evidence, or a different time set by the court. The court should consider the nature of

the disputed issues, the amount in controversy, and the resources of the parties in determining whether to permit expert testimony. The court also may consider appointment of an expert under Rule 706 of the Federal Rules of Evidence as an alternative to hearing testimony from experts retained by the parties.

Committee Note

There is a risk that a party to an action governed by these simplified rules may seek to increase the costs of litigating by offering expert testimony that would not be offered if the only motive were a desire to invest an amount reasonably proportioned to the stakes of the litigation. A party who seeks to offer expert testimony that is reasonably justified in terms of the difficulty of the issues to be tried should be allowed to present the testimony, even though the expense seems great in relation to the money at stake, unless the result may be an unfair advantage in relation to another party who cannot reasonably incur the cost of securing its own expert testimony.

Rule 108 cannot be applied to exclude expert testimony that is required by applicable substantive law. In professional malpractice actions, for example, expert testimony often is required to establish the elements of the claim.

Rule 109. Trial date

(a) Trial Date Set on Filing. At the time an action governed by these rules is filed, the clerk must set a trial date that is [no later than]:

- (1) six months from the filing date, or
- (2) seven months from the filing date if any party is the United States, an agency of the United States, an officer or employee of the United States sued in an official capacity, or an officer or employee of the United States sued in an individual capacity for acts or omissions occurring in connection with the performance of duties on behalf of the United States.

(b) Serving Notice of Trial Date. Notice of the Rule 109(a) trial date must be served

- (1) with the summons and complaint or,
- (2) if a defendant has waived service, promptly after the action is {filed} [commenced].

(c) Amending Trial Date. The Rule 109(a) trial date may be extended by order [of the court] to a date later than the period set by Rule 109(a) only on showing that:

- (1) the plaintiff had good reason for failing to serve a defendant within 20 days from the filing date, or

- (2) extraordinary reasons require a deferred trial date, but it is not sufficient reason (A) that the parties have not completed disclosure or discovery, nor (B) that the nature of the action requires deferral.

Committee Note

Expeditious disposition is an important element of these simplified rules. Setting a firm trial date when the action is filed will prompt the parties to proceed expeditiously. This effect requires that the date be quite firm. Extensions are allowed only when there is good reason for failing to effect service within 20 days from filing, or when extraordinary reasons require greater time. Failure to complete disclosure and discovery, and pleas that an action is by its nature too complex to prepare in six months (or seven months if the parties include the United States or its agents), do not provide sufficient reason. It is expected that courts will manage their dockets so that only extraordinary docket conditions will require an extension because the court is unable to honor the initial trial date.

Reporter's Comment

This provision might well be moved up to lie between Rule 103 and Rule 104.

The draft Committee Note points to the objections that may be advanced to the “speedy trial” requirement. Particularly with individual docket systems, it may prove very difficult to honor a trial date set at the time of filing. On the other hand, the importance of speedy trial cannot be denied, particularly with a procedural system that is designed to achieve economy. These issues are important, and deserve hard work to craft the best possible rule. A firm six-month trial date could be more easily achieved if districts that have a substantial number of judges would adopt a centralized docket for these cases. If indeed these cases are amenable to simplified procedure, a centralized docket system might work reasonably well.

Because this draft rule was a last-minute addition, it has been created without attempting to work through the many issues that should be considered if it is to be adopted. A six-month trial date could create havoc if the plaintiff is allowed to make service at any time within the 120-day period allowed by Rule 4(m). Many other time periods also need to be considered, including those that suspend the time to answer while a Rule 12 motion is pending, the time to complete disclosure, and so on. Beyond the time periods set in the Rules, it may be necessary to consider time periods set by local rules — a lengthy notice requirement for motions in general, or more specific timing requirements for summary judgment motions, could be incompatible with the 6-month trial date.

Another source of time problems may arise from local ADR practices. Commonly ADR establishes a "time out" from ordinary requirements. Adjustments may be needed on this score as well.

All of these firm timing requirements suggest another problem. If firm deadlines are set for several steps along the way, the result may be more expensive litigation. Forced to "do it now or never," lawyers may feel compelled to do many things that, without this pressure, would never be done. It is not necessarily a good answer to require that all motions be made within X days, or to require that an answer be filed before the court decides a motion to dismiss or for more definite statement, and so on.

A firm trial date provision could be drafted in different terms that might reduce these difficulties. For example, the date might be set by order after the pleadings are closed.

In addition to a firm trial date, it also may be desirable to think about trial time limits. It might be provided, for instance, that good cause must be shown to obtain more than one trial day for all plaintiffs or for all defendants.