UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK
500 PEARL STREET, 8TH FLOOR
NEW YORK, NEW YORK 10007-1312

CLIFFORD P. KIRSCH
DISTRICT COURT EXECUTIVE

(212) 637-0500
FAX: (212) 637-0383

April 4, 1995

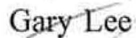
Mr. Frederick Rusillo
Program Specialist (CJRA)
Court Programs Branch
Administrative Office of the U.S. Courts
One Columbus Circle, NE
Washington, D.C. 20544

Dear Fred:

I am enclosing for your information the Southern District's Second Annual Assessment along with the Advisory Group's recommendations to the Court concerning Rule 26.

Any questions please call.

Sincerely,



Gary Lee
Assistant District Executive

Second Annual Assessment
of the
Southern District of New York
Civil Justice Reform Act Advisory Group

A. Introduction

The Advisory Group for the United States District Court for the Southern District of New York ("the Court") was constituted in March 1991 under the provisions of the Civil Justice Reform Act, 28 U.S.C. § 471 ("CJRA"). After being constituted in March 1991 with fourteen members, the Group prepared a Report with Recommendations, including the statutorily required Civil Justice Expense and Delay Reduction Plan which was adopted by the Court in December 1991. A Guide to the Plan was adopted in July 1992, and the Plan was initially assessed in the fall of 1993 pursuant to 28 U.S.C. § 475.

What follows in the Second Annual Assessment of the Advisory Group are the major recommendations of the Group to the Court following the completion of the second full year of operations under the CJRA.

1. Differential Case Management

The Court was required by the CJRA to have a differential case management system for three (3) years, but that three (3) years has expired, and the court is now free to discontinue that practice if it so desires.

The Plan adopted by the Court instituted a tracking system by which cases were classified as either "expedited", "standard", or "complex". Because "complex" cases will, as a practical matter, always be treated differently by judges on an ad hoc basis, the question of whether a formal three track system is useful in the Southern District of New York largely

turns on the usefulness of classifying cases as expedited.

Perhaps the most important distinction between "expedited" and other cases was the required exchange of relevant documents in expedited cases. Another goal of designating cases as expedited was to encourage the setting of a date for trial within one year of filing.

In a random sample of 55 cases filed during the year ending October 31, 1993 which were designated as "expedited", 64% of counsel were not even aware of the automatic disclosure requirement of the Plan. Of those who were aware, only half complied. Overall there seems to be little enthusiasm for automatic disclosure **(confirming the Group's recommendation to the Court to opt out of the automatic disclosure requests of Rule 26(a)(1), Fed. R. Civ. P.)**. Additionally, out of the 55 cases surveyed, no trial setting was made within the first year in 43 cases, and only 4 trial dates were set at the initial case management conference as the Plan provides. The only "trial" actually held within a year was a preliminary injunction hearing that presumably would have been held regardless of designation.

Perhaps the most striking statistic is the limited degree to which the tracking system has been used by the Court. Only 15% of all cases filed from January 1, 1993 to December 31, 1993 were given a designation. Under the Plan, it is the designation of a case that triggers the court annexed mediation program. The failure to designate has had the unfortunate side effect of limiting the flow of cases to mediation (although some judges send a small number of cases to mediation without designation).

The Advisory Group believes the case designation process has not served a useful purpose and should be terminated. Given the current case load and the variety of cases within

each judge's docket, classification of a small portion as expedited has served no useful purpose and is unlikely to do so in the future.

As to Automatic Discovery in Certain Prisoner Cases pursuant to Local Rule 48, further evaluation is required. Local rule 48 became operative on January 1, 1994 requiring that city and state defendants in certain identified prisoner's civil rights cases respond automatically to standing interrogatories and document requests. To date it has not been possible to determine whether the traditional defense counsel in these cases are complying in substantial measure with the rule or whether they continue to register objections despite the Court's approval of the form and substance of the requests.

The Pro Se Office has set up a system for identifying Rule 48 cases at the same time it reviews cases in order to make recommendations regarding in forma pauperis treatment and sua sponte dismissals. If the Rule appears applicable, the complaint and files are stamped to indicate this fact, and the docket is flagged to identify the two mandatory discovery response dates. We are advised by the Pro Se office that approximately 125 cases are pending to which the Rule is applicable.

The Pro Se Office should in the future have further information regarding compliance with the rule. After some further experience has been accumulated, it would be appropriate to undertake a more extensive survey to determine whether the Rule has had the desired effect of accelerating the pace of discovery and avoiding discovery disputes of a repetitive nature.

2. Technology

The Court has continued to move forward in utilizing new technology to offer both convenience to the bar and more effectively administer its docket. Facsimile machines have

been made available to those chambers which have requested one. Networking is now available. All chambers in the new courthouse will be linked to electronic mail and the Internet with a projected linking of all chambers in the 40 Centre St. courthouse and the new White Plains courthouse by March, 1995. Realizing the fiscal constraints the court operates within, these efforts are to be applauded.

The Advisory Group believes the court should move forward on the following technological issues in an effort to streamline the litigation process:

A. **Electronic Filing** - With networking capablilites now in place, the court should take all necessary steps to establish a workable system for electronic filing. Both facsimile and electronic means for filing are now expressly authorized by amended rule 5, Fed. R. Civ. P., if permitted by the Court.

B. **Expansion of PACER** - Both PACER and CHASER are fully operational within the courthouse. There are presently 2,542 law firms that are subscribers to PACER. PACER should be expanded to include all orders and opinions issued by the court. Currently, certain judges send out copies of orders and decisions automatically to all counsel; as to others who do not follow that procedure, most firms incur the time and expense in having someone make a daily check of court records to determine if an order or decision were issued. Any additional expense to the court could be paid for by an expense addition to the fee schedule now in existence for a law firm's use of PACER.

C. **Video and Telephonic Conferencing** - The process of implementing videoconferencing has begun. Each courtroom in the new courthouse has been provided with the necessary cabling to allow for the future use of videoconferencing. The court should

continue in its efforts to provide such services. Four telephonic conference systems are available in the new courthouse. The usage of these systems is encouraged so as to avoid the necessity of time and travel by counsel in instances where a physical appearance is unnecessary.

D. **Real-time Reporting** - This procedure, successfully implemented and utilized by five judges, should be encouraged. Further publicity of the availability of real-time reporting to both the bar and the bench is necessary.

In line with the above, it is suggested that Local General Rule 7 which prohibits cellular telephones and tape recorders in the courthouse without the written permission of a judge be revisited so as to allow counsel to bring in laptop computers, cellular telephones and small portable tape recorders under appropriate control. Recognizing the need to balance courthouse security with attorneys' needs, we strongly feel that access to such communications systems within the courthouse can make for more efficient use of attorney time.

3. Alternate Dispute Resolution

This component of the CJRA Plan adopted by the Court is arguably the sole aspect of the Plan that should continue to be pursued. Based upon limited feedback, the program appears to be well regarded among members of the bar as well as a number of judges. As previously stated, the classification system has limited the flow of cases into the mediation program.

The Advisory Group believes that, with the termination of the classification system,

that all cases (excluding those ineligible for mediation, i.e. Prisoner Pro Se) be eligible for mediation.

The process would work as follows:

After 120 days of a case being filed, the judge will receive a notice from the CJRA Staff Attorney advising that a mediation session for said case has been scheduled unless the judge advises otherwise. However, this would not prohibit a judge from referring a case for mediation or mediation on the consent of all parties.

Should this process result in creating an overwhelming case load for the mediators, a system would be put in place adjusting the number of cases sent to mediation.

B. Conclusion

The term of the present Advisory Group expires, pursuant to the CJRA, in March 1995. Based on the experience to date, reconstitution is recommended. The Group's mission would be to consult with the Board of Judges of the Court and its Committees, to conduct research and analysis as requested, to review court facilities and their operation, to consider and make recommendations with respect to the practices and operation of both the civil and criminal dockets **(A specific example is that the Case Differentiation Subcommittee was the source of proposals which resulted in the Court adopting Local Rule 48 requiring automatic discolsure in *pro se* cases)**, to remain current with respect to alternative dispute mechanisms and to make any recommendations that are deemed appropriate. This research and assessment would be conducted by practitioners and academics selected by the Chief Judge for that purpose.

The Group should remain small, no more than 15, and should consist of practitioners familiar with the Court and its most significant types of litigation, both civil and criminal. It should be appropriately diverse and should include academics whose areas of study directly relate to the operation of the Court. The members of the Court should make recommendations for membership to the Chief Judge, and at least one member of the Court should be an ex officio member of the Group, together with the Clerk of Court and the District Executive. An appropriate number of current Group members would remain.

The continuation of the Advisory Group as proposed would be responsive to the Court, provide a vehicle for satisfying the requirements of CJRA, and amplify and extend the reach of the Court beyond its present capacities.

M E M O R A N D U M

TO: Advisory Group

FROM: Philip Graham, Joseph McLaughlin, Shira Scheindlin

RE: Amended Federal Rules of Civil Procedure

DATE: June 20, 1994

While there is no uniformity in the language of each of the new rules, many of them provide the court with the power to depart from the rule either by local rule or by court directive. The subcommittee of the Advisory Group will address only those new rules which specifically provide that the court may take such action.[1]

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1 It is unclear whether in referring in some instances to the power of a Court to issue local rules and in other instances using language such as "unless otherwise limited by order of the Court... ." the drafters of the amendments intended a distinction in the scope of the Court's authority. Compare Rule 26(a) with Rule 26(b). A district court has inherent and statutory power to formulate procedural rules, and may adopt rules that are not inconsistent with the Federal Rules of Civil Procedure. See 28 U.S.C. § 2071 (courts "may from time to time prescribe rules for the conduct of their business... consistent with Acts of Congress and [the Federal Rules of Civil Procedure]"); Fed. R. Civ. P. 83. We believe that in issuing local rules the Court is not limited to addressing only those Rules of Civil Procedure that explicitly refer to the power of the Court to alter the provision by local rule. Rather, when a Rule indicates that it is subject to variance by the judge in a particular case, the rule should ordinarily be subject to uniform variance by adoption of a local rule. This is the interpretation we propose, for example, in opting out of the ten deposition limit of Rules 30 and 31. The opt out should not be deemed inconsistent with the Rule because it will be subject to the continuing ability of the judge on each case to impose appropriate limits at a case management conference. See general discussion in Almond v. U.S. District Court, 1994 WL 144671 (D.N.H.) and cases there cited.

1. Rule 26(a)(1)(A)

> (A) the name and, if known, the address and telephone number of each individual likely to have discoverable information relevant to disputed facts alleged with particularity in the pleadings, identifying the subjects of the information;

* * *

Rule 26(a)(1)(B)

> (B) a copy of, or a description by category and location of, all documents, data compilations, and tangible things in the possession, custody, or control of the party that are relevant to disputed facts alleged with particularity in the pleadings;

* * *

Rule 26(a)(1)(C)

> (C) a computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34 the documents or other evidentiary material, not privileged or protected from disclosure, on which such computation is based, including materials bearing on the nature and extent of injuries suffered; and

* * *

Rule 26(a)(1)(D)

> (D) for inspection and copying as under Rule 34 any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment.

* * *

Rule 26(a)(1)(A)-(D) The four subparts of Rule 26(a)(1) all provide that certain information be automatically disclosed by one party to another. While we do not quarrel with the principle

that the categories of information described in these sections should be generally available upon request (and indeed some are provided for by Local Rule 46), we do not believe that such information ought to be gathered and disclosed automatically simply upon the filing of a lawsuit.

We believe that the court should continue to opt out of these rules. We believe that these rules create an undue burden on a party and an unfair expense. The ambiguities in the Rule may also promote rather than discourage motion practice and may invite tactical maneuvering to preclude evidence at trial on the basis of non-production. Moreover, strict adherence to the rules prevents any opportunity for judicial scrutiny of the burdens imposed in a particular case. The rules eliminate any incentive for the parties to negotiate regarding the scope of discovery. Finally, because cases come in all sizes and shapes these general rules may be particularly inappropriate as overbroad.

2. Rule 26(a)(2)

> (B) Except as otherwise stipulated or directed by the court, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

* * *

We believe that the court should not opt out of this rule. The requirement that a written report be provided is a good one. The automatic nature of the required disclosure is also a step forward. We believe that adherence to this rule will promote settlements and avoid delay at the time of trial.

3. Rule 26(a)(3)

(3) Pretrial Disclosures. In addition to the disclosures required in the preceding paragraphs, a party shall provide to other parties the following information regarding the evidence that it may present at trial other than solely for impeachment purposes:

(A) the name and, if not previously provided, the address and telephone number of each witness, separately identifying those whom the party expects to present and those whom the party may call if the need arises;

(B) the designation of those witnesses whose testimony is expected to be presented by means of a deposition and, if not taken stenographically, a transcript of the pertinent portions of the deposition testimony; and

(C) an appropriate identification of each document or other exhibit, including summaries of other evidence, separately identifying those which the party expects to offer and those which the party may offer if the need arises.

Unless otherwise directed by the court, these disclosures shall be made at least 30 days before trial. Within 14 days thereafter, unless a different time is specified by the court, a party may serve and file a list disclosing (i) any objections to the use under Rule 32(a) of a deposition designated by another party under subparagraph (B) and (ii) any objection, together with the grounds therefor, that may be made to the admissibility of materials identified under subparagraph (C). Objections not so disclosed, other than objections under Rules 402 and 403 of the Federal Rules of Evidence, shall be deemed waived unless excused by the court for good cause shown.

* * *

We believe that the court should not opt out of this rule. The rule states, however, that any objections, with grounds, for the admissibility of documents listed must be raised 16 days before trial. If the objection is not raised, it is waived. The Advisory Group previously concluded that this requirement makes no sense, as one might not know the grounds for objection to the admissibility of a document at trial (e.g., relevance) until the case is actually on trial. In the context of discussing pre-trial orders, the Advisory Group has already considered whether it was useful to identify document objections in advance of

trial; and there appeared to be a consensus that only objections to authenticity serve a useful purpose at the pre-trial stage. Rather than recommending that the Court opt out of a portion of a Rule, the subcommittee believes that it would be preferable for judges to exercise their discretion in individual cases to direct that this portion of the Rule not be followed.

4. Rule 26(a)(4)

> (4) Form of Disclosures; Filing. Unless otherwise directed by order or local rule, all disclosure under paragraphs (1) through (3) shall be made in writing, signed, served, and promptly filed with the court.

* * *

We believe that the court should not opt out of this rule, except to the limited extent already provided by Local Rule 18(a) of the Civil Rules of the United States District Courts for the Southern and Eastern Districts of New York ("Civil Rules"), which provides that "[p]ursuant to Rule 5(d) of the Federal Rules of Civil Procedure, depositions interrogatories, requests for documents, requests for admissions, and answers and responses shall not be filed with the clerk's office except by order of the court."

5. Rule 26(b)(1-5)

> (b) Discovery Scope and Limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:
>
> (1) In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.
>
> (2) Limitations. By order or by local rule, the court may alter the limits in these rules on the number of depositions and interrogatories and may also limit the length of depositions under Rule 30 and the number

of requests under Rule 36. The frequency or extent of use of the discovery methods otherwise permitted under these rules and by any local rule shall be limited by the court if it determines that (i) the discovery sought is unreasonably cumulative or duplicate, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues. The court may act upon its own initiative after reasonable notice or pursuant to a motion under subdivision (c).

(3) Trial Preparation: Materials. Subject to the provisions of subdivision (B)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (B)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a sh owing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a

substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(4) Trial Preparation: Experts.

(A) A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If a report from the expert is required under subdivision (A)(2)(B), the deposition shall not be conducted until after the report is provided.

(B) A party may, through interrogatories or by deposition, discovery facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result, (i) the court shall require that the part seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under this subdivision; and (ii) with respect to discovery obtained under subdivision (b)(4)(B) of this rule the court shall require the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(5) Claims of Privilege or Protection of Trial Preparation Materials. When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to asses the applicability of the privilege or protection.

* * *

We believe that the court should not opt out of this rule. In particular, Rule 26(b)(2) will be the subject of further comment when we address amended Rules 30 and 33; Rule 26(b)(5) is almost identical to Local Rule 46(e)(2).

6. Rule 26(d)

> (d) **Timing and Sequence of Discovery.** Except when authorized under these rules or by local rule, order or agreement of the parties, a party may not seek discovery from any source before the parties have met and conferred as required by subdivision (f). Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence, and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

* * *

We believe that the court should opt out of this rule. Absent an objection, the parties should be permitted to begin discovery without awaiting a court conference. If the parties hold a discovery meeting pursuant to Rule 26(f), below, and agree on the parameters of discovery, there should be no impediment to beginning discovery. However, if the parties are unable to agree on the scope of initial discovery, or have discovery disputes, the court should agree promptly to hear this dispute. Paragraph 3 of the CJRA Plan should be amended to conform to Rule 16(b) of the Federal Rules of Civil Procedure, requiring that a conference with the court be held within 120 days of the service (rather than the filing) of the complaint. Nonetheless, parties may request a conference at an earlier date if they are unable to agree on a discovery plan and waiting 120 days from filing will cause unnecessary delay. When such a request is made, the court should make every effort to hear the dispute promptly.

This comment is applicable to the references to Rule 26(d) in Rules 30, 31, 33, 34 and 36.

7. Rules 26(f)-(g)

> (f) **Meeting of Parties: Planning for Discovery.** Except in actions exempted by local rule or when otherwise ordered, the parties shall, as soon as practicable and in any event at least 14 days before a scheduling conference is held or a scheduling order is due under Rule 16(b), meet to discuss the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of

the case, to make or arrange for the disclosures required by subdivision (a)(1), and to develop a proposed discovery plan. The plan shall indicate the parties; views and proposals concerning:

(1) what changes should be made in the timing, form, or requirement for disclosures under subdivision (a) or local rule, including a statement as to when disclosures under subdivision (A)(1) were made or will be made;

(2) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused upon particular issues;

(3) what changes should be made in the limitation on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and

(4) any other orders that should be entered by the court under subdivision (c) or under Rule 16(b) and (c).

The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging and being present or represented at the meeting, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 10 days after the meeting a written report outlining the plan.

(g) Signing of Disclosures, Discovery Requests, Responses, and Objections.

(1) Every disclosure made pursuant to subdivision (A)(1) or subdivision (a)(3) shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. An unrepresented party shall sign the disclosure and state the party's address. The signature of the attorney or party constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the disclosure is complete and correct as of the time it is made.

(2) Every discovery request, response, or objection made by a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. An unrepresented party shall sign the request, response, or objection and state the party's address.

The signature of the attorney or party constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the request, response, or objection is:

(A) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;

(B) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and

(C) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation.

If a request, response, or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response, or objection, and a party shall not be obligated to take any action with respect to it until it is signed.

(3) If without substantial justification a certification is made in violation of the rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the disclosure, request, response, or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney's fee.

* * *

We believe that the court <u>should not</u> opt out of these rules. Paragraph 3 of the Plan should be amended, however, to conform to the schedule set forth in the amended rules by substituting the word "service" for the word "filing". We do not believe that the initial case management conference should be timed to the filing of the complaint.

8. Rules 30 and 31

(a) When Depositions May Be Taken; When Leave Required.

(1) A party may take the testimony of any person, including a party, by deposition upon oral examination without leave of court except as provided in paragraph (2). The attendance of witnesses may be compelled by subpoena as provided in Rule 45.

(2) A party must obtain leave of court, which shall be granted to the extent consistent with the principles stated in Rule 26(b)(2), if the person to be examined is confined in prison or if, without the written stipulation of the parties.

(A) a proposed deposition would result in more than ten depositions being taken under this rule or Rule 31 by the plaintiffs, or by the defendants, or by third-party defendants;

*** * ***

Rule 31. Depositions Upon Written Questions
(a) Serving Questions; Notice.

(1) A party may take the testimony of any person, including a party, by deposition upon written questions without leave of court except as provided in paragraph (2) The attendance of witnesses may be compelled by the use of subpoena as provided in Rule 45.

(2) A party must obtain leave of court, which shall be granted to the extent consistent with the principles stated in Rule 26(b)(2), if the person to be examined is confined in prison or if, without the written stipulation of the parties.

(A) a proposed deposition would result in more than ten depositions being taken under this rule or Rule 30 by the plaintiffs, or by the defendants, or by third-party defendants;

(B) the person to be examined has already been deposed in the case; or

(C) a party seeks to take a deposition before the time specified in Rule 26(d).

(3) A party desiring to take a deposition upon written questions shall serve them upon every other party with a notice stating (1) the name and address of the person who is to answer them, if known, and if the name is not known, a general description sufficient to

identify the person or the particular class or group to which the person belongs, and (2) the name or descriptive title and address of the officer before whom the deposition is to be taken. A deposition upon written questions may be taken of a public or private corporation or a partnership or association or governmental agency in accordance with the provisions of Rule 30(b)(6).

(4) Within 14 days after the notice and written questions are served, a party may serve cross questions upon all other parties. Within 7 days after being served with cross questions, a party may serve redirect questions upon all other parties. Within 7 days after being served with redirect questions, a party may serve recross questions upon all other parties. The court may for cause shown enlarge or shorten the time.

(b) Officer to Take Responses and Prepare Record. A copy of the notice and copies of all questions served shall be delivered by the party taking the deposition to the officer designated in the notice, who shall proceed promptly, in the manner provided by Rule 30(c), (e) and (f), to take the testimony of the witness in response to the questions and to prepare, certify, and file or mail the deposition, attaching thereto the copy of the notice and the questions received by the officer.

(c) Notice of Filing. When the deposition is filed the party taking it shall promptly give notice thereof to all other parties.

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We believe that the court should continue to opt out only of Rule 30(a)(2)(A) and 31(a)(2)(A) requiring leave of court or the agreement of the parties to permit more than ten (10) depositions per side. This should be handled at the case management conference on a case by case basis. The remainder of amended rule 30 is fine.

9. Rule 33

Rule 33. Interrogatories to Parties

(a) Availability. Without leave of court or written stipulation, any party may serve upon any other party written interrogatories, not exceeding 25 in number including all discrete subparts, to be answered by the party served or, if the party served is a public or private corporation or a partnership or association or governmental

agency, by any officer or agent, who shall furnish such information as is available to the party. Leave to serve additional interrogatories shall be granted to the extent consistent with the principles of Rule 26(b)(2). Without leave of court or written stipulation, interrogatories may not be served before the time specified in Rule 26(d).

(b) **Answers and Objections.**

(1) Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the objecting party shall state the reasons for objection and shall answer to the extent the interrogatory is not objectionable.

(2) The answers are to be signed by the person making them, and the objections signed by the attorney making them.

(3) The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections if any, within 30 days after the service of the interrogatories. A shorter or longer time may be directed by the court or, in the absence of such an order, agreed to in writing by the parties subject to Rule 29.

(4) All grounds for an objection to an interrogatory shall be stated with specificity. Any ground not stated in a timely objection is waived unless the party's failure to object is excused by the court for goods case shown.

(5) The party submitting the interrogatories may move for an order under Rule 37(a) with respect to any objection to or other failure to answer an interrogatory.

(c) **Scope; Use at Trial.** Interrogatories may relate to any matters which can be inquired into under Rule 26(b)(1), and the answers may be used to the extent permitted by the rules of evidence.

An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but the court may order that such an interrogatory need not be answered until after designated discovery has been completed or until a pre-trial conference or other later time.

(d) **Option to Produce Business Records.** Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, including a com-

pilation, abstract or summary thereof and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries. A specification shall be in sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the records from which the answer may be ascertained.

* * *

We believe that the court should continue to opt out of this rule, solely to the extent it places a numerical limit on the number of interrogatories propounded by each party. As discussed above, this can be handled on a case by case basis at the case management conference.