

Civil Procedure II Outline
Professor Vaughn □ Spring 1998

I. Introduction

A. Pretrial Process:

- Pleadings
- Joinder
- Class Actions
- Discovery
- Pretrial conference
- Pretrial Motions
 - Summary Judgment
- Right to Trial by Jury
- Selection of the Jury
- Instructions & Verdicts
- Post-trial Motions

B. Role of the Jury in Civil Litigation

C. Focus on rules and advisory committee notes.

- statutory interpretation
- evaluation of the rules

1. The strength of the federal rules is their neutrality, they do not favor one class or group over another.
2. Settlement benefits the parties, the courts & society. The federal rules should encourage settlements. The rules should be reevaluated with the goal of settlement in mind.
3. The content of procedural rules is not as important as their clarity. It does not matter what the procedural rules are as long as they are clear and understandable.
4. Uniformity of procedure is highly overrated. Federal judicial districts should be able to respond to local conditions and local judgments about procedure.

DMichelman, The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights

4 values/reasons furthered by allowing person to litigate

1. *Dignity values* - reflect concern humiliation or loss of self-respect which a person might suffer if denied opportunity to lit.
2. *Participation values* - appreciation of litigation as one of modes in persons exert influence, or have their wills "counted" in societal decisions which they care about.
3. *Deterrence values* - recognize the instrumentality of litigation as a mechanism for influencing or constraining individual behavior in ways thought socially desirable.
4. *Effectuation values* - litigation as an important means through which persons are enabled to get, or are given assurance of having, whatever we are pleased to regard as rightfully theirs.

-Party typologies:

1. One-shotters
 - only occasional recourse to the courts
 - divorce litigants, auto accident litigants, etc.
2. Repeat players
 - engaged in many similar suits over time

- insurance companies, prosecutors, finance companies., etc.

II. Class Actions: Rule 23

A. **Rule 23(a)** - all 4 requirements must be met to be certified as a class action:

- 1. numerosity - "the class is so numerous that joinder of all members is impracticable"
[satisfied if more than 40 members; usually not satisfied if less than 25 members]
- 2. commonality - "there are questions of law or fact common to the class"
- 3. typicality - "the claims or defenses of the representative parties are typical of the claims or defenses of the class"
- and □ 4. adequate representation - "the representative parties will fairly and adequately protect the interests of the class"

-what constitutes adequacy of representation? 3 elements:

- a. representative parties of the class must have a substantial stake in the litigation
- b. adequacy of class lawyer - depends upon interest in litigation, technical competence, resources (experience, motivation, support personnel)
- c. ct has affirmative responsibility to look at the class itself and see if there is internal antagonism

Application to ACA:

a. ascertainable class → A persons harmed by contamination of Wells G & H.
√B all persons served by Wells G & H.

- problems in including future symptoms/harms - if defined as class A does not include all potential plaintiffs and may exclude those who may be harmed in future (some who died of leukemia chose not to be joined).

b. Numerosity - Are members of the class too numerous to be joined?
→32 plaintiffs. Depends on size of claim and geographic disparity - since from family units, and from the same place (small geographic area), seems practical to join members of the class.

c. Commonality →all contracted leukemia in a common way and by same defendant; liability of defendant is common.

d. Typicality → claims of participant are typical to those of the class.

c. Adequate Representation -

1) Anne Anderson - Is Anderson an adequate representative of the class?
→goals differ - she wanted injunction; others may want \$
→She may adequately represent those who have been harmed, but not necessarily those that could be harmed in future (ie, men with heart conditions) - Ct could have created a subclass if representative did not satisfy requirement for all class members.

2) Schlichtmann - adequacy of class lawyer
→challenge on basis of: inexperience (in a complex case, in a scientific and legal setting) & lack of resources (small firm).
[vs. Tony Roisman - Trial Lawyers for Public Justice]
→Opposing counsel would have challenged certification of the class & adequacy of legal representation. While it may seem contrary to own interests, if defense does not challenge now & if defense does win the class action, the plaintiffs may raise questions of adequacy of representation and nullify defense's victory.

and B. **Rule 23(b)** - must satisfy 1 of 3 types of class actions, in order to maintain class action:

prejudice 1. **23(b)(1)** - the prosecution of separate actions by or against individual members of the
-no opt out class would create a risk of: [mandatory class action - bind all members of class]

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish *incompatible standards of conduct for the party opposing the class*, or [prejudice to non-class party - affect defendants]

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or *substantially impair or impede their ability to protect their interests*;

[prejudice members of class - affect plaintiffs]

[limited fund argument - share pool of limited funds - like interpleader]

declaratory or injunctive relief -no opt out 2. **23(b)(2)** - the party opposing the class has *acted or refused to act on grounds generally applicable to the class*, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole;

[mandatory class action - bind all members of class] [applies only to P]

damages -opt out -notice 3. **23(b)(3)** - the court finds that the *questions of law or fact common to the members of the class predominate* over any questions affecting only individual members, and that a *class action is superior* to other available methods for the fair and efficient adjudication of the controversy. [damages class action]

a. common question predominates

and b. show that class action is the superior way to resolve the case more economically (ie, mass tort case - asbestos case)

c. 4 determining factors:

1) interest of members of the class in individually controlling the prosecution or defense of separate actions; 23(b)(3)(A)

2) extent and nature of any litigation concerning the controversy already commenced by or against members of the class; 23(b)(3)(B)

3) desirability or undesirability of concentrating litigation of claims in the particular forum; 23(b)(3)(C)

4) difficulties likely to be encountered in the management of a class action. 23(b)(3)(D)

Application to ACA -

23(b)(1)(a) → if each P were to sue D, strong possibility that Grace and Beatrice would be given different and incompatible standards of conduct.

23(b)(1)(b) → not really a concern that have to share limited pool of funds, despite numerous Ps and possibility of high punitive damages in wrongful death cases [Mass Gen. Laws ch. 229, sec.2]

23(b)(2) → P can seek an injunction from further contamination. But no reason for injunction b/c wells are already closed.

- Ps claimed that injunctive relief & forcing Ds to admit responsibility and accept accountability for acts was more important than money

-But, if monetary goals exceed injunctive goals, cannot be classified under (b)(2) = cost of injunctive relief from cleanup will outweigh money damages.

23(b)(3) → strongest argument b/c mass tort claim.

-common question → causation - factual causation vs. medical causation (present & future). But as to question of individual damages, all have not suffered the same way.

-superior → mass tort claim [problems: opt out issues, notice issues, inadequate representation could cause people to get screwed out of their opt outs if they are

not given notice; there could be collateral attacks or fighting within the party; if P fails to return form for class membership, assumed to have consented & lose opt out.]

4. **23(c)(2)** Court decides whether class action will be maintained

[re: R. 23(b)(3) class actions]

Due Process

1) Notice --- in 23(b)(3) class actions, individual notice is given to all members of class that can be identified through reasonable effort.

2) Opt out provision - in 23(b)(3) class actions, given chance to be excluded from class action & therefore not bound by the judgement.

Costs

3) Costs -- representative (plaintiff) bears the cost of notification.

4) All members are bound by class action, except those that opt out of 23(b)(3) class action

vs. 23(b)(1) & 23(b)(2) actions - notice is subject to discretion; possible that may not give any kind of notice.

5. **23(d)** *Orders in Conduct of Actions*

Court may make appropriate orders:

a. determining course of proceedings

b. requiring notice and type of notice for adjudication of claims

c. impose conditions on the representatives or intervenors

d. dealing with procedural matters

C. Subject Matter Jurisdiction

1. Federal question

2. Diversity Class Action:

a) Diversity based on citizenship of representative/named parties of class

b) Amount in controversy (Section 1367)

(Zahn p. 722)

-Zahn rule: each member of the class must separately meet amount in controversy > \$75,000

vs. supplemental jurisdiction (section 1367) - only need representative party to claim > \$75,000

-language of 1367 & legislative history - indicates that did not intend to change Zahn rule.

Application to ACA

1. Could Charles Anderson be part of the class? → Yes. He could not have been a member of individual action b/c he would have destroyed diversity. But, in class action, only the citizenship of representative of the class is taken into account.

a. May be a number of non-diverse members, b/c only look at citizenship of named members of the class.

b. amount in controversy - section 1367 - satisfies jurisdictional amount =supplemental jurisdiction applies [Note: Zahn rule].

D. Personal Jurisdiction

Rule: state exercises jurisdiction over D even if the absentee P does not have minimum contacts with the state (Shutts)

1. Phillips Petroleum v. Shutts (p.725) where members of the class were not in state.

-D argued that court lacked personal jurisdiction over representative of class and members of the class, b/c fails to satisfy *minimum contacts test* (Int'l Shoe)

-D also argues for affirmative consent or opt in provision. [members will not seek individual action for small claims ie, \$100]

Holding: Court does not require minimum contacts tests, based on distinction made between class members and defendants.

1. Consent becomes the basis for applying personal jurisdiction
 - Opt out* provision - *failure to opt out is treated as consent*
 - b/c people are given the option of being excluded from the litigation
 - Court rejects opt in provisions
2. Members will not seek individual action for small claims ie, \$100.

2. Due Process Requirements:

1. Notice (must receive notice)
2. Opportunity to be heard
3. Opportunity to opt out* (*failure to opt-out indicates consent*)
4. Adequate representation.

-Holding is limited to suits wholly or predominately for money judgments & applies only to plaintiffs class.

-if did not satisfy due process, would not gain benefits of judgment & would be subjected to litigation outside of state.

3. *Implications:*

a. Application to R. 23

-burden on members of plaintiff class is different from burden on non-resident defendant:

- need not hire counsel or appear
- not subject to counter or cross-claims or liability for fees or costs
- not subject to coercive or punitive remedies
- nor will adverse judgement bind an absent plaintiff for any damages.
- provided with an opportunity to opt out.

b. nationwide class actions - maintains personal jurisdiction over defendants, but does not bind absent plaintiffs:

- provides potential for dueling class actions
- Hansberry - Due process is satisfied & judgment is binding on all class members when the interests of the class are *adequately represented* by the class representative during the suit. [personal jurisdiction over defendants]

E. Settlement of class actions

1. Approaches to Settlement:

a. Approach as settlement class action: where reach settlement before formal class certification

- settlement class is conditionally certified "for settlement purposes only"
- formal class certification is deferred until Ps attorneys and Ds negotiate a settlement agreement.

vs b. Approach as class action as if will be litigated

1) Rule 23(e) [requires class certification before settlement]

- a) require court's approval before dismiss or compromise class action

- b) notice of proposed dismissal or compromise shall be given to all members of the class
 - 2). Apply criteria of Rule 23(a)
 - 1) numerosity
 - 2) commonality
 - 3) typicality
 - 4) adequacy of representation**
 - focus on settlement proposal
 - conflicts within class
 - 3) Apply criteria of Rule 23(b)(3)
 - consider predominance of common questions & superiority
- 2. Schools of Thought:
 - a. *No settlement before certification*
 - judge is better able to assess through certification process whether settlement is bona fide.
 - protect class members from unfair settlement made
 - potential for collateral attack* - would not be efficient or economical if situation arises after settlement where rights of absent class members were not taken into account.
 - b. Encourage settlement whenever possible.
- 3. Amchem (p. 746) Asbestos case
 - Can consider settlement, but must meet class action requirements (ie, adequacy of representation and predominance of common questions)
 - Court held that cannot settle b/c:
 - a. inadequacy of representation b/c future injuries are not accounted for:
 - conflicts of interest w/in settlement proposal
 - injured in the present vs. those injured in the future.
 - adjustment of inflation
 - opt out of class when suffer harm
 - immediate payout vs. future interests
 - (problem of collateral attacks of persons who suffer injuries in the future)
 - b. Under Rule 23(b)(3), huge number of class members, poses problems to representative in bearing notice costs & superiority requirement.
 - c. Problem with Receipt of Notice under R. 23(b)(3) - significant problems w/ satisfying notice requirements b/c don't know who has been exposed to asbestos, and even those who have been exposed may not be aware that they belong to the class.
 - Breyer Concurrence*: Ct should remand b/c case is addressing questions of fact; settlement is more important in mass tort cases than the majority indicates.
- 4. *Application to ACA*
 - a. Proposed Settlement
 - 1. establish a settlement fund & claims procedure
 - 2. payouts for leukemia & certain cancers according to a schedule
 - 3. payouts in future for those who contract leukemia or cancer (waive statute of limitations)
 - Note: no recovery for: fear of cancer or leukemia; loss of consortium; weakened immune system; medical monitoring

4. no adjustments for inflation
5. limit opt out class for class members
 - Defendants can opt out after 10 years
- b. Evaluation of ACA proposed settlement, in light of Amchem
 1. Conflict of interest by those suffered now vs. suffered in the future
 - a. local exposure (vs. national exposure with asbestos cases)
 - b. Anne Anderson - representative of those who have suffered a loss in the present and may be a possible representative for those who may suffer in the future.
 2. Notice - ACA is a more compact class,
 - where studies have pinpointed who has been served by Wells G & H, thereby making it easier to identify who has been harmed and who will be harmed in the future.
5. *Views on Class Actions:*
 - a. Joinder device
 - b. Representational device that empowers the named class representative to act on behalf of others similarly situated whether or not they could have or would have sued separately
 - c. Judges' recent activism in controlling class actions
 - 1) redefine classes to improve manageability
 - 2) grant partial certification
 - 3) bifurcate the adjudication (liability & remedy in different phases)
 - 4) high standards for atty representing class
 - 5) management techniques
 - 6) establish subclasses to mediate conflicts btwn class members
 - 7) sampling - statistical evaluation to produce results for the larger class
 - d. Role of Attorneys
 - 1) attorneys have a lot of control over the case
 - 2) can solicit class members based on free speech
 - 3) ct may order counsel to elect a committee to make decisions for the class
 - 4) cts use complicated methods for calculating fees
 - 5) difficult to find attorneys that are qualified to handle class actions.

III. Scope of Discovery

- A. 1938 Federal Rules of Civil Procedure created modern discovery rules
 1. reduced importance of pleadings and increased the importance of discovery
 2. increase access, use of courts to address societal tensions, where court focused on merits rather than procedure of claims.
- B. Purposes of Modern Discovery:
 1. Preserve Evidence
 2. Form & Eliminate Issues
 3. Obtain Information
- C. Arguments for Discovery
 1. Prevent Surprises
 2. Fairer Trials
 3. Aid Settlements - better able to judge position of opponents
 4. Less time-consuming trials
- D. *Discovery Plan* - Need to have a **Theory**, b/c acquire facts that develop other lines of inquiry & therefore should leave open other avenues of inquiry.

E. *General Themes:*

1. party control of discovery (by agreement & cooperation)
 vs. judicial involvement
 -acquire information from parties, rather than relying on what you receive.
2. relying on work of others - problem when parties withhold information
3. expense, cost, abuse
4. Amendments in the 70s, 80s, 90s
 1993 Mandatory disclosure provisions [R. 26(a)]
- 5 Acquire as much info as possible vs. nature of advocacy/adversarial process

F. *Mandatory Disclosures:* [Amended in 1993]

26(a)(1)

1. *Initial Disclosures* (w/o awaiting discovery requests) [duty to disclose basic info]
[*Note:* can be superceded by local rules - many courts have opted out of mandatory disclosure requirements]
 - (A) name, address, telephone number [discoverable information identifying subjects of information]
 - (B) copy or description of all documents in possession, custody or control of party that are relevant to the disputed facts alleged in the pleadings;
 - (C) computation of any category of damages & documents on which computations are based;
 - (D) insurance agreements

Application to ACA : How would mandatory disclosure requirements have altered the course of discovery in ACA? [depends on whether see discovery as instrument for reaching the truth vs. discovery as an adversarial game]

1. See list of required disclosures - Rule 26(a)(1)
2. Local rules provision allows jurisdictions to opt out, which would encourage forum shopping.
3. Ds would be required to disclose info much faster (ie, names of people who worked for companies) & Ps would not have to get all info at by request (saved some time & money).
4. D would have been subject to more sanctions (ie, Mary Ryan may have been sanctioned for withholding info re: Yankee Report)

G. *Scope of Discovery*

R. 26(b)(1)

1. May obtain discovery regarding any matter, not privileged, which is relevant...

□ Relevancy test: - [Broad scope - can discover anything that is relevant]

a. relevant to subject matter in pending action

or b. relevant to claim/defense of party seeking discovery or to the claim/defense of any other party

R. 26(b)(1) □

2. Discoverable as long as appears reasonably calculated; need not be admissible at trial

3. Burden of determining relevancy:

a. Parties themselves determine whether relevant

b. burden on opposing party to prove that material is not relevant
 [advantages/risks of answering discovery]

c. Court decides whether relevant or not.

Application to ACA

1. Relevance of requesting info re: chemicals other than 6 complaint chemicals
 - a. P use broad definition of relevance
 - vs. b Grace argues that pleadings (complaint) indicate subject matter.

Rule 11 provides limits on discovery - no factual basis

2. Relevance of deposing Riley re: Tannery vs. 15 acres
 - a. Beatrice argues that Ps were only talking about the 15 acres, not the tannery.
 - vs. b. P argues that need to depose Riley in order to answer the question of how the dumping took place?
 - Did others or Riley himself dump chemicals?
 - or was the 15 acres itself contaminated?
 - Schlichtmann amended complaint
- Skinner denied Beatrice's motion b/c relevance can shift (not just based on complaint); indicate expansion of discovery & defenses
- information provided in Beatrice's memo
 - Yankee report shows how water on 15 acres moved to Wells G & H.

H. *Informal or Extrajudicial Discovery - w/o using Federal Rules*

1. private investigations
2. Freedom of Information Act
3. Government agencies make information public
4. Internet

Application to ACA - informal interviews (Al Love); hired private detective; FOIA request from EPA; medical studies from MA Dept of Public Health & Harvard Health Study; and their own scientific research (based upon their own theory & hiring experts to test that theory)

1. Schlichtmann's use of a private investigator
2. *Beatrice* made a motion to prohibit extrajudicial discovery methods (ie, former employee) b/c a) Al Love was a former employee, b) concern over misrepresentation by private investigator over his involvement in the case, c) ethical violations.
 - a. *Protective order* under R. 26(c) to terminate deceptive practices by investigator does not apply b/c R. 26(c) grants court power to protect formal discovery process, but not informal discovery.
 - b. *Ethical violations* - Beatrice claimed that P violated ethical obligations over private acquisition of information, where a private investigator had talked to Al Love, an employee of Beatrice.

Model Rule 8.4

- 1) Should lawyers be responsible for "mild" deception by undercover investigators?
 - R. 84(a) - attempt to violate rules through acts of another
 - R. 84(c) - misrepresentation
- Skinner granted Beatrice's motion - a lawyer, & those acting on behalf of attorneys, cannot make false statements vs. fair housing investigations, which do allow "mild" deception/ misrepresentations and attorneys are not vicariously liable for misrepresentation of another.
- 2) speaking with a represented party?

Model Rule 4.2

- Under Model Codes - a lawyer, or those acting on behalf of attorneys, cannot talk to someone who is represented by counsel w/o an attorney present.
- P claimed that Al Love cut a deal w/ P by his own free will.
- Skinner issued order to P & investigator not to make any false statements and to fully disclose that they represented Ps in suit.

IV. Protective Orders - Discretionary Limits on Scope of Discovery

A. Rule 26(c)

1. upon motion by a party or by the person from whom discovery is sought...
2. accompanied by a certificate of good faith attempt to confer w/other parties...
- std. 3. for good cause shown
- std. 4. ct may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including 1 of the following:
 - a. that the disclosure or discovery cannot be had
 - b. disclosure or disclosure may be had only on specific terms or conditions
 - c. certain matters prohibited from inquiry, or scope of disclosure/discovery be limited to certain matters
 - d. discovery be had by only a specific method
 - e. discovery be conducted w/no one present except persons designated by court
 - f. deposition after being sealed be opened only by order of the court
 - g. trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way
 - h. parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

not an
exclusive list

=broad terms that gives court broad discretion in granting protective order

B. Marese v. Orthopaedic Surg. (p. 771)

- Court declined to issue protective order under 26(c), when D refused to produce documents & held in contempt
- Rule: parties must consider whether there are reasonable alternatives to protective order:
 - a. *in camera inspection/review* of documents to determine whether it is proper
 - problems with in camera -
 - time/efficiency - judge has to review all documents
 - inconsistent with adversarial process
 - b. *redaction* of files - [not necessary in discovery of case]
 - c. *timing/sequence of discovery* under 26(d)
- standards:
 - a. annoyance, embarrassment, oppression, undue burden & expense
 - b. good cause shown
 - c. balancing of interests
 - d. discretion
- there are not many appellate cases re: discovery b/c of the final judgment rule □ party must show that the ruling was prejudicial.

C. Seattle Times

1. Purpose of discovery - to help preparation for litigation
 2. Problem with discovery requests b/c potential for abuse
 - a. information may be obtained that is irrelevant or if publicly released could be damaging to reputation & privacy
 3. *Holding*: No absolute right to privacy of documents. "Protective order does not violate the First Amendment if the protective order is entered on:
 1. a showing of good cause [as required by Rule 26(c)]
 2. is limited to pre-trial civil discovery,
 - and 3. does not restrict dissemination of information if gained from other sources."
- 3 criteria:

Application to ACA -

1. J. Peter Grace example:

P wanted J. Peter Grace deposition b/c Grace is most knowledgeable re: Grace's corporate policy
-Cheeseman [Grace] sought protective order so that CEO Grace would not be deposed.

-argues that P's real motivation is publicity(want interview w/Grace in 60 minutes piece)

-argues against timing (very close to trial) & P had plenty of time to come up with this line of argument

-argues that Mr. Grace is a very busy man, who can't be deposed for every litigation the company is involved in. [had deposed *Manning C. Morrill - former VP at Cryovac* - no evidence supporting Nesson's charge of an affirmative corporate policy of neglect]

→Skinner required P to show that there was something worth getting out of the deposition. Later, denied P's motion b/c P never made a connection between information & J. Peter Grace.

D. Confidentiality Orders (umbrella protective order)

1. Ps and Ds agree to confidentiality orders b/c increases the likelihood that will get relevant information & goals of client are extremely important.

2. application in ACA - confidentiality stipulation

V. Secrecy in Litigation - denying access to information from litigation to people outside of litigation.

A. Traditional ways of limiting access to litigation:

1. protective orders

2. sealing orders (actually seal all records from public access)

3. confidential settlements with secrecy provisions

-confidentiality agreement, where the parties agree not to disclose information from litigation & prevent disclosing provisions of settlement.

B. *Types of information:*

1. dangerous prescriptive pharmaceuticals

2. professional malpractice (ie. heart surgeons, therapists involved in sexual misconduct)

3. dangerous products

4. environmental pollution of residential areas

5. sexual harrassment

C. Information acquired in discovery denied to:

1. lawyers in other cases

2. regulatory administrative agencies

3. scientists

4. members of the public

D. Arguments for disclosure to those groups of people:

1. Deterrence - increase the likelihood that party would be liable in another piece of litigation & would therefore change litigation posture & original behavior

2. Efficiency argument - why should we reinvent the wheel?

3. Confidentiality order - would prohibit from dissemination to those other attorneys

E. Motivations for secrecy in litigation:

1. Defendant's interest is in limiting from additional litigation, publicity

2. Plaintiffs agree to provisions b/c confidentiality has a value

- both parties agree b/c there is a premium paid for that provision;

and - confidentiality is the key to a settlement.

3. Judges have an interest in getting rid of litigation, protecting other parties' interest by limiting dissemination

E. Implications for Health and Safety

1. information to regulatory & administrative agencies:
 - a. Safety issues: healthy & safety information is necessary to carry out regulatory responsibility. Open litigation statutes - public hazard & Sunshine Act
2. information to scientific community

w/ lack of information can stifle research into risks & thereby affect consumer protection, b/c consumers would not know what to buy or not to buy.

G. Advocates for reform argue that information regarding public health and safety obtained in litigation should be readily available to regulatory agencies, scientists, members of the public and other attorneys.

Theme: Conflict between protection of parties & trial process vs. public access to important health and safety information

example: Florida Sunshine in Litigation Act

→court may not enter judgment which conceals a public hazard

1. Restricts ability of court to seal records
 - a. cannot conceal public hazard information
 - b. agreement to conceal a public hazard is unenforceable
2. Narrows the court's discretion
3. information will be shared by attorneys in litigation

-guarantee that information in similar litigation will have access, but others outside of litigation will not.
4. definition of public hazard is broad
5. Restricts ability for settlement
6. May encourage early settlement before documents are turned over & parties have less information.

H. *Secrecy in Litigation in ACA* -

Grace sought protective orders to seal documents & prevent *media* from access.

→Interpretation of Seattle - protective orders are not subject to heightened scrutiny

- a. concern over P's press conference re: inspection of Grace's property & P's counsel disseminating/publicizing materials obtained through formal discovery process.
- b. argued that couldn't get fair trial - all publicity that was coming on the eve of trial, influenced the fairness of trial by *tainting the jury pool*, where the jury would come in w/ preconceived notion of defendant's guilt.

1st Order

1. Skinner's 1st Protective Order (Sept. 4th)
 - a. prohibited release of information to pretty much everyone
 - b. exceptions - Order did not prohibit from disclosing info to environmental or health authorities of federal, state, local Woburn government b/c relates directly to community's interest in health & safety [consistent w/ Seattle Times]
 - c. concerns that protective order was too broad

ie, If Anne Anderson had a press conference in Woburn...

1. not protected by protective order b/c prohibited "parties"
2. *Local Rule 35* - no public statements if there is a reasonable likelihood that such dissemination will interfere with a fair trial →may apply to Anne
3. under Seattle Times, prohibiting Anderson from speaking would not be considered unconstitutional.

2nd Order

2. October 8th Order (Interim Protective Order)

- a. duration of protective order extends until end of trial
- b. "swearing of the trial jury" - response to Grace concern on impartiality of jurors, Ct in much better control over what jury sees, then there is less of a need to a protective order
- c. exception for experts -
 - 1) scientific issues were cutting edge & required health/enviro. experts
 - 2) chemical contamination issue - importance of experts in acquiring information b/c of independent importance of research

Final

4. October 16th Order - Final Protective Order

→Skinner gave WGBH access to information not available to other intervenors (ie, Boston Globe, CBS - 60 minutes) b/c

- 1) could broadcast NOVA program on toxic trial -
- 2) but cannot release until after jury is selected - [vs. whereas newspaper would print info immediately]
- 3) people may make extrajudicial statements to WGBH b/c obtain information during discovery process
- 4) allowing press preview before aired

→Inconsistent w/ Seattle b/c certain people could access info, while Seattle stated that could access info only if get info extra-judiciously.

5. *Boston Globe's arguments*: Globe claims that has a 1st amendment right to get access to discovery materials

Interpretation of Seattle Times :

- 1) *good cause* - need for access re: toxic waste b/c public interest in health & safety. (different from Seattle)
- 2) limited to info found in pretrial discovery context -
 - presumption in FRCP that discovery process is open
- 3) doesn't apply to information obtained outside of discovery
 - public has a common law right to court materials

vs. Good cause for protective orders - could be economically crippling for Grace and Beatrice; people would not know all the facts, but would make decisions based just on biased media programs.

-protective order applies to pretrial discovery context - considering that discovery is important to vindicate rights, parties may be reluctant seek redress if knew that confidential information would be released = Courts therefore have an obligation to preserve this process.

5. 1st Circuit decision -

a. Interpretation Seattle Times -

- 1) 1st Amendment considerations do play role in evaluating P.Os
 - 2) receives *heightened* First Amendment scrutiny on P.Os, as long as satisfy "good cause" requirement [R. 26(c)].
 - 3) *Good cause* must be based on particular factual demonstration of potential harm (not on conclusory statements)
 - In this case, potential for harmful publicity was good cause for PO.
- judiciary's interest in controlling discovery process in controlling discovery process outweigh public's interest in having access to that information.

b. Keep health & safety exception - exception for local officials b/c justified.

*c. *exception of media*

→ 1st Cir. rejects Skinner's PO b/c creating a monopoly by distinguishing between WGBH and the Globe and environmental agencies. A court may not selectively exclude news media from access to information otherwise made available for public dissemination.

Hypo: Suppose Federal Rule 26(c) included MA Sunshine Litigation Act
apply general provision to specific circumstances:

If public hazard, cannot enter protective order concealing public hazard or information concerning a public hazard

-broad interpretation of "public hazard" - would require release of information

re: sufficient grounds that has caused harm

→should transfer to different venue b/c would ensure fair trial

VI. Depositions

A. Use of Depositions:

tool for assessing performance of a deponent as a witness
& calculating odds with proceeding with trial.

B. Rule 30

1. *Notice*: who can we depose?

a. *parties* - under **Rule 30(b)**, required to give notice of deposition to party & give notice within reasonable time ["reasonable notice"]

b. *nonparties* - must subpoena nonparty to compel attendance **Rule 45**

1) may ask nonparty to appear voluntarily, but if they do not appear, you may be sanctioned for fees under **Rule 30(g)(2)**.

2) subpoena nonparty

3) give notice

4) notice within reasonable time

c. if don't know who exactly to depose, **Rule 30(b)(6)**

1) Required to give notice to corporation/organization/governmental agency and describe with reasonable particularity the matters on which examination is requested.

2) corporation/organization/govt. agency has the obligation to produce/designate 1/more persons to consent to testify on its behalf & may set forth, for each person designated, the matters on which the person will testify.

3) Problem of interpretation re: reasonable particularity

a. requires interpretation in light of context

b. broad request gives the subpoenaed party leeway in choice of deponent, but...

c. "does not preclude taking a deposition by any other procedures authorized in these rules" -

interpretation:

-language

-purpose

Application to ACA: Notice to Beatrice

-if P asked for a specific VP of Grace

1) under 30(b)(6) - "shall designate one or more officers..."

→ "*most knowledgeable person*" notice - corporation required to produce officer who is familiar w/ topic to be addressed.

language

Purpose

-while may have not described with "reasonable particularity" the matters on which examination is requested...
and -"this subdivision does not preclude taking a deposition by any other procedure authorized in these rules"
 2) even if not, P still has authority under 30(a) to choose who to depose & consistent with purpose of rules which is to give P, not D, ability to control depositions.
 -D produced *Paul Shallane* as the one most knowledgeable re: environmental matters and waste disposal matters
 -under 30(b)(6) - D can choose who will speak on behalf of the corporation & argues that it would be a waste of time by deposing those that are not the most knowledgeable.
 vs. -R. 30(a)(1) P can choose who to depose
 -R. 26(c) protective order provision which prevents P from harassing deponent by calling any person in deposition
 -Advisory Committee notes - organization may designate persons other than officers, directors, and managing agents, but only with their consent (ie, employee or agent)
 →Shallane unable/unwilling to provide info re: chemical disposal in Cryovac.
 →Disposal info revealed only when deposed *Thomas Barbas & Al Love*

language
policy

purpose

B. *Objections or refusals to answer*

risks: 1. Motion to compel disclosure or discovery
 a. **37(a)(2)(B)** - if deponent fails to answer question submitted under Rules 30 or 31 [depositions oral & written]..., the discovering party may move for an order compelling an answer...or order compelling inspection in accordance with request.
 risks of paying b. **37(a)(4)** - *sanctions*
 If motion is granted, the court shall require the deponent or the attorney advising such conduct or both to *pay reasonable expenses, including attorney's fees, unless* the court finds that the motion was filed without movant's first making a *good faith effort* to obtain disclosure w/o court action, or the objection/nonresponse was *substantially justified*, or that other circumstances make an *award of expenses unjust*.
 no coaching 2. **30(d)(1)** - [restricts situations where an attorney may instruct deponent not to answer]
 a. party may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation on evidence directed by the court, or to present a motion under (3) [examination is being *conducted in bad faith* or in such a *manner as unreasonable to annoy, embarrass, or oppress the deponent or party*] [added in 1993]

Application to ACA

1. Relevance of Paul Shallane deposition (does it fall w/in scope of discovery?)
 a. Schlichtmann asked Shallane questions re: chemicals other than 6 in complaint
 -Cheeseman instructed PS not to answer
 b. Schlichtman said he would call an emergency judge & filed motion to compel.
 -Cheesman argued that Schlichtmann never filed a motion on the issue re: chemicals other than 6 in complaint, which is a central issue that should have been raised before with a judge familiar with the case.

30(d)(1)

37(a)(2)(B)

→Skinner granted P's motion to compel & PS had to answer.

-Cheeseman had the option of drafting a motion under **Rule 30(d)(1)** as to why deposition should be stricken from the record under **Rule 32(4)**, if the information is not relevant, otherwise objection is waived & on the record.

2. *Ethical issues in deposition*

a. Cheeseman response - once Cheeseman found out that Barbas had lied, he called Schlichtmann & said that he would not mind if Barbas was deposed again [later, offered to pay for investigation re: Barbas]

Model Rule 3.3 → Model Rules **3.3** - prohibit against an attorney from knowingly presenting false evidence.

b. Riley lied in deposition when he claimed that he had destroyed formula books

3. Schlichtmann could have asked for attorney's fees from Cheeseman

-Under **37(a)(4)** - Court can impose costs of attorneys fees where granted motion

-But Skinner is not likely to order payment of fees b/c 37(a)(4) requires a good faith effort to resolve the objections before seeking court action.

4. Deposition of medical experts

-objectional deposition behavior, where Schlichtmann swore & coached/reinterpreted answers of medical experts.

-Schlichtmann should have objected in non-suggestive, non-argumentative manner [Rule 30(d)(1)].

or directed experts not to answer [opposing counsel could have sought motion to compel]

→5. "*Woodshed conference*" - Schlichtmann was given a reprimand, where he is only allowed to object to the form of the question

?Adequacy of Skinner's Response?

-Changes of the Federal Rules and articles indicate that judges are less tolerant of attorney misconduct during overly aggressive depositions on both sides

- restrict attorneys more significantly

- impose sanctions under rules or under court's inherent power/discretion or under Model Rules.

7. Facher article - advice re: deposition practice & tactics (ch. 9, p. 48)

-Objections in depositions should be rare b/c wasting of time & effort (deponent has to wait around)

R. 30(b)(3) -if really egregious improper conduct of deposition, instruct deponent not to answer and seek an order under R. 30(b)(3) [designate another method to record testimony]

-Question of attorney's discretion - sometimes better not to instruct deponent not to answer.

VII. Interrogatories - Rule 33

A. Contrast with Depositions

1. burden & costs on parties:(acquiring information for own party at expense of another) draft series of questions (small cost)

vs. heavy burden on party answering interrogatory

2. only get an answer to question that you are asked

potential for *ambiguous or misleading* answers, where would have to sent another set of interrogatories to clarify answer vs. deposition - can resolve issues & ask immediately.

B. Rule 33

- Rule 33(a)** 1. *Availability* - Without leave of the court or written stipulation, cannot issue more than 25 questions, including all discrete subparts.
- a. *Interpretation* re: "subparts"
 - 1) subpart meaning physical division of questions
 - 2) subpart meaning different topics covered, where each question is a different topic.
 - b. *Purpose*
 - limit number of interrogatories b/c would otherwise change relations between parties
 - limit judicial intervention
 - c. Rule 33(a) and Rule 26(a) [mandatory pretrial disclosures] were amended at the same time for the *purposes of limiting the # of interrogatories*:
 - 1) Rule 26(a)(1) - mandatory disclosure already provides answers to some questions that may be asked on interrogatories, and therefore help parties meet the 25 question limit under Rule 33.
 - 2) *Note*: While court may opt out of mandatory disclosure provisions, Rule 33 is fixed, even tho both provisions were supposed to work together.
 - 1) Court may alter limits to rules on number of interrogatories & leave to serve additional interrogatories will be granted to the extent consistent with Rule **26(b)(2)** [by order/local rule]
2. *Answers and Objections* [Rule 33(b)]
- Rule 33(b)(1)** a. **Objections** - **Rule 33(b)(1)** - If party objects to interrogatory, party shall state reasons for objection and shall answer to the extent the interrogatory is not objectionable
- Rule 33(b)(4)** b. *Service* - within 30 days after service of interrogatories [Rule 33(b)(3)]
- c. **Waive objections** - if do not state a timely objection, waive right to object to interrogatory
- d. **If do not answer**,
 - 1) treated as automatic violation under **Rule 37(d)**, and will be ordered to respond.
 - 2) party submitting interrogatories may move for an order under 37(a) [Rule 33(b)(5)]
- Rule 33(d)** 3. *Option to Produce Business Records*

Application to ACA

1. Grace's Answers -
 - a. Associate drafted answers, Facher signed them
 - b. strategy in answers - repeat answer
 - although spend much effort to respond to interrogatories in conductive investigative search (questioning employees), D will have to acquire information anyway to support their own stance. (ie, re: 6 oz. jar of chloroform - within Grace's interest to find out what happened to the jar.)
 - c. Helpfulness of Grace's answers: Not very
 - undue burden - how much effort do parties need to put in to answer questions? limits?
- vs. - legitimacy of shifting burden from defendant to plaintiff..
2. Cheeseman's objections re: chemicals

- scope/test for relevancy - after 1979, chemicals can still be relevant b/c can cast light on what happened before 1979 (ie, change of procedures)
- Under R. 26(b)(1) - parties may obtain information that is relevant and reasonable calculated to lead to the discovery of admissible evidence.
- 3. Duty to supplement information - **Rule 26(e)** - duty to correct/supplement disclosure or response; to continually update information of interrogatory answer
- 4. Negotiations - parties should negotiate before using court to settle disputes.

VIII. Requests for Production - Rule 34

A. Document Discovery

1. Rule 34

Rule 34(a)

- a.. *Scope* -- any party may serve on any other party a request
 - 1) to produce and permit to inspect and copy any designated documents
 - or 2) to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party

Interpretation

- Hart: Influence test - a party may be required to exercise what influence he has to produce documents, even where he has no direct possession, custody or control; must at least exert influence in attempting to comply with order b/c person is in the best position to provide that information & use his influence to get it.

- or 2) to permit entry upon designated land or other property in the possession or control of the party....for purposes of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation....

ie, *electronically held documents*

- Rule 34(a) permits request for information which can be "obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form"

- language is broad enough to cover info contained in electronic form.

Rule 34(b)

b. **Procedure**

- 1) No limitation to # of documents requested and describe each request with reasonable particularity [vs. limitation in interrogatories R. 33]

purpose:

- discovery is cumulative
- lessen burden b/c instead of answering questions, merely submitting documents.
- clarify or support complaint

- 2) party shall produce documents as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request (see leg. history - protect against abuse) [compare w/ R. 33(d)]

Interpretation

- P has choice to determine how documents are organized; purpose is to prevent obscuring particular documents (see leg. hist)
- vs. -literal - the way D keeps his documents.

Rule 34(c)

- c. *Non-parties* - may be compelled to produce document/things or submit to inspection under **Rule 45(a)(1)** - can subpoena documents even w/o subpoenaing party.

2. **Response**

- a. Time to Respond - 30 days after request [Rule 34(b)]
 -agree to produce, object, agree in part
- options: b. Objections (based on relevance [Rule 26(b)(1)])
 1) no express provisions waiving objections
- Interpretation: a) since waiver provision is not included in rule, did not intend to include and automatic waiver does not apply. Therefore, have not forfeited right to object to document request.
 vs. b) intended to include waiver provision in R. 34, b/c had already included waiver provision in R. 33. (untimely objections)
 -or objections included in response
 =arguments based on omissions are not analogous under R. 34 w/document requests.
- options: c. Move for protective order [Rule 26(c)] b/c good cause to avoid "annoyance, embarrassment. [balance interests of parties]
- Sanctions 3. Destruction of Documents
 a. Timing of destruction - depends on what stage of litigation.
 b. Discovery sanctions under **Rule 37**: -- R. 37(a) - If failed to respond to document request, discovering party may file motion to compel.
 -Under 37(b) - If fail to respond to order compelling disclosure, will be sanctioned for contempt. [remedy only after motion to compel] [loopholes]
- obstruction of justice c. Ethical provision of *Model Rules of Professional Conduct Rule 3.4*
 -cannot unlawfully destroy or [counsel] or assist another to destroy] documents with potential evidentiary value.
- Interpretations: 1) not a violation of ethical rule if did not unlawfully destroy or counsel
 vs. 2) protect power of discovery process
 -criticisms: inconsistency
4. Solutions:
 a. change Rule 37
 b. Parties request that court place order to prevent destruction
 c. recommend "Record Retention Plan" within a company
 -determines what to destroy regularly & what should be kept for period of time.
 1) corrupt intent if just follow policy of company's record retention plan?
 2) everything has "potential evidentiary value" if anticipate litigation
 3) spoliation of evidence
 -if destroy something important, it is assumed that destroyed info that was harmful to position.
 4) left subject to judge's instructions to the jury assumption re: spoiled evidence

Application to ACA

1. Beatrice's Documents request: health requests; records from govt agencies; communications to govt agencies; media reports; state & federal income returns; communications between Ps and any Ds (depending on interpretation, AL Love may or may not be included in request)
 - a. General and Specific Requests
 1. Beatrice's strategy of requesting documents in different levels of specificity was to ensure that certain documents would be produced & so that narrow questions would not skip over other issues.

- criticized for covering same documents
- request is subject to interpretation
- b. "Reasonable particularity" [R. 34(b)]-- request was too broad b/c did not describe documents w/ "reasonable particularity"
 - Beatrice not sure what they are looking for and to cover other aspects not covered by a specific request.
- c. Information is not relevant under *Rule 26(b)(1)*
 - justifies grounds for seeking protective order [Rule 26(c)]for "*annoyance, embarrassment, oppression, or undue burden or expense.*" b/c invasion of privacy (ie, state & federal income returns). [balance interests of parties]
 - legislative history - omission of "good cause" requirement of 26(b)(3)
 - while special provisions added to protect, abuse still exists.

2. *Beatrice's Possessory, Custody, and Control over Riley documents*

Facts: Beatrice → Riley & Wildwood Conservation Corporation (held the 15 acres)
Yankee Report was published after the tannery was resold to Beatrice.

- P argues that Beatrice has control - interpreted loosely to mean "influence"
- Beatrice claims that it did not have possession or legal custody of documents.

Issue: Does Beatrice have control over the documents?

Holding: Skinner held that Beatrice must turn over documents under 34(a)

1. Contract of resale contained a provision stating that Riley would cooperate with the litigation sufficient under 34(a) to hold that Beatrice had "possession, custody or control" over Riley documents.
2. Arctic Bold case - control is interpreted broadly/loosely to mean "influence"
discovery rules are to be interpreted broadly so that will have a flexible or effective pretrial process. (purpose of FRCP rules)
3. Hart: Influence test - a party may be required to exercise what influence he has to produce documents, even where he has no direct possession, custody or control; must at least exert influence in attempting to comply with order b/c person is in the best position to provide that information & use his influence to get it. (effect of rule)

3. *If Grace had come to counsel re: destroying documents*

a. Record Retention Plan ?

- 1) before closure of Wells G & H - destroy b/c don't know anything about whether wells contaminated 15 acres
- 2) after closure of Wells G & H - destroy
- 3) After complaint filed - no b/c Federal Statute requires corrupt motive.

B. Entry, Inspection & Testing of Land

Rule 34(a)(2) vs. Current Rule 45

a. **Rule 34(a)(2)** - permitted "inspecting and measuring, surveying, photographing, testing or sampling the property"

-leg. history - Rule 34 applies only to parties;

But, recognizes that "ocassionally necessary to enter land or inspect large tangible things" of non-parties. Therefore, Rule 34 does not preclude independent actions for discovery against persons not parties.

vs. b **Rule 45(a)(1)(C)** [*after 1991*]- permits subpoena for "*inspection*" of land.

Interpretation

-subject to interpretation b/c does not specify what constitutes "inspection" as under Rule 34(a)(2) [omitted language of 34(a)(2)]

- vs.
- 1) does not include sampling, survey, etc. b/c not intended & not stated
 - 2) so obvious that assumed and implied

Application to ACA

1. Agreements - Negotiate request for inspection

a. D's Purposes of negotiations:

1) *supervision* - parties want as much control over process to ensure that both parties follow agreement about what will/will not be tested & establish what is considered proprietary information.

-if move outside scope of agreement, can terminate inspection and seek grievance

2) *protection of property*

a) confidentiality - do not want information to be released.

b) proprietary information would be of great value if released.

b. P's purposes in negotiations: Want inspection to work, by reducing likelihood of dispute, saving time & money & possibility of order seeking redress.

c. Topics included within negotiations:

1) Testing of 15 acres

2) Transfer of land from Beatrice to Riley & resold land to Wildwood Conservation Corporation

-b/c lent to merits of Ps case; procedure & protection of land; insulate from liability

2. Access to 15 acres & resale of Tannery

a. Corporate shell game

1) only one month before trial started and P wanted to inspect 15 acres

2) Facher believed that P were funded by a syndicate of attorneys/ outside group b/c using # of experts & lavishly spending money

b. Beatrice claims that it does not own the tannery and therefore is not involved in the litigation: 1) Riley owns the tannery b/c Beatrice was losing money from Riley tannery & got rid of it; 2) did not really hurt Ps.

c. Events:

1) Riley/Ryan negotiated with Ps. →split independent evaluations

2) Negotiations were thrown out b/c media released info re: inspection

3) Ps seek motion to compel on Beatrice under R. 26(c)

→magistrate held that protective order could not apply to a *nonparty* (ie, Riley/Ryan)

4) Ps amended complaint to join Riley

→rejected b/c would defeat diversity

5) P argued that Beatrice had an obligation under Rule 37(a)(1)(B)

-Beatrice would be in "control" of property under R. 34(a)(2) b/c resale agreement & provisions held that Beatrice was still responsible for EPA cleanup of property.

-under "influence" test, Beatrice was in control.

d. Skinner did not agree w/ Ps request to inspect 15 acres:

- 1) undue burden on Ds & no time for Ds to prepare
- 2) delay trial

IX. Physical and Mental Exams - Rule 35

35(a) A. Requirements:

1. mental or physical condition in controversy
2. good cause

35(b) B. Report of Examiner

1. If requested by party who submitted to order for examination, party requesting the examination shall deliver a copy of a detailed written report of the examiner [R.35(b)(1)]
2. By requesting/obtaining the report or by taking the deposition of the examiner, the party examined waives any privilege [ie, doctor-patient privilege] the party may have in that action or any other involving the same controversy re: mental/physical condition. [R. 35(b)(2)]
3. Can request report for examinations made by agreement [R. 35(b)(3)]

C. Good Cause

1. Schlagenhauf v. Holder (U.S. 1964)
 - a. Requires showing of good cause
 - 1) closely related to necessity rather than just relevancy
[more than relevancy]
 - and 2) unable to obtain elsewhere - examine other ways of obtaining same information; if there are other ways, then less likely there will be a good cause showing.
 - b. Burden is on moving party to establish good cause
P argues that under R. 35 submits voluntarily & therefore waives objections.
D argues that enter involuntarily to court and R. 35 does not apply
→ Ct rejects argument of applying R. 35 on a waiver basis, & holds that even though mental conditions have been established by pleadings, moving party still has the burden to establish good cause.
 - c. Fact-specific determination
 - d. Judicial discretion
2. greater importance in good cause requirement when submitting to physical/mental exams & therefore require necessity b/c

Rationale:

- a. *Stigma* - Stigma with certain diseases. & P suffers emotional distress from own injuries or injuries on family members.
- b. *Subjectivity* - mental exams are more subjective & may lead to potential for abuse. "Any certified examiner" is broad requirement.
- c. *Invasion of Privacy* - more personal & greater stigma with certain diseases & requires more cooperation.
- d. *Potential for Abuse*

D. If refuse to submit to examination, options:

1. Motion to Compel -
2. Potential Sanctions:
 - a. preventing party from introducing evidence
 - b. remove issues from case
 - c. issue summary judgment
 - d. hold them in contempt → potential for imprisonment

-but not applicable where refuse to submit to physical/mental exam b/c exams are so invasive an act re: privacy & bodily integrity

E. Role of Agreements

-Despite "good cause" requirement, most parties seek an agreement, not by court order.

Application to ACA re: Scratch Test

Facts: Parties had agreed to protocol. Altho not w/in protocol, doctors did scratch test & sinus x-ray. W/in protocol that doctors would engage in followup procedures & tests

1. Could Ds show good cause for conducting tests, if they had presented issue before doctors conducted the test?

-Yes, Good Cause: [balance risks & needs]

1. Necessity - test provides relevant information b/c could potentially connect medical/physical condition to chemicals.
2. invasiveness of risk - Scratch test was not an intrusive test.

2. scratch test vs. skin patch test

-Skin patch test is more invasive and potential adverse effects are greater.
Therefore would be difficult for Ds to establish good cause.

3. Whether the patients had given real consent to the test?

-Ds argue that doctors conducted tests in interest of the patients & medically warranted.
-Ps argue that doctors are adversaries b/c working for Ds and getting information for their positions. Since this was a legal proceeding, not a doctor-patient relationship, Ps legal interests should have been protected.

Should an attorneys be present during examinations? [majority of federal courts have held that there is no absolute right to have atty present; privacy issues]
[more time should be spent w/ details of protocol]

→Skinner ordered both tests to continue; deny P's motion for protective order b/c tactical

4. Dr. Beck (psychiatrist) tested individual members of the family

Were the Plaintiffs entitled to reports of their psychiatric exams?

a. Examination by agreement, not done by court order → Rule. 35(b)(3)

Rule 35(b)(1) if exam, under ct. order, doctor has to submit written report.
applies to examinations made under agreement

1) "does not *preclude* discovery of a report or taking of a *deposition* of examiner" [Rule 35(b)(3)]

2) states that entitled to report under 35(b)(1)

Rule 26(a)(2)(B) - parties automatically produce detailed reports w/respect to testifying witnesses [courts can opt of mandatory disclosure of expert reports]

b. Waiver provision R.35(b)(2)

-if request report, Ps waive privileges (ie, doctor-patient privilege)

-in MA, no general doctor-patient privilege; but therapist-patient privilege would be waived.

c. What constitutes a report under R. 35(b)(1)?

-specifically developed or document produced during exam?

-P claims that did not receive report under R. 35(b)(1) , but an eligible stream of consciousness [interpretation: positive duty to create comprehensible report]

→Skinner rejects Ps argument and holds that P are lucky with what they got.

[idea of report is that supposed to provide useful information]

X. Requests to Admit - Rule 36

1. *Rule 36*

Rule 36(a)

a. *Request for Admission*

Written request for admission of truth of any matters that relate to statements or opinions of fact or application of law to fact, including the genuineness of any document. 1) No limitations as to number of requests to admit under R. 36

But, *Note:* Under *Rule 26(b)(2)* by order or by local rule, the court may limit requests to admit (if used as a discovery tool)

2) *Genuineness* - Different from other discovery tools b/c inquire into truthfulness or genuineness of document

3) Each matter shall be separately set forth.

[Could have requested to admit earlier in litigation as a pretrial procedure]

Rule 36(b)

b. *Effect of admission*

1) any matter admitted is conclusively established unless the court, upon motion, permits withdrawal or amendment [can't take it back; different from other discovery tools b/c can challenge]

2) Amendments are permitted, but will prejudice that party in maintaining the action or defense on the merits.

2. *Options of Responses:*

1. **no response** → all matters are admitted

-if file late response, matter is admitted

[in practice, if file late request, can ask that late request be an admission]

2. **deny** - [*Note:* if other party proves something that is denied, party may have to pay costs subject to R. 37(c)]

3. **object** - on basis of vagueness/ambiguous, irrelevance, otherwise ineffectively drafted, privilege, compound sentence (each matter should be separately set forth)

4. **admit in part, deny in part** - must specifically state reasons

5. **lack of information or knowledge** - may not be used unless states that had made reasonable inquiry and that the information known or readily obtainable by the party is insufficient to enable party to admit or deny.

3. *Sanctions*

a) *Rule 37(c)* -If party fails to admit genuineness & later facts are proved to be true, that party may be subject to paying expenses in establishing proof, including reasonable attorney's fees.

b) *Rule 26(g)* - counterpart to *Rule 11* applicable to discovery requests, responses, object signature constitutes a certification.

Application to ACA: Plaintiff's Request for Admission to Defendant Riley (54 page document)

Beatrice objected to all requests to admit & therefore did not admit anything

Kinds of objections:

1. *Vagueness* -

-Beatrice's generally objected that Plaintiff's request are too vague.

ie. description of Riley property: tannery vs. 15 acres

[but #9,10, 11 sets out specific descriptions of property]

2. *Lack of knowledge*

Beatrice's form answer "*lacked information or knowledge to form a belief as to the truth of the allegations*" [under **Rule 8(b)** treated as denial of allegations]

-but under **Rule 36(a)**, answering party is required to conduct "*reasonable inquiry*" or obtain "*information known or readily obtainable*" [burden]

-involvement of judges as umpire/manager in controlling direction of the case

3. *Relevance* - same broad standard as R. 26(b)(1)

tannery vs. 15 acres
complaint chemicals

4. *Corporate "view" of the matter* - B claims that not requesting admission of fact opinion vs. fact - object on grounds that admit what someone else believes
But, under R. 36(a) "opinions of facts" are permitted - broad concept of opinions

XI. Work Product Privilege - Rule 26(b)(3)

A. *Analysis* under Rule 26(b)(3)

1. Documents & Tangible Things
2. Prepared in anticipation of litigation or for trial
 - a. ordinary course of business
 - b. other business purpose
3. by or for a party or representative
4. Showing:
 - a. Substantial need
 - b. Obtain substantial equivalent without undue hardship[*not otherwise available*]
 - unique material
 - access
 - costs
 - c. Other discovery devices (ie, depositions, interrogatories)
4. Shall protect *mental impressions, conclusions, opinions, or legal theories* of an attorney or other representative of a party concerning the litigation
 - Opinion work product* → absolute privilege
 - vs. *Fact work product* → qualified privilege
 - b. Upjohn - at minimum, require far greater showing of necessity required to obtain opinion work (vs. fact work product)
 - c. *Redaction* - even assuming that there is opinion work product included, opinion work product can be separated from fact work product through redaction, leaving "factual" only.
 - burden on court & difficulty of separating fact & opinion (interweaved)
 - Hickman - opposing party strategy of freeloading mental impressions & theories of attorneys
 - d. statements
 - both party/non-party may confer statement without required showing.
 - statement previously made 1) written signed statement, 2) stenographic mechanical, electrical or other recording or transcript
 - [mental impressions, legal theories, conclusions and opinions are immune even tho can show substantial need and not otherwise available]

interpretation:

Rule 26(b)(5) 5. Attorney-client privilege (*absolute privilege*)

- a. trial preparation materials
 - does not necessarily include preexisting documents
 - required to show that materials were acquired to obtain legal advice
 - b. describe the nature of the documents... without revealing privileged/protected information to enable other parties to assess the applicability of the privilege or protection
6. Appeals
 - cannot appeal final interim ruling
 - Therefore, great discretion for pretrial process.

XII. Discovery from Experts

A. Testifying Experts

1. Rule 26(a)(2) - Disclosure of Expert Testimony

- a. identity of those experts to be used at trial [Rule 26(a)(2)(A)]
- b. written report (prepared & signed by witness) [Rule 26(a)(2)(A)]
- c. additional information about those experts:
 - 1) complete statement of opinions
 - 2) data used in forming opinions
 - 3) exhibits to be used
 - 4) list of all publications by witness in last 10yrs [used to see how their present opinion sits with their previous writings]
 - 5) list of cases which experts have testified in last 4 yrs [provides a basis for what they said before, preview of what likely to hear in this case so as to prepare a better list of questions of testimony]
 - 6) compensation to be paid for study & testimony
 - 7) qualifications of the witness [important b/c if he is not qualified then he cannot make the conclusions which he is making; may prohibit admission into evidence]

2. Rule 26(b)(4) - deposition of expert at trial

R. 26(b)(4)(A)

- a. opposing party may depose anyone who is listed as potential expert witness b. *delay* deposition until receive written report from expert (under 26(a)(2)(B)) [ACA - practice at time, depositions were standard practice]
- c. *Fees* - R. 26(b)(4) - court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery -deposition and the time prepared for.

B. Rule 26(b)(4)(B) [Non-Testifying Experts]

1. Rule 26(b)(4)(B)

- a. Can obtain info by interrogatories & depositions re: facts & opinions
- b. Showing of "exceptional circumstances" under which it is impracticable for party seeking discovery to obtain facts or opinions on the same subject by other means.
 - 1) unique expert (limited # of experts) - if expert is only one in field, may qualify as exceptional circumstances.
 - 2) unique test
- c. Cost provisions: fair portion of the fees spent must be paid by *opposing party* [R. 26(b)(4)(C)] [incentive for discovery of testifying experts & for preparing your case]

Application to ACA - Dr. Beck (psychiatrist)

-Dr. Beck had completed some of the interviews with the plaintiffs.

-Withdrawn as testifying expert: After reporting to the defendants, the defendant changed his status from a testifying expert to a non-testifying expert.

1. now can only depose this expert in "exceptional circumstances":

- a. uniqueness - [not hired by Ps; had experts of own]
 - 1) test that can't be replicated - whatever was tested was destroyed
 - 2) not unique expert - unless you can't get someone else in the field b/c there are so few or this expert is unique

2 Does a *change in status* from testifying to nontestifying witness require showing of *exceptional circumstance*?:

- Dr. Beck had examined plaintiffs, so there may be more of a cause to find exceptional circumstance.
- No, judicially inefficient to find an "exceptional circumstance" every time the label is changed.
- Yes, Dr. Beck could be considered unique in that he is non-biased b/c he is defendant's witness.

→Skinner's held that Ps request for Dr. Beck's deposition is denied under R. 26(b)(4)

3. Hypo: Attempt to get names of nontestifying experts:

a. Why would we be concerned with the Ds knowing the experts we used?

- 1) don't want them to get refuting evidence
- 2) may have an agreement with the expert that you won't have them testify in court b/c don't want to be identified as consulting with the plaintiff & just don't want to testify.

b. What arguments could we use not to have to produce this information?

- 1) application of *work product privilege* - "attorney-expert dialectic" - same justification as the *mental impressions, legal theories and opinions*
- 2) *protective orders* - argue that the deposition of the expert would constitute "annoyance, embarrassment, oppression or undue burden or expense"
- 3) no "exceptional circumstances" □ nothing unique about this expert

vs. 4) 26(b)(4)(B) - may discover known facts & opinions held by an expert.

Apply R. 26(b)(3)

Apply R. 26(c)

XIII. Sanctions - Discovery Abuse

A. 1st Circuit Opinion

1. **Rule 60(b)** court may relieve a party or party's legal representative from final judgment, order, or proceeding for:

- a. fraud, misrepresentation or misconduct of an adverse party [R. 60(b)(3)]
- b. by clear and convincing evidence
- c. if deliberate misconduct, responsible party must show by "clear and convincing evidence" that the conduct did not "substantially interfere with the aggrieved party's ability to fully and fairly prepare for and proceed at trial."
- d. if no deliberate misconduct, aggrieved party has the burden by preponderance of the evidence to demonstrate substantial interference.
- e. Therefore, right to a new trial.

2. "*Deliberate Misconduct*"

- a. Knowing and purposeful act, but still not guilty of nefarious intent to violate rule (term of art) [includes accidental misconduct]
- b. does not necessarily rise to a level of an ethical violation & therefore not subject to R. 37 sanctions.

3. "*Substantial Interference*"

- 1. if deliberate misconduct, rebuttable presumption of substantial interference to prepare fully and fairly to case.
- 2. Therefore, right to a new trial

Application to ACA Yankee Report (ACA pp. 460-89)

Yankee Report held that PW#1 was influenced by PW#2, based upon small concentrations. If PW#1 was the source, should expect levels of PW#1 to be greater than concentration at PW#2.

1. Misconduct by Mary Ryan

- Ryan claimed that the Yankee Report was conducted as work product under R 26(b)(3).
- *Under R. 26(b)(5)* once she claimed work product privilege, she must disclose or notify the existence of the work product and provide enough information for the other party to object, or otherwise evaluate the claim.
- Ryan claimed that common practice in MA was not to disclose information about the work product.
- In a Washington State Physicians v. Fisons Corp. - WA Supreme Ct. held that the standards for discovery is based on the *spirit of the rule*, not common practice of the law.
- Mary Ryan's conduct was analogous to Washington Supreme court case
 - a. character of the documents of the case revealed the *outcome or effect to* outcome.
 - b. type of misconduct - *intentionally withheld* documents from the plaintiff
 - c. custom - customary practice in MA to place burden on the plaintiff/ requesting party to obtain the documents.

2. Facher/Ryan Affidavit

a. "*deliberate misconduct*" under 1st Cir.

1) Ryan filed answer to questions & filed an affidavit

a) Timing discrepancies - what occurred at depositions vs. release of Yankee report

b) Jacob's veracity

-Schlichtmann claimed that this was proof of fraud on court.

→Skinner refuses to accept new affidavit & won't consider it for legal purposes.

2) Since Ryan is a non-party and therefore not subject to sanctions, Schlichtmann is imputing misconduct by Ryan to Beatrice & requesting a new trial against Beatrice.

→Skinner held that *Beatrice* has committed *deliberate misconduct & rebuttable presumption of that Beatrice substantially interfered & therefore, P have a right to a new trial.*

3) Solution:

-Beatrice's sanctions = Beatrice will pay for experts & hydrolic studies

-Schlichtmann rejected solution b/c experts were employed by Beatrice & had connections to Grace [not neutral experts]; Schlichtmann felt that if he did not disagree with these experts he would be affirming experts & affirming their results.

b. *substantial interference*

-Beatrice has to prove with "clear and convincing evidence" that existence of the report would not have effected way that Plaintiff would have handled the investigation & therefore, Beatrice did not substantially interfere with fair and full preparation of case.

→Skinner held that there was no substantial interference

-b/c Report did not show hydrological connection w/ contamination

c. Balancing misconduct by both parties:

Rule 11 violation

1) Schlichtmann had violated Rule 11 in filing meritless claims against Beatrice (discovery proved that P had no objective basis in fact for claim).

-Ps have no evidence that dumped chemicals on tannery property, based on looking at Schlichtmann's investigative file & court found no evi-

dence that Schlichtmann ever knew of contamination & had proceeded to trial with no factual basis for claim.

discovery abuse
sanction

- 2) Beatrice had been found guilty of deliberate misconduct.
→Skinner balanced both violations and held that both sides have been equally guilty of misconduct and neither side could impose sanctions against each other.
- d. Appeal -- Would Court of Appeals have upheld new trial?
Evaluating recommendation in relation to judge's discretion
fairness?

XIV. Pretrial

Pretrial process:

weed out claims	56
narrow issues	16
provide information	26-37
give notice	8
liberal joinder of claims and parties	

A. Rule 16 - [mandates scheduling order & conferences]

- Rule 16(a)** 1. [Tracking] *Court may in its discretion direct the attorneys for parties & unrepresented parties to appear for:*
- a. expediting disposition of action [expedited/normal/complex (different schedules depending on type of case)]
 - b. establishing early and continuing control...
 - c. discouraging wasteful pretrial activities
 - d. improve quality of trial through more thorough preparation
 - e. facilitating the settlement
- Rule 16(b)** 2. *Requires scheduling order - shall - [except if exempt by local rule]*
-Advisory Notes: specifically added mandatory scheduling order that must be prepared even in the absence of a formal pretrial conference.
3. Rule of Judges as Managers
Judges as arbitrators vs. Judge as active manager
-Advisory Notes: alter focus of pretrial conferences to case management, not merely conduct of trial.

Application to ACA: Skinner's Management of ACA

1. Skinner underestimated amount of discovery in the case
He could have limited amount of discovery or sped up trial
Better management could have reduced amount of waste
2. Skinner issued scheduling order on Sept. 1984 □ 2 yrs after case was removed to federal court. *Under Rule 16(1983)* - must file scheduling order 120 days after the complaint.
3. Did the defendant's delay trial? Yes
Did the defendant reduce the ability of the plaintiffs to carry out to trial?
-Was it ethical to delay trial?

- Model Rule 3.2** -Model Rules of Professional Conduct Rule 3.2 - *lawyer shall make reasonable efforts to expedite litigation consistent with interest of the client*
- an attorney in good faith must have a substantial reason for action other than delay [interest in delay is an insufficient reason];
 - whether the delay is in the interest of the client.

-Beatrice's clients have a legitimate interest in having attorneys (Facher) review materials of discovery before trial.

4. Judicial attitude to management

Skinner view role as judge as an arbitrator

-[in his defense, mandatory scheduling requirements were not enforced]

vs. Judge as an active manager and responsible for directing and controlling parties.

B. Pretrial Conference

1. *Discretionary* - **Rule 16(a)** - judicial discretion to order pretrial conference

2. *Exchange of information* - **R. 26(a)(3)** - even without a pretrial conference, under R. 26(a)(3) parties are obligated to exchange information before trial

a. pretrial memo includes: name/address/contact # of witnesses, identification of each document or exhibit

3. *Encourage Settlement before trial* - **Rule 16(c)(9)** -

a. Role of the judge in settlement -

1. no transcript requirement, therefore no record of judge's involvement

2. should the same judge handle pretrial and trial?

-some courts require that magistrate handles pretrial

-other courts, judges handles pretrial & judges are to lead to settlement of case.

ACA - Skinner wasn't involved much in settlement negotiations, but in pretrial conference, he made a pitch for settlement btwn the parties [Skinner's attitude was more expansive, than actual involvement in settlement]

4. Pretrial Order - **Rule 16(e)**

a. Rule 16(e)

1) after any conference, an order shall be entered reciting the action taken.

2) pretrial order shall be *modified only to prevent manifest injustice*. [difficult to change pretrial order]

-*Application to ACA* - No pretrial order, but a transcript was kept that enumerated judge's order & in effect, treated as order.

C. Civil Justice Reform Act of 1990, 28 USC 471-482 -

-Requires each federal district court to develop an "expense & delay reduction plan" - [act is seen as decentralizing procedure, affirming the managerial role of judges & encouraging the use of alternative dispute resolution]

options: 1. fast tracking - specific deadlines for each stage of pretrial process

2. individual dockets - handled by the judge

3. unified dockets - different judges work on case during pretrial

4. staging - only certain issues in discovery go first

5. differentiated case management - expedited, normal & complex track

MA

-United States District Court of Massachusetts adopted its Expense & Delay Reduction Plan on Nov. 1991 -emphasizing the importance of judicial management of cases.

Judicial officials have the principal responsibility for the conduct of the pretrial process.

a. *Article I* - includes mandatory scheduling conference, where parties present a mutual pretrial schedule

b. *Article II* - judge/magistrate controls discovery.

XV. Settlement

A. Different approaches to negotiation

1. Random - based on moving from one figure to another [Schlichtmann]
2. Theory of case & likelihood of winning (strengths & weaknesses of case)
Application to ACA - assessment of value of case changed as proceeded with case
\$24 million was initial offer
-increased after meeting with Professor Neeson

B. Involvement of clients within negotiations

Model Rules of Professional Responsibility

Model Rule 1.2 (a) - [obligation to inform client of settlement & to abide by client's decision]
"A lawyer shall abide by a client's decisions concerning the objectives of representation ... and shall consult with the client as to the means by which they are to be accomplished...A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter."

Model Rule 1.4 - [obligation to keep client reasonably informed about status of litigation]
"A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information. b) a lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

C. Role of the Courts

1. Dispute resolution leaves process to control of both parties
2. Court serves some function other than to resolve disputes but to serve as an adjudicating body
3. Settlements would become more & more difficult, without the standards established by adjudicated decisions.

D. Structured Settlements -

1. Types:
 - a. payouts of large amounts of money over a period of time through the use of annuities
 - b. conditioning settlement payouts on the occurrence of certain contingencies
2. Advantages
 - a. *not taxable* (except funds that represent lost wages or salary or payments of medical expenses that have already been paid by the plaintiff and have been claimed by plaintiff as deductions from ordinary income - will be taxed as ordinary income)
 - b. structured settlements with *children* accrue interest tax-free & ensure that award will be available to child
 - c. *information exchange* as to what want to convey & what want to protect
3. Disadvantages
 - a. takes away from client fundamental decisions in outcome of case
 - b. depends upon the economic viability of the insurance company holding the annuity
 - c. attorney fees are not part of structure agreements and provision must be made.

Application to ACA

1. Should Plaintiffs have settled with Beatrice before trial? No. "empty trial" argument □
If P settles with B, Grace would argue that 15 acres was contaminated by B.
If P settles with G, Beatrice would argue that 15 acres was contaminated by G
2. Was there a conflict of interest between clients in settling?

-some clients were likely to have their claims dismissed b/c water would not have reached their families.

-But, Schlichtmann wanted Ps to stick together.

-Should have been discussed with Ps.

3. During negotiations, did Plaintiff's attorney say anything that was not true?

a. Money - Schlichtmann gave impression that he had unlimited funds.

b. Misstatements:

-expect or permit parties to posture & pose during negotiations & therefore expect misstatements or untrue statements.

-**Model Rule 4.1** - Truthfulness & statements to others

"prohibits false statements of material fact of law to 3rd parties"

-matter of judgment as to what constitutes material facts (facts essential to case)

-sanctions under model rules = professional sanction (internalization)

evaluate question of judgment in applying or interpreting ethical rules.

XVI. Polyfurcation of Trial - separate trial on different phases of trial

1. **Rule 42(b)**

a. in furtherance of convenience or to avoid prejudice

or b. when separate trials will be conducive to expedition and economy

c. the court may order a separate trial

Application to ACA:

1. Proposed trial plans:

a. *Grace* - wanted to separate liability & damages

1) 3 stages of liability:

a) contamination of wells

b) water reached plaintiffs

c) medical causation

2) damages - compensatory & punitive

→would present evidence on each phase & jury would return verdicts before next phase begins

b. *Plaintiffs* - try one plaintiff's case from beginning to end.

-Anne Anderson would serve as a test case and tried first. Any remaining issues would be tried within.

-If affirmative verdict in Anderson case on common issues of liability, the second phases would entail presentation of the remaining claims on a family-by-family basis.

c. *Beatrice* - foreseeability - known or should have know (suggests negligence)

prove 1) negligence, 2) causation 3) liability

-first determine/try dispositive issues common to all claims.

-if plaintiffs fail to prove any one of the dispositive issues by a preponderance of the evidence, the court should dismiss the complaint against Beatrice.

→Skinner's order - (looks like Beatrice's)

trifurcation plan - divide trial into three phases.

1) whether Beatrice/Grace were responsible for contaminating wells G & H

2) medical causation

3) damages

2. Impact of Skinner's decision on outcome of case & perception of justice

- a. Plaintiffs did not testify at trial.
- b. Plaintiffs families receded so far in trial that disappear & failed to have a voice at trial and influence plaintiffs' perception as to whether justice was accomplished.
- c. removes human drama from proceedings - Jury hears only tedious, technical character of case & plaintiffs lose the emotions behind the deaths
- d. polyfurcation prevented jury from bringing *community values and perspectives* to bear in its decision-making.

XVI. Adjudication without Trial

A. General Rules that permit claims to be removed from process:

- 1. **Rule 12(b)(6)** - *Motion to dismiss for failure to state a claim upon which relief can be granted*. [Accept allegations as true, but no relief possible under any theory fairly contained in the pleading.]
- 2. **Rule 12(c)** - *Motion for Judgment on the Pleadings* -
Pleadings leave no material fact to be decided. Movant entitled to judgment as a matter of law [looks at pleadings as a whole] [very rare; ie, statute of limitations]
- 3. **Rule 56** - *Summary Judgment*
No genuine issue of material fact and movant is entitled to judgment as a matter of law. Material beyond the pleadings are considered: ie, affidavits, discovery materials before trial. [paper prediction]
- 4. **Rule 50(a)** - *Directed Verdict (Judgement as a Matter of Law)*
std:
 - 1) After evidence received at trial
 - 2) Reasoning jury could not find in favor of the nonmoving party
 - 3) all inferences favorable to nonmoving party
 - 4) all credibility determinations drawn in favor of nonmoving party
- 5. **Rule 50(b)** - *Judgment notwithstanding the verdict*
[renewed motion for judgment as a matter of law]
same standard for a directed verdict, but made after jury returns verdict.
- 6. **Rule 50(c)** Appellate reversal because does not support judgment
same standard as directed verdict, but conducted by the appellate court.
- 7. **Rule 41** *Voluntary Dismissal*

B. Summary Judgment - Rule 56

- 1. *Purpose*: to screen out cases that don't need a trial (trial → to resolve disputes of fact)
- 2. Tactical Reasons for filing motion for summary judgment
 - a. opportunity to educate the judge about this issue before trial
 - b. *discovery device* - forces the plaintiff to produce information in order to defeat summary judgment & thereby obtain info re: Ps case.
 - c. *settlement strategy* - the more burdensome on P, more likely to settle than respond
 - d. resolve legal issues & factual disputes.
 - e. *judicial efficiency*
- 3. **Rule 56**:

Rule 56(c)

- a. **Requirements**:
 - 1. *no genuine issue as to any material fact*
 - 2. *entitled to judgement as a matter of law*
- b. [Must look at evidence proffered by the parties]
 - 1. Affidavits
 - 2. Depositions
 - 3. Answers to Interrogatories

Rule 56(e)

4. Pleadings

c. *Showing*:

1. affidavits must be supported by personal knowledge
2. set forth such facts as would be admissible in evidence showing that there is no genuine issue for trial
[may not rest upon *mere allegations or denials* of pleadings]
3. response to summary judgment may not rest upon conclusory allegations or denials of adverse party's pleadings, but must respond with *affidavits or specific facts showing that there is a genuine issue for trial.*
[P's burden of persuasion]

→ Judge looks at evidence and determines whether there is a dispute as to material issue of fact. If no, judge can rule as a matter of law.

4. ***Genuine Issue of Material Fact***

a. Standard to determine:

- 1) no dispute
- 2) no supporting evidence

or

b. Burden is on the moving party when the motion is made against the party with burden of persuasion at trial

c. Advisory Notes:

-1963 Amendments - if evidence does not establish absence of genuine issue, must deny summary judgment [suggests that need an affirmative showing of absence of genuine issue]

-Proposed 1991 Amendments - provision, in accordance with Celotex, would have enabled parties to meet burden of producing evidence or proof, by referencing any absence of probative evidence.

4. Cases re: Standards for determining existence of genuine issue of material fact

a. **Celotex Corp. v. Catrett**

Rule: D (moving party) can prevail by merely noting P's lack of evidence to support crucial element of P's claim. → D's burden is satisfied
[ode to summary judgment - shows great willingness to grant summary judgment]

b. **Brennan (Celotex dissent)**

1. Burden - If D just needs to show that nothing in record supports P's claim, court is shifting the burden of persuasion onto P/non-moving party to come forward with admissible evidence & lessens the burden on the moving party.

2. D can move for summary judgment without much cost to the moving party D and in return, get P's theory of the case. Motion will be more common.

3. Creates two trials: 1) before and 2) after

b. **Kress v. United States** [inconsistent w/ Celotex]

Rule: Court required an affirmative showing of absence of genuine issue of fact. P did not have to respond to summary judgment b/c Ds failed to carry out initial burden.

d. **Anderson v. Liberty Lobby**

Rule: heightened evidentiary requirements meant that the court had to evaluate evidence in the record to see if P has proven by "clear and convincing evidence" -increases burden on P to prove material fact by forcing Ps to come forward with everything. Make it easier for D to bring a motion for summary judgment.

Brennan Dissent - would create a paper trial before the trial

J. Rehnquist

Application to ACA: Grace's Motion for Summary Judgment

A. *Grace* argues that there is *no genuine issue of material fact* supporting P's medical causation claim that contamination or exposure to chemicals will cause leukemia

a. No personal knowledge - Affidavits are not supported by personal knowledge
- no medically accepted evidence or literature that would support an expert opinion on behalf of the plaintiffs that these chemicals were cause of leukemia.

b. no supporting facts - [If plaintiffs have no support for causation, they therefore cannot show medical causation (key element of case)]

→Therefore, with present facts, Defendants are entitled to summary judgment.

B. Plaintiff's Response

1. Even if Court grants summary judgement re: leukemia claims, P still has other claims

2. Material facts are still in dispute & therefore should be left to trial

3. Under Rule 56(e) P (nonmovant) has to come forward with material other than complaint to show that there is a genuine issue of material fact:

a. Affidavit is supported by personal knowledge:

-P's expert personally examined Ps; examined all plaintiffs and impact on their immune system

-reviewed medical literature

→based on personal knowledge, exposure did cause leukemia suffered by Ps

-[D argue that affidavit was contrary to R. 56(e) b/c affidavit was an opinion by an expert based upon review of medical literature, no on personal knowledge or supported by facts]

→Determination as to which expert is correct or which expert the jury will agree with should be left to the jury.

C. Standard to determine whether there is a genuine issue of material fact:

1. *Plaintiffs* argue that court has to be certain that there is no way that P can establish this material fact at trial [try to predict what will happen at trial]

2. *Defendants* argue that MA law requires a showing by the preponderance of evidence & the burden of persuasion is on the Plaintiffs at trial.

-*Note*: Under Celotex - D would only have to point out lack of evidence & would not have had to negate P's claims

-*Note*: Under Anderson - Plaintiffs carry the burden of persuasion at trial to prove with "clear and convincing evidence"

D. Disagreement re: relationship btwn standard for *summary judgment* to *direct verdict*

1. Defendants -link standards together - if the court is convinced that a jury will grant directed verdict at trial for the Defendants,, the court might as well grant motion for summary judgment before trial.

[std for summary judgment = std for directed verdict]

[Therefore, removes plaintiff's ability to go to trial]

2. Plaintiffs - do not link standards b/c different in process

before trial, based on arguments

vs. at trial, based on evidence

[std for summary judgment ≠std for directed verdict]

E. Defendants filed joint motion for partial summary judgment

2 kinds: no factual disputes

law to be applied

→allowed Skinner to define legal standard he would apply and therefore remove some of Ps claims (ie, permitted some IIED claims under MA law, statute of limitations barred some of wrongful death claims)

C. Directed Verdict - Rule 50(a)

1. Rule 50(a)

- a. after presentation of evidence
- b. could a "reasoning" jury find in favor of the nonmoving party
- c. the jury would draw all permissible inferences in favor of nonmoving party
- d. jury would resolve all credibility determinations in favor of nonmoving party
- e. jury would have to consider clear, unbiased, uncontradicted evidence against the nonmoving party.

2. Standard:

- a. verdict has to be supported by evidence
- b. same standard of burden of moving party

D. Standards of summary judgment closely related to standard of directed verdict

1. Defendant - connect the standards

Judge predicts what the trial will look like

-If judge believes that would have to direct verdict to D, then might as well rule for D at summary judgment.

2. Plaintiffs - [Brennan Dissent] - do no link standards

- a. creates a paper trial before the trial

-if std for summary judgment same as std for directed verdict, just reproducing trial in paper before trial

b. Under **Rule 56(f)** - if appears from affidavits opposing the motion for SJ that nonmoving party (P) cannot present facts essential to justify party's opposition, the court may refuse judgment. [addresses concern that P are not necessarily prepared] or order a continuance.

c. balancing evidence [clear & convincing (Anderson) vs. preponderance of the evidence (MA law)] should be left to the jury

d. exacerbates the problem b/c making it easier for D to bring directed verdict w/o evidence.

-high burden for the P, less cost/burden for D & increases Ds odds of winning.

→Reflects change in behavior towards motions for summary judgment

-Defendants bring the most motions & Cts are more willing to grant summary judgment.

C. Voluntary Dismissal - Rule 41

Rule 41(a)(1) 1. Voluntary Dismissal by Plaintiff; by Stipulation:

- a. action may be dismissed without requiring court's permission:

1) by filing a notice of dismissal at any time *before* service by the adverse party of an answer or of a motion for summary judgment. [R. 41(a)(1)(i)]

or 2) by filing a stipulation of dismissal signed by all parties who have appeared in the action. [R. 41(a)(1)(ii)]

- b. dismissal with prejudice

1) *adjudicated on the merits* and *dismissed with prejudice*, if had previously dismissed an action based on or including the same claim.

Rule 41(a)(2) 2. Voluntary Dismissal by Order of the Court

a. If counterclaim has been pleaded by D prior to service upon D of P's motion to dismiss, the action shall not be dismissed against the D, unless the counterclaim can remain pending the independent adjudication by the court.

- b. Unless otherwise specified, *dismissal is without prejudice*.
[court can control terms & prevent harassment as would have under R. 41(a)(1)]

- Rule 41(d)**
- 3. Costs of Previously Dismissed Claim
 - a. If previously dismissed claim, court may make order for payment of costs of action previously dismissed and may stay the proceedings until plaintiff complied with order [cannot commence action until pays costs]
 - b. relates to 41(a) - when P (not the court) has previously dismissed the action.
 - c. [court controls when P can bring claim.]

XVII. Trial by Jury

A. Role of the jury in Civil Litigation

- 1. Fact finding function
- 2. Representative of community - represents community as a whole
- 3. acts as an outsider to judicial process - general perspective of community & stranger
- 4. control judicial corruption
- 5. dispensing with rules - flexibility in applying the rules
- 6. legitimacy - contributing to the legitimacy of the judicial process b/c in a position to observe & evaluate in an open forum, which leads to legitimacy of the outcome
- 7. form of citizenship decisionmaking unique to any government branch
 - seen as a lower house of the judiciary
 - method of citizen involvement in judicial decision-making

B. Judicial Control over Jury

- 1. Decision-making process
- 2. Polyfurcation of trial
- 3. Influence what a jury does and how it makes its decisions.

C. Right to Trial by Jury

- 1. Guaranteed by 7th Amendment - "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved. . . ."
 - a. preserves right created in 1791 "shall be preserved"
 - applicable only in federal courts.
 - states are flexible under own state provisions about determining right to trial by jury
 - b. dual system of courts - separate systems of law & equity
- 2. Historical Development
 - a. Common Law Courts - use of juries to decide cases
 - b. Courts of Equity - no juries
 - different set of remedies enforced by power of chancellor to do or not to do something (ie, injunction)
 - c. Conflict between law and equity resolved in 1616 w/ equitable cleanup doctrine - permit court of equity to resolve both equitable and legal questions of case & power to enjoin common law courts from proceeding with the same case
 - requirements: no adequate remedy at law
 - resolve legal issues without juries.
 - d. 1791 - Amendments to the Constitution, including 7th Amendment created 2 separate existing courts (law & equity)
 - e. 1938 - Federal Rules of Civil Procedure came into effect
 - merge actions of law & equity into a "civil action"

* D. Historical Approach to determine if law or equity:

- 1. Nature of proceedings & relief sought (ie, breach of contract & injunctive relief)

2. Historical derivation of proceedings & relief
3. Which relief is incidental & subordinate?
→[in effect, deprives parties of right to trial by jury on claims where in common law courts would have permitted trial by jury]

E. Cases:

1. Beacon Theatres Inc. v. Westover

Facts: Beacon Theatres (drive-in movie theater) threatened to sue Fox for antitrust violations b/c Fox had exclusive rights to show new release movies. Fox sues Beacon under Federal Declaratory Judgment Act (would have had to wait to be sued in order to bring suit) and Beacon counterclaims for treble damages under federal anti-trust laws (includes right to trial by jury) & requests trial by trial.

Holding: Supreme Court held that just because Fox first brought case in court of equity, Fox cannot prevent Beacon from getting a jury trial.

- right is constitutionally protected under
- equity is not protected by the Constitution

* →*Legal issues should be tried before a jury first, then court can decide whether to create an injunction.*

Criticisms: Applied right to case where equitable relief was clearly incidental.

2. Dairy Queen

→Legal issues should be tried first, regardless of whether legal relief is incidental or not. [in effect, deletes 3rd prong of historical approach]

-Dairy Queen sued for equitable remedies (injunction & accounting). Court held that basically asking for damages for breach of contract & can't change the legal claim just by seeking an equitable remedy. Contract claim for damages would have fallen under common law rule of right to trial by jury.

3. Ross footnote (to determine "legal" nature of issue)

a. stockholder's derivative suit was historically only available in equity. Since historically only available in courts of equity, no right to trial by jury.

→Court has now rejected argument, b/c one civil action gives right to trial by jury. The nature of the underlying claim is a common law claim which has a right to trial by jury.

b. complexity exception - capability of jury to decide cases depends upon the complexity of the case.

→Court has rejected idea of complexity exception

2 prong test:

1. compare cause of action - traditionally equity or common law?
2. relief sought

F. Rules to Right to Trial by Jury

1. **Rule 38**

Rule 38(b) a. *Demand* - no automatic right to trial by jury - required to ask for trial by jury within a specific time [10 days after last pleading]

Rule 38(d) otherwise b. *Waiver* - if fail to demand jury trial, waive right to jury trial.

2. In a removed action - **Rule 81** -

a. **Rule 81(c)** - if not required to make a demand for jury trial in state court, not required to make a demand in federal court,

- b. unless the court directs that they do so within a specified time if they desire to claim trial by jury.

Application to ACA

- Hypos:*
1. If plaintiffs are primarily seeking (equitable relief and injunction) via cleanup, does that affect right to trial by jury? No
 1. right to trial by jury guaranteed by 7th Amendment -
 - √ common law → traditional torts case
 - √ value in controversy exceeds \$20 → asking for punitive damages
 2. FRCP [1938] → merged suits of law & equity into one "*civil action*"
 3. Cases → legal issues are tried 1st regardless whether they are incidental/ not.
See Beacon & Dairy Queen
 4. 2 prong test:
 - 1) historical root - compare cause of action
- traditionally equity/common law?
 - 2) nature and proceeding - relief sought?
 5. *Note:* may not want to go to jury b/c of complexity [Ross footnote]
 2. Removed action - Suppose that state court does not require party to make a demand for right to trial by jury, will that right to trial by jury be affected if claim is removed to federal court?

No. Under **Rule 81(c)** if don't have to make demand in state court, should not be required to make demand to make demand in federal court & therefore retains right to trial by jury in federal court.
 3. Judge Skinner & jury: Is Skinner favorable to jury trial?

-ambiguity in his views toward juries.

 1. Skinner believes that tend toward emotional appeals to juries, where would not understand technical side. Yet, acknowledges that juries are pretty conscientious when there is an emotional appeal.

G. Composition and Selection of the Jury

Rule 481. *Size of Jury: 6 vs. 12 person jury*

- 7th Amendment preserves right of trial by jury, but does not specify number
[?constitutionality of less than 12-person jury?]
- Rule 48** - preserves this right and clarifies number of jurors -
The court shall seat a jury of not fewer than 6 and not more than 12 members

Policy:

- a. Arguments for 6 person jury:
 - 1) 7th Amendment does not specify number
 - 2) Rule 48 - text/language
 - 3) logistics - easier to seat/administer 6 people
 - 4) efficiency - efficiency of deliberation/decisionmaking & argument in trial process
-has not been subject to evaluation & testing (no empirical evidence)
- vs. b. Argument for 12 person jury:
 - 1) Under 7th Amendment, right of trial by jury shall be preserved; does not specify number
 - 2) Under Rule 48, verdict has to be unanimous in federal court.

cannot have verdict from jury of less than 6.

→w/12 people, ensures verdict

1) Fairness - more representative of the community (community representation)

2) decisionmaking/deliberation process would not be much different
-supported by empirical evidence by social science research

→Size of jury affects ways deliberate and way prepare for trial

H. Voire Dire - "to speak and to see"

1. Different roles of attorneys/judges in federal and state court

Rule 47

a. federal court - judge or attorneys can conduct the voire dire under Rule 47

-usually the judge conducts the voire dire

b. state court - attorneys usually conduct the voire dire

2. **Rule 47**

Rule 47(a)

a. *Examination of jurors:*

1) judge or attorney may conduct examination of prospective jurors.

2) If judge conducts examination, court shall permit parties or their attorneys to supplement the examination by further inquiry or shall itself (judge) submit additional questions of parties or attorneys as it deems proper.

Rule 47(b)

b. *Peremptory Challenges* - allows 3 to each party, under 28 U.S.C. 1870

-Court may allow additional peremptory challenges and permit them to be exercised separately or jointly.

Rule 47(c)

c. *Excuse* - Ct may excuse for good cause

Application to ACA

3. Process: (ACA)

-attorneys initially submit questions, then Skinner questioned jury himself, one at a time.

-after juror left, Skinner conferred with attorney whether/not want to ask additional questions. Might call juror back in for more questioning.

4. advantages to attorney for conducting voire dire:

-frame questions in a particular way & process of wooing jurors

-takes 2x as long for attorneys to conduct voire dire.

5. Jury Questionnaires:

a. reject b/c prefer to pose questions to jury & see reaction & pose additional ?s

b. likely to be more intrusive; invasion of privacy

6. Jury Polling

a. jury polling provides demographic breakdown & attitude survey so attorney can predict likelihood of attitude of potential jurors.

b. pool was already biased in favor of Ps b/c of pretrial publicity

c. Woman wrote Skinner over concern over "push polling," (jury simulations) which influence jury pool to believe in a certain way

7. Voire Dire Questions

a. method of determining whether jurors will be fair & impartial, not method of excluding.

b. Types of questions: publicity of the trial, knowledge of events, special knowledge

c. Skinner rejects idea of selecting a more educated jury.

8. Challenges:

- a. *Challenges to the Array* - question the validity of the process used to put together the group of jurors from the pool
 - w/ broader geographic pool in federal court, more likely to have fair & impartial jury b/c have less knowledge of case.
 - Skinner delayed motion to transfer until *voire dire*, b/c he wanted to determine whether a fair & impartial jury can be selected from current pool. [may have affected outcome]
- b. *Challenges for Cause* - attempt to identify jurors who are biased/incapable of reaching an impartial decision.
 - no limits to challenges for cause
 - Example: questions re: J. Peter Grace
- c. *Peremptory Challenges* - Permits attorneys to disagree with judgment, by removing juror themselves - applies to persons who have been seated in jury & have passed challenges for cause.
 - 1) Purpose: attorneys' attempt to construct a more favorable jury
 - 2) Number -
 - a. Under $\bar{\bar{1}}1870$ - each party shall be entitled to three peremptory challenges. Court may allow additional peremptory challenges and permit them to be exercised separately or jointly. [provides a minimum number of peremptories
 - vs. b. ACA - Skinner permitted 6 peremptory challenges to each side.
 - i. Nesson concerned that if alternate peremptories between P & Ds, D exercises the last peremptory challenge.
 - ii. Keating wanted more peremptories, where Skinner gave total of 6 to Ds b/c concerned over which D would exercise peremptories. On their own Beatrice and Grace split number between each other.

9. Constitutional challenges to use of peremptories- [representation w/ impartiality?]
 - Supreme Court forbids exercise of peremptory challenges solely on the basis of race or gender b/c exercised by the authority of government.
 - a. Edmondson - use of peremptories by private citizens constitutes a state action; use of peremptories based on violates Constitution on basis of race discrimination.
 - b. Gender-based challenges (analogous to race-based challenges)
 - Required to give an additional *facially neutral* reason as to why struck down juror (Purkett v. Elem)
 - problem - can give any reason, unless show intentional discrimination & motives of exercising peremptories.

Application to ACA

P used peremptories against *men*.

D used peremptories against *young mothers* (women w/children)

-Facher argued that difficult for any woman w/small children to decide case on evidence rather than emotion; but, Facher did not elect to exclude father w/small children, reasoning that "a woman who carried a child for nine months is a *special class*"

-and at time, women with small children could be excused from jury service in MA federal district court.
 →Skinner did not dismiss this woman b/c reject "special class argument" and burden is on juror that should be excused.

XVIII. Taking Case from Jury

A. Methods of Controlling the Jury by the Court

1. elements of the claim
2. composition of suit
3. order of trial
4. burden of persuasion
5. presumptions
6. instructions re: legal standards (Cts can also comment on the evidence)
7. Type of verdict
8. Directed Verdict/Judgment Notwithstanding the Verdict [Rule 50]
 - 12(b)(6)
 - 12(c) - judgment on the pleadings
 - 56 - motion for summary judgment

B. Directed Verdict/Judgment Notwithstanding the Verdict

1. Rule 50

Rule 50(a)(2)

a) Time - may be made at any time before submission of case to the jury

Rule 50(a)(1)

b) Requirements:

- 1. After evidence received at trial
- 2. party has been *fully heard on an issue*
- and 3. if there is *no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue [substantial evidence/reasonable jury]*

c) A "reasoning jury" could not find in favor of nonmoving party:

1. *presumptions*:
 - a. jury would draw all inferences in favor of nonmoving party
 - b. jury would resolve all credibility determinations in favor of nonmoving party

[Note: no directed verdict if question credibility of witnesses]
- c. jury would have to consider clear, unbiased, uncontradicted evidence against the nonmoving party.

f) Court may grant judgment as a matter of law as to one or more "issues", even if not directing verdict as to entire claim; as well as direct verdict on case as a whole.

2. Standard:

a) Rule 50(a) [current]- *Substantial evidence & reasonable jury standard*

b) No standard before 1991

- 1) federal courts used "scintilla test" - judge would deny directed verdict motion if even the smallest amount of evidence supported *nonmovant's case*. [MA state courts - ie, ACA]
- vs. 2) Court could direct verdict when the evidence would permit only *one "reasonable conclusion"* regarding the issue [1st circuit]
- vs. 3) Historical interpretation [see below]

3. History (before 1980) Development from mid to late-19th century

- a. Common law - no such thing as directed verdict
 - only 2 ways of preventing or overturning jury verdict:
 - 1) *Demurrer to the evidence* made by D at close of Ps case. If D lost, D could not present evidence. Court could then render a judgment on Ps evidence.
 - 2) *New Trial* - required a retrial of the case before another jury.
- b. 1850 - Supreme Court upholds a directed verdict for one of parties, which became a rule of law, not a rule of fact.
 - 1850 - 1871 *Standard*: directed verdict denied if "any evidence" supports Ps claim
 - 1871 - Supreme Court abandons "any evidence" standard. Ps claim must be supported by sufficient evidence so that "a jury could properly proceed"
 - 1871-1943 - Standard evolves to substantial evidence/reasonable jury standard.
 - 1943 - Supreme Court upholds the constitutionality of directed verdict against a challenge that it violates 7th Amendment.
 - MA followed substantial evidence/reasonable jury standard
- c. Controversy about the role of jury & what jury does
 - 1) populists - juries prevent efficient litigation. Most efficient is mediation or arbitration; but in federal courts where right to trial by jury, cannot rest case on directed verdict w/o agreement of the parties.
- d. Purpose of Directed Verdict:
 - 1) Efficiency
 - a) Judicial efficiency - if no basis for claim, process should end
 - b) efficiency in waiting until jury returns directed verdict b/c have not interfered with jury process.
 - if appellate court overturns a judgement notwithstanding the verdict, the jury's verdict will be reinstated.
 - c) If respect the jury process, should not intervene b/c will come up with the same result that the judge believed that they would in a directed verdict.
 - 2) Fairness - ensures that the jury will act fairly

Application to ACA

Skinner determined what evidence was relevant in directed verdict ruling before trial"

- 1. Directed Verdict Rulings:
 - No duty to warn plaintiffs*- Defendant does not have a duty to warn b/c no identifiable class of persons to be warned.
 - Required *foreseeability* to strict liability claim.
- 2. Skinner's directed verdict rulings affected outcome & Ps ability to appeal:
 - Directed verdict rulings cut holes in Ps case
 - a. By requiring foreseeability concept under strict liability theory, defendants did not owe plaintiffs duty prior to 1964, b/c lack of identifiable class of people who might foreseeably have been injured by polluted water.

- b. Limited Plaintiffs on negligence claims, where Ps had to prove at least negligence by demonstrating that the tannery should have been aware that the purposeful activities of its personnel presented a danger to others
- c. Altho the judgment was not for D, eliminated bases for P's legal claims & undercuts Ps appeal altogether.
 - 1) failure to warn could not be considered as demonstrating negligence.
 - 2) eliminated any possibility of holding Beatrice responsible for 3rd party dumpers [Riley]
 - 3) P cannot argue negligence theory for Ds activity prior to opening of Well G in 1964
- d. on appeal, P could claim that crucial errors were made in trial (ie, errors under MA tort law) [but, see special verdict]

Rule 50(b) Judgment Notwithstanding the Verdict

[Renewed motion for judgment as a matter of law]

- 1. **Rule 50(b)** - Court may renew request for judgement as matter of law, after jury returns verdict.
- 2. same standard as for directed verdict
- 3. Use of judgment notwithstanding the verdict rather than directed verdict
 - 1) motion made only after entry of verdict by the jury
 - 2) less interference with jury
 - 3) efficiency if overturned on appeal?? [see below]

Rule 50(c) Appellate Reversal of Judgment Notwithstanding the verdict

-same standard as directed verdict, but conducted by appellate court.

→if appellate overturns judgment notwithstanding the verdict, *jury's verdict will be reinstated.*

XIX. Instructions and Verdicts

A. Jury Instructions

Legal instructions which give the standard that should be applied.

Issues: 1. Instructions should be given at the end of trial.

2. Instructions should not be taken in jury room.

[-Otherwise, jury might pick apart the words of the instructions, rather than evaluating the instructions as a whole, from reading instructions as a whole]

1. Rule 51

a. *Request* - At close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written request that the court instruct the jury on the law as set forth in the requests [parties can pose instructions as part of pre-trial memorandum].

b. *Timing* - 1) The court may instruct the jury before or after argument, or both.
[vs. instructions given before trial - understand legal relevance]]

c. *Objections* - parties must object before the jury retires to consider its verdict, otherwise waive objections

2. Other aids - liberal approach of permitting other types of assistance

a. *Notes*

Rule? 1) under federal rules, *judge's discretion* to allow jury to take notes or to take notes in jury room during deliberation.

- 2) Advantages to those who are good notetakers vs. those who are not.
- 3) Notes can be biased, b/c may reflect juror's own conclusions, rather than solely factual determination.

Application to ACA

Skinner allowed jury to take notes & take notes in juryroom.

b. Evidence - Jury is permitted to take evidence into jury room (ACA)
 Allows jury to replay parts of the trial & pull up documents
 vs. script of the trial - legal issues

c. Questions by Jurors - Jury permitted to ask questions thru judge (ACA)

3. Under federal law, juries are not treated very well as a fact finder
 vs. under common law, jury could be deprived of life & food & therefore encouraged rapid deliberations.

B. Verdicts - Rule 49

Rule 49(b) 1. *General Verdict Accompanied by Answer to Interrogatories* [Rule 49(b)]
 [Generally who wins & how much party receives]
 a. The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict.

Rule 49(a) 2. *Special Verdict* [Asks the jury specific questions]
 a. **Rule 49(a)**
 1) The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact.
 2) *Ommitted issues of fact* - If the court omits any issue of fact raised by the pleadings or by the evidence, each party waives the right to a trial by jury of the issue so ommitted unless before the jury retires, the party demands it submission to the jury.

interpretation

- a) submission of additional questions -
 - i. Rule 49(a) does not address whether court can pose additional questions
 - but, ii judge has discretion to pose additional questions to the jury after they return the answers required in special verdict, where the court has power to correct the omission of any facts from the jury's finding simply by making the requisite findings himself. [judicial power]

3) As to an issue omitted without such demand [that it be submitted to the jury] the court may make a finding. [judicial power]

b. *Standard of Appellate Review of Judge's Ruling under Rule 49.*

on issue of ommitted fact

on trial judge's ruling

- 1) Standards of Review:
 - a. standard of review as to judge's finding on whether an issue of fact was omitted = *preponderance of the evidence standard*
 - b. court of appeal's standard of review for a district court judge's determination that a fact was ommitted from Rule 49 special interrogatories = *clearly erroneous standard* of Rule 52(a)

2) Interpretation of "clearly erroneous standard" = as long as it is plausible.

c. *Effect on Ps and Ds*

- P 1) Encroaches on function and discretion of the jury.
P 2) Outcome depends heavily on what those questions are & how they are framed.
3) Burden on the parties to secure a jury verdict on all factual issues (or risk waiving the right to trial by jury on that issue)
4) Gives the court the extensive powers to resolve issues of fact which should have been, but were not covered by the interrogatories.
5) Great deference given to judge's fact finding.
5) P's → prefer general verdict
6) Ds → limits discretion to the jury, opportunity for error, grounds jury to specific facts of the case & rely less on emotional response.

d. *Strategy of Ps and Ds regarding the jury*

- 1) Plaintiff's strategy - prefer general verdict
in special verdict - want very broad & few questions
2) Defendant's strategy
- prefer special verdict - many & specific questions

Application to ACA -- Form of verdict affects appellate review

-Skinner used special verdict. Defendant's initially submitted 14 questions

-In polyfurcation/phasing of the trial did not necessarily necessitate a special verdict, b/c a jury can just decide whether the defendants were negligent in contaminating the property which led to the contamination of the wells.

1. Special interrogatories: Question 1 - determined outcome of phase 1 of trial
Have the plaintiffs established by a preponderance of the evidence that any of the following chemicals were disposed of at the Beatrice site after Aug. 27, 1968 and substantially contributed to the contamination of Wells G & H by these chemicals prior to May 22, 1979?

Chemicals: Benzene → found no evidence

Choloroform → found no evidence

111 Tichloroethane → expert did not appear to know what he was talking about and therefore jury could not rely on his testimony.

Answer: No, to each chemical & did not answer the remaining interrogatories.

[Unclear as to whether jury is objecting to which part of question.]

a. Facher (Beatrice) had objected to #1 b/c compound question could have backfired against them.

-After jury's answer, Beatrice moved for immediate entry of judgment under Rule 54(b) on grounds that jury's negative answer to question 1 is dispositive.

b. Schlictmann interpreted jury's conclusion to suggest that they found that the disposal had not substantially contributed to the contamination of wells G & H. Beatrice's contribution to the contamination may have been small compared to other polluters, but Beatrice's contribution would have been sufficient to impose liability on Beatrice.

-Schlictmann took advantage of ambiguity of question & assumed that question would not be determinative of outcome of case & trial would have to proceed to phase 2. Under phase 2, even though B was not a

major polluter of the wells, B could be found to meet the "substantial factor" test for causation b/c small but sufficient to cause harm. [whether there was any contribution to contamination of wells G & H.]

→Skinner held that P should have objected to special interrogatory before jury retired for deliberation & therefore P waived objection & is precluded from later attacking the interrogatory.

=Skinner ruled on finding of fact & found that no water from 15 acres contaminated wells G & H, and therefore, Beatrice never contaminated wells G & H.

-Skinner did not believe plaintiff's expert witness testimonies.

=Therefore, Skinner held that jury's answer to Interrogatory 1 is determinative of this case by itself, and warrants entry of judgment for Beatrice.

2. *No basis for asking additional questions:*

→Skinner rejected idea of allowing additional questions b/c reasoned that it would be fundamentally unfair & failure of P's evidence mandates the same result.

3. Skinner's findings under Rule 49 insulates his rulings on Beatrice's motion for directed verdict from appellate review.

a. P waived right to trial by jury on issue by acquiescing & failing to demand submission of an omitted issue under Rule 49(a)

b. Therefore, appellate court decides whether Skinner's ruling was "clearly erroneous"

c. Where there are 2 permissible views of the evidence (district court vs. court of appeals), the factfinder's choice cannot be clearly erroneous & the appellate court will defer the judge's fact finding.

-Skinner held that "it has not been established by a preponderance of the evidence that any contaminant from the Beatrice site reached the wells."

4. Insulation of directed verdict rulings from appellate review, even though they were subject to legitimate legal challenge.

a. Even if P claimed that court erred in applying correct standard, applying the correct standard would not have changed the outcome of the case, b/c jury found no causation [jury's factual findings in Rule 49 special verdict at end of 1st phase of trial]. No causation, no case.

b. Immense discretion is given to the judge under Rule 49.

XX. Interpretation of Rules

A. Structure of Arguments

1. Identify the applicable Rule
2. Select language that needs to be interpreted in order to resolve specific dispute:
 - a. meaning of words & phrases
 - 1) definition of specific terms
 - 26(b)(1) "reasonably calculated to lead to the discovery of admissible evidence."
 - 26(e) "seasonably" to amend
 - 30 "reasonable notice"
 - 34 "usable form" / described with "reasonable particularity"
 - 35 "good cause"
 - 36 "reasonable inquiry" / "known or readily obtainable"
 - "good faith"
 - 2) importance of context:
 - 1) where the language appears
 - 2) factual setting
 - b. relationship between words chosen in one place in light of words chosen elsewhere.
3. Stock argument about language (based upon experience of using language)
ie, omission - if state in one place and not another
Rule 33 vs. Rule 34 - waive objection by not responding
4. Choose between (at least 2) permissible interpretations allowed by the language:
 - a. Criteria: (Canons of Interpretation)
 - 1) Language - reliance on analysis of the language (which interpretation makes the best use of definitions, grammar & stock argument)
[prob- useful, but not determinative of outcome - "equal but opposite"]
 - 2) Purpose - which interpretation is most consistent with what the rule is trying to accomplish in responding to the topic being addressed
 - a) *Textualism* - focus on language of text itself -
 - i. literalism - purpose can be derived from the language & context
 - ii. purposeful - purpose derived from reading the text generally
 - b) *Statements of Purpose outside of text* - what is rule trying to accomplish & how does it fit with the application of other rules?
ie, legislative history, Federal Rules, advisory committee notes.
[problem - is this within the plain meaning of the text?]
 - c) Incorporation of background or contextual values
 - i. presumed neutrality of rules - P vs. D
 - ii. reliance of the adversary process
 - iii. preference for general or specific rules
-preference for rules that spell everything out or preference for rules that are subject to some flexibility and discretion.
 - iv. uniformity of rules via meaning & application of the Rules.
- 3) Choice: Best arguments incorporate both language and purpose:

plain meaning

legislative intent

- a) This language has got to mean
- and b) fits perfectly with the purpose of the rule.

Note: Procedural Advocacy

- 1) *flexibility* of rules
- 2) choice indicates that there is a *structure* to arguments.

5. *Role of Cases:*

1. Limited number of cases within pretrial process addressing interpretative issues in the Rules and disagreements between and among courts about interpretation.

-argument w/in opinion is necessarily persuasive authority b/c not w/in jurisdiction. Therefore, issues of interpretation are left open and are not restrained by cases.

2. Parallels between statutory interpretation and case analysis:

Holding - if ambiguous, can interpret holding narrowly or broadly

- a. application of holding - language, order presented
- b. purpose of holding -

Note:

6. Repeating arguments: (Themes)

- 1. About language and purpose
- 2. About issues that arise in more than one context
ie, amount of discretion granted to the court for purposes of local rules.

Civil Procedure is a system in process.....

Note: Skinner's rulings -

- 1. Denial of Grace's Rule 11 Motion
- 2. Denial of Grace's Motion for Summary Judgment
- 3. Polyfurcation of the Trial
- 4. Yankee Report
 - Denial of P's 60(b) Motion
 - Finding of deliberate misconduct
 - No substantial interference with preparation for trial
 - Discovery Sanctions - Rule 11 sanctions against Shlictmann
- 5. Rulings on P's motion for Directed Verdict
- 6. Use of the Special Verdict.