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Judge's Response to Professors Hazard and Taruffo

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I. Introduction

The value of the Transnational Principles and Rules—for U.S. courts and courts in all countries—lies in at least two areas. First, over time, parts of the Transnational Principles and Rules might be adopted by courts or legislatures for use in commercial disputes between citizens of different countries, or might serve as a procedural mechanism for resolution outside the judicial system by agreement of the parties. Second, the Transnational Principles and Rules may cause us to reexamine the foundations of our respective procedural rules with a view toward considering revisions. Over time, this reexamination may encourage transnational harmonization of civil procedure.

My perspective is that of a judge and one who has spent several years in American rule-making—first as a member of the Advisory Committee on Civil Rules and then as Chairman of the parent committee, the Supreme Court's Committee on Rules of Practice and Procedure. From this perspective, I would like to comment on U.S. civil procedure and the Transnational Principles and Rules, and also to respond to the excellent papers of my colleagues, Professors Hazard and Taruffo. I will focus on discovery, expert testimony, and the jury trial, three distinctive

* Chief Judge, United States Court of Appeals for the Third Circuit. Dana Remus Irwin provided helpful comments on this draft.

aspects of our civil procedural system.

II. Discovery

As you know, U.S. discovery allows parties wide latitude in searching for information and evidence to develop their cases. Together with notice pleading, broad discovery permits plaintiffs broad access to the judicial system. There are a few exceptions to the notice pleading requirement. For example, Federal Rule 9(b) requires claims of fraud to be pled with particularity. The Private Securities Law Reform Act of 1995 imposes heightened requirements for fact pleadings in securities fraud actions. But in general, the Federal Rules do not require the fact pleading that is required by the Transnational Principles and Rules, and by many countries.

In most cases, discovery is routine and not problematic. Through a variety of discovery mechanisms—document requests, interrogatories, witness depositions, requests for admissions and physical examinations—parties can explore any unprivileged matter that is relevant to the claim or defense of any party in the case. Unlike in a civil law system, where the gathering of evidence is viewed as the judge's task, discovery in our system is party-driven. There is no requirement for a prior court order. The party seeking discovery simply makes a request of the other party for responsive documents, for answers to interrogatories, to depose a witness, and so on. Unless the party receiving the request has a valid ground for objection, it must respond with relevant and responsive documents and information. Valid objections include claims that the request is unfairly burdensome, seeks material obviously irrelevant, or seeks privileged information. If disputes arise during discovery, the parties generally attempt to negotiate a solution. If they cannot reach an agreement, they will rely on informal or formal judicial resolution. As a trial judge in both state and federal court, I had small children at home, which provided great training for resolving disputes among quarrelsome lawyers.

Permissive discovery rules have not always been part of the American procedural tradition. Prior to adoption of the Federal Rules of Civil Procedure in 1938, parties were given little access to evidence in the hands of an opponent. In conjunction with notice pleading, the new discovery rules were adopted as a suitable implementation of the adversary system, offering plaintiffs greater access to the judicial system.

Discovery plays a central role in our procedural system, not only in allowing parties to develop their positions, but in facilitating pre-trial resolution in the majority of cases. In the twelve month period leading up to September 30, 2005, more than 98% of civil cases filed in federal

courts were terminated before trial. Of these, approximately a quarter were terminated without any judicial action at all.[1]

Defendants may file motions to dismiss to challenge legally insufficient complaints. If these motions are granted, defendants avoid the costs of discovery and its potential for revealing information beneficial to the plaintiff's case. In certain cases, a motion to dismiss may be the focal point, because it disposes of the case without the need for discovery. The Private Securities Reform Litigation Act specifically provides that discovery will be stayed until the judge decides a motion to dismiss. This statutory amendment to the general rule, applicable only in private securities actions, illustrates how important it can be to defendants to avoid discovery.

If a motion to dismiss is not granted or was not sought, one or both parties may file a motion for summary judgment, also a pivotal procedure in many cases. Unless the dispute is solely a matter of law, discovery is crucial here, because summary judgment can only be granted if the judge concludes there is no remaining issue of material fact to be decided at trial. At any time during a case, parties may engage in settlement talks. Often, they are encouraged to do so by the judge.

Despite discovery's central place in our procedural system, calls are often made for reform. Critics contend our discovery rules compromise other important values, such as efficiency and privacy, and give unfair advantage to parties with greater resources. Critics also contend parties overuse discovery requests in order to inflict delay and expense on the other party. If a party abuses the discovery rules, a judge can impose sanctions or take other actions. But it is sometimes difficult to distinguish between discovery that is thorough and aggressive, and discovery that is unnecessary and abusive. Sometimes, a party's recourse to another party's excessive discovery requests is to respond in like manner.

Prior to 2000, the Federal Rules allowed discovery of "any matter, not privileged, which is relevant to the subject matter involved in the pending action."[2] Under this standard, it was sufficient for discovery requests to relate to evidence only incidentally relevant to the issues in the pleadings, whether or not the evidence could prove or disprove the claims in question. Defendants complained to the rules committees that this standard's broad scope allowed plaintiffs to abuse the system by making broad and onerous document requests that often inflicted substantial production costs on defendants.

1. *See* Administrative Office of the United States Courts, *2005 Judicial Business of the United States Courts,* Table C-4, p. 182 (2006).

2. Fed. R. Civ. P. 26(b)(1) (1999).

In response, the Federal Rules were amended in 2000 to limit the scope of discovery to "any matter, not privileged, that is relevant to the claim or defense of any party."[3] The comment to the amendment explains

> [t]he rule change signals to the court that it has the authority to confine discovery to the claims and defenses asserted in the pleadings, and signals to the parties that they have no entitlement to discovery to develop new claims or defenses that are not already identified in the pleadings.[4]

As an exception to the general rule and on a showing of good cause, the court may allow discovery of any matter relevant to the subject matter of the action.[5] The amendments have helped limit abusive discovery requests by limiting the scope of permissible discovery.

In practice, our discovery is still broader than that contemplated by the Transnational Principles and Rules. But at least in theory, the basic standards are similar. Under the Transnational Principles and Rules, a party is entitled to disclosure of "relevant evidence," defined as "probative material that supports, contradicts, or weakens a contention of fact at issue in the proceeding."[6] Unlike the Federal Rules, the Transnational Principles and Rules do not entitle a party to disclosure of information that is reasonably calculated to lead to the discovery of admissible evidence. Some critics of our discovery rules would advocate a similarly limited scope in our courts.

Other amendments to the Federal Rules in 2000 responded to complaints by plaintiffs that defendants were overusing and prolonging depositions in an attempt to drive up plaintiffs' litigation costs. A provision was added specifying that "[u]nless otherwise authorized by the court or stipulated by the parties, a deposition is limited to one day of seven hours."[7] The comment further explains that "[t]he presumptive duration may be extended, or otherwise altered, by agreement. Absent agreement, a court order is needed. The party seeking a court order to extend the examination, or otherwise alter the limitations, is expected to show good cause to justify such an order."[8]

Another response to discovery abuse has been increased judicial oversight and control. Particularly in complex cases, it is common for judges to conduct pretrial conferences to address discovery controversies

3. Fed. R. Civ. P. 26(b)(1) (2006).
4. Fed. R. Civ. P. 26(b)(1), Comment to 2000 Amendment.
5. *See* Fed. R. Civ. P. 26(b)(1).
6. Transnational Principle 16.1, Comment P-16A.
7. Fed. R. Civ. P. 30(d)(2) (2006).
8. Fed. R. Civ. P. 30(d)(2), Comment to 2000 Amendment.

and other issues. This represents a change from the traditional judicial attitude toward Federal discovery rules, which allowed discovery without much external restraint. Increased judicial involvement has been an effective means of addressing discovery disputes and abuses, and has resulted in increased efficiency. Increased judicial involvement is also compatible with the Transnational Principles and Rules, which envision an active role for the judge throughout all aspects of a case.

Two areas of discovery in which U.S. judges are playing increasingly active roles—international discovery and electronic discovery—have particular relevance for transnational commercial litigation. Discovery of evidence abroad can be particularly difficult when the evidence is located in a country with a more restrictive approach to discovery. The Hague Convention on Taking of Evidence Abroad sought to facilitate international discovery by offering various methods for obtaining information located in foreign countries. All of its methods are cumbersome and ultimately defer to the procedures of the county in which the evidence is located.

In 1987, the U.S. Supreme Court severely limited the effectiveness and relevance of the Hague Convention in U.S. courts by holding it does not control when its terms unfairly inhibit discovery.[9] Since its terms are almost always more restrictive than U.S. procedural rules, our judges often conclude it unfairly inhibits discovery, and then allow for use of the Federal Rules. This creates friction with foreign countries, foreign companies, and other foreign entities.

Friction can also arise when our discovery rules are invoked for the benefit of foreign litigants involved in foreign litigation. 28 U.S.C. § 1782 allows a U.S. judge to require a person residing or present in the forum to produce documents or provide testimony for use in litigation in a foreign or international tribunal. The requirements of this section are simpler than those of the Hague Convention. Where satisfied, a judge has broad discretion to grant assistance. The U.S. Supreme Court has endorsed broad use of this provision, and has specified that the party seeking the evidence need not show it would be discoverable in the foreign or international tribunal.[10] Accordingly, U.S. judges are granted broad discretion to facilitate international discovery.

A second area of increasing judicial involvement is electronic discovery, which is rapidly becoming the focus of discovery in many trials. Given the volume of data that may be involved, electronic discovery can be extremely expensive for all parties. Segregating

9. *See* Societe Nationale Industrielle Aerospatiale v. United States District Court, 482 U.S. 522 (1987).

10. *See* Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241 (2004).

relevant and non-privileged information from non-relevant and/or non-privileged information is difficult, time-consuming, and expensive, particularly if the requested data must be retrieved from backup tapes, metadata or legacy data. The producing party generally bears the expense of complying with a discovery request. But electronic discovery also poses high costs to the requesting party, who must sort through large volumes of produced electronic data, information and documents.

One of the most difficult issues posed by electronic discovery involves the duty to retain and preserve electronic evidence in anticipation of litigation. Precisely when this duty arises is not clear. Once a complaint has been filed, a party is on notice and the duty exists. But the question is raised whether the duty may arise earlier—whether a party may have a duty to monitor for potential lawsuits and to retain electronic evidence in situations where it should reasonably anticipate a lawsuit. In some regulated industries, there is a statutory duty to retain documents outside of the context of potential or actual litigation. Once the duty arises, a party must suspend its document destruction policies and ensure that relevant documents are preserved. It is unclear whether, and to what extent, a party must also restore potentially relevant data that is no longer easily accessible.

At the current time, the Federal Rules do not specifically address electronic discovery. But an amendment, proposed by the rules committees and recently approved by the Judicial Conference, addresses the issue. Under amended Rule 26, a party would be required to produce all relevant accessible data stored on its electronic storage systems, along with a description by category and location of all relevant but not reasonably accessible data. Data that is not reasonably accessible would be presumptively outside the scope of discovery unless the requesting party could show good cause for discovery—in which case the judge would weigh the cost of production against the showing of good cause.[11] The judge would be able to specify the conditions for discovery, including "payment by the requesting party of part of all of the reasonable costs of obtaining information from sources that are not reasonably accessible."[12] In addition, amended Rule 37 would specify that absent "exceptional circumstances," sanctions would not be imposed for data lost because of the routine, good-faith operation of an electronic storage system.[13] If these amendments are approved by the Supreme

11. *See Report of the Judicial Conference Committee on Rules of Practice and Procedure to the Chief Justice of the United States and Members of the Judicial Conference of the United States,* September 2005, Proposed Amendments to the Federal Rules of Civil Procedure, at 43 (Proposed Rule 26(b)(2)).

12. *Id.* at 48 (Committee Note to Proposed Rule 26(b)(2)).

13. *See id.* at 84 (Proposed Rule 37(f)).

Court, they will take effect in December 2006.

Large multinational companies rely on electronic communications and electronic storage of documents and data. As a result, electronic discovery plays a central role in international commercial disputes. The Transnational Principles and Rules' limited scope of disclosure, and disallowance of "fishing expeditions," would, if followed, mitigate the cost problem by limiting the need to restore data that is no longer easily accessible. But questions would remain as to the timing, nature and extent of a duty to retain electronic records.

III. Expert Testimony

Under the Federal Rules, the parties have substantial control over the use and selection of expert witnesses. While it is not uncommon for this to lead to "a battle of the experts," the Supreme Court has tightened the applicable rules, and provided for increased judicial involvement in managing expert testimony. The Federal Rules have been amended to codify these changes.

Prior to the early 1990s, admissibility of scientific evidence was premised on whether the evidence derived from scientific knowledge that was "generally accepted" in the relevant scientific community. In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, the Supreme Court rejected this test and held that Federal Rule of Evidence 702—the rule that allows for expert testimony—requires judges to determine admissibility based on (1) whether the subject of the expert testimony is scientific knowledge grounded in the methods and procedures of science (in other words, if the testimony is reliable) and (2) whether the testimony will assist the trier of fact in understanding the evidence or determining an issue in the case (in other words, if the testimony is relevant).[14] In *Kumho Tire Co. v. Carmichael*, the Supreme Court clarified that trial judges must evaluate the reliability and relevance of all expert testimony in determining admissibility, and not just scientific testimony.[15] Together, *Daubert* and *Kumho* require the trial judge to serve as the "gatekeeper" who must assess the reliability and relevance of all expert testimony offered pursuant to Rule 702.

In 2000, the Federal Rules were amended to codify the Supreme Court's decisions. Rule 702 now provides expert testimony is admissible "if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the

14. *See* Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993).
15. *See* Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137 (1999).

case."[16] The comment to the amendment reiterates that the amendment's purpose is to ensure the reliability of all forms of expert testimony admitted at trial.[17] Rules 701 and 703 were amended in conjunction with Rule 702. Rule 701 now provides that opinions and inferences of lay witnesses may not be based on scientific, technical or other specialized knowledge within the scope of Rule 702.[18] The comment explains that the purpose of the amendment is to ensure the gatekeeping requirements of 702 are not evaded by "proffering an expert in lay witness clothing."[19] Rule 703 clarifies the limited circumstances under which inadmissible evidence, relied on by an expert witness in forming an expert opinion, can be disclosed to a jury to assist the jury in evaluating the expert's opinion.[20]

Judicial involvement in expert testimony has always been an integral part of case management, but judges are now charged with increased rigor and scrutiny in addressing issues raised by the use of expert witnesses. Starting at a pre-trial conference, a judge is involved in exploring the need for, and possible limitations on, expert testimony. A judge can also appoint an expert pursuant to Rule 706, which provides: "[t]he court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection."[21]

The Federal Rules start with the premise of party-appointed experts, but allow for court-appointed experts. The Transnational Principles and Rules provide for the opposite. Transnational Rule 26.1 provides that "[t]he court must appoint a neutral expert or panel of experts when required by law and may do so when it considers that expert evidence may be helpful." Transnational Rule 26.3 provides "[a] party may designate an expert or panel of experts on any issue. An expert so designated is governed by the same standards of objectivity and neutrality as a court-appointed expert."

The comment to the applicable Transnational Rule begins by stating "[t]hese Rules adopt the civil-law rule and provisions of the modern English procedure according to which the court appoints a neutral expert or panel of experts."[22] But after acknowledging that experts are generally appointed on the same basis as other witnesses in common-law systems, the comment states "[t]his Rule adopts an intermediate position. The court may appoint experts but the parties may also present experts

16. Fed. R. Evid. 702 (2006).
17. *See* Fed. R. Evid. 702, Comment to 2000 Amendment.
18. *See* Fed. R. Evid. 701 (2006).
19. Fed. R. Evid. 701, Comment to 2000 Amendment.
20. *See* Fed. R. Evid. 703 (2006).
21. Fed. R. Evid. 706 (2006).
22. Transnational Rule 26, Comment R-26A.

whether or not the court has done so."[23] The Federal Rules and the Transnational Rules may not be as far apart on this issue as some may think, since they both allow for both forms of expert testimony. Specific implementation of the Transnational Rules could result in a system similar to ours, which relies heavily on party-appointed experts, or similar to a civil law system, which relies heavily on court-appointed experts.

IV. Civil Jury Trial

In actions at law—usually, suits seeking money damages—a jury trial is generally a matter of constitutional right in both in federal and state courts. But many commentators have noted "the decline of the jury trial" or "the vanishing jury trial," as most civil cases do not reach trial. Scholars and commentators have cited several reasons for this, some of which were touched upon in the discussion of discovery. For example, the costs of discovery encourage many parties to settle prior to trial. And many cases are disposed of on motions to dismiss or for summary judgment.

Another significant factor decreasing the number of jury trials is risk aversion on the part of the parties. Will the jury's verdict be based on something other than careful consideration of the evidence? Will the case be resolved in an unpredictable way? A perennial question is whether, and to what extent, jurors are influenced by external factors, such as socio-economic, racial, and religious backgrounds and beliefs. Jury nullification in varying degrees occurs when a jury bases its verdict on these or other external factors, and ignores the judge's instructions on the applicable law governing the case. While traditionally associated with criminal trials, jury nullification can occur in civil trials as well. Experienced judges can provide an effective check on jury nullification through detailed and understandable jury instructions.

Our system also allows means to evaluate whether or not a jury verdict is justified by a rational evaluation of the evidence. Appellate courts typically review the "rationality" of jury verdicts in criminal cases because convicted defendants usually appeal the sufficiency of the evidence. Of course, there is no appellate review of a criminal jury acquittal. Although less common, appellate judges are also asked to review the weight of the evidence supporting a plaintiff's verdict in civil cases. On a motion for a new trial, trial judges make this assessment as well. But the burden of proof in civil cases is preponderance of the evidence, which is less onerous than the beyond a reasonable doubt

23. Transnational Rule 26, Comment R-26D.

standard of criminal cases, and therefore more difficult to overturn. Jury interrogatories are usually employed to define the issues, and to distinguish between the jury's specific findings on various elements of liability and damages.

Parties also face a risk that in complex cases, for example those involving intellectual property or antitrust, jurors may have difficulty understanding the trial evidence. Jurors do well in making credibility determinations. Are they qualified to evaluate complicated technical evidence or high-level expert testimony? Traditionally, jurors were prohibited from taking notes during trial and had to keep track of evidence through memory alone. In complicated cases, this could present particular difficulties. Jurors are still prohibited from taking notes in many state courts, but are permitted to do so in federal court.

Jurors are now more representative of the population at large, and of a wide spectrum of views, than before. Traditionally, jury service lists were compiled from property tax roles. Now, names of potential jurors are drawn from voter registration lists and department of motor vehicle records. The resulting jury service lists are more broadly inclusive of the adult population.

Traditionally, it has been the advocates' job to educate the jury, but many have advocated a more active role for the judge in helping the jurors understand the issues. Judges could play a role in questioning witnesses, much like in the inquisitorial tradition, to ensure jurors hear answers to questions that the advocates have not posed, but that may be helpful in understanding the case. A judge's experience allows him or her to receive and consider evidence differently than would a lay juror. A judge will typically focus on the dispositive issues, and will demand answers to disputed questions. This means that an advocate's presentation of evidence to a judge need not be as methodical as to a jury. It also means that a judge can play an important role in helping the jury to understand the evidence and issues involved in a case. Such a role is not required by the Transnational Principles and Rules, which provide that questioning witnesses and eliciting testimony should proceed as is customary in the forum, but would certainly be compatible with them.

It is interesting to consider the difference between verdicts reached in jury trials and determinations that would be made by a judge addressing the same evidence. Anecdotally, most judges I know think juries in criminal cases, where credibility determinations are often key, do an excellent job in deciding questions of guilt or innocence. Judges are less satisfied with civil juries, partly because of the difficulty in comprehending complex cases and partly because of variances in finding liability and in damage awards. One significant difference between a

judge's decision and a jury verdict is the detailed and reasoned explanation that a federal judge will provide when deciding cases without a jury. A trial judge's "findings of fact and conclusions of law" provide reasoned decisions that meet the standard of what is expected in civil law systems. Appellate review is deferential to the judges' factual findings (clearly erroneous) but plenary with respect to issues of law.

Another risk the parties face involves jury selection. Jury selection procedures vary. Typically, prospective jurors with obvious conflicts of interest are excused, and the remaining jurors are asked various questions about themselves in a process we refer to as voir dire. Responses that indicate possible prejudice are the basis for challenges for cause. In federal court, judges conduct voir dire questioning. In most state courts, advocates do. Each party then has a limited number of peremptory challenges—three in federal cases—which may be used for any reason other than to exclude a juror on the basis of race or ethnicity. The trial jury consists of those who are not disqualified by challenges for cause or peremptory challenges.

In theory, the jury selection process protects against jurors who are biased or who have a predetermined view of a case. In reality, each party wants a jury favorable to its case or at a minimum, a jury that is impartial, and wants to use voir dire and peremptory challenges to exclude jurors it perceives to be unfavorable. Some experienced advocates consider jury selection to be the most important aspect of trying a jury case. For this reason, in important cases, parties with substantial resources employ jury consultants to aid in juror selection and run mock trials before surrogate jurors to "try out" their case.

It is the judge who desires an impartial jury. In jury selection and in the entire conduct of the trial, the judge endeavors to ensure that the proceeding is geared not only toward resolving the parties' dispute, but doing so based on a truthful assessment of the evidence. Resolving disputes and finding truth are not mutually exclusive, and most judges play a significant role in ensuring that the benefits of the adversarial system do not come at the expense of justice. As an example, pre-trial and during the trial, the judge is charged with interpreting the rules of evidence that are based on concepts of relevance, trustworthiness and absence of prejudice. By regulating the admissibility of evidence, and excluding evidence incompatible with a fair trial, the judge ensures that the proceeding will further the pursuit of justice.

Furthermore, judges are responsible for informing and educating the jury as to the governing law of the case. They do so through jury instructions, which explain the legal principles the jurors are to apply to the evidence. Understandable, balanced jury instructions are crucial to fair jury verdicts. While the parties can play a role in suggesting and

formulating jury instructions, it is ultimately a task of the judge.

In bench trials as well, judges play a prominent and independent role in guiding the proceedings. As a specific example, just as Transnational Principle 22.2.3 allows a judge to "rely upon . . . an interpretation of the facts or of the evidence that has not been advanced by a party," so too can our trial judges, when deciding cases without a jury, rely upon an interpretation of the evidence not offered by the parties. Also, on appeal, judges may affirm or reverse on grounds not raised by the parties. Therefore, in determining the most accurate and fair characterization of the facts and in applying the law, a judge plays an independent role, and is not bound by the presentations and arguments of the parties.

V. Conclusion

Whether or not the Transnational Principles and Rules are formally adopted in various countries, they offer great value. They encourage us to reevaluate the principles and rules of our respective procedural systems, and they offer thoroughly considered solutions to problems that arise in adjudication in general, and transnational commercial suits in particular.