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Analyzing the Southern District of New York's Amended "Related Cases" Rule: The Process for Challenging Nonrandom Case Assignment Remains Inadequate

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ANALYZING THE SOUTHERN DISTRICT OF NEW YORK'S AMENDED "RELATED CASES" RULE: THE PROCESS FOR CHALLENGING NONRANDOM CASE ASSIGNMENT REMAINS INADEQUATE

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ABSTRACT

On October 31, 2013, the Second Circuit relied on a little-known rule pertaining to the Southern District of New York's (SDNY) assignment practices for related civil cases to remove Judge Shira A. Scheindlin, a seasoned and respected jurist, from two high-profile stop-and-frisk cases. This highly unusual and unexpected move was met with ardent public support—for Judge Scheindlin. But the catalyst for this series of unprecedented procedural twists and turns, the SDNY's old Division of Business Rule 13 (Old Rule 13), which governed the assignment of related civil cases, has been left unexamined. This Article refocuses the discussion on this overlooked rule.

First, this Article explains the consequences of Old Rule 13's division of business label. Unlike local rules of civil procedure, a division of business rule is not subject to review by the Second Circuit, nor is it open to public comment. Creation and enforcement of a district court's division of business rules are delegated to the court itself. Unsurprisingly, decisions made pursuant to such rules are largely unreviewable. Next, this Article explains that, precisely because it was a division of business rule, Old Rule 13 permitted case assignment decisions that might have raised red flags had they occurred pursuant to a local rule of civil procedure. This Article further argues that Old Rule 13 was only nominally a rule about relatedness; in actuality, it functioned as a mechanism by which judges could pull certain cases onto their dockets based on the cases' subject matter. Old Rule 13 is the reason so many high-pro-

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file stop-and-frisk cases were sent to Judge Scheindlin, as opposed to being divvied up at random amongst all the SDNY judges. This Article also tracks how the stop-and-frisk cases were assigned, their odd procedural histories on appeal, recent hints of settlements, and the police unions' attempts to intervene and halt any implementation of Judge Scheindlin's orders. On January 1, 2014, the SDNY adopted amendments to Old Rule 13, seemingly in reaction to the circumstances that caused Judge Scheindlin's removal. This Article ends with an analysis of the amendments, concluding that they do not do enough to explain why a judge decides to deem a case related to an earlier-filed matter, and that they do not create meaningful motion practice through which parties can challenge a relatedness decision.

The issues that presumably motivated the Second Circuit's actions have not been fixed. Rather than amend the rule even further, a far easier solution would be to eliminate Amended Rule 13 entirely. For now, the district's case assignment procedures remain shrouded in secrecy, and, most disturbingly, are still easy to manipulate. If a judge wants to overcome random case assignment and engage in subject matter specific case shopping, the SDNY's division of business rules will not stop the practice.

INTRODUCTION

On October 31, 2013, the Second Circuit relied on a little-known procedural rule to remove Southern District of New York (SDNY) Judge Shira A. Scheindlin from high-profile stop-and-frisk cases.[1] This unexpected move stirred up passionate defenses on Judge Scheindlin's behalf.[2] But the SDNY's old Division of Business Rule 13 (Old Rule 13),[3] the catalyst for Judge Scheindlin's removal,[4] has been left largely unexamined. This Article refocuses the academic discussion on the overlooked rule. It begins by explaining the consequences of Old Rule 13's "division of business" label. Unlike local rules of civil procedure, once adopted, the SDNY division of business rules are not reviewed by the Second Circuit and are not open to public comment;[5] creation and enforcement of a district court's division of business rules are delegated to the court itself.[6] Unsurprisingly, decisions made pursuant to such rules are largely unreviewable.[7] This is true even when division of business rules have the effect of diminishing the chances that a case will be assigned at random.[8] Precisely because it was a division of business

1. Ligon v. City of New York (*Ligon II*), 538 Fed. App'x 101, 102–03 (2d Cir. 2013), *vacated in part by* 743 F.3d 362 (2d Cir. 2014).

2. *See, e.g.*, Editorial Board, *Judge Scheindlin's Case*, N.Y. TIMES, Nov. 8, 2013, at A34, *available at* http://www.nytimes.com/2013/11/08/opinion/judge-scheindlins-case.html (arguing that the Second Circuit "erred badly" and "unjustly damaged Scheindlin's reputation" by removing her); Emily Bazelon, *Shut Up, Judge! A Misguided Appeals Court Tries to Silence—and Quash—Stop-and-Frisk Judge Shira Scheindlin*, SLATE (Nov. 1, 2013), http://www.slate.com/articles/news_and_politics/jurisprudence/?2013/11/nypd_and_judge_shira_scheindlin_2nd_circuit_appeals_court_judges_try_to.html (arguing that "the 2nd Circuit's move to remove [Judge Scheindlin] was . . . an overreach"); Jeffrey Toobin, *The Preposterous Removal of Judge Scheindlin*, NEW YORKER (Oct. 31, 2013), http://www.newyorker.com/online/blogs/newsdesk/2013/10/?the-preposterous-removal-of-judge-scheindlin.html (arguing that Judge Scheindlin's removal was "preposterous," and that "[s]he should be honored for [her conduct in the case], not scolded").

3. S.D.N.Y. Div. Bus. r. 13 (amended Jan. 1, 2014) (on file with author). Because this rule was amended on January 1, 2014, after Judge Scheindlin's removal, this Article refers to the pre-January 1, 2014 version as "Old Rule 13" and the version currently in effect as "Amended Rule 13."

4. *See Ligon II*, 538 F. App'x at 102–03.

5. *See* 28 U.S.C. § 137 (2012) ("The business of a court having more than one judge shall be divided among the judges as provided by the rules and orders of the court. The chief judge of the district court shall be responsible for the observance of such rules and orders, and shall divide the business and assign the cases so far as such rules and orders do not otherwise prescribe.").

6. *Id.*

7. *See id.*

8. *See* discussion *infra* notes 23–31 and accompanying text.

rule, Old Rule 13 permitted case assignment decisions that might have raised red flags if undertaken pursuant to a local rule of civil procedure.[9] Old Rule 13, in fact, is the reason why so many stop-and-frisk cases were transferred to Judge Scheindlin, whether or not they were actually related to cases already on her docket.[10]

On January 1, 2014, the SDNY adopted amendments to Old Rule 13,[11] likely in reaction to Judge Scheindlin's removal. This Article analyzes the amendments, concluding that they do not do enough to establish a meaningful way for parties to challenge a relatedness determination or the transfer of their case to another judge. The district's case assignment procedures remain shrouded in secrecy, and, most disturbingly, are still easy to manipulate if a judge wants to circumvent the normal random case assignment process to engage in subject-matter-specific case shopping.

I.
THE SDNY'S RELATED CASES RULE (OLD RULE 13) GOVERNED RELATEDNESS IN NAME ONLY.

A. Old Rule 13 Was Not a Local Rule of Civil Procedure, But a Division of Business Rule Specific to the SDNY.

On October 31, 2013, the Second Circuit removed Judge Scheindlin from several cases challenging the New York Police Department's (NYPD) stop-and-frisk practices that she had presided over since their filing, asserting that Judge Scheindlin had improperly applied the "related cases rule."[12] The court referred to the rule as "S.D.N.Y. & E.D.N.Y. Local Rule 13(a)."[13] Yet the rule at issue applied solely to the SDNY; it was a "division of business" rule, not a local rule of civil procedure applicable to both the SDNY and the Eastern District of New York (EDNY).

The EDNY has its own "division of business" rules.[14] However, the SDNY and the EDNY share joint local civil rules.[15] The rule that caused Judge Scheindlin's removal was a division of business rule

9. *See infra* Part I.B.

10. *See infra* Part I.C.

11. *See* S.D.N.Y. Div. Bus. r. 13 (effective Jan. 1, 2014), *available at* http://www.nyed.uscourts.gov/sites/default/files/local_rules/localrules.pdf.

12. Ligon v. City of New York (*Ligon II*), 538 Fed. App'x 101, 102–03 (2d Cir. 2013), *vacated in part by* 743 F.3d 362 (2d Cir. 2014).

13. *Id.* at 102.

14. *See generally* E.D.N.Y. Div. Bus. r. 50.1–50.7 (effective Sept. 3, 2013), *available at* http://www.nyed.uscourts.gov/sites/default/files/local_rules/localrules.pdf.

15. *See generally* S.D.N.Y. & E.D.N.Y. Civ. r. 1.1–83.9 (effective Sept. 3, 2013), http://www.nyed.uscourts.gov/sites/default/files/local_rules/localrules.pdf.

and not a local civil rule, a distinction that matters. Division of business rules are adopted "for the internal management of the case load of the court" and to "govern the assignment and transfer of actions," as well as the court's operation.[16] By contrast, local civil rules "govern subjects including motions, orders and judgments, discovery, trial conduct, and costs and bonds."[17] In addition, pursuant to Federal Rule of Civil Procedure 83, local civil rules are adopted and amended "[a]fter giving public notice and an opportunity for comment."[18] Local civil rules also "must be consistent with—but not duplicate—federal statutes and rules adopted under 28 U.S.C. §§ 2072 and 2075."[19] Otherwise, they may be abrogated by a circuit's judicial council.[20] "Copies of [local civil] rules and amendments must, on their adoption . . . be made available to the public."[21]

Division of business rules are not as closely scrutinized as local civil rules. In fact, a judicial council's power to abrogate a rule "does not extend to guidelines for the division of business."[22] In addition, there is no requirement that division of business rules be made subject to public notice and comment.[23] Nor must they be made available to the public at the time they are amended or adopted, as local civil rules are.[24] The circuit's judicial council steps

16. 1 MICHAEL SILBERBERG ET AL., CIVIL PRACTICE IN THE SOUTHERN DISTRICT OF NEW YORK § 1:3 (2013–2014 ed.).

17. *Id.*

18. FED. R. CIV. P. 83(a)(1).

19. *Id.* Section 2072 governs rules of procedure and evidence, whereas section 2075 governs bankruptcy rules. *See* 28 U.S.C. §§ 2072, 2075 (2012).

20. *See* 28 U.S.C. § 332(d)(4) (2012) (providing that "[e]ach judicial council shall periodically review [local rules prescribed by district courts] within its circuit" for consistency with, inter alia, the Federal Rules of Civil Procedure, and that "[e]ach council may modify or abrogate any such rule found inconsistent in the course of such a review"); *see also* FED. R. CIV. P. 83(a)(1). In addition, each judicial circuit meets at least twice a year, and consists of "the chief judge of the circuit . . . and an equal number of circuit judges and district judges of the circuit." 28 U.S.C. § 332(a)(1) (2012).

21. FED. R. CIV. P. 83(a)(1).

22. Jack B. Weinstein, Chief Judge, U.S. District Court, Eastern District of New York, Address to the Alexander Fellows of the Benjamin N. Cardozo School of Law: The Limited Power of the Federal Courts of Appeals to Order a Case Reassigned to Another District Judge, 120 F.R.D. 267, 270 (1988).

23. *See* 28 U.S.C. § 137 (2012) ("The business of a court having more than one judge shall be divided among the judges as provided by the rules and orders of the court. The chief judge of the district court shall be responsible for the observance of such rules and orders, and shall divide the business and assign the cases so far as such rules and orders do not otherwise prescribe.").

24. *See id.*

in only if "the district judges in any district are unable to agree upon the adoption of rules or orders."[25] District judges adopt the division of business rules that govern how they assign their own cases and the chief judge of the district serves as the rules' enforcer.[26] As a result, a district court's division of business is self-created and self-regulated in a circular fashion that provides little opportunity for meaningful review.

The SDNY's rules regarding case assignment are division of business rules. SDNY Division of Business Rule 1 (Rule 1) describes the "individual assignment system," pursuant to which "[e]ach civil and criminal action and proceeding, except as otherwise provided, shall be assigned *by lot* to one judge."[27] The phrase "by lot" implies that case assignment is conducted randomly. Moreover, the rule expressly provides that case assignment is to be administered "in such a manner that all active judges, except the chief judge, shall be assigned an equal share of the categories of cases of the court over a period of time."[28] Despite this rule, and the much-heralded notion of random case assignment, parties have no right to random assignment of cases.[29]

The "related cases rule" referred to by the Second Circuit[30] was also a division of business rule, and hence, highly unregulated. Old

25. *Id.* At least one judicial council has stepped in to resolve division of business disputes among district judges. *See* Utah-Idaho Sugar Co. v. Ritter, 461 F.2d 1100 (10th Cir. 1972), In *Utah-Idaho Sugar Co.*, the Utah district court's "business of the court[ ]" had been supervised by the Tenth Circuit's judicial council for fifteen years because during that time, its judges could not agree on case assignment rules. *Id.* at 1101–02. The Tenth Circuit upheld the rules put in place by the circuit's judicial council that "require[ed] an equal and random division of civil cases," and as a result, the Chief Judge of the District of Utah was prevented from distributing cases, including the plaintiff's, as he saw fit. *Id.* at 1103–04.

26. *See* 13 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3505 (3d ed. 2013) ("[I]t is the function of the chief judge of the district to apportion the business of the court among the judges in the district, in accordance with such rules and orders as the court may promulgate.").

27. S.D.N.Y. Div. Bus. r. 1 (effective Jan. 1, 2014) (emphasis added), *available at* http://www.nyed.uscourts.gov/sites/default/files/local_rules/localrules.pdf.

28. *Id.*

29. *See, e.g.*, Bd. of Sch. Dirs. of Milwaukee v. Wisconsin, 102 F.R.D. 596, 598 (E.D. Wis. 1984) ("The assignment of cases does not give or deny any litigant any due process rights."); United States v. Keane, 375 F. Supp. 1201, 1204 (D. Ill. 1974) (arguing that criminal defendants have no due process right to the manner in which their cases are assigned).

30. Ligon v. City of New York (*Ligon II*), 538 Fed. App'x 101, 102–03 (2d Cir. 2013), *vacated in part by* 743 F.3d 362 (2d Cir. 2014).

Rule 13 governed the transfer of related cases.[31] As explained below, transferring newly filed cases pursuant to Old Rule 13 caused a case to be assigned deliberately to a particular jurist, breaking Rule 1's promise of random assignment.

B. Old Rule 13 Gave Judges Limitless Power to Transfer Cases Under the Guise of "Relatedness."

The judges of the SDNY approved amendments to Old Rule 13 on December 18, 2013.[32] Old Rule 13 was characterized by certain hallmarks that facilitated the transfer of a newly filed case away from the judge to whom it was originally randomly assigned.[33] The case would then be forwarded onto the docket of a judge already presiding over a purportedly "related case."[34]

What qualified a case for transfer under Old Rule 13? Transfer of a newly filed case to a judge presiding over a purportedly related earlier-filed case was appropriate if the interests of "justice and efficiency" so required.[35] To determine relatedness, Old Rule 13 provided that a judge was required to consider whether: (1) substantial judicial resources would be saved; (2) "just, efficient and economical conduct of the litigations would be advanced"; (3) the "convenience of the parties or witness would be served"; or (4) there existed "a congruence of parties or witnesses or the likelihood of a consolidated or joint trial or joint pre-trial discovery."[36]

In practice, however, the relatedness factors were misleading. Though the rule appeared to require that a judge consider certain factors bearing on relatedness (stating that judges "will" consider the factors), the rule also stated that the factors were not intended "to limit the criteria considered in determining relatedness."[37] As a result, the criteria considered in determining relatedness were both undefined and theoretically limitless.

A party contending that its newly filed case was related to an earlier-filed case had to disclose its contention of relatedness at the time the case began.[38] For the purposes of most civil cases, this

31. *See* S.D.N.Y. Div. Bus. r. 13 (amended Jan. 1, 2014) (on file with author).

32. Order, *In Re* Rule 13 of the Rules for the Div. of Bus. Among Judges, No. 13-mc-432 (S.D.N.Y. Dec. 23, 2013), ECF No. 1.

33. *See* S.D.N.Y. Div. Bus. r. 13 (amended Jan. 1, 2014) (on file with author).

34. *See id.* r. 13(c)(ii) (directing that after a civil case was designated as related, it should be "forwarded to the judge before whom the earlier-filed case is then pending").

35. *Id.* r. 13(a).

36. *Id.*

37. *Id.* r. 13(a)(iii).

38. *Id.* r. 13(c)(i).

meant that the plaintiff had to file a contention of relatedness at the same time it filed its complaint with the the SDNY.[39]

Following such a designation, the case would automatically be "forwarded to the judge [presiding over] the earlier-filed case."[40] Despite the list of "relatedness" factors, the judge to whom the case was forwarded had "the sole discretion to accept or reject" the forwarded case.[41] This "sole discretion" aspect of the rule had the effect of eliminating any need to find actual relatedness between a newly received case and the one to which it was allegedly related. Most importantly, the accepting judge was not required to state his or her reasons for accepting a case as related.[42] Therefore, a case could be accepted under Old Rule 13 because it was actually related to a previously filed case, or alternatively for any reason whatsoever, proper or not.

If a party wanted to challenge a judge's decision to accept a case as related, the party's motion regarding the relatedness designation was heard by the same judge who deemed it related.[43] But the motion was not set for argument; rather, the judge who accepted the case also had "the sole discretion to accept or reject the motion."[44] Nor did the rule require that the party that previously designated the case as related oppose the motion challenging relatedness.[45]

As a result, the moving party challenging relatedness had no opportunity to be heard on its motion.[46] The judge to whom the case was forwarded could simply accept or reject the motion challenging relatedness, perhaps without even reading it.[47] This procedure varied significantly from the one applicable to motions to consolidate or motions for a joint trial, which Old Rule 13 stated were regulated by the Federal Rules of Civil Procedure.[48] Those motions, by contrast, were to be "noticed for hearing before the judge having the lowest docket number, with courtesy copies to be provided to the judge or judges having the cases with higher docket

39. S.D.N.Y. Div. Bus. r. 13(c)(i) (amended Jan. 1, 2014) (on file with author).

40. *Id.* r. 13(c)(ii).

41. *Id.*

42. *See id.*

43. *Id.* r. 13(c)(iv).

44. *Id.*

45. S.D.N.Y. Div. Bus. r. 13 (amended Jan. 1, 2014) (on file with author).

46. *See id.*

47. *See id.*

48. *Id.* r. 13(e); *see also* FED. R. CIV. P. 42.

numbers."[49] A party challenging relatedness, arguably a decision as important as the decision to challenge consolidation,[50] had less power than a party challenging consolidation.[51]

Just as it did not require a judge to state his or her reasons for accepting a case as related, Old Rule 13 did not require that a judge give reasons for rejecting a motion that challenged relatedness.[52] As a result, not only was a decision regarding relatedness effectively unreviewable, any reason justifying the decision to accept a case was never revealed.

Finally, nothing in Old Rule 13 was intended to limit intrajudicial transfer practices authorized by SDNY Division of Business Rule 14 (Rule 14). Old Rule 13 provided that "[n]othing contained in this rule limits the use of Rule 14 for reassignment of all or part of any case from the docket of one judge to that of another by agreement of the respective judges."[53] As Old Rule 13 suggested, Rule 14, which remains unchanged despite Old Rule 13's amendment, is a rule that allows two judges to agree to move a case from one judge's docket to the other's of their own accord.[54] Rule 14 states that "[a]ny judge, upon written advice to the assignment committee, may transfer directly any case or any part of any case on that judge's docket to any consenting judge".[55] Old Rule 13's failure to enforce any actual relatedness requirement, the lack of procedure through which to challenge, or even discern, the relatedness decision, and the effect of the nearly limitless transfer

49. S.D.N.Y. Div. Bus. r. 13(e) (amended Jan. 1, 2014) (on file with author).

50. A party challenging relatedness may be seeking to avoid the very practice described in this article: assignment to a judge with a clear desire to accumulate a certain category of cases on his docket in order to rule a certain way in each case so assigned. A party challenging consolidation may also be seeking to avoid assignment to a judge the party may view as an unfavorable audience for his case. Consolidation motions can be used for tactical purposes in order to have a particular portion of a case—for example, discovery—consolidated with the discovery of a separately filed case in order to slow down or speed up discovery in another case in which the attorneys have not acted diligently. Consolidation also allows a weak case to piggyback on a stronger one, for purposes of discovery or even trial.

51. *See* S.D.N.Y. Div. Bus. r. 13(e) (amended Jan. 1, 2014) (on file with author).

52. *Id.* r. 13(c)(ii).

53. *Id.* r. 13(f).

54. *Id.* r. 14.

55. *Id.* The only exceptions to Rule 14 transfers are those cases that implicate SDNY Division of Business Rule 16, a rule governing the transfer of cases in which a judge has been disqualified or "presided at a mistrial or former trial of the case." *See id.* r. 14, 16. As a result, there can be no Rule 14 transfer of a case to a judge who has been previously disqualified from the case in question or who presided over a mistrial or earlier trial of that case. *Id.* r. 16.

possibilities created by Rule 14 turned the related cases rule into one that had nothing to do with relatedness. Rather, it was a rule through which judges could pull certain cases onto their dockets without having to justify their reasons for doing so.

Old Rule 13 was an effective way for a judge to engage in subject-matter-specific case shopping.

C. The Effect of Old Rule 13 Was That High-Profile Stop-and-Frisk Cases Piled Up on Judge Scheindlin's Docket.

The most notorious example of how Old Rule 13 permitted the aggregation of a certain kind of case on one judge's docket despite an arguable lack of relatedness is a series of four high-profile stop-and-frisk cases, all assigned to Judge Shira A. Scheindlin. Media attention has focused on two of these cases,[56] *Daniels v. City of New York* (*Daniels II*)[57] and *Floyd v. City of New York* (*Floyd II*),[58] but two additional cases were assigned to Judge Scheindlin as a result of the original decision to deem *Floyd* related to *Daniels*: *Ligon v. City of New York* (*Ligon I*)[59] and *Davis v. City of New York*.[60] It remains unclear what links these four cases to each other, aside from the fact that they all involve high-profile challenges to NYPD policies.[61]

The cases' complicated procedural histories began in 1999, when Judge Scheindlin was randomly assigned *Daniels v. City of New*

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56. *See, e.g.*, Mark Hamblett, *Circuit Rebuffs Scheindlin on Stop/Frisk*, N.Y. L.J., Nov. 1, 2013, at 1 (discussing only *Daniels* and *Floyd*); *Judge Scheindlin's Case*, *supra* note 2 (same).

57. 138 F. Supp. 2d 562 (S.D.N.Y. 2001).

58. 959 F. Supp. 2d 540 (S.D.N.Y. 2013).

59. 925 F. Supp. 2d 478 (S.D.N.Y. 2013).

60. 959 F. Supp. 2d 324 (S.D.N.Y. 2010).

61. Not all stop-and-frisk policies are one and the same. For example, the *Davis* case challenged "vertical patrols" in public housing. *See* Complaint at 2, *Davis*, 959 F. Supp. 2d 324 (S.D.N.Y. 2013) (No. 10 Civ. 699), 2010 WL 9937605. "[V]ertical patrols are thorough sweeps of large apartment buildings by two or more police officers" that "provide an opportunity for the police to inspect public housing buildings for physical hazards" and "enable the police to sweep a building for potential lawbreakers." Adam Carlis, *The Illegality of Vertical Patrols*, 109 COLUM. L. REV. 2002, 2012 (2009). *Ligon*, by contrast, challenged the NYPD's trespass arrest policy, or "Operation Clean Halls," through which NYPD officers patrol *private* housing complexes across New York City. *Ligon I*, 925 F. Supp. 2d at 484–85; *see also* Complaint, *Ligon I*, 925 F. Supp. 478 (S.D.N.Y. 2012) (No. 12 Civ. 2274), 2012 WL 1031760. After receiving a landlord's permission to do so, Operation Clean Halls allowed the NYPD to enter private buildings enrolled in a program known as the Trespass Affidavit Program, through which "police officers . . . patrol[led] inside and around thousands of private residential apartment buildings throughout New York City." *Ligon I*, 925 F. Supp. 2d at 484–85.

York,[62] a case filed by the nonprofit Center for Constitutional Rights.[63] The suit, brought pursuant to 42 U.S.C. § 1983, alleged that the NYPD's stop-and-frisk practices violated the Fourth Amendment and sought to disband the NYPD's Street Crime Unit.[64] The *Daniels* plaintiffs negotiated a sweeping settlement, which required the NYPD to create a written policy regarding racial profiling and to train officers regarding the same.[65] The settlement also required police to complete a written form each time they conducted a stop-and-frisk (known as a UF-250 report), and to provide plaintiffs' counsel with quarterly data regarding these reports "from the last quarter of 2003 through the first quarter of 2007."[66]

The *Daniels* parties returned to Judge Scheindlin's courtroom in 2007.[67] The plaintiffs accused the NYPD of a "surge" in the kind of illegal stops at issue in their complaint.[68] Instead of reopening *Daniels*, Judge Scheindlin suggested another approach.[69] "If you got proof of inappropriate racial profiling in a good constitutional case, why don't you bring a lawsuit?," the judge asked.[70] "You can certainly mark it as related,"[71] she added. On January 31, 2008, the Center for Constitutional Rights and an attorney named Jonathan Moore, both of whom served as plaintiffs' counsel in *Daniels*, brought *Floyd v. City of New York*.[72] Like *Daniels*, *Floyd* was brought pursuant to § 1983 and alleged that the NYPD engaged in stop-and-frisk practices that violated the Fourth Amendment.[73] On the date *Floyd* was filed, a docket entry noted that *Floyd* had been referred to

62. Notice of Reassignment to Judge Shira A. Scheindlin, Daniels v. City of New York, No. 99 Civ. 1695 (S.D.N.Y. Mar. 23, 1999), ECF No. 5.

63. Complaint, Daniels v. City of New York (*Daniels II*), 138 F. Supp. 2d 562 (S.D.N.Y. 2001) (No. 99 Civ. 1695); *see also* Joseph Goldstein, *A Court Rule Directs Cases over Friskings to One Judge*, N.Y. TIMES, May 6, 2013, at A16; *Daniels, et al. v. the City of New York*, CENTER FOR CONST. RTS., http://ccrjustice.org/ourcases/past-cases/daniels,-et-al.-v.-city-new-york (last visited Nov. 11, 2014).

64. Complaint, *Daniels II*, 138 F. Supp. 2d 562 (No. 99 Civ. 1695); *see also* Goldstein, *supra* note 63.

65. Stipulation of Settlement, *Daniels II*, 138 F. Supp. 2d 562 (No. 99 Civ. 1695), *available at* http://ccrjustice.org/files/Daniels_StipulationOfSettlement_12_03_0.pdf.

66. *Id.*

67. *See* Memorandum Opinion and Order, *Daniels*, No. 99 Civ. 1695 (S.D.N.Y. July 16, 2007), 2007 WL 2077150.

68. Goldstein, *supra* note 63.

69. *Id.*

70. *Id.*

71. *Id.*

72. Complaint, Floyd v. City of New York (*Floyd II*), 959 F. Supp. 2d 540 (S.D.N.Y. 2008) (No. 08 Civ. 1034), ECF No. 1.

73. *Id.* at 1–2.

Judge Scheindlin as "possibly related" to *Daniels*.[74] On February 15, 2008, a "Notice of Assignment" officially sent *Floyd* to Judge Scheindlin.[75]

The "Notice of Assignment" does not explain the reasons for deeming the cases related.[76] And none of the relatedness factors set out by Old Rule 13 seem to have applied. The first relatedness factor, "a substantial saving of judicial resources,"[77] did not apply. *Daniels* was a closed case; deeming *Floyd* related to *Daniels* would not have resulted in any judicial resource saving related to discovery, for example, or any other benefit derived from linking two active cases with overlapping questions of law or fact. Because *Daniels* was closed, there was nothing to combine with *Floyd*. The second factor, that "the just, efficient and economical conduct of the litigations would be advanced,"[78] would also have been inapplicable when the previously filed case was already closed. Between *Daniels* and *Floyd*, there was only one "litigation"—the just-filed and therefore active case, *Floyd*.

Similarly, the third factor, serving "the convenience of the parties of the witnesses,"[79] would not have supported a determination of relatedness between *Floyd* and *Daniels*. The plaintiffs in *Floyd* were not the same people as the plaintiffs in *Daniels*, and aside from the City, an institutional party sued almost daily, the defendants were likewise new. Also, the class certified in *Daniels* included "all persons subjected to suspicionless stops by the [Street Crimes Unit]."[80] By the time *Floyd* was filed, the Street Crimes Unit had been disbanded for several years.[81] Finally, the fourth factor, the likelihood of "a consolidated or joint trial or joint pre-trial discovery,"[82] could not have been applied to deem two cases, one of

74. Case Referred to Judge Shira A. Scheindlin as Possibly Related to 1:99-CV-1695, Floyd v. City of New York, No. 08 Civ. 1034 (S.D.N.Y. Jan. 31, 2008).

75. Notice of Assignment to Judge Shira A. Scheindlin, Floyd v. City of New York, No. 08 Civ. 1034 (S.D.N.Y. Feb. 15, 2008), ECF No. 4.

76. *See id.*

77. S.D.N.Y. Div. Bus. r. 13(a)(i) (amended Jan. 1, 2014) (on file with author).

78. *Id.* r. (a)(ii).

79. *Id.* r. 13(a)(iii).

80. Daniels v. City of New York (*Daniels I*), 198 F.R.D. 409, 416 n.6 (S.D.N.Y. 2001). The Street Crimes Unit was "an elite squad of police officers whose mission is to interdict violent crime in New York City and, in particular, remove illegal firearms from the streets." *Id.* at 411 n.1.

81. Floyd v. City of New York (*Floyd I*), No. 08 Civ. 1034, 2008 WL 4179210, at *4 (S.D.N.Y. Sept. 10, 2008).

82. S.D.N.Y. Div. Bus. r. 13(a)(iii) (amended Jan. 1, 2014) (on file with author).

which was no longer pending, related. As a result, nothing in the record or Old Rule 13 explains what rendered these two cases related.

On January 28, 2010, *Davis v. City of New York*, a case challenging the NYPD's "vertical patrols" in New York public housing on the grounds that certain detentions made during those patrols lacked reasonable suspicion, was also referred to Judge Scheindlin on the date it was filed.[83] It was accepted as related to *Floyd* several days later.[84]

Why *Floyd* and *Davis* were accepted as related is also unclear, especially given the difference in the stop-and-frisk policies at issue (street-level policing versus public housing and residential policing). The court itself noted that "[w]hat distinguishes [*Davis*] from the other two [cases, *Daniels* and *Floyd*,] is its focus on stop and frisk practices at public housing properties owned and operated by the New York City Housing Authority . . . ."[85] This key difference would, at *Davis*'s outset, seem to have suggested very different forms of discovery in the two cases, namely, a need for both different witnesses and different experts. It is unclear what substantial saving of judicial resources (the first relatedness factor) would have resulted from deeming the two cases related. Similarly, it is unclear how the second relatedness factor, "the just, efficient and economical conduct of the litigations"[86] would have been advanced based on the different policies at issue in *Floyd* and *Davis*. Again, aside from the City, the parties in the two "related" cases differed, rendering the third relatedness factor, "the convenience of the parties or witnesses,"[87] also irrelevant. Finally, as to the likelihood "of a consolidated or joint trial or joint pre-trial discovery,"[88] the fourth relatedness factor, the difference in the policies at issue must have made joint pretrial discovery seem unlikely. It is similarly unclear how a joint trial related to different NYPD policies, and stops and searches that occurred in very different contexts, would have been arranged. Indeed, the plaintiffs in *Davis* objected to participating in a joint

83. Complaint, *Davis*, *supra* note 61; Case Referred to Judge Shira A. Scheindlin as Possibly Related to 1:08-CV-1034, Davis v. City of New York, No. 10 Civ. 699 (S.D.N.Y. Jan. 28, 2010).

84. Case Accepted as Related, Davis v. City of New York, No. 10 Civ. 699 (S.D.N.Y. Feb. 8, 2010).

85. Davis v. City of New York, 959 F. Supp. 2d 324, 332 (S.D.N.Y. 2013).

86. S.D.N.Y. Div. Bus. r. 13(a)(ii) (amended Jan. 1, 2014) (on file with author).

87. *Id.* r. 13(a)(iii).

88. *Id.*

remedies hearing with the *Floyd* parties.[89] It is difficult to divine why *Davis* and *Floyd* were deemed related.

In 2012, yet another landmark class action stop-and-frisk case came before Judge Scheindlin. *Ligon v. City of New York* (*Ligon I*) challenged the NYPD's trespass arrest policy, or Operation Clean Halls, through which NYPD officers patrol private housing across New York City.[90] On March 28, 2012, the case was referred to Judge Scheindlin as potentially related to *Davis*, and soon after it was accepted as a related case.[91] Again, why this case was deemed related to *Davis* is not in the record. The parties differed, as did the claims: public housing in *Davis* versus private housing in *Ligon*.[92]

This policy difference between *Ligon* and *Davis* suggests that at *Ligon*'s outset, *Ligon* and *Davis* would have involved very different forms of discovery. There is no indication as to why deeming these cases related would have resulted in a substantial saving of judicial resources (the first relatedness factor). Likewise, though cases are deemed related based on the potential for "the just, efficient and economical conduct of the litigations,"[93] because the two cases involved different policies, this factor too would not have been satisfied. Again, aside from the City, the parties in the two "related" cases differed, rendering the third relatedness factor, "the convenience of the parties or witnesses,"[94] also irrelevant.

Finally, as to the likelihood "of a consolidated or joint trial or joint pre-trial discovery,"[95] the fourth relatedness factor, the advanced stage of the *Davis* litigation, as compared to the newly filed *Ligon* matter, must have made joint trial or pre-trial discovery seem unlikely. A January 9, 2012 order in *Davis* set March 5, 2012, as the

89. Order at 2, Davis v. City of New York, No. 10 Civ. 699 (S.D.N.Y. Feb. 11, 2013), ECF No. 265.

90. 925 F. Supp. 2d 478 (S.D.N.Y. 2013); *see also* Complaint, *Ligon I*, *supra* note 61. Many of the buildings subject to Operation Clean Halls, though private residences, were large apartment complexes where residents faced quality-of-life challenges, such as rampant crime, similar to those confronted by residents of New York City public housing. The operation allowed "police officers to patrol inside and around thousands of private residential apartment buildings throughout New York City." *Ligon I*, 925 F. Supp. 2d at 484–85.

91. Case Referred to Judge Shira A. Scheindlin as Possibly Related to 10-CV-699, Ligon v. City of New York, No. 12 Civ. 2274 (S.D.N.Y. Mar. 28, 2012); Case Accepted as Related, Ligon v. City of New York, No. 12 Civ. 2274 (S.D.N.Y. Apr. 3, 2012).

92. *See supra* note 61.

93. S.D.N.Y. Div. Bus. r. 13(a)(ii) (amended Jan. 1, 2014) (on file with author).

94. *Id.* r. 13(a)(iii).

95. *Id.*

date fact discovery would close;[96] that is, discovery in *Davis* was set to close before *Ligon* was even filed.[97] The *Davis* defendants moved for summary judgment on June 16, 2012.[98] By that date, there was no discovery left to complete in *Davis*, and, for purposes of relatedness, no discovery to join with *Ligon*. Indeed, the first scheduling order entered in *Ligon*, on April 23, 2012, pertained only to limited discovery related to the *Ligon* preliminary injunction hearing.[99] It is similarly unclear how a joint trial could have been contemplated in *Ligon* and *Davis*; the plaintiffs in *Davis* objected to participating in a joint remedies hearing with the *Ligon* parties.[100]

The only thread connecting these four cases was that they were each high-profile Fourth Amendment-related § 1983 class actions. *Daniels*, the first case, challenged the specific practices of the NYPD's Street Crimes Unit and was settled before a decision on the merits was reached.[101] By the time *Floyd* was filed, the Street Crimes Unit had been disbanded.[102] *Davis* pertained to stops-and-frisks happening in New York City public housing, which is a very different setting than those at issue in *Daniels* and *Floyd*.[103] *Ligon* challenged trespass arrests, and related stops-and-frisks, occurring in private residences.[104] The link between these four cases became increasingly attenuated as one after the other was assigned to Judge Scheindlin. The only discernible similarities are that in each case the plaintiffs suing the NYPD received favorable rulings, and two of the cases (*Floyd* and *Daniels*) involved the same plaintiffs' counsel.

D. Old Rule 13 Led, in Part, to Judge Scheindlin's Removal from Two Stop-and-Frisk Cases and a Procedural Nightmare Ensued.

On October 31, 2013, the Second Circuit removed Judge Shira A. Scheindlin from the *Floyd* and *Ligon* matters.[105] In a three-page order, it concluded that she "ran afoul of the Code of Conduct for

96. Order at 2, Davis v. City of New York, No. 10 Civ. 699 (S.D.N.Y. Jan. 9, 2012), ECF No. 139.

97. *Ligon* was filed on March 28, 2012. *See* Complaint, *Ligon I*, *supra* note 61.

98. Motion for Summary Judgment, Davis v. City of New York, 959 F. Supp. 2d 324 (S.D.N.Y. 2013) (No. 10 Civ. 699), ECF No. 173.

99. Scheduling Order, Ligon v. City of New York, No. 12 Civ. 2274 (S.D.N.Y. Apr. 23, 2012), ECF No. 14.

100. Order, *supra* note 89.

101. *See supra* notes 62–66 and accompanying text.

102. *See supra* note 81 and accompanying text.

103. *See supra* note 85 and accompanying text.

104. *See supra* note 90 and accompanying text.

105. Corrected Order, Floyd v. City of New York, No. 13-3524 (2d Cir. Oct. 31, 2013), ECF No. 96.

United States Judges" due to "the appearance of impartiality surrounding [the *Floyd* and *Ligon*] litigation [which] was compromised by the District Judge's improper application of the Court's 'related cases rule.'"[106] In support of this conclusion, the court referred to the hearing at which Judge Scheindlin had instructed the *Daniels* plaintiffs' attorneys on how to file a related case.[107] The court also concluded that Judge Scheindlin improperly applied the related cases rule by engaging in "a series of media interviews and public statements purporting to respond publicly to criticism of the District Court."[108] The reaction to Judge Scheindlin's removal was decidedly negative, and pundits and professors alike rallied behind her, supporting her right to speak publicly about the judicial process.[109]

Judge Scheindlin, represented by New York University law professor Burt Neuborne, sought leave in front of the Second Circuit to file a motion regarding her disqualification.[110] The City then sought modification of the Second Circuit's order staying Judge Scheindlin's *Floyd* and *Ligon* opinions (which had been stayed in the same order that removed the judge), asking that the court instead vacate her orders in service of the "appearance[ ] of fair and impartial administration of justice."[111] The Second Circuit denied

106. *Id.* at 2.

107. *Id.* at 2 n.1.

108. *Id.* at 2–3.

109. *See, e.g.*, Editorial Board, *Judge Scheindlin's Case*, N.Y. TIMES, Nov. 8, 2013, at A34, *available at* http://www.nytimes.com/2013/11/08/opinion/judge-scheindlins-case.html (arguing that the Second Circuit "erred badly" and "unjustly damaged Scheindlin's reputation" by removing her); Emily Bazelon, *Shut Up, Judge! A Misguided Appeals Court Tries to Silence—and Quash—Stop-and-Frisk Judge Shira Scheindlin*, SLATE (Nov. 1, 2013), http://www.slate.com/articles/news_and_politics/jurisprudence/?2013/11/nypd_and_judge_shira_scheindlin_2nd_circuit_appeals_court_judges_try_to.html (arguing that "the 2nd Circuit's move to remove [Judge Scheindlin] was . . . an overreach"); Jeffrey Toobin, *The Preposterous Removal of Judge Scheindlin*, NEW YORKER (Oct. 31, 2013), http://www.newyorker.com/online/blogs/newsdesk/2013/10/?the-preposterous-removal-of-judge-scheindlin.html (arguing that Judge Scheindlin's removal was "preposterous," and that "[s]he should be honored for [her conduct in the case], not scolded").

110. Movant Shira Scheindlin's Notice of Appearance at 1–2, Floyd v. City of New York, No. 13-3524 (2d Cir. Nov. 6, 2013), ECF No. 260; Movant Shira Scheindlin's Notice of Appearance at 1–2, Ligon v. City of New York, No. 13-3123 (2d Cir. Nov. 6, 2013), ECF No. 177.

111. Appellant's Motion for an Order Modifying the Stay Order Dated October 31, 2013 at 2, Ligon v. City of New York (*Ligon V*), 736 F.3d 231 (2d Cir. 2013) (per curiam) (No. 13-3088), ECF No. 265.

both requests.[112] First, it found that it knew of "no precedent suggesting that a district judge has standing before an appellate court to protest reassignment of a case."[113] Second, it denied the City's motion to vacate, albeit without prejudice.[114] In a separate order filed on the same date, November 13, 2013, the Second Circuit attempted to soften the blow of Judge Scheindlin's removal.[115] It noted that it had made no findings "of misconduct, actual bias, or actual partiality on the part of Judge Scheindlin," but that a review of the record caused the court to find:

> [H]er conduct while on the bench, which appears to have resulted in these lawsuits being filed and directed to her, in conjunction with her statements to the media and the resulting stories published while a decision on the merits was pending and while public interest in the outcome of the litigation was high, might cause a reasonable observer to question her impartiality. For this reason, her disqualification is required . . . .[116]

The court also addressed its position as to Old Rule 13, noting:

> [T]he gravamen of why reassignment of this case is necessary is not simply the use of Local Rule 13. It is the appearance of partiality that was created by Judge Scheindlin's conduct during the December 21, 2007 [*Daniels*] hearing in suggesting that the plaintiffs bring a lawsuit, outlining the basis for the suit, intimating her view of its merit, stating how she would rule on the plaintiffs' document request in that suit, *and* telling the plaintiffs that she would take it as a related case, as well as the media interviews she gave during the *Floyd* proceedings.[117]

In the meantime, on November 5, 2013, Bill De Blasio won the New York City mayoral race.[118] While campaigning, De Blasio promised to withdraw the City's appeals of the *Floyd* and *Ligon* matters.[119] This caused speculation that De Blasio's win would essen-

112. *Ligon V*, 736 F.3d 231; Ligon v. City of New York (*Ligon IV*), 736 F.3d 166 (2d Cir. 2013) (per curiam).

113. *Ligon IV*, 736 F.3d at 170.

114. *Ligon V*, 736 F.3d at 232.

115. Ligon v. City of New York (*Ligon III*), 736 F.3d 118 (2d Cir. 2013) (per curiam), *vacated in part by* 743 F.3d 362 (2d Cir. 2014).

116. *Id.* at 124.

117. *Id.* at 126 n.17 (emphasis in original).

118. Michael Barbaro & David W. Chen, *De Blasio Wins Mayor's Race in Landslide; Christie Coasts to 2nd Term as Governor*, N.Y. TIMES, Nov. 6, 2013, at A1.

119. Benjamin Weiser, *Judges Decline to Reverse Stop-and-Frisk Ruling, All But Ending Mayor's Fight*, N.Y. TIMES, Nov. 22, 2013, at A21.

tially end the *Floyd* and *Ligon* appeals, and that Judge Scheindlin's orders would stand.[120]

On January 30, 2014, the City asked the Second Circuit for a "limited remand of [*Ligon* and *Floyd*] to the District Court for the purpose of exploring a full resolution of the cases."[121] De Blasio also held a press conference signaling that the cases would settle and that the City would agree to have the NYPD monitored for three years.[122] Yet, on the same day the City's motion to remand was filed, the Second Circuit ordered the "Police Intervenors," a group of police unions still attempting to intervene in the *Ligon* and *Floyd* appeals, to respond to the City's motion, and ordered that the response be filed by February 7, 2014.[123] The Police Intervenors' response opposed the City's motion to remand, arguing that the City should not be able to prevent review of the District Court's "flawed and harmful rulings."[124]

On February 14, 2014, in a brief supporting the City's motion to remand, the plaintiffs claimed that "the parties have not reached a 'settlement agreement,'" only an agreement "to proceed towards resolving this litigation by negotiating the terms of the independent monitor."[125] On February 21, 2014, the Second Circuit granted the motion to remand and stayed the *Floyd* and *Ligon* appeals "for the purpose of supervising settlement discussions among such concerned or interested parties as the District Court deems appropriate."[126] Finally, on October 31, 2014, the Second Circuit denied the Police Intervenors' motions as untimely and failing to establish the legally protectable interests required to allow intervention, foreclos-

120. *Id.*

121. Declaration in Support of Appellants' Motion for a Limited Remand to the District Court at 2, Ligon v. City of New York (*Ligon VI*), 743 F.3d 362 (2d Cir. 2014) (No. 13-3088), ECF No. 459.

122. *See* Benjamin Weiser & Joseph Goldstein, *Mayor Says New York City Will Settle Suits on Stop-and-Frisk Tactics*, N.Y. Times, Jan. 31, 2014, at A1.

123. Order at 1, Floyd v. City of New York (*Floyd III*), No. 13-3088, 2014 WL 5486552 (2d Cir. Oct. 31, 2014) (per curiam) (No. 13-3088), ECF No. 460. The Police Intervenors argued that if the City were to withdraw its appeals, they should be permitted to "vindicat[e] their own rights" and ensure that "the district court's flawed injunction . . . will not saddle the NYPD and its members for years to come." Movant Captains' Endowment Association et al.'s Motion to Intervene at 3, *Floyd III*, 2014 WL 5486552 (No. 13-3088), ECF No. 252.

124. Movant Captains' Endowment Association et al.'s Motion in Opposition to Appellants' Motion for a Limited Remand to the District Court at 3–8, *Floyd III*, 2014 WL 5486552 (No. 13-3088), ECF No. 465.

125. Appellees' Reply to Appellants' Motion for a Limited Remand to the District Court at 4, *Ligon VI*, 743 F.3d 362 (No. 13-3088), ECF No. 469.

126. *Ligon VI*, 743 F.3d at 365.

ing the possibility that they might raise successful challenges to Judge Scheindlin's orders.[127]

II.
THE SDNY HAS AMENDED OLD RULE 13, BUT LEFT MUCH UNCHANGED.

A. Chief Judge Preska Announced Changes to Old Rule 13.

This story took another unusual turn when, in a December 23, 2013 interview with the New York Times, Southern District Chief Judge Loretta Preska announced that the SDNY had amended its related cases rule.[128] According to the New York Times, "[t]he district court began its review after [the Times] reported in May about the use of a court rule to send the [*Floyd*] case to Judge Scheindlin."[129]

Judge Preska explained the highlights of the rule's amendments: "[A] judge being asked to accept a 'related' case will still make that decision alone, [however] the court's three-judge assignment committee, including the chief judge, will review every case where a claim of relatedness has been made."[130] In addition, if the committee disagrees with the judge's relatedness determination, "the matter will be assigned randomly to a new judge."[131] Moreover, "the statements seeking to designate a case as related and any objections would be docketed publicly."[132]

B. The Changes to Old Rule 13 Are Superficial.

What other changes does the rule's revision implement? Gone is the provision that the relatedness decision is left to the "sole dis-

127. *Floyd III*, 2014 WL 5486552. *Cf.* Michael C. Dorf, *What Are the Remaining Stakes in the NYC Stop-and-Frisk Litigation?*, DORF L. (Nov. 11, 2013), http://www.dorfonlaw.org/2013/11/what-are-remaining-stakes-in-nyc-stop.html. Before the Second Circuit's most recent opinion, the author had previously argued that the stop-and-frisk appeals were "still alive" because the district court lacked jurisdiction to hear them in the first place, and that withdrawing an appeal would have amounted to consenting to jurisdiction, which no party can do. *See* Katherine Macfarlane, *The Stop-and-Frisk Appeals Are Still Alive*, BROOK. L. SCH. PRACTICUM (Dec. 26, 2013), http://practicum.brooklaw.edu/articles/new-york-city's-stop-and-frisk-appeals-are-still-alive.

128. Benjamin Weiser & Joseph Goldstein, *Federal Court Alters Rules on Judge Assignments*, N.Y. TIMES, Dec. 24, 2013, at A19.

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

cretion" of the judge to whom the earlier-filed case was assigned,[133] a provision which had the effect of rendering consideration of any of the listed relatedness factors meaningless. Importantly, and perhaps in reaction to what happened in the stop-and-frisk cases, Amended Rule 13 says that "[c]ivil cases shall not be deemed related merely because they involve common legal issues or the same parties."[134] As a result, the provision that the judge "will" consider certain factors to determine relatedness has some force. Also, in most instances, "civil cases presumptively shall not be deemed related unless both cases are pending before the Court (or the earlier case is on appeal)."[135] This portion of Amended Rule 13 appears to be a reaction to the determination that *Floyd* was related to *Daniels* even after *Daniels* had concluded.

What doesn't Amended Rule 13 do? Any judge who accepts a case as related still need not state his or her reasons for doing so.[136] Rather, the only record of why a case is related is the form on which the party that designated the case as related stated *its* reasons for doing so.[137] As a result, the assignment committee will review a judge's decision to deem a case related without the benefit of any hearing or adversarial proceeding that might explain why the judge ruled in a particular manner.

Also, Amended Rule 13 allows a party to "contest a claim of relatedness by any other in writing addressed to the judge having the case with the lowest docket number," meaning the earlier-filed case.[138] However, though this "submission" must be forwarded to the assignment committee, there is still no procedure in place to allow motion practice challenging the relatedness determination, either in front of the judge who made the decision or the assignment committee.[139] There is no opportunity for a relatedness hearing, nor is a party who wants a case to be deemed related required to respond to a submission opposing relatedness.[140]

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133. S.D.N.Y. Div. Bus. r. 13(c)(ii) (amended Jan. 1, 2014) (on file with author).

134. S.D.N.Y. Div. Bus. r. 13(a)(2)(A) (effective Jan. 1, 2014), *available at* http://www.nyed.uscourts.gov/sites/default/files/local_rules/localrules.pdf.

135. *Id.* r. 13(a)(2)(B).

136. *See generally id.*

137. *See id.*

138. *Id.* r. 13(b)(1).

139. *Id.*

140. *See generally* S.D.N.Y. Div. Bus. r. 13(a)(2)(A) (effective Jan. 1, 2014), *available at* http://www.nyed.uscourts.gov/sites/default/files/local_rules/localrules.pdf.

Moreover, despite the revisions to Old Rule 13, there are still myriad ways in which cases could be pulled to one judge's docket "merely because they involve common legal issues or the same parties" or happen to pertain to a judge's preferred subject matter.[141] Visiting judges and senior district judges decide what sort of cases they want to hear.[142] Judges can transfer cases amongst each other for almost any reason pursuant to Rule 14.[143] Until these rules are also amended in a meaningful manner, judges may still use them to accumulate a certain type of case on their dockets.

CONCLUSION

Despite recent amendments to Old Rule 13, random case assignment in the SDNY is still easily overcome. Amended Rule 13 may still be used as a vehicle through which to accumulate cases based on their subject matter. Nor do the amendments create any process that would bring a relatedness decision to light—there is still no requirement that a judge state his or her reasons for deeming a case related. The amendments also do not allow for actual motion practice challenging relatedness. A relatedness motion is not set for argument, nor is a response required.

There is at least one way to implement meaningful change to Amended Rule 13: open it up to public comment. The court should include a provision in Amended Rule 13 that mimics the motion practice available to parties challenging case consolidation. Moreover, the public deserves to know additional details regarding case assignment. For example, who sits on the assignment committee? Are judges initially assigned to a case that is later subject to a relatedness transfer allowed to vote on the transfer's appropriateness?

One more fundamental question lingers: do we need Amended Rule 13? Given the ability to combine all aspects of a case pursuant to Federal Rule of Civil Procedure 42's consolidation procedures, which afford motion practice and an opportunity for each

141. *See id.*

142. *Id.* r. 12 (effective Sept. 3, 2013) ("When a visiting judge is assigned to this district, that judge shall advise the assignment committee of the number and categories of pending cases which that judge is required or willing to accept."); *id.* r. 11 ("If a senior judge is willing and able to undertake assignment of pending cases from other judges, that judge may (1) accept assignment of all or any part of any case from any judge on mutual consent, or (2) advise the assignment committee of the number, status and categories of pending cases which that judge is willing to undertake.").

143. *Id.* r. 14.

party to be heard,[144] perhaps the best course is to eliminate Amended Rule 13 entirely. Overwhelming cases can still be transferred away from visiting and senior judges. Rule 14 provides ample opportunity to transfer cases from one judge to another. But given the seemingly insurmountable opportunity for Amended Rule 13 to be used as a vehicle through which to gather cases based on their subject matter, in a way that can never be meaningfully challenged, perhaps the best course is to do away with such a rule. This would send even more cases through the random assignment process.

Finally, any change that is meant to increase transparency with respect to case assignment should itself be transparent.[145] But the changes to Old Rule 13 were announced via an interview with the *New York Times* published online late on the Monday before Christmas. The amendments were not published on the SDNY's website until January 2014.[146] Though available in online databases as of April 2014, at the time this Article was originally drafted in February 2014, Amended Rule 13 could not be located on WestLaw. There was no notice to the bar regarding the changed procedures. If transparency is truly the goal, reaching out to members of the bar, who must adhere to case assignment procedures, would signal a good faith change to the manner in which this issue has been handled to date.

144. *See* FED. R. CIV. P. 42.

145. *See* Weiser & Goldstein, *supra* note 128 (highlighting Judge Preska's explanation that amendments to Old Rule 13 were intended to "increase transparency").

146. *See* S.D.N.Y. Div. Bus. r. 13 (effective Jan. 1, 2014), *available at* http://www.nyed.uscourts.gov/sites/default/files/local_rules/localrules.pdf.