

Report to the Chief Justice of the United States
on the
2010 Conference on Civil Litigation

Submitted by the Judicial Conference Advisory Committee on Civil Rules and
the Committee on Rules of Practice and Procedure

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INTRODUCTION¹

The Civil Rules Advisory Committee hosted the 2010 Conference on Civil Litigation at the Duke University School of Law on May 10 and 11. The Conference was designed as a disciplined identification of litigation problems and exploration of the most promising opportunities to improve federal civil litigation. More than seventy judges, lawyers, and academics presented and discussed empirical information, analytical papers, pilot projects, and various approaches used by both federal and state judges, in considering ways to address the problems of costs and delays in the federal civil justice system. Over 200 invited participants selected to ensure diverse views, expertise, and experience filled all the space available at the Law School and engaged in two days of panel presentations followed by extensive audience discussion. The result is a large amount of empirical information and a rich array of possible approaches to improving how the federal courts serve civil litigants.

I. THE BACKGROUND AND PURPOSE OF THE CONFERENCE

For many years, the Judicial Conference Rules Committees have heard complaints about the costs, delays, and burdens of civil litigation in the federal courts. And for many years, the Rules Committees have worked to address these complaints. That work is reflected in the fact that the Civil Rules, particularly the discovery rules, have been amended more frequently than any others. The more recent changes have been preceded by efforts to obtain reliable empirical information to identify how the rules are operating and the likely effect of proposed changes. Despite these recent rule changes, complaints about costs, delays, and burdens in civil litigation have persisted. Many of the complaints are inconsistent and conflicting. The Rules Committees concluded that a more comprehensive and holistic approach was called for in its empirical work. The 2010 Conference was built on an unprecedented array of empirical studies and data, surveys of thousands of lawyers, data from corporations on the actual costs spent on discovery, and white papers issued by national organizations and groups and by prominent lawyers. In addition, the Conference relied on data gathered in earlier rules-related work.

In 1997, the Civil Rules Committee hosted a conference at the Boston College Law School to explore whether the persistent complaints should be the basis for changes to the Federal Rules of Civil Procedure governing discovery. That conference was also preceded by empirical studies conducted by the Federal Judicial Center (FJC). After that conference, changes were proposed to the discovery rules, including a narrowing of the definition of the scope of discovery in Rule 26(b)(1). That change was enacted in 2000. Since then, however, the litigation landscape has changed with astonishing rapidity, largely reflecting the revolution in information technology. The advent and wide use of electronic discovery renewed and amplified the complaints that the existing rules and practices are inadequate to achieve the promise of Rule 1: a just, speedy, and inexpensive resolution to every civil action in the federal courts.

The discovery rules were amended again in 2006 to recognize distinct features of electronic discovery and provide better tools for managing it. The 2007 style project simplified and clarified all the rules, the 2008 enactment of Federal Rule of Evidence 502 reduced the risks of inadvertent privilege waiver in discovery, and the 2009 time-computation project made the calculation of

¹ There are many people and entities to thank and acknowledge for their support of, and work on, the Conference. A complete list is beyond this report. Particular thanks, however, must be extended to the Duke University School of Law and Dean David F. Levi; the Federal Judicial Center and Judge Barbara Rothstein and Dr. Emery Lee; the Administrative Office and Director James Duff; the Judicial Conference of the United States; and each of the Conference panel moderators.

deadlines easier. With these internal changes in place, and with external changes continuing to occur, the Advisory Committee determined that it was time again to step back, to take a hard look at how well the Civil Rules are working, and to analyze feasible and effective ways to reduce costs and delays.

Some of the same information-technology changes that gave rise to electronic discovery also provided the promise of improved access to empirical information about the costs and burdens imposed in civil lawsuits in federal courts. A great amount of empirical data was assembled in preparation for the 2010 Conference. The Rules Committees asked the FJC to study federal civil cases that terminated in the last quarter of 2008, the most recent quarter that could be studied in time for the Conference. The study included detailed surveys of the lawyers about their experience in the cases. The FJC also administered surveys for the Litigation Section of the American Bar Association (ABA) and for the National Employment Lawyers Association (NELA). The Institute for the Advancement of the American Legal System (IAALS) conducted a detailed study of the members of the American College of Trial Lawyers (American College). The Searle Institute at Northwestern Law School and a consortium of large corporations also provided empirical information designed to measure in ways not previously available the actual costs of conducting electronic and other discovery. The rich and detailed data generated by all this work provided an important anchor for the Conference discussion and will be a basis for further assessment of the federal civil justice system for years to come.

The many judges, lawyers with diverse practices, consumers of legal services, and academic critics of legal institutions and processes provided an important range of perspectives. Lawyers representing plaintiffs, defendants, or both, and from big and small firms as well as public interest practice, were recruited. Clients were represented by corporate counsel for businesses ranging from very large multinational entities to much smaller companies, as well as by government lawyers. Empirical work was presented by FJC staff, private and public interest research entities, bar associations, and academics. The academic participants also provided historical and jurisprudential grounding. Experience with state-court practices was explored to show the range of possibilities working within the framework of the American adversary system. Different litigation bar groups were represented. The mix of these participants in the organized panels and in the subsequent discussions resulted in consensus on some issues and divergence on others. The diversity of views and experience helped identify the areas in which disagreements tracked the familiar plaintiff-defendant divide and areas in which both disagreements and consensus transcended that line.

Assembling the panels and commissioning, coordinating, and reviewing the empirical studies and papers occupied the planning committee, and particularly its chair, Judge John Koeltl, for a year. The empirical information, papers, and reports from the Conference are available at the following website: <http://civilconference.uscourts.gov>, and the Duke Law Review will publish many of the papers. The Conference was streamed live by the FJC. Attachments to this report include the agenda, which lists the panel topics and panelists; a separate list of the panelists, sorted by panel; and a list of the titles and authors of the papers, sorted by panel. While many of the empirical studies, pilot projects, and proposals for rule changes will continue and may be expanded, the materials presented and discussed at the Conference will provide the inspiration and foundation for years of future work.

II. PRELIMINARY RESULTS OF THE EMPIRICAL AND OTHER STUDIES

A full accounting of the empirical studies and findings is beyond the scope of this report. But a brief summary of some of the preliminary results demonstrates the important role they will play in determining the most promising avenues for improving federal civil litigation.

The FJC conducted a closed-case study of 3,550 cases drawn from the total of all cases that terminated in federal district courts for the last quarter of 2008. The sample was constructed to eliminate categories of cases in which discovery is seldom used and to insure the inclusion of cases likely to encounter the range of litigation issues. The study included every case that had lasted for at least four years and every case that was actually tried, a design likely to capture the cases involving significant discovery. The study showed that plaintiffs reported \$15,000 as the median total costs in cases that had at least some discovery. The figure for defendants was \$20,000. In the top 5% of this sample, however, the reported costs were much higher. The most expensive cases were those in which both the plaintiff and the defendant requested discovery of electronic information; the 95th percentile was \$850,000 for plaintiffs and \$991,900 for defendants.

The results closely parallel the findings of the 1997 closed-case survey the FJC did for the Advisory Committee in connection with the work that led to the Boston College Law School Discovery Conference. Both FJC studies showed that in many cases filed in the federal courts, the lawyers handling the cases viewed the discovery as reasonably proportional to the needs of the cases and the Civil Rules as working well. The FJC studies support the conclusion that the cases raising concerns are a relatively small percentage of those filed in the federal courts, but the numbers and the nature of these cases deserve close attention. It would be a mistake to equate the relatively small percentage of such cases with a lack of importance. The most costly cases tend to be the ones that are more complicated and difficult, in which the stakes for the parties, financial or otherwise, are large. One set of issues is whether the cases with the higher costs in the FJC studies are problematic, that is, whether the costs are disproportionate to the stakes. Higher costs may not be problematic if they are justified by the amounts or issues at stake in the litigation; lower costs may still be problematic if they are burdensome because they are the result of excessive discovery that is not justified by what is at stake in the litigation or if the costs are low only because, for example, a defendant agreed to settle a meritless case to avoid high discovery costs.

Several other surveys supplemented the FJC work. The IAALS worked with the American College on a survey that was sent to every Fellow of the American College. With some modifications, that survey was also administered by the FJC for the Litigation Section of the ABA and for NELA. The responses varied considerably among the different groups.² The American College respondents—who have more years of experience in the profession and are selected from a small fraction of the bar—reflected greater general dissatisfaction with current civil procedure than the other groups. The ABA Section of Litigation survey responses did not indicate the same degree of dissatisfaction with the rules' ability to meet the goals of Rule 1 as the American College responses, but still reflected a greater degree of dissatisfaction with the operation of the Civil Rules than the FJC survey results.

The survey responses by the members of the plaintiff-oriented NELA were generally that the Civil Rules are not conducive to securing a “just, speedy, and inexpensive determination of every action,” but most remained hopeful that current problems could be remedied by minimal reforms. Among the concerns raised by NELA respondents were that the rules are not applied as written and are applied inconsistently; that local rules often conflict with the Federal Rules; that initial disclosures are not useful in reducing discovery or saving money; that discovery is often abused but

² The 1997 and the 2009 FJC surveys asked lawyers about their actual experiences in litigating specific cases and followed up with additional questions for a sample of those cases. This study design has an important advantage over surveys asking for general impressions about how the system is working. Responses to such questions about general impressions tend to be less grounded in actual case experience. Indeed, there was sometimes a striking difference between lawyers' responses about the proportionality of discovery that they experienced in specific cases and general statements about excessive discovery.

sanctions are rarely used (although more than half of the respondents found that in the majority of cases, counsel agree on the scope and timing of discovery); that litigation is too costly; that discovery is too expensive; and that delays increase costs.

On the defense-oriented side, the Lawyers for Civil Justice, the Civil Justice Reform Group, and the U.S. Chamber Institute for Legal Reform surveyed corporate counsel of Fortune 200 companies and reported that the survey respondents viewed litigation costs as too high. The participating corporations reported that outside litigation costs account for about 1 in every 300 dollars of U.S. revenue for corporations not in insurance or health care. The respondents also reported that the average discovery costs per major case represent about 30% of the average outside legal fees. The report drafted by the groups conducting the survey concluded that litigation costs continue to rise and are consuming an increasing percentage of corporate revenue; that the U.S. litigation system imposes a much greater cost burden on companies than systems outside the United States; that inefficient and expensive discovery does not aid the fact finder; that companies spend a significant amount every year on litigation transaction costs; and that large organizations often face disproportionately burdensome discovery costs, particularly with respect to e-discovery.

The surveys showed as major perceived difficulties on the defense side that contested issues are not identified early enough to forestall needlessly extensive and expensive discovery; that discovery may impose disproportionate burdens on the parties and at times on nonparties, made worse by the difficulties of discovering electronically stored information; and that adversaries with little information to be discovered have the ability to impose enormous expense on large data producers—not only in legal fees but also in disruption of ongoing business—with no responsibility under the American Rule to reimburse the costs. The surveys showed as major perceived difficulties on the plaintiffs' side that much of the cost of discovery arises from efforts to evade and “stonewall” clear and legitimate requests, that motions are filed to impose costs rather than to advance the litigation, and that the existing rules are not as effective as they should be in controlling such tactics. One area of consensus in the various surveys, however, was that district or magistrate judges must be considerably more involved in managing each case from the outset, to tailor the motions practice and shape the discovery to the reasonable needs of that case. The challenge is to achieve this on a consistent, institutional basis without interfering with the independence and creativity of each judge and district responding to the specific mix of cases and docket conditions, and without interfering with the effective handling of many cases under existing rules and practices.

Another area of consensus was that making changes to the Federal Rules of Civil Procedure is not sufficient to make meaningful improvements. While there was disagreement over whether and to what extent specific rules should be changed, there was agreement that there is a limit to what rule changes alone can accomplish. Rule changes will be ineffective if they are not accompanied by judicial education, legal education, and support provided by the development of materials to facilitate implementing more efficient and effective procedures. What is needed can be described in two words—cooperation and proportionality—and one phrase—sustained, active, hands-on judicial case management. These goals can be advanced by several means, including improved formal ongoing education programs for lawyers and judges, the development and use of “best practices” guides and protocols, and other means of encouraging cost-effective litigation practices consistent with vigorous advocacy.

The Conference generated specific and general suggestions for changing both rules and litigation practices. The suggestions fall into the categories identified above: changes to the rules; changes to judicial and legal education; the development of protocols, guidelines, and projects to test and refine continued improvements; and the development of materials to support these efforts.

III. RULEMAKING

Two points of consensus on rulemaking emerged from the Conference. First, while rule changes alone cannot address the problems, there are opportunities for useful and important changes. Second, there is no general sense that the 1938 rules structure has failed. While there is need for improvement, the time has not come to abandon the system and start over.

One recurring question is the extent to which new or amended rules are needed as opposed to more frequent and effective use of the existing rules. Conference participants repeatedly observed that the existing rules provide many tools, clear authority, and ample flexibility for lawyers, litigants, and the courts to control cost and delay. Conference participants noted that many of the problems that exist could be substantially reduced by using the existing rules more often and more effectively. It is important to understand the reasons that existing rules are not invoked or enforced more reliably and the extent to which changes in judicial and lawyer education can respond to those reasons. It is also important to understand the extent to which the problems of costs, delays, and unfairness can be addressed by enforcing the procedural rules. Economic and other incentives that drive how lawyers and litigants conduct litigation are certainly important. One judge with many years of experience both in the district court and on the court of appeals put it succinctly: “what we’re seeing is the limits of rules.” And it is important to distinguish between costs, delays, and burdens created by such causes as strains placed on federal judges by competing demands on their time on the one hand, and difficulties that arise from any weakness of the existing Civil Rules on the other.

Although rule amendments are not the only answer, the Conference did identify some candidates for amendment that attracted strong support and others that deserve close analysis. Some of these suggestions are already the subject of the Advisory Committee’s work. Others draw on existing best practices, case law direction, state-court experience, or the results of pilot projects. Yet other ideas are less well-developed but may prove promising.

A general question is whether a basic premise of the existing rules, that each rule applies to all the cases in the federal system, should continue to govern. Over the years, there have been specific, well-identified departures from the so-called transubstantivity principle. Examples within the rules include Rule 9(b) and the categories of cases excluded from Rule 26(a)’s initial disclosure requirements. Although no one suggested a wholesale departure from transubstantivity, several Conference papers and participants raised the possibility of increasing the rule-based exceptions to it. Two general categories of exceptions were raised: exceptions by subject matter, such as a case raising official immunity issues; and exceptions by complexity or amount at issue in a case, such as a system that would channel cases into specific tracks.

Pleading and discovery dominated Conference suggestions for rule amendments. Some longstanding topics were conspicuous for lack of attention. Although there was substantial interest in exploring the phenomena of settlement and the “vanishing trial,” the Rule 68 provisions on offer of judgment received no more than a collateral glance. And the protective-order provisions of Rule 26(c) drew no comment or attention at all, other than suggestions for standardizing protective orders for categories of litigation, such as employment cases, to expedite their use.

A. Pleading

The 1938 Civil Rules diminished the role of pleadings and greatly expanded the role of discovery. Discovery has been continually on the Advisory Committee’s docket since the substantial revisions accomplished by the 1970 amendments. Pleading has been considered at intervals since 1993, when the decision in *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993), suggested that adoption of “heightened” pleading is a subject for the

Enabling Act process, not judicial decision. At that time, however, the Advisory Committee found no broad support or need for amendments to pleading rules.

The decisions in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), brought pleading to the forefront of attention and debate. The academy in particular reacted in force to these decisions. A speaker at the Association of American Law Schools Civil Procedure Workshop in June 2010 counted eighty-seven law review articles on these cases, a count that continues to grow. Some members of Congress have proposed variations of bills intended to “roll back” the pleading standard, seeming to assume a fixed status quo of practice that did not exist. The lower courts have, over time, begun to provide the detail and nuance necessary to understand the specific impacts of these most recent Supreme Court interpretations of the familiar words of Rule 8. Well before the 2010 Conference, the Advisory Committee had begun a detailed study of the effects of *Twombly* and *Iqbal* on practice, to determine whether any rule amendments should be proposed and, if so, what direction they should take. That work continues, now informed by the addition of the materials and discussion presented at the Conference. As part of that work, the FJC was asked to provide data on the number and disposition of motions to dismiss in the wake of *Twombly* and *Iqbal*. That study is ongoing, but initial results are expected to be released this fall.

The Conference covered a full spectrum of pleading amendment possibilities, with disagreements that largely corresponded to the plaintiff-defendant divide over whether the current pleading standard provides timely and adequate identification of the issues to be decided and of those cases that cannot succeed and should be dismissed without further expenditure of time and resources. Some speakers presented the view that although the final answer should be adopted through the Enabling Act process, there is an emergency in pleading practice that should be cured by legislation enacted by Congress that would establish a rule that should endure until the Enabling Act process can work through its always deliberate procedures. Others expressed the view that the common-law process of case-law interpretation has smoothed out some of the statements in, and responded to the concerns raised by, *Twombly* and *Iqbal*, and will continue to do so. Yet others argued that although the Court only interpreted the language of Rule 8(a)(2), that rule should be amended to express more clearly the guidance provided by the *Twombly* and *Iqbal* opinions. Some recommended moving still further in the direction of “fact” pleading; these recommendations ranged from less factual detail than Code pleading, to “facts constituting the cause of action,” to “notice plus pleading” that explicitly requires a court to consider not only factual allegations but also reasonable inferences from those allegations.

Another set of possibilities, apart from the general Rule 8(a) pleading standard, is to expand on the categories of claims flagged for “heightened pleading” by Rule 9(b). Two of the categories often mentioned for distinctively demanding pleading standards are claims of conspiracy and actions that involve official immunity.

Yet another set of possibilities is to focus on the Rule 12(b)(6) motion to dismiss rather than on the Rule 8(a) standard for sufficient pleading. Much of the debate about pleading standards focuses on cases in which plaintiffs lack access to information necessary to plead sufficiently because that information is solely in the hands of the defendants and not available through public resources or informal investigation. “Information asymmetry” has become the descriptive phrase for cases in which only formal discovery is able to provide plaintiffs with information necessary to plead adequately. The Conference participants provided substantial encouragement for rule amendments that would explicitly integrate pleading with limited initial discovery in such cases. Various forms will be considered. A plaintiff might identify in the complaint fact matters as to which discovery is needed to support an amended complaint and seek focused discovery under judicial supervision. Or one response to a motion to dismiss under Rule 12(b)(6) might be for the plaintiff to make a preliminary showing of “information asymmetry” and to seek focused, supervised

discovery before a response to the motion is required. Another approach might be to require the court asked to decide a motion to dismiss to consider the need for discovery in light of probable differences in access to information. Alternatively, there might be some opportunity for prefiling discovery in aid of framing a complaint, drawing from models adopted in several states.

Yet other approaches to pleading have been explored in the past and continue to be open for further work. One would expand the Rule 12(e) motion for a more definite statement to focus on an order to plead in a way that will facilitate case management by the court and parties. Another would expand the use of replies, drawing on approaches used in official-immunity cases as one example.

Pleading problems are of course not limited to complaints. Plaintiffs' attorneys assert that defendants frequently fail to adhere to the response requirements built into Rule 8(b). The Conference, however, did not produce suggestions for revising this rule. The difficulty here seems to lie not in the rule but in its observance, another illustration of the limited capacity of rulemaking to achieve desirable ends. By contrast, a number of Conference participants did make the specific suggestion that the standard for pleading an affirmative defense should parallel the standard for pleading a claim. That question can be addressed by new rule text, and that possibility will be considered by the Advisory Committee.

B. Discovery

Empirical studies conducted over the course of more than forty years have shown that the discovery rules work well in most cases. But examining the cases in which discovery has been problematic because, for example, it was disproportionate or abusive, requires continuing work. Discovery disputes, the burdens discovery imposes, the time discovery consumes, and the costs associated with discovery increase with the stakes in the litigation, both financial and legal; with the complexity of the issues; and with the volume of materials involved in discovery. The Conference produced some specific areas of agreement on the need for some additional rule changes and better enforcement of existing rules, along with areas of disagreement on whether a more significant overhaul of the discovery rules is needed. This was also the area in which the recognition that rule changes alone are inadequate to produce meaningful improvements in litigation behavior or significantly reduce the costs and delays of discovery had the greatest force. Rules alone cannot educate lawyers (or their clients) in the distinction between zealous advocacy and hyper-advocacy.

The Conference discussions of discovery problems extended beyond the costs, delays, and abuses imposed by overbroad discovery demands to include those imposed by discovery responses that do not comply with reasonable obligations. While the defense-side lawyers reported routine use of overbroad and excessive discovery demands, plaintiff-side lawyers reported practices such as "stonewalling" and the paper and electronic versions of "document dumps," accompanied by long delays, overly narrow interpretations of discovery requests, and motions that require expensive responses from opposing parties and that create delay while the court rules.

Privilege logs were identified as both a cause of unnecessary expense and delay and a symptom of the dysfunction that can produce these problems. Privilege logs are expensive and time-consuming to generate, more so since electronic discovery increased the volume of materials that must be reviewed. Defense-side lawyers reported that after all the work and expense, the logs are rarely important in many cases. Plaintiff-side lawyers reported that many logs are designed to hide helpful documents behind privilege claims that, if tested, are shown to be implausible. While Rule 26(g) already addresses this abuse of privilege logs, it may be that Rule 26(g) is too obscure in its location or insufficiently forceful in its expression and should be improved. Or it may be that Rule 26(g) is an example of an existing rule that judges and lawyers can be shown ways to use more

effectively. Others suggested that the Civil Rules should explicitly permit more flexible approaches to presenting privilege logs and to testing their validity, combined with judicial and legal education about useful approaches. An example of such an approach would be to have a judge supervise sampling techniques that select log documents for a determination of whether the privilege claims are valid. Federal Rule of Evidence Rule 502, enacted in 2008, provides helpful support for further work in this area.

In 2000, the basic scope of discovery defined in Rule 26(b)(1) was amended to require a court order finding good cause for discovery going beyond the parties' claims or defenses to include the subject matter involved in the action. The extent of the actual change effected by this amendment continues to be debated. But there was no demand at the Conference for a change to the rule language; there is no clear case for present reform. There is continuing concern that the proportionality provisions of Rule 26(b)(2), added in 1983, have not accomplished what was intended. Again, however, there was no suggestion that this rule language should be changed. Rather, the discussion focused on proposals to make the proportionality limit more effective and at the same time to address the need to control both over-demanding discovery requests and under-inclusive discovery responses.

There was significant support across plaintiff and defense lines for more precise guidance in the rules on the obligation to preserve information relevant to litigation and the consequences of failing to do so. Large data producers, whether public or private, for profit or otherwise, made clear a sense of bewilderment about the scope of their obligations to preserve information for litigation and the importance of clear rules that will give assurance that compliance will avert severe sanctions for what in an electronic world are inevitable losses of information. The uncertainty leads to inefficient, wasteful, expensive, and time-consuming information management and discovery, which in turn adds to costs and delays in litigation. Clear guidance should be provided if it can be.

A Conference panel produced a proposal for "Elements of a Preservation Rule" that achieved a consensus on the panel. The proposal exemplifies many of the complexities that led the Advisory and Standing Rules Committees in developing the 2006 electronic discovery rules to at least defer enacting a rule to address them. One question is whether a rule can helpfully define the event that triggers a duty to preserve. Many cases find a duty to preserve before a lawsuit is filed, triggered by events that give "reasonable notice" that litigation is likely. It is unclear that a rule drafted in such general terms would provide the guidance asked for. Careful consideration must be given to whether it is proper to frame a rule addressing preservation before any federal action is filed. Careful consideration must also be given to whether a rule can specify the topics on which information must be preserved in terms more helpful than the open-ended scope of discovery allowed by Rule 26(b)(1), or can helpfully specify the categories of persons or data sources subject to preservation duties. While all acknowledge the challenge, preservation obligations are so important that the Advisory Committee is committed to exploring the possibilities for rulemaking. The Discovery Subcommittee is already at work on these issues.

Spoliation sanctions are directly related to preservation obligations, but the sanctions questions raised at the Conference are more easily defined. Sanctions cover a wide range, from those that directly terminate a case to those that simply award the costs of providing proof by alternative means. An instruction that adverse inferences may be drawn from the destruction of evidence is somewhere in the middle as a matter of formal description, but many lawyers view it as close to the "case-terminating" pole. The circuits divide on the degrees of culpability required for various sanctions. Some allow the most severe sanctions only on finding deliberate intent to suppress evidence. Others allow an adverse inference instruction on finding simple negligence. Conference participants asked for a rule establishing uniform standards of culpability for different sanctions. These issues are also important and will be explored. Depending on the direction taken, it may prove

desirable to enlist the Evidence Rules Advisory Committee in the effort. The Discovery Subcommittee is already at work on possible solutions to the lack of uniformity in sanctions decisions.

The initial disclosure obligations imposed by Rule 26(a)(1) were also the subject of Conference attention. The 1993 version of the initial disclosure rule required identification of witnesses and documents with favorable and unfavorable information relevant to disputed facts alleged with particularity in the pleadings. It also expressly allowed districts to opt out of the initial disclosure requirement by local rule. Many courts opted out. The rule was amended in 2000 to require national uniformity, but reduced the information that had to be disclosed to what was helpful to the disclosing party. A number of Conference participants argued that the result is a rule that is unnecessary for many cases, in which the parties already know much of the information and expect to do little or no discovery, and inappropriate or unhelpful for more heavily discovered cases, in which discovery will of necessity ask for identification of all witnesses and all documents. Some responded that a more robust disclosure obligation is the proper approach, pointing to the experience in the Arizona state courts. Others argued for entirely or largely abandoning the initial disclosure requirement.

Another category of discovery rule proposals continued the strategy of setting presumptive limits on the number of discovery events. This strategy has proven successful in limiting the length of depositions and the number of interrogatories. Many suggested limiting the number of document requests and the number of requests for admission. Other suggestions were to limit the use of requests for admission to authenticating documents, and to prohibit or defer contention interrogatories. Some of these suggestions build on state-court experience and should be studied carefully.

Other discovery proposals are more ambitious. One, building on the model of the Private Securities Litigation Reform Act, would require that discovery be suspended when a motion to dismiss is filed. Another, more sweeping still, would impose the costs of responding to discovery on the requesting party. More limited versions of a requester-pays rule would result in cost sharing at least when discovery demands prove overbroad and disproportionate or the requesting party loses on the merits. Such proposals are a greater departure from the existing system and would require careful study of their likely impact beyond the discovery process itself. An assessment of the need for such departures depends in part on whether the types of rule changes sketched above, together with other changes to provide more effective enforcement of the rules, will produce the desired improvements, or whether a more thorough shift is required.

C. Case Management

The empirical findings that the current rules work well in most cases bear on the question of whether “simplified rules” should be adopted to facilitate disposition of the many actions that involve relatively small amounts of money. A draft set of “simplified rules” designed to produce a shorter time to trial, with less discovery and fewer motions, for simpler cases with smaller stakes, was prepared several years ago. It was put aside for lack of support. One reason was the response—supported by the experience in federal courts that adopted “case-tracking” by local rule, and in some state courts using “case-tracking”—that few lawyers would opt for a simplified track and that many would seek to opt out if initially assigned to it. Another reason was that the existing case-management rules, including Rule 16, allow a court to tailor the extent of discovery and motions to the stakes and needs of each case. There was widespread support at the Conference for reinvigorating the case-management tools that already exist in the rules. The question is whether there should be changes in those rules or whether what is needed are changes in how judges and lawyers are educated and trained to invoke, implement, and enforce those rules.

Pleas for universalized and invigorated case management achieved strong consensus at the Conference. Many participants agreed that each case should be managed by a single judge. Others championed the use of magistrate judges to handle pretrial work. There was consensus that the first Rule 16 conference should be a serious exchange, requiring careful planning by the lawyers and often attended by the parties. Firm deadlines should be set, at least for all events other than trial; there was some disagreement over the plausibility of setting firm trial dates at the beginning of an action. Conference participants underscored that judicial case-management must be ongoing. A judge who is available for prompt resolution of pretrial disputes saves the parties time and money. Discovery management is often critical to achieving the proportionality limits of Rule 26. A judge who offers prompt assistance in resolving disputes without exchanges of motions and responses is much better able to keep a case on track, keep the discovery demands within the proportionality limits, and avoid overly narrow responses to proper discovery demands.

Several suggestions were made for rule changes that would make ongoing and detailed judicial case-management more often sought and more consistently provided. One suggestion was to require judges to hold in-person Rule 16 conferences in cases involving represented parties, to enable a meaningful and detailed discussion about tailoring discovery and motions to the specific cases. Other suggestions sought to reduce the delays encountered in judicial rulings on discovery disputes, which add to costs and overall delays, by making it easier and more efficient for judges to understand the substance of the dispute and to resolve it. One example would be having a rule-based system for a prompt hearing on a dispute—a pre-motion conference—before a district or magistrate judge, before the parties begin exchanging rounds of discovery motions and briefs, to try to avoid the need for such motions or at least narrow the issues they address.

Other Conference suggestions expressed wide frustration in overall delays by judges in ruling on motions. This problem extends to the amount and distribution of judicial resources, which are well beyond the scope of rule amendments. But some of these problems may be susceptible to improvement by changes in judicial and lawyer training.

IV. THE NEED FOR STRATEGIES IN ADDITION TO RULE AMENDMENTS

A. Judicial and Legal Education

The many possibilities for improving the administration of the present rules can be summarized in shorthand terms: cooperation; proportionality; and sustained, active, hands-on judicial case management. Many of the strategies for pursuing these possibilities lie outside the rulemaking process. The Rules Committees do not train judges or lawyers, write manuals, draft practice pointers, or develop “best practices” guides. But the Rules Committees are eager to work with those responsible for such efforts and to ensure that the rules, the training, and the supporting materials all reinforce each other.

The FJC was deeply involved in the Conference and has already begun planning for judicial education to implement some of the lessons learned about the additional work judges must do to work towards cooperation, proportionality, and effective case management. The FJC is exploring changes in how both newly appointed and experienced judges are trained in effective methods for managing electronic discovery and in how recent changes in the practice can best be met by corresponding changes in case management.

These efforts will be supported by the development of effective and readily available materials for lawyers, litigants, and judges to use in a variety of cases. Such materials can include pattern interrogatories and production requests for specific categories of litigation. Such pattern discovery requests would be presumptively unobjectionable and could save both sides time and

money, and spare the court some of the skirmishing that now occurs. Promising work developing pattern interrogatory requests for employment discrimination actions is already underway as a result of the Conference. This work involves both plaintiff and defense lawyers cooperating to ensure that the form discovery requests reflect the views of both sides. Other categories of litigation would benefit from similar efforts. Similarly, standard protective orders that have been tested in practice could be a more time- and cost-effective alternative to each firm or lawyer inventing different forms of orders that in turn can generate litigation.

Bar organizations and legal research groups have also expressed a willingness to work on educating and training lawyers and clients in methods to promote cooperation consistent with vigorous advocacy and changes in litigation practice and behavior necessary to achieve proportionality in discovery. The existing rules provide many opportunities and incentives to cooperate, including the Rule 26(f) party conference, the Rule 16 scheduling orders and pretrial conferences, and the “meet and confer” obligations for many motions. While many lawyers honor and seize these opportunities, others do not, whether because of mistaken notions of the duties of “zealous advocacy,” clients who dictate “scorched earth” practices, self-serving desires to expand their own work, or lack of training and experience. Professional bar organizations have tried to address these problems by adopting standards of cooperation. It will be important to encourage widespread recognition and implementation of these standards. In addition, groups such as the Sedona Conference, which was an early leader in identifying the need to adapt basic litigation strategies to manage electronic information, and the IAALS, are committed to continuing to develop and improve standards that are specifically responsive to continuing changes in technology and business that profoundly affect litigation.

The education and training must include not only lawyers, but also clients. In this respect, one area many have noted as important is the lack of preparation by even large and sophisticated data producers for electronic discovery, which has in turn contributed to the problems lawyers and judges have encountered. Bar and other organizations specifically representing clients will have an important role in such efforts.

B. Pilot Projects and Other Empirical Research

One form of empirical research will be pilot projects to test new ideas. An example of a promising project is the Seventh Circuit Electronic Discovery Pilot Program, which has convened large numbers of lawyers and judges to educate the bench and the bar on the problems of discovering electronically stored information and to devise improved practices. That pilot program developed and tested Principles Relating to the Discovery of Electronically Stored Information.³ The FJC will study this pilot program and the accompanying principles to identify successful strategies that can be adopted elsewhere, to develop useful materials for judges and lawyers, and to improve judicial and legal education on managing electronic discovery.

The state courts are an important source of information about experience with different rules and approaches. The Conference included detailed research on practices in Arizona and Oregon.

³ The committee overseeing the pilot program has released a report on phase one of the program, which explains the process and reasoning behind the development of the principles and provides preliminary results of information gathered on the application of the principles in cases during phase one of the pilot program. See SEVENTH CIRCUIT ELECTRONIC DISCOVERY PILOT PROGRAM COMMITTEE, SEVENTH CIRCUIT ELECTRONIC DISCOVERY PILOT PROGRAM REPORT ON PHASE ONE (2010), available at <http://civilconference.uscourts.gov> (follow “Library” hyperlink; then follow “Seventh Circuit Electronic Discovery Pilot Program” hyperlink on page 4) (last visited September 1, 2010).

For example, Arizona goes far beyond federal practice by requiring highly detailed initial disclosures. Oregon continues to have fact pleading. Continued study of state practice will be important.

V. SPECIFIC IMPLEMENTATION STEPS

The 2010 Conference has provided more than could have been expected or even hoped for. The immediate task for the Rules Committees is to prioritize the many issues identified in the Conference for further study. The Conference highlighted two particular areas that merit the Rules Committees' prompt attention: (1) discovery in complex or highly contested cases, including preservation and spoliation of electronically stored information; and (2) review of pleading standards in light of the recent Supreme Court cases. The Advisory Committee has initiated work in these areas. The Discovery Subcommittee chaired by Judge David Campbell has begun considering rules to provide better guidance on preservation and spoliation of evidence, particularly with respect to electronically stored information. The Chair and Reporter of the Advisory Committee have begun exploring rule responses that might be developed as current pleading issues become better focused. On a broader basis, a new subcommittee chaired by Judge John Koeltl has begun to study the many different kinds of projects needed to capitalize on the insights gained from the Conference.

Some aspects of the work, such as judicial education, the development of supporting materials, and the development and implementation of pilot projects will be coordinated with the FJC. The FJC has also already begun working to implement some of the insights and lessons the Conference provided. Education programs, best practices guides, and different kinds of supporting materials for the bench and the bar will help achieve better use of present court rules. Research, empirical data, and pilot projects, such as the Seventh Circuit Electronic Discovery Pilot Program, will continue to provide the foundation for sound rule amendments and for changes in judicial education.

Bar and legal research organizations are already at work on developing their own training and supporting materials for lawyers and litigants to promote some of the lessons learned. As one example, NELA and the American College, with the IAALS, are working to develop pattern discovery requests for employment cases.

All of this will require continuing hard work by the Rules Committees to carry forward the momentum provided by the broad-based and carefully considered observations and proposals. The agenda for the Advisory Committee is demanding. But the goals are as old as the Federal Rules of Civil Procedure. They are the goals of Rule 1: to secure the just, speedy, and inexpensive determination of every civil action and proceeding in the federal courts.

Agenda
2010 Litigation Review Conference
Duke Law School
May 10-11, 2010

Monday, May 10, 2010

7:30-8:30 Continental Breakfast

8:30-8:45 **Welcome and Introduction:** Judges Lee Rosenthal, Mark Kravitz , and John Koeltl

8:45-10:15 **The Empirical Research: Overview of Satisfaction or Dissatisfaction with the Current System, and Suggestions for Change Raised by the Data**

Moderator: Judge Barbara Rothstein

A. The FJC Data: Judge Barbara Rothstein, Dr. Emery Lee, and Tom Willging

B. The Litigation Section Data: Lorna Schofield, Dr. Emery Lee, and Tom Willging

C. The NELA Data: Rebecca Hamburg

D. Follow Up Lawyer Interviews: Dr. Emery Lee, Tom Willging

10:15-10:30 BREAK

10:30-11:45 **The Empirical Research: Continued**

Moderator: Justice Rebecca Kourlis

E. Vanishing Jury Trial Data: Prof. Marc Galanter

F. The ACTL/IAALS Data: Justice Rebecca Kourlis, Paul Saunders

G. LJC Cost Data: Alexander Dimitrief

H. RAND Data: Nicholas Pace

I. Commentary on the Presented Research: Prof. Marc Galanter, Prof. Theodore Eisenberg, Jordan Singer

11:45-1:00 **Pleadings and Dispositive Motions: Fact Based Pleading, Twombly, Iqbal, Efforts to Decide Cases on the Papers Either at the Beginning of the Process or at the End of the Process**

Moderator: Prof. Arthur Miller

Participants: Judge Jon Newman, Prof. Adam Pritchard, Prof. Geoffrey Hazard, Daniel Girard, Sheila Birnbaum, Jocelyn Larkin

1:00-2:00 LUNCH

2:00-2:30 Speaker: Former Deputy Attorney General David Ogden

2:30-3:45 **Issues with the Current State of Discovery: Is There Really Excessive Discovery, and if so, What are the Possible Solutions?**

Moderator: Elizabeth Cabraser

Participants: Judge David Campbell, Magistrate Judge J. Paul Grimm, Jason Baron, Patrick Stueve, Stephen Susman, Prof. Catherine Struve

3:45-5:00 **Judicial Management of the Litigation Process: Is the Solution to Excessive Cost and Delay Greater Judicial Involvement?**

Moderator: Judge Patrick Higginbotham

Participants: Judge Michael Baylson, Magistrate Judge J. David Waxse, Jeffery Greenbaum, Prof. Judith Resnik, William Butterfield, Paul Bland

Tuesday, May 11, 2010

7:30-8:30 Continental Breakfast

8:30-9:45 **E-Discovery: Discussion of the Cost Benefit Analysis of E-Discovery and the Degree to Which the New Rules are Working or Not**

Moderator: Gregory Joseph

Participants: Judge Shira Scheindlin, Magistrate Judge John Facciola, John Barkett, Thomas Allman, Joseph Garrison, Daniel Willoughby, Jr.

9:45-10:30 **Settlement: Is the Litigation Process Structured for Settlement Rather than Trial and Should it Be? Should the Answers Depend on the Complexity of the Case including Whether the Action is a Class Action?**

Moderator: Judge Brock Hornby

Participants: Judge Paul Friedman, Prof. Richard Nagareda, Prof. Robert Bone, James Batson, Loren Kieve

10:30-10:45 BREAK

10:45-11:45 **Perspectives from the Users of the System: Corporate General Counsel, Outside Lawyers, Public, and Governmental Lawyers**

Moderator: Judge John Koeltl

Participants: Alan Morrison, Amy Schulman, Thomas Gottschalk, Ariana Tadler, Anthony West, Joseph Sellers

11:45-1:00 **Perspectives from the States: Different Solutions for Common Problems and their Relative Effectiveness; IAALS Pilot Results**

Moderator: Justice Andrew Hurwitz

Participants: Justice Kourlis, Paula Hannaford-Agor, Prof. Seymour Moskowitz, William, Judge Henry Kantor

- 1:00-1:30 LUNCH
- 1:30-2:00 Speaker: Chief Judge James Holderman
- 2:00- 3:15 **The Bar Association Proposals: ACTL, ABA Litigation Section, NYCBA, AAJ, LCJ, DRI**
- Moderator: Lorna Schofield
- Participants: Lorna Schofield, David Beck, Wendy Schwartz, Bruce Parker, John Vail
- 3:15-4:30 **Observations from Those Involved in the Rule Making Process over the Years**
- Moderator: Dean David Levi
- Participants: Judge Anthony Scirica, Judge Patrick Higginbotham, Prof. Paul Carrington, Prof. Daniel Coquillette, Prof. Arthur Miller
- 4:30-5:00 **Summary and Conclusions:** Judge Lee Rosenthal, Judge Mark Kravitz, Prof. Edward Cooper, Prof. Rick Marcus

Conference Panelists, By Panel
2010 Litigation Review Conference
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Welcome and Introduction:

- Judge Lee Rosenthal (United States District Court Judge from S.D. Tex.; Current Chair of the Committee on Rules of Practice and Procedure; Former Chair of the Advisory Committee on Civil Rules)
- Judge Mark Kravitz (United States District Court Judge from D. Conn.; Current Chair of the Advisory Committee on Civil Rules)
- Judge John Koeltl (United States District Court Judge from S.D.N.Y. ; Current member of the Advisory Committee on Civil Rules)

Empirical Research Panel #1:

- Judge Barbara Jacobs Rothstein (Director of the Federal Judicial Center; United States District Court Judge from W.D. Wash.)
- Dr. Emery Lee III (Senior researcher in the Federal Judicial Center)
- Tom Willging (Senior researcher in the Federal Judicial Center)
- Lorna Schofield (Partner at Debevoise & Plimpton; Current Chair of the ABA Litigation Section)
- Rebecca Hamburg (Program Director of the National Employment Lawyers Association)

Empirical Research Panel #2:

- Justice Rebecca Kourlis (Executive Director of the Institute for the Advancement of the American Legal System; Former Justice on the Colorado Supreme Court)
- Professor Marc Galanter (Professor of Law at University of Wisconsin-Madison and the London School of Economics and Political Science)
- Paul Saunders (Partner at Cravath, Swain & Moore LLP)
- Alexander Dimitrief (Vice President and Senior Counsel for Litigation and Legal Policy at General Electric)
- Nicholas Pace (Staff member of RAND Institute for Civil Justice)
- Professor Theodore Eisenberg (Professor of Law at Cornell Law School)
- Jordan Singer (Director of Research at the Institute for the Advancement of the American Legal System)

Pleadings and Dispositive Motions Panel:

- Professor Arthur Miller (Professor of Law at the New York University School of Law; Former Reporter to the Advisory Committee on Civil Rules)
- Judge Jon Newman (United States Court of Appeals Judge for the Second Circuit)
- Professor Adam Pritchard (Professor of Law at University of Michigan Law School)
- Professor Geoffrey Hazard (Professor of Law at Hastings College of Law)
- Daniel Girard (Managing partner of Girard Gibbs LLP; Current member of the Advisory Committee on Civil Rules)
- Sheila Birnbaum (Co-head of Skadden Arps Complex Tort and Insurance Group; Former member of the Advisory Committee on Civil Rules)
- Jocelyn Larkin (Deputy Executive Director of the Impact Fund)

Current State of Discovery Panel:

- Elizabeth Cabraser (Founding partner at Lieff, Cabraser, Heimann & Bernstein, LLP)
- Judge David Campbell (United States District Court Judge from D. Ariz.; Current member of the Advisory Committee on Civil Rules)
- Magistrate Judge J. Paul Grimm (United States Magistrate Judge from D. Md.; Current member of the Advisory Committee on Civil Rules)
- Jason Baron (Director of Litigation for the National Archives and Records Administration)
- Patrick Stueve (Founding partner of Stueve Siegel Hanson LLP)
- Stephen Susman (Founding partner of Susman Godfrey)
- Professor Catherine Struve (Professor of Law at University of Pennsylvania School of Law)

Judicial Management Panel:

- Judge Patrick Higginbotham (United States Court of Appeals Judge for the Fifth Circuit; Former Chair of the Advisory Committee on Civil Rules)
- Judge Michael Baylson (United States District Court Judge for E.D. Pa.; Current member of the Advisory Committee on Civil Rules)
- Magistrate Judge J. David Waxse (United States Magistrate Judge for D. Kan.)
- Jeffery Greenbaum (Partner at Sills Cummis & Gross P.C.)
- Professor Judith Resnik (Professor of Law at Yale Law School)
- William Butterfield (Partner at Hausfeld LLP)
- Paul Bland (Staff attorney at Public Justice)

E-Discovery Panel:

- Gregory Joseph (Principal of Greg P. Joseph Law Offices, LLC; President Elect of the American College of Trial Lawyers; Former member of the Advisory Committee on Evidence Rules)
- Judge Shira Scheindlin (United States District Court Judge from S.D.N.Y.; Former member of the Advisory Committee on Civil Rules)
- Magistrate Judge John M. Facciola (United States Magistrate Judge from D. D.C.)
- John Barkett (Partner at Shook, Hardy & Bacon L.L.P.)
- Thomas Allman (Former General Counsel of BASF Corporation)
- Joseph Garrison (Founding partner of Garrison, Levin-Epstein, Chimes, Richardson & Fitzgerald, P.C.)
- Daniel Willoughby, Jr. (Partner at King & Spalding)

Settlement Panel:

- Judge Brock Hornby (United States District Court Judge from D. Me.)
- Judge Paul Friedman (United States District Court Judge from D.D.C.; Former member of the Advisory Committee on Criminal Rules)
- Professor Richard Nagareda (Professor of Law at Vanderbilt University School of Law)
- Professor Robert Bone (Professor of Law at the University of Texas School of Law)
- James Batson (Partner at Liddle & Robinson, L.L.P.)
- Loren Kieve (Founding partner of Kieve Law Offices)

Users of the System Panel:

- Alan Morrison (Dean for Public Interest & Public Service at the George Washington University Law School)
- Amy Schulman (Senior Vice President and General Counsel of Pfizer Corporation)
- Thomas Gottschalk (Of counsel to Kirkland & Ellis; Former General Counsel at General Motors Company)
- Ariana Tadler (Partner at Milberg LLP)
- Anthony West (Assistant Attorney General, Civil Division, Department of Justice)
- Joseph Sellers (Partner at Cohen Millstein Sellers & Toll PLLC)

Perspectives from the States Panel:

- Justice Andrew Hurwitz (Justice on the Arizona Supreme Court; Current member of the Advisory Committee on Evidence Rules)
- Justice Rebecca Kourlis (Executive Director of the Institute for the Advancement of the American Legal System; Former Justice on the Colorado Supreme Court)

- Paula Hannaford-Agor (Director of the Center for Jury Studies, National Center for State Courts)
- Professor Seymour Moskowitz (Professor of Law at Valparaiso University School of Law)
- William Maledon (Partner at Osborn Maledon, P.A.; Current member of the Committee on Rules of Practice and Procedure)
- Judge Henry Kantor (Judge of the Circuit Court of the State of Oregon)

Bar Association Proposals Panel:

- Lorna Schofield (Partner at Debevoise & Plimpton; Current Chair of the ABA Litigation Section)
- David Beck (Founding partner of Beck, Redden & Secrest; Former member of the Committee on Rules of Practice and Procedure; Former President of the American College of Trial Lawyers)
- Wendy Schwartz (Partner at Reed Smith, LLP)
- Bruce Parker (Partner at Venable's Products Liability Practice Group)
- John Vail (Representative of American Association of Justice)

Rulemaking Panel:

- Dean David Levi (Dean of Duke University School of Law; Former United States District Judge from E.D. Cal.; Former Chair of the Committee on Rules of Practice and Procedure and the Advisory Committee on Civil Rules)
- Judge Anthony Scirica (United States Court of Appeals Judge for the Third Circuit; Former Chair of the Committee on Rules of Practice)
- Judge Patrick Higginbotham (United States Court of Appeals Judge for the Fifth Circuit; Former Chair of the Advisory Committee on Civil Rules)
- Professor Paul Carrington (Professor of Law at Duke University School of Law; Former Reporter to the Advisory Committee on Civil Rules)
- Professor Daniel Coquillette (Professor of Law at Harvard Law School and Boston College of Law; Reporter to the Committee on Rules of Practice and Procedure)
- Professor Arthur Miller (Professor of Law at the New York University School of Law; Former Reporter to the Advisory Committee on Civil Rules)

Summary and Conclusions:

- Judge Lee Rosenthal (United States District Court Judge from S.D. Tex.; Current Chair of the Committee on Rules of Practice and Procedure; Former Chair of the Advisory Committee on Civil Rules)
- Judge Mark Kravitz (United States District Court Judge from D. Conn.; Current Chair of the Advisory Committee on Civil Rules)

- Professor Edward Cooper (Professor of Law at University of Michigan School of Law; Reporter to the Advisory Committee on Civil Rules)
- Professor Rick Marcus (Professor of Law at Hastings College of Law; Associate Reporter to the Advisory Committee on Civil Rules)

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