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2010 CIVIL LITIGATION REVIEW CONFERENCE

Introduction

PROGRESS IN THE SPIRIT OF RULE 1

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The six articles that appear in this issue of the *Duke Law Journal* were prepared for the 2010 Civil Litigation Review Conference (Duke Conference), which was held at Duke University School of Law on May 10 and 11, 2010. The Duke Conference was sponsored by the Advisory Committee on Civil Rules at the request of the Standing Committee on Rules of Practice and Procedure (Standing Committee) of the Judicial Conference of the United States. It is helpful to place these articles in the context of the conference for which they were prepared.

The Federal Rules of Civil Procedure begin with the aspirational standard that the Rules "should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding."[1] The Rules provide the framework within which lawyers can litigate their cases until they are decided by motion, settled, or tried to the court or a jury. Wisely administered by

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1. FED. R. CIV. P. 1.

attentive judges and cooperative lawyers who seek to keep the costs of the litigation proportionate to the stakes—whether economic or otherwise—involved in the litigation, the process can achieve justice in every action.

But it is also plain that the system can be abused so that the goals of Rule 1 are not achieved. Plaintiffs can bring unmeritorious cases with the expectation that the burdens and risks of the litigation will produce unjustified settlements. Defendants can assert unfounded defenses or use the discovery process to wear down plaintiffs so that meritorious claims are never tried or settled on a reasonable basis. Although the costs of discovery should be proportionate to the stakes, whether economic or otherwise, discovery can be used for impermissible purposes such as increasing the burdens of the litigation to gain an unjustified advantage for the plaintiffs or the defendants.

Over the years there have been complaints that the costs and delays in the federal civil-litigation system were impeding rather than promoting the goals of Rule 1. The rulemakers have responded with varying amendments to the Federal Rules of Civil Procedure. Recently, the complaints appear to have escalated. In particular, in April 2008, a survey of the members of the American College of Trial Lawyers (ACTL), conducted jointly by the ACTL and the Institute for the Advancement of the American Legal System (IAALS), concluded that the American civil justice system, including the federal system, was "in serious need of repair."[2]

In late 2008, the Standing Committee, chaired by Judge Lee Rosenthal, asked the Civil Rules Advisory Committee (Rules Committee), chaired by Judge Mark Kravitz, to hold a conference on the issues of cost and delay in the federal civil-litigation system. In January 2009, Judge Kravitz appointed a Planning Committee for the conference, which came to be held at Duke University School of Law in May 2010.[3] The conference was the occasion for an extraordinary

2. ACTL & IAALS, INTERIM REPORT ON THE JOINT PROJECT OF THE AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM 3 (2008), *available at* http://www.actl.com/AM/Template.cfm?Section=Home&template=/CM/ContentDisplay.cfm&ContentID=3650.

3. Memorandum from Judge Mark R. Kravitz, Chair, Advisory Comm. on Fed. Rules of Civil Procedure, to Judge Lee H. Rosenthal, Chair, Standing Comm. on Rules of Practice & Procedure 1 (May 17, 2010), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV05-2010.pdf (discussing proposals from the Duke Conference on how to manage cost and delay in litigation); *see also* JUDICIAL CONFERENCE ADVISORY COMM. ON

outpouring of empirical research, scholarly commentary, and thoughtful input from judges, lawyers, academics, and users of the system, including the government, corporations, and groups representing individual litigants and public interest causes.

An important component of the Duke Conference was new empirical research that sought to determine the nature and extent of any problems in the system. A major contribution to that research was the survey by the Federal Judicial Center.[4] That research, which was supervised by Emery Lee III and Thomas Willging, is summarized in their article, *Defining the Problem of Cost in Federal Civil Litigation*.[5] The survey asked attorneys who were involved in cases that were closed in federal court in the fourth quarter of 2008 about those cases.[6] The survey is thus particularly authoritative, because it sought specific comments about specific cases rather than impressions about the system over a course of cases and years. More than 60 percent of the respondents reported that the disclosure and discovery in their closed cases generated the "right amount" of information,[7] and more than half of the respondents reported that the costs of discovery were the "right amount" in proportion to their clients' stakes in the closed cases.[8] The survey also reported that the median cost of discovery was very modest, but the costs of discovery in high-stakes litigation were, perhaps unsurprisingly, very high.[9]

The Duke Conference also considered the results of the ACTL/IAALS survey and of additional surveys of lawyers with respect to their views of the federal litigation system. These surveys included a survey of the members of the Litigation Section of the American Bar Association and a survey of the members of the

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CIVIL RULES & COMM. ON RULES OF PRACTICE & PROCEDURE, REPORT TO THE CHIEF JUSTICE OF THE UNITED STATES ON THE 2010 CONFERENCE ON CIVIL LITIGATION (n.d.), *available at* http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/$defaultview/9286E143BF0D4651852577BB004D4450/$File/Report to the Chief Justice.pdf (discussing the Duke Conference and its results).

4. EMERY G. LEE III & THOMAS E. WILLGING, FED. JUDICIAL CTR., NATIONAL, CASE-BASED CIVIL RULES SURVEY: PRELIMINARY REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES (2009), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/$file/dissurv1.pdf.

5. Emery G. Lee III & Thomas E. Willging, *Defining the Problem of Cost in Federal Civil Litigation*, 60 DUKE L.J. 765 (2010).

6. LEE & WILLGING, *supra* note 4, at 85.

7. *Id.* at 27 & fig.13.

8. *Id.* at 28 & fig.14.

9. *Id.* at 35–36.

National Employment Lawyers Association,[10] which generally represents plaintiffs in employment cases. These surveys tended to reflect greater dissatisfaction with the system than the Federal Judicial Center survey, although they were not based on specific cases. The views of such significant sectors of the bar are important data that must be considered in connection with any proposals for changes to the Rules. The conference also considered important new data on the costs of litigation for major corporations that were produced by the RAND Institute and by the Searle Center Survey of the Costs of Litigation.[11] It is plain that, although the cost of discovery in the median case may be reasonable and indeed low, the costs in high-stakes litigation can be enormous. One challenge for the rulemakers is to maintain the advantages of the system for those cases in which the costs are satisfactory, while at the same time assuring that the system treats appropriately cases in which the costs of the process may have grown unwieldy.

In addition to the empirical research, a major component of the Duke Conference was the production of scholarly papers from judges, lawyers, academics, and users of the system. Initially, there were five "seed" research papers to stimulate thought and discussion. Professor Arthur Miller did an extensive and thoughtful paper on pleadings, with an emphasis on the Supreme Court's recent decisions in *Bell Atlantic Corp. v. Twombly*[12] and *Ashcroft v. Iqbal*,[13] which has already been published in the *Duke Law Journal*.[14] Judge Patrick Higginbotham wrote a provocative paper criticizing the lack of trials in the federal civil-litigation process and questioning the role of the judge as manager rather than trial judge. That paper, *The Present*

10. These studies, as well as all of the emperical data, are available under the "Empirical Research" links at http://civilconference.uscourts.gov.

11. The Searle Center on Law, Regulation, and Economic Growth administered the survey, which was formulated by several civil justice reform groups. *See* LAWYERS FOR CIVIL JUSTICE, CIVIL JUSTICE REFORM GRP. & U.S. CHAMBER INST. FOR LEGAL REFORM, LITIGATION COST SURVEY OF MAJOR COMPANIES (2010), *available at* http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/$defaultview/33A2682A2D4EF700852577190060E4B5/$File/Litigation Cost Survey of Major Companies.pdf. The RAND data is unpublished.

12. Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).

13. Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009).

14. Arthur R. Miller, *From* Conley *to* Twombly *to* Iqbal*: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1 (2010).

Plight of the United States District Courts,[15] appears in this issue of the *Duke Law Journal*.

Three other papers also sparked discussion and made substantial contributions to the Duke Conference. Justice Andrew Hurwitz of the Arizona Supreme Court submitted a paper on the state experience with rules of civil procedure, *Possible Responses to the ACTL/IAALS Report: The Arizona Experience*.[16] An analysis of the state systems was a focus of part of the conference, with the expectation that the federal system could draw on the states' experiences with changes and improvements in rules of civil procedure. Elizabeth Cabraser contributed a paper on discovery from the plaintiff's perspective, *Uncovering Discovery*.[17] And Gregory Joseph wrote an important article on the need for rules to deal with the developing problems of e-discovery—in particular, rules for preservation of electronic documents and standards for sanctions for the destruction of such material—entitled *Electronic Discovery and Other Problems*.[18]

Although these articles were the genesis of the papers for the Duke Conference, many additional papers and studies were submitted as participants sought to engage in a dialogue in preparation for the conference. Ultimately, an astonishing number of papers was submitted. The papers are extraordinary not only for their number but also for the thoughtfulness of their contributions to the process of civil-justice reform. They include papers from many segments of the bar, the judiciary, and the academy, as well as from users of the system. They also include thorough reports from bar associations and legal groups that spent over a year studying the federal civil justice system and devising thoughtful suggestions for improvements. These groups include the Litigation Section of the

15. Patrick E. Higginbotham, *The Present Plight of the United States District Courts*, 60 DUKE L.J. 745 (2010).

16. Andrew D. Hurwitz, Possible Responses to the ACTL/IAALS Report: The Arizona Experience (2010) (unpublished manuscript), *available at* http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/$defaultview/D808196C5400988C85257648004568BC/$File/Justice Andrew Hurwitz, The Arizona Experience (Revised 4-5-09).pdf.

17. Elizabeth J. Cabraser, Uncovering Discovery (2010) (unpublished manuscript), *available at* http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/$defaultview/12C00D75EEE2711D8525764800454561/$File/Elizabeth Cabraser, Uncovering Discovery.pdf.

18. Gregory P. Joseph, Electronic Discovery and Other Problems (2010) (unpublished manuscript) (2009), *available at* http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/$defaultview/EE0CC8AFE81F5D90852576480045504B/$File/Gregory P. Joseph, Electronic Discovery and Other Problems.pdf.

American Bar Association, the ACTL, the Association of the Bar of the City of New York, the American Association for Justice, Lawyers for Civil Justice, and the Defense Research Institute. The results of pilot programs conducted in several states by the IAALS were also produced for discussion at the Duke Conference. This research will be the grist for the Rules Committee for years to come, as well as for judges, practitioners, and scholars interested in the improvement of the civil justice system. All of this research is available on the conference website, http://civilconference.uscourts.gov.

At the Duke Conference itself, there were eleven panels, spread over two days, that discussed the empirical research and various aspects of the civil litigation process, including pleadings, discovery, e-discovery, and settlement. Other panels provided perspectives from frequent litigants including corporations, public interest groups, lawyers representing plaintiffs, and the government; from state court judges and others familiar with state court approaches to common problems; from bar associations and legal groups; and from distinguished judges and professors who have been involved with the rulemaking process over the years. The insights from the various panels highlighted points of agreement and areas of substantial disagreement.

One area of substantial agreement was the need for active judicial management of litigation. The litigants and parties welcomed this involvement as a way of assuring that proceedings are conducted in such a way that their costs are proportionate to the stakes of the litigation. Active judicial management is also a means of assuring that there is early definition of the issues that are important to the resolution of the litigation, whether that resolution is by motion, settlement, or trial. If the case proceeds through discovery, the judge can attempt to ensure that discovery is appropriately limited to the needs of the particular case. The degree of judicial management will vary with the complexity of the case. The flexibility of rules that deal with all types and sizes of litigation—transsubstantive rules—allows the judge to fashion solutions tailored to the needs of the individual case. Professor Steven Gensler's thoughtful article, *Judicial Case Management: Caught in the Crossfire*,[19] explains the usefulness of such case management while at the same time highlighting objections to it.

19. Steven S. Gensler, *Judicial Case Management: Caught in the Crossfire*, 60 DUKE L.J. 669 (2010).

Judge Higginbotham's article cautions that district court judges are becoming managers, rather than the trial judges that they should be.[20]

A central issue for the discovery panel was whether discovery abuse exists and, if so, what should be done about it. As already noted, the empirical research by the Federal Judicial Center tended to indicate that in most cases attorneys were satisfied with the amount and proportionality of discovery, although other surveys indicated more dissatisfaction with the state of discovery. The division of views on the incidence of abusive discovery is reflected in the articles by John Beisner, *Discovering a Better Way: The Need for Effective Civil Litigation Reform*,[21] and Professor Paul Carrington, *Politics and Civil Procedure Rulemaking: Reflections on Experience*,[22] both of which appear in this issue. Beisner, writing on behalf of the U.S. Chamber Institute for Legal Reform, argues that the pretrial discovery process is "dysfunctional, with litigants utilizing discovery excessively and abusively."[23] Carrington, meanwhile, notes that complaints about the costs of discovery have existed for decades and may be due in part to laudable efforts to provide access to the courts for people who deserve to have their rights vindicated.[24] Carrington also points out that work of the Federal Judicial Center seems to indicate that the complaints about the costs of litigation have been overblown.[25]

The panel on discovery did reach a consensus that there are tools available in the current Federal Rules of Civil Procedure to deal with discovery abuse. Any discovery abuse, whether by plaintiffs or by defendants, is a concern to all those involved in the system—judges, lawyers, and clients. It burdens the system as a whole in addition to making individual cases more costly. Even if that abuse is concentrated in the most high-stakes litigation, it is a matter of concern that should be addressed. Although some Rules may warrant amendment to discourage discovery abuse and to assure that discovery is proportional, judges already have a substantial degree of discretion to curb abuse. Numerous speakers stressed that what is important is judicial education to assure that judges exercise the

20. Higginbotham, *supra* note 15.

21. John H. Beisner, *Discovering a Better Way: The Need for Effective Civil Litigation Reform*, 60 DUKE L.J. 547 (2010).

22. Paul D. Carrington, *Politics and Civil Procedure Rulemaking: Reflections on Experience*, 60 DUKE L.J. 597 (2010).

23. Beisner, *supra* note 21, at 549.

24. Carrington, *supra* note 22, at 623–34.

25. *Id.* at 612.

discretion available to them, together with a change in the culture for lawyers and clients. Both lawyers and clients must come to understand that cooperation is, in fact, the most effective and cost-efficient way to litigate cases.

Particular concerns were expressed about e-discovery at the conference, relating to the costs of the discovery itself, as well as the costs associated with the preservation of electronically stored information (ESI), to assure that a party or its counsel is not subjected to sanctions for destroying that information. The issue of increasing numbers of sanctions for e-discovery violations is the subject of the paper by Dan Willoughby, Jr., Rose Jones, and Gregory Antine, *Sanctions for E-Discovery Violations: By the Numbers*,[26] that appears in this issue. Given the enormous potential volume of ESI, the topic was a matter of great concern at the Duke Conference and the subject of a specific panel on e-discovery.[27] The panel, chaired by Gregory Joseph and consisting of distinguished judges and practitioners, reached a consensus that a rule addressing preservation (spoliation) would be a valuable addition to the Federal Rules of Civil Procedure.[28] The panel members also agreed that the Rules in general, and a preservation rule in particular, should treat huge cases, with enormous discovery, differently from all other cases.[29]

There is much to be done after the Duke Conference. The conference has provided a substantial amount of data and many thoughtful suggestions for substantial improvements in the process of federal civil litigation to achieve the aspirations of Rule 1. Participants came away from the conference enthused about the possibilities for improvement in the system, but with a full realization of the enormity of the tasks that lie ahead. For the rulemakers, there is the need to address concerns about the pleading standards and to determine whether anything should be done in this area. The Rules Committee is focusing on that subject, and the Federal Judicial Center is continuing to do research on the practical effects of the Supreme Court's decisions in *Iqbal* and *Twombly*. The Rules

26. Dan H. Willoughby, Jr., Rose Hunter Jones & Gregory R. Antine, *Sanctions for E-Discovery Violations: By the Numbers*, 60 DUKE L.J. 789 (2010).

27. Memorandum from Gregory P. Joseph to Judge John G. Koeltl 1–4 (May 11, 2010), *available at* http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/$defaultview/56CEC2792C3A77708525772D00519A7E/$File/E-Discovery Panel, Executive Summary.pdf.

28. *Id.* at 5.

29. *Id.*

Committee is also following up on the strong impetus from the Duke Conference to develop a new rule relating to e-discovery. But these are challenging projects that will require considerable effort to arrive at satisfactory language that resolves the often-conflicting concerns that have been raised. Finally, the Rules Committee is studying the myriad proposals for additional changes to the Rules that were made by the participants in the conference and the organizations that submitted their views to the conference.

For judges, the Duke Conference suggests that greater efforts should be made to understand and use the tools available for judicial management of litigation, to ensure that litigation is conducted in a way that keeps its costs proportional to the stakes involved, and to ensure that parties are given opportunities for trial if there are issues of fact and the clients desire to have them tried rather than settled.

The conference also has significant implications for members of the legal profession, both practicing lawyers and academics. Changes in the Rules can only go so far to curb abuse. Lawyers must come to appreciate their responsibility to conduct litigation in a cooperative fashion that gets to the heart of the matter without increasing expenses for the sake of burdening the opposition. Best practices were advanced at the Duke Conference, but for these to have an impact, lawyers must follow them, bar associations must propound them, and law schools must teach them.

This is an exciting challenge for all of us as we strive for the goal of Rule 1: "the just, speedy, and inexpensive determination of every action and proceeding."[30]

The members of the Advisory Committee on Civil Rules are very grateful to Duke University School of Law, and particularly to Dean David Levi, a former Chair of the Committee, for their hospitality and enormous efforts in making the Duke Conference a success. We are also appreciative of the editors and staff of the *Duke Law Journal* for publishing some of the papers from the conference. We hope that this issue will continue to generate enthusiasm for efforts to improve the federal civil-litigation process.

30. FED. R. CIV. P. 1.