The Federal Rules of Civil Procedure: An Illustration of the Tension between Access and Efficiency in American Courts

By

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A thesis submitted in partial fulfillment
of the requirements of the
University Honors Program
University of South Florida St. Petersburg

December 3, 2015

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University Honors Program
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Honors Thesis

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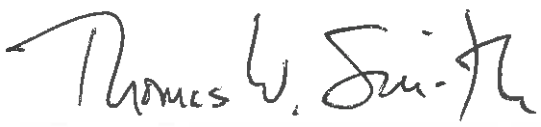

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ABSTRACT

Though they originated as an insubstantial entity, United States Federal Courts have become a virtual force as precedent setting tools to regulate various facets of society from business to civil rights. Much of this metamorphosis can be attributed to their procedural rulebook, the Federal Rules of Civil Procedure. Such a large component of forming the nation's legal interpretations and traditions warrants evaluation to reveal its underlying principles and goals. America's jurisprudential history is plagued with philosophical battles, among these is a continual debate over the principles of access versus efficiency in an attempt to pick a side. Over time, the answer has alternated and evolved but not without social effects. As such, being informed on any negative impact the functions of our court systems may have is important for academic, legal, and civic communities alike. This research aims to contribute to current literature by revealing through history and precedent the impact of procedure on litigation in federal courts while assessing its current state through rule amendments. Though founded on principles of access and ease, the Federal Rules of Civil Procedure have through modern re-interpretation, become a barrier to court access for average litigants. In practice, not only does this violate the spirit of the rules, but it is also a precarious possibility for those with challenging claims or suing more resourced defendants. This makes for a highly salient flaw which is revealed to be the result of a distinct modern leaning towards philosophical principles of efficiency, sustained in the most recent and highly contentious 2015 amendments. Tracing the process of producing these displays that responsive democracy in the arena of judicial rulemaking is alive and well, but not for those in favor of judicial access.

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I. Introduction

For nearly eighty years in United States district courts, the Federal Rules of Civil Procedure have functioned as the procedural rulebook for civil lawsuits. These detailed guidelines govern every step of litigation for which adherence is key to successful completion. Today, they are a regularly applied code and basic knowledge for legal professionals but these are more than mere rules. They simultaneously reflect jurisprudential principles and serve as a mechanism of social ordering. In order to fully understand the components and effects of modern civil procedure, it is necessary to reflect on history.

It would seem reasonable to view the procedures as a natural product of the evolution of American jurisprudence but history tells us otherwise. The current literature on procedural rules tells a complex story beginning in 13th century England, migrating to the colonies, and filtered by multiple actors before becoming a finished product which we still tailor from time to time. As a result, where the rules began in spirit is not their existence today.

The modern courts have their problems, oft-named everywhere from popular media to scholarly research. Procedure in particular is both a blessing and a curse. In federal courts, one of the largest hurdles for litigants is actually seeing their day in court. All in the name of efficiency, following complex procedure is crucial for a judge to even allow a case to enter the pre-trial phase, plagued with more potential catches at every turn. Even in a system where every resource is readily available, a basic knowledge is no longer enough to interpret it and be fully prepared.

A potential for disparate impact and a violation of original intent in terms of citizen access are apparent here, warranting further exploration to uncover and consolidate acting influences on this recent change. An understanding of the underlying principles answers the question of how they came to exist and why, while providing perspective on balancing the ideals. Today is the

culmination of centuries of trial and error in the legal profession, all of which can inform us on how to move forward in a positive functional manner in the future.

Historical Antecedents

A thorough explanation in terms of American history, naturally begins with the colonies. Colonial courts initially rejected the English system and in practice, pioneered new tactics based on it.[1] Beginning in the 13th century, English formal litigation took place in a dual court system of common law and chancery, commonly known as law and equity.[2] The common law courts were identifiable by their writ system, jury trials, and single issue pleading.[3] This formalistic system was centered on consistent and predictable law application based on proof where specific issues pointed to specific remedies.[4] Courts of chancery were for "exceptional cases" where rather than testimony the defendant's conscience was searched with the resolution being specific relief.[5] Such cases led to a larger litigation package (as joinders were allowed) while being less bound by procedure or precedent as the chancellor decided both law and fact as applicable.[6] Common law courts became known for their rigidity and chancery for their flexibility.

Once the states were established, Northern colonists distrusted the idea of separate courts.[7] As a result, the earliest colonial courts had few writs, wide jurisdiction, and encouraged high juror participation.[8] Naturally, as the nation and amount of litigation grew, more organized procedures were needed. English procedures slowly caught on with the colonies but the reliance on jurors

[1] Stephen Subrin, "How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective," *University of Pennsylvania Law Review,* no. 135 (1987): 926, accessed May 25, 2015.
[2] Ibid. p. 914
[3] Ibid. p. 914-915
[4] Ibid.
[5] Ibid. p. 918-919
[6] Ibid.
[7] Ibid. p. 926
[8] Ibid. p. 927

remained.[9] All colonies provided the right to a jury trial where law and fact were decided.[10] This served as a means for controlling judges and by having participants see the law at work, garnered support for laws themselves.[11]

After much contention over the democratic meaning of a judicial branch, the Constitution established the Supreme Court and lower court system which would remain a work in progress for some time. The Judiciary Act of 1789 was adopted during the first session of the First United States Congress to establish the federal judiciary, its jurisdiction, and districts.[12] At the time, many citizens "feared" an independent federal judiciary may threaten state courts and restrict civil liberties.[13] The act was a compromise between those who wanted federal courts to exercise full Constitutional jurisdiction and those who opposed any lower federal courts or wanted them severely restricted.[14] This was accomplished through provisions which effectively devolved some powers to state courts or created shared powers.[15] The change came with several procedural difficulties, the most notable being the operation of the courts themselves and procedural inconsistencies.[16] To improve the system, the Process Act of 1792 aimed to bring consistency and organization without crossing the states by authorizing federal courts to write rules for everything except actions at law.[17] The language of the act required a federal court to apply common law rules of pleading and procedure in effect in the states.[18] Meanwhile, state courts underwent their own metamorphosis, making decisions not only about whether to have a dual court system but also in

[9] See Subrin, "How Equity Conquered Common Law," 928-929
[10] Ibid.
[11] Ibid.
[12] "Judiciary Act of 1789," Library of Congress, accessed July 16, 2015.
[13] "History of the Federal Judiciary," Federal Judicial Center, accessed December 9, 2015.
[14] Ibid.
[15] Ibid.
[16] See Subrin, "How Equity Conquered Common Law," 931
[17] "Equity Jurisdiction in Federal Courts," Federal Judicial Center, accessed June 28, 2015.
[18] Ibid.

terms of procedure. Many sided with the English common law tradition and as a result, during the 19th century the courts picked up more restrictions.[19] At the same time, treatises and law schools replaced the apprenticing that previously trained lawyers, a change which put practical application behind formal education.[20]

Prominent New York lawyer David Dudley Field sparked the state-based movement away from common law pleading suggesting a then radical merger of law and equity to form a simpler litigation process.[21] His reasoning was that common law resulted in a system that obscured facts and legal issues while equity cases did not necessarily need a separate court.[22] The drafters using equity as a model, focused on creating a simple universal procedure and expanded remedies all with less documentation.[23] Though inspired by courts of equity, it still featured many elements of common law such as predictability garnered through minimal judicial or legal flexibility to preserve notions of limited government and states' rights.[24] The resulting "Field Code" was a code of civil procedure for New York state courts, one of the first sets of procedural rules created bearing the goal of universal application causing many states to follow suit.[25]

Though state courts were making strides, lawyers in federal courts still felt the frustration of working with the Process Act, mainly due to its lack of provisions for procedure where there were none.[26] Further, until 1842 when the Federal Equity Rules were adopted, it provided limited equity rules (as there were few equity cases), so judges deciding equity cases were directed to look to the precedents of the English Court of Chancery as suppliers of default equity rules.[27] In an

[19] See Subrin, "How Equity Conquered Common Law," 929
[20] Ibid.
[21] See Subrin, "How Equity Conquered Common Law," 932-933
[22] Ibid.
[23] Ibid. p. 933-934
[24] Ibid.
[25] Ibid. p. 939
[26] See Federal Judicial Center, "Equity Jurisdiction in Federal Courts"
[27] Ibid.

attempt to resolve the problem, Congress enacted the Conformity Act of 1872, instead requiring federal courts to conform their procedure to the current practice in their states.[28] Federal courts only had procedural autonomy over rules of evidence.[29]

Over time, this brought another issue for lawyers. By the 20th century, some states followed common law and others followed code procedure.[30] Some code procedure states merged law and equity procedure into a civil procedure system while federal courts preserved the dual system.[31] This was magnified by the Second Industrial Revolution, increased number of cases featuring interstate commerce and those heard under diversity jurisdiction.[32] Two cases very similar on the facts, even those arising under the same substantive federal law, under the Conformity Act could turn out differently due to the variation in state rules. For lawyers, there was a high risk of losing cases due to an abstract unknown rule. Partially as a result, firms tended to stay small and not cross state boundaries, generating an economic impact to the profession.[33]

During the last two decades of the 19th century, there were multiple attempts within the American Bar Association to have the Conformity Act replaced with uniform federal rules, all of which failed to win member approval.[34] However, in the early 1900s, when change became timely given the political climate, the ABA became a big part of launching the movement for reform. Roscoe Pound addressing the association in 1906, discussed the issue of rigid procedure as a judicial inhibition to substantive law, a new perspective which sparked the interest of many.[35] By

[28] Daniel Holt, "From Conformity to Uniformity: The Rules Enabling Act of 1934 and The Rise of Federal Judicial Authority," *The Federal Lawyer,* May 2012, 48-51, accessed July 5, 2015.
[29] Ibid.
[30] See Holt, "From Conformity to Uniformity," 48-51
[31] Ibid.
[32] See Federal Judicial Center, "Equity Jurisdiction in Federal Courts"
[33] Jack Guttenberg, "Practicing Law in the Twenty-First Century in a Twentieth (Nineteenth) Century Straightjacket: Something has to give," *Michigan State Law Review, n*o. 415 (2012): 420-422, accessed July 5, 2015.
[34] See Subrin, "How Equity Conquered Common Law," 943
[35] Ibid. p. 944

shifting the rhetoric from substance to procedure, he was able to gain support from the association's mainly conservative base.[36] At the time, the federal judiciary was being portrayed by progressives as an obstacle to progress that could be removed through measures forcing judicial restraint.[37] To counter the liberal debate over substantive ideas, conservatives found it convenient to start focusing on procedure.

In response to Pound's sentiments combined with the political climate, the ABA established committees which produced reports to suggest a remedy.[38] One focused on Uniform Judicial Procedure was established in 1911 and headed by Thomas Shelton, who produced an ABA resolution advocating uniform federal procedure.[39] He later served as Enabling Act lobbyist and though wavering on the role of judges, ultimately valued flexibility over judicial rigidity.[40] A partial win took place in 1912 with the Supreme Court's adoption of the new Federal Equity Rules drawing mainly on simplified practice and documentation.[41] This was oft cited by supporters as an example of the purpose and improvement that could take place under simplified, uniform practice.[42]

The ABA-led movement within the legal profession supported an authorization for federal court rulemaking led by the Supreme Court as an opportunity for not only a system steeped in uniformity but also flexible and response to lawyer's needs.[43] Though a noble pursuit, it was primarily a means of deflecting attention from conservative positions courts had taken on socioeconomic issues.[44] Calls for greater judicial efficiency were in reality attempts to reduce

[36] See Subrin, "How Equity Conquered Common Law," 946
[37] Ibid. p. 955
[38] Ibid. p. 946
[39] Ibid. p. 948-951
[40] Ibid.
[41] Ibid. p. 953
[42] Ibid.
[43] See Holt, "From Conformity to Uniformity," 48-51
[44] See Subrin, "How Equity Conquered Common Law," 956

outcry for popular control over the judiciary.[45] Many participants were indeed motivated as well by the potential financial incentives to harmonious state procedures and a single federal procedure.[46] Firms whose small size was born of necessity had much to gain from multistate practices during a time in which interstate business was increasing.

After Shelton's death in 1931, Senator Walsh of Montana, member of the Senate Judiciary Committee emerged as chief opponent of the measure, arguing that uniform procedure would be unduly burdensome to the profession to develop and track.[47] Partially due to this, the uniform federal rules bill failed to pass the Senate for over a decade.[48] This pattern continued until William Taft, supporter of uniform civil procedure from his presidency through tenure as a Supreme Court Chief Justice, made moves that opened space for reform.[49] Part of his efforts to increase efficiency included greater authority to assign judges nationwide, which led to the creation of the Conference of Senior Circuit Judges, later renamed the Judicial Conference of the United States in 1922.[50] This created an additional motivation for abandoning conformity, as judges could find themselves hearing cases in different states.[51] In 1933, Senator Walsh died before taking office as President Roosevelt's first Attorney General and Homer Cummings, strong proponent of the procedure bill, was appointed in his place.[52] With the president' support, he recommended its passage in 1934 and months later, the Rules Enabling Act passed both houses of congress.[53]

[45] See Subrin, "How Equity Conquered Common Law," 956
[46] Stephen Subrin, "Uniformity in Procedural Rules and the Attributes of a Sound Procedural System: The Case for Presumptive Limits," *Alabama Law Review, n*o. 49. (1997): 88, accessed June 13, 2015.
[47] See Holt, "From Conformity to Uniformity," 48-51
[48] Ibid.
[49] Ibid.
[50] Ibid.
[51] Ibid.
[52] Ibid.
[53] Ibid.

The first battle was over the big merger. Charles Edward Clark, dean of Yale Law School, co-authored, published, and widely disseminated an article arguing that federal procedural reform had to include a full merger of law an equity.[54] The rules, which were initially to be drafted by the Office of Attorney General came under control of the Supreme Court where an advisory committee was developed to draft them.[55] The formative group included Clark, along with lawyers, professors, and politicians of the time from all ideological perspectives.[56] During the drafting process, the "Pound-Clark" vision prevailed as the major theme, the idea that procedure should step aside and not interfere with substance.[57] Clark, a former civil trial lawyer with small case experience, perceived the need for government to play a more active role in society and procedural reform as a means for social control.[58] The insertion of this perspective into what was a deeply conservative initiative changed the underlying focus and direction of this project.

Clark's dominance in the drafting process was potentially due to sending his agenda in the form of a first draft in advance to the other committee members.[59] As a group, they built from these ideas and those in use by the states to develop a rulebook for civil procedure, making tough decisions and trying to predict the effect of each rule along the way. Their drafts were circulated nationwide for critique before becoming law in 1938 by means of congressional inaction.[60]

The Federal Rules of Civil Procedure unify law and equity, replacing common law and code pleading with a uniform system for all federal courts. This system of resolving legal disputes is based on notice pleading, allowing litigants to use the machinery of the courts to compel

[54] See Subrin, "How Equity Conquered Common Law ," 970
[55] Ibid. p. 970 - 971
[56] Ibid.
[57] Ibid. p. 973
[58] Ibid. p. 964-966
[59] Ibid. p. 973
[60] Ibid.

discovery of evidence and hold open testimony to prove the case.[61] It is less formal and technical in terms of requirements and application, meaning plaintiffs are less likely to face dismissal due to technicalities or language disparities because the details are left for later. This is an equitable notion, by nature, due to its focus on the legal issue in question rather than the ability of a litigant to construct a formal notice or argument. In addition, the rules introduced what is now an essential component of the modern process, pretrial conferences to help judges manage caseloads.[62]

In 1957, Congress amended the act creating the Judicial Conference of the United States to consolidate power for advising the Supreme Court on revisions to procedural rules.[63] They also appointed a standing committee and advisory committees for each set of federal procedural rules to generate efficiency and responsiveness to the needs of the profession.[64]

The rules have been revised every few years since the mid-1940s to the extent that today's rules in certain areas vary greatly from what the original drafters put together. In 2007, they were completely rewritten for ease of understanding but not substantive changes.[65]

Elements of Change

Central to the historical context of the federal rules development are the issues of federalism and states' rights. This centrality is proven by the fact that once FRCP becomes law, no further major reform takes place. Instead, amendments are only made directly to these rules. Many facets of them have since been adapted with the ostensible purpose of procedural ease, but always preserving the place of FRCP in federal courts. Historically speaking, such preservation

[61] Joseph Seiner, "The Trouble with Twombly: A Proposed Pleading Standard for Employment Discrimination Cases," *University of Illinois Law Review.* No. 4. (2009): 1016-1017, accessed June 28, 2015.
[62] See Subrin, "How Equity Conquered Common Law ," 981
[63] "FAQs: The Judicial Conference," United States Courts, accessed July 5, 2015.
[64] Ibid.
[65] Federal Rules of Civil Procedure, U.S. Code 28 (2015), § 1.

caused its lifespan to be longer than its predecessors which implies that this set of rules possess a successful element which the others did not. That element is general applicability.

From the beginning, the American system of dual federalism has impacted the very underpinnings of national governance in every manner. The origins of federal-state interactions are characterized by a distinct leaning towards states' rights. The Articles of Confederation lent few federal powers and the Supremacy Clause of the Constitution alone only gives the government some leverage power.[66] Ideologically, the background and political society were divided. The anti-federalists disliked Constitutional powers being divided in such a manner while the federalists saw states as impeding the development of commerce, private property, and strong federal government as key to hegemony.[67] The Bill of Rights manifested among other things as a compromise between the two sides of debate.[68]

The original leaning towards states' rights put into practice is what led to a patchwork of practices, rules, and regulations across the former colonies. Not only did this negatively impact citizens and businesspeople alike, but also trickled over to create an unnecessary burden on the legal profession and federal courts. In every predecessor to the Federal Rules of Civil Procedure, the procedure itself bound the federal courts to the states will regardless of how inconvenient or procedurally challenging.

Initially, proponents of change introduced rules based on the notion that if popular and useful, the states will pick them up and follow them. When these did not work out, they moved on to develop something new. The most extreme example of this being the Conformity Act, requiring

[66] "The Question of States Rights: The Constitution and American Federalism (An Introduction)", Exploring Constitutional Law, accessed June 13, 2015.
[67] See Exploring Constitutional Law, "The Question of States Rights"
[68] Ibid.

federal courts to adhere to procedural rules per state.[69] Though this clearly is a setup for failure, the legal profession worked hard to make it at least functional. Increasing differences between the court systems made it hard, especially once states began to abolish distinctions between law and equity jurisdiction while the Supreme Court resisted doing such a thing.[70] The most confusion resulted from the rise of cases in the post-World War 1 economic boom dealing with issues of business and commerce, magnifying every procedural issue being faced. [71]At the same time, the country experienced an ideological shift towards a strong federal government and questioned how many rights states really had instead of taking their expansive autonomy for granted.[72] Though the Great Depression reduced the amount of litigation, it led citizens and politicians alike to take a warmer view towards federal intervention.[73] The New Deal was just one example of how a strong national government could be a positive change for everyone. In the legal profession, the differences which complete state control of procedure allowed came to be seen as an impediment rather than natural. Ironically, federal regulation could actually be freeing.

Once the Enabling Act was passed in Congress, it was groundbreaking legislation. For the first time, the judicial branch was placed in complete procedural control of civil cases brought before federal courts. As a result, over the years which followed, the rules or a version of them, were adopted by each state. In a 1986 study, forty-eight years after the rules passage, twenty-two states were found to have replica procedural systems and a total of ten more with close systems differing by technicalities.[74] What we see here is once the federal government took leadership in their own courts to further efficiency and display leadership, state courts for the most part followed.

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[69] See Holt, "From Conformity to Uniformity," 48-51
[70] Ibid.
[71] See Federal Judicial Center, "Equity Jurisdiction in Federal Courts"
[72] See Exploring Constitutional Law, "The Question of States Rights"
[73] Ibid.
[74] John Oakley, "A Fresh Look at the Federal Rules in State Courts", *Nevada Law Journal, n*o. 3. (2002): 355-357, accessed July 5, 2015.

Of notable mention is the fact that the judiciary through the drafters did not take this as an opportunity to ignore what worked for the states. The big change of merging of law and equity which took place through the federal rules was borrowed from its successful practice in the states who did so, calling the combination a "civil action".[75] Federalism, in practice here, worked properly by having mitigating effect on both parties.

In Theory

The origins of the American system come from the English dual court system of common law and equity. These refer back to differing legal theories regarding the role of the courts in society and best practices for them. The common law theory is based on ancient custom and associated with a conservative nature, favoring procedure based in custom and judicial reason.[76] This produces consistent and predictable application of the law focused around proof to determine monetary damages. The judge's role here is minimal as the system provides both procedure and remedy. [77]

Equity as a theory originated as a medieval law of fairness in property rights providing the modern equivalent of specific performance.[78] It is based on individual justice by having cases decided according to the offender's conscience and taking a liberal view towards settling matters, allowing personal exemptions and focusing on flexibility.[79] This produces a somewhat random system because of the variety of factors and types of relief possible. As a result, the judge's role is

[75] See Federal Judicial Center, "Equity Jurisdiction in Federal Courts
[76] "Custom, Common Law, and Constitutionalism", University of Wisconsin-Madison, accessed May 31, 2015.
[77] See University of Wisconsin-Madison, "Custom, Common Law, and Constitutionalism"
[78] "History of Trusts", RBC Wealth Management, accessed July 5, 2015.
[79] See Subrin, "How Equity Conquered Common Law, " 918-920

critical, they are tasked with deciding law and fact along with its application under the circumstances.[80]

Much of the history of civil procedure is about the process of striking a balance or a leaning towards one of these court systems and thus their underlying theories of jurisprudence. The Federal Rules of Civil Procedure, in abolishing separate courts, spoke to the desire for a common law system with an equitable process. The drafters wanted a simple, streamlined process that was organized and efficient yet uncomplicated. Having the experience in which the rules were sometimes too numerous judicial officers themselves to decipher was convincing enough that enduring an incredibly formal system just to get a day in court was unnecessary. Due to this, they turned towards the idea that judges should be unhindered, rather than made to focus on containment of the case for speedy resolution.[81] This meant the style of pleading and correspondence with the court would require less documentation and legal articulation as those details were for later resolution.[82]

In other words, the main idea was that litigants in this system would not win by *presenting* a better case, they would win by *having* a better case. Though quite liberal in nature, this reform had roots in substantive notions of justice. Without procedural traps to look out for (or seek, depending on one's goal in litigation) litigants can focus more on having their day in court. Having this be less of a concern when trying to resolve a legal matter also maintains equal access to the system. An uncomplicated system is one the common citizen can participate in and have an opinion about. It is neither incomprehensible nor inaccessible, but subject to the scrutiny of the masses.

[80] See Subrin, "How Equity Conquered Common Law," 918-920.
[81] Joseph Seiner, "The Trouble with Twombly: A Proposed Pleading Standard for Employment Discrimination Cases," *University of Illinois Law Review, n*o. 4. (2009): 1016-1017, accessed June 28, 2015.
[82] Ibid.

The original nature of the Federal Rules of Civil Procedure was not only a very efficient change of theoretical pace for the federal courts but also a democratic one.

II. Original Practice under the Federal Rules

The Federal Rules of Civil Procedure were established primarily as a response to the patchwork of national rules governing the litigation process in federal courts. As a result of rule-making being enacted mainly per state or jurisdiction, the lack of cohesion made it difficult for litigants and their attorneys to successfully present claims before court. As the number of cases before federal courts increased along with the number of multistate law firms, professional and judicial advocates began to call for greater uniformity. The resulting movement culminated in the Rules Enabling Act of 1934 which enabled the federal judiciary to set their own rules for the first time. Four years later, the Federal Rules were approved and took immediate effect in courts nationwide. Since 1938, the utility and proper usage of various procedural establishments created by the rules have been put to question.

Scholars have divided the history of American civil procedure into four mainly distinct eras. The first begins with the nation's founding, the second with the introduction of code pleading, the third with the inception of the Federal Rules, and the fourth characterized by a major shift away from tenets of the Federal Rules beginning with late 20th century precedents. This chapter is a review of the third era's procedural tenets, the original cornerstones of legal practice under the Federal Rules.

Among its many functions, the Rules Enabling Act acted to forbid courts from enacting rules which would "abridge, enlarge, or modify any substantive right."[83] Establishing procedural order was intended to assist substantive law rather than influence its application. This concept is further explicated within the rules themselves. Rule one of the Federal Rules of Civil Procedure is

[83] Suzette Malveaux, "A Diamond in the Rough: Trans-Substantivity of the Federal Rules of Civil Procedure and its Detrimental Impact on Civil Rights," *Washington University Law Review*, no. 2 (2014): 459-460, accessed August 18, 2015.

a statement of intent, explaining that the rules are to "secure the just, speedy, and inexpensive determination of every action."[84] The Federal Rules, in their original state carried several intentions aimed at maintaining access and efficiency to and for the courts. Specific major elements of original practice reviewed in this section are uniformity and simplicity, pleading, discovery, the motion to dismiss, summary judgment, and judicial intervention. Following the review of original practice cornerstones is an exploration of precedents established under this era.

Uniformity and Simplicity

A major goal of the Federal Rules was simplicity for litigants, including less procedural technicalities and "traps" which could make or break a case.[85] Drafter Charles Clark emphasized that the rules would be a simple and flexible system of procedural steps in which the merits of the case are at all times stressed.[86] Not only would these procedures be simple to follow, but also apply in a uniform manner so that national practice could become more cohesive for the ease of judges, lawyers, and the public.[87] To accomplish this, the Rules Enabling Act established the Supreme Court as a rulemaking authority which would make rules to apply the same way in all cases.[88] Such a notion has been labeled by scholars as "trans-substantivity," the idea that the rules will apply to all federal civil action in the same manner regardless of the substantive right being pursued.[89]

[84] James Maxeiner, "The Federal Rules at 75: Dispute Resolution, Private Enforcement, or Decisions According to Law?" *Georgia State University Law Review*, no. 4 (2014): 994, accessed August 18, 2015.
[85] Maurice Rosenberg, "Federal Rules of Civil Procedure in Action: Assessing their Impact," *University of Pennsylvania Law Review*, no. 137 (1989): 2197, accessed July 5, 2015.
[86] See Maxeiner, "The Federal Rules at 75," 995
[87] See Malveaux, "A Diamond in the Rough," 460
[88] Arthur Miller, "From *Conley* to *Twombly* to *Iqbal:* A Double Play on the Federal Rules of Civil Procedure," *Duke Law Journal*, no. 1 (2010): 84, accessed June 28, 2015.
[89] See Malveaux, "A Diamond in the Rough," 456

Pleading

Historically, pleading helped organize a case so it could be understood in terms of what legal consequences would stem from the circumstances.[90] Over time, courts came to require varying extents of technicality within a plaintiff's complaint, the more extreme ones being what the rules drafters sought to avoid. The Federal Rules freed parties from the need to state their case in a specified manner or adhere to semantic requirements. [91]

Rule 8, General Rules of Pleading, explains what plaintiffs and defendants must follow.[92] Rule 8a states that pleading must contain "a short and plain statement of the grounds for the court's jurisdiction", "a short and plain statement of the claim showing that the pleader is entitled to relief" and "a demand for the relief sought."[93] Notably, the pleading standard does not require parties to establish a precise legal ground of claims.[94] In sum, the procedure for pleading focuses on "notice pleading," a non-technical manner of setting forth claims and defenses, focused on letting the opposing litigants know the cause of action being alleged and remedy demanded.[95] Creating a contrast from code pleading and common law, the parties are to plead facts and the court is to help parties identify the legal and factual issues.[96] This process can occur throughout the pretrial process, evidenced by Rule 15, which freely allowed amendment of pleadings "when the preservation of the merits of the action will be subserved thereby".[97]

[90] Arthur Miller, "Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Civil Procedure," *New York University Law Review*, no. 88 (2013): 300, accessed June 28, 2015.
[91] See Rosenberg, "Federal Rules of Civil Procedure in Action," 2207
[92] Federal Rules of Civil Procedure, §8.
[93] Ibid.
[94] See Maxeiner, "The Federal Rules at 75," 998
[95] See Rosenberg, "Federal Rules of Civil Procedure in Action," 2206
[96] See Maxeiner, "The Federal Rules at 75," 997
[97] Ibid. p. 1001

Discovery

Wide discovery essentially enabled parties to secure any information relevant to the subject matter at issue in the litigation.[98] The Federal Rules largest impact has been said to be the liberalization of pretrial discovery.[99] The drafters of the rules believed that mainly unrestricted discovery provisions would help the parties reach settlements or avoid trial and involve no great cost or burden to the system.[100] The premises were that more is better and discovery should be a lawyer's pursuit with judges taking as little part as possible.[101] Discovery serves as a device to narrow and clarify the basic issues between the parties, obtain evidence for use at trial, and secure information about evidence that may be used at trial.[102] The rules were to restrain the use of information but not the acquisition of it.[103] In general, unless limited by court order parties may obtain discovery regarding "any non-privileged matter that is relevant to any party's claim or defense".[104] The original text of Rule 26(a) invited what scholars have dubbed "unlimited discovery". [105]

Motion to Dismiss

Aware that among many meritious claims entering the federal court system would be some of a frivolous nature, the drafters sought to create mechanisms by which defendants could assert aid the court in disposing of claims. Rule 12(b) of the Federal Rules provides seven defenses that can be asserted by motion. These include lack of subject matter jurisdiction, lack of personal

[98] See Miller, "Simplified Pleading, Meaningful Days in Court, and Trials on the Merits," 289
[99] See Rosenberg, "Federal Rules of Civil Procedure in Action," 2203
[100] Ibid. p. 2205.
[101] Ibid.
[102] Charles Wright and Arthur Miller, "Federal Practice and Procedure", *West*, 3rd ed. (1998): §2001, pg. 18.
[103] Ibid.
[104] Federal Rules of Civil Procedure, §26
[105] Richard Marcus, "The Revival of Fact Pleading under the Federal Rules of Civil Procedure", *Columbia Law Review*, no. 3 (1986): 444, Accessed May 13, 2015.

jurisdiction, improper venue, insufficient process, insufficient service of process, failure to state a claim upon which relief can be granted, and failure to join a party.[106] Among these, Rule 12(b) (6), failure to state a claim upon which relief can be granted, is the main mechanism for the motion to dismiss.[107] It allows defendants to assert that the plaintiff has not submitted a complaint containing an actual allegation and/or a litigious claim, thus there are no grounds to move forward with litigation. This tool allows a judge who agrees with this assertion to quickly dispose of the case.

Summary Judgment

For the drafters, summary judgment was an exceptional remedy with a limited role.[108] The motion for summary judgment was designed for identifying trial worthy issues, in other words, cases in which the facts themselves were involved in the dispute.[109] According to Rule 56, Summary Judgment, "the court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law".[110] Also, the court may consider summary judgment on its own after "identifying for the parties material facts that may not be genuinely in dispute.[111] This ability is inspired by the idea that part of the court's job is to help parties identify the legal and factual issues of their case.

Judicial Intervention

Because the rules placed minimal requirements on parties and aimed to leave the ultimate determination of legal issues and application of law for the judge, a noteworthy amount of judicial

[106] Federal Rules of Civil Procedure, §12
[107] See Rosenberg, "Federal Rules of Civil Procedure in Action," 2197
[108] Stephen Subrin and Thomas Main, ""The Fourth Era of American Civil Procedure", *University of Pennsylvania Law Review*, no. 162 (2014): 1851, Accessed August 18, 2015.
[109] See Miller, "Simplified Pleading, Meaningful Days in Court, and Trials on the Merits," 312
[110] Federal Rules of Civil Procedure, §56
[111] Ibid.

freedom was necessary as well. The amount of judicial power devolved through application of procedure is seen in their wide ability to dispose of cases or claims.[112] For example, Rule 11 required attorneys to sign pleadings with the clients to avoid fictitious claims but also authorized judges to strike pleadings that were without good grounds and permitted them to sanction attorneys for violations.[113] As alluded in the previous section, summary judgment as well is an example of wide judicial discretion in disposing of cases as Rule 56 was a nearly new device at the time.[114] Even in cases for which the judge is not sole arbiter of the outcome, those tried by jury, judicial involvement is encouraged. Rules 49(c), 49, and 51 provide guidance and requirements for judges in cases tried by jury including juror instructions, verdict polling, and assistance in understanding their duties.[115]

Precedent in Action

Dioguardi v. *Durning* (1944) and *Conley* v. *Gibson* (1957) are the seminal third era cases in which the courts rule in favor with the procedures as outlines in the original Federal Rules. Both cases deal with pleadings rejected at the district court phase but ultimately upheld as acceptable by higher courts. The reasoning provided by the justices and their suggestions within created precedent setting opinions on the issue.

In *Dioguardi*, John Dioguardi, an immigrant and *pro se* plaintiff asserted grievances against the Collector of Customs of the Port of New York.[116] He was upset over the Collectors handling of a public sale of merchandise that he attempted to import from Italy.[117] Dioguardi drew

[112] See Maxeiner, "The Federal Rules at 75," 1002
[113] Ibid. p. 1000.
[114] See Maxeiner, "The Federal Rules at 75," 1002
[115] Ibid.
[116] See Miller, "From *Conley* to *Twombly* to *Iqbal*," 6
[117] Emily Sherwin, "The Jurisprudence of Pleading: Rights, Rules, and Conley v. Gibson", *Cornell Law Library,* no. 105 (2008): 86, accessed September 13, 2015.

his own complaint alleging factual circumstances in broken English which the district court dismissed for failure to state a claim.[118] Judge Clark, principal drafter of the Federal Rules, wrote for the Second Circuit in overturning the district court's Rule 12(b) (6) dismissal of Dioguardi's action, finding enough information within the complaint to satisfy the rule 8(a) (2) pleading standards.[119] Judge Clark's opinion noted that the rules no longer demanded "facts sufficient to constitute a cause of action" which was the old code pleading requirement.[120]

Thirteen years later, the new pleading standard was reconfirmed in *Conley* v. *Gibson*. At one time, *Conley* was the fourth most cited decision by the federal court and had been called "the most important decision on pleading of the twentieth century.[121] In Conley, a group of African-American railroad workers sued their union under the Railway Labor Act alleging that the collective bargaining agreement gave the employees certain protections from discharge and loss of seniority.[122] However, the railroad eliminated forty-five jobs held by African-American workers who were terminated or demoted and filled their positions filled with Caucasian workers.[123] The plaintiffs alleged that the union failed to give them protection comparable to Caucasian employees, thus failing to represent them "equally and in good faith".[124] The district court dismissed the complaint for lack of jurisdiction and the appellate court affirmed, but the Supreme Court found jurisdiction and further considered the sufficiency of the pleadings set forth in the complaint.[125]

Here, the court set forth the new standard for considering a motion to dismiss a complaint for failure to state a claim. The Supreme Court famously stated "a complaint should not be

[118] See Miller, "From *Conley* to *Twombly* to *Iqbal*," 6
[119] Ibid.
[120] Ibid. p. 7
[121] Joseph Seiner, "The Trouble with Twombly: A Proposed Pleading Standard for Employment Discrimination Cases", *University of Illinois Law Review*, no. 4 (2009): 1017, accessed June 28, 2015.
[122] Ibid.
[123] Ibid.
[124] Ibid. p. 1017-1018
[125] See Seiner, "The Trouble with Twombly," 1017-1018.

dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim..."[126] Pleadings only need to "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests" to survive a motion to dismiss.[127] Judges were to accept all factual allegations as true and draw all inferences in favor of the pleader.[128] The motion to dismiss was to be denied except in clear cases.[129] Applying that standard, the court found that the plaintiff's allegations if proven, could establish a breach of the union's statutory duty to represent their workers fairly and without hostile discrimination.[130]

[126] See Miller, "From *Conley* to *Twombly* to *Iqbal*," *7*
[127] Ibid. p. 4
[128] Ibid. p. 18
[129] Ibid.
[130] See Seiner, "The Trouble with Twombly," 1018

III. Modern Practice under the Federal Rules

The third era of civil procedure lasted for approximately fifty years following the rules inception. In function, it was the clearest representation of the rule drafters aims in revamping civil procedure both to prevent the confusion that results from non-uniformity and create an openness that would not shut out certain groups of litigants. Under original practice, litigation became two parties setting their claims before the court, the ultimate fact finder and applier of law, through an open and simple process. Under the rare circumstance that the claim was clearly without merit or presented a non-issue, the parties and the court had mechanisms by which to rid themselves of the matter. Overall, the third era was quite liberal in nature, reflecting an attitude of inclusion and openness that has not been seen since.

Modern practice under the Federal Rules of Civil Procedure composes the fourth era of civil procedure, characterized by a departure from the tenets of original procedure.[131] The fourth era is not marked by a distinct policy shift or official change in methods but rather an organic movement composed of individual judicial decisions and political rhetoric.[132] [133] This chapter is a review of the fourth era's procedural tenets, the modern cornerstones of legal practice under the Federal Rules.

The original purpose of the rules remains unchanged, rule one still provides that the rules are to "secure the just, speedy, and inexpensive determination of every action".[134] Only minor changes to the actual text governing civil procedure have been made yet major shifts in case outcomes have been observed. The specific major elements of modern practice reviewed in this

[131] Stephen Subrin and Thomas Main, "The Fourth Era of American Civil Procedure", *University of Pennsylvania Law Review*, no. 162 (2014): 1841, Accessed August 18, 2015.
[132] Ibid.
[133] See Miller, "From *Conley* to *Twombly* to *Iqbal*," 12-14
[134] See Rosenberg, "Federal Rules of Civil Procedure in Action: Assessing their Impact," 2197

section are uniformity and simplicity, pleading, discovery, the motion to dismiss, summary judgment, and judicial intervention. Following the review of modern practice is an exploration of precedents established under this era.

Uniformity and Simplicity

Clearly, simplicity for litigants has been a goal of the Federal Rules since their inception. The review of original practice showed that the drafters made simplicity and flexibility a priority in establishing these rules. The main reason the rules came to be was to accomplish trans-substantivity and foster the creation of an understandable guide to civil litigation.[135] They wanted to avoid procedural traps or the possibility of them being created for litigants. Under modern practice, uniformity has been somewhat reduced by the proliferation of local rules but simplicity is still a priority.[136] One procedural element which has seen increased usage in the fourth era, judicial case management, has even been said to have increased the courts efficiency in making litigation a smooth process.[137] Generally speaking, following the rules is a straightforward process, but meeting the varying burdensome standards can be troubling for litigants.

Pleading

The goal of pleading is to organize a case so it can be understood in terms of what legal consequences may stem from the circumstances.[138] The Federal Rules aimed to free parties from needing to state their case through an arduous process. Rule 8a in General Rules of Pleading states that pleading must contain "a short and plain statement of the grounds for the court's jurisdiction",

[135]See Malveaux, "A Diamond in the Rough," 456
[136] See Subrin, "How Equity Conquered Common Law," 911
[137] See Miller, "Simplified Pleading, Meaningful Days in Court, and Trials on the Merits," 293
[138] Ibid. p. 300

"a short and plain statement of the claim showing that the pleader is entitled to relief" and "a demand for the relief sought".[139] Originally, the Federal Rules only required notice pleading of facts with free amendment.[140]

In recent practice, however, judges have applied more demanding pleading standards resulting in more dismissals for failure to state a claim.[141] This new standard was established in *Bell Atlantic Corp* v. *Twombly* and has been named plausibility pleading.[142] Following this precedent, courts have been compelled to demand enough facts to state a claim to relief that is plausible on its face.[143] This has caused the function of a complaint to be transformed from a limited role to one which can determine the outcome of a case.[144] Rather than simply stating a claim, plaintiffs are now required to present a facially plausible allegation during the pretrial process and possibly before discovery. Reaching this standard varies by the judge's subjective interpretations of the claim and how much reliable information is included within.

Discovery

A substantial tenet of the original Federal Rules practice, designed to enable litigants to bring all necessary facts in support of their claim was wide discovery. The acquisition of information was not to be restrained outside of court orders and privileged matters.[145] [146]Over time, this has changed. Discovery is one of the few areas of the Federal Rules which has faced substantial amendment in modern practice. These amendments resulted from a philosophical movement away

[139] Federal Rules of Civil Procedure, § 8.
[140] See Maxeiner, "The Federal Rules at 75," 1001
[141] See Miller, "From *Conley* to *Twombly* to *Iqbal,"* 12
[142] Ibid. p. 14
[143] Ibid. (emphasis added)
[144] Ibid. p.19
[145] Charles Wright and Arthur Miller, "Federal Practice and Procedure", *West*, 3rd ed. (1998): §2001, pg. 18
[146] Federal Rules of Civil Procedure, § 26

from a trial on the merits and the open information which results to judicial gatekeeping and avoiding frivolous suits. [147]

In 1980 and 1983 rule 26(a) was amended, these changes authorized judges to limit "duplicative" or "unduly burdensome" discovery in an attempt to protect parties right to an economic decision on the merits.[148] In 1993, seeking to further the same objective, rule 30 was amended to place limits on depositions and rule 33 for interrogatories.[149] Finally, in 2000, rule 26(b)(1) was modified, limiting the scope of discovery to relevant material.[150] These amendments have transformed discovery from a largely unrestricted process to one that occurs under close watch and scrutiny of the courts. Again, the determination of what meets these new standards is determined in a subjective manner.

Motion to Dismiss

Rule 12(b)(6), known simply as "failure to state a claim", is a mechanism asserted by motion from the defense for dismissing cases of a frivolous nature without burdening the court system or opposing litigants.[151] [152] A remedy originally designed for specific circumstances, the motion to dismiss has now largely become a tool of judicial power. Plausibility pleading, explained in a previous section, was in part motivated by a desire to develop a stronger role for the motion to dismiss as a tool to filter the supposed excess of meritless litigation, deter abusive practices, and contain costs.[153] A defendant can now easily and quickly move pursuant to rule 12(b)(6) that the plaintiff has not put forth a plausible claim, as this is a lower pleading standard than originally

[147] See Miller, "Simplified Pleading, Meaningful Days in Court, and Trials on the Merits," 358
[148] See Marcus, "The Revival of Fact Pleading," 444
[149] See Miller, "Simplified Pleading, Meaningful Days in Court, and Trials on the Merits," 355
[150] Ibid.
[151] See Rosenberg, "Federal Rules of Civil Procedure in Action," 2197
[152] Federal Rules of Civil Procedure, §12
[153] See Miller, "From *Conley* to *Twombly* to *Iqbal,"* 53

needed. This makes the court determine factual matters and their merits at the beginning of the case, before discovery, giving the plaintiff a high burden to overcome. The standard for dismissal has moved from a simple lack of allegation or claim to the lack of a plausible claim, a change which promotes a high level of judicial discretion.[154]

Summary Judgment

Summary judgment began as a method of disposal for cases with no factual disputes. According to Rule 56, Summary Judgment, "the court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law".[155] Under original practice and today, this enables the court to be more efficient in quickly providing a remedy in cases that did not necessitate full, protracted, and expensive litigation. Summary judgment can be ordered after the motion of either party or as a result of the court's independent evaluation of the parties' claims.[156] Like the motion to dismiss, summary judgment faces greater usage as judicial discretion in determining a trial worthy issue becomes commonplace. When the remedy is appropriate is a much contended issue as the Summary Judgment Trilogy cases, explored later in this section demonstrate.[157] These and other judicial decisions made during modern practice have made the previous exceptional remedy a focal point of litigation.[158] Similar to the motion to dismiss, responding to a motion or acting independently, judges are prompted to review the merits of a case and possibly resolve trial-worthy issues without

[154] See Miller, "Simplified Pleading, Meaningful Days in Court, and Trials on the Merits," 339
[155] Federal Rules of Civil Procedure, §56
[156] Ibid.
[157] See Miller, "From *Conley* to *Twombly* to *Iqbal,"* 12
[158] See Subrin, "The Fourth Era of American Civil Procedure," 1851

having a trial.[159] Perhaps as a result, studies show that less than half the cases that encounter a summary judgment motion will survive it.[160]

Judicial Intervention

Under original practice, judicial intervention and case management were a priority for the drafters to enable. Much power was given in the ability to dispose of cases and guide juries in making their decisions. The main difference between original and modern practice here is again how the rules are being used. Once judges were empowered to made wider use of the latitude their positions afford, which came from both the judicial and political realm, they did so.[161] [162] Where judges could not simply do away with non-meritious litigation, they have sought to bring a certain organization and gatekeeping to the litigation process.

Mainly as a response to the 1960s litigation explosion, case management has become a big part of civil litigation, particularly in federal courts.[163] [164] This introduced meetings and conferences to discuss elements of the case and obtain judicial approval before moving forward.[165] Over time, meetings to arrange cases became meetings to settle cases as settlement and referral to alternative dispute resolution became commonplace early in the litigation process.[166] [167] With this, judges became the key players in moving dispute resolution from the courtroom to a host of other locations or simply not at all.

[159] See Miller, "Simplified Pleading, Meaningful Days in Court, and Trials on the Merits," 312
[160] See Subrin, "The Fourth Era of American Civil Procedure," 1852
[161] Ibid. p. 1863-1868
[162] See Marcus, "The Revival of Fact Pleading," 441
[163] See Miller, "Simplified Pleading, Meaningful Days in Court, and Trials on the Merits," 293
[164] See Subrin, "The Fourth Era of American Civil Procedure," 1859-1861
[165] Ibid.
[166] Ibid.
[167] See Miller, "Simplified Pleading, Meaningful Days in Court, and Trials on the Merits," 328

Precedent in Action

In Chapter 2, two seminal fourth era cases *Dioguardi* v. *Durning* (1944) and *Conley* v. *Gibson* (1957) were explored as examples of the real precedent setters under original practice. Their holdings essentially set notice pleading as the standard and limited the role of the motion to dismiss and summary judgment. This open concept of pleadings opened the court to a diverse group of litigation over time which has been theorized to contribute to the litigation explosion of the 1960s.[168] The judicial response to the litigation explosion consisted of efforts to constrain the size and scope of litigation before them.[169] This change of pace is represented by a number of fourth era cases, five of which are explored here in two distinct sets based on subject area.

The first set of cases is widely referred to as the "Summary Judgment Trilogy", it includes *Matsushita Electric Industrial Co* v. *Zenith Radio Corp*, *Anderson* v. *Liberty Lobby*, and *Celotex Corp* v. *Catrett*. This is a group of cases decided by the Supreme Court in 1986 focusing on the issue of summary judgment which brought forth the precedent lower courts have been following throughout modern practice.

Matsushita involved an action in Federal Court between 21 Japanese corporations that manufactured and sold consumer electronic products and American corporations that manufactured and sold television sets.[170] In dispute was an allegation that Matsushita illegally conspired to drive American firms from the market by engaging in a scheme to fix and maintain artificially high prices for television sets in Japan and fix and maintain low prices for the sets exported and sold to the United States.[171] This claim alleged a violation of multiple American

[168] See Miller, "Simplified Pleading, Meaningful Days in Court, and Trials on the Merits," 360
[169] See Miller, "From *Conley* to *Twombly* to *Iqbal,"* 53
[170] *Matsushita Elec. Industrial Co.* v. *Zenith Radio Corp.*, 475 U. S. 574 (1986)
[171] Ibid.

regulatory acts.[172] After years of discovery, Matsushita moved for summary judgment.[173] The District Court directed parties to file evidentiary statements, most of which was found inadmissible or failed to raise a genuine issue of material fact as to the existence of the alleged conspiracy.[174] As a result, summary judgment was granted in Matsushita's favor.[175] The Court of Appeals reversed the decision after determining that much of the evidence was admissible with reasonable evidence of conspiracy.[176]

On appeal to the Supreme Court, it was held that the evidence which the Court of Appeals relied on (a "five company rule" and minimum prices for exports) could not provide a claim.[177] According to the court, to survive a summary judgment motion, respondents must establish a genuine issue of material fact and if the factual content renders the claim implausible, they must offer "more persuasive evidence to support their claims than would otherwise be necessary".[178] The direct evidence on which the Court of Appeals relied was said to have "little relevance to the alleged conspiracy" and failed to consider the absence of a plausible motive to engage in predatory pricing.[179] In the absence of any rational motive to conspire, pricing practices, conduct overseas, and price-distribution agreements cannot create a genuine issue for trial.[180]

Decided the same day, *Celotex* further affirmed the court's crackdown on allegations lacking evidence. The case began as a widow's wrongful death action arising from her late husband's exposure to asbestos products manufactured or distributed by the Celotex

[172] *Matsushita Elec. Industrial Co.* v. *Zenith Radio Corp.,* 475 U. S. 574 (1986)
[173] Ibid.
[174] Ibid.
[175] Ibid.
[176] Ibid.
[177] Ibid.
[178] Ibid.
[179] Ibid.
[180] Ibid.

Corporation.[181] Months into the case, Celotex filed a motion for summary judgment alleging that during discovery the plaintiff failed to produce evidence supporting her allegation that the decedent was exposed to their products, arguing that the documents produced were inadmissible hearsay.[182] The court granted their motion but the Court of Appeals reversed on the grounds that Celotex failed to support its motion with negating evidence.[183]

On appeal to the Supreme Court, it was held that the Court of Appeals position was "inconsistent with the standard for summary judgment", that rule 56(c) summary judgment against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which they will bear the burden of proof at trial.[184] They further explain that as a result there is no genuine issue as to any material fact, such a failure of proof concerning an essential element of the nonmoving party's case renders all other facts immaterial.[185] It is noted that a motion for summary judgment can be made with or without supporting affidavits and the burden on the moving party may be discharged by simply showing that there is an absence of evidence to support the nonmoving party's case.[186] Obtaining summary judgment is as simple as pointing out through motion that the other party has not proven key information. The determination of what constitutes a key element to one's case remains open to judicial interpretation.

The last of the trilogy, *Anderson* originated as a libel suit in Federal District court between a nonprofit corporation and the publishers of a magazine alleged to have made statements which were false and derogatory.[187] Liberty Lobby alleged that Anderson's article portrayed the

[181] *Celotex Corp.* v. *Catrett*, 477 U. S. 317 (1986)
[182] Ibid.
[183] Ibid.
[184] Ibid.
[185] Ibid.
[186] *Celotex Corp.* v. *Catrett*, 477 U. S. 317 (1986)
[187] Ibid.

organization and its founder as neo-Nazi, anti-Semitic, racist, and Fascist.[188] After discovery, Anderson moved for summary judgment asserting that because the respondents were public figures, they were required to prove their case under the standards established in *New York Times* v. *Sullivan* and that actual malice was absent as a matter of law.[189] The District Court held that the public figure exemption (arising from *Sullivan*) applied and entered summary judgment on the grounds that the findings precluded a finding of actual malice.[190] The Court of Appeals held that the requirement that actual malice be proven need not be considered at the summary judgment stage thus it was improperly granted.[191]

On appeal to the Supreme Court, the Court of Appeals holding was overturned on the grounds that the Court of Appeals did not apply the correct standard in reviewing the District Court's grant.[192] Their decision states that at the summary judgment stage, the trial judge's function is only to determine whether there is a genuine issue for trial and there is no issue unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party.[193] According to the court, the appropriate inquiry is whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one sided that one party must prevail as a matter of law.[194] The movant has the burden of showing that there is no genuine issue of fact, but the plaintiff is not thereby relieved of his own burden of producing in turn evidence that would support a jury verdict.[195] It is noted that the mere existence of an alleged factual dispute between the parties cannot defeat an otherwise properly supported motion for

[188] *Celotex Corp.* v. *Catrett,* 477 U. S. 317 (1986)
[189] Ibid.
[190] Ibid.
[191] Ibid.
[192] *Anderson* v. *Liberty Lobby, Inc.,* 477 U. S. 242 (1986)
[193] Ibid.
[194] Ibid.
[195] Ibid.

summary judgment.[196] The trial judge's summary judgment inquiry as to whether a genuine issue exists is whether the evidence presented is such that a jury applying that evidentiary standard could reasonably find for either the plaintiff or the defendant.[197] In setting this precedent, the court essentially instructed judges to use their knowledge and experience to predict the possible case outcomes in order to decide if it can move forward to trial.

The second set of cases for examination are from the recent past and deal specifically with pleadings. *Bell Atlantic Corp* v. *Twombly* (2007) and *Ashcroft* v. *Iqbal* (2009) are the oft cited and contended recent precedent setting decisions which have created a major deviation from *Conley* and the tenets of original practice.

Bell began as a suit between subscribers of local phone and internet services and Bell Atlantic along with local phone companies alleging that Bell violated anti-trust laws by agreeing not to compete and exclude other competitors, allowing each local phone company to monopolize its own market.[198] The District Court dismissed their complaint concluding that parallel business conduct allegations alone do not state a claim under the Sherman Act, additional facts must be alleged which exclude independent self-interested conduct as an explanation.[199] The Court of Appeals held that Bell's parallel conduct allegations were sufficient to withstand a motion to dismiss because they failed to show that there is no set of facts that would permit plaintiffs to demonstrate the parallelism was a product of collusion rather than coincidence.[200]

On appeal to the Supreme Court it was decided that stating a Sherman Act claim requires a complaint with enough factual matter to suggest that an agreement was made, allegations alone

[196] *Anderson* v. *Liberty Lobby, Inc.,* 477 U. S. 242 (1986)
[197] Ibid.
[198] Ibid.
[199] *Ashcroft* v. *Iqbal,* 556 U. S. 662 (2009)
[200] Ibid.

will not suffice.[201] They explained that *Conley* described the "breadth of opportunity" to prove what an adequate complaint claims, but not the minimum standard of adequate pleading to govern a complaint's survival.[202] Under the plausibility standard, the plaintiff's claim of conspiracy comes up short. Because the plaintiffs did not bring their claims across the line from "conceivable to plausible", their complaint was dismissed.[203] In introducing this new standard, the court insisted that asking for plausible grounds would not impose a "probability requirement" at the pleading stage but raise a reasonable expectation that discovery will reveal evidence of illegal agreement.[204] This opinion in practice dismissed notice pleading, the major holding of *Conley* upon which courts relied for the liberal pleading standards of original practice and introduced the new plausibility standard.

Two year later, in *Ashcroft*, often referred to as *Iqbal*, Javaid Iqbal, one of thousands of Arab Muslim men detained during the FBI investigation into the September 11th terrorist attacks alleged violations of his statutory and constitutional rights during confinement.[205] The defendants which included representatives of the Department of Justice, Bureau of Prisons, and the FBI argued they should be protected through qualified immunity as they were acting in official government roles.[206] The District Court denied their motion to dismiss and rejected their defenses.[207] The Court of Appeals decided to affirm on most counts, but on the issue of whether his complaint was sufficient to survive a motion to dismiss using the *Twombly* standard concluded that it was.[208]

[201] *Ashcroft* v. *Iqbal*, 556 U. S. 662 (2009)
[202] Ibid.
[203] Ibid.
[204] Ibid.
[205] *Bell Atlantic Corp.* v. *Twombly*, 550 U. S. 544 (2007)
[206] Ibid.
[207] Ibid.
[208] Ibid.

On appeal to the Supreme Court, the Twombly standard was put to examination. The court explained that a claim has facial plausibility when "pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged".[209] It was further established that two principles underlie *Twombly.* First, the idea that a court must accept a complaint's allegations as true is inapplicable to "threadbare recitals" of a cause of action's elements, supported by conclusory statements.[210] Second, determining whether a complaint states a plausible claim is context-specific, requiring the reviewing court to draw on its experience and common sense.[211] As for the examination process, a court considering a motion to dismiss may begin by identifying allegations that because they are conclusions are not entitled to the assumption of truth. Legal conclusions must be supported by factual allegations.[212] Next, when there are well-pleaded factual allegations, a court should "assume their veracity" then determine whether they "plausibly give rise to an entitlement to relief".[213] Iqbal's complaint did not contain facts plausibly showing that the FBI policy was based on discriminatory factors. The court rejected three of his arguments including his claim that *Twombly* should be limited to its antitrust context.[214]

Because *Twombly* interpreted and applied rule 8 which governs pleading in all civil cases, according to the court, the case "applies to antitrust and discrimination suits alike".[215] Here, the court refuses to err in judgment regarding plausibility pleading and their interpretation of rule 8, affirming for future cases that there is to be no doubt as to the application of *Twombly's* new pleading standard, it is by default for all cases decided in federal courts.

[209] *Bell Atlantic Corp.* v. *Twombly,* 550 U. S. 544 (2007)
[210] Ibid.
[211] Ibid.
[212] Ibid.
[213] Ibid.
[214] Ibid.
[215] Ibid.

IV. Why Change?

The Federal Rules of Civil Procedure were a new and radical experiment for American jurisprudence, a distinct tilting of the power scales from the states to the federal government. The issue of states rights, as seen through judicial history, largely mirrored an ongoing political battle taking place across the nation. Though different eras saw different issues, the underlying question remained the same: how much power does the federal government need?

For decades, citizens and statesmen alike operated on the default presumption that federal courts located within state boundaries did not need formal procedural autonomy. One hundred and forty five years elapsed between the creation of lower federal courts through the Judiciary Act of 1789 and the decision to place the power to promulgate rules for those courts in the hands of the judiciary through the Rules Enabling Act of 1934. During that time, the nature of the legal profession and litigation were major factors nurturing the complacency inherent among judges and lawyers who worked under a patchwork of national rules. It was not until cases and law firms expanded in number and size that both sides realized something had to change for the sake of uniformity. In particular, change was necessary to secure the ability of lawyers to successfully fulfill their duty in court. It is impossible to well represent a client without knowing the procedural rulebook by which to play the litigation game as cases are often determined by one's ability to follow the rules more so than the existence of a legitimate claim for relief.

The Rules Enabling Act of 1934 sought to remedy the ailment from which early 20th century lawyers suffered by mandating that any rules promulgated by the Supreme Court would supersede those at the time governing federal courts from state to state.[216] Four years later, the

[216] "28 USC §2072: Rules of procedure and evidence; power to prescribe," Office of the Law Revision Council, accessed July 16, 2015.

Federal Rules of Civil Procedure's enactment instantly created actual uniformity in federal court procedure. These rules not only much such a groundbreaking achievement but also went a step further. The review of original practice under the rules revealed that they had a character, motive, and goal. The drafters purposefully created a largely liberalized, open system built around notice pleading and focused on getting a trial on the merits for every potentially legitimate claim. Pound believed that the formalism inherent in the common law writ system with its rigid procedural steps hindered the "just application of substantive law" and its adaptation to modern circumstances.[217] This notion of openness and flexibility in procedural law's function was solidified by precedent, making this the way federal courts worked for years until yet another change arrived.

In the mid to late 20th century, there is a marked shift away from the procedural tenets of the third era. For various reasons, barriers were slowly but surely being erected in the paths to justice for litigants. Among the major changes included plausibility pleading, increased judicial discretion, and increased burdens for plaintiffs trying to prove they deserve a day in court. As a result, the original spirit of the Federal Rules was largely eradicated. Clearly, there was a shift in the philosophy underlying federal courts and specifically in the minds of those who make such decisions regarding their function and methods. Every change is a reaction to a catalyst. Peeling back the many layers to this issue reveals functionalism and ideology to be the motivating perspectives behind actors on the sides of access and efficiency.

[217] See Subrin, "How Equity Conquered Common Law," 945

Functionalism

In the third era, going to trial was a realistic expectation because costs were not prohibitive and cases remained small.[218] Courts tried cases at a relatively swift pace and delays rarely imposed an undue burden on parties.[219] Initially, the open court model, in practice, appeared to be working well. In 1951, the median time from filing to disposition in federal courts was 12.2 months.[220] However, eleven years later in 1962 the same measure rose to an average of 16 months.[221] This growth has been theorized to result, among other things, from the procedural system introduced by the Federal Rules.

The writ system and single issue pleading which composed common law procedure that translated into early America attempted to among other things, define, control, and contain litigation.[222] Containment is a historical principle, intended to have cases lead to predictable results, constrain judicial discretion, and make civil participation easier.[223] A contained and rule laden system is what federal courts mainly operated under before the Federal Rules inception. The expected result of lifting those restraints slowly but surely came to fruition after their imposition and the supporting precedents.

Lax pleading gave plaintiffs an incentive to plead vaguely in hopes that discovery would turn up material.[224] Courts abiding by the *Conley* standard were inclined to deny motions to dismiss because they could not tell enough about the plaintiff's claim to decide if they would prevail at trial, necessitating expensive discovery.[225] Some federal judges perceived a pro-plaintiff shift in

[218] See Subrin and Main, "The Fourth Era of American Civil Procedure," 1846
[219] Ibid.
[220] Ibid.
[221] Ibid.
[222] Stephen Subrin, "Uniformity in Procedural Rules and the Attributes of a Sound Procedural System: The Case for Presumptive Limits," *Alabama Law Review, n*o. 49. (1997): 85, accessed June 13, 2015.
[223] Ibid. p. 86
[224] See Marcus, "The Revival of Fact Pleading," 445
[225] Ibid.

the power balance as broad discovery could impose substantial costs on defendants to the extent of becoming the principal object of litigation rather than a device for helping resolve it.[226] Hourly billing actually became the norm once discovery became routine.[227] Many lawyers saw the rules as a mechanism to further client interests in a battle with the opponent rather than a tool to move forward in litigation.[228] The litigation explosion itself has been said to have occurred due to the private sector counsel being fee hungry, claims that opposes call "fearmongering".[229]

Soon after the rules went into effect, there were signs that lawyers and judges felt a need to limit the system and there was an early movement to replace the federal pleading rule with a more stringent one.[230] On top of potential issues with the rules themselves, case types changed. At the rules inception they were small and few, but over time the issues and cases became bigger.[231] In the 1970s, the civil caseload absolutely exploded.[232] From 1962-1975 and 1975-1983, the number of filings doubled while the number of federal district judges only increased by 20% and 30% respectively.[233] This increase in civil filings was fueled by plaintiffs seeking justice under the relatively new statutory rights enacted in the 1960s.[234] The private sector responded almost immediately, from 1970-1984, the number of lawyers nearly doubled as with the size of firms, fees, and litigation departments.[235] In the public sector's attempt to catch up, from the 1960s-90s, Congress created hundreds of new jurisdictional grants but not enough to fully balance the judicial workload.[236]

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[226] See Marcus, "The Revival of Fact Pleading," 441
[227] See Maxeiner, "The Federal Rules at 75," 1008
[228] Ibid. p. 1007
[229] See Miller, "Simplified Pleading, Meaningful Days in Court, and Trials on the Merits," 302
[230] See Subrin, "How Equity Conquered Common Law," 983
[231] See Miller, "Simplified Pleading, Meaningful Days in Court, and Trials on the Merits," 290
[232] See Subrin and Main, "The Fourth Era of American Civil Procedure," 1859
[233] Ibid.
[234] Ibid.
[235] Ibid. p. 1860
[236] Ibid. p. 1859

As a result, cases could not be resolved by the old fashioned one-by-one method. The judicial reaction to the perception that things were out of control was to take control. [237] The idea of judicial management actually began in the 1940s but the increasing caseload of the courts encouraged Chief Justice Warren to appoint a group of judges to determine a solution.[238] They developed a systemic approach for processing cases which was explicated in the *Manual for Complex Litigation*.[239] Case management became the prescription for all cases with a latent goal of settlement to avoid the lengthy and expensive process of going to trial.[240] To ensure everyone was following the plan, courts switched to individual calendars and began measuring judicial efficiency and timing for the first time, creating an incentive for judges to stay on task.[241] Over time judges came to have a larger staff, delegate duties, and mainly take on a supervisory role leading to a level of bureaucratization within the federal judiciary, a change which has been said to further discourage them from hosting trials.[242]

The functional perspective says that the courts must prioritize efficiency over access. The increased complexity, magnitude, and number of cases led to cost and delay in the court system soon following the inception of the federal rules. Many of those tasked with funneling these cases through the system simply saw greater judicial control as the way out.[243] The Federal Rules have come under significant criticism from defendants, defense counsel, and judges themselves. These individuals cite discovery abuse, expense and delay, excessive court rulemaking, unpredictability, litigiousness, and an overly adversarial atmosphere among modern litigation as systemic failures

[237] See Subrin and Main, "The Fourth Era of American Civil Procedure," 1861
[238] See Miller, "Simplified Pleading, Meaningful Days in Court, and Trials on the Merits," 293
[239] See Marcus, "The Revival of Fact Pleading," 441
[240] See Subrin and Main, "The Fourth Era of American Civil Procedure," 1862
[241] Ibid.
[242] Ibid. p. 1873
[243] See Miller, "From *Conley* to *Twombly* to *Iqbal*," 54

fostered by the rules as proof that we need reform.[244] Such critiques are not purely a matter of interpretation but often quite real, the price paid for operating and maintaining the open court philosophy. That considered, deviations from the original philosophy can certainly be born of concern and not always ulterior motive.[245]

A review of district court decisions has made clear that federal courts are actively applying the *Twombly* plausibility pleading standard to cases brought under Title VII of the Civil Rights Act of 1964.[246] The entire notion of plausibility pleading was motivated by a desire to develop a stronger role for the motion to dismiss and supposed excess of meritless litigation, deter abusive practices, and contain costs.[247] At the same time, plausibility pleading has been said to "grant unbridled discretion to district court judges" who become the judge and jury at times due to a trial-like scrutiny of the merits which could very well be affected by judicial attitudes.[248] [249] These potential issues have some claiming inconsistency in rulings, a legitimate concern in a procedural system aimed at creating transsubstantivity.[250]

Ideology

Drafters of the Federal Rules of Civil Procedure knew the system they were creating lacked restraint but their philosophy forced them away from more controlling methods.[251] That change from the previous common law influenced system created an ideological battle with two sides, one which promoted rules that controlled litigation and the other which defended rules that open

[244] See Subrin, "How Equity Conquered Common Law," 911
[245] See Miller, "Simplified Pleading, Meaningful Days in Court, and Trials on the Merits," 286
[246] See Seiner, "The Trouble with Twombly," 1035
[247] See Miller, "From *Conley* to *Twombly* to *Iqbal*," 53
[248] Ibid. p. 22
[249] Ibid. p. 30
[250] Ibid.
[251] See Subrin, "How Equity Conquered Common Law," 975

litigation.[252] The two sides to the ideological battle include defendants who are often large entities facing claims of varying meritiosity who naturally want a heightened pleading standard and plaintiffs, citizens or civil protection counsel who believe heightened pleading would undermine the national interest and leave critical information in the hands of defendants through unfulfilled discovery.[253] A major issue among open court supporters since the beginning of the fourth era is the increasing disfavor of civil rights cases in the gatekeeping process, posing the question of whether an issue central to our concept of liberty deserves to be pushed aside.[254]

Procedural rules are more than simple guidelines. The function of rules in litigation and the role of such litigation in American society makes them a source of societal power. Because every step of litigation is covered by procedure, the rules determine the ease or complexity of pursuing claims and defending them. In summation, rulemaking is essentially the power to decide the winners and losers of litigation. It is the power to assign, protect, or deny privilege in the realm of litigation before the judge has to hear a single argument. This factor combined with the inherent politicization of such a powerful thing means that procedural rules have a difficult time maintaining a value neutral existence and are constantly subject to ideologically motivated manipulation.[255]

The business community's outrage at the pro-plaintiff aspects of civil litigation under the federal rules began in the 1950s, however over time that influence spread to politics through advertising campaigns which attacked politicians who supported "greedy plaintiffs and judges." [256] Newt Gingrich's "Contract with America" criticized an over-litigious society and called for

[252] See Maxeiner, "The Federal Rules at 75," 983
[253] See Miller, "From *Conley* to *Twombly* to *Iqbal*," 16
[254] See Marcus, "The Revival of Fact Pleading," 471
[255] See Miller, "From *Conley* to *Twombly* to *Iqbal*," 13
[256] See Subrin and Main, "The Fourth Era of American Civil Procedure," 1867

restrictions to court access and deterrents.[257] Though the movement generated little legislation, it enjoyed traction politically by bringing the issue to the forefront of voters' minds. In terms of ideology, Conservatism now bears a distinct tie to closed courts.

The Advisory Committee, Standing Committee, and other levels of the Judicial Conference which promulgates federal court rules is composed of members appointed through a mainly Conservative apparatus.[258] These individuals tend to have strong affiliations with the business community and specifically large businesses of the sort often defending themselves from civil claims.[259] Courts and Congress have mainly been hands off with compelled arbitration clauses and laws on class arbitration as compelled private adjudication puts these issues outside the public process and does not contribute to backlogs of cases.[260] However, as a result, business entities have been enabled to capture control over the manner and means for resolving disputes with their customers.[261] They end up with a built in adjudicatory and tactical advantage.[262]

Within the courts themselves, judicial attitudes and preferences have been observed in action. It is of notable mention that 4 of 5 judges who constituted the majority in *Iqbal* along with many judges and clerks today were members of law school Federalist Societies, groups formed for conservative students to connect.[263] The ideological link is not isolated to that single case. Brescia and Ohanian studied 548 cases regarding employment and housing discrimination in federal court from 2004 through 2010 in which the specificity of pleading was challenged.[264] Their analysis

[257] See Subrin and Main, "The Fourth Era of American Civil Procedure," 1868
[258] Ibid. p. 1872
[259] Ibid. p. 1873
[260] See Miller, "Simplified Pleading, Meaningful Days in Court, and Trials on the Merits," 328
[261] Ibid. p. 329
[262] Ibid.
[263] See Subrin and Main, "The Fourth Era of American Civil Procedure," 1871
[264] Raymond Brescia and Edward Ohanian, "The Politics of Procedure: An Empirical Analysis of Motion Practice in Civil Rights Litigation under the New Plausibility Standard," *Akron Law Review,* no. 47 (2014): 333, accessed August 18, 2015.

revealed several potential judicial biases based on ideology, race, and gender. Among them was a finding that judges nominated by Republican presidents ruled to dismiss 7% more often than those nominated by Democratic presidents following the *Iqbal* ruling.[265]

There has been a difference in the nature of litigation over time. In 1962, 11% of all civil cases before the court were tried, excluding those settled without court intervention increases that number to 24%.[266] In 2012, 1% of cases were tried while 99% were terminated by dismissal, summary judgment, or settlement.[267] For the 1% of cases that made it to trial, the medial time from filing to disposition was 23 months.[268]

Rule 11 in particular had a disproportionate impact on civil rights plaintiffs.[269] Before *Twombly,* such cases had a 61% dismissal rate, after *Iqbal*, the rate rose to 72%.[270] Motions to dismiss have been observed to be granted at five times the rate they were before *Twombly*.[271] If there is a covert ideologically motivated movement to permanently damage plaintiff's ability to successfully bring civil rights claims before the court, it has been a successful endeavor.

Biases are an inherent component of human nature to which lawyers, judges, and legislators are not immune. Rulemaking is more than it appears to be at first glance, though tighter procedures serve a functional role for an overloaded court system, there is no denying that such practices shut the door to a particular group of litigants. The motivation to make such a choice by simultaneously denying a salient civil rights crisis is often a matter of ideology rather than purely functional thinking.

[265] See Brescia and Ohanian, "The Politics of Procedure," 356
[266] See Subrin and Main, "The Fourth Era of American Civil Procedure," 1878
[267] Ibid.
[268] Ibid. p. 1859
[269] See Brescia and Ohanian, "The Politics of Procedure," 349
[270] Ibid. p. 353
[271] Ibid.

V. The Duke Conference

Clearly, the Federal Rules of Civil Procedure have a perceived and proven power over case outcomes manifested through precedent and rulemaking. Previous chapters have assessed the impact of these measures and various factors which motivated those in charge to follow through with them. The other component to studying changes in civil procedure is an in-depth exploration of how those changes take place, particularly through the means of rulemaking, the drafters intended mechanism for generating procedural changes.

The Judicial Conference of the United States engages in near-constant revision of the Federal Rules of Civil Procedure through a labyrinth-like process involving multiple conferences, mini-conferences, committees, and subcommittees. Rulemaking is mainly coordinated by the Committee on Rules of Practice and Procedure, commonly referred to as the "Standing Committee."[272] Beneath the Standing Committee are five advisory committees for each area of procedure, one of them being the Advisory Committee on Civil Rules of Procedure.[273] These committees are free to establish subcommittees for particular tasks or as temporal measures.[274] Many actors are involved in an official capacity and a great number more regular citizens and interest groups provide input during public comment periods, through scholarly contributions, and recommendation letters. Procedural change is by no means made in secret, but it naturally involves a level of sophistication and bureaucratic maneuvering that far exceeds that of the average citizen's comprehension. It is important to note that an open process is by nature a democratic initiative but in practice, may not fully achieve those ends.

[272] "How the Rulemaking Process Works", Federal Judicial Center, accessed November 21, 2015
[273] Ibid.
[274] Ibid.

Though rule changes are ongoing, over the last eight to ten years, the conference has received complaints regarding the costs, delays, and burdens of civil litigation.[275] Major critiques include the piecemeal method to rulemaking which has led to moderate changes and application inconsistencies across jurisdictions.[276] Not only have some of the allowances under the rules themselves been challenged by lawyers and scholars but also the very method by which they have been made.

In response to the growing distain, the Civil Rules Advisory Committee hosted the 2010 Conference on Civil Litigation in May at the Duke University School of Law, leading to its common reference as the "Duke Conference."[277] The notion of hosting an actual conference to determine the issues and coalesce on a general plan follows the style introduced to the judiciary by the original movement that gave us the Federal Rules. Within this setting it becomes possible to avoid the deficiencies of specialized committees and look at the litigation problems generated by the rules with a broader focus.

In a report to the Chief Justice, the Conference purpose is described as "a disciplined identification of litigation problems and exploration of the most promising opportunities to improve federal civil litigation."[278] More than seventy judges, lawyers, and academics took part in presentations while over two-hundred invited participants attended and contributed to discussions.[279] These individuals were selected from a cross section of the legal profession to create a diversity of views and experience.[280] The presentations featured empirical information,

[275] Judicial Conference Advisory Committee on Civil Rules and the Committee on Rules of Practice and Procedure, *Report to the Chief Justice of the United States on the 2010 Conference on Civil Litigation* (2010): 1 , accessed November 6, 2015
[276] Ibid.
[277] See Judicial Conference, "Report to the Chief Justice", 1
[278] Ibid.
[279] Ibid.
[280] Ibid.

analytical papers, pilot projects, and approaches used by various jurisdictions in considering ways to address the problems of costs and delays in the federal system.[281] A major focus of the conference was empirical studies conducted by the Federal Judicial Center, the first of their kind to face serious consideration since the committee's 1997 conference.[282]

This study originated at the request of the Rules Committees to attain recent empirical information regarding federal cases.[283] The FJC studied federal civil cases that terminated in the last quarter of 2008, including a survey of the lawyers to learn about their experience in the cases.[284] They also administered surveys for the Litigation Section of the American Bar Association and for the National Employment Lawyers Association.[285] In addition, The Institute for the Advancement of the American Legal System conducted a study of the members of the American College of Trial Lawyers.[286] The Searly Institute at Northwestern Law School and a grouping of large corporations provided information as well.[287]

The FJC study included 3,550 cases drawn from all cases terminated in federal district courts for the last quarter of 2008, this sample was constructed to eliminate cases where discovery was not used and include cases likely encountering litigation issues.[288] Paying particular attention to lengthy cases, it included every case lasting at least four years at each case actually tried.[289]

[281] See Judicial Conference, "Report to the Chief Justice," 1
[282] Ibid.
[283] Ibid. p.2
[284] Ibid.
[285] Ibid.
[286] Ibid.
[287] Ibid.
[288] Ibid. p. 3
[289] Ibid.

Major findings included:

- $15,000 median plaintiff discovery costs[290]
- $20,000 median defendant discovery costs[291]
- $850,000 95th percentile plaintiff discovery costs[292]
- $991,900 95th percentile plaintiff discovery costs[293]

Despite these staggering costs of discovery in some cases, lawyers were said to view discovery as "reasonably proportional" to needs of cases and the rules as working well.[294] The IAALS American College survey, whose respondents had more years of experience in the profession and are selected from a small fraction of the bar, had greater dissatisfaction with current procedure than other groups.[295] The ABA Section of Litigation survey responses did not indicate the same degree of dissatisfaction, but still greater than those of the FJC survey.[296]

Members of the plaintiff-oriented NELA felt the Civil Rules were not conducive to their goal, but felt problems could be resolved with minimal reforms.[297] They cited the issues of application, local rules, discovery abuse, and abuse.[298] The defense oriented side, the Lawyers for Civil Justice, the Civil Justice Reform Group, and U.S. Chamber Institute for Legal Reform, surveyed corporate counsel of Fortune 200 companies.[299] These respondents reported that litigation costs were too high, accounting for 1 in 300 dollars of U.S. Revenue (for non-insurance or health care corporations) and continue to rise in a disproportionate fashion compared to plaintiffs.[300]

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[290] See Judicial Conference, "Report to the Chief Justice," 3
[291] Ibid.
[292] Ibid.
[293] Ibid.
[294] Ibid.
[295] Ibid.
[296] Ibid.
[297] Ibid.
[298] Ibid.
[299] Ibid. p. 4
[300] Ibid.

Major perceived difficulties for defendants:

- Contested issues not identified early enough to forestall discovery[301]
- Discovery imposing disproportionate burdens on parties and non-parties[302]
- Adversaries imposing expenses without a responsibility to reimburse[303]

Major perceived difficulties for plaintiffs:

- Costs of discovery resulting from efforts to evade requests[304]
- Motions filed to impose costs rather than advance litigation[305]
- Existing rules not as effective as they should be in promoting fairness[306]

Shared consensus was found over the need for greater judicial management, specifically tailored to the needs of each case, a task which requires the creation of uniform standards without interfering with judicial independence in responding to various cases.[307] It was said that cooperation and proportionality are necessary to foster judicial case management and suggested means included ongoing education, the development of guidebooks, and more.[308] A second area of consensus was the idea that rule changes alone cannot generate improvements.[309] As a result, this conference faced disagreement over how much specific rules should be changed.[310]

The macro-level determinations made at the conference included changes to the rules, new judicial and legal education, development of guidelines, and projects to test and refine continued improvements, along with the development of materials to support these efforts. Though there was a fair amount of discontent with the current rules structure, the report takes note that "the time has

[301] See Judicial Conference, "Report to the Chief Justice," 4
[302] Ibid.
[303] Ibid.
[304] Ibid.
[305] Ibid.
[306] Ibid.
[307] Ibid.
[308] Ibid.
[309] Ibid.
[310] Ibid.

not come to abandon the system and start over".[311] Conference participants emphasized that the rules fail not in content but in application.[312] They considered it important to instead understand why rules are not being enforced and how could alleviate the issues cited. Still, some rules were sponsored for amendment, most of which received strong support and agreement over the need for analysis.[313]

Whether or not to expressly allow departures from transsubstantivity principle was a general question explored.[314] Multiple papers and participants raised the possibility of increasing the rule-based exceptions to the premise that each rule applies to all cases in the federal system, generally as a result of subject matter and by complexity or amount at issue.[315] Such suggestions aim to reduce conflict with other rules systems or local rules, and channel cases into specific tracks.[316]

The major focus of exploration for new amendments which dominated conference suggestions was within the pleading and discovery provisions. Participants encouraged rule amendments that would explicitly integrate pleading with limited initial discovery, increase judicial supervision, and require the court to consider the potential for asymmetrical information when deciding on a motion.[317] Also explored was response requirements, asserted as an issue by plaintiffs who claimed defendants typically fail to adequately comply.[318] Partially as a result, conference participants suggested the standard for pleading an affirmative defense parallel the standard for pleading a claim.[319]

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[311] See Judicial Conference, "Report to the Chief Justice," 5
[312] Ibid.
[313] Ibid.
[314] Ibid.
[315] Ibid.
[316] Ibid.
[317] Ibid. p.6
[318] Ibid.
[319] Ibid. p. 7

On the issue of discovery, the report cites that empirical studies show discovery rules work well in most cases.[320] In those where it was problematic, the culprits were disproportionality or abuse, actions which are costly for both sides of litigation but primarily defendants.[321] Along with the issues raised by overbroad discovery were unreasonable discovery responses.[322] There was significant support among plaintiffs and defendants for more precise guidance in the rules on the obligation to preserve information relevant to litigation and the consequences of failing to do so.[323] Large data producers have been "bewildered" by the scope of their obligations to preserve information for litigation and made clear the importance of assurance that compliance will avert severe sanctions for inevitable losses of electronic information.[324] A conference panel produced a proposal, "Elements of a Preservation Rule" which explained that careful consideration must be given to the properness of framing a rule addressing preservation.[325] Sanctions for failing to comply vary by the jurisdiction, so conference participants suggested a rule establishing uniform standards of culpability for different sanctions.[326]

Existing case-management rules allow a court to tailor the extent of discovery and motions to the stakes and needs of each case, there was widespread support for reinvigorating these.[327] The contentious question was whether there should be changes in the rules or changes in how judges and lawyers deal with them.[328] Assigning cases to different "tracks" was suggested as another

[320] See Judicial Conference, "Report to the Chief Justice," 7
[321] Ibid.
[322] Ibid. p. 7-8
[323] Ibid.
[324] Ibid. p. 8
[325] Ibid.
[326] Ibid. p. 8-9
[327] Ibid. p. 9
[328] Ibid.

approach to rein in discovery.[329] It was thought that this approach may begin by reinvigorating or expanding on earlier tracking programs adopted by local rules.[330]

When it comes to strategies other than rules, judicial and legal education were established as a priority. According to the report, the Rules Committees do not train judges or lawyers but are "eager" to work with those responsible and ensure the rules, training, and supporting materials reinforce each other.[331] At the time, the FJC was planning for judicial education to implement lessons learned about effective case management, exploring changes in how judges are trained, and finding how changes can be effected through improved case management.[332] These efforts were to be supported by the development of materials for the use of litigants, lawyers, and judges.[333] It was determined that a future form of empirical research would be pilot programs to test new ideas and identify successful strategies that can be adopted, generating additional educational material.[334]

[329] See Judicial Conference, "Report to the Chief Justice," 9
[330] Ibid.
[331] Ibid. p. 10
[332] Ibid.
[333] Ibid.
[334] Ibid. p. 11

Specific ideas generated during the conference are described below in Table 1.

Table 1: Duke Conference Suggested Rules Amendments

Rule 1	Become "less ambitious"[335]
Rule 2	Abandon transsubstantivity[336] and create special provisions for complex cases or categories[337]
Rule 7	Require a certificate of good faith conferral between counsel, an ABA suggestion[338]
Rule 8	Revise the standard for pleading affirmative defenses[339]
Rule 11	Create a deadline to abandon claims or defenses[340]
Rule 12	The ABA suggested adding the requirement that except in complex cases, a court must rule promptly on a Motion to Dismiss and must rule within 60 days after a full briefing[341]
Rule 16	Require consideration of discovery budget[342] and a mandatory pre-trial conference[343]
Rule 26	Revise initial disclosures to prevent an unnecessary burden or pleading necessity, define the scope of discovery, create limitations on requests, and suggest an expansion of topics for conference[344]
Rule 34	Resolve potential ambiguity in the rule and create limitations on e-discovery requests[345]
Rule 37(e)	Revise the duty to preserve and sanctions[346] by determining discovery obligations, when the duty to preserve evidence and thus sanctions begins[347]
Rule 56	Remove the discovery hindrances to summary judgment, require prompt rulings due to delays or failure to rule, and revise for general inefficiency[348]
General	- Revise pleading standards[349] - Require greater judicial intervention[350] - Create a system for cost shifting[351] - Support rule enforcement[352] - Deal with local rules inconsistency[353]

[335] Advisory Committee on Federal Rules of Civil Procedure, *Report of the Civil Rules Advisory Committee* (May 2010): 12, accessed November 1, 2015.
[336] Ibid. p. 7
[337] Advisory Committee on Federal Rules of Civil Procedure, *Report of the Civil Rules Advisory Committee* (December 2010): 89, accessed November 1, 2015.
[338] Ibid. p. 90
[339] See Advisory Committee, "Report of the Civil Rules Advisory Committee," (May 2010), 16
[340] See Advisory Committee, "Report of the Civil Rules Advisory Committee," (December 2010), 91
[341] Ibid.
[342] See Advisory Committee, "Report of the Civil Rules Advisory Committee," (May 2010), 15
[343] See Advisory Committee, "Report of the Civil Rules Advisory Committee," (December 2010), 91
[344] See Advisory Committee, "Report of the Civil Rules Advisory Committee," (May 2010), 14
[345] Ibid.
[346] Ibid. p. 12
[347] Ibid.
[348] See Advisory Committee, "Report of the Civil Rules Advisory Committee," (December 2010), 92
[349] See Advisory Committee, "Report of the Civil Rules Advisory Committee," (May 2010), 2
[350] Ibid. p. 11
[351] Ibid. p. 15
[352] Ibid. p. 11
[353] Ibid. p. 16

VI. The Road to…2015?

The Duke Conference both arose from and established the Judicial Conference's continual commitment to responsiveness. It was the concerns of litigators and judicial interest groups that sparked the need for a serious discussion to suggest changes which may be executed through the framework of the committee's ongoing revision process. What separated this set of concerns from the typical requests was their general rather than specific nature. Issues with the costs and time involved in litigation caused by a lack of stringent rules or judicial willingness to apply existing rules are rooted in multiple rules and provisions of them. It was clear that a targeted approach would not offer resolve, nor would the presumption that rulemaking alone could provide a remedy. Instead, the committee was to generate a multifaceted plan involving rules, education, and research.

Early Developments

Following the Duke conference, the immediate task for the Rules Committees was to prioritize the issues identified in the Conference for further study.[354] The Conference highlighted two areas that merit attention:

1. Discovery in complex or highly contested cases including preservation and spoliation of electronically stored information[355]
2. Review of pleading standards in light of the recent Supreme Court cases[356]

[354] See Judicial Conference, "Report to the Chief Justice," 12
[355] Ibid.
[356] Ibid.

It is important to note that the "optimistic" view of the Civil Rules was not universal.[357] The Duke Subcommittee and Advisory Committee considered that "dramatic reform, even drastic reform" was needed.[358] They found it important to improve procedures for all types of litigation while recognizing that some changes may take years.[359] These long term projects include seeking inspiration from well-functioning local district and conducting empirical studies.[360]

To deal with the many suggestions for rule amendments generated at the Conference, the subcommittee worked to establish priorities among them before drafting.[361] According to the report, discovery of electronically stored information commanded "great attention" at the Duke Conference.[362] The Committee and Discovery Subcommittee began work immediately after the conference, driving three rough sketches of possible approaches.[363] The task of translating suggestions in this area into a procedural rule was described as "formidable, perhaps impossible".[364]

The first sketch, directly responding to the Duke panel, sought to provide specific guidance and defined preservation obligations in great detail.[365] The second was similar, but substituted general obligations for detailed directions.[366] The third focused on sanctions, relying on backward inference to shape preservation obligations.[367] Each sketch was designed to provoke discussion and further review. However, this was halted due to a variety of concerns from the subcommittee,

[357] Advisory Committee on Federal Rules of Civil Procedure, *Report of the Civil Rules Advisory Committee* (May 2011): 58, accessed November 1, 2015.
[358] Ibid.
[359] See Advisory Committee, "Report of the Civil Rules Advisory Committee," (May 2011): 58.
[360] Ibid.
[361] Ibid. p. 59
[362] Advisory Committee on Federal Rules of Civil Procedure, *Report of the Civil Rules Advisory Committee* (December 2011): 25, accessed November 1, 2015.
[363] Ibid.
[364] Ibid.
[365] Ibid.
[366] Ibid.
[367] Ibid.

which concluded it needed more information about the real-life dynamics of preservation problems to determine whether rules could provide useful guidance.[368] To obtain this, they decided to host a mini-conference before the fall 2011 full committee meeting, extending an invitation to an array of individuals experienced in preservation and general E-Discovery issues, including specialists in technical and technological issues.[369]

This diverse group of experts and litigators came together with the Subcommittee and other Committee members in Dallas on September 9, 2011.[370] Many of the problems described here involved costly over-preservation of potentially discoverable information.[371] The participants recognized that the duty to preserve is triggered by a reasonable expectation of litigation but were uncertain as to what they must preserve.[372] This creates a certain uneasiness as they have a great aversion to the risk of sanctions in whatever litigation might actually ensue.[373] The risks feared go beyond any direct impact of sanctions but also the reputational effect of sanctions —being branded as evidence destroyers.[374] As a preventative measure, companies often preserve information for litigation that is never brought.[375] One anecdote described spending $5,000,000 to preserve information, with costs increasing by $100,000 a month, all for litigation that had not yet been filed.[376] Others generally described preserving far greater volumes of information than were ever sought in litigation that actually ensued.[377] Participants further noted that preservation issues are not limited to large institutions which typically have massive volumes of information subject to

[368] See Advisory Committee, "Report of the Civil Rules Advisory Committee" (December 2011): 25
[369] Ibid.
[370] Ibid. p. 3
[371] Ibid.
[372] Ibid.
[373] Ibid.
[374] Ibid.
[375] Ibid.
[376] Ibid. p. 4
[377] Ibid.

discovery, individual parties also can have substantial obligations, a potential ignorance that should be considered.[378]

Discussion at the mini-conference generated some disagreement about the steps that might be taken to address preservation problems, including whether the time has come to consider drafting rule based solutions.[379] Ultimately, the Committee was led to the conclusion that the Subcommittee should continue to consider all approaches.[380]

Within the Discovery Subcommittee's work beyond this conference and other meetings was a reliance on empirical data and research which ran concurrent with the development of actual rules. Initial research by Andrea Kuperman showed that federal courts have a mainly uniform approach to the events that trigger a duty to preserve, all of which agree that a duty to preserve *can* arise before litigation is actually filed.[381] A reasonable expectation that litigation may be filed is often what triggers the duty.[382] However, no uniform case law on the scope, location, or age of information that must be preserved was found and there were significant differences among the circuits on what conduct can lead to sanctions.[383]

At this point, one year following the Duke Conference, early phase ideas for expediting litigation multiple options had been developed. Some included:

- Reduce the time for service in Rule 4(m) to 60 days after filing rather than 120[384]
- Require actual scheduling conference between court and parties, avoiding alternatives[385]
- Add to list of optional contents of Rule 16(b)(3), a provision for setting a date by which parties must abandon any claims or defenses that can no longer be asserted in good faith[386]

[378] See Advisory Committee, "Report of the Civil Rules Advisory Committee" (December 2011): 4
[379] Ibid.
[380] Ibid. p. 6
[381] Ibid. p. 2
[382] Ibid.
[383] Ibid.
[384] Ibid. p. 10
[385] Ibid. p. 9
[386] Ibid p.10

Initial Sketches and Challenges

According to the report, the pace of work quickened after the Standing Committee meeting in June 2012.[387] Beginning in July, the Discovery Subcommittee held eight conference calls to develop its proposal.[388] As this point, the Advisory Committee hoped for case-management amendment ideas to be presented to the Standing Committee at its June 2013 meeting with a recommendation for publication.[389] This is the first mention of the rules being presented together. According to the report they would form a "broad package of amendment ideas with new Rule 37(e)".[390] Rule 37(e) was both an ongoing project for the Rules Committees and a cited concern at the Duke Conference.[391]

The "new" rule 37(e) of the 2006 E-Discovery Amendments provided protection against sanctions for loss of electronically stored information due to the "routine, good faith operation of an electronic information system". [392] Revisions were intended to respond to an expanded amount and variety of digital information along with potential costs and burdens.[393] Part of the compulsion to act resulted from the House Judiciary Committee holding a hearing in December 2011 on the costs of American discovery which largely focused on the costs of preservation.[394] After the mini-conference and subsequent meetings, the Subcommittee decided to focus on the "Category 3 approach," a proposed Rule 37(g) dealing with sanctions for failure to preserve information.[395] There were continual questions about how to refine this proposal, and beginning in early July 2012,

[387] Advisory Committee on Federal Rules of Civil Procedure, *Report of the Civil Rules Advisory Committee* (December 2012): 2, accessed November 1, 2015.
[388] Ibid. p. 3
[389] Ibid.
[390] Ibid.
[391] Ibid. p. 3
[392] Ibid.
[393] Ibid. p. 3-4
[394] Ibid. p. 4
[395] Ibid. p. 5

the Subcommittee worked to prepare a final proposed rule for the full Advisory Committee meeting in November 2012.[396] Once it was completed, the Subcommittee turned to the issue of whether this new provision should be a new Rule 37(g) or a replacement, ultimately deciding that the current rule did not provide any further protections, so replacement seemed more suitable.[397] The new rule's main objective was to replace the disparate treatment of preservation and sanctions issues in different circuits with a single standard.[398] Also it encompassed a clarification that sanctions could be employed only if the court found that the failure was willful or in bad faith, and that failure caused substantial prejudice in the litigation.[399] This was designed to provide protection against inappropriate sanctions and reassure those who might be inclined to over preserve to reduce the risk of sanctions.[400] Not only was the amendment intending to raise the threshold for sanctions above negligence, it also provided a uniform standard for federal courts and applied to all discoverable information.[401]

The new rule 37(e) was presented to the Advisory Committee at its November 2012 meeting.[402] All members except the Department of Justice voted in favor of submitting it to the Standing Committee.[403] The Department reported that it had not gathered input from internal interested parties and could not vote in favor at the time.[404] The concerns raised were not entirely negative and the final rule proposal responded to most of the Department's concerns.[405]

[396] Ibid.
[397] Ibid.
[398] Ibid. p. 6
[399] Ibid.
[400] Ibid. p. 9
[401] See Advisory Committee, "Report of the Civil Rules Advisory Committee" (December 2012): 10
[402] Ibid. p. 6
[403] Ibid.
[404] Ibid.
[405] Ibid.

In response to this proposal, the full Committee tasked the Subcommittee with addressing concerns about rulemaking power, specifically due to the reach of new rule 37(e).[406] The Subcommittee met again within the month and considered these issues.[407] Because the goal of amended 37(e) was to achieve uniformity in the federal courts due to a diversity of local rules, the subcommittee concluded there was "little reason" to expect it would violate the Rules Enabling Act provisions.[408]

Beyond the intricacies of Rule 37, the Subcommittee began to narrow the list of considerations which would make their way into the rules package, discarding possible changes that were not "ripe for present consideration."[409] The proposals were at this point grouped into three sets developed under the package mentality and with a goal that together they may encourage significant reductions in cost and delay.[410] These involved multiple rules and different parts of those rules.

The first topics involved early stages of case management.[411] Suggested changes included shortening the time for service after filing, reducing the time for issuing a scheduling order, and emphasizing the value of holding an actual conference before issuing a scheduling order.[412] The next set of changes involved the reach of discovery.[413] They began with shifting the proportionality factors, limiting the scope of discovery to relevant matter and modifying the provision for discovery of information not admissible in evidence.[414] More specific suggestions included reducing the presumptive number of depositions and interrogatories, and for the first time

[406] See Advisory Committee, "Report of the Civil Rules Advisory Committee" (December 2012): 21
[407] Ibid. p. 6
[408] Ibid.
[409] Ibid. p. 128
[410] Ibid. p. 128-129
[411] Ibid. p. 128
[412] Ibid.
[413] Ibid. p. 128-129
[414] Ibid. p. 129

incorporating presumptive limitations on the number of requests to produce and admit.[415] Another approach was a set of provisions to improve the quality of discovery objections and the clarity of responses.[416] The last proposal would revise Rule 1 to direct that the rules be employed by the court and parties to secure its goals.[417]

The Published Rules Amendment Package

In January 2013, the Standing Committee approved publication of Rule 37(e) considering that changes would be brought to the June meeting.[418] The May 2013 report to the Standing Committee recommended publication of the rules amendment package for public comment.[419] This proposal was composed of Rules 1, 4, 16, 26, 30, 31, 33, 34, 36, and 37.[420]

The rules proposals were grouped in three sets as previously determined. One set aimed to improve early and effective judicial case management.[421] The second sought to enhance the means of keeping discovery proportional to the action.[422] The third hoped to advance cooperation.[423] The rules involved in these three sets overlap.[424] The following is a summary of each grouping:

[415] See Advisory Committee, "Report of the Civil Rules Advisory Committee" (December 2012): 129
[416] Ibid.
[417] Ibid.
[418] Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, *Preliminary Draft of Proposed Amendment to the Federal Rules of Bankruptcy and Civil Procedure* (August 2013): 6, accessed November 1, 2015.
[419] Advisory Committee on Federal Rules of Civil Procedure, *Report of the Civil Rules Advisory Committee* (May 2013): 1, accessed November 3, 2015.
[420] Ibid.
[421] Ibid. p. 4
[422] Ibid.
[423] Ibid.
[424] Ibid.

1) Case-Management Proposals

The case-management proposals reflect a perception that the early stages of litigation often take too long, which incurs expense.[425] These rule revisions aimed to expedite litigation to resolve this difficulty for parties.

The drafters proposed revising rule 4(m) to shorten the time to serve a summons and complaint from 120 days to 60 days.[426] By having the action moving in half the time, it responded to the commonly expressed view that four months for service was too long.[427] Concerns that circumstances occasionally justify a longer time to effect service were said to be met by the court's duty, (already in Rule 4(m)), to extend if the plaintiff shows good cause.[428]

Rule 16(b)(2), at the time of drafting provided that the judge must issue the scheduling order within the earlier of 120 days after any defendant has been served or 90 days after any defendant has appeared.[429] The recommended revision cut the times to 90 days after any defendant is served or 60 days after any defendant appears.[430] The original plan called for a 50% reduction but concerns that it may inhibit parties from adequately preparing for scheduling conferences curtailed it.[431] The Department of Justice and other attorneys raised concerns that the time required to designate attorneys in a large organization is followed by identifying the right people in the client agency to work with them and to begin gathering information necessary to litigate.[432] They suggested that more time to prepare would make for a better scheduling conference and more

[425] See Advisory Committee, "Report of the Civil Rules Advisory Committee" (May 2013): 4
[426] Ibid.
[427] Ibid. p. 5
[428] Ibid.
[429] Ibid.
[430] Ibid.
[431] Ibid.
[432] Ibid. p. 6

effective discovery in the end.[433] Thus it was decided that the committee note should reflect that extensions be "liberally" granted. [434]

Rule 16(b)(1)(B) authorizes issuance of a scheduling order after receiving the parties' Rule 26(f) report or after consulting "at a scheduling conference by telephone, mail, or other means".[435] The committee considered a proposal that would require an actual conference except actions in exempted categories, but this was rejected after hearing from several judges and lawyers at the mini-conference.[436] This change is effected by requiring consultation simply "at a scheduling conference", exempting actions exempted by local rule.[437] Creating a national rule was suspended in favor of awaiting further inquiry into the categories exempted by local rules.[438]

With rule 26(d)(1) the Subcommittee considered proposals that would allow discovery requests to be made before the parties' Rule 26(f) conference in order to facilitate this meeting by allowing consideration of actual requests, providing a focus for discussion.[439] Some participants in the mini-conference, particularly plaintiff counsel, said they would take advantage of this procedure.[440] Others expressed skepticism, fearing that requests made before the conference would be unreasonably broad and resist change at the conference.[441] Considering these concerns, the Subcommittee concluded that the opportunity should be made available to advance the Rule 26(f) conference.[442]

[433] See Advisory Committee, "Report of the Civil Rules Advisory Committee" (May 2013): 6
[434] Ibid.
[435] Ibid.
[436] Ibid. p. 7
[437] Ibid.
[438] Ibid.
[439] Ibid. p. 8
[440] Ibid. p. 9
[441] Ibid.
[442] Ibid.

2) Proportionality

Many proposals sought to promote use of discovery proportional to the needs of the case.[443] A major driver of the litigation cost burden was said to be unbridled discovery that aims to incur cost or seek information of questionable relevance. In the area of fostering proportionality, the drafters sought to enact rules which would curtail this practice.

Several proposals were considered to limit the scope of discovery provided by Rule 26(b)(1) by adding a requirement of "proportionality."[444] However, addition of this term without definition generated concerns that it would be too open-ended to support meaningful implementation.[445] At the same time, many participants in the mini-conference expressed content with the current Rule 26(b)(2)(C) principles, citing implementation rather than rule text as the problem, insisting it is not invoked often enough to dampen excessive discovery demands.[446] These considerations framed a proposal to revise the scope of discovery so it must be proportional to the needs of the case considering among other things, whether the burden or expense outweighs its likely benefit.[447] Under the rule draft, party-controlled discovery became limited to "matter that is relevant to any party's claim or defense" and court-controlled discovery extended to "any matter relevant to the subject matter involved in the action". [448]

Additional proposals reduced the limits in rules 30, 31, 33, and added to Rule 36 for the first time, presumptive numerical limits.[449] These included reducing the presumptive limit on the number of depositions from 10 to 5 and the presumptive duration to 1 day of 6 hours.[450] Reducing

[443] See Advisory Committee, "Report of the Civil Rules Advisory Committee" (May 2013): 9
[444] Ibid.
[445] Ibid. p. 10
[446] Ibid.
[447] Ibid.
[448] Ibid.
[449] Ibid. p. 12
[450] Ibid.

the presumptive limit on the number of depositions was considered at length.[451] Some judges at the Duke Conference expressed the view that civil litigators over-use depositions.[452] At the same time, many parties are opting to resolve their disputes through private arbitration or mediation services because they do not involve depositions.[453]

Research by the FJC further supports these concerns.[454] According to the data base compiled for the 2010 FJC study, cases with more than 5 depositions ranged from 14% to 23% of the pool, and an estimated 78% - 79% of these cases had 10 or fewer depositions.[455] Other findings included that each additional deposition increases the cost of an action by about 5%, and estimates that discovery costs are "too high" tend to increase with the number of depositions.[456] Some lawyers who represent individual plaintiffs in employment discrimination cases have urged that they commonly need more than 5 depositions to establish their claims.[457] So, the Committee Note addressed these concerns by stressing that leave to take more must be granted when appropriate.[458]

Shortening the presumptive length of a deposition from 7 hours to 6 hours reflects revision of earlier drafts that would have reduced the time to 4 hours.[459] The 4-hour limit was prompted by experience in some state courts but several comments suggested that for many depositions, 4 hours will not suffice.[460]

The proposal to reduce the presumptive number of Rule 33 interrogatories to 15 did not attract much concern.[461] There was some concern that 15 interrogatories are not enough even for

[451] See Advisory Committee, "Report of the Civil Rules Advisory Committee" (May 2013): 12
[452] Ibid.
[453] Ibid. p. 13
[454] Ibid.
[455] Ibid.
[456] Ibid.
[457] Ibid.
[458] Ibid. p. 14
[459] Ibid.
[460] Ibid.
[461] Ibid.

some relatively small-stakes cases.[462] Still, the Subcommittee concluded that 15 will meet the needs of most cases, and it is advantageous to provide for court supervision in other cases.[463]

Multiple concerns did underlie Rule 34 proposals which sought to address objections and actual production.[464] Objections are addressed in two ways. First, Rule 34(b)(2)(B) would require that the grounds for objecting to a request be stated with specificity.[465] Second, Rule 34(b)(2)(C) would require that an objection "state whether any responsive materials are being withheld on the basis of that objection." [466] These provisions aimed to respond to a common lament that Rule 34 responses begin with a "laundry list" of objections, produce volumes of materials, then conclude that the production is made subject to the objections.[467] The requesting party is typically left uncertain as to whether anything actually has been withheld.[468] Actual production of material was addressed by new language in Rule 34(b)(2)(B) and a corresponding addition to Rule 37(a)(3)(B)(iv).[469] The new provision directed that a party electing to produce must state they will do so and directs that production be completed no later than as stated in the request or a later reasonable time stated in the response.[470] To match, rule 37 was further amended by adding authority to move for an order to compel production if "a party fails to produce documents."[471]

[462] See Advisory Committee, "Report of the Civil Rules Advisory Committee" (May 2013): 14
[463] Ibid.
[464] Ibid. p. 15
[465] Ibid.
[466] Ibid.
[467] Ibid.
[468] Ibid.
[469] Ibid.
[470] Ibid. p. 16
[471] Ibid.

3) Cooperation

Only one rule was involved in the efforts to generate cooperation and that was rule 1 which essentially functions as the federal rules purpose statement. Proponents insisted that reasonable cooperation among adversaries is vitally important to successful use of the resources provided by the Civil Rules and the explicit inclusion of this aim could help it be accomplished [472] Participants at the Duke Conference regularly pointed to the costs imposed by hyper adversary behavior as an example of the need for a rule that would enhance cooperation.[473] Such a provision might be limited to the discovery rules alone (which generates most complaints) or apply generally to all litigation behavior.[474] Consideration of drafts that would impose a direct and general duty of cooperation faced multiple concerns.[475] The first being that cooperation is an open-ended concept, it is difficult to identify a proper balance of cooperation with legitimate, even essential, adversary behavior.[476] There also is a potential for risk that a general duty of cooperation could conflict with professional responsibilities of effective representation.[477] As a result, these drafts were abandoned and the end proposal was a modest addition to Rule 1.[478]

In this, the parties were made to share responsibility for achieving the aspirations expressed in Rule 1 by the underlined addition to the rule:

"These rules should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding." [479]

[472] See Advisory Committee, "Report of the Civil Rules Advisory Committee" (May 2013): 16
[473] Ibid.
[474] Ibid.
[475] Ibid.
[476] Ibid.
[477] Ibid.
[478] Ibid.
[479] Ibid.

Rule 37(e)

The proposed amendment to rule 37(e) focused on sanctions rather than attempting to directly regulate the details of preservation.[480] It provided a uniform national standard to support imposition of sanctions with the exception of certain cases.[481]

A few issues were raised which the Committee aimed to resolve in revisions. Concern was expressed about use of the word "sanction," which might have adverse significance.[482] Standing Committee members felt that the proposed rule language may permit sanctions even in cases where the loss of information was of minor significance.[483] As a result, rule 37(e)(1)(B)(ii) was revised to authorize imposition of sanctions (in the absence of a finding of willfulness or bad faith) only when they irreparably deprived a party of any meaningful opportunity to present or defend against the claims or defense in the litigation.[484] According to the revised committee note, this was to be determined by examining the importance of the lost information and exploring the possibility that curative measures under subdivision (e)(1)(A) could reduce the adverse impact.[485] If these measures are impossible or fail, the court must determine whether the loss has irreparably deprived a party of any meaningful opportunity to present or defend against their claims.[486] The requirement was further narrowed by looking to all the claims in the action. [487]Lost information may appear critical to a particular claim or defense, but the drafters insist sanctions should not be imposed or should be limited if the claims or defenses are not central to the litigation.[488] The first two questions

[480] See Advisory Committee, "Report of the Civil Rules Advisory Committee" (May 2013): 35
[481] Ibid.
[482] Ibid. p. 36
[483] Ibid. p. 37
[484] Ibid.
[485] Ibid. p. 38
[486] Ibid.
[487] Ibid.
[488] Ibid.

in the list for public comment invited input on issues related to those raised by the Standing Committee discussion.[489]

Standing Committee members also raised concerns about proposed (B)(ii) and its potential to allow the imposition of sanctions when information was lost by accident rather than focusing on willful or bad faith losses.[490] As a response, the Advisory Committee decided that changing this proposal to focus on "the party's actions" rather than "the party's failure" resolved the problem.[491] In addition, it was suggested that the term "substantial prejudice in the litigation" in rule 37(e)(1)(B)(i) as the burden for a party seeking sanctions meet in proving the effect of the information loss be given further definition and the Advisory Committee was urged to invite public comment on this topic, so it composed the third question in the list.[492]

Public Perceptions and Committee Responses

The Standing Committee approved the August 2013 publication of the proposed amendments package, this included Rules 1, 4, 16, 26, 30, 31, 33, 34, 36, and 37.[493] The proposals, along with others published at the same time, were explored at three maximum-capacity hearings in November, January, and February, hosted in Washington, D.C., Phoenix, Arizona, and Dallas, Texas, respectively.[494] They were also addressed in more than 2,000 written comments submitted to the Committee.[495]

[489] See Advisory Committee, "Report of the Civil Rules Advisory Committee" (May 2013): 38
[490] Ibid. p. 39
[491] Ibid.
[492] Ibid.
[493] Advisory Committee on Federal Rules of Civil Procedure, *Report of the Civil Rules Advisory Committee* (May 2014): 3, accessed November 3, 2015.
[494] Ibid.
[495] Ibid.

The Civil Rules Advisory Committee met in Washington, D.C., in November 2013.[496] The first day of the meeting was a hearing on the proposed Civil Rules amendments published for comment in August.[497] Forty-one witnesses testified.[498] Cumulatively, the comments and testimony generated responsive changes by the committees.

The Civil Rules Committee unanimously recommended that the Standing Committee recommend most of the published proposals for approval by the Judicial Conference and adoption by the Supreme Court.[499] The Committee recommended that the Standing Committee withdraw a few proposed amendments.[500] According to the report, the parts that carried forward remained an integrated package aimed at the same goals and those omitted were designed to contribute to these ends, but the remaining package would "function well without them".[501]

A substantially revised version of rule 37(e) was approved for publication at the June 2013 meeting.[502] The invitation for comments included five specific questions on points highlighted in the Standing Committee discussion.[503] Many concerns were raised in extensive testimony and voluminous comments.[504] The rule text was revised extensively in response but the core of the published rule remained.[505]

The Committee carefully studied the public testimony and comments.[506] These came from a variety of sources, most of which can be categorized as pro-access or pro-efficiency. On the

[496] Advisory Committee on Federal Rules of Civil Procedure, *Report of the Civil Rules Advisory Committee* (December 2013): 1, accessed November 3, 2015.
[497] Ibid.
[498] Ibid.
[499] See Advisory Committee, "Report of the Civil Rules Advisory Committee" (May 2014): 3
[500] Ibid.
[501] Ibid. p. 4
[502] Ibid. p. 2
[503] Ibid.
[504] Ibid.
[505] Ibid.
[506] Ibid. p. 4

access side were plaintiff attorneys, civil rights groups, some scholars, litigation groups, and legal foundations.[507] Supporting efficiency based initiatives were defense attorneys, large corporations such as Google, Hewlett-Packard, and some litigation groups.[508] According to the report, more "balanced assessments" were provided by public agencies, judges associations, and organized bar groups.[509]

Comments were divided, but largely supportive, on the proposal to amend Rule 1 to advance cooperation among the parties, and on the proposals to amend Rules 4 and 16 to enhance early and active case management.[510] Reactions to the discovery proposals however, were mixed.[511] Many comments, often clearly reflecting pro-plaintiff or pro-defendant views, divided "sharply" between strong opposition and strong support.[512] Other comments provided more balanced assessments, many of these came from public agencies or organized bar groups that generated their positions in a process seeking to establish an acceptable common consensus.[513] After considering all points of view, the Committee was "convinced" that the recommended amendments will make the civil litigation process work better for all parties.[514] The proposals are explored per category below, in order of greatest to least public comments:

1) Discovery Proposals

The Advisory Committee recommended that the Standing Committee forward most of the published discovery proposals for adoption, with a few revisions in rule texts and with expanded

[507] See Advisory Committee, "Report of the Civil Rules Advisory Committee" (May 2014): 37-216
[508] Ibid.
[509] Ibid. p. 4
[510] Ibid.
[511] Ibid.
[512] Ibid.
[513] Ibid.
[514] Ibid.

Committee Notes.[515] The Committee also recommended that the Standing Committee omit proposals for new and reduced presumptive limits for discovery under Rules 30, 31, 33, and 36.[516] All that remained of these proposals were the parts that amended Rules 30, 31, and 33 to reflect the proposal to transfer the operative provisions of Rule 26(b)(2)(C)(iii) to Rule 26(b)(1).[517]

For Rule 26(b)(1), which addressed the scope of discovery and proportionality, those who wrote and testified about experience representing plaintiffs saw proportionality as a new limit designed to favor defendants.[518] They criticized the factors as subjective and so flexible as to defy any uniform application among different courts.[519] They further asserted that "proportionality" would become a new objection to discovery requests or encourage parties to withhold information by making determinations of nonproportionality, leading to increased motion practice, costs and delay.[520] They were especially concerned that proportionality would routinely overshadow the extensive discovery needed to prove many claims that involve modest amounts of money but important principles for plaintiffs and the public interest.[521] These problems can be particularly emphasized in categories of cases that involve "asymmetric information." For example, plaintiffs in many employment and civil rights actions have little relevant information, while defendants hold all the important cards and reveal them only through extensive discovery.[522] Most discovery comments were from plaintiffs-side employment lawyers, citing the difficulties they already encounter trying to discover enough information to avoid summary judgment and prove their claims.[523]

[515] See Advisory Committee, "Report of the Civil Rules Advisory Committee" (May 2014): 4
[516] Ibid.
[517] Ibid.
[518] Ibid. p. 5
[519] Ibid.
[520] Ibid.
[521] Ibid.
[522] Ibid.
[523] Ibid. p. 242

Other comments against proportionality came from sources such as members of congress, judges and judicial associations, civil rights groups, and researchers.[524] Some of these asserted that proportionality would impose a new burden on the requesting party to justify each discovery request.[525] Others argued that the proportionality proposal is a solution in search of a problem, that discovery in civil litigation is already proportional to the needs of cases.[526] These arguments were often coupled with the assertion that there is no empirical evidence to support concerns that disproportional discovery is sought in a worrisome number of cases.[527]

The Committee considered these comments but remained "convinced" that the proposal would constitute a "significant improvement" to the rules governing discovery.[528] The Committee reached this conclusion for three primary reasons: emphasis on proportionality at the Duke conference, the history of proportionality and Rule 26(b)(1), and adjustments to the 26(b)(1) proposal through committee note.[529] According to the report, the Committee remained convinced that the proportionality considerations "should not and will not increase the costs of litigation" but instead will decrease the cost of resolving disputes without sacrificing fairness.[530]

Another rule involved in some level of debate was rule 26(c)(1) which originally authorized an order to protect against "undue burden or expense". [531] This authority included the ability to allow discovery only on the condition that the requesting party bear part or all of the costs of responding, which some courts were utilizing.[532] According to the report, making the authority explicit would ensure it being considered as an alternative to denying requests or ordering them

[524] See Advisory Committee, "Report of the Civil Rules Advisory Committee" (May 2014): 81-126
[525] Ibid. p. 5
[526] Ibid.
[527] Ibid.
[528] Ibid.
[529] Ibid. p. 5-8
[530] Ibid. p. 8
[531] Ibid. p. 11
[532] Ibid.

despite the risk of imposing undue burdens and expense on the responding party.[533] To foster balance, the Committee Note admonished that recognizing the authority to shift the costs of discovery does not mean that cost-shifting should become a common practice.[534]

Next was rule 34, with three proposals for amendment.[535] The first change would require that an objection to a request to produce be stated "with specificity." [536] The second permitted a responding party to state that it will produce copies of documents or ESI instead of permitting inspection, and may state a reasonable time for the response.[537] The third required that an objection state whether any responsive materials are being withheld on the basis of that objection.[538] These proposals were well supported by the testimony and comments, though some issues were cited.[539]

A particular concern was that a party who limits discovery may not know what documents or ESI it has not found, and cannot state whether any materials are being "withheld". [540] This concern was addressed by expanding the Committee Note to state that a party who does not intend to search all sources should object by specifying the bounds of the search it plans to undertake.[541] This objection could also serve as a statement that anything outside the described limits is being "withheld".[542]

Along the same lines, the proposals would add Rule 26(d)(2) to allow a party to deliver a Rule 34 request before the Rule 26(f) conference.[543] The comments on this proposal were mixed.[544]

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[533] See Advisory Committee, "Report of the Civil Rules Advisory Committee" (May 2014): 11
[534] Ibid.
[535] Ibid.
[536] Ibid.
[537] Ibid.
[538] Ibid.
[539] Ibid.
[540] Ibid.
[541] Ibid.
[542] Ibid.
[543] Ibid. p. 12
[544] Ibid.

Doubts were expressed over whether anyone would seize the opportunity and fears were expressed that requests would be inappropriately broad and encourage the requesting party to adhere without taking account of good-faith objections expressed at the conference.[545] Plaintiff lawyers were more likely to say they would use the opportunity to provide advance notice of what should be discussed at the Rule 26(f) conference.[546] Defense lawyers were more likely to say they would welcome receiving advance requests than to say that they would make them.[547] So, the Committee recommended that this proposal be approved for adoption.[548]

Regarding the numerical limits proposals for rules 30, 31, 33, and 36, much contention was had. The published proposals sought to encourage active case management and advance the efficient use of discovery by amending the presumptive numerical limits to promote efficiency and early discussion about the extent of discovery needed to resolve the dispute.[549] Rules 30 and 31 would have been amended to reduce the presumptive limit on the number of depositions.[550] Rule 30(d) would have been amended by reducing the presumptive limit for an oral deposition.[551] Rule 33 would have been amended to reduce the presumptive number of interrogatories a party may serve on any other party.[552] And, for the first time, a presumptive limit would have been introduced for requests to admit under Rule 36, excluding requests to admit the genuineness of documents from the count.[553]

[545] See Advisory Committee, "Report of the Civil Rules Advisory Committee" (May 2014): 12
[546] Ibid.
[547] Ibid.
[548] Ibid.
[549] Ibid.
[550] Ibid.
[551] Ibid.
[552] Ibid.
[553] Ibid.

These proposals garnered some support but also encountered fierce resistance.[554] The most basic ground of resistance was that the present limits in Rules 30, 31, and 33 work well.[555] Many expressed the fear that presumptive limits would become hard limits in some courts and would deprive parties of the evidence needed to prove their claims and defenses.[556] The comments further suggested that there is no need or reason to change them, nor any experience that would suggest requests to admit are so frequently over-used as to require introduction of a first time presumptive limit.[557]

The proposals addressing depositions were further resisted by urging that many types of cases require more than 5 depositions.[558] Fears were expressed that opposing parties could not be relied upon to agree on a reasonable number, that agreement might be reached only by inappropriate trade-offs in other areas and the rule would be seen to express that 5 depositions are the new ceiling of reasonableness.[559] All of these concerns were commonly bundled into an argument that reduced limits would generate more contentiousness and increased motion practice.[560] Resistance to the reduction of the presumptive number of interrogatories, and to introducing a presumptive limit on requests to admit, was similar.[561]

Narrower concerns addressed the proposal to reduce the presumptive time for an oral deposition from one day of 7 hours to one day of 6 hours.[562] The Committee originally contemplated a 4-hour limit, based on its success in some state courts.[563] Prepublication comments

[554] See Advisory Committee, "Report of the Civil Rules Advisory Committee" (May 2014): 12
[555] Ibid.
[556] Ibid.
[557] Ibid p. 12-13
[558] Ibid. p. 13
[559] Ibid.
[560] Ibid.
[561] Ibid.
[562] Ibid.
[563] Ibid.

expressed such "grave concerns" that the Committee decided to recommend a 6-hour limit instead.[564] Many comments, however, suggested the need for at least the full 7 hours in cases that involve several parties, questioning based on lengthy documents that the respondent must review, or obstructive behavior designed to "run the clock".[565]

These concerns persuaded the Committee that was better not to press ahead with these proposals, they were withdrawn from consideration.[566]

2) Early Case Management

The proposals aimed at encouraging early and active case management drew fewer comments than the discovery proposals.[567] The proposals to add to Rule 16 met general, but not unanimous, approval.[568] The Committee recommended the Rule 16 proposals for adoption without change.[569] However, the proposal to reduce the time for service under Rule 4(m) encountered substantial opposition.[570] The Committee considered these comments and recommended that the time to serve be reduced from 120 to 90 days, rather than the earlier proposal to reduce the time to 60 days.[571]

In rule 16, the time for the scheduling conference was revised to be set at the earlier of 90 days after any defendant has been served, down from 120 days in the present rule, or to 60 days after any defendant has appeared, down from 90 days in the present rule.[572] But the proposal also added, for the first time, a provision allowing the judge to set a later time on finding good cause

[564] See Advisory Committee, "Report of the Civil Rules Advisory Committee" (May 2014): 13
[565] Ibid.
[566] Ibid.
[567] Ibid. p.14
[568] Ibid.
[569] Ibid.
[570] Ibid.
[571] Ibid.
[572] Ibid.

for delay.[573] The concerns about these shortened times expressed in the testimony and comments echoed concerns the Committee considered.[574] They were based on the fear that the new times may not suffice to prepare adequately, particularly in a complex case or one involving a large institutional party that needs time to work through the complexities of its internal organization.[575]

The proposal added two subjects to the list of contents permitted in a scheduling order: the preservation of ESI, and agreements reached under Evidence Rule 502, but there was no significant objection to these provisions.[576] However, it also listed as a permitted topic a direction in the scheduling order that before moving for an order relating to discovery, the movant must request a conference with the court.[577] The Committee originally thought it may be desirable to adopt a pre-motion conference requirement, not simply a topic permitted for a scheduling order. [578] Many courts have adopted such requirements by local rule and experience shows this practice is effective in resolving discovery disputes quickly and at a low cost.[579] Due to the fact that what works for some courts may not work for all, the requirement was not added.[580]

In Rule 4(m) which sets the time to serve, the published proposal sought to expedite initiation of litigation by reducing this period from 120 to 60 days.[581] The comments and testimony led the Committee to recommend that the period be set at 90 days.[582] Many comments offered reasons why 60 days is not enough time to serve process.[583] Language was added to the Committee

[573] See Advisory Committee, "Report of the Civil Rules Advisory Committee" (May 2014): 14
[574] Ibid.
[575] Ibid.
[576] Ibid.
[577] Ibid. p. 15
[578] Ibid.
[579] Ibid.
[580] Ibid.
[581] Ibid.
[582] Ibid.
[583] Ibid.

Note to recognize that even at 90 days, the new limit "will increase the frequency of occasions to extend the time for good cause".[584]

3) Cooperation

The published proposal amended Rule 1 to direct that the rules "be construed, and administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding".[585] The Committee recommended approval of this proposal for adoption without change to either rule text or Committee Note.[586] There was little opposition to the basic concept of cooperation and any doubts that emerged went in different directions.[587] One concern was that Rule 1 is "iconic," and should not be touched.[588] Another was that the rules directly provide procedural requirements, not professional responsibility, so complicate these provisions may invite confusion and ill-founded attempts to seek sanctions.[589] Doubts also were expressed on practical grounds as comments suggested that the proposed rule was attractive as an abstract proposition, but would prompt the strategic use of "Rule 1 motions" for dilatory purposes.[590] None of these concerns seemed to warrant any change of the published proposal.[591]

[584] See Advisory Committee, "Report of the Civil Rules Advisory Committee" (May 2014): 15
[585] Ibid. p. 15-16
[586] Ibid. p. 16
[587] Ibid.
[588] Ibid.
[589] Ibid.
[590] Ibid.
[591] Ibid.

Rule 37(e)

Though the new rule differed from the proposed amendment published for public comment in August 2013, the Advisory Committee unanimously decided that republication would not be necessary to achieve adequate public comment and would not assist the work of the Advisory Committee on this subject.[592] In general, two goals inspired this work, one was to establish greater uniformity in the ways in which federal courts respond to a loss of ESI and the other was to relieve the pressures that have led many potential litigants to engage in what they describe as massive and costly over-preservation.[593] Information from many sources, including detailed examples provided in the public comments and testimony, supported the proposition that great costs are often incurred to preserve information in anticipation of litigation, including litigation that is never brought.[594]

During the two years following the Duke Conference, the Subcommittee considered several basic approaches but in the end, it became apparent that the range of cases in federal court is too broad and diverse to permit specific guidelines.[595] The Subcommittee chose instead to pursue a different approach addressing court actions in response to a failure to preserve information in the anticipation or conduct of litigation.[596] Under this approach, the proposed Rule would not itself create a duty to preserve instead taking the duty as established by case law.[597] Researched showed cases uniformly hold that a duty to preserve information arises when litigation is reasonably anticipated.[598] Although some comments urged that the rule should eliminate any duty to preserve

[592] See Advisory Committee, "Report of the Civil Rules Advisory Committee" (May 2014): 35
[593] Ibid.
[594] Ibid.
[595] Ibid. p. 36
[596] Ibid.
[597] Ibid.
[598] Ibid.

before an action is actually filed, the Advisory Committee believed that a rule so limited would result in the loss or destruction of information needed for litigation.[599]

The Advisory Committee's Discovery Subcommittee began deliberating on appropriate reactions to the public comments with a half day meeting in Dallas immediately after the third public hearing.[600] The Subcommittee held six conference calls after that meeting to examine the issues raised.[601] Many of the comments reinforced conclusions previously reached by the Subcommittee, while others provided new insights.[602]

The Advisory Committee remained "firmly convinced" that a rule addressing the loss of ESI in civil litigation was greatly needed.[603] They arrived at this conclusion due to the explosion of ESI in recent years affecting all aspects of civil litigation making preservation a major issue confronting parties and courts causing a bewildering array of court cases.[604] As a result, loss of electronically stored information produced a significant split in the circuits.[605] The public comments demonstrated that ESI is over-preserved out of fear that some might be lost, they would be viewed as negligent, and potentially sued in a circuit that permits serious sanctions.[606] The Advisory Committee sought to resolve this circuit split with a more uniform approach and was satisfied that the new proposed rule would do so. [607]

At the same time, the public comments made the Advisory Committee more sensitive to the need to preserve a broad range of trial court discretion for dealing with lost ESI.[608] Among

[599] See Advisory Committee, "Report of the Civil Rules Advisory Committee" (May 2014): 36
[600] Ibid. p.37
[601] Ibid.
[602] Ibid.
[603] Ibid.
[604] Ibid.
[605] Ibid.
[606] Ibid.
[607] Ibid.
[608] Ibid.

other steps after its Dallas meeting, the Discovery Subcommittee took a look at cases addressing the loss of information relevant to litigation.[609] The public comments and this analysis highlighted the wide variety of situations faced by when information is lost, and strongly underscored the need to preserve broad trial court discretion in fashioning remedies.[610] The revised rule proposal therefore retained such discretion.[611]

The public comments also made clear that the explosion of ESI will continue and even accelerate.[612] Significant amounts of ESI will be created and stored not only by sophisticated entities with large IT departments, but also by unsophisticated persons whose lives are recorded on their phones, tablets, cars, social media pages, and tools not even presently foreseen.[613] The litigation challenges created by ESI and its loss are predicted to increase, not decrease, and will affect unsophisticated as well as sophisticated litigants.[614] The Advisory Committee accordingly concluded that the published proposal's approach of limiting virtually all forms of "sanctions" to a showing of both substantial prejudice and willfulness or bad faith was too restrictive.[615] The value of preserving judicial flexibility was reinforced by a related conclusion.[616] One reason for significantly limiting sanctions was to reduce the costly over-preservation that had been emphasized.[617] Many who commented noted their high costs of preservation, but none were able to provide any precise prediction of the amount that would be saved by reducing the fear of

[609] See Advisory Committee, "Report of the Civil Rules Advisory Committee" (May 2014): 37
[610] Ibid. p. 37-38
[611] Ibid. p.38
[612] Ibid.
[613] Ibid.
[614] Ibid.
[615] Ibid.
[616] Ibid.
[617] Ibid.

sanctions.[618] So the potential savings from reducing over-preservation, were deemed "too uncertain to justify seriously limiting trial court discretion".[619]

The Advisory Committee also concluded that any reference in the new rule to "sanctions," should be deleted.[620] They found that allowing curative measures was appropriate for the loss of ESI, and that drafting a rule became complicated if it sought to distinguish between curative measures and sanctions.[621] Further questions were raised during the public comment period about the references in the published draft to "substantial prejudice" and "willful or in bad faith". [622] Many comments urged that further definitions should be adopted.[623] Similarly, the published provision that allowed sanctions when the loss of information "irreparably deprived" a party of opportunity to present or defend against the claims drew criticism.[624] Many expressed concern that it risked undoing the attempt to limit "sanctions" to circumstances of substantial prejudice and either willfulness or bad faith.[625] The terms were said to be subjective.[626]

In addition, the Advisory Committee recommended that the rule be limited to ESI because it was the subject that launched the venture and to them most required uniform guidance.[627] They recognized that this decision could be debated but cited that efforts have shown it is very difficult to craft a rule dealing with failure to preserve tangible things.[628] The published rule sought to accommodate such cases by allowing "sanctions" but this drew many comments suggesting that it

[618] See Advisory Committee, "Report of the Civil Rules Advisory Committee" (May 2014): 38
[619] Ibid.
[620] Ibid.
[621] Ibid.
[622] Ibid.
[623] Ibid. p.38-39
[624] Ibid p.39
[625] Ibid.
[626] Ibid.
[627] Ibid.
[628] Ibid. p.40

opened the door to avoiding the limits otherwise imposed on "sanctions". [629] It was determined that limiting the new rule to ESI avoids this complication.[630]

Further, practical distinctions between ESI and other kinds of evidence were found.[631] ESI is created in large amounts previously unheard of and often is duplicated.[632] The potential consequences of its loss in one location often will be less severe than the consequences of the loss of tangible evidence.[633] ESI also is deleted or modified on a regular basis, frequently with no conscious action on the part of the person or entity that created it.[634] These practical distinctions, the difficulty of writing a rule that covers all forms of evidence, and others persuaded the Advisory Committee that the new Rule 37(e), like the present, should be limited to ESI.[635] The Committee recognized that the dividing line between ESI and other evidence may in some instances be unclear.[636] Still they concluded that courts are well equipped to deal it on a case-by-case basis and that the reasons for limiting the rule to ESI outweigh any potential complications.[637]

Major elements of the new rule include:

Reasonable steps to preserve - the revised rule was designed to apply if ESI that "should have been preserved" in the "anticipation or conduct" of litigation is lost because a party failed to take "reasonable steps" to preserve it.[638] Responding to issues cited by commenters about all

[629] See Advisory Committee, "Report of the Civil Rules Advisory Committee" (May 2014): 40
[630] Ibid.
[631] Ibid.
[632] Ibid.
[633] Ibid.
[634] Ibid.
[635] Ibid.
[636] Ibid.
[637] Ibid.
[638] Ibid.

parties potential liability, the Note recognizes that the party's sophistication with regard to litigation may bear on whether it should have realized what should be preserved.[639]

Restoration or replacement of Lost ESI - if reasonable steps were not taken, and information was lost as a result, the rule directs that the next focus should be on whether the lost information can be restored or replaced through additional discovery.[640] Proposed Rule 37(e)(1) provided that the court may: upon finding prejudice, order measures "no greater than necessary" to cure it.[641] This proposal added a limit urged by many of the comments – that the measures be no greater than necessary.[642] The proposal said that the court must find prejudice to order corrective measures, but did not say which party bears the burden of proving prejudice.[643] Many comments raised concerns about assigning burdens, noting that it is often difficult for a party to prove it was prejudiced by the loss of information it has never seen.[644]

Adverse instructions - *p*roposed (e)(2) provided that the court may[645]:

> (2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation:
> (A) presume that the lost information was unfavorable to the party;
> (B) instruct the jury that it may or must presume the information was unfavorable to the party; or
> (C) dismiss the action or enter a default judgment.

A primary purpose of this provision was to eliminate the circuit split on when a court may give an adverse inference jury instruction for ESI loss by permitting adverse inference instructions only on a finding that the party acted with the intent to deprive another of the information.[646]

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[639] See Advisory Committee, "Report of the Civil Rules Advisory Committee" (May 2014): 41
[640] Ibid.
[641] Ibid.
[642] Ibid.
[643] Ibid.
[644] Ibid.
[645] Ibid. p. 42
[646] Ibid.

Beyond these rule elements, the published proposal included a list of factors that it said the court should employ in determining whether a party should have retained information and whether it lost the information willfully or in bad faith.[647] The list received much attention during the public comment period.[648] Some saw them as providing useful guidance to parties but others raised substantial concerns about whether the list was incomplete and possibly misleading. As a result, the eventual decision of the Advisory Committee was to remove the factors from the rule.[649]

Lastly, the published preliminary draft called for replacing present Rule 37(e) with the new rule.[650] The invitation for public comment included the question whether the present rule should be preserved.[651] There were some comments that favored retaining some of the present rule, but the great majority saw no need for retaining the current rule once the new rule is adopted.[652] Going along with this, the Advisory Committee recommended replacing the current rule with the new rule.[653]

Final Approval

The Advisory Committee unanimously approved and submitted the proposed amendments with a recommendation that they be approved and submitted to the Judicial Conference at its April 2014 meeting.[654] The amendments were subsequently approved unanimously by the Standing Committee at its meeting in May 2014.[655] From there, the Judicial Conference approved and

[647] See Advisory Committee, "Report of the Civil Rules Advisory Committee" (May 2014): 45
[648] Ibid.
[649] Ibid.
[650] Ibid.
[651] Ibid.
[652] Ibid.
[653] Ibid.
[654] Advisory Committee on Federal Rules of Civil Procedure, *Report to the Judicial Conference* (September 2014): 1, accessed November 3, 2015.
[655] Ibid.

forwarded the rules package to the Supreme Court in September 2014.[656] In April 2015, the amendments were submitted to Congress for approval by Chief Justice Roberts, who ordered them effective on December 1, 2015 absent any Congressional action to reject or modify.[657]

[656] United States Courts, "Judicial Conferences Receives Budget Update, Forwards Rules Package to Supreme Court", accessed November 2, 2015.
[657] Supreme Court of the United States, *Transmittal to Congress* (April 29, 2015): 13-15, accessed November 1, 2015.

VII. Analysis

The journey these rules travelled ostensibly began with the 2010 Duke Conference, but philosophically originated centuries ago. Tracing that path from the beginning reveals a major process aimed at achieving centrality and balance among competing interests. One of the mechanisms for doing that is to make parties abide by the same rules. However, over time, this notion itself became complicated through the expansion of litigation due to the American economic booms and rights movements. It is at this point that the tensions between access and efficiency in generating and applying the federal rules become apparent as acting influences on the court's function.

Original rules practice espoused the liberal ethos that the courts and litigation itself are designed to be open and rules are guidelines rather than absolute truths. When the courts became burdened with a high caseload, partially as a result, voices from the side of efficiency began to win the private and public battle. Now, modern rules practice is characterized by a mainly closed court that is focused on the duration and necessity of litigation, a concern catalyzed by fiscal interests, typically those of large corporations who have much at stake. Considering this, it is little surprise that the push to foster court efficiency even if it hinders access has grown significantly and enjoyed success. In fact, the entire purpose for hosting the 2010 Duke Conference was to respond to efficiency based complaints by generating a rules package. The Advisory Committee was in the beginning more attentive to the needs of one side and merely accommodating the other views.

It is clear from the issues cited at the conference that the classic opposing sides, plaintiffs and defendants, have different viewpoints of how litigation should take place. The chief complaint, rising litigation costs, was as usual an issue cited mainly by defendants. The FJC survey reviewed from this perspective shows a two-sided story. Defense counsel essentially cited the size and scope

of plaintiff requests as in need of limitation while plaintiff counsel characterized their behavior as arising from the unresponsiveness and dodgy nature of defendants.[658] There was little consensus as to why costs are rising but there was agreement regarding who can halt the process.[659] Both sides agreed that judicial management and uniform application of rules should be a priority.[660]

Regarding the proposed rule amendments in general, the suggestions can be summated as limitations. Though participants cited other remedies for procedural deficiencies, many saw additional restraints made explicit through new rules or rule revisions as the solution. Sketches for revisions that addressed e-discovery preservation, required prompt responses from parties and rules from judges, requirements of conferral among the court and parties, and even special litigation tracks were discussed.[661] This considered, it is entirely reasonable to say that the Duke Conference leaned towards efficiency by any means possible.

What happened next further reveals the operative philosophy of the drafters. In the May 2013 report, three sets of rules proposals were revealed for upcoming publication and public comment including case management, discovery, and cooperation. Within each category, the proposals focused on increased rulemaking and restraint in the name of court efficiency. Ideas to improve case management included expediting the early litigation process by measures such as shortening the time for service and issuing of scheduling orders, and permitting early discovery requests.[662] Along the same lines, a myriad of ideas were sketched out for improving discovery, the major alleged device for rampant costs. These included explicit instructions to ensure proportionality, reduce excessive requests and presumptive limits, expedited document

[658] See Judicial Conference, "Report to the Chief Justice," 4
[659] Ibid.
[660] Ibid.
[661] See Advisory Committee, "Report of the Civil Rules Advisory Committee" (December 2012): 128-129
[662] Ibid.

production, and uniform national sanctions for failure to preserve information.[663] Finally, the drafters aimed to foster cooperation by revising rule one to explicitly include this among the goals of litigation.[664]

Naturally, a number of these proposals came under heavy criticism once published. The case management proposal for rule 4(m) reducing the time to serve was heavily contended.[665] The original proposal reduced the time by 50% which many responders cited was not reasonable, in response the final version of the rule featured a 25% reduction instead.[666] Discovery provisions were also a source of debate. Among these was the original sketch to reduce presumptive numerical limits on depositions and interrogatories, which was completely dropped after the committee reviewed comments and listened to testimony indicating dissent.[667] Again, the unreasonableness of cutting the limits down so far and creating a new burden, most likely for plaintiffs already struggling to present their claims, was put forth and the committee was entirely responsive.

Similarly, the process rule 37(e) went through is somewhat an example of committee responsiveness. The public brought forward a need for more judicial discretion in ESI loss cases due to variability and definitional problems with some terms such as "sanctions".[668] In response to both these and Standing Committee concerns, they decided to limit the rule to ESI failure to preserve guidelines, omitting the terms with definitional problems and generally providing what should occur in a willful or negligent loss case.[669] It does not expressly provide what should be

[663] See Advisory Committee, "Report of the Civil Rules Advisory Committee" (December 2012): 128-129
[664] Ibid.
[665] See Advisory Committee, "Report of the Civil Rules Advisory Committee" (May 2014): 14
[666] Ibid.
[667] Ibid p. 12-13
[668] Ibid. p. 37-40
[669] Ibid.

preserved, which was an early request from large data producing entities who must anticipate litigation, but avoids doing so due to a literal inability.[670]

This pattern of responsiveness was not consistent, other actions displayed the committee's willingness to make precarious judgment calls against the urging of public commenters. For example, the addition of a proportionality requirement for Rule 26(b)(1) in reference to discovery was cited as helping defendants, particularly in cases with asymmetrical information such as employment discrimination or other civil rights cases.[671] If the defendant has vastly more information than the plaintiff, discovery within the case is nearly guaranteed to be non-proportional. The final decision on the rule from the committee was to pursue proportionality anyway, offering a three point reasoning for their choice.[672] Though judges will still have significant discretion in determining how to apply the rule, the potential for plaintiff's discovery requests to come under greater scrutiny has undoubtedly been implemented and the dissenters predictions are likely to ring true in some circuits.

Ultimately, the rules drafting and revision process between the 2010 Conference and their submission to Congress displays marked differences from beginning to end. They began with a very stringent set of proposals set forth at the conference to create a more efficient procedural system which through a fairly representative democracy based method, became a more scaled back proposal. Unlike the 1938 drafters, the committee members did not carry an explicit ideological goal to open or close the courts. While acting in the name of efficiency, their response to public outcry in most of the proposals that received complaints was to act accordingly. In some, they took

[670] See Advisory Committee, "Report of the Civil Rules Advisory Committee" (May 2014): 37-40
[671] Ibid. p. 5-8
[672] Ibid.

on the representative role and decided in terms of what would be for the greater good which is still to be determined.

A common perception among current litigators is that the new time limits in rules 4 and 16 will simply require more forethought and planning on the behalf of parties.[673] But most focus more on the rule 26(b) amendment to include proportionality and remove the classic authorization of any "matter relevant to the party's claim or defense" that invited more expansive discovery requests.[674] [675]Some attention has been given to changes to the rule 34 document production requests.[676] [677]Also, the revision of rule 37(e) is widely regarded as a big deal for e-discovery due to establishing a uniform test to establish that culpability in the loss of ESI and provision remedies when preservation has not been met.[678] [679] [680]Generally, legal scholars and legal bloggers have made the new rules a focus and seem to take part in sharing this knowledge with others in the profession. Likewise, the profession's leadership has sought to provide guidelines for dealing with the changes. The American Bar Association Section of Litigation and Duke Law Center for Judicial Studies are jointly presenting a thirteen city series of dialogues[681]. Their stated goal is to "further the understanding of the case management techniques that will help courts and litigants realize the Amendments' full potential to make discovery more targeted, less expensive and more effective in achieving justice".[682] Each three hour program features leaders from the Rules

[673] Mack, Olga, Poster, Sara, and Spaulding, Tom, "Proposed Changes to FRCP – More Efficiency for Civil Procedures", *Association of Corporate Counsel,* (2014): 84, accessed November 1, 2015.
[674] Ibid.
[675] Metropolitan Corporate Counsel, "Just Follow the Rules! FRCP amendments could be e-discovery game changer", (July 2015). Accessed November 14, 2015.
[676] Ibid.
[677] See Mack, Poster, and Spaulding, "Proposed Changes to FRCP," 88-89
[678] Ibid.
[679] See Metropolitan Corporate Counsel, "Just Follow the Rules!"
[680] Lange, Michele. "SCOTUS Approves Proposed FRCP Amendments." *The E-discovery Blog.* Accessed November 1, 2015.
[681] American Bar Association Section of Litigation and Duke Law Center for Judicial Studies, "Rules Amendments Roadshow," accessed November 1, 2015.
[682] Ibid.

amendment process, panel discussions among judges and litigators, all to walk participants through application of the new rules using hypothetical cases and techniques.[683]

The View from the Bench

While every bit of academic research is helpful in furthering the current knowledge regarding the Federal Rules and their impact, it is highly important to note the relevance of judges and court staff in this process. Though some are already noted in research as taking part in the drafting of rules or making suggestions, all federal court judges who handle civil cases and their staff are on the front lines of implementation. Currently, there are 678 district court judgeships across the nation entrusted to abide by the procedural rules designated for their cases.[684] The successful implementation and usage of these rules furthers their legitimacy and impacts the ongoing amendments.

To capture a sample of judicial reactions and plans, several interviews were conducted in November 2015 focused on judicial staff in the Middle District of Florida.[685] The results generally show that staff are aware of and preparing for upcoming changes. However, three of four interviewees explained that because the rules are not effective until December 1st, they are not a current priority.[686] Two in particular noted that they will not study the changes until they are official. [687]

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[683] See American Bar Association Section of Litigation and Duke Law Center for Judicial Studies, "Rules Amendments Roadshow"
[684] Federal Judicial Center, "Who Does What," Accessed November 25, 2015.
[685] Sample interview questions: *How are you preparing for the upcoming rule changes? What changes do you anticipate for the court? What are your perceptions of the new rules? Do you think the changes will work well with local rules? How do you know the rules are changing and when do you start paying attention?*
[686] C1, Interview by author, Phone, Middle District of Florida, November 19, 2015; C2, Interview by author, Phone, Middle District of Florida, November 23, 2015; C4, Interview by author, Phone, Middle District of Florida, November 25, 2015.
[687] See C2, Interview by author; C4, Interview by author

As for changes they are paying attention to, amendments to rules 4m, 16, 26, 37, and 55 were cited with rule 26 mentioned by each interviewee. There was a lack of unanimity over the impact of reducing the time for service. One staff member shared that this change would "make cases move faster" and put more pressure on court employees to help everyone be motivated to bring cases to their conclusion, describing this change as "a good thing." [688] They noted that the court exists to "serve the parties" and wants to "do things that help them." [689] However, another said this would affect the day to day function of the court and could cause conflict with local rules, creating a potential need for local rule revision. [690] They further shared that these provisions make it seem that the court makes all decisions regarding deadlines when in reality parties do. [691]Yet another staff member took a slightly different perspective, explaining that anytime the federal rules change, it could obviate the need for a local rule, so the court may simply have to adapt. [692]

Regarding discovery provisions, two interviewees provided a mainly neutral perspective on the upcoming changes. One commented that the rule 26 change is "important" going forward because it makes the costs of discovery an important factor for the court to take into account in determining whether to order production. [693] They also noted that due to the rule 37 amendments, the court will know going forward "what we are going to sanction people for doing," indicating that there were previously grey areas regarding accidentally deleted information. [694] The other interviewee who commented on discovery provisions made a general statement that "some aren't too drastic" but will make explicit what was already implicit. [695] Regarding specific provisions,

[688] See C2, Interview by author
[689] Ibid.
[690] See C1, Interview by author
[691] Ibid.
[692] C3, Interview by author, Phone, Middle District of Florida, November 23, 2015.
[693] Ibid.
[694] Ibid.
[695] See C4, Interview by author

they said that rule 26's new proportionality component would change how orders are drafted and how things are considered. [696]

Overall, though responses were few partially due to a general apprehension towards commenting on such a sensitive matter, they were mainly consistent. Judicial staff perceive that the 2015 amendments are going to change how their office functions, in some aspects causing improvement and in others creating new obligations. Though keenly aware of their impact on a case's success, the rules to those who actually do the work of applying them are simply rules. At this level, philosophical trends and ideological motivations are irrelevant for staff acting in an official capacity. Their major concerns seem to exist in terms of ensuring proper implementation and adjusting their patterns accordingly. Considering these findings, the rules package appears to be facing a generally positive reception and should be implemented as intended.

[696] See C4, Interview by author

VIII. Conclusion

The Federal Rules of Civil Procedure are a fascinatingly complex staple of American jurisprudence for which points of fixation are built around the fact that rulemaking assigns winners and losers. Initially praised for the amazing feat of bringing uniformity out of an uncoordinated and relatively new judicial system, the rules have become a serious source of contention in the legal profession as a realization of their true power emerged over the 20th century. Tracing this part of judicial history shows that as awareness rose for all interests, the court was closed to average litigants through procedural changes and precedent setting opinions. This process is what shows us the two sides of the philosophical battle which re-emerged, proponents of access and proponents of efficiency.

Much of modern rule practice is characterized by a distinct leaning towards efficiency, one that appears to have won the most recent battle through the survival of rules amendments and precedent promoting expedient and reasoned litigation. Though efforts were successfully made to curtail the extent of these proposals, the anticipated and potential impact remains substantial.

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Appendix
Judicial Staff Interviews

This appendix contains the survey instrument for phone interviews with judicial staff. Participants were solicited in November 2015 by direct phone calls to thirteen offices of judges in the United States District Court for the Middle District of Florida, including both District and Magistrate Judges. Of the thirteen contacted, four participated in the interviews, all of whom requested to remain anonymous. Questions employed varied slightly based on their willingness to engage in discussion, but generally included the following:

- How are you preparing for the upcoming rule changes?
- How do you know the rules are changing and when do you start paying attention?
- What changes do you anticipate for the court?
- What are your perceptions of the new rules?
- Do you think the changes will work well with local rules?