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More than

30 years ago,

the civil rules were

amended to try to bring

proportionality to discovery.

But very little changed in practice.

On Dec. 1, 2015, new rules with the same

goal take effect. In the pages that follow, judges

and lawyers outline the changes, discuss the intended

impact, and offer guidelines for adapting to this new — and

yet familiar — landscape. **Are we finally on the right track?**

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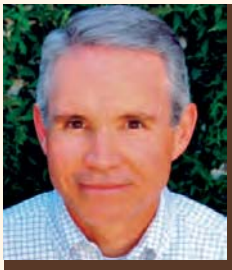
New Rules, New Opportunities

by David G. Campbell

IN May of 2010, some 200 judges, lawyers, and academics gathered for two days at the Duke University Law School to evaluate the state of civil litigation in federal court. The conference was sponsored by the Advisory Committee on the Federal Rules of Civil Procedure. Many studies, surveys, and papers were prepared in advance of the conference to aid the discussion. Although the gathering found that federal civil litigation works reasonably well and that a complete overhaul of the system is not warranted, the participants also concluded that several improvements clearly are needed. Four stood out in particular: greater cooperation among litigants, greater proportionality in discovery, earlier and more active case management by judges, and a new rule addressing the preservation and loss of electronically stored information ("ESI").

The Advisory Committee took the findings of the Duke conference and drafted amendments that address these four areas of focus. The amendments have been approved unanimously by the Advisory Committee, the Standing Committee on the Rules of Practice and Procedure, the Judicial Conference of the United States, and the United States Supreme Court and will take effect on Dec. 1, 2015, unless Congress acts to disapprove them. As Congressional disapproval appears unlikely, judges and lawyers should become familiar with the new rules. The Advisory Committee believes they present a unique opportunity to improve the delivery of civil justice in federal courts.

Participants in the Duke conference recognized that rule amendments alone will do little to improve the civil litigation system. A change in behavior is also required. As a result, over the course of the next several months the Advisory Committee, the Federal Judicial Center ("FJC"), and other groups will be promoting the new rule amendments and their intended improvements. This article is a small step in that direction. If the amendments have their intended effect, civil litigation will become more efficient and less expensive without sacrificing any party's opportunity to obtain the evidence needed to prove its case.[1]



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THE DUKE CONFERENCE AND DRAFTING OF THE AMENDMENTS

Participants in the Duke conference included federal and state judges from trial and appellate courts around the country, plaintiff and defense lawyers, public interest lawyers, in-house attorneys from business and government, and distinguished law professors. The FJC and other organizations conducted studies and surveys in advance of the conference, and more than 40 papers and 25 compilations of data were presented. Some 70 judges, lawyers, and academics made presentations to the conference, followed by a broad-ranging discussion among all participants.[2]

The Advisory Committee prepared a post-conference report for Chief Justice John Roberts.[3] The report noted that there was no general sense that the 1938 approach to the Federal Rules of Civil Procedure has failed. "While there is need for improvement, the time has not come to abandon the system and start over."[4] The report identified three specific areas of needed improvement: "What is needed can be described in two words — cooperation and proportionality — and one phrase — sustained,

> "Participants in the Duke conference recognized that rule amendments alone will do little to improve the civil litigation system. A change in behavior is also required.

active, hands-on judicial case management."[5] The report also noted "significant support across plaintiff and defense lines for more precise guidance in the rules on the obligation to preserve [ESI] and the consequences of failing to do so."[6]

Following the Duke conference, the Advisory Committee appointed a subcommittee to develop rule amendments based on conference presentations and conclusions. The subcommittee compiled a list of all proposed rule amendments made at the conference and then held numerous calls and meetings to winnow and refine the suggestions. Over the course of two years, the subcommittee held many discussions, circulated drafts of proposed rule amendments, and sponsored a mini-conference with invited judges, lawyers, and law professors to discuss possible amendments. The subcommittee presented recommendations for full discussion at meetings of the Advisory Committee and the Standing Committee in 2011, 2012, and 2013.

While this work was underway, a separate subcommittee worked on a rule to address the preservation and loss of ESI. This subcommittee also held numerous discussions and meetings, circulated and refined drafts, and sponsored a mini-conference with judges, lawyers, and technical experts to discuss possible solutions to the litigation challenges presented by ESI.

The proposed amendments were published for public comment in August 2013. Over the next six months, more than 2,300 written comments were received and more than 120 witnesses appeared and addressed the Advisory Committee in public hearings held in Washington, D.C., Phoenix, and Dallas. Following the public comment process, the subcommittees revised the proposed amendments and again presented them to the Advisory and Standing Committees, where they were adopted unanimously. The rule amendments were then approved without dissent by the Judicial Conference of the United States and the Supreme Court.

The amendments affect more than 20 different provisions in the civil rules, but this article will address them in terms of the four areas of focus identified at the Duke conference: cooperation, proportionality, early and active judicial case management, and ESI.

COOPERATION

There was near-unanimous agreement at the Duke conference that cooperation among litigants can reduce the time and expense of civil litigation without compromising vigorous and professional advocacy. In a survey of members of the ABA Section of Litigation completed before the conference, 95 percent of respondents agreed that collaboration and professionalism by attorneys can reduce client costs.[7]

Cooperation, of course, cannot be legislated, but rule amendments and the actions of judges can do much to encourage it. Rule 1 now provides that the civil rules "should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding." The proposed amendment will add the following italicized language: The 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." The intent is to make clear that parties as well as courts have a responsibility to achieve the Rule 1 goals.

The Committee Note to this proposed amendment observes that "discussions of ways to improve the administration of civil justice regularly include pleas to discourage over-use, misuse, and abuse of procedural tools that increase cost and result in delay. Effective advocacy is consistent with — and indeed depends upon — cooperative and proportional use of procedure."

Sanctions are not the only means of discouraging litigation abuses; judges often have opportunities to remind litigants of their obligation to cooperate. Such admonitions can now be backed with a citation to Rule 1.

PROPORTIONALITY AND OTHER DISCOVERY CHANGES

The Advisory Committee report to the Chief Justice noted "[o]ne area of consensus in the various surveys" conducted before the Duke conference: "that district and magistrate judges must be considerably more involved in managing each case from the outset, to tailor motion practice and shape the discovery to the reasonable needs of the case."[8] This wording captures the meaning of "proportional" discovery; it is discovery tailored to the reasonable needs of the case. It affords enough information for a litigant to prove his or her case, but avoids excess and waste. Unwarranted document production requests, excessive interrogatories, obstructive responses to legitimate discovery requests, and unduly long depositions all result in disproportionate discovery costs.

Studies completed in advance of the Duke conference suggested that disproportionate discovery occurs in a significant percentage of federal court cases. An FJC survey of closed federal cases found that a quarter of the lawyers who handled the cases believed that discovery costs were too high for their client's stake in the case.[9] Other surveys showed greater dissatisfaction. Members in the American College of Trial Lawyers ("ACTL") widely agreed that today's civil litigation system takes too long and costs too much, resulting in some deserving cases not being filed and other cases

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