

RULE REFORM, CASE MANAGEMENT, AND CULTURE CHANGE

MAKING THE CASE FOR
REAL AND LASTING REFORM



RULE REFORM, CASE MANAGEMENT,
AND CULTURE CHANGE:

MAKING THE CASE FOR REAL AND LASTING REFORM

Hon. Rebecca Love Kourlis & Brittany K.T. Kauffman***

I. INTRODUCTION

“Dissatisfaction with the administration of justice is as old as the law itself.”

—Roscoe Pound¹

In 1906, Roscoe Pound recognized this simple but true reality. In this vein, arguably it follows that there will always be a desire for civil justice reform. If such dissatisfaction and continual desire for reform are true, then they invite the question of whether the current efforts toward civil justice reform are any different than those of the last 100 years. And how can we expect the impact of our current efforts to be any greater this time around? We propose two answers—the first a look back, and the second a look forward.

First, to take a positive view of history, it is not that the reforms of the past have not worked. The courts have had to keep pace and adjust to monumental changes since the Federal Rules of Civil Procedure went into effect in 1938. The rules have been revised, technology has been incorporated, and thought leaders around the country have put their best efforts into improving our system of civil justice through rule revisions. The system is not untouched since 1938, when the Federal Rules of Civil Procedure were first implemented. Further, we have not been merely rehashing the same issues for a century. The reforms of the past were essential to get us where we are today. Unfortunately, the pressures on our system have only grown over time, and at a faster rate.

* Executive Director, IAALS, the Institute for the Advancement of the American Legal System, at the University of Denver. IAALS is a national, independent research center dedicated to continuous improvement of the process and culture of the civil justice system. Further information on IAALS’s mission and work can be found at <http://iaals.du.edu>.

** Director, *Rule One Initiative*, IAALS.

1. Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 A.B.A. REP. 395, 395 (1906), reprinted in 70 F.R.D. 79, 85 (1976).

Thus, despite the good efforts of the past, we nevertheless find ourselves at a crossroads. We have a system that is suffering from cost and delay, such that parties with meritorious cases cannot get into court, and those who are in court cannot afford to get to trial given the expense of discovery. On top of these issues, we also need to ensure that our courts keep pace with ever-changing technology, ever-decreasing budgets, and the rising numbers of self-represented litigants. We believe rule reform is an essential component of addressing these issues. However, one lesson we can learn from looking back at history is that rule reform alone is not enough. We also need a change in culture, beyond the impact on conduct that comes from the rules changes. This means a change in culture for the judges and attorneys. While we separate these concepts into efficient case management and legal culture in this article for emphasis, we recognize that it boils down to a change in culture for both.

II. THE CASE FOR RULE REFORM

We have a long history of rule reform in the United States, as we have worked to keep pace with the changing needs of our society. Clear and relevant rules are essential for achieving a “just, speedy, and inexpensive determination” in the civil disputes that are brought before our courts.² Rule reform continues to play a critical role today, with important proposed federal rule amendments currently under consideration before the Supreme Court. In addition, there has been experimentation at the state level through a variety of pilot projects. Across the state and federal projects, these reform efforts have had a clear mission of improving the delivery of civil justice.

A. *The History of Rule Reform*

The history of procedure is a series of attempts to solve the problems created by the preceding generation's procedural reforms. Any set of decisions made will produce unforeseen results that, in turn, will need to be addressed.

—Judith Resnick³

Prior to the inception of the Federal Rules of Civil Procedure in 1938, civil procedure in the United States was “widely described as chaotic, overly complicated, and rigidly formal.”⁴ American courts followed the approach of the English courts, and discovery in federal courts was severely limited.⁵ Law and equity were treated separately, discovery was minimal, pleading was

2. See FED. R. CIV. P. 1.

3. Judith Resnick, *Tiers*, 57 S. CAL. L. REV. 837, 1030 (1984).

4. INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., HISTORICAL BACKGROUND TO THE FEDERAL RULES OF CIVIL PROCEDURE (2009) (on file with the authors) [hereinafter HISTORICAL BACKGROUND].

5. See generally Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Discovery Rules*, 39 B.C. L. REV. 691, 694–95 (1998), available at <http://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=2099&context=bclr>.

highly formulaic, the joinder of parties and claims was complicated if not impossible, and the rules of procedure varied widely across states and courts.⁶ This process created clear “Dissatisfaction with the Administration of Justice,” as Dean Roscoe Pound highlighted in his famous address in 1906.⁷ As he concluded,

[O]ur system of courts is archaic and our procedures behind the times. Uncertainty, delay and expense, and above all, the injustice of deciding cases upon points of practice, which are the mere etiquette of justice, direct results of the organization of our courts and the backwardness of our procedure, have created a deep-seated desire to keep out of court.⁸

With the advent of the Federal Rules of Civil Procedure in 1938 came a new era of civil procedure in the United States.

Concerned that the outcomes of trials often hinged not on the merits of the case but on the skills of counsel or the financial resources of the parties, the drafters were determined to implement a system that would allow the parties to have the ‘fullest possible knowledge of the issues and facts before trial.’⁹

The goal was to develop a system that allowed for wide-ranging discovery to ensure the just determination of all disputes that come before the court for resolution.¹⁰ The drafters believed that liberal discovery would reduce litigation costs by eliminating the wasteful practices of preparing for trial in the absence of information and revealing the facts of the case at an early stage.¹¹ The drafters also believed that pretrial discovery would be efficient, based on the belief that the parties’ mutual self-interest and desire to avoid wasting time and money would lead to the efficient exchange of information.¹² The philosophy was simple: give counsel, and ultimately the judge or jury all the information available, and let them sort through it to find the truth.¹³

6. See generally *id.* at 693 & n. 16.

7. See Pound, *supra* note 1, at 395.

8. William H. Erickson, *The Pound Conference Recommendations: A Blueprint for the Justice System in the Twenty-First Century*, 76 F.R.D. 277, 277 (1978) (citing 35 F.R.D. 241, 284 (1964), 29 A.B.A. REP. 395, 408 (1906)).

9. John H. Beisner, *Discovering a Better Way: The Need for Effective Civil Litigation*, 60 DUKE L.J. 547, 556 (2010) (citing Griffin D. Bell, Chilton Davis Varner & Hugh Q. Gottschalk, *Automatic Disclosure in Discovery—The Rush to Reform*, 27 GA. L. REV. 1, 6 (1992) (quoting *Hickman v. Taylor*, 329 U.S. 495, 501 (1947))).

10. *Id.*

11. *Id.*

12. *Id.*

13. See generally HISTORICAL BACKGROUND, *supra* note 4, at 7. See also WILLIAM A. GLASER, PRETRIAL DISCOVERY AND THE ADVERSARY SYSTEM 234 (Russell Sage Foundation) (1968) (describing the “utopian combination of hopes” of the drafters who “expected that the exchange of information between the litigants would bring to the court more facts, better reasoned arguments, and a fuller knowledge of the merits of the suit”).

Professor Robert Bone has described the era that followed implementation of the rules in 1938 until 1970 as the Golden Age of Rulemaking.¹⁴ The period is marked by broadening of the Federal Rules, including expansion of liberal discovery. States began adopting their own versions of the Federal Rules and law schools began teaching federal procedure in the 1950s.¹⁵ While there were some concerns expressed during this period, in general there was a consensus that the rules were “among the most beneficial means for determining civil cases.”¹⁶

The rules were amended in 1946, including the scope of discovery, making clear that liberal discovery should be allowed.¹⁷ The 1970 amendments likewise expanded discovery, taking the broad standard for deposition discovery and making it applicable to all discovery.¹⁸ Professor Richard Marcus, currently Associate Reporter to the Advisory Committee on Civil Rules (“Rules Committee”), has referred to the 1970 amendments as the high-water mark of “party-controlled discovery.”¹⁹ He is, of course, pointing out the distinction between discovery in which counsel is calling all of the shots, and discovery that is governed by the judge.

By the late 1960s and into the 1970s, the “excitement over the Federal Rules began to wane,”²⁰ and by 1976, the year of the Pound Conference, there were clear concerns regarding the “troubled state of litigation” in the United States.²¹ Among the major concerns expressed at the Pound Conference, convened by Chief Justice Burger to commemorate the 70th Anniversary of Roscoe Pound’s seminal address and to examine the current issues facing the American justice system, was the “abuse” of broad discovery.²² That conference marked the tipping point. From 1976 forward, there has been a serious commitment on the part of the Rules Committee to address the concerns of cost and delay through rule amendments, including amendments in 1980, 1983, 1993, 2000, and 2006. “[P]rovisions relating to discovery, judicial management, and pleadings, among other things, were blamed for contributing—or at least failing to stop—a host of growing problems, including cost, complexity, delay, abuse of process and an increasingly hostile litigation culture.”²³ The amendments over this period were focused on

14. Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887, 897 (1999).

15. See generally HISTORICAL BACKGROUND, *supra* note 4, at 13.

16. Hon. Leon R. Yankwich, “Short Cuts” in Long Cases, 13 F.R.D. 41, 49 (1951).

17. HISTORICAL BACKGROUND, *supra* note 4, at 14–15.

18. *Id.*

19. Richard L. Marcus, *Discovery Containment Redux*, 39 B.C. L. REV. 747, 749 (1998).

20. Robert G. Bone, *Who Decides? A Critical Look at Procedural Discretion*, 28 CARDOZO L. REV. 1961, 1973 (2007).

21. Griffin D. Bell, Chilton Davis Varner & Hugh Q. Gottschalk, *Automatic Disclosure in Discovery—The Rush to Reform*, 27 GA. L. REV. 1, 9 (1992).

22. HISTORICAL BACKGROUND, *supra* note 4, at 18.

23. INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., AMERICA’S AILING CIVIL JUSTICE SYSTEM: THE DIAGNOSIS AND TREATMENT OF THE FEDERAL RULES OF CIVIL

addressing “the problem of over-discovery,”²⁴ enabling the court “to keep tighter rein on the extent of discovery,”²⁵ advocating the early exchange of information so as to minimize gamesmanship and litigation costs, and keeping pace with the advent of electronically stored information.²⁶ The current efforts of the Rules Committee and the proposed federal rule amendments that are expected to go into effect on December 1, 2015, discussed below, echo and emphasize these same themes.

B. The Need for Rule Reform

The history of Anglo-American procedure has been an unending effort to perfect the imperfect. Some of our efforts have made things worse, others have made them better. We have not yet come to the endpoint of procedural reform.

—Jay Tidmarsh²⁷

We have focused significant time and energy on rule reform over the last forty years. It is “largely a history of trying to put the discovery genie back in the bottle, first by increasing judicial control over case management, then by limiting the methods of available discovery, then by mandating disclosures at the outset of the case, and most recently, by installing more stringent judicial gate keeping at the pleading stage.”²⁸ As we have said previously, this has been a process of “continual tinkering that neither killed the Rules nor entirely cured them.”²⁹ Rules reform in the past has had only incremental impact—and sometimes even negative impact. But, that history is far from a reason to throw in the towel. Rather, the lesson to be learned is that rules reform is necessary but not sufficient. We must change the rules, and we must also do more beyond those changes.

In an ideal world, with the best judges and lawyers, and parties that get along amicably, the rules of procedure may be unnecessary for a just, speedy, and inexpensive resolution of disputes. In such an ideal world, however, it is likely that such a dispute would resolve before ever entering our civil justice system. Instead, we live in the real world, with a civil justice system whose very purpose is to resolve conflict between parties that have not been able to resolve their disputes on their own. The rules of procedure are essential for enforcing rights and dealing with disputes in a fair and just way. They ensure a process that is fair and reasoned, and consistent across all cases. Rules also control and encourage behavior, including the behavior of the court, the judge,

PROCEDURE (2009) [hereinafter AMERICA’S AILING CIVIL JUSTICE SYSTEM], available at <http://iaals.du.edu/library/publications/americas-ailing-civil-justice-system>.

24. See FED. R. CIV. P. 26(b) advisory committee notes (1983 amend).

25. See FED. R. CIV. P. 26(b) advisory committee notes (1993 amend).

26. See generally HISTORICAL BACKGROUND, *supra* note 4, at 19–25.

27. Jay Tidmarsh, *Resolving Cases “On the Merits,”* 87 DENV. U. L. REV. 407, 407 (2010).

28. AMERICA’S AILING CIVIL JUSTICE SYSTEM, *supra* note 23, at 4.

29. *Id.* at 1.

the attorneys, and the parties. While it is critical to achieve case management and culture change, it is often a change in rules that is the spark for those corollary changes. Without rules reform, nothing else may change. Because we are trained as attorneys to work within the contours of the rules to advocate for our clients, rules reform is an essential component in achieving real and lasting improvement to our civil justice system.

In 2007, IAALS and the American College of Trial Lawyers Task Force on Discovery and Civil Justice (ACTL Task Force or Task Force) formed a partnership to study cost and delay in America's civil justice system and to propose solutions.³⁰ Following a survey of the Fellows of the ACTL, and after a great deal of additional research, discussion, and deliberation, in 2009 IAALS and the Task Force published a *Final Report*, which included twenty-nine proposed Principles containing broad ideas to improve the system, including changes in judicial management, pleading, discovery, experts, and education.³¹ Looking back at the history of reform above, the Report emphasized that what is needed is more radical change to the rules governing discovery.³² “We concluded that [e]fforts to limit discovery must begin with definition of the type of discovery that is permissible.”³³ Recognizing that it is “difficult, if not impossible,” to write that definition in a way that satisfies everyone, we recognized that, nevertheless, there must be change.³⁴ “Whatever the definition, broad, unlimited discovery is now the default notwithstanding that various bar and other groups have complained for years about the burden, expense and abuse of discovery.”³⁵ We proposed that “[p]roportionality be the most important principle applied to all discovery,” and that parties should be permitted “*limited discovery proportionately tied to the claims actually at issue, after which there will be no more.*”³⁶ In short, we advocated for the change in the default—from access to ALL information absent an order of the court, to access to only some, pointed information absent an order of the court.

There have been several significant surveys over the course of the last five years that speak to this need for reform. Following the survey of the ACTL Fellows, the Federal Judicial Center (“FJC”) administered similar surveys on

30. The name of the Task Force was initially the ACTL Task Force on Discovery, but it was later revised to the Task Force on Discovery and Civil Justice to acknowledge that the problems that were identified were not confined to discovery.

31. See generally AM. COLL. OF TRIAL LAWYERS TASK FORCE ON DISCOVERY & INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., FINAL REPORT ON THE JOINT PROJECT OF THE AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM 2 (rev. ed. 2009) [hereinafter FINAL REPORT], available at http://iaals.du.edu/images/wygwam/documents/publications/ACTL-IAALS_Final_Report_rev_8-4-10.pdf.

32. *Id.* at 9.

33. *Id.* at 10.

34. *Id.*

35. *Id.*

36. *Id.* at 7, 10.

members of the American Bar Association (“ABA”) Section of Litigation³⁷ and members of the National Employment Lawyers Association (“NELA”).³⁸ IAALS also conducted a survey of state and federal trial judges.³⁹ One of the first themes to emerge from the collective studies is that the cost of litigation in the United States hinders access to justice.⁴⁰ More than three out of four attorneys in every group expressed agreement that “[l]itigation is too expensive.”⁴¹ The surveys also reflected that attorneys believe “[d]iscovery is too expensive,” with at least 70% of attorneys agreeing with this statement in each group.⁴² In all three organizations, the attorneys identified the “time required to complete discovery” as the primary cause of delay.⁴³ The judges agreed, with over 80% of trial judges identifying the time required to complete discovery as a “significant cause of delay.”⁴⁴ Thus, today we stand better armed than ever before, with recognition of the problem and support for more aggressive rule reform. One of the new developments in this round of rule making has been the role of empirical data. Only within the last decade or so have courts been able to provide broad data about the process in place. Access to that data has played an increasing role in the Rules Committee’s decisions regarding rule amendments,⁴⁵ and the Rules Committee has pointed to the bar-group recommendations and empirical research in support of the current proposed federal amendments, discussed further below.⁴⁶

37. AM. BAR ASS’N, ABA SECTION OF LITIGATION MEMBER SURVEY ON CIVIL PRACTICE: FULL REPORT (2009) [hereinafter AM. BAR ASS’N, ABA LITIGATION SURVEY].

38. REBECCA M. HAMBURG & MATTHEW C. KOSKI, NAT’L EMP’T LAWYERS ASS’N, SUMMARY OF RESULTS OF FEDERAL JUDICIAL CENTER SURVEY OF NELA MEMBERS, FALL 2009 (2010) [hereinafter HAMBURG & KOSKI, NELA SURVEY].

39. CORINA GERETY, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., TRIAL BENCH VIEWS: FINDINGS FROM A NATIONAL SURVEY ON CIVIL PROCEDURE 38–39 (2010) [hereinafter GERETY, STATE AND FEDERAL JUDGE SURVEY].

40. See CORINA GERETY, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., EXCESS & ACCESS: CONSENSUS ON THE AMERICAN CIVIL JUSTICE LANDSCAPE 9 (2011).

41. *Id.* at 9.

42. *Id.* at 11.

43. *Id.* at 11.

44. *Id.* at 11.

45. See Thomas E. Willging, *Past and Potential Uses of Empirical Research in Civil Rulemaking*, 77 NOTRE DAME L. REV. 1121, 1141–87 (2002), available at <http://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=1528&context=ndlr>.

46. See generally Memorandum from Judge David G. Campbell to Judge Jeffrey Sutton, Proposed Amendments to the Federal Rules of Civil Procedure (June 14, 2014), Appendix B at B6–7 [hereinafter Campbell Memorandum], available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/ST09-2014-add.pdf>.

C. *Current Rule Reform Efforts*

The civil justice system is a centerpiece of American democracy. It is in need of improvement. We must refuse to settle for an ailing system that does not adequately meet the needs of litigants. Rather, we must begin to test possible solutions.

—Rebecca Love Kourlis and Paul C. Saunders⁴⁷

In the federal system, there are pending rule amendments that would represent broad scale reform, and a variety of pilot projects underway across the country. The states have not been sitting on the sidelines during these reform years. At the state level, there has been experimentation with rule changes through pilot projects, and in one instance, implementation of statewide rule changes. Similar themes emerge from all of the efforts—state and federal.

Out of the IAALS and the ACTL Task Force's 2009 Final Report grew a second publication of proposed Pilot Project Rules intended for implementation and evaluation in pilot projects around the country.⁴⁸ As the name implies, the Pilot Project Rules were a set of twelve proposed pilot rules for use by courts that were interested in testing the recommendations of the Task Force. Several members of the Task Force took the pilot project rules to their individual jurisdictions and were instrumental in the adoption of such projects. In other pilot projects, courts and the bar have adopted a unique set of rules for application in defined groups of cases.

Despite their difference, the incorporation of proportionality into the rules is a clear theme across all these efforts. Colorado's Civil Access Pilot Project sets forth the importance of proportionality in the scope of the rules.⁴⁹ Pilot Project Rule 1.3 provides that

At all times, the court and the parties shall address the action in ways designed to assure that the process and the costs are proportionate to the needs of the case. . . . This proportionality rule shall shape the process of the case in order to achieve a just, timely, efficient and cost effective determination of all actions.⁵⁰

In addition, the Pilot Project 7.2 provides that the judge shall apply the proportionality factors in “determining whether to permit or exclude discovery

47. INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS. & AM. COLL. OF TRIAL LAWYERS TASK FORCE ON DISCOVERY & CIVIL JUSTICE, 21ST CENTURY CIVIL JUSTICE SYSTEM: A ROADMAP FOR REFORM: PILOT PROJECT RULES 1 (2009), *available at* http://iaals.du.edu/images/wygwam/documents/publications/Pilot_Project_Rules2009.pdf.

48. *Id.*

49. Supreme Court of Colorado, Chief Justice Directive 11-02: Adopting Pilot Rules for Certain District Court Civil Cases (Colo. amend. July 2014) Pilot Project Rule [hereinafter Chief Justice Directive 11-02], *available at* http://www.courts.state.co.us/Courts/Supreme_Court/Directives/11-02amended%207-11-14.pdf.

50. *Id.* Pilot Project Rule 1.3.

and pretrial motions.”⁵¹ The evaluation of the pilot project found that this aspect of the rules was successful, with four out of five surveyed attorneys indicating that the time to disposition was proportionate to the subject CAPP case, and three out of four attorneys indicating the litigation costs were proportionate.⁵² New Hampshire adopted the Proportional Discovery/Automatic Disclosure (PAD) Pilot Rules in several pilot counties in 2010, with the goal of reducing the “‘gamesmanship’ in the conduct of litigation,” reducing the “time spent by lawyers and courts in resolving discovery issues and disputes,” and promoting “the prompt and just resolution of cases.”⁵³ The PAD Pilot Rules incorporated: fact-based pleading to help better define the issues early in the case, early automatic disclosures, and limitations on discovery.⁵⁴ While New Hampshire did not see a decrease in the overall time to disposition (one of the significant goals of the project), anecdotal reports from lawyers suggested that those provisions were working well, and the rules have now been implemented statewide.⁵⁵ In contrast, Utah has incorporated proportionality through an institutionalized tiered approach to discovery implemented statewide via sweeping, permanent statewide rule changes.⁵⁶ The rules incorporate tiers of discovery based on the amount in controversy.⁵⁷ Thus, while pilot projects have adopted proportionality as a guiding principle for discovery, the projects have done so in different ways.

This same theme resonates in the current proposed changes to the federal rules. In May of 2010, the Rules Committee convened a Conference on Civil Litigation at Duke University to study the current state of the civil justice system and to work toward solutions to the identified problems. Building on the Duke 2010 Conference work, the Rules Committee developed proposed rule changes intended to remedy some of these problems. The proposed amendments were published for public comment in the fall of 2013, revised following the comment period in the spring of 2014, and most recently forwarded by the Judicial Conference to the Supreme Court with the recommendation that they be adopted. The Supreme Court has until May 1,

51. *Id.* Pilot Project Rule 7.2.

52. CORINA GERETY & LOGAN CORNETT, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., MOMENTUM FOR CHANGE: THE IMPACT OF THE COLORADO CIVIL ACCESS PILOT PROJECT 1 (2014), available at http://iaals.du.edu/images/wygwam/documents/publications/Momentum_for_Change_CAPP_Final_Report.pdf.

53. See Order Adopting Superior Court PAD Pilot Rules, PR 3 committee notes (N.H. Apr. 6, 2010), available at <http://www.courts.state.nh.us/supreme/orders/04-06-2010-Order-adopting-PAD-Pilot-Project-Rules.pdf>.

54. See generally *id.* PR 1, 3, & 4.

55. See generally PAULA HANNAFORD-AGOR, CIVIL JUSTICE INITIATIVE: NEW HAMPSHIRE: IMPACT OF THE PROPORTIONAL DISCOVERY/AUTOMATIC DISCLOSURE (PAD) PILOT RULES 17 (2013), available at <http://www.ncsc.org/~media/Files/PDF/Topics/Civil%20Procedure/12022013-Civil-Justice-Initiative-New-Hampshire.ashx>.

56. See generally *Utah Rules of Civil Procedure*, UTAH ST. CTS., <http://www.utcourts.gov/resources/rules/urcp/> (last visited Mar. 6, 2015) (showing numerous amendments to rules governing discovery).

57. See UTAH R. CIV. P. 26.

2015 to consider the amendments. Once they are adopted by the Supreme Court, they will go into effect December 1, 2015, “unless Congress enacts legislation to reject, modify, or defer the proposed amendments.”

There are two categories of amendments: the Duke proposals drafted by the Duke Subcommittee following the 2010 Duke Conference organized by the Rules Committee, and the proposed new Rule 37(e) drafted by the Discovery Subcommittee.⁵⁸ The changes to Rule 37(e) stem from the Discovery Subcommittee’s work to draft a rule addressing the preservation and loss of Electronically Stored Information (“ESI”). The Duke “package” of amendments is intended to provide a renewed emphasis on proportionality, earlier and more informed case management, and cooperation. None of these concepts are new to the federal rules. Nevertheless, the amendments represent an underscored commitment to each of these concepts. One of the most significant, and controversial, of the proposed amendments is the addition of proportionality into the scope of discovery under Rule 26(b)(1).⁵⁹ The Rules Committee has proposed relocating the factors already prescribed by Rule 26(b)(2)(C)(iii), with some modifications, into Rule 26(b)(1), which would read in part:

Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.⁶⁰

Virtually the same proportionality factors were first added to Rule 26 as part of the 1983 amendments, moved as part of the 1993 amendments, and addressed again in the 2000 amendments, all with the goal of emphasizing the need to control excessive discovery.⁶¹ Thus, “three previous Civil Rules Committees in three different decades have reached the same conclusion as the current Committee—that proportionality is an important and necessary feature of civil litigation in federal courts.”⁶² The purpose in moving them is to make the concept an explicit component of the scope of discovery. The incorporation of proportionality into the scope of discovery is much more bold and controversial than the prior amendments, and the intent is to make a real and significant impact on behavior: both the judges’ in controlling discovery, and the parties’ in conducting discovery.

On a parallel track, in 2011 the Conference of Chief Justices (“CCJ”) passed Resolution 4 in Support of State Action Plans to Reduce Costs Associated with the Prosecution and Defense of Ordinary Civil Cases. The

58. See generally Campbell Memorandum, *supra* note 46, B-2 to B-3.

59. *Id.* app. B-5.

60. *Id.*

61. *Id.* app. B-7.

62. *Id.* app. B-8.

CCJ recognized that a focus on civil justice reform was sweeping the nation, in the form of pilot projects and rule changes being implemented across the country, and the CCJ resolved to support and encourage such efforts. Thus, in 2013, the CCJ adopted Resolution 5, creating a Civil Justice Improvements Committee charged with developing guidelines and best practices for civil litigation in the state courts, based upon evidence derived from the state pilot projects and other applicable research and input. The Civil Justice Improvements Committee has been working under this charge and recommendations are expected in early spring 2016. While this work will not itself comprise direct rule changes, given that the recommendations will be formulated as guidelines and best practices. Nevertheless, it will likely presage further rule changes at the state level.

II. THE CASE FOR JUDICIAL CASE MANAGEMENT

As important as rule reform is to achieving changes in our current system, efficient and effective judicial case management is equally—if not more—important. The rule changes above acknowledge and support this belief, with the hope that the changes to the rules will instigate the case management that is essential to achieve a lasting change in our system. Unfortunately, however, although the rules set the stage, ultimately effective case management must come from the judges.

A. *The History of Judicial Case Management*

Since Chief Justice Warren Burger convened the Williamsburg conference in 1971 to address serious problems of backlog and inefficiency in U.S. courts, study after study has confirmed that judicial case management is the answer. Cases resolve in less time, at lower cost, and often with better results when judges manage them actively.

—Hon. David Campbell⁶³

Case management is newer than our rules, yet this concept—and its promise for a better system—has been around for decades. Going back to the 1950s, researchers began drawing a connection between the efficiency of judicial management and delays in delivery of civil justice.⁶⁴ “By the 1980s a substantial and rapidly developing body of literature had given rise to a culture of ‘managing to reduce delay.’”⁶⁵ Case management was cemented into our

63. INST. FOR ADVANCEMENT OF THE AM. LEGAL SYS. & AM. COLL. OF TRIAL LAWYERS, WORKING SMARTER NOT HARDER: HOW EXCELLENT JUDGES MANAGE CASES at inside cover (2014) [hereinafter WORKING SMARTER], available at http://iaals.du.edu/images/wygwam/documents/publications/Working_Smarter_Not_Harder.pdf.

64. See generally Hans Zeisel, Harry Kalven, Jr. & Bernard Buchholz, Delay in the Court (1959).

65. See Hon. William G. Young & Jordan M. Singer, *Bench Presence: Toward a More Complete Model of Federal District Court Productivity*, 118 PENN. ST. L. REV. 55, 66 (Summer

Federal Rules of Civil Procedure in 1983, when Rules 16 and 26 were amended. The 1993 federal rule amendments further expanded the judges' managerial role in the pretrial process. Since then, the rule makers have turned again and again to case management, adding "more tools to the rulebook to combat excessive cost and delay, especially in discovery."⁶⁶ The developments have generally been "accepted—even applauded—as a positive step toward controlling cost and delay in civil cases."⁶⁷ Yet when initially adopted there was clear opposition to the amendments, and there have been continuing tensions about the role judges should play, and the role of case management, in our system.

The amendments in 1983 made the judge's authority to manage cases explicit, empowering federal judges to control the pretrial scheduling of their cases, including setting limits on discovery, discouraging wasteful pretrial activities, and facilitating settlement. As the Rules Committee noted at the time, "Rule 16, which deals with pre-trial conferences and orders, has been revised to insure closer and more effective judicial scheduling, management and control of litigation as a means of avoiding unnecessary delay and expense."⁶⁸ The Rules Committee noted that while "[i]n many respects, the rule has been a success," there has nevertheless "been a widespread feeling that amendment is necessary to encourage pretrial management that meets the needs of modern litigation."⁶⁹ The amendments stemmed from criticism that Rule 16, in its earlier form, resulted in too many pretrial requirements in small cases, and not enough administration in more complex cases.⁷⁰

There were also amendments in 1983 to Rule 26, which were "aimed at protecting against excessive discovery and evasion of reasonable discovery demands."⁷¹ The amendments to Rule 26 required judges, in certain circumstances, to limit the frequency and extent of use of discovery methods. The Rules Committee pointed to empirical research from the 1970s that reflected that, "when a trial judge intervenes personally at an early stage to assume judicial control over a case and to schedule dates for completion by the parties of the principal pretrial steps, the case is disposed of by settlement or trial more efficiently and with less cost and delay than when the parties are left

2013). See, e.g., BARRY MAHONEY ET AL., CHANGING TIMES IN TRIAL COURTS: CASEFLOW MANAGEMENT AND DELAY REDUCTION IN URBAN TRIAL COURTS (1988), available at <http://cdm16501.contentdm.oclc.org/cdm/ref/collection/ctadmin/id/7>.

66. Steven S. Gensler & Lee H. Rosenthal, *The Reappearing Judge*, 61 U. KAN. L. REV. 849, 851 (2013).

67. Rebecca Love Kourlis & Jordan M. Singer, *Managing Toward the Goals of Rule 1*, 4 FED. CTS. L. REV. 1, 2 (2010).

68. Memorandum from Walter R. Mansfield to Judge Edward T. Gignoux 1 (Mar. 9, 1982), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV03-1982.pdf> (including submittal of final draft of proposed amendments to Rule 16 and 26).

69. FED. R. CIV. P. 16 advisory committee notes (1983 amend).

70. *Id.*

71. Memorandum from Mansfield, *supra* note 68, at 1.

2015] *KOURLIS & KAUFFMAN: THE CASE FOR REAL REFORM* 505

to their own devices.”⁷² Building on this, the amendments made the authority of the court to manage the case explicit.⁷³

The 1993 amendments continued to enforce the role of the judge in controlling and scheduling discovery and other matters related to the pretrial process under Rule 16 so as to “facilitate the just, speedy, and inexpensive disposition of the action.”⁷⁴ Rule 16 was amended, in part, to “emphasize that a major objective of pretrial conferences should be to consider appropriate controls on the extent and timing of discovery.”⁷⁵ There were a few comments to the proposed changes to Rule 16 in 1993 that expressed opposition to “managerial judging,”⁷⁶ a term that was “not meant as a compliment.”⁷⁷ There were concerns with the growing authority of the court to manage the pretrial process, with a concern “about infringing on counsel’s ability to control the trial process, and in part a fear that many judges will misuse this discretion.”⁷⁸

The advent of the Rule 16 conference provided judges with the opportunity to take more active control of their cases, set the tone of the litigation, and define the relationship between the court and the attorneys.⁷⁹ As judges took on this more active role, they moved beyond the “passive arbiter” of prior eras.⁸⁰

72. *Id.* (citing STEVEN FLANDERS, FEDERAL JUDICIAL CENTER, CASE MANAGEMENT AND COURT MANAGEMENT IN UNITED STATES DISTRICT COURTS 17 (1977)).

73. *Id.* See generally ARTHUR R. MILLER, FED. JUDICIAL CTR., THE AUGUST 1983 AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE: PROMOTING EFFECTIVE CASE MANAGEMENT AND LAWYER RESPONSIBILITY 30–36 (1984); Richard L. Marcus, *Reducing Court Costs and Delay: The Potential Impact of the Proposed Amendments to the Federal Rules of Civil Procedure*, 66 JUDICATURE 363, 365–69 (1983).

74. See generally Memorandum from the Comm. on Rules of Practice and Procedure of the Judicial Conference of the United States to Hon. Robert E. Keeton, Attachment A at 47 (May 1, 1992) [hereinafter Memorandum to Hon. Robert E. Keeton], available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV5-1992.pdf> (including proposed amendments to the Federal Rules of Civil Procedure).

75. *Id.* at 49.

76. Memorandum to Hon. Robert E. Keeton, *supra* note 74, Attachment B at 6.

77. Steven S. Gensler & Lee H. Rosenthal, *The Reappearing Judge*, 61 U. KAN. L. REV. 849, 851 (2013).

78. Memorandum to Hon. Robert E. Keeton, *supra* note 74, at Attachment B at 7.

79. Richard L. Marcus, *Reining in the American Litigator: The New Role of American Judges*, 27 HASTINGS INT’L & COMP. L. REV. 3, 16–19 (2003).

80. *Id.* at 19.

B. The Need for Judicial Case Management Reform

[I]f a recurrent theme can be divined from all of the studies and the commentary to the myriad rule changes in the last thirty years, it is that the most effective way to control litigation costs is for a judge to take charge of the case from its inception and to manage it aggressively through the pretrial process by helping shape, limit, and enforce a reasonable discovery plan, resolve disputes that the parties cannot settle on their own, and keep the case on a tight schedule to ensure the most expeditious disposition of the case by motion, settlement, or trial.

—Hon. Paul W. Grimm⁸¹

Despite early opposition, case management has taken hold and become a key aspect of the pretrial process. Nevertheless, there continue to be doubts about the role judges play, particularly given the shift away from trials—which are at an all-time low⁸²—toward pretrial process and settlement.⁸³ There are those who have worried about “managerial judging,” arguing that the focus on delay reduction has moved judges from public actors in the courthouse presiding over live courtroom proceedings to judges stuck in chambers.⁸⁴ Some suggest that judges have been consigned only to managing cases, and not to preparing cases for trial and presiding over the trial. We now have terms of art, like “bench presence,” that raise questions regarding how judges use their time, and the impact of this shift on our civil justice system.⁸⁵ There are also lawyers who have opposed the increasing control that judges are exerting over their cases.⁸⁶ Nevertheless, there is more support now than ever for hands-on case management tailored to the needs of the case.

81. Hon. Paul W. Grimm, *The State of Discovery Practice in Civil Cases: Must the Rules Be Changed To Reduce Costs and Burdens, or Can Significant Improvements Be Achieved Within the Existing Rules?* 12 SEDONA CONF. J. 47 5–6 (2011), available at https://thesedonaconference.org/system/files/Article_The_State_of_Discovery_Practice.pdf.

82. Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL L. STUDIES 459, 459–60 (2004); MARC GALANTER & ANGELA FROZENA, *THE CONTINUING DECLINE OF CIVIL TRIALS IN AMERICAN COURTS*, 2011 FORUM FOR STATE APPELLATE COURT JUDGES (2011), available at <http://poundinstitute.org/docs/2011%20judges%20forum/2011%20Forum%20Galanter-Frozena%20Paper.pdf>.

83. See generally Steven Gensler, *Judicial Case Management: Caught in the Crossfire*, 60 DUKE L.J. 669, 735 (2010).

84. Steven S. Gensler & Lee H. Rosenthal, *The Reappearing Judge*, 61 U. KAN. L. REV. 849, 851 (2013).

85. See Hon. William G. Young & Jordan M. Singer, *Bench Presence: Toward a More Complete Model of Federal District Court Productivity*, 118 PENN. ST. L. REV. 55, 58, 66 (Summer 2013) (introducing a new metric called “bench presence,” which is a “measure of the time that a federal district judge spends on the bench, presiding over the adjudication of issues in an open forum”).

86. See Marcus, *supra* note 79, at 20.

As far back as the 1980s, Barry Mahoney and his colleagues recognized the importance of early and active judicial case management.⁸⁷

One of the fundamental precepts of those who advocate strong management by courts in civil cases is that courts must take control of incoming cases at the earliest possible time—ideally, at the point the complaint is filed. The rationale is simple: for management purposes, the earlier the potential caseload is recognized and accounted for, the better prepared the court will be to deal with it. “Taking control,” as used in this sense, does not mean that the court must become actively involved in managing case progress or scheduling intervening events at this initial point. But simply organizing filing and record keeping systems to account for every case, from the point of its inception as a civil lawsuit until its conclusion, can enable the court to have a full picture of its caseload and thus to monitor both the status of the overall caseload and the progress of individual cases. With such information, the court is in the position to act upon problems as they arise and to make early decisions about case scheduling so as to allocate resources effectively and avoid or minimize delays.

The support for this concept of early and active case management has grown over the years. Looking again to recent surveys of attorneys and judges, they reflect “that solid majorities of attorneys and judges believe early judicial intervention (by judges or magistrate judges) helps to focus the litigation, by narrowing the issues and limiting discovery.”⁸⁸ These studies and others reflect that there is general agreement that early and active judicial involvement “for the duration of a case is a positive development for the pretrial process and leads to more satisfactory results for clients.”⁸⁹ The willingness of counsel to expect and even embrace judicial case management creates a platform for success of that case management. IAALS’ own federal docket study concluded that efficient case processing is most likely where “the local legal community, steered by the expectations of the judiciary, embraces (or at least accepts) strong case management.”⁹⁰

Despite this support, there remains a gap between the ideal of early and efficient case management and judicial case management in practice.

87. See BARRY MAHONEY ET AL., CHANGING TIMES IN TRIAL COURTS: CASEFLOW MANAGEMENT AND DELAY REDUCTION IN URBAN TRIAL COURTS 75–76 (1988), available at <http://cdm16501.contentdm.oclc.org/cdm/ref/collection/ctadmin/id/7>.

88. CORINA D. GERETY & BRITTANY K.T. KAUFFMAN, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., SUMMARY OF EMPIRICAL RESEARCH ON THE CIVIL JUSTICE PROCESS: 2008-2013 45 (2014) (citing GERETY, STATE AND FEDERAL JUDGE SURVEY, *supra* note 39, at 9–10; AM. BAR ASS’N, ABA LITIGATION SURVEY REPORT, *supra* note 37, at 124–25; HAMBURG & KOSKI, NELA SURVEY, *supra* note 38, at 40; KIRSTEN BARRETT ET AL., MATHEMATICA POLICY RESEARCH, ACTL CIVIL LITIGATION SURVEY: FINAL REPORT 68 (2008) [hereinafter KIRSTEN BARRETT ET AL., ACTL FELLOWS SURVEY]).

89. *Id.*

90. INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., CIVIL CASE PROCESSING IN THE FEDERAL DISTRICT COURTS: A 21ST CENTURY ANALYSIS 9 (2009).

Regarding the availability of judicial officers to resolve discovery disputes on a timely basis, about two-thirds of attorneys responded that district court judges are *not* available.⁹¹ While there is more support than ever for the concept of case management, in practice, judges are facing ever-increasing dockets and decreased court resources.⁹² This is particularly true in the state courts. Far from suggesting that burgeoning dockets and emptying coffers make case management less practical, to the contrary, these added pressures mean that efficient case management is needed now more than ever.

C. *Current Judicial Case Management initiatives Around the Country*

Even if there is reason to fear that general federal procedure should not apply in all its sweep to every case in federal court, it is not clear that “general federal procedure” is as procrustean as the champions of simplified procedure may claim. The Civil Rules provide many opportunities for tailoring procedure to the realistic needs of individual actions.

—Edward H. Cooper⁹³

In addition to all of the rule changes and pilot projects that specifically ramp up the role of case management in the pretrial process, there are several projects around the country focused primarily on case management. These projects are testing out many of the current innovations in case management and providing the opportunity for evaluation and broader scale implementation. Some of the pilot projects highlight the judge’s role by directly incorporating case management into the pilot project rules themselves, similar to the approach in the proposed federal rules amendments. Other projects recognize the importance of case management through broader principles, which are then incorporated on a voluntary basis in particular cases. Regardless of the method of implementation, these projects are focusing on case management in a way that emphasizes that efficient case management is a necessary component in achieving change.

Colorado’s Civil Access Pilot Project provides an example of a project that incorporates increased case management into the project pilot rules themselves. The pilot project rules provide that a single judge “will be assigned to the case for all purposes, and, absent unavoidable or extraordinary circumstances, that judge will remain assigned to the case until final resolution, including any post-trial proceedings.”⁹⁴ The pilot rules also provide that the judge will hold an initial case management conference early in the case with

91. AM. BAR ASS’N, ABA LITIGATION SURVEY, *supra* note 37, at 63–64; HAMBURG & KOSKI, NELA SURVEY, *supra* note 38, at 30.

92. *See, e.g.*, Judge Lee Smalley Edmon, *Keeping Courtrooms Open In Times of Steep Budget Cuts*, 51 NO. 1 JUDGES’ J., Winter 2012, at 18.

93. Edward H. Cooper, *Simplified Rules of Civil Procedure?*, 100 MICH. L. REV. 1794, 1798 (2002).

94. Chief Justice Directive 11-02, *supra* note 49, Pilot Project Rule 5.

lead counsel to shape the pretrial process to the needs of the case.⁹⁵ Based on this initial conference and the joint report of the parties submitted in advance, the judge determines the permitted discovery and all timelines, including the trial date, and sets forth the above in the case management order.⁹⁶ The pilot project rules go on to highlight the importance of “Ongoing Active Case Management,” the title of Pilot Project Rule 8, which provides for continued active case management and status conferences as needed, on initiation by the parties or the court.⁹⁷

The evaluation of the project reflects the success of the case management aspects of the project:

The docket study shows that CAPP cases are more likely to have a single judge. In addition, the parties are 4.6 times more likely to see that judge earlier and will see him or her twice as often. CAPP’s early, active, and ongoing judicial management of cases received more positive feedback in the surveys than any other aspect of the project, with many calling for it to become a permanent feature of the rules.⁹⁸

Anecdotal feedback regarding CAPP has highlighted the importance of the case management conference in identifying the issues early in the litigation and providing the judge an opportunity to clarify the expectations of counsel and set the tone for litigation. Perhaps most importantly, it also provided the judge an opportunity to assess the needs of the case and tailor the pretrial process, including discovery, to ensure proportionality.

Other projects have incorporated increased case management via judges voluntarily adopting the pilot project in individual cases. The Southern District of New York’s Pilot Project Regarding Case Management Techniques for Complex Civil Cases focuses on judicial pretrial case management of complex cases. In early 2011, the Judicial Improvements Committee (“JIC”) of the U.S. District Court for the Southern District of New York formed an attorneys’ Advisory Group, drawn from many sectors of the bar, to work with the JIC in developing the pilot project. The pilot went into effect on November 1, 2011 and ended November 14, 2014. The order documenting the completion of the project also recognized that judges may continue to treat any case as complex if they so choose, and to abide by any, or all, of the provisions of the pilot project.⁹⁹ In addition, practitioners can agree to voluntarily implement any, or all, of the provisions of the project. The bench and the bar

95. *Id.*, Pilot Project Rule 7.1.

96. *Id.*, Pilot Project Rule 7.2.

97. *Id.*, Pilot Project Rule 8.

98. GERETY & CORNETT, *supra* note 52, at 1.

99. See Standing Order M10-468, 11-MISC-0388, *In re* Pilot Project Regarding Case Mgmt. Techniques for Complex Civil Cases in the S. Dist. of New York 1 (S.D.N.Y. Nov. 14, 2014), available at http://www.nysd.uscourts.gov/rules/Complex_Civil_Rules_Pilot.pdf.

are urged to consider the provisions as best practices, and the plan remains available on the court's website for reference.¹⁰⁰

The SDNY pilot project provides various initial pretrial case management procedures focused on increased hands-on judicial management early in the process. The project includes an initial report of the parties prior to the pretrial conference and an early case management conference with lead counsel in attendance where the parties "shall provide the Court with a concise overview of the essential issues in the case and the importance of discovery in resolving those issues so that the Court can make a proportionality assessment and limit the scope of discovery as it deems appropriate."¹⁰¹ The project also includes submittal of discovery disputes by letter rather than full briefing, with a decision from the court within fourteen days.¹⁰² For most other motions, the project provides for pre-motion conferences following letters rather than briefing.¹⁰³

These case management techniques are similar to other innovative approaches found around the country, both in more formal pilot projects and in courtrooms, where judges implement them on a case-by-case or full-docket basis. In 2014, in collaboration with the American College of Trial Lawyers, IAALS published the results of its interviews with nearly 30 state and federal trial court judges, from diverse jurisdictions nationwide, who were identified as being outstanding and efficient case managers. The publication, titled *Working Smarter, Not Harder: How Excellent Judges Manage Cases ("Working Smarter")*, documents the recommendations and key practices of those judges, and speaks to many of the innovative and successful case management practices that are being used around the country.¹⁰⁴ Recommendations include utilizing active and continuing judicial involvement at the outset, convening a case management conference early in the life of the case and then setting deadlines, reducing and streamlining motions practice, and creating a culture of collegiality and professionalism.¹⁰⁵

The *Working Smarter* study and publication has spurred additional efforts around the country focused on case management, including a new pilot project in Utah implementing efficient case management for their Tier 3 cases. As noted above, Utah adopted a tiered approach to discovery in 2011 based on amount in controversy.¹⁰⁶ Tier 3 cases involve monetary damages of \$300,000

100. See generally Standing Order M10-468, 11-MISC-0388, *In re* Pilot Project Regarding Case Mgmt. Techniques for Complex Civil Cases in the S. Dist. of New York (S.D.N.Y. Nov. 1, 2011), available at http://www.nysd.uscourts.gov/rules/Complex_Civil_Rules_Pilot_2011-10-31.pdf.

101. *Id.* at 2.

102. *Id.* at 4 (Initial Pretrial Case Management Procedures II).

103. *Id.* at 8 (Motion Procedures A).

104. See WORKING SMARTER, *supra* note 63.

105. *Id.*

106. See UTAH R. CIV. P. 26.

2015] *KOURLIS & KAUFFMAN: THE CASE FOR REAL REFORM* 511

or more, and include the most complex cases in Utah courts.¹⁰⁷ The Tier 3 Case Management program, currently scheduled to go into effect in 2015, will incorporate many of the lessons from *Working Smarter*, including an early case management conference with lead counsel focused on prioritizing discovery and determining the amount of discovery that is proportional to the case. Periodic status conferences are encouraged, as needed, as are the setting of deadlines and the treatment of those deadlines as firm.

Finally, it is important to circle back and recognize that a significant portion of the proposed federal rule amendments relate to increased early and active judicial case management. The proposed amendments include several changes to Rule 16, including encouraging case management conferences with direct exchanges, such as via phone or in person.¹⁰⁸ The time frame for holding the scheduling conference is earlier to encourage early management of cases by judges, and there are additional subjects added to the list of issues to be addressed.¹⁰⁹ One such topic for discussion is whether the parties should be required to request a conference with the court prior to filing discovery motions.¹¹⁰ “Many federal judges require such pre-motion conferences, and experience has shown them to be very effective in resolving discovery disputes quickly and inexpensively. The amendments seek to encourage this practice by including it in the Rule 16 topics.”¹¹¹ The rule changes are intended to further cement case management as a permanent and essential aspect of our civil justice system.

III. THE CASE FOR CULTURE CHANGE

While the headlines in the push for civil justice reform have been rule changes and judicial case management changes, the importance of a change in the legal culture cannot be understated. Arguably the impact of a new legal culture on litigation could be just as profound as effective judicial case management. While history does not provide us as many lessons to be learned in terms of how to change culture in the legal system, there are current efforts around the country that provide examples of success and lay the groundwork for even greater change.

107. *Id.*

108. Campbell Memorandum, *supra* note 46, app. B-12.

109. *Id.*

110. *Id.*

111. *Id.*

A. *The Need for Culture Change*

Discovery reform . . . will not be complete until there is a culture change in the legal profession and its clients. The system simply cannot continue on the basis that every piece of information is relevant in every case, or that the 'one size fits all' approach of Rules can accommodate the needs of the variety of cases that come before the Courts.

—Justice Colin L. Campbell¹¹²

The impact of legal culture has always been more difficult to measure than the impact of rules or case management. Nevertheless, there has been recognition that legal culture matters. Going back to the 1980s, Barry Mahoney and his colleagues took a look at the linkage between the perceptions of court administrators and the problems of delay.¹¹³ The results reflect significant differences across courts, particularly between relatively fast and slow courts, with respect to the attitudes, expectations, and behavior patterns of those involved in the pretrial process. In addition, there was “better bench-bar communication, greater concern about delay, and less resistance to court efforts to manage caseload” in the faster courts.¹¹⁴ We know much more about culture today, with contributions such as Brian Ostrom and Roger Hanson’s work on *Understanding and Diagnosing Court Culture*, which recognizes “[t]he effort to better understand court culture offers a practical means to make a difference in courts’ success.”¹¹⁵

The same can be said for local legal culture. Recent studies highlight that our legal culture today can be contentious and abusive, and there is definitely room for improvement. “Between 50% and 70% of attorneys believe that counsel use discovery as a tool to force settlement, though this sentiment is stronger for defense attorneys than for plaintiff attorneys.”¹¹⁶ Similar proportions of state and federal judges agree.¹¹⁷ And, a notable portion of attorneys report that discovery abuse reaches almost every case.¹¹⁸ As for

112. FINAL REPORT, *supra* note 31, at 25.

113. See BARRY MAHONEY ET AL., CHANGING TIMES IN TRIAL COURTS: CASEFLOW MANAGEMENT AND DELAY REDUCTION IN URBAN TRIAL COURTS 87 (1988), available at <http://cdm16501.contentdm.oclc.org/cdm/ref/collection/ctadmin/id/7>.

114. *Id.* at 89–90.

115. Brian J. Ostrom & Roger A. Hanson, *Understanding and Diagnosing Court Culture*, CT. REV. (2009), available at <http://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1307&context=ajacourtreview>.

116. Corina D. Gerety & Brittany K.T. Kauffman, *Summary of Empirical Research on the Civil Justice Process: 2008-2013*, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS. 48, (2014) (citing AM. BAR ASS’N, ABA LITIGATION SURVEY, *supra* note 37 at 68; HAMBURG & KOSKI, NELA SURVEY, *supra* note 38, at 30; KIRSTEN BARRETT ET AL., ACTL FELLOWS SURVEY, *supra* note 88, at 45 and app. C, tbl. VI.1.).

117. GERETY, STATE AND FEDERAL JUDGE SURVEY, *supra* note 39, at 28.

118. AM. BAR ASS’N, ABA LITIGATION SURVEY, *supra* note 37, at 62 (51% agreed); HAMBURG & KOSKI, NELA SURVEY, *supra* note 38, at 30 (65% agreed); EMERY G. LEE III &

2015] *KOURLIS & KAUFFMAN: THE CASE FOR REAL REFORM* 513

general counsel, a majority agrees that opposing counsel are generally uncooperative,¹¹⁹ reporting high levels of discovery misconduct in the form of overusing discovery procedures and harassing or obstructing the opposition.¹²⁰ What is clear is that we do not have a “culture of proportionality” in discovery, and until we focus on the culture itself, it is unlikely that any changes in the language of the rules will have the desired outcome.

Real change must come from the inside. Lawyers themselves must commit to a different approach to litigation that is characterized by cooperation and efficiency—but not at the expense of fairness. Ironically, if that change were to occur, probably no rules would need amendment. As Professor Steven Gensler has remarked,

A very different approach might be to leave the case-management scheme in place but to change how judges and lawyers use it. Professor Thomas Rowe, himself a member of the Advisory Committee, has observed that the case-management model will inevitably struggle to control costs if lawyers continue to act like spoiled children, requiring judges to provide the equivalent of constant adult supervision. Perhaps this suggests that what we need is not new rules but better play.¹²¹

Unfortunately, just as overloaded dockets and decreased resources have increased the pressures on judges, for attorneys the pressure point has been the advent of electronic discovery. Electronic discovery has changed the paradigm of legal practice.

[T]here must be a change in culture among litigation lawyers. The last 30 years have seen truculence, gamesmanship, and a supreme rule of “volunteer nothing.” Because of the new complexity and volume of information, however, the game theory underlying much of litigation has changed. Litigators must collaborate far more than they have in the past, particularly concerning the discovery of information systems. If they do not, they act against their own self-interest.¹²²

THOMAS E. WILLGING, FED. JUDICIAL CTR., FEDERAL JUDICIAL CENTER NATIONAL, CASE-BASED CIVIL RULES SURVEY 70–71 (2009) (21% of plaintiff attorneys, 23% of plaintiff and defense attorneys, and 16% of defense attorneys agreed); KIRSTEN BARRETT ET AL., ACTL FELLOWS SURVEY, *supra* note 88, at 45 (45% agreed).

119. INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., CIVIL LITIGATION SURVEY OF CHIEF LEGAL OFFICERS AND GENERAL COUNSEL BELONGING TO THE ASSOCIATION OF CORPORATE COUNSEL 22 (2010).

120. *Id.* at 27–28.

121. Steven Gensler, *Judicial Case Management: Caught in the Crossfire*, 60 DUKE L.J. 669, 734 (2010).

122. George L. Paul & Jason R. Baron, *Information Inflation: Can the Legal System Adapt?*, 13 RICH. J.L. & TECH. 10, 2–3 (2007); *see also* Bennett B. Borden & Jason R. Baron, *Finding the Signal in the Noise: Information Governance, Analytics, and the Future of Legal Practice*, 20 RICH. J.L. & TECH. 7, 5 (2014).

The impact of information's "new hyper-flow" may be final recognition that culture change is imperative.¹²³

B. Current efforts to achieve Culture Change

I want to challenge those . . . who dismissed the idea as utopian, and push for change where change is needed to keep the civil justice system functioning."

—Richard Braman¹²⁴

Just as there are projects around the country focused on improving the civil justice system through rule reform and case management, so too are there projects focused on culture. The main focus in the area of legal culture change has been on the notion of "cooperation." In 2007, at a panel discussion on the impact of e-discovery, then Executive Director of the Sedona Conference[®] Richard Braman argued that law school needs to teach cooperative practices.¹²⁵ He noted that "[s]tudents need to be told that there's a time for adversarialness. That's [in] the courtroom. And there's a time when you need to cooperate and collaborate with your adversary to get the facts on the table about which you're going to litigate."¹²⁶ Despite the fact that several other panelists dismissed the idea as "utopian," Braman went on to draft The Sedona Conference[®] Cooperation Proclamation.¹²⁷ With the Proclamation, The Sedona Conference[®] launched a "coordinated effort to promote cooperation by all parties to the discovery process to achieve the goal of a 'just, speedy, and inexpensive determination of every action.'"¹²⁸ Over 150 state and federal judges around the country have endorsed the Cooperation Proclamation.

Some still struggle with how cooperation squares with zealous advocacy. Judge Paul Grimm hit that tension head-on in *Mancia v. Mayflower*: "However central the adversary system is to our way of formal dispute resolution, there is nothing inherent in it that precludes cooperation between the parties and their attorneys during the litigation process to achieve orderly and effective discovery of the competing facts on which the system depends."¹²⁹

Moreover, the idea of cooperation has been around for several decades. Going back to the amendments in 1993 and continuing through the 2000 and 2006 amendments, the Rules Committee has continued to focus on eliminating

123. *Id.*

124. Kenneth J. Withers, *E-Discovery and Combative Legal Culture: Finding a Way out of Purgatory*, 2009 ANNUAL AAJ-PAPERS 5 (2009).

125. *Id.*

126. *Id.* (citing John Bace, *Cost of E-Discovery Threatens to Skew the Justice System* (Apr. 30, 2007), http://www.knowledgestrategysolutions.com/wp-content/uploads/cost_of_ediscovery_threatens_148170-2.pdf).

127. The Sedona Conference[®], *The Sedona Conference[®] Cooperation Proclamation*, 10 SEDONA CONF. J. 331 (2009 Supp.).

128. *Id.*

129. *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354, 361 (2008).

opportunities for gamesmanship and contention throughout the discovery process. The current proposed amendments take the focus on cooperation farther than ever before. Rule 1 currently provides that the civil rules “should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.”¹³⁰ The proposed amendment would provide that the rules be “construed, administered, *and employed by the court and the parties*” to meet those same goals.¹³¹ The Rules Committee has recognized that “a rule amendment alone will not produce reasonable and cooperative behavior among litigants, but believes that the proposed amendment will provide a meaningful step in that direction.”¹³² The Committee further recognized that the rule change must be “combined with continuing efforts to educate litigants and courts on the importance of cooperation in reducing unnecessary costs in civil litigation.”¹³³ In short, the obligation to act in a way designed to produce a just, speedy, and inexpensive outcome falls not just on the judge, not just on the rules or the court system—but on the attorneys as well.

Beyond the proposed federal rule amendments, the pilot projects have served as a proving ground for the notion of cooperation among and between the parties. One example is the Seventh Circuit Electronic Discovery Pilot Program, which originated in the U.S. District Court for the Northern District of Illinois as a response to widespread discussion about the rising burden and cost of electronic discovery. Under the leadership of Chief Judge James Holderman and Magistrate Judge Nan Nolan, a diverse E-Discovery Committee developed Principles Relating to the Discovery of Electronically Stored Information (Principles) intended to incentivize early information exchange and meaningful cooperation related to preservation and discovery. The Committee and its work has been an exemplar, resulting in an active bench and bar and making its own impact on the legal culture in the Seventh Circuit.

The Principles are implemented through standing orders issued by individual judges voluntarily participating in the program. Principle 1.02 on Cooperation notes:

An attorney’s zealous representation of a client is not compromised by conducting discovery in a cooperative manner. The failure of counsel or the parties to litigation to cooperate in facilitating and reasonably limiting discovery requests and responses raises litigation costs and contributes to the risk of sanctions.¹³⁴

The Principles go on to provide for an early meet and confer regarding

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

131. Campbell Memorandum, *supra* note 46, at app. B-13.

132. *Id.*

133. *Id.*

134. See 7TH CIRCUIT ELECTRONIC DISCOVERY COMM., PRINCIPLES RELATING TO THE DISCOVERY OF ELECTRONICALLY STORED INFORMATION Principle 1.02 (rev. Aug. 1, 2010).

discovery and preservation with the goal of identifying disputes early in the process for resolution.¹³⁵ The Phase II Report on the pilot project reports that attorneys who have put aside gamesmanship and embraced the concept of cooperation do not believe it has undermined the zealous representation of their clients.¹³⁶ “In fact, it is becoming an essential component of appropriate representation—particularly in the area of electronic discovery—in order to achieve a just, speedy, and inexpensive determination for clients.”¹³⁷

The Initial Discovery Protocols for Employment Cases Alleging Adverse Action provides another example of attorneys working together across the “v.”¹³⁸ Under the direction of the Standing Committee and the Rules Committee, and with the assistance of IAALS, a diverse group of employment lawyers developed the protocols, which create a new category of information exchange, replacing initial disclosures with initial discovery specific to these cases. Both sides provide the identified discovery automatically within 30 days of the defendant’s responsive pleading or motion. While further discovery is not affected, the intent of the Protocols is to assure that the early automatic exchange of information will focus and streamline the dispute—to the benefit of both the plaintiff and the defendant. Gone are the expensive back-and-forth discovery requests, delays, foot-dragging, and arguing. The parties are required to produce—at the outset—the information that is seminal to the litigation: the information that they would ultimately disgorge through the discovery ping-pong match. The protocols change the dynamic of the litigation, for the better, by having both parties share the information at the outset.

IV. CONCLUSION

It is again time to consider bold reforms to our procedural system. Today our system faces pressures and challenges across numerous fronts, and modest tweaking of this rule or that doctrine cannot address the system’s fundamental crisis.

—Jay Tidmarsh¹³⁹

As history and experimentation have illustrated, our three-legged stool will only stand if all three legs are strengthened together. Rule reform, judicial case

135. *Id.* Principle 2.01.

136. *See, e.g.*, SEVENTH CIR. ELECTRONIC DISCOVERY PILOT PROGRAM COMM., SEVENTH CIRCUIT ELECTRONIC DISCOVERY PILOT PROGRAM FINAL REPORT ON PHASE TWO MAY 2010-MAY 2012, 3 (reporting that 96% of attorneys surveyed as part of the pilot program reported either no effect or an increase in ability to represent zealously).

137. Rebecca Love Kourlis & Brittany K.T. Kauffman, *The American Civil Justice System: From Recommendations to Reform in the 21st Century*, 61 U. KAN. L. REV. 877, 891 (2013).

138. *See* FED. JUDICIAL CTR., PILOT PROJECT REGARDING INITIAL DISCOVERY PROTOCOLS FOR EMPLOYMENT CASES ALLEGING ADVERSE ACTION 2 (2011), available at [http://www.fjc.gov/public/pdf.nsf/lookup/DiscEmpl.pdf/\\$file/DiscEmpl.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/DiscEmpl.pdf/$file/DiscEmpl.pdf).

139. Jay Tidmarsh, *Pound’s Century and Ours*, 81 NOTRE DAME L. REV. 513, 516 (2006).

2015] *KOURLIS & KAUFFMAN: THE CASE FOR REAL REFORM* 517

management and culture change are necessary in tandem. Rules set the expectations and can change the legal culture, but a good judge also plays a critical role in early case management and enforcement of those expectations. Therefore it takes more than just rule reform and increased judicial case management. To make the bold reforms necessary for our system, we need to change the culture. Despite Pound's clear concerns in 1906, he remained optimistic about the potential for reform and "look[ed] forward to a near future when our courts will be swift and certain agents of justice, whose decisions will be acquiesced in and respected by all."¹⁴⁰ The experimentation around the country, and the positive early results, make us optimistic as well.

140. Pound, *supra* note 1, at 417.