

ARTICLES

PROCEDURAL POSTCARD FROM AMERICA

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American procedure has long been distinctive. It was part of the common law family of procedure, but different from the other common law countries, and even more different from the civil law countries. Gradually, the other common law countries have changed their procedures to be more similar to that in the civil law countries, which have at the same time been introducing elements that resemble some traditional features of common law procedure. In that sense, harmonization seems to be happening in the rest of the world, except America. That remains true, but ongoing procedural changes in America mean that US procedure is coming to resemble the procedure of the rest of the world a bit more than it did a generation ago. This article reports on the most recent reform package for the US federal courts, which will be under active consideration in America in 2013–2014.

Key words: case management; discovery controls; proportionality; time limits.

1. Introduction

The goal of this report is to introduce procedural changes now under active consideration for the US federal courts. Doing so calls for some reflection on various procedural approaches in other countries.

For many procedure scholars, the dividing line between common law and civil law jurisdictions has been a familiar organizing principle for generations. It has much to offer, at least as an descriptive matter. It seems in some ways to reflect historical trends going back to the 18th century, as the state-centered attitude in France diverged from the 'free market' approach in England.¹ Part of that divergence was the

¹ For discussion, see G Rude, *Revolutionary Europe 1783–1815* (John Wiley & Sons 1964) 21–22 (describing way in which industry in France was controlled by State enterprises, while in England alone 'a distinct class of industrial entrepreneurs' arose).

way in which judges in post-Revolutionary France were required to adhere closely to dictates of the legislature, while in England the common law authority of judges to develop legal principles relatively independently of action by Parliament endured. The divergence played out in terms of procedure; the control of civil litigation by the judge in the civil law system contrasted with the more 'entrepreneurial' features of English litigation. These differences explain the well known common law/civil law dichotomy.

Procedure is not a fixed constant, however, and the civil law/common law dividing line has become less helpful with the passage of time.² The 'mother country' of the common law, England, has shifted its procedure in ways that seem to resemble the civil law systems.³ We of the common law world have simultaneously come to appreciate that there are considerable differences between countries included in the civil law category, for those countries are hardly monolithic with regard to their procedure. Thus, we are told that German procedure has evolved for a generation or more towards a single continuous trial,⁴ and some aspects of discovery have been introduced into Japanese civil procedure.⁵ For much of the world, procedural harmonization has seemed increasingly a genuine possibility. Thus, the American Law Institute and UNIDROIT were able in 2006 to adopt Principles and Rules of Transnational Civil Procedure.⁶

So the traditional division of the procedural world into two spheres has increasingly seemed to present a flawed description of reality. It also suffered from a significant omission – what some would call the 'socialist' attitude toward procedure.⁷ As an organizing principle, this vision might be regarded as embracing what Professor Damaška called the 'activist state' approach – that the state should

² R Marcus, 'Exceptionalism and Convergence: Form versus Content and Categorical Views of Procedure' in J Walker & O Chase (eds), *Common Law and Civil Law and the Future of Categories* (LexisNexis Canada 2010), 521.

³ In the words of Professor Zuckerman, '[t]he adjudicative process begins as soon as the court assumes control over the litigation,' and 'the trial too has changed almost beyond recognition' because evidence and arguments are presented throughout. A Zuckerman, *Civil Procedure* (LexisNexis 2003), 42–43. Professor Andrews adds that the 'oral continuous narrative flow of a civil trial is now in tatters' because witness statements commonly take the place of witness testimony. N Andrews, *English Civil Procedure* (OUP 2003), 124.

⁴ See AT von Mehren, 'Some Comparative Reflections on First Instance Civil Procedure: Recent Reforms in German Civil Procedure and the Federal Rules' (1988) 63 *Notre Dame L. Rev.* 609.

⁵ C Goodman, *Justice and Civil Procedure in Japan* (Oceana Publications, Dobbs Ferry 2004) 283–89 (detailing the limited 'inquiry' procedure allowed under a 1996 reform, and explaining that the absence of sanctions for disobedience 'fatally flaws the procedure').

⁶ ALI/UNIDROIT, *Principles and Rules of Transnational Civil Procedure* (Cambridge 2006).

⁷ A Uzelac, 'Survival of the Third Legal Tradition?' in *Common Law, Civil Law, and the Future of Categories* (n 2) 377.

take an interventionist attitude toward society through its legal institutions,⁸ as compared with what he called the 'reactive state', which relied on courts only for dispute resolution and not also for policy implementation.⁹ From that perspective, the French approach to procedure – embodied in the 1806 French code – emphasized a *laissez faire* attitude in keeping with the 'reactive state', leaving it to the parties to develop and present the case.¹⁰ With the tumultuous developments of 1989–1991, the 'socialist' model receded. Meanwhile, the reforms wrought by Lord Woolf in the UK moved its procedure significantly closer to the Continental model.¹¹

So one might think that procedural harmonization is the order of the day. If so, there seems to be one exception – the United States. For a long time, it has been recognized that the US was a land of procedural exceptionalism.¹² Unlike the rest of the world, America relied on jury trials, lax pleading, and broad discovery to develop cases. It also permitted large pain and suffering damage awards, often allowed substantial punitive damage verdicts, and curtailed appellate (and any judicial) review of jury decisions. Beyond that, US litigation regularly served to achieve 'activist' objectives, most prominently in relation to civil rights, consumer protection, and environmental concerns.¹³

Even Professor Damaška despaired of fitting this litigation activity into his 'activist' and 'reactive' categories.¹⁴ Somewhat similarly, when the ALI and UNIDROIT announced their transnational principles and rules of civil procedure, they consciously excluded the American practices not only of jury trial but also of notice pleading and broad discovery. So this report is designed to provide at least a sketch – a postcard – about where American procedure may be going. Since 1970, changes in American procedures have oriented largely toward constraining the features that excite most opposition elsewhere, to much consternation among some US commentators. But from the perspective of the rest of the world, these changes likely will not seem nearly as momentous as they do to some in America. Another episode in this reform effort is under way, making this report perhaps singularly timely.

⁸ See generally M Damaška, *The Faces of Justice and State Authority* (YUP 1986).

⁹ *ibid* ch III.

¹⁰ CH van Rhee, *Introduction to European Traditions in Civil Procedure* (Intersentia 2005) 3–14.

¹¹ See n 3.

¹² See eg R Marcus, 'Putting American Procedural Exceptionalism into a Globalized Context' (2005) 53 *Am J Comp L* 709.

¹³ For background, see R Kagan, *Adversarial Legalism: The American Way of Law* (HUP 2001); T Burke, *Lawyers, Lawsuits, and Legal Rights* (Berkeley 2002).

¹⁴ See Damaška (n 8) 238–39 (recognizing that in such litigation an American judge 'can be at once a minilegislature').

2. The background of American procedural exceptionalism

One could argue that the US was always exceptional in important ways – it was a large country that achieved independence from a colonial power and dedicated itself to democracy when there was really no model for that manner of governance. But it was not particularly exceptional in terms of judicial methods, at least not as compared with England. It did embrace jury trial as a constitutional right, which was not true in England, where jury trial fell out of favor for civil cases during the 19th century. But many American states did ‘adopt’ English common law resolution of most civil disputes. The US also had two independent sets of courts – federal and state – beholden to different legislatures and reliant on sometimes divergent versions of the common law. Almost unavoidably, it presented a complicated picture.

During the mid 19th century, a ‘codification’ movement arose in the US, prompting legislative adoption of legal principles for many bodies of law that formerly had been governed entirely by common law made by judges. This effort was spearheaded by David Dudley Field, an extremely successful New York lawyer who deplored the latitude judges had under the common law to innovate and invent new doctrines. In that sense, he may have been expressing an impatience like that behind the efforts in the French Revolution to curtail judicial discretion.¹⁵

The most successful aspect of the codification movement was the civil procedure code – called the Field Code – which was adopted in New York and in many western states, where it remains to the present. Like 19th century efforts in England to make procedure less technical, it sought to simplify American procedure and facilitate resolution of cases on the merits instead of technical points. But this effort was supposedly resisted by judges in many places, and by the end of the 19th century many deplored the extent to which the resolution of American cases turned on issues of procedure.¹⁶

The solution to this problem was thought to be creation of a national system of civil procedure for the federal courts that would abandon the technicalities of the past. In 1934, Congress granted the Supreme Court authority to promulgate a national code of procedure rules for the federal courts without much indication what should be in that code.¹⁷ During the following four years, a committee of prominent lawyers drafted a new set of rules that was designed to make a break with existing regimes. It stressed simplified pleading requirements and introduced a ‘revolutionary’

¹⁵ In 1938, the US Supreme Court held that federal judges did not have independent authority to develop common law rules, but had to follow state law unless a federal law applied. See *Erie Railroad Co v Tompkins* 304 US 64 (1938).

¹⁶ R Pound, ‘The Causes of Popular Dissatisfaction With the Administration of Justice’ (1906) 29 Rep. of the ABA 395, 408–15 (emphasizing ‘the injustice of deciding cases upon points of practice’).

¹⁷ See generally S Burbank, ‘The Rules Enabling Act of 1934’ (1982) 130 U Pa L Rev 1015.

new opportunity for very broad discovery.¹⁸ Although it is clear that the drafters of these new rules appreciated that they were significantly different from those that had applied before, it is also clear that they were in no sense ‘revolutionaries’. To the contrary, they were uniformly from leading law firms and elite law schools.

Whatever the intentions of the drafters of the new procedure code, they seem to have contributed to a mid-century transformation of American litigation. Much of that transformation depended on changes in substantive law, not procedure. Beginning around 1950, American law entered an expansive phase. One force propelling this expansion was the civil rights movement; although that movement depended largely on political activity in the streets, it also relied on litigation in the courts, such as the epochal constitutional challenge to racial discrimination in the schools.¹⁹ Another force was the expansion of common law claims on such grounds as products liability; the range of possible tort liability broadened considerably.²⁰ A third stimulus was legislative activity; both Congress and state legislatures passed many new statutory regulations and authorized those who suffered due to a violation of a regulation to sue the violator.

At least to some extent, there was a synergy between these expanded grounds for recovery in court and the new procedural rules. Relaxed pleading made it easier for plaintiffs to get their cases into court. Broad discovery enabled them to obtain proof to support their claims. Arguably, broad discovery also enabled them to persuade common law judges to expand existing grounds for recovery or adopt new ones by proving with the fruits of that discovery that defendants had acted in an unacceptable manner.²¹ By the 1970s, revisions to American class-action procedures sometimes made that device available to magnify the consequences just described.

By the 1970s, then, these combined developments had led to at least the perception that American litigation was uniquely potent and threatening. American procedural ‘exceptionalism’ had made its mark. Many other countries resisted it with such measures as ‘blocking’ statutes forbidding American discovery on their soil, and rules against recognizing American punitive damage awards. The time for reconsideration had by then arrived in the US as well.

¹⁸ For discussion, see S Subrin, ‘How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective’ (1987) 135 U Pa L Rev 909; S Subrin, ‘Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules’ (1998) 39 Bos Col L Rev 691.

¹⁹ For discussion of this phenomenon, see A Chayes, ‘The Role of the Judge in Public Law Litigation’ (1976) 89 Harv L Rev 1281.

²⁰ See G Priest, ‘The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law’ (1985) 14 J Legal Stud 461.

²¹ See J Friedenthal, ‘A Divided Supreme Court Adopts Discovery Amendments to the Federal Rules of Civil Procedure’ (1981) 69 Calif L Rev 806, 818.

3. Retreating from the most aggressive versions of American exceptionalism

The most liberal version of American procedure went into place when amendments to the discovery rules became effective in 1970. The class-action rule had been amended in 1966, and became a favorite device for some plaintiff lawyers.

A recoil began fairly soon afterwards. By the late 1970s, Professor Miller (who had just become Reporter of the committee that proposes changes to the federal procedure rules) wrote of the strong reaction among judges against what they regarded as overuse of class actions.²² More significant for our purposes, however, was the growing dissatisfaction in both the bar and bench with the supposed excesses resulting from broad discovery. Chief Justice Burger appeared sympathetic to those concerns, and they resulted in the convening in 1976 of a major conference about excesses of American litigation.²³ There followed formal proposals to narrow the scope of discovery and curtail it in other ways, but after vigorous opposition many of those proposals were withdrawn,²⁴ and three Justices of the Supreme Court dissented from the adoption of the remaining proposals on the ground they did not go far enough.²⁵

Actually, new proposals were waiting in the wings. With Professor Miller as Reporter, further amendments to the Federal Rules were proposed in 1981 that did at least three things of note: (1) they replaced a rule provision that invited unlimited discovery²⁶ with one directing judges to limit discovery if it was disproportional to the case; (2) they required judges to manage cases in several ways, and encouraged them to do so in many additional ways; and (3) they transformed the rule for punishing litigation misconduct (Rule 11) from being ineffective to being potentially very effective.²⁷

In a significant sense, this set of amendments confirmed a watershed in American procedural attitudes. Most significantly, the amendments installed case management

²² See A Miller, 'Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem"' (1979) 92 Harv L Rev 664.

²³ See 'The Pound Conference Recommendations: A Blueprint for the Justice System in the Twenty-First Century' (1976) 76 FRD 277–336.

²⁴ See R Marcus, 'Discovery Containment Redux' (1998) 39 Bos Col L Rev 747, 753–68 (describing this controversy).

²⁵ Powell J, 'Dissenting from Amendments to Federal Rules of Civil Procedure' (1980) 440 US 997.

²⁶ Until 1983, Fed R Civ P 26(a) had stated: 'Unless the court orders otherwise under subdivision (c) of this rule [dealing with protective orders, in which the moving party has the burden of showing such an order is necessary], the frequency of use of these methods [of discovery] is not limited'.

²⁷ For an overview, see A Miller, *The August 1983 Amendments to the Federal Rules of Civil Procedure: Promoting Effective Case Management and Lawyer Responsibility* (Federal Judicial Center 1984).

as a prominent feature of federal court procedure. This attitude was not entirely new in 1983. In metropolitan courts like those in San Francisco and New York, the judges had employed such practices since the 1960s.²⁸ This effort generated some academic opposition,²⁹ but gained increasing acceptance among federal judges. Although some view this change as a 'shift to the right',³⁰ it is difficult to attribute this growing sense of judicial responsibility for the conduct of cases before them as flowing from particular political views.³¹ In state courts, similar initiatives have appeared; in California, for example, many metropolitan courts have 'complex litigation' departments in which the same judge handles a case from start to finish and engages in active case management.

Other aspects of the 1983 shift were less successful. Rule 11, which was greatly fortified that year, came to be viewed as something of a monster fairly quickly. As revised, it seemed to invite repeated applications to the judge to punish the other side for something it did in the conduct of the litigation. Reportedly, some lawyers made a habit of attaching such an application to almost every filing in court. That possibility led to substantial study³² and eventually an unprecedented 'call' by the federal rules committee for commentary on whether the rule should be changed. It was changed in 1993 to deal with some of the problems that had been identified, and has receded in importance since those changes.³³

The third major plank to the 1983 changes – emphasizing proportionality in discovery – had initial consequences that were almost the opposite of the explosive effects of the amendment to Rule 11. For some time, almost nobody paid it any attention to it. A decade later I wrote in a treatise on federal-court practice that the proportionality provision 'seems to have created only a ripple in the caselaw'.³⁴ But in the next edition of the same treatise, in 2010, I was able to write that 'attention to the proportionality provisions has grown since 1994, and endorsement of their use has widened'.³⁵

²⁸ For a review, see R Peckham, 'The Federal Judge as Case Manager: The New Role in Guiding a Case From Filing to Disposition' (1981) 69 Calif L Rev 770.

²⁹ See J Resnik, 'Managerial Judges' (1982) 92 Harv L Rev 374.

³⁰ S Gavin, 'Managerial Justice in a Post-Daubert World' (2006) 234 FRD 196, 196.

³¹ See R Marcus, 'Reining in the American Lawyer: The New Role of American Judges' (2003) 27 Hast Int'l & Comp L Rev 2.

³² See eg E Wiggins, T Willging, & D Stienstra, *Report on Rule 11* (Federal Judicial Center 1991); S Burbank (ed), *Report of the Third Circuit Task Force on Federal Rule of Civil Procedure 11* (American Judicatur Society 1989); S Burbank, 'The Transformation of American Civil Procedure: The Example of Rule 11' (1989) 137 U Pa L Rev 1925.

³³ See eg *Stove Builder International Inc v GHP Group Inc* 280 FRD 402, 403 (ND Ill 2012) (referring to 'the fang-drawing 1993 amendments' to Rule 11).

³⁴ C Wright, A Miller, & R Marcus, *Federal Practice & Procedure* (2nd edn, West 1994) vol 8, para 2008.1.

³⁵ — *Federal Practice & Procedure* (3rd edn, West 2010) para 2008.1.

Thus, the 1983 rule changes signalled a new direction that had been initiated by individual judges managing their own dockets but became part of the mandatory practice of all federal judges pursuant to federal rule changes. Further changes have fortified that impulse, and also the effort to contain overbroad discovery. In 1993 the discovery rules were amended to direct that some 'core information' be disclosed early in the case without the need for a formal discovery request, and also to impose a moratorium on formal discovery until the parties met and conferred on a 'discovery plan'. Further amendments in 2000 formally narrowed the scope of discovery, and additional changes in 2006 added provisions specifically tailored to the problems presented by discovery of electronically stored information.

Throughout, some efforts at constraining discovery were attacked vigorously as harming the basic American commitment to broad access to needed evidence. At least some of those criticisms have been shown to have overstated the impact of the rule changes, which turned out to be very modest. The narrowing of the scope of discovery in 2000 is a notable example of a change that was vehemently opposed but seemed to have made almost no actual change in practice.

Meanwhile, other changes have also prompted vehement objections that liberal American procedure is being harmed. By far the most prominent example of that reaction occurred in response to two Supreme Court decisions about pleading requirements, which seemed to invite judges to reject claims they regarded as not being 'plausible'.³⁶ As one judge put it, these decisions 'ignited a firestorm that within months reached all the way to Congress'.³⁷ They also ignited an academic firestorm that has so far grown to more than 700 articles in print. One oddity is that the Supreme Court seemed to be saying that case management was not a sufficient brake on over-discovery, so that weeding out cases before discovery is necessary.³⁸

All in all, American procedural reform seems to operate in a setting that is more public, and perhaps 'politicized', than in other countries. A major stimulus to making the effort is the reality of dissatisfaction. In part, that may be inevitable. More than 100 years ago, Dean Pound sparked the 20th century's effort at reforming American procedure by speaking about the inevitability that there will be public dissatisfaction with the administration of justice.³⁹ A century's experience since then supports his thesis.

³⁶ *Bell Atlantic Corp v Twombly* 550 US 544 (2007); *Ashcroft v Iqbal* 556 US 662 (2009).

³⁷ D O'Scannlain 'Access to Justice Within the Federal Courts – a Ninth Circuit Perspective' (2012) 90 *Ore L Rev* 1033, 1035.

³⁸ See *Bell Atlantic* (n 36) 559–60 (referring to 'the common lament that the success of judicial supervision in checking discovery abuse has been on the modest side'). One of the Justices who joined in that decision, later seemed to retreat from the view that case management does not work. See *Ashcroft* (n 36) 700 (Breyer J, dissenting, arguing that the majority opinion does not provide 'convincing grounds for finding these alternative case-management tools inadequate, either in general or in the case before us'). It may be worth noting that Justice Breyer's brother is a federal district judge in San Francisco, and quite familiar with the effectiveness of judicial case management.

³⁹ See Pound (n 16).

More particularly, it's hard to deny that many argue that US procedure is not functioning as one would want it to function. Sometimes this seems to be a universally-held attitude, even though different sectors of the bar are upset about different aspects of the practice. As a political matter, the notion that American litigation is too costly and time-consuming has gained much force. As an empirical matter, proving or evaluating such claims is difficult and involves contentious value judgments. Those who find that litigation is a net loss almost always regard the cost and delay associated with litigation as injury added to insult. For them (often representing large organizations, such as companies), the costs may appear so insufferable because the cost of litigating for individuals is sometimes considerably smaller than the cost large organizations must bear when they are sued. Those who revere the judicial breakthroughs of the civil rights era and favor improved 'access to justice', on the other hand, see the litigation terrain quite differently. Ultimately, there is an inevitable imponderable about when 'rights' are important enough to justify 'costs' that result from efforts to enforce those rights.

4. The next installment of American reform?

In this charged atmosphere, there may be heightened resistance to any significant changes to US procedure. Furthermore, there may also be energetic efforts to portray changes that are not really very dramatic as cataclysmic. Together, these realities prompt caution about what to change.

One way to try to get a clear and balanced picture in such circumstances is to gather a group of wise and experienced people with a multitude of views and seek their guidance. That is what the US Judicial Conference's Advisory Committee on Civil Rules (the body charged with developing procedural changes for the US federal courts) did in May, 2010, hosting a major two-day conference at Duke Law School that delved deeply into a variety of contentious subjects.⁴⁰ As might be expected, the conference generated a very large number of ideas for change and much disagreement about whether these ideas were good ideas. The Committee then spent nearly three years examining, evaluating, and refining these ideas. During that time, it convened two one-day conferences on particular aspects of the evolving rule revision ideas. Gradually some ideas were dropped and others were reshaped into a package that finally won full support of the committee.

In June, 2013, the resulting proposals to amend the Federal Rules of Civil Procedure were approved for publication. By statute, proposals to amend the procedure rules must be published for public comment.⁴¹ By practice, that public comment

⁴⁰ Detailed information about the Duke Conference can be found at: <www.uscourts.gov/RulesAndProcedures/archives/projects-rules-committees/2010-civil-litigation-conference.aspx> accessed October 2013.

⁴¹ 28 USC para 2071(b).

period runs from August 15 until the following February 15, so this package is to be published for comment on August 15, 2013. The principal features of the package are summarized below, and the full package can be accessed online.⁴²

4.1. Enhanced and accelerated case management

Since 1983, some case management has been required for most cases, and more has been encouraged. In the view of most judges and many experienced lawyers, these efforts have paid major dividends. A recurrent objection about case management is that judges don't do enough of it, and that they don't do it soon enough.⁴³ At the same time, it is relatively clear that resistant judges cannot be forced to do things they regard as pointless. Probably unlike many other judiciaries (which look, to American eyes, like bureaucratic governmental agencies) American judges are independent, sometimes fiercely independent. It is quite difficult for anyone, even other judges, to tell them exactly what to do in handling the cases before them.

Reduced time to issue scheduling order: Despite the difficulties, the rules do contain some provisions that require some measures of case management. Perhaps most prominent, and certainly earliest, is the requirement that judges issue a 'scheduling order' within a certain period of time after a case is filed. This order must include some time limits on completing pretrial activities⁴⁴ and it may include many other things. Presently the judge need not issue this order until 120 days after a defendant has been served. The amendment would halve that time, requiring that the scheduling order issue within 60 days of commencement of the case, while allowing the judge to extend that period for good cause.

Requirement of actual conference: The current rule says that the scheduling order only after the parties submit their proposed discovery plan, or after the judge has consulted with the parties at a scheduling conference 'or by telephone, mail, or other means'.⁴⁵ Many lawyers enthuse about the value of direct contemporaneous interaction with judges at these events. Some worry that insisting that judges interact in this way when they don't want to may be counterproductive, and also that making them do so will eat up time they might be better spend doing other arguably more valuable tasks, such as trying cases. But even busy judges claim to be able to make this effort without prejudice to their ability to manage their caseloads. So the rule would be amended to remove authority to satisfy the conference requirement 'by telephone, mail, or other means'.

⁴² See <www.uscourts.gov> accessed October 2013 for the full published package of proposed amendments.

⁴³ To be sure, there are some who think judges do too much of it. At least among those who talk to the judges who make the procedure rules, however, that view is not prominent.

⁴⁴ Fed R Civ P 16(b)(3)(A) (directing that the scheduling order 'must limit the time to join other parties, amend the pleadings, complete discovery, and file motions').

⁴⁵ Fed R Civ P 16(b)(1)(B).

Allowing some early discovery requests: In 1993, a rule amendment required the parties to confer at the beginning of the case to develop a discovery plan, and report to the judge about what they had agreed upon.⁴⁶ At the same time, another new rule provision directed that formal discovery requests be postponed until after the parties had conferred and developed a discovery plan.⁴⁷ The idea was that the parties should work out their discovery plan before they launched formal discovery requests.

But it also seemed that they might benefit from knowing more precisely what discovery would be sought before they tried to develop a discovery plan. This need might be more pronounced with discovery of electronically stored information (such as email), which has become increasingly important in American litigation. At least some kinds of discovery – particularly depositions – could be unduly disruptive if initiated before the discovery plan were developed. But allowing early Rule 34 requests for documentary and other information – often the greatest source of objections about discovery burdens – might often facilitate meaningful conferences about a discovery plan. So the proposed amendments permit early Rule 34 requests, providing also that responses not be due until the normal 30 days elapsed after the planning conference.

4.2. Proportionality and scope of discovery

The idea of proportionality has been in the rules since 1983, when it was added to the discovery rules as a command to judges to limit discovery that was disproportionate. As noted above,⁴⁸ the early returns on this innovation were limited. But the notion has unavoidable appeal. That appeal is perhaps most evident in the kinds of situations that are offered to illustrate challenges to the breadth of American discovery, for these anecdotal tidbits almost always involve hugely disruptive and expensive efforts that seem to have almost no promise of providing useful information. Rarely do discovery opponents portray discovery as objectionable when it appears likely to reveal useful evidence.

That attitude means that American objectors to American discovery do not rely on the sort of right not to incriminate oneself that received respect in Europe.⁴⁹ To the contrary, one proposal by prominent economists was that proportionality

⁴⁶ Fed R Civ P 26(f).

⁴⁷ See Fed R Civ P 26(d).

⁴⁸ See *supra* text accompanying notes 34–35.

⁴⁹ See eg N Trocker, 'Transnational Litigation, Access to Evidence and U.S. Discovery: Learning from American "Exceptionalism"?' in R Stürner, & M Kawano (eds), *Current Topics of International Litigation* (Mohr Siebeck 2009) 145, 156 ('The [European] codes of civil procedure of the 19th Century strictly adhered to the principle *nemo tenetur edere contra se*, i.e., the principle that no party has to help her opponent in his/her inquiry into the facts'); A Junker, 'Access to Documentary Evidence in German Civil Procedure' in P Gottwald (ed), *Litigation in England and Germany* (Gieseking 2010) 51, 52 ('The principle applied was that no party must produce a document which is required to win the case of the opponent').

should be enhanced by declaring that any discovery request be deemed 'abusive' if satisfying it required efforts that outweighed the evidentiary value to the requesting party's case of the resulting information.⁵⁰ So the battle here is not fought out on the ground that '[i] have a right to keep my secrets secret', but instead that '[t]his discovery won't reveal anything of importance to the litigation but will cost me large amounts of money'.

For a long time, efforts have been made to recalibrate discovery to minimize wasted expense. The measuring rod is 'relevance', and is very broad. Until 2000, discovery could be sought of anything relevant to the 'subject matter' in the litigation, but then it was changed to focus on items 'relevant to any party's claim or defense.'⁵¹ The new proposal is to inject proportionality more directly into the definition of the scope of discovery by providing that besides seeking relevant information, proposed discovery must be: 'proportional to the needs of the case considering the amount in controversy, the importance of the issues at stake in the action, 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'. In addition, language in the present rule invoked by courts to support discovery whenever it 'appears reasonably calculated to lead to the discovery of admissible evidence' would be removed.

Besides proposing this general revision of the scope of discovery, the amendment package reduces specific numerical limits on the use of certain discovery devices. Numerical limits were also introduced in 1993. The idea is not that no case could justify a larger number of discovery events than the limits, but rather that having a limit meant that parties would at least have to pause and ask themselves, and perhaps the judge, whether more discovery was warranted in the given case. The idea of reducing the limits was to increase the number of occasions when that pause would be necessary. Thus, the limit for depositions would be lowered from ten to five, and limit for interrogatories would be lowered from 25 to 15, and a limit of 25 requests for admissions would be imposed.

It may seem strange that Rule 34 document requests are not similarly limited in number, given that this form of discovery is the one that seems to generate the most frequent burden objections. But the burden of complying with precisely drawn 'rifle shot' requests would be less than the burden of complying with broad 'dragnet' requests. As a result, placing a numerical limit on this form of discovery might actually produce more rather than less burden by encouraging broader requests.

As a further prompt towards proportionality, a small addition to the protective order rule explicitly authorizes the court to allocate the expenses of responding to discovery to the party seeking discovery if doing so seems justified to avoid undue burden to the responding party.

⁵⁰ See R Cooter, & D Rubinfeld, 'Reforming the New Discovery Rules' (1995) 84 Geo LJ 61.

⁵¹ Fed R Civ P 26(b)(1).

Finally, additional proposed amendments seek to reduce unjustified burdens on parties seeking discovery. Those parties report that they often confront ‘general’ or ‘boilerplate’ objections coupled with promises to produce ‘subject to these objections.’ This strategy leaves requesting parties guessing whether they should challenge the objections because they can’t tell whether anything has actually been withheld based on the objections. Proposed changes to Rule 34(b) therefore would require that the grounds for objections be ‘stated with specificity’ and state whether any responsive materials have been withheld based on those objections. Additional changes to the rule would require that parties comply with the timetable for production set forth by the requesting party or specify when they will produce, a measure that responds to the contention that responding parties too often don’t really produce anything until ordered to do so by the court even though they promise to do so.

4.3. Cooperation

At first blush, the notion that American litigators might cooperate with each other sounds fanciful. After all, America is the home of the adversary tradition, and over the last generation that tradition has led to ‘Rambo litigation’ tendencies in the American bar. It also has some hallowed support in the notion that a lawyer is the party’s last ‘friend’ when confronting a potentially all-powerful opponent and court system.⁵²

Nonetheless, at the Duke Conference in May, 2010, a recurrent theme was the value and great importance of cooperation. In part, this possibly surprising development resulted from the growing importance of discovery of electronically stored information. Although rule amendments were adopted in 2006 to provide significant guidance on how to handle this mode of discovery, those amendments were premised on the notion that the best design for such discovery in a given case was the design the parties developed on their own.⁵³ Those amendments therefore fortified the Rule 26(f) provisions for making a discovery plan to require attention to electronic discovery issues. And since 2006 lawyers and judges have found that failure to cooperate in designing an electronic discovery regime could cause severe problems later in the litigation.

So there was much reason to encourage cooperation, even in the US. But there was also much concern about making the cooperation issue another one for the adversaries to fight over. At some point, judges cannot readily make parties cooperate in negotiating their rights; judges, instead, are available to decide what those rights are. One might say that relaxing those rights through mandated cooperation is antithetical to the purpose of a court system committed to enforcing rights, not

⁵² For further analysis, see R Marcus, ‘Cooperation and Litigation: Thoughts on the American Experience’ (2013) 61 *Kansas L Rev* 821.

⁵³ See R Marcus, ‘E-Discovery Beyond the Federal Rules’ (2008) 37 *U Balt L Rev* 321, 328–33.

to diluting them by insisting on cooperation with the violator. On the other hand, particularly with regard to discovery, it is peculiar to speak in terms of rights. Even American discovery is not intended as an abstract 'right', but rather a method of providing access to evidence needed to permit the judge to reach an accurate decision about the issues of right raised in the case. Ultimately the judge can decide how much is too much; that's the whole idea behind proportionality.

Rule 1, the exhortation at the beginning of the rules, therefore would be amended to say that the rules would be 'employed... by the parties' to secure just, speedy, and inexpensive decisions, and the accompanying Note would add that '[e]ffective advocacy is consistent with – and indeed depends upon – cooperative and proportional use of procedure.'

4.4. Preservation and sanctions

For decades, American courts have recognized that potential litigants must preserve potential evidence when they become aware of potential litigation. Although that string of 'potentials' suggests that there may be occasions when parties don't know they should keep things, or what they should keep, these problems had not seemed to be terribly important until use of computers began to assume its current massive importance.

Nowadays, all American organizations, and almost all American people, use multiple computers, not only desktops or laptops, but also handheld computer devices. And they often resort to social media for social purposes that could be relevant in lawsuits. Keeping track of all that material is a qualitatively larger task than in the past. As criminal investigations that rely on such electronic information have proved again and again, however, this evidence may be singularly, even uniquely, important.

Keeping all electronic information is hugely difficult, and perhaps impossible, particularly for an organization. But in at least a few high-profile cases, it seemed that enterprises that had failed to retain or make available such information were subjected to severe punishments as a result.⁵⁴ Fearing such sanctions, many companies undertook extremely expensive and intrusive efforts to retain vast quantities of electronic information for multiple possible litigations even though very few lawsuits actually resulted and sanctions were actually imposed exceptionally rarely.

At the Duke Conference, the E-Discovery Panel, composed of a diverse group of judges lawyers with vast experience with these problems, urged that a new rule be developed to solve these problems. After a great deal of work, a new Rule 37(e) was developed that (1) authorizes use of 'curative measures' when a party 'failed to preserve discoverable information that should have been preserved'; and (2) authorizes sanctions for failure to preserve only when the party's actions

⁵⁴ See eg *Residential Funding Corp v DeGeorge Finan Corp* 306 F 3d 99 (2d Cir 2002) (directing that sanctions be imposed for negligence or gross negligence).

‘caused substantial prejudice in the litigation and were willful or in bad faith’. That requirement of a finding of willfulness or bad faith would nullify the cases holding that negligence sufficed, although the rule would permit sanctions for negligence in exceptionally rare cases in which the party’s actions ‘irreparably deprived a party of any meaningful opportunity to present or defend against the claims in the action’.

This rule proposal does not go as far as some wanted, for some wanted a precise set of directives on when information must be retained, what information must be retained, in what form, and for how long. But it is designed to provide national uniformity⁵⁵ and guard against sanctions in the absence of proof of willfulness or bad faith.

5. What happens next

As noted above, this package of rule proposals will be published on Aug. 15, 2013. The proposed amendments will be accessible to all via the US Courts’ website: www.uscourts.gov. For a six-month period, any member of the public will be able to submit written comments on the amendment proposals. Three public hearings will be held at which anyone who signs up can appear and testify. Almost certainly, there will be many comments and many witnesses. Almost certainly, they will disagree on a number of points. Almost certainly, there will be strong criticisms of individual amendment proposals, and some may criticize them all. All of these public comments will also be posted on the US Courts’ website, so anyone who wants to find out what was raised can do so.

After the public comment period is finished, the Advisory Committee will reflect on what it has heard and decide whether to go forward with the rule amendments as published, revise them, or discard some or all. It is not possible now to say what will happen then.⁵⁶ But it is fairly likely that there will be some changes to the proposed amendments, and it is reasonably likely that there will be some amendments to the rules. It is possible to add that if there are amendments they will go into effect no sooner than December 1, 2015.

6. Conclusion

From the perspective of the rest of the world, this package of changes is likely to seem very modest, perhaps minimal. From the perspective of some of those who comment, it will probably be described as radical or revolutionary. From the perspective of many, the changes may seem to need some reorientation but to be

⁵⁵ It should be noted, however, that the rule would not apply directly to actions in state courts. It may be, however, that state courts would adopt similar rules should the federal rule go forward.

⁵⁶ I am the Associate Reporter of the Advisory Committee, and have been involved in the process since the beginning. I cannot foresee now how these proposals will fare between now and April, 2014. In this article I speak only for myself, but I am confident that anyone else associated with the amendment process would similarly admit ignorance of whether the proposed amendments will be promulgated.

fundamentally reasonable. For those outside the US, the message is that our basic structure remains much the same (and different from that almost everywhere else), but that it is also changing in nontrivial ways.

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