



INSTITUTE *for the* ADVANCEMENT  
*of the* AMERICAN LEGAL SYSTEM



Judge John G. Koeltl  
Daniel Patrick Moynihan United States Courthouse  
500 Pearl St.  
New York, NY 10007 United States of America

### Comment regarding Rules Amendments under consideration

Members of the Civil Rules Advisory Committee:

On behalf of IAALS – the Institute for the Advancement of the American Legal System, we wish to commend the prodigious work that has gone into the currently pending Rules Amendments.

These amendments originated from the Duke Conference deliberations, which occurred in May of 2010. Over the intervening three year period, the Subcommittee has demonstrated an unwavering commitment to assuring that substantive proposals, responsive to the Duke outcomes, would be before the Standing Committee and the public in a timely manner.

The general themes from the Duke Conference, and from subsequent conferences addressing these issues, have consistently echoed the need for a fair, effective court process in which the issues are joined efficiently, the necessary information is exchanged, and the case is resolved fairly. As you note, cooperation, proportionality, and early hands-on case management are the tools that we all hope will work toward reducing cost and delay for the benefit of all litigants.

The Duke Proposals are clearly an effort to put those themes into operation. We, as a research entity, are also thrilled by the extent to which the proposals are based upon research that has been done and is being done in the field.<sup>1</sup>

With reference to the specific proposals, we offer the following comment for your consideration:

First, we support the early case management edict reflected in Rules 4(m) and 16(b), and the relaxation of the Rule 26(d)(1) discovery moratorium to permit early delivery of Rule 34 requests to produce as appropriate.

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<sup>1</sup> On that note, we observe that the Adverse Action Employment Protocols are cited with approval in the Report, as is the general concept that case-type-specific Rules and protocols may be warranted for other types of cases as well. See DUKE CONFERENCE RULES PACKAGE, April 11-12, 2013 Agenda Book, at 77 (of 324), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2013-04.pdf>. This concept comports with our recommendations and research to date.

Second, we applaud the effort to incorporate proportionality more explicitly into Rule 26(b)(1) and throughout the proposals. We support the presumptive limits on discovery, which create curbs on the process, but which also allow for exceptions in individual cases.

We are greatly in favor of the constraint on written discovery motions absent a conference with the court in Rule 16(b)(3)(v). On this point, we would note that we are in the process of conducting a nation-wide study of judges who are perceived to be excellent case managers and one of the techniques they uniformly embrace is precisely what the Rule would now require. We refer you to an early preview of the results of that study, written by Richard Holme of the American College of Trial Lawyers.<sup>2</sup>

As to the Rule One expansion, we suggest that it is, in our view, very well-grounded in an effort to expand responsibility for the just, speedy, and inexpensive resolution of disputes to attorneys as well. All of the research suggests that legal culture is an enormous part of the effective functioning of a particular court system, and the culture involves both the judges and the attorneys.<sup>3</sup> On the other hand, research also points to the key role of a judge in the process. Our PACER study identified the difference in case processing that one jurisdiction or judge could make purely by the way in which Rules are applied locally.<sup>4</sup> Broader research points to the importance of judicial leadership in the implementation of Rules and case management procedures.<sup>5</sup> Indeed, our work in analyzing the Rules amendments in Arizona suggested that the Rules worked very well, when enforced by the judges – but were not at all self-actuating.<sup>6</sup> Hence, our concern is merely that by broadening responsibility for the appropriate enforcement and functioning of Rules to all actors, we would not want the judges to feel disempowered or to shirk accountability to the system and to the litigants. Accordingly, we would suggest that the language related to attorneys might better be incorporated into the Rules of Professional Conduct, and the enforcement of the Rules of Civil Procedure left to the aegis of the courts.

In conclusion, we enthusiastically support the publication of the Rules proposals, with the one caveat noted above, and look forward to the proceedings before the Standing Committee and the public comment that the proposals will generate.

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<sup>2</sup> Richard P. Holme, “No Written Discovery Motions” *Technique Reduces Delays, Costs, and Judges’ Workloads*, 42 COLO. LAW. 65 (March 2013), available at <http://online.iaals.du.edu/files/2013/04/TCL-No-Written-Discovery-Motions.pdf>.

<sup>3</sup> Brian J. Ostrom & Roger A. Hanson, *Understanding Court Culture is Key to Successful Court Reform*, NAT’L CENTER FOR ST. CTS. FUTURE TRENDS IN ST. CTS., 2010, available at <http://cdm16501.contentdm.oclc.org/cdm/ref/collection/ctadmin/id/1611>.

<sup>4</sup> INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., CIVIL CASE PROCESSING IN THE FEDERAL DISTRICT COURTS: A 21ST CENTURY ANALYSIS 8-9, 28-29, 80-81 (2009).

<sup>5</sup> See, e.g., AM. BAR ASS’N, ABA SECTION OF LITIGATION MEMBER SURVEY ON CIVIL PRACTICE: FULL REPORT 124-26 (2009), available at

[http://www.americanbar.org/content/dam/aba/migrated/litigation/survey/docs/report\\_aba\\_report.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/litigation/survey/docs/report_aba_report.authcheckdam.pdf); AM. COLL. OF TRIAL LAWYERS TASK FORCE ON DISCOVERY & INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., INTERIM REPORT (INCLUDING 2008 LITIGATION SURVEY OF THE FELLOWS OF THE AMERICAN COLLEGE OF TRIAL LAWYERS) 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 A-6 (2008), available at [http://iaals.du.edu/images/wygwam/documents/publications/Interim\\_Report\\_Final\\_for\\_web.pdf](http://iaals.du.edu/images/wygwam/documents/publications/Interim_Report_Final_for_web.pdf).

<sup>6</sup> INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., SURVEY OF THE ARIZONA BENCH & BAR ON THE ARIZONA RULES OF CIVIL PROCEDURE 26 (2010), available at [http://iaals.du.edu/images/wygwam/documents/publications/Survey\\_Arizona\\_Bench\\_Bar2010.pdf](http://iaals.du.edu/images/wygwam/documents/publications/Survey_Arizona_Bench_Bar2010.pdf).

We try in our work to be mindful of the adage that the perfect should not stand in the way of the good, and these proposals – although never perfect – truly represent significant forward motion. Thank you again.

Sincerely,

A handwritten signature in black ink that reads "Rebecca Hale Kowlis". The signature is written in a cursive style with a large initial 'R' and a distinct 'K'.

Executive Director