

The nuts and bolts

How did these new amendments to the civil rules come about? Why now? How will they succeed when past efforts have failed? **DUKE LAW DEAN DAVID F. LEVI** leads a discussion with some of the leaders behind the changes.

THE PANEL:



JUDGE DAVID G. CAMPBELL, U.S. District Court for the District of Arizona, served as chair of the Advisory Committee on Civil Rules until October 2015.



JUDGE JOHN G. KOELTL of the U.S. District Court for the Southern District of New York is a former member of the Advisory Committee.



CHILTON VARNER is a partner at King & Spalding, a past member of the Committee, and former president of the American College of Trial Lawyers.



JUDGE DEREK P. PULLAN of the Utah Fourth Judicial District is a proportionality pioneer who helped overhaul Utah's civil procedure rules in 2011.



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Judge Campbell, since you were the chair of the Committee, could you briefly summarize the salient amendments? What brings us here?

Campbell: The current amendment proposals can be traced back to a conference that the Civil Rules Committee sponsored in 2010. About 200 lawyers, judges, and law professors came together at the Duke University Law School to evaluate the effectiveness of the Federal Rules of Civil Procedure. Papers were written in advance, studies were performed and two days of vigorous discussion were held.

The conclusions of the conference could be summarized as follows: the civil rules and civil litigation work reasonably well, but improvement is needed in four areas: increased cooperation among litigants, greater proportionality in discovery, earlier and more active case management by judges, and guidance on the preservation and loss of electronically stored information.

Judge Koeltl, you were very involved in this process. What would you add?

Koeltl: One of the important things about the Duke Conference was there was a shared view – among plaintiffs’ lawyers, defense lawyers, public interest lawyers, clients, academics – that there were some problems in the system. The system didn’t have to be completely revised with a whole new set of rules, but we could do better. Every statistical survey that was conducted showed a measurable level of dissatisfaction because the costs of litigation were disproportionate to what was involved in the litigation. The consequences were such that cases were settled that shouldn’t settle, or that settled for amounts that were inappropriate. That was a view shared by plaintiffs’ lawyers, defendants’ lawyers, and the other participants.

Ms. Varner, from your perspective as a leading trial lawyer and litigator, would you agree there is a fairly broad consensus?

Varner: I think so. Certainly, an organization with which I’m familiar, the American College of Trial Lawyers, did an exhaustive survey of its membership, which is drawn from civil and criminal attorneys, plaintiffs’ and defendants’ attorneys, public defenders, and government attorneys, and concluded that probably the biggest problem with modern civil litigation is its disproportionate cost that increasingly hampers access.

Judge Pullan, do these rules proposals resonate with you? Are these the same areas that law reformers and judges are concerned about in the state courts?

Pullan: I think those factors are the driving force behind change on the state level as well. There was a sense in Utah that the federal rules were designed for high-value, ‘Cadillac litigation,’ when what happens in state courts is more ‘VW litigation.’ We ought to re-examine why we have a system of rules that is one-size-fits-all. We certainly are interested in the proportionality question, and Utah has been operating under a proportionality framework since 2011. So we have probably more experience in the application of that concept than most other states.

Case management was a harder sell on the state side just because of the high volume of cases per judge. Active judicial case management would require a cultural shift in the judiciary. But I think that’s coming. We are rolling out a pilot project for early, active case management for Jan. 1. More and more judges are coming to understand that the earlier they are involved in managing cases the more time is saved on the back end. So I think those factors all drive what is happening in Utah and in many states across the country.

I suspect you’re seeing an uptick in pro se litigants as well, and so that introduces a whole new factor, in that you’ve got people who don’t know the rules at all. Would it be fair to say that

one of the goals here was to make the rules somewhat more flexible? The Federal Judicial Center did a study several years ago and found that many cases have very little discovery. Is it fair to look on these rules as being equally useful in the case with limited discovery as they are in the most complex case?

Koeltl: From my perspective the answer to that is yes. The amendments should be viewed holistically. They’re meant to encourage the lawyers to cooperate at their initial conference. They’re geared to allow early delivery of requests for documents and other kinds of information so they can be discussed early. They’re geared to encourage the judge to meet with the lawyers early on at the initial conference. If all of those things happen, each case can be structured in the way that is most reasonable for that case.

Judge Koeltl, you took on the scope of discovery, which was an old topic and had been extremely controversial in my time on the Committee but here seemed less controversial. Among other changes, you eliminated from the scope language the sentence that stated ‘relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.’ You put this language back into the rule in a different place. Why this change?

Koeltl: We were persuaded by the history of that language that it was never intended to define the scope of discovery. That sentence goes back in some form to 1946. It was put in as an answer to an objection that you couldn’t get discovery if it wasn’t admissible in evidence. So, you couldn’t ask at a deposition a question if the answer was hearsay, because that wouldn’t be admissible at trial. Going back to 1946, the drafters said, no, that’s not a fair objection to discovery. But that salutary purpose

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— Chilton Varner

morphed over the years to be misused as the definition of the scope of discovery. So if you could make an argument that the discovery was reasonably calculated to lead to the discovery of admissible evidence, lawyers and judges said, well, then it's discoverable now. But the language was never intended to be a statement of the scope of discovery.

In 2000, the rule was amended to say 'relevant' information need not be admissible to be discoverable, and the drafters thought that would make it clear to people that it was not intended to be a definition of the scope of discovery. But we were told, and the research that was done for us indicated, that the sentence was still being used as a means to define the scope of discovery. If you could make an argument that the discovery you were looking for could lead to the discovery of admissible evidence, then that was within the scope of discovery. That was wrong. That was never the intent of that sentence. So we reformulated it to go back

to its true meaning, and the final sentence of the amended rule will now say: 'Information within the scope of discovery need not be admissible in evidence to be discoverable.' So it's clear that the lack of admissibility is not a fair objection. On the other hand, that doesn't define the permissible scope of discovery.

Many lawyers thought this was the definition of scope. Has there been any pushback from the bar on that change?

Varner: There has been some consternation and concern amongst the bar. This particular sentence that was eliminated from the rule on scope of discovery may be a red flag that is symptomatic of other concerns that have been voiced about the package of amendments. I bet that anyone in this conversation could repeat by memory the language in the current rule, which will be moved elsewhere when the amendments become effective. Certainly that sentence has been quoted in every brief that has sought additional discovery, for as long as any of us can remember. It was a mantra that was part of the introduction to any discovery motion seeking additional discovery.

I think, however, the debate has provided more heat than light. The concern about this particular language is part of a larger concern that this package of amendments may turn off the discovery spigot. That is not what this package of amendments is intended to do. In particular, I think the relocation of the language, as well as the proportionality discussion in the new rules, just says we need to take a careful look at whether the initial discovery opens the spigot full blast or whether there may be something less that could still produce a sensible and just result. In some cases, I think there may be circumstances that say the full spigot is deserved; but that certainly is not true of all cases – by any means.

The amendments are valuable because they make us sit down at the start of the case and make some reasoned decisions as to

where we start with discovery. In a number of cases that won't be where that discovery ends; the scope of discovery will be amended and modified as the case progresses and the parties and the court learn more. But I believe that the amendments will prove useful for both sides, and I personally support the relocation of the language we have been talking about.

Let's go to proportionality. Judge Pullan, you are one of the leading figures in what I'll call the 'proportionality movement,' certainly in Utah where I think what you did is in part the model for the federal rules. What is it that you were trying to do with proportionality, and what do you see as the benefits and difficulties of that approach?

Pullan: A lot of John's discussion about proportionality and what drove the changes happened in the state of Utah. The real problem is that with the amount of retained data growing exponentially, we can no longer work in a system that permits discovery of everything in every case. In 2008, the average end user may have owned about 100 GB of information. In 2012 that number was closer to 1,000 GB. That's just one average end user. Obviously corporations retain vast amounts beyond that. What that led to was an environment where civil discovery was costing far too much and taking way too long.

If you stopped a person on the street and said, "How would you describe the civil justice system?"; I doubt they would say, "It's just, speedy, and inexpensive." What we were finding, as John said, is that cases with merit were not filed because they didn't meet a rational cost-benefit analysis, and specious cases would settle to avoid the threat of a discovery bill. There was a general sense in the bar that we needed to do something to make our discovery efforts proportional to what was at stake in the litigation. It was a necessary change to restore balance and to achieve the objectives of Rule 1.

Judge Campbell, proportionality first appeared in the rules some 30 years ago and was supposed to respond to some of the litigation excesses of the 1970s. Over the years, through the amendment process, the Committee has tried to highlight proportionality to draw judges' attention to it. Why does the Committee think it will have better success this time?

Campbell: Well, you're right that the concept of proportionality has been in the rules since 1983. The current version of Rule 26(b)(2)(C)(iii) specifies when a court can limit discovery. It includes various proportionality factors that will be relocated under the new amendments. In addition, the current version of Rule 26(g)(1)(B)(iii) addresses a lawyer's obligation when issuing or responding to discovery requests, and it too includes proportionality factors. But these proportionality factors seem to have been overlooked by most litigants and many judges. So we are moving the factors that are now in Rule 26(b)(2)(C)(iii) right into the scope of discovery in Rule 26(b)(1). The language which sets the scope of discovery will now require both that requested information be relevant to the claims and defenses and that it be proportional to the needs of the case considering these various identified factors. We think this will locate proportionality factors in a place where they cannot be missed, by judges or lawyers, because they will be right in the definition of what is discoverable in civil litigation.

Along with that we're making some other changes, such as taking out the reference to information reasonably calculated to lead to the discovery of admissible evidence. So there will really be just one sentence in the Federal Rules of Civil Procedure that establishes the scope of discovery, and that sentence will now include both relevancy and proportionality.

Is there any concern, Judge Koeltl, that, with so much emphasis on proportionality, the cases that formerly went through the system

without much muss or fuss will now get dragged into a debate over proportionality that maybe would not have occurred before?

Koeltl: I don't think that will happen. In the cases where there has not been a problem of overuse of discovery or problems of cost and delay, there would be no reason to have a dispute over proportionality. Surveys indicated that the mean number of depositions in closed cases was around three for the defendants and the plaintiffs. You'll have a lot of cases where the issue simply won't come up. Where the issues do come up, there are holistic ways of dealing with it, with reasonable lawyers in conferences with judges at the initial Rule 16 conferences.

I'm optimistic that the rules will not cause disputes where there shouldn't be disputes. Where there are problems of overuse or misuse of discovery, then there will be ways of dealing with it. For those who haven't had the problems before, they shouldn't have the problems in the future. For those many people who have experienced discovery problems in the past, they should find the rules as a salutary way of dealing with those problems.

Judge Pullan, I'd be interested in your views. I'm certain you were quite focused on this question in Utah.

Pullan: The same concern was raised in the Utah bar about whether we would have satellite litigation over the proportionality standard. We've been operating under a proportionality framework since November 2011, and we have not seen that happen.

That's important information to have, and very helpful. Now let's talk about the proportionality factors. They were reordered; one was added. Ms. Varner, how does it strike you now? Are the first factors the most important?

Varner: My personal reaction when I looked at the reordering was that I thought it was appropriate to move to the end that language

about whether the burden or expense of the proposed discovery outweighs its likely benefit, because that's probably in shorthand the best description of proportionality's goal. But I think the first five factors appearing before that language at least give the court and the parties some issues to talk about. They raise some questions that should be addressed, and they will probably help provide a roadmap for how to reach the burden-benefit determination that's described in that sixth factor. So I approve of the relocation.

I think the proposed rule represents a clarification, rather than a sweeping sea change. The fact that the proportionality factors bear significant resemblance to what was already in the rule beforehand is useful in dealing with some of the pushback about these amendments representing major changes that favor one side or the other. I look at these factors as our best effort to come up with a system whereby we try to reduce cost and encourage efficiency. I don't think any one of the factors is more important than any other. Certainly not all cases will call for application of all the factors. But this sets out a reasoned way for going about trying to determine what is proportional, particularly at the outset of the case when you may not have all the information and the claims may not yet be clearly defined.

Judge Campbell, was it envisioned that judges would go through each one of the factors in every case? Or can they consider that this is helpful guidance — that one factor might be dispositive and they wouldn't necessarily discuss the others?

Campbell: It is not expected that judges would need to go through each factor in making decisions, or that the parties will need to do so in making arguments. This is very much intended to be, at least from my perspective, in the form of helpful guidance. There may be cases where some of the factors are simply not relevant. I think most of the factors will be relevant most of the time, and parties will have to think about them, but we ▶

are not suggesting that all factors will need to be considered in every case, nor are we suggesting that they appear in some order of priority such that the first is more important than the fourth. This is really intended to inform the discussion that we hope will occur between parties and judges when scope of discovery needs to be decided.

The Committee added a new factor, and I gather this was your creation, Judge Pullan, and that is the parties' relative access to relevant information. Could you talk about that?

Pullan: One concern that was raised in Utah is that there are certain case types where one side has access to most if not all of the information related to the case. I think a good example of that is a case involving wrongful termination of an employee. Product liability cases also can be that way. On the state level, certainly divorce actions can sometimes be like that. That "relative access to information" provision was intended to address this problem. Utah had adopted a framework in which discovery requests were limited based on the amount in controversy. The Rules Committee felt that those limits would work an injustice where a party lacked access to relevant information about the case.

So that would be applied by a court to perhaps liberalize discovery for the requestor, in consideration of the fact that one party is not in a position to consult its own files because all the information is with the other side?

Campbell: That's right. We heard from a lot of plaintiff and employment litigation lawyers expressing just that view. They were concerned that if all the discovery is flowing in one direction, then the defense will argue that that fact alone shows the discovery is disproportionate. This provision is intended to rebuff that notion. In some cases, one side possesses most of the relevant information and necessarily will do most of the responding to discovery. That fact does not make the discovery disproportionate.

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— Derek Pullan

How about the parties' resources?

That was there already, and it was a somewhat controversial position. How does the Committee think that will work?

Koeltl: You can conceive of situations where the burden of the discovery will be unusually severe because the person, whether individually or corporate, lacks resources, and where the discovery ends up being unusually burdensome. You can think about financial resources, you can think about technological resources where there are demands for information that will require technological resources that a party may not have.

The public entities told us that they were concerned about their own resources, because even though it's often thought that

public entities have unlimited resources, in fact they have limited resources, and the number of requests for information that they get can be quite extensive. So you have to take into account what their resources really are to be able to respond to a request.

Could it cut the other way, too? If you have very considerable resources and you're asking for a lot of discovery, the judge might say, 'You have the resources to get this information in another way.' Or, we should talk about cost shifting or cost sharing?

Koeltl: Well, there's always the possibility of cost shifting to the extent that the information that's being sought is not really critical or key information, so that the assumption that the party producing the information will pay for it may not apply.

A judge could well say, 'Look, if the requestor is really interested in that information – I don't think that information is really critical to the case – but if you really want it and you have the resources you can pay to get that information.' On the other side, a party who has limited resources can say, 'I don't have the resources to get all that information. Do you want to come and inspect my files?' – rather than produce. You can do that.

Judge Campbell, do you want to address cost shifting? This is the first time the rules explicitly discuss cost shifting, even though the concept has been there for some time.

Campbell: I think I can state with absolute confidence that the Committee does not view the amendment to Rule 26(c)(1)(B), which will make the possibility of cost allocation explicit in the rule, as working any sort of significant change in how discovery is to proceed in civil cases.

The Supreme Court held in 1978 that courts could use Rule 26(c) to shift discovery costs where appropriate. The amendment merely makes that authority explicit, and the Committee note makes clear that this is

not intended to signal some sort of change to a requestor-pays approach to discovery. It's merely to bring the rule into conformity with what the Supreme Court has said for a long time. In virtually all cases, if discovery is relevant and proportional to the needs of the case, the party producing the information will pay for the cost of production. The Committee note says exactly that. In order to invoke this cost-shifting language, or any of the other protections that exist in Rule 26(c)(1), a party must satisfy the Rule 26(c)(1) requirement of showing good cause. Cost shifting is now and should be in the future a rare occurrence.

I'd like to go back to proportionality. At the beginning of a case the parties may be uncertain about what the discovery is or what the dispositive issues are going to be. Are there any burden of proof defaults that will give guidance to the court when the information is unclear or when a judge says, "Gee, there's just not all that much here." Does one side still have the burden of proof as before? Or do these proportionality rules change that? Judge Pullan, your thoughts?

Pullan: Utah adopted a model in which the requesting party always has the burden of demonstrating proportionality. When I testified before the federal rules Committee in Arizona, I was asked about that decision. The proposed federal rule did not go that far. But, in practical effect, I think the outcome ultimately is the same: The requirement that the requesting party show proportionality really is a statement about which party goes first when the issue of proportionality arises. Certainly if a requesting party can't show that the discovery has a likely benefit, can't show that it's reasonable or important, or if there are other sources that are less expensive, then that request is not likely to meet the proportionality standard. The responding party is going to be in a better position to talk about burden and expense, other sources of information, perhaps relative access. But in the end a judge has to decide, "Does this request meet the

proportionality standard under the rule?" So I think the burden of proof question – Utah placed it squarely on the shoulders of the requesting party – is really just a reminder: Ultimately, parties need to show that what they are asking for is proportional to what is at stake in the litigation.

How did the Rules Committee handle this question of burden?

Campbell: We addressed it specifically in the Committee note. I'll just read one sentence of that note: "Restoring the proportionality calculation to Rule 26(b)(1) does not change the existing responsibilities of the court and the parties to consider proportionality, and the change does not place on the party seeking discovery the burden of addressing all proportionality considerations." The note goes on to say that it's a collective discussion that needs to occur as to whether or not discovery is proportional, and that various parties will have information probative of the various factors that go into that decision.

Koeltl: What you said is exactly right. The advisory Committee note makes it clear that if there is a dispute with respect to proportionality and it comes before the court, the parties' responsibilities would be the same as they have been since 1983. So it was explicit that the changes in the rule were not intended to change the burdens in the discovery dispute. Normally the party seeking the discovery would have to make the showing of why the information is relevant, and if a party objects to the discovery on the grounds that it's overly burdensome, that party will have to show that it's overly burdensome. Then, ultimately it will be for the court to make the decision. But that isn't changed from where it's been since 1983.

I think that's very helpful. Ms. Varner, do you anticipate any confusion about this in the bar?

Varner: I think it's good to have had a lot of robust discussion about proportionality. It's good that many different views have

been aired. But I bet that once the package of amendments becomes effective, it won't take federal judges very long to become comfortable with the proportionality analysis. The factors have been there when previous disputes erupted. The factors have been considered by courts before. I think it's probably going to work out better than a lot of the critics have predicted.

Let's talk about some of the case-management techniques. When I was on the Committee, we thought Evidence Rule 502 might be the most important amendment that any of us had worked on, that it might really change litigation and make it much more efficient. But it doesn't seem to have had that effect.

Varner: I'm happy to speak from the point of view of the practitioner on that one. I think that Rule 502 offers immense potential advantages in efficiency and cost savings. But you're right, David, that the claw-back provisions initially met with a rather chilly reception. I've discussed this with people on the Rules Committee, and I think the main concern amongst lawyers was this: We appreciate that you're giving us a chance to claw back any inadvertently produced information, but we don't want that information to be seen by the adversary or potentially by the court in the first place. So all the manual, meticulous, expensive document-by-document reviews continued, even after the adoption of Rule 502.

Now having said that, I would say that I have seen a softening if not a breaking of the ice more recently, and certainly in the mass-tort area where I do a lot of my work, a Rule 502 provision is becoming more and more routine as part of the initial Rule 16 order. I think, however, a number of judges still remain wary, if not ignorant, of the rule. I think they worry about satellite litigation, so perhaps the rule has not been involved as often as hoped.

But I am seeing an increase in the use of the rule. I think the potential for Rule

502 remains great. As a practical matter, its application still remains limited.

Perhaps there's some hope there. Now, what about other management techniques? The rule is very favorable to active management – probably mostly in the more time-consuming cases but not exclusively. Some judges make themselves available for informal telephonic discovery conferences that can be held on shortened time. How does the bar view that kind of management and availability?

Varner: I think the bar agrees that this is a great case-management tool. I first encountered it maybe 20 years ago, when Judge Stanley Marcus, now on the 11th Circuit Court of Appeals, was a district court judge in the Southern District of Florida. He had a standing announcement to all who appeared before him that he was available Wednesday mornings at 8 o'clock by phone to discuss any discovery dispute before a motion would be filed. It worked like a charm. I talked to other practitioners, and I don't see a real difference between the plaintiffs' and the defendants' bar on this question. Both sides believe that it is the exception for a discovery dispute to be decided on "the law." I think such motions are more fact-sensitive, and a conference gives the judge an opportunity to try to figure out what he or she needs to know in order to make a good ruling on that dispute.

Are any of our judges here making themselves available for that kind of an informal telephone conference in advance of a motion?

Campbell: I do it in all of my cases. I have a two- or three-sentence description of the issue that my judicial assistant types up for me when she gets the call from the parties to set the conference call. I'll get on the phone with the parties – on the record – and the issue usually will be resolved in about 30 minutes. Nobody will have spent any time briefing the issue, I won't have to spend time reading briefs or

writing an order, and my prompt decision will allow the case to move forward on schedule. I think it's far and away the best approach to resolving a discovery dispute.

There's a small percentage of disputes that require briefing, and when they do I require the parties to file simultaneous memoranda within three or four days of the call, addressing the issues that have been identified in the call, and then I rule. It not only allows discovery issues to be resolved quickly and cases to stay on schedule, but also acquaints me with the case more fully. So when I get to the summary judgment stage or when I get to the trial, I'm generally better informed about the issues in the case and the parties and even how the lawyers have behaved – all of which makes me a better trial judge.

Koeltl: We have a local rule in the Southern District of New York that before bringing a discovery motion, not only do you have to have a meet-and-confer, as required under the federal rules, but you have to ask for a pre-motion conference before the judge. We don't get discovery motions without the lawyers having asked for a pre-motion conference. Some of the lawyers give us letters; some don't. I do those conferences, and I'm available during depositions for telephone calls.

The pre-motion conference has reduced the number of discovery motions that we have in the district to a very, very small number. I can usually dispose of the dispute either in court, at the conference, or over the phone. And that's it. I have a Rule 16 conference in almost every case – usually personally, sometimes by telephone – and I issue the scheduling order. Sometimes the parties ask, "Judge, if we have discovery disputes, should we take them to the magistrate judge?" And I say no. I really prefer that you bring them to me because I like to see who's being reasonable and who's not being reasonable. As a result of that, often people find they can act reasonably without having to bring the dispute to me. So it's an enormous benefit to require the pre-motion conference.

Pullan: We don't have a pre-motion

conference requirement. But in connection with Utah's proportionality rule change we adopted a requirement that any discovery disputes be presented in the form of a "statement of discovery issues." This requirement is now in Utah Rule 37. Whenever there's a dispute regarding discovery, one side files a four-page memo. Seven days later the other side files a four-page objection. Most judges decide these disputes by telephone, and parties get an answer within generally 10 days to two weeks.

This expedited process was intended to address the problem of discovery grinding to a halt every time someone filed a motion to compel. Under the previous rules, by the time you got the issue fully briefed and argued two months had passed. The new Rule 37 process has been the death knell of the motion to compel in Utah. I don't see them anymore, and I think most Utah judges would agree with that. We are resolving discovery disputes four months earlier in the process of litigation than we were just three years ago. That has been confirmed empirically in a study done by the National Center for State Courts, called *Civil Justice Initiative, Utah: Impact of Revisions to Rule 26 on Discovery Practice in the Utah District Court*.

I agree with John: The mere fact that a judge is readily available by telephone to resolve discovery disputes means that attorneys and parties are no longer posturing on these questions and taking unreasonable positions.

May I congratulate John Rabiej, our Judicial Center director here at Duke, for his work with judges and lawyers after the Duke Conference. He convened a group to start working on guidelines and best practices, and one of the practices they suggest is that where there's any doubt about the discovery or it's unclear how far it should go, the party should focus on the information that is most promising. Begin there, and if they need more after that, they'll have a better idea of

what they need and the court will be better informed. How does that strike you as a best practice, Judge Pullan?

Pullan: I think there's real wisdom in that process. It's essentially the idea that we ought to capture low-hanging fruit first, at less cost. The fear that low-hanging fruit may be all I get should not be a concern because subsequent requests will be more narrowly tailored and more likely to comply with the proportionality framework. The fear that there will always be a second and third round of discovery is similarly unfounded because subsequent requests cannot be cumulative or unduly burdensome. So both sides will continue to benefit from the proportionality framework but also garner the cost-savings of focusing on that low-hanging fruit first.

Campbell: I agree with what Derek has said. I also want to emphasize that focusing everyone on the low-hanging fruit first will work only if the parties are assured that they can get the higher fruit later if it is necessary for the case.

Koeltl: I agree also. I just want to add an endorsement for the discovery protocols for employment discrimination cases, which were developed over the course of a year with input from both plaintiffs' and defendants' lawyers. They provide for core discovery at the beginning of the case. They were negotiated by very experienced lawyers for plaintiffs and defendants to arrive at a group of discovery requests at the beginning of the litigation so that parties on both sides will produce – within 30 days of the time that the defendant has made an answer or motion to dismiss – the core discovery that reasonable lawyers know they will have to produce in any event. The result is that the parties have the most important discovery early in the case, and they can analyze it and determine whether this is a case that should be settled early and what additional discovery they need. If it's a case that they decide should go to trial, then they can focus subsequent discovery.

Ms. Varner, Rule 37(e) is very complicated. We won't try to do it justice today. One question: The rule tries to provide a safer safe harbor where electronically stored information is lost not due to any malicious intent. Does the rule help in any way at the beginning of the case when you have to advise the client on the nature of the litigation hold for electronic information?

Varner: I think the amendment does clarify the situation. There was a circuit court split on this question as well, so I think the work of the Committee is valuable in offering clearer guidance. Only time will tell whether the "intent to deprive the adversary" is the right prescription, but I support that as an improvement over the prior rule.

I think in advising clients, there will be a real value to the whole proportionality piece. You can advise clients that it would be appropriate for them, when trying to determine what materials ought to be maintained and preserved, to go through a proportionality diagnosis to try to measure the uniqueness and the importance of the information against the burden and expense of retaining it. For a corporation in today's environment, as Judge Pullan noted earlier, the amount of information generated on a daily basis is staggering. The expense of retaining everything once there is a threat of litigation or litigation in fact, is even more chilling. So this is a material, practical problem for litigants, whether it be the U.S. government or a large corporation. You have to make those decisions early on. I applaud the clarification. We'll now have to go to work to see what effect it has.

Judge Campbell, the Committee is saying goodbye to the forms. Many are venerable, but many have not been kept up to date for a long time and are anachronisms. I think the Committee felt it was just too big a job to try to keep the forms up to date and to take the forms that were out of date and

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– John Koeltl

rewrite them entirely. But we're in an era where we have a lot of pro se litigants. Will there be other ways in which pro se litigants can get access to forms and boilerplates that will be helpful to them as they try to litigate in federal court?

Campbell: Yes. The Administrative Office of the United States Courts has an existing set of forms that are available online and available through links on most of the district court websites. That set of forms is actually going to be expanded at the request of the Rules Committee, and some excellent judges have been added to the group to develop those forms, including Judge Koeltl. There are also many local court websites that have forms, particularly for those cases that often have pro se litigants, and there are lots of commercially available forms that are generally accessible without cost in local libraries or on the Internet.

But the reality is that the forms that now are attached to the civil rules haven't been used by pro se litigants. In 12 years on the bench I have never seen anybody use any of the forms attached to the civil rules other than those required for waiver of service of process. Before we decided to abolish the forms, we talked to not only lawyers and law firms, but also public interest litigation firms, legal aid offices – and we could not find anybody that used the forms. They are simply outdated, as you note, David. We don't think that this change will inhibit any litigant moving forward in federal court.

Judge Koeltl, are there benefits to taking the forms out of the enabling-act process and maybe permitting a more nimble process for generating forms and keeping them up to date?

Koeltl: Sure. The forms that are attached to the federal rules now have to go through the Rules Enabling Act process, which generally takes about, well, five years is how long it took these amendments to get through. So it would be a long and complicated process to amend the forms that are attached to the rules. The Administrative Office has the ability to publish new forms quickly, and the forms we are thinking about include forms that are actually much more used by pro se litigants than the forms attached to the federal rules now. For example, there are no model forms for employment discrimination cases, civil rights cases under Section 1983, or under the *Bivens* decision. So the forms that would be most helpful to pro se litigants are simply not there. We hope that the Administrative Office will now be publishing those kinds of forms.

There are some people, mainly academics, who were opposed to the removal of the forms, I think on the hope that the Committee would use the process to revise or overrule the Supreme Court's decisions in *Iqbal* and *Twombly*. If the Committee were interested in amending the rules

having to do with what it takes to state a claim and certain kinds of claims, I take it the Committee can still do that if it thought that was wise or appropriate?

Campbell: I agree with that. Anybody familiar with the process we went through in deciding to eliminate the forms knows that it was never the intent of the Committee to have the elimination of the forms somehow signal a change in pleading standards or an acquiescence in *Iqbal* and *Twombly*. It just didn't have anything to do with the Rule 8 and Rule 9 pleading requirements. In fact, the Committee note to the Rule 84 abrogation will say the abrogation of forms is not intended to signal any change in pleading practice or pleading requirements.

One last question: Here we are, you've done this marvelous, big piece of work. What's left to be done? If you could drive a further reform, what would it be? Or have we achieved perfection?

Campbell: I don't think any of us assumes we achieved perfection. As Chilton suggested a minute ago, this is a work in process. These amendments will need to be adjusted as we learn more from their application. One of the things the Civil Rules Committee and the Standing Committee chaired by Judge Jeffrey Sutton are now looking into is the creation of pilot projects that will test other innovations designed to make litigation more efficient. That will include projects looking at local district programs that enhance disclosures required under Rule 26 up front, that would set shorter schedules for getting cases to trial, and that would consider channeling cases depending on their complexity into more complex or simpler procedures.

The thought is that if we can get district courts to experiment with changes we'll have more information with which to make a proposal, in addition to the very valuable experience that comes out of the states like Utah. The Committee is very

much interested in continuing to look for improvements.

Koeltl: The most important thing to me is the implementation of these rule amendments. They're certainly not the end of the process. Proportionality has been in the rules since 1983 but hasn't been followed. One of the purposes behind putting all of these rule amendments together was to let judges and lawyers know that something important has happened, and they really should attempt to understand what these changes are. So there's a process of judicial education and legal education for the bar to have people understand the way in which all of these amendments work and what they're intended to accomplish. The amendments will only be as good as the implementation. If I had my way, a lot of effort will be placed on education for judges and continuing legal education for the bar.

Pullan: In the same way that this movement toward proportionality requires a cultural change in the way members of the bar litigate civil cases, a cultural change within the judiciary is also afoot. We must persuade judges that early and active case management is an infinitely more efficient way to process their civil litigation calendars. Changing entrenched practices takes time and consistent effort. But I see that happening in Utah. Pilot projects focused on case management can provide persuasive evidence for reluctant state jurists.

Varner: I think the Committee has bitten off about as much as we can chew for now. I agree that the implementation process is going to be critical and deserves the support and engagement of the bar. The Committee has done terrific work on a complex project. I say congratulations, and we'll look forward to the culture shift that Judge Pullan talks about.