COMMENT
TO
THE CIVIL RULES ADVISORY COMMITTEE
ON

THE CURRENT DUKE SUBCOMMITTEE SKETCHES

LAWYERS FOR CIVIL JUSTICE

October 31, 2012

We applaud the Duke Subcommittee for dedicating serious effort to solving many of the chronic problems presented by the lack of clarity and guidance in the Civil Rules. The recent revisions to the sketches reflect progress in the direction of significant improvements to the Rules, perhaps motivated by the discussion at the Dallas Mini-conference that exposed many of the Subcommittee's previous proposals as tinkering around the edges at a time when serious and meaningful revision is necessary. We respectfully submit these comments in order to assist in furthering that progress as there is still more work to be done.

I. LCJ's Concerns Regarding Addition of "Cooperation" to Rule 1

Our civil justice system is plagued by a fundamental problem that is directly traceable to the intersection of (a) the 20th Century philosophy of full pretrial disclosure and (b) the 21st Century reality that even ordinary litigation files can comprise millions of pages (and almost always come sprinkled randomly with privileged documents). "Full disclosure" – once an easier task and a laudable goal – has become extremely onerous and expensive.

Some think this unforeseen collision is manageable and propose that Rule 1 of the Federal Rules be amended to add a new affirmative requirement that the parties "cooperate" with each other. Because of significant opposition to adding the vague, subjective requirement of cooperation to Rule 1, the recent revision of the Duke Sketches recommends against adding the last sentence of the earlier proposal to the text of the Rule, but suggests making Rule 1 applicable to parties so that the "concept of cooperation could be spelled out in the Committee Note once it is clear that Rule 1 applies to lawyers and not simply the court."[1] Inserting such an open ended, potentially contentious concept into the Notes under the guise of explaining that the amendment applies Rule I to parties for the first time, is only slightly less objectionable than inserting "cooperation"

[1] Duke Sketches at 42. Two alternatives were originally proposed: "* * * [These rules] should be construed, ~~and~~ administered, and employed by the court and parties to secure the just, speedy, and inexpensive determination of every action and proceeding, ~~[and the parties should cooperate to achieve these ends].~~ [Strikethrough added]
or:
* * * [These rules] should be construed and administered by the court to achieve the just, speedy, and inexpensive determination of every action and proceeding. ~~The parties should cooperate to achieve these ends.~~" *Id.* at 44 [Strikethrough added]

into the text of the rule. We continue to oppose such an amendment and strongly support the alternative formulation: "* * * [These rules] should [must] be construed and administered by the court to achieve the just, speedy, and inexpensive determination of every action and proceeding." Indeed, we recommend changing back the "should" to "must" to recapture the original purpose of the Rule.

The courts construe and administer the Rules. The parties comply with them. Requiring the parties to "employ" the Rules confuses their role in the system and apparently exists now only as a vehicle to carry "language that encourages cooperation" in the Note. Duke Sketches at 42. Amending Rule 1 to apply it to parties to subject them to an affirmative and subjective requirement of "cooperation," as spelled out in the Note, is not proper rule making and would introduce a new, untested, and vague concept into our adversary system, fraught with unintended consequences. It is one more point on which parties can disagree and blame the other when it is to their advantage. It should be rejected outright.

Any departure from our adversary tradition, however well intentioned and however much seen to be needed at this moment in the history of our judicial system is an open-ended invitation to mischief. Instead of creating a rule that raises more questions than provides guidance, the goal of Rule 1 is better achieved by providing counsel and the court with clear, unambiguous, bright line rules that clearly set forth the parties responsibilities – those rules we have proposed throughout.

II. The Duke Subcommittee's "Changes in the Initial Stages of the Litigation Process"

Section I of the Duke Subcommittee proposals focuses on the early stages of discovery and case management, including 26(f) and conferences with the Court. These proposals are thoughtful and generally sound, but fail to address the underlying problem, which is the overbroad and burdensome discovery that occurs all too often under the rules, even in light of restrictions imposed by past amendments.

1. Timing

The current structure of discovery timing seldom causes significant delays in the progress of lawsuits. For this reason, the Subcommittee's proposals are unlikely to solve the fundamental problems caused by the unduly broad scope of discovery and perverse cost default assumptions. The real culprits are excessive discovery requests, including e-discovery which requires the preservation and possible production of untold terabytes of information, unreasonable preservation requirements, and the protracted discovery controversies thus engendered.

The new Sketches (at 4) carry forward the shortening of the time for service under Rule 4(m) and indicate that an actual, contemporaneous scheduling conference also won consensus support. The enactment of these proposals concerning time limits for service of a complaint, for issuance of a scheduling order, and for the scheduling of the Rule 26(f) and Rule 16 Conferences, and changing the Rule 26(d) moratorium would not result in a significant improvement in the orderly administration of justice.

2. Case Management and Judicial Conferences

For similar reasons, the Subcommittee's proposals related to case management and judicial conferences, while well intentioned, miss the mark. There can be no doubt that diligent lawyers, constructive parties, and an active and interested judge can make these conferences effective in managing litigation. It is equally true that incidents of good case management have not been effective in controlling the systemic problems of increasing costs and burdens of overly broad discovery. Judges already have the authority to tailor discovery for each and every case, while the Subcommittee's recommendation to allow an informal pre-motion conference adds little except additional complexity. Better case management cannot significantly alleviate the enormous costs, burdens and unintended consequences of unnecessary preservation and discovery. Self-enforcing rules (allowing exceptions for rare cases) are the best path to efficient discovery. The existence of such rules will in most cases eliminate the need for time-consuming judicial intervention, allowing judges to focus their efforts on the merits of cases.

III. The Duke Subcommittee's Proposals on "Other Discovery Issues"

Discussion at the Dallas Mini-conference confirmed the widely observed fact that civil litigators conduct more discovery than is necessary to try a case, settle it, or brief a motion for summary judgment. As acknowledged in the Subcommittee's revised sketches, "serious, even grave, problems persist" despite the history of amendments to the Rules of Civil Procedure, in particular the rules of discovery. Repeated attempts to reign in the problems of abuse, misuse, and, more recently, to address the changing realities of preservation of information and litigation cost allocation have not achieved the intended result of minimizing discovery abuse and misuse. It is time for fundamental change and, as was said in LCJ's October 30, 2012 Comment, Judge Campbell's recently drafted sketch of a significantly revised Rule 26(b)(1) is a very encouraging sign that real change is within reach, although further amendments should be considered.

1. Numerical Limits

The current Sketches carry forward the proposals to reduce to 15 the presumptive number of Rule 33 interrogatories and to adopt a presumptive limit of 25 for Rule 36 requests to admit. Although greater concern was expressed about the proposal to reduce the presumptive limits on depositions to 5 per side and to reduce the presumptive duration of a deposition to 4 hours those proposals also carried forward. Sketches at 24. Placing numerical limits on depositions, interrogatories, document requests, and requests to admit is a reasonable and appropriate step towards curbing discovery abuse. The presumptive limits proposed by the Duke Subcommittee are reasonable and we support them. Of course, such limits by themselves will not solve the problems of discovery abuse; it is essential that they be adopted together with amendments that address more fundamental issues including scope of discovery and existing perverse cost default rules.

2. Sanctions Torts Proposals

The new Sketches continue the requirements that Rule 34 objections be stated specifically and state whether anything is being withheld on the basis of an objection, but wisely withdrew the proposal to add "not evasive" to the certifications under Rule 26(g)(1). Sketches at 28. We strongly support the decision to withdraw "not evasive" as such language would likely serve to increase litigation over discovery practices.

LCJ opposes the Duke Subcommittee's proposed changes to Rules 34, and 37, which, allegedly, are intended to avoid delay in the production of documents and to modernize the way in which document requests are answered in light of actual production practices. Not only are these proposals insufficient to address the major problems of discovery, but they would also give rise to "sanctions torts" that could create more new problems.

The proposal to amend Rule 34(b)(2)(B) should also fall. Requiring that parties choosing to produce electronically stored information (rather than allowing inspection) state that production must be completed "no later than the date for inspection stated in the request" will only serve to encourage the sort of discovery motions that result in additional cost and delay that the Committee seeks to reduce. It is inevitable that disputes will arise regarding the reasonableness of the timeframe laid out by the requesting party, particularly in cases where individual litigants seek discovery from large corporate entities and (as discussed above) misunderstand the difficulty of their requests. Consequently, rather than discouraging the need for judicial intervention (which inevitably results in delay and added cost), the proposed amendment would encourage it.

Moreover, despite the express acknowledgement in the Advisory Committee's earlier notes that the amendments to Rule 34 were "not meant to create a routine right of access to a party's electronic information system," the language of the proposed amendment nonetheless implicitly relies on the premise that responding parties may avoid the timeline trap by simply choosing to allow inspection. This "choice" fails to address the difficulties of creating an inspection protocol for ESI that does not first require its production (thus rendering the choice a fiction) or require the acceptance of the incredible risk and considerable expense of allowing direct access to a responding party's information systems. In short, because "inspection" of ESI is not a practical or realistic alternative to its production, the proposed amendment would only serve to trap responding parties into unreasonable timelines or require expensive and time consuming satellite litigation to resolve disagreement surrounding production.

The proposed amendment to Rule 34(b)(2)(C) requiring specification of whether any responsive material is being withheld would create yet another discovery obligation that would only serve to add to the burden of discovery and would result in additional delays and inevitable disagreements regarding compliance.

3. Preservation in Rules 16(b)(3) and 26(f)

Preservation is a key driver of discovery costs and must be handled in a comprehensive manner as suggested in LCJ's October 30, 2012 Comment. The Subcommittee's observation that the

sketches making preservation a specific subject for the Rule 26(f) conference and the Rule 16(b) scheduling order are "innocuous" is generally correct. In LCJ's view, the question of whether to include preservation as a subject for conferences and scheduling orders should await determination by the Committee as to the much more significant matters of the nature of amendments governing preservation triggers, sanctions, and scope of all discovery.

4. Other Issues

Some other issues merit only a brief mention. The objective of the proposal to allow discovery before the parties' conference (Sketches at 13-18) may be laudable, but the result would be to add more complexity and opportunities for mischief to an already costly and burdensome process.

As to initial disclosures (at 36), we agree that Rule 26(a)(1)(A) be kept in place for now and that, because initial disclosures are not a fundamental source of excessive discovery, specific proposals to re-visit disclosure are premature.

We also agree that the proposals concerning Rules 33 and 36 (at 32-36) to defer responses to contention interrogatories and requests to admit until the close of discovery do not seem to warrant incorporation into the Federal Rules of Civil Procedure.

Conclusion

We applaud the Committee's reexamination of the Rules and agree that the Duke Subcommittee proposals contain some proposals of real merit. However, consideration of these items must not distract the Committee from its focus on rule amendments that address the heart of today's discovery problems. In the final analysis, the Committee cannot solve the problems civil litigation faces today without integrating into its current work the interrelated rule amendments governing discovery, preservation, and cost default assumptions that we have proposed. Real progress has already been made and we look forward to more to come.

Respectfully submitted,

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