RODGERS, POWERS & SCHWARTZ LLP

18 Tremont Street
Boston, MA 02108
Tel. (617) 742-7010
Fax (617) 742-7225

ATTORNEYS AT LAW

Jonathan J. Margolis
Email • jmargolis@theemploymentlawyers.com

November 4, 2013

Advisory Committee on Civil Rules
Committee on Practice and Procedure
Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
Washington, D.C. 20544

Re: Proposed Amendments to the Rules of Civil Procedure[1]

Members of the Committee,

Why are we here? Usually, when that question is asked it is rhetorical, and the person posing it proceeds to supply an answer. But I mean the question seriously: Why is the Committee considering a set of changes to the Rules of Civil Procedure that will frequently have substantial, even decisive effects on the outcome of cases in the federal courts? I realize that at this late date the proposals have achieved a certain internal logic and momentum, but given the significant substantive influence that they will have upon the civil justice system if adopted, I hope that—even now—members of the Committee will be willing to ask whether the restrictive amendments that are on the table can be justified by the needs of our civil justice system.

A long-standing principle of American law is that procedural rules should not decide substantive outcomes. Although the outcome-determinative test of *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945), proved insufficient to deal with

[1] I note that my firm submitted an earlier set of comments to the proposed changes, as they then were, on February 7, 2013.

the complexities uncovered by *Erie Ry. Co. v. Tompkins*, 304 U.S. 64 (1938), the precept that procedure should affect the form and shape of litigation, but not its result, remains a constant. *See*, e.g., *In re Zimmer Nexgen Knee Implant Prods. Liab. Litig.*, 890 F. Supp. 2d 896, 903 (N.D. Ill. 2012). The proposals now before the Committee would trench upon that principle.

The proposed amendments would not only affect how a substantial number of lawsuits will come out, but the results would favor one side much more than the other. Taken as a whole, the suggested amendments would give defendants an advantage over plaintiffs far more often than the other way around. That would be true across the range of civil lawsuits. Such a result should hardly be surprising: The largest part of the proposed changes would reduce the amount of discovery available to the parties; such limits tend to favor the side that has more information before suit is commenced, and so needs to learn less during the process. That side is generally the defendant, if only because plaintiffs bear the burden of proof.

This view is not just theoretical; it is based on more than four decades of practice that has covered a wide range of litigation. For the past fifteen years, my practice has been concentrated in representing plaintiffs, particularly employees, in civil rights matters. Before that, however, I spent decades in personal injury, consumer and business litigation, after starting my professional life as a tax lawyer. From that varied background, I can say with assurance that while the proposed changes will prove neutral in some cases, in all too many instances they will have significant, even decisive effects, and that those will benefit defendants substantially more often than plaintiffs.

Civil rights litigation involving employment discrimination is a field in which the information-imbalance tends to be especially rife, and as such is an apt laboratory for examining the proposed changes. Typically, the employer has all of the records that surround the wrongful action alleged by the plaintiff, and a predominance of other information about the plaintiff's employment, while the (usually now former-) employee may have trouble even obtaining her personnel record except by compulsion of law. That imbalance may help to explain why so many members of the employment bar have submitted comments on the present proposals. However, many other types of litigation also commonly

exhibit a disparity in knowledge between the parties—intellectual property, medical malpractice, antitrust, consumer protection, civil fraud, *qui tam* and much commercial litigation are examples. The problem of asymmetry extends across the range of civil cases.

The effect of a reduction in the opportunities for discovery should be viewed against a long-term trend in which civil litigation has come to be dominated by motions to dismiss and for summary judgment, to the point where trial by jury has become a rarity. Indeed, in the 12 months ending March 31, 2012, only 1.1 percent of the civil cases terminated went to trial, and only .77 percent were tried to juries.[2] The progression that has led to the near-extinction of civil trials will only be exacerbated if less discovery is permitted, which will be the inevitable result of further limiting the number of depositions and interrogatories, and introducing a limit on the number of requests for admissions. Inevitably, additional restrictions on the amount of information discovered will mean that meritorious claims are denied simply because plaintiffs were unable to obtain the information out there that was needed to prove their cases.

The proposed amendments are intended to make the civil justice system more efficient and economical. In concept, those aims are unexceptionable. All of us in the legal profession, and the public at large, have an interest in improving efficiency in the courts and in reducing unnecessary expense. But the courts are part of a civil justice system, the ultimate purpose of which is not efficiency or economy, but to deliver results that are, in the main at least, just. It is not trivial that in Rule 1 the word "just" precedes "speedy" and "inexpensive." Who of us would argue that the rule would be the same were it to call for interpretation to provide for "inexpensive, speedy and just" outcomes?

We can easily fall into the habit of classifying cases in generalities, as for instance in characterizing a matter as "a run-of-the-mine" personal injury,

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[2] Administrative Office of the United States Courts, Federal Judicial Caseload Statistics, March 31, 2012, Table C-4, available at http://www.uscourts.gov/ Viewer.aspx?doc= /uscourts/Statistics/FederalJudicialCaseload Statistics/2012/tables/C04Mar12.pdf; and *see*, Chin, Trial by Jury or Trial by Motion? Summary Judgment, Iqbal and Employment Discrimination, 57 N.Y.L. SCH. L. REV. 671, 672, n. 7 (2012); Young, Vanishing Trials, Vanishing Juries, Vanishing Constitution, SUFFOLK L. REV. Vol. XL, 67 (2007).

contract or employment discrimination case, *see,* e.g. *Fincher v. Depository Trust & Clearing Corp.*, 604 F.3d 712, 721 (2d Cir. N.Y. 2010). When we do that, however, we risk forgetting that, to the parties, theirs is the only case that matters, that the outcome often affects the rest of their lives (sometimes in overwhelming ways), and that they depend on the court not only to decide the controversy, but to deliver a result that is fair under the law. That—justice in every individual case, not efficiency or economy—should be the primary value that the civil justice system represents. Severe limits on the amount of discovery permitted will undermine the values on which the system rests.

The proposed amendments will not only tend to favor defendants, they will also encourage misuse of discovery. The process of discovery may be abused by excessive demands, but it is also misused by obstructionism; the proposals now before you are heavily weighted toward dealing with the former problem, giving much less consideration to the latter. While courts need tools to manage discovery and prevent abuse, I have seen no empirical evidence that stricter controls than are now in place would make litigation swifter or less costly, and there is no ground to suggest that they would lead to more just results. My own experience, and that of a substantial number of other lawyers with whom I have discussed these issues, suggests that reduced limits on numbers of depositions, interrogatories and requests for admissions would be likely to go beyond merely deterring excessiveness, to encourage and facilitate obstruction of legitimate inquiry. In that sense, the proposed amendments would actually reduce the efficiency of the system. Certainly, one effect of the new limitations would be much more frequent motion practice than is now the case. To take one example, I am not aware of many motions seeking permission to take more than 10 depositions, but if the proposed restrictions are implemented, countless cases will include motions seeking to enlarge the number to more than five.

Such significant changes as are now proposed should carry a heavy burden to justify the effect that they would have on litigants. However, I have seen little evidence of a need sufficient to impose the costs that the proposals would entail. In particular, there is no tide of litigation threatening to inundate the courts. Indeed, the number of cases pending in the District Courts as of

March 31, 2012 (267,784) is not substantially different from the number as of March 31, 2004 (264,487).[3]

Nor is there evidence of a general feeling among attorneys that the present system needs significant change. Indeed, evidence collected by the Federal Judicial Center suggests that those who practice before the courts, and have an even better vantage point than judges to view the ways in which the discovery process actually plays out, do not express strong motivation in favor of further substantial limitations.[4]

Turning to specific proposed changes:

Proportionality: The proposed re-writing of Rule 26(b)(1) would remove the classic definition of discoverable information—material that is reasonably calculated to lead to the discovery of admissible evidence—and replace it with an overriding proportionality standard. Although the revised rule would still provide that information need not be admissible to be discoverable, the text and order of the proposed language exalts proportionality over discoverability. In practice, this will mean that relevant evidence—and information likely to lead to relevant evidence—will not be discoverable as of right. That would be a blow to the goal of producing just results based on truth.

The proposed proportionality standard itself expresses worthy goals, but its application is likely to prove difficult and inconsistent. The first of the standards to be applied, "the needs of the case" is undefined and in practical terms indefinable. The needs of the case, like beauty, are in the eye of the beholder, and reasoned standards for determining them will be difficult or even impossible to develop.

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[3] U.S. District Courts—Civil Cases Commenced, Terminated and Pending During the 12 month Periods Ending March 31, 2011 and 2012, Table C; http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/Federal Judicial CaseloadStatistics/2012/tables/C00Mar12.pdf; U.S. District Courts—Civil Cases Commenced, Terminated and Pending During the 12 month Periods Ending March 31, 2011 and 2012, Table C, http://www.uscourts.gov/uscourts/Statistics/FederalJudicialCaseloadStatistics/2004/tables/C00Mar04.pdf.

[4] *See* Lee, Early Stages of Litigation Attorney Study, 10, 12, Tables 6 and 10, Federal Judicial Center (2012), , and Lee and Willging, , National Case-Based Civil Rules Survey, 28, Federal Judicial Center (2009).

While the amount in controversy seems to be a straightforward test, it will frequently prove to be anything but. For one thing, at the early stage of a case, when disputes over the scope of discovery are likely to arise, the amount of potential damages may be unknown to at least one of the parties, or even to all involved. In matters where equitable relief is significant—reinstatement, public accommodation, preventing future fraudulent conduct or infringement on patents or trademarks, as examples—the "amount in controversy" will be an unwieldy principle, indeed.

The balancing test proposed—whether the burden of discovery will outweigh the likely benefits—will also prove to be inapt in many cases in which it will be necessary to go through the discovery process in order to find out what is at stake. One of my partners is presently involved in a matter in which she has had to make repeated efforts to obtain information in a reduction-in-force, a case in which the defendant has shifted its position from asserting that only one employee besides the plaintiff was involved to admitting that almost five dozen potential comparators exist. At the beginning of the process, it might have appeared to a court that the discovery sought was out of all proportion to the likely benefit to the plaintiff's case, but it is now clear that that has not been so.

Cases in which the possibility of multiple or punitive damages exist present another area where the proposed proportionality concept will prove a poor guide. Defendants will never acknowledge that punitive damages may result from their conduct, while plaintiffs will cite matters such as *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993), in which the Supreme Court found that punitive damages 526 times the actual losses suffered did not violate the Due Process clause. Even apart from those extremes, however, the rules should recognize that punitive and multiple damages are meant to carry out vital public policies. Their availability should, at the very least, be factors that courts must—not may—take into account when determining the discovery to be permitted. To do otherwise would have the effect of rewarding those who do wrong knowingly and intentionally.

If the civil justice system is to deliver something that approaches justice, care must be exercised to make sure that limiting discovery based on the "amount in controversy" does not become a self-fulfilling prophecy, in which

constricting the amount of information available prevents the parties from learning enough for a full and fair evaluation of the case, whether at summary judgment or trial.

Courts should also be mandated to recognize that factors not subject to easy quantification must nonetheless be taken into account before discovery may be limited on account of the amount in controversy. Pain and suffering in tort cases and emotional distress damages in employment matters are just two instances in which no one but the jury can really state what the amount in controversy is. They also present frequent examples of situations in which damages may increase substantially during the course of the litigation: exacerbation of injuries, psychological sequelae, or a continuing inability to obtain new employment are just some of the facts that may change during the course of the case, and may justify substantially higher awards than might first have appeared to be the case.

Deposition Limits: While I can foresee instances in which shortening the presumptive length of depositions from seven to six hours might materially limit the amount of discovery, I suspect that that will be rare and remediable (and as a practical matter, I wonder if lawyers will really pull witnesses out of depositions after six hours).

Reducing the limit on the number of depositions is very different, however. It is the most questionable of all the proposed changes to the Rules.

It is no answer to say that the proposed limits are only presumptive; in some as yet undefined number of instances, the presumptive limit will prove actual. And the number of such cases is only likely to increase as time passes. If the proposed rule is adopted, in the not-distant future a plaintiff will find herself limited to five depositions, which will be followed by imposition of summary judgment. When the case is appealed, the court of appeals will rule that the limitations were within the district court's discretion. After a few such decisions—which will be virtually inevitable—most defense attorneys will adopt the practice of resisting any more than the minimum number of depositions. Indeed, counsel may come to fear that they are committing malpractice by failing to fight attempts to increase the number.

Such a substantial limitation on parties' opportunities to make their cases might be justified if there were a significant amount of evidence that depositions are often so numerous as to be abusive. I have not heard such complaints from my colleagues in the management-side bar, or seen or heard of motions or orders responding to parties' seeking to take too many depositions. Indeed, the evidence collected by the Committee on Practice and Procedure suggests strongly that that is not the case. Speaking of discovery generally, in reporting the results of the conference at Duke University School of Law in May, 2010, the Advisory Committee concluded that:

> The most prominent themes developed at the Conference are frequently summarized in two words and a phrase: cooperation, proportionality, and "early, hands-on case management." Most participants felt that these goals can be pursued effectively within the basic framework of the Civil Rules as they stand. There was little call for drastic revision, and it was recognized that the rules can be made to work better by renewing efforts to educate lawyers and judges in the opportunities already available.

Report to the Standing Committee, December 5, 2012, 218.

The proposed changes in the number of depositions normally allowed (and the reduced limits on interrogatories, as well as the first-time limitations on requests for admissions discussed below) will, in practice, force a "drastic revision" in the handling of civil cases, one that will make it harder for plaintiffs and easier for defendants to prevail.

The Duke Subcommittee report to the Committee went on to suggest that "It also was recognized that many possible rules reforms should be guided by empirical work, both in the form done by the Federal Judicial Center and other investigators…" *Id.* As I have noted above, the results of such

investigations provide little support for the substantial further limitations on discovery now under discussion.[5]

While these studies show room for improvement in the handling of discovery, they provide no support at all for the substantial limitations now under consideration. As last year's report concluded, the best way to make the rules work better is through education of lawyers and judges about them as they now exist.

Limits on Interrogatories and Requests for Admissions: Interrogatories and requests for admissions are useful for limited, but nonetheless important purposes. In employment cases, for instance, it is far more efficient for a plaintiff to ask the defendant to identify those who made the decision to fire or demote the plaintiff in an interrogatory than to parse out perhaps thousands of documents or to ask multiple deposition witnesses. Based upon answers to interrogatories, a plaintiff can determine which supervisors and co-workers are most likely to provide relevant testimony at depositions, whether human-resources representatives and investigators of workplace complaints will need to be called, and the like. Interrogatories are also useful to plaintiffs in determining whether affirmative defenses are real or simply thrown in as boiler-plate. From a defendant's standpoint, interrogatories can be an efficient way to obtain identities of witnesses (particularly multiple medical providers and those who might testify about non-economic damages) and summaries of claimed damages.

Is there a real need to reduce the number of interrogatories presumptively allowed—particularly as that will generate motions to permit parties to serve more, thereby further burdening the District Courts? If motions to limit the number of interrogatories are frequently filed, I have not heard of them. Indeed, I know of no evidence suggesting that a problem presently exists. In most cases, the system works; there is, then, no need to impose substantial changes.

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[5] Lee, Early Stages of Litigation Attorney Study, 10, 12, Tables 6 and 10, Federal Judicial Center (2012), , and Lee and Willging, , National Case-Based Civil Rules Survey, 28, Federal Judicial Center (2009).

Requests for admissions can be effective in narrowing issues. If they can be followed up with interrogatories seeking facts to support any denials, they are less likely to be result in lawyers simply denying any proposition that they believe the other side may be unable to prove. While there are instances in which an excessive number of requests have been made, I know of no empirical evidence that such practices are so prevalent that they exert a significant burden on the civil justice system, or that they warrant allowing only the small number of requests proposed—a limit that will make requests for admissions essentially useless in almost all cases. The proposed limitations are a case of throwing the baby out with the bathwater, limiting all parties' access to discovery, because a few attorneys have gone too far.

Before closing, I suggest that rather than imposing substantial new limitations on discovery, a more productive course would be to encourage initiatives such as the Pilot Project for Initial Discovery Protocols in Employment Cases Alleging Adverse Action; they are an example of what the Duke Subcommittee referred to as the best way to improve the practical operation of the discovery process: cooperation, proportionality, and early, hands-on case management.[6] Joint efforts such as those that created the Protocols are proving to be effective in making the civil justice system more efficient, without tipping the scales of justice or producing the rancor and frequent resorts to judicial intervention that some of the proposed changes to the Civil Rules would engender.

Sincerely,

Jonathan J. Margolis
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[6] In the spirit of full disclosure, I should note that I was privileged to be a member of the committee that drafted the Protocols, under the leadership of Judge Koeltl.