THE COST OF RULES, THE RULE OF COSTS: A PRACTICAL PRACTITIONER'S PERSPECTIVE

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INTRODUCTION

From the perspective of courts, lawyers, and litigants in 1938, the new Federal Rules of Civil Procedure (Federal Rules) set out to advance the noble goal of "promot[ing] efficiency and lower[ing] litigation costs."[1] As Judge Marrero has noted, there were several means to this end:

(1) a "fuller factual record" would narrow "pretrial preparation to disputed material issues";

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1 Victor Marrero, *The Cost of Rules, the Rule of Costs*, 37 CARDOZO L. REV. 1599, 1602 (2016).

(2) transparency into each side's strengths and weaknesses would facilitate settlement; and

(3) the exchange of relevant materials would "curtail evidentiary disputes and expedite resolution of conflicts" by promoting cooperation among the litigants.[2] The result anticipated in 1938, then, was the elimination of "trial by ambush," and moving to a more fair and efficient resolution of disputes.[3]

Eighty years later, there can be no serious disagreement with Judge Marrero's statement that "the full promise of the Federal Rules as it relates to the efficiency and economy of justice is far from realized in federal courts."[4] As to the cause of this disappointment, Judge Marrero focuses primarily on the "responsibility for rising litigation excess produced by professional styles and actions of lawyers themselves."[5] Other commentators attribute the demise of the civil trial and the rise of inefficiency in federal court litigation to the significant changes in technology that the drafters of the Federal Rules in 1938 could not have anticipated.[6]

This Comment will not undertake the impossible task of balancing attribution between the various causes of the current inefficiencies of federal court litigation. Rather, from the perspective of a federal court litigator, the Comment offers, for consideration by greater minds with authority to effect change, modest reforms aimed at promoting efficiency and cooperation among the three constituencies in federal court litigation: the court, counsel, and the parties. These reforms are informed, in part, by the timely Fourth Annual Federal Judges Survey, which offers judicial perspectives on the state of e-discovery law and practice.[7]

This Comment first briefly describes the context in which the Federal Rules were enacted (Part I) in comparison to the current environment (Part II). The Comment then sets forth several proposals to reform litigation in federal court to achieve the efficiencies Judge Marrero has described (Part III). The Comment concludes with a sentiment of appreciation to Judge Marrero for his attention to these

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2 *Id.*

3 George A. Davidson, *Who Killed the Civil Trial?*, N.Y. L.J., Sept. 4, 2007; Marrero, *supra* note 1, at 1601.

4 Marrero, *supra* note 1, at 1602.

5 *Id.* at 1609; *id.* at 1605 ("parties increase the cost and burden of discovery in federal court through delay and avoidance tactics") (quoting EMERY G. LEE III & THOMAS E. WILLGING, FED. JUDICIAL CTR., FEDERAL JUDICIAL CENTER NATIONAL, CASE-BASED CIVIL RULES SURVEY: PRELIMINARY REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 2, 28 (2009)).

6 Davidson, *supra* note 3.

7 EXTERRO, BDO CONSULTING & E.D.R.M/DUKE LAW, 4TH ANNUAL FEDERAL JUDGES SURVEY: JUDICIAL PERSPECTIVES ON THE STATE OF E-DISCOVERY LAW AND PRACTICE (2018) [hereinafter JUDGES' SURVEY].

issues and optimism for reform.

I. THE WAY WE WERE: 1938

As crafted in 1938, "the Federal Rules provided for a system of full discovery pursuant to which each party to a lawsuit was entitled, through demands for depositions and document production, to find out in advance of trial the facts known to the opposing party."[8] As my partner, George Davidson, has noted, this framework "was quite workable in the technology of the day," which involved the rather "primitive" duplication of documents through carbon-copying or commercial printing.[9] As a result of these technological limitations, the "document discovery process in litigation was not particularly taxing."[10] Law firms themselves were smaller and paralegals had not yet been invented.[11] Large cases were the exception rather than the rule.[12]

II. THE WAY WE ARE: 2018

Today, "discovery of electronic information has changed fundamentally the dynamics of the litigation process."[13] Discovery costs have skyrocketed and law firm staffing—along with that of satellite e-discovery vendors and consultants—has expanded to meet the demands of e-discovery.[14] With the advent of the "Internet of Things" and an array of data-creating devices, the volume of information that may need to be preserved, collected, processed, and produced in litigation has only grown and will continue to grow.[15]

The universe of electronic information is both a blessing and a curse. It is a blessing because disputed questions can be answered and the facts cannot be hidden. It is a curse because of the burden involved in collecting and reviewing giga-, tera-, or even peta-bytes of data.[16] The answer may exist, but prove elusive if there is not a means to sort through one quadrillion bytes of data.

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8 Davidson, *supra* note 3.

9 *Id.*

10 *Id.*

11 *Id.*

12 *Id.*

13 *Id.*

14 *Id.*

15 *See, e.g.*, Antigone Peyton, *A Litigator's Guide to the Internet of Things*, 22 RICH. J.L. & TECH. 9, 25 (2016).

16 *See, e.g.*, Radian Asset Assurance, Inc. v. Coll. of the Christian Bros. of N.M., No. Civ. 09-0885, 2010 WL 4928866, at *4 (D.N.M. Oct. 22, 2010) (finding that searching through over six terabytes of data would impose an undue burden on defendant).

Machines have created these problems. Humans now must solve or, at least, mitigate them.

III. THE WAY FORWARD: POTENTIAL REFORMS

A. *Reform Objectives*

Realistically, the volume of electronic information will only increase, and litigators will only continue to be adversarial and motivated, at least in part, by financial considerations.[17] Accepting these circumstances as a given, then, two practical objectives should form the basis of any attempt at reform.

First, to facilitate the efficient litigation of large complex cases. It is important for the federal courts to get the large, high profile cases right. It will instill confidence in the judicial system and make more room for the smaller, less difficult cases.

Second, to promote settlement opportunities. Realistically, less than 5% of federal civil cases proceed to a jury trial,[18] meaning that the system would grind to a halt if a trial occurred in every case. The Federal Rules and judges' individual practices should therefore concentrate on procedures that are more likely to bring the parties to the table for productive settlement negotiations at the earliest point possible in the litigation.

Fortunately, some of the recent amendments to the Federal Rules have already proven effective at advancing these objectives. First, Rule 26(b)(1)'s emphasis on proportionality links the scope of discovery to the necessity and burden of discovery.[19] The practical effect of the amendment is to impose an outer limitation on what must be produced. Second, Rule 37(e), which imposes a uniform approach to lost electronically stored information (ESI), "offers a framework that can assist parties to prosecute or defend against spoliation of ESI and guide judges in the resolution of spoliation allegations."[20] Third, the addition of "parties" in Rule 1 "make[s] express the obligation of judges and lawyers to work cooperatively in controlling the expense and time demands of litigation . . . [and] highlights the point that lawyers—though representing adverse parties—have an affirmative duty to work together, and with the court, to achieve prompt and efficient resolutions of disputes."[21] Fourth, and finally, the cost-shifting mechanism in Rule

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17 Marrero, *supra* note 1, at 1645.

18 JUDGES SURVEY, *supra* note 7, at 22 (Hon. Michelle Childs, U.S.D.J., D.S.C.).

19 JUDGES SURVEY, *supra* note 7, at 27 (Hon. Ronald Hedges, U.S.M.J., D.N.J. (Ret.)).

20 *Id.*

21 *Id.* (quoting U.S. SUPREME COURT, 2015 YEAR-END REPORT ON THE FEDERAL JUDICIARY

37(a) is viewed as giving judges another tool to encourage cooperation.[22]

B. *Reform Proposals*

1. Eliminate, or Limit, Certain Discovery Devices

Judge Marrero makes the apt observation that "some practitioners conceive of litigation as if all or particular court proceedings that the rules permit are in fact essential—even obligatory—in every case."[23] The Federal Rules permit procedures that, eighty years ago, may have added to efficiency but, in the current age, principally provide more opportunities for adversaries to increase cost, add delay, and engage in mischief. These include interrogatories,[24] depositions by written questions,[25] and requests for admission.[26]

These three types of devices could be eliminated altogether and, in the future, be permitted only by leave of court on a showing of good cause and proportionality. At the risk of striking fear in the heart of many a federal court civil litigator, a similar approach could be taken as to depositions: allowing them only with court permission where it is necessary to preserve testimony from a witness who will be unavailable at trial. Finally, document requests could likewise be limited, to ten absent leave of court, down from the current limit of twenty-five.[27]

The purpose is to focus pre-trial procedures and resources on document discovery issues. The parties may concentrate their efforts on finding the best, or worst, document for their theory of the case, and facilitate settlement discussions. For that small minority of cases that will proceed to trial, this streamlining will have the added benefit of narrowing evidence to be presented to the fact-finder to two categories—documents and witnesses.

2. The Judge Who Will Try the Case is the Judge Who Oversees Discovery

Judge Marrero posits that "[j]udges can and should play a more vigorous role in case management."[28] In those districts where magistrate

(2015)).

22 *Id.* at 29 (Hon. Frank Maas, U.S.M.J., S.D.N.Y. (Ret.)).

23 Marrero, *supra* note 1, at 1646.

24 FED. R. CIV. P. 33.

25 FED. R. CIV. P. 31.

26 FED. R. CIV. P. 36.

27 FED. R. CIV. P. 33(a)(1).

28 Marrero, *supra* note 1, at 1642.

judges exclusively oversee discovery, circumstances are ripe for parties' ability to arbitrage judicial attention to discovery disputes. Magistrate judges may, understandably, be reluctant to limit discovery in cases where they will not be overseeing the trial. By having the presiding judge be involved from the commencement of the case, that judge will be able to develop familiarity with the parties, their legal theories, and the facts. The parties will benefit from continuity of rulings on key issues.[29] Having the trial judge involved throughout the litigation may also provide additional opportunities to facilitate resolution of discovery disputes, avoid unnecessary motion practice, and facilitate settlement negotiations between the parties.

3. Increase Education About E-Discovery

With minor exceptions, most federal judges and litigators would benefit from additional education concerning e-discovery issues. There are many organized publications and programs available for federal judges, such as the Federal Judicial Center's treatise entitled *Managing Discovery of Electronic Information*.[30] A recurring "special focus" program on the latest e-discovery issues and effective means of resolving e-discovery disputes would likely benefit district court and magistrate judges alike. The more judges know about e-discovery, the better they will be able to concentrate the parties' efforts and resolve disputes efficiently.

The need for greater e-discovery education of lawyers is equally prevalent. Despite the reality that many junior lawyers become involved in e-discovery from the earliest days of their practice, e-discovery is sparsely taught in law school and virtually absent from bar examinations.[31] District courts could consider adding regular e-discovery training as a continuing legal education (CLE) requirement for litigators to remain admitted in good standing.

More fundamentally, there are a variety of best practices that any federal litigator should employ to best represent their client in e-discovery matters. First and foremost, a litigator should have, from the beginning of the case, a detailed knowledge of the client's data management systems and the mechanisms required to preserve, store,

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29 JUDGES SURVEY, *supra* note 7, at 9 (Hon. Ronald Hedges, U.S.M.J., D.N.J. (Ret.)).

30 *Id. See also* RONALD J. HEDGES, BARBARA J. ROTHSTEIN & ELIZABETH C. WIGGINS, MANAGING DISCOVERY OF ELECTRONIC INFORMATION (3d ed. 2017), *available at* https://www.fjc.gov/sites/default/files/2017/Managing_Discovery_of_Electronic_Information_3d_ed.pdf [https://perma.cc/EK9Y-MUWH].

31 *Cf.* JUDGES SURVEY, *supra* note 7, at 10 (noting that 10% of judges felt that e-discovery knowledge should be covered in law school or on the bar exam).

retrieve, process, and review potentially relevant ESI.[32] Consultation with key personnel associated with the case and with the client's information technology systems is key to the litigator's ability to gain and regularly update this knowledge throughout the litigation.[33]

Second, the litigator should have a firm understanding of the interrelationship between the relevance and proportionality standards contemplated by the Federal Rules.[34] From the framework that the Federal Rules provide, and armed with detailed knowledge of his or her client's ESI, the litigator will be better able to advance well-articulated and defensible positions in e-discovery disputes.[35]

Third, the litigator should be aware of assisted review tools or sampling techniques (technology-assisted review, or TAR) that may provide an efficient alternative to expedite review of large volumes of ESI. Courts are increasingly willing to allow parties to employ these tools.[36] Litigators should be prepared to describe the mechanics of these tools, as well as provide the court with meaningful metrics to enable it to evaluate their utility and effectiveness.[37]

4. Require In-Person Meet-and-Confer Sessions for Discovery Disputes

In the immortal words of Supreme Court Justice Louis Brandeis, "[s]unlight is said to be the best of disinfectants."[38] These words ring equally true for lawyers in discovery disputes. Letter-writing and telephone conference calls permit litigators to put up a visible shield against candor, flexibility, and reasonableness.

One potential remedy is to require, where the first round of dispute resolution has failed, an in-person meet-and-confer. Retired United States Magistrate Judge David Waxse employed this practice with the added requirement that the session be videotaped.[39] Following the session, the parties were required either to advise him of their resolution

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32 *Id.* at 11 (Hon. Michelle Childs, U.S.D.J., D.S.C.).

33 *Id.*

34 *Id.*

35 *Id.*

36 *See* Winfield v. City of New York, No. 15-CV-05236 (LTS) (KHP), 2017 WL 5664852 (S.D.N.Y. Nov. 27, 2017) (approving use of TAR and ordering defendants to produce sample of documents deemed non-responsive through TAR); Rio Tinto PLC v. Vale S.A., No. 14 Civ. 3042 (RMB) (AJP), 2015 WL 4367250 (S.D.N.Y. July 15, 2015) (appointing special master to oversee parties' TAR); Moore v. Publicis Groupe & MSL Grp., 287 F.R.D. 182 (S.D.N.Y. 2012) (establishing protocol for parties' TAR and production of ESI).

37 JUDGES SURVEY, *supra* note 7, at 11 (Hon. Michelle Childs, U.S.D.J., D.S.C.).

38 Louis D. Brandeis, *What Publicity Can Do*, HARPER'S WKLY., Dec. 20, 1913, at 10.

39 JUDGES SURVEY, *supra* note 7, at 14 (Hon. David Waxse, U.S.M.J., D. Kan.).

of the disputed issue, or provide a copy of the videotape for his review.[40] He later commented that he never once had to watch such a video, demonstrating the utility of this approach in resolving disputes.[41]

5. Streamline Dispositive Motion Practice

In Judge Marrero's view, dispositive motions—motions to dismiss or for summary judgment—are among the most consequential determinants in increasing the length and cost of federal court litigation.[42] Motions to dismiss are filed in more than one-third of federal cases but, of those filed, less than a third lead to complete victories.[43] For post-discovery summary judgment motions, the success rate is also only about one-third.[44] From the judicial perspective, given that there is a far less-than-even chance of success and given the resources the parties must expend in preparing and the court must expend in deciding these motions, it might appear that limiting these motions would lead to more efficient litigation.

From the parties' perspective, however, there are reasons to pursue these motions even if the chance of success is less than 50%. Even a partial victory will eliminate unnecessary defendants and claims, and streamline discovery as a result.

With a reconciliation of these two firmly-held perspectives unlikely, the question becomes how courts can best encourage and decide dispositive motions that are more likely to facilitate resolution of the litigation. One common practice is the requirement of pre-motion letters, to which the opposing party has an opportunity to respond.[45] In the particular case of a motion to dismiss, this practice enables the court to take into account whether the plaintiff, informed about the defect in its pleading, takes advantage of the opportunity to amend and minimize the likelihood of non-final dismissal and serial amendments.[46] Judge Marrero, himself, employs this type of rule.[47] His rule cautions a plaintiff that, where the court issues preliminary guidance that the motion to dismiss is likely to be granted and the plaintiff elects to stand

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40 *Id.*

41 *Id.*

42 Marrero, *supra* note 1, at 1626 n.75, 1653.

43 *Id.* at 1633.

44 *Id.* at 1665 & n.129.

45 *See, e.g.*, Hon. P. Kevin Castel, *Individual Practices of Judge P. Kevin Castel*, S.D.N.Y. 2 (Feb. 27, 2017), http://www.nysd.uscourts.gov/cases/show.php?db=judge_info&id=1374 [https://perma.cc/9TDZ-XX8Y] (Rule 4.A).

46 *Id.*

47 *See* Hon. Victor Marrero, *Individual Practices of United States District Judge Victor Marrero*, S.D.N.Y. 2–3 (Mar. 25, 2016), http://www.nysd.uscourts.gov/cases/show.php?db=judge_info&id=1280 [http://perma.cc/Q4DT-Z9HZ] (Rule II.B.1).

on the original pleading without amendment, the court may consider those circumstances as grounds for sanctions against the plaintiff, including attorneys' fees and costs.[48] Other mechanisms for narrowing the scope of dispositive motions include limitations on the length of briefs and the number of exhibits submitted, absent a showing of good cause.

As a practical matter, dispositive motions continue to have an inherent value to the judicial system in reducing the number of cases and issues to be tried by the fact-finder. Through continued creative approaches by individual courts and judges, courts will undoubtedly continue to balance due process with efficient use of judicial resources.

CONCLUSION

Since its publication in 2016, courts and academics have recognized the importance of the issues that Judge Marrero raised in his Article.[49] That the Article engendered a panel discussion among the judges of the Southern District of New York is no less surprising. Judge Marrero's critiques will continue to provoke thought, discussion, and creativity to consider means, formal or informal, to reduce the cost of rules and promote more cost-effective litigation in federal court.

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48 *See id.* at 3 (Rule II.B.4).

49 *See, e.g.*, Cruz v. Zucker, No. 14-cv-4456 (JSR), 2017 WL 1093285, at *3 n.6 (S.D.N.Y. Mar. 10, 2017); Andrew S. Pollis, *Busting up the Pretrial Industry*, 85 FORDHAM L. REV. 2097, 2102 n.41, 2107 nn.81–82 (2017).