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## Introduction: Reflections on the Future of Discovery in Civil Cases

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## Symposium: The Future of Discovery

### Introduction: Reflections on the Future of Discovery in Civil Cases

*Honorable Paul W. Grimm\**

I would like to thank the *Law Review* for their generous invitation to participate in this symposium about the future of discovery in our civil justice system. Before starting, let me mention that the comments that I express here today are mine alone.

Let me begin with a few words about my perspective. I began my legal career as a prosecutor in the Army. When I got off of active duty, I became a local county prosecutor. In criminal law, we didn't have discovery problems. We had an "open file" policy, where we disclosed all the evidence we had, and we either worked out a plea or tried the case. There were lots of both. Then I became an assistant attorney general in Maryland, and I had civil as well as criminal cases. I had to learn the discovery rules, which seemed quite byzantine to me. I remember asking my boss if he had any advice for me before I took my first deposition, and he said, "Ask all the right questions, get all the right answers." Accurate, perhaps, but not very helpful. Then I went into private practice for thirteen years as a civil litigator, doing commercial litigation in state and federal court. I became a combatant in the discovery wars, which means there were far fewer trials and lots of

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discovery disputes. Lots of them. So many, in fact, that I was part of the group of lawyers that drafted discovery guidelines adopted in 1995 by our federal court, in an effort to curb the most egregious violations.

Beginning in 1997, I became a magistrate judge and then spent nearly sixteen years dealing with discovery disputes on a daily basis. This was right at the time when the whole electronic-information revolution was unfolding, and I was lucky to be right in the thick of things as we tried to figure out how to make the discovery rules work when we were dealing with terabytes of electronic data instead of banker's boxes of hard-copy documents. Now, after five years of being a district judge, I still handle all my discovery disputes, but I incorporate that activity into the broader function of actively managing my civil cases from initial status conference to final resolution. This is for a civil docket that averages around four hundred cases. Bridging my work as a magistrate judge and district judge was my six-year stint as a member of the Civil Rules Advisory Committee. There, as the chair of the Discovery Subcommittee, I participated in the five-year journey from the Duke Conference in May of 2010 to congressional approval on December 1, 2015 of what have come to be known as the "2015 Rule Changes." And just to prove that you can indeed be "forgotten but not gone," I continued to be involved after the end of my official tenure on the Rules Committee, first, by participating in the educational effort during 2015–16 to teach federal judges and members of the bar about the 2015 changes. I crisscrossed the country several times in the process. And second, beginning in 2016, I have helped out with the working group that has developed the two pilot projects that the Chief Justice mentioned in his 2015 year-end report on the judiciary,<sup>1</sup> which are being implemented even as I speak. So, you see, I have spent some time thinking about the past, present, and future of discovery in our civil justice system.

When Judge David Campbell, who is the current chair of the Standing Committee and was then the chair of the Civil Rules Committee, was writing his memorandum to Judge Jeff Sutton, who is here today and who was then the chair of the Standing Committee, he summarized the 2015 Rule Changes as being capable of description in two words—cooperation and proportionality—and one phrase—sustained, active, hands-on judicial case management.<sup>2</sup> Cooperation in

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1. JOHN G. ROBERTS, 2015 YEAR-END REPORT ON THE FEDERAL JUDICIARY 9–10 (2015), <http://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf> [<https://perma.cc/D6PH-GDD8>].

2. Memorandum from David G. Campbell, Chair, Advisory Comm. on Fed. Rules of Civil Procedure, to Jeffrey Sutton, Chair, Standing Comm. on Rules of Practice and Procedure, at B-2

the sense of the changes to Rule 1, which now requires the parties as well as the court to employ the rules to achieve the just, speedy, and inexpensive resolution of all civil cases. Proportionality because of the changes designed to fortify the proportionality requirement that had been part of Rule 26 for thirty years but never enforced as hoped or intended by the rulemakers. And sustained, active, hands-on judicial case management because of the changes to Rule 16, adding to the subjects that should be included in the pretrial conference and scheduling order and the encouragement of judges to informally resolve discovery disputes without the time and expense required for formal briefing. In addition, as you know, the committee took on the task of revising Rule 37(e) to deal with problems relating to the preservation of electronically stored information (“ESI”) and the circumstances where sanctions should be imposed for the failure to do so.

As the drafting, publication, and public hearing processes relating to the 2015 changes unfolded, I began to think that there was truly only a single unifying concept that captured the essence of everything the committee was really trying to do. It was embodied in the concept that discovery should be limited to that which was proportional to what was at issue in the case, as defined by the issues framed by the pleadings. And certainly, from the more than 2,300 written comments and testimony of 120 witnesses at the public hearings,<sup>3</sup> the proportionality requirement was the one that drew most of the attention—both positive and negative.

The image that I always have in my mind when I think about the proportionality requirement is taken from a wonderful *New Yorker* cartoon. I like it so much that I bought a framed copy of it, and it is in my office so that I am reminded every day about what we tried to achieve in the 2015 changes. The cartoon, displayed now for all of you to see, shows a lawyer sitting behind his desk, with a pile of documents scattered all over. He is looking at his client, sitting in a chair at the side of the desk. The client has a look of concern on his face. At the bottom of the cartoon, the lawyer is saying, “You have a pretty good case, Mr. Pitkin. How much justice can you afford?”<sup>4</sup> The dark humor and irony of this cartoon never fails to grab me. You see, the proportionality rule is designed to make it so that a just outcome is not

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to B-3 (June 14, 2014), <http://www.uscourts.gov/file/18218/download> [<https://perma.cc/7CQ7-LE7V>].

3. David G. Campbell, *Amendments to the Federal Rules of Practice and Procedure: Civil Rules 2015—Overview*, FED. JUD. CTR. (Dec. 1, 2015), <https://www.fjc.gov/content/309286/rules-amendments-2015-civil-overview> [<https://perma.cc/K5TW-TVXR>].

4. J.B. Handelsman, *NEW YORKER*, Dec. 24, 1973, at 52.

dependent on how much money you can afford to spend when you litigate.

With all this focus on proportionality, I started to ask myself some fairly fundamental questions. First of all, if it was so important to the whole discovery process, how could it be that after thirty years of requiring proportionality, the near-universal view of judges, lawyers, and academics was that the goal had not been achieved—not even close? It was as if the civil rules had been selling a product that no one—the judges, the lawyers, nor the litigants—was interested in buying. Heck, forget buying: it seemed like we couldn't give it away, which led me to ask myself questions about what we really meant by proportionality in the first place. After all, the concept as expressed in the rules was pretty abstract: a cost-benefit analysis considering the issues in the case, the amount in controversy (in cases seeking money damages), and the importance of the information.<sup>5</sup> All well and good, but in an individual case, just how is a judge supposed to go about actually achieving proportionality? What tools should be used?

As I thought about this, I began to consider an even more fundamental question: How do we know if it is even possible for judges to manage discovery in every case so that it is proportional? I wanted something more than anecdotal information—"anecdota," as Professor Rick Marcus calls it. No, I wanted concrete examples. So I began to think about how I could find out whether proportional discovery was achievable and, if so, how.

The starting place, I reasoned, was to search for cases deciding discovery disputes during the thirty-year lifespan of the proportionality rule to see what judges who recognized that the rule existed did to apply it in their cases. So, with the help of my wonderful career law clerk, Lisa Bergstrom, we developed a Westlaw search designed to capture every case that mentioned proportionality in connection with civil discovery, whether by referencing "proportionality" or by citation to the particular rule number where the proportionality requirement was found at that point in time. And after some test runs and adjustment to the search terms, we ran the search. It produced 193 cases, which I then read and indexed.<sup>6</sup> Now, while 193 may seem like a big number, when you consider that it spanned thirty years' worth of decisions, your perspective changes a bit. It averages out to only 6.4 proportionality decisions a year. That, in itself, is informative.

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5. See FED. R. CIV. P. 26(b)(1).

6. Paul W. Grimm, *Are We Insane? The Quest for Proportionality in the Discovery Rules of the Federal Rules of Civil Procedure*, 36 REV. LITIG. 117, 141 (2017).

By indexing the cases, I was surprised to find a remarkably large number of techniques that judges had developed to achieve proportionality when they put their minds to it. I will list them for you now: (1) active, hands-on judicial monitoring and, when required, management of the discovery process; (2) promoting (and, if necessary, requiring) cooperation among the parties and counsel; (3) adopting informal discovery-resolution methods; (4) phasing discovery; (5) using judicial adjuncts (whether formal, such as special masters, or informal, like informal discovery “mediators”); (6) employing cost shifting, where justified; (7) intervening *sua sponte* to limit the scope of discovery; (8) enforcing prohibitions against boilerplate objections and other improper delay-and-avoidance practices; (9) ordering sampling of voluminous data sources to reduce cost and burden, especially in big-data ESI cases; (10) using Rule 26(b)(2)(C) to require that discovery be obtained from less burdensome or expensive sources; (11) using protocols, standing orders, local rules, and guidelines that implemented the proportionality requirement; (12) encouraging the use of technology (such as technology-assisted review) to reduce discovery costs in big-data ESI cases; (13) developing a discovery “budget” by estimating the range of plausible recovery and costs of discovery and using that estimate to figure out how many lawyer hours should be spent on discovery; (14) imposing caps on the amount of time that parties were required to spend in responding to discovery requests or the amount of money to be spent on discovery (as measured by attorney billing rates and costs of completing discovery); (15) enforcing the Rule 26(g) certifications (which contain miniproportionality requirements imposed on parties requesting discovery, responding to discovery requests, or objecting to discovery requests); (16) lowering discovery costs through use of Evidence Rule 502; and (17) where necessary, imposing sanctions when other avenues had been exhausted.<sup>7</sup>

As you can see, there are seventeen techniques that had been used, alone or in combination, by judges who wanted to achieve proportionality in their cases—many more than I had expected when I began my search. What jumps out at you is how common sense they all are and how, to some extent, each could be looked at as essentially a subset of the first—active judicial management from start to finish.

There was an unexpected benefit I realized by looking at the 193 cases located by my search. I also was able to see what kinds of problems led to the disputes that required the judges to intervene—the cases most likely to raise proportionality problems. I will list them now, but you will see that there are no real surprises: (1) unusually complex

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7. *Id.* at 144–77.

cases (e.g., patent/intellectual property, antitrust, class actions, mass torts, MDL cases); (2) cases where large amounts of ESI are sought; (3) cases where there is excessive client animosity; (4) cases involving attorney misconduct, overzealousness, or overaggressiveness; (5) cases involving issues of spoliation of evidence; (6) litigation involving pro se litigants; and (7) cases involving asymmetrical information (i.e., where one party has far more discoverable information than the other).<sup>8</sup>

So, if there are abundant tools for judges to use to achieve proportionality, and if we can readily forecast in advance the type of cases most likely to create proportionality issues, why is it that there continues to be so much anecdotal information from bar surveys and legal writing suggesting that proportionality continues to be an elusive goal? As I thought more about this, I began to wonder whether the true problem was reluctance by judges to intervene in discovery to achieve proportionality or lack of awareness by judges of the expectation that they do so. It reminded me of another famous cartoon, this one from the Pogo comic strip, when Pogo says, “[W]e have met the enemy and he is us.”<sup>9</sup>

To try to test this, I prepared a survey. With the help of the Federal Judicial Center (“FJC”), I was able to administer the survey to federal district judges and magistrate judges who were attending FJC education programs during 2015. Did I mention that I don’t have much of an outside life? Participation in the survey was voluntary and anonymous. I received 110 responses, representing about ten percent of the entire federal judiciary.<sup>10</sup> And while I would be the first to caution against drawing too many firm conclusions based on such a small sample, I do think that the survey results are informative. First, only nineteen percent of the district judges said that they always keep discovery disputes for resolution.<sup>11</sup> Twenty-six percent said they always refer them to magistrate judges, and fifty-five percent said they keep some but refer others to magistrates.<sup>12</sup> That means that eighty-one percent of district judges refer discovery disputes to magistrate judges at least some of the time, which makes it unsurprising that sixty-seven percent of the cases discussing proportionality that my search disclosed were decided by magistrate judges.<sup>13</sup> Could it be that district judges are becoming too removed from the entire discovery process to ensure that it is proportional?

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8. *Id.* at 177–87.

9. WALT KELLY, THE BEST OF POGO 163 (Mrs. Walt Kelly & Bill Crouch, Jr. eds., 1982).

10. Grimm, *supra* note 6, at 134, 140.

11. *Id.* at 135.

12. *Id.*

13. *Id.*

Second, I asked the judges which of two choices best described their approach to resolving discovery disputes: “I actively manage the discovery process in my cases,” or “I become involved in the discovery process when the parties have a dispute that results in the filing of a motion.”<sup>14</sup> Only eighteen percent of district judges and thirty-nine percent of magistrate judges said that they actively managed the discovery in their cases.<sup>15</sup> That means that eighty-two percent of district judges and sixty-one percent of magistrate judges waited until there was a discovery motion to get involved.<sup>16</sup> That’s a pretty big gap between the expectation baked into the rules that judges actively manage the discovery process and the reality of how things actually are being done. These responses suggest that most district judges and magistrate judges view themselves as “dispute resolvers,” not “case managers.”

But there were also some promising responses to the survey. When asked how likely they were to balance the interests of the party requesting discovery against the burdens and expenses to the party from whom discovery was requested, eighty-six percent of district judges and ninety-three percent of magistrate judges said that they did so always or frequently.<sup>17</sup> This suggests that even if they did not view themselves as active case managers, the strong majority of judges did factor in proportionality when resolving discovery disputes—whether formally or informally.

And when I asked the judges whether they had ever used any of the seventeen proportionality techniques my case review disclosed, more than fifty percent of both district and magistrate judges had employed some or even many of them.<sup>18</sup> This suggests that the common-sense techniques are in fact being used. And some of the techniques have been used far more frequently than others.

Here is what I took away from my case review and survey of judges. First, we have a long way to go to educate judges about the benefit of active judicial management of the discovery process and the proportionality requirement. Second, just telling judges to “go forth and actively manage” without showing them concrete ways to do it in realistic case settings is not going to be effective. I am happy to report that thanks to the hard work of Judge Jeremy Fogel, director of the Federal Judicial Center, the educational programs for new and experienced judges alike now include special emphasis on management

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14. *Id.* at 136.

15. *Id.*

16. *Id.*

17. *Id.* at 137.

18. *Id.* at 138.

of the discovery process and the proportionality requirement. And the instruction is interactive, using realistic fact patterns that allow the judges to see how to get the job done and the benefit to them by doing so. After all, the less time you have to spend resolving formally briefed discovery disputes, the more time you have to work on the substantive issues in your cases. Judges who see the benefit of actively managing their dockets to achieve proportionality are more apt to do so—that's the great thing about self-interest. For anyone interested in more information about the study I did, including more detailed discussion of the proportionality techniques disclosed by the review of cases, or anyone having difficulty sleeping, I wrote a law article about it that was published by the University of Texas School of Law's journal *The Review of Litigation*. It is found in the Winter 2017 edition, Volume 36, Number 1.<sup>19</sup>

In the brief time remaining, I would like to turn my attention to some thoughts about the future of discovery—after all, that is the title of this symposium. One thing that we heard over and over during the publication and approval process of the 2015 Rule Changes was the notion that future rule changes should not be based on anecdotal information or the views of the Rules Committee about what *might* improve the process. Instead, it would be far better to recommend rule changes based on practices that have been tested in actual courts and in actual cases and demonstrated to be successful. The Rules Committee took those comments to heart, and during 2016, a lot of terrific judges, lawyers, and folks from the Administrative Office of the U.S. Courts and FJC worked to develop two pilot projects designed to test specific procedures to help us better achieve the goal of Rule 1 of the civil procedure rules: the just, speedy, and inexpensive resolution of all civil cases.<sup>20</sup>

The first is the Mandatory Initial Discovery Pilot, currently being implemented in the District of Arizona and Northern District of Illinois, modeled on the mandatory initial-disclosure requirements that have been adopted in about ten states, most notably in Arizona, which has had them for over twenty years. The goal is to require, through a general order or standing order, the prediscovery disclosure of information relevant to claims and defenses actually pleaded—whether favorable or unfavorable—before formal discovery under the rules commences. By analyzing the data regarding the number of discovery motions filed; length of time from filing to settlement, dispositive motion, or trial; as well as attorney surveys, we hope to be able to

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19. See *id.* at 117.

20. See FED. R. CIV. P. 1.

evaluate how the pilot courts do in comparison to others that don't follow these procedures. If, as hoped, resolution times are faster, there are fewer discovery motions filed, and the parties are more satisfied, then we may be able to have empirical evidence to back up any future recommended rule changes.

The second pilot, which has yet to begin implementation, is called the Expedited Procedures Pilot. It seeks to measure whether specific procedures (such as prompt issuance of scheduling orders within a specific amount of time after the appearance of counsel or filing of an answer); a finite period of discovery that may not be extended more than one time (upon a showing of due diligence and good cause); expedited resolution of dispositive motions within a specific amount of time; and the setting of a firm, fixed trial date that, once set, will not be changed absent exceptional circumstances, will result in measurable improvements in the time within which cases are resolved once filed.

These two pilot projects have been approved for implementation by the Judicial Conference of the United States, and Chief Justice Roberts gave them a dignified "shout-out" in his 2015 annual report on the judiciary.<sup>21</sup> Here is what he said: "The practical implementation of the rules may require some adaptation and innovation. I encourage all to support the judiciary's plans to test the workability of new case management and discovery practices through carefully conceived pilot programs."<sup>22</sup>

But Chief Justice Roberts said more in his 2015 annual report. He reminded us that "[t]he success of the 2015 civil rules amendments will require more than organized educational efforts"<sup>23</sup> and, might I add, carefully conceived pilot projects:

It will also require a genuine commitment, by judges and lawyers alike, to ensure that our legal culture reflects the values we all ultimately share. Judges must be willing to take on a stewardship role, managing their cases from the outset rather than allowing parties alone to dictate the scope of discovery and the pace of litigation.<sup>24</sup>

Looking backward, I realize that most of us are cautious about doing things differently from the way we have grown comfortable doing them. Judges are nothing if not zealous about protecting their independence in managing their civil dockets. And it takes a disciplined and principled lawyer to counsel a client against the decades-old abusive practices that have brought us to the point where things are today. But if we are to preserve the system that we all have devoted our careers to, we must be willing to embrace the types of changes the 2015

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21. ROBERTS, *supra* note 1, at 9–10.

22. *Id.*

23. *Id.* at 10.

24. *Id.*

rules require and to try out promising, new procedures to see if they can make things better, faster, and less expensive. We are going to need a helping hand in the future to find courts and lawyers willing to sign up for the two pilot projects—from judges, lawyers, and academics alike. But we owe it to our profession, our colleagues, our clients, and the public—which our system must be shown to serve, and serve well—to be willing to try new techniques to make the system better.

So, when I think about my hope for the future of discovery, I think about a time when *The New Yorker* will feature a cartoon showing a lawyer talking to her client. The lawyer has a reassuring look on her face. The client, still concerned, looks at her hopefully as she says: “You’ve got a pretty good case, Mr. Pitkin. I’m confident we will reach a just outcome at a cost you can afford, and I don’t think it’s going to take too long.” Maybe this cartoon isn’t very amusing, and it lacks the dark irony of the original, but it sure is something to work hard to achieve. Thank you.