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Rulemaking, Litigation Culture and Reform in Federal Courts

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Culturally based litigation practices are central to the policies of federal courts. Unlike the Federal Rules of Civil Procedure, cultural based practices are neither uniform nor explicitly defined among the federal courts. These practices are specifically tailored to ensure judicial efficiency, and in turn, they heavily influence practice and procedure in federal courts. This Article examines the significance of cultural litigation practices and their influence on amending or establishing new Federal Rules of Civil Procedure. The author proposes that rulemaking must compliment cultural practices in order to be successful and concludes that when conflict exists between these practices and rulemaking, cultural practices will ultimately establish standards for the conduct of litigation in the federal courts.

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Edward D. Cavanagh[†]

Abstract

Culturally based litigation practices are central to the policies of federal courts. Unlike the Federal Rules of Civil Procedure, cultural based practices are neither uniform nor explicitly defined among the federal courts. These practices are specifically tailored to ensure judicial efficiency, and in turn, they heavily influence practice and procedure in federal courts. This Article examines the significance of cultural litigation practices and their influence on amending or establishing new Federal Rules of Civil Procedure. The author proposes that rulemaking must compliment cultural practices in order to be successful and concludes that when conflict exists between these practices and rulemaking, cultural practices will ultimately establish standards for the conduct of litigation in the federal courts.

I. Introduction

This Article examines the role of litigation culture in establishing standards for the conduct of litigation in the federal courts. It argues that culturally based practices are firmly embedded in the federal civil justice system. The practice culture in a particular district may be the source of local rules or may serve as a gap-filler to provide standards where written rules do not exist or are not cost-effective to draft. Rules at odds with cultural practices face resistance from the bench and bar. Culturally rooted practices are not easily dislodged, and a mere amendment to the Federal Rules of Civil Procedure is unlikely to transform an established litigation culture. This is not to suggest that change cannot be effectuated but only that cultural changes are incremental and proceed at a glacial pace. These principles are amply illustrated through two culture shocks

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to the federal civil justice system brought about by the promulgation of the Federal Rules: notice pleading and pretrial discovery. Neither notice pleading nor the liberal discovery envisioned by the drafters of the Federal Rules has been wholeheartedly embraced by the bench and bar. Both have been subject to periodic guerilla warfare by opponents. These attacks appear to have made some headway, and courts and the Advisory Committee have begun to retrench and perhaps turn back the clock.

II. Foreword: The Role of Culture in Shaping Federal Practice and Procedure

The Federal Rules of Civil Procedure, adopted in 1938, govern practice and procedure of federal civil cases. Although expansive in length, breadth, and depth, the Federal Rules do not cover every aspect of federal pleading and practice. The drafters of the Federal Rules recognized that a comprehensive, all-inclusive procedural code was not necessary to achieve fair outcomes in federal courts, nor, as a practical matter, was it possible to draft such a code in a cost-effective manner. Accordingly, the Federal Rules take a big-picture approach and leave it up to the various district courts to develop their own detailed rules of the road for the specifics of federal litigation.

District courts have responded in several ways. First, they have promulgated local rules of practice,[1] an approach specifically authorized by the Federal Rules.[2] Second, they have adopted standing orders[3]—procedures that apply to all civil cases unless the court directs otherwise. Standing orders achieve the same effect as local rules but without the formalities required of local rules. Third, some judges have adopted chambers rules to alert practitioners to judges' preferences in handling

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[1] *See Local Court Rules*, UNITED STATES COURTS, http://www.uscourts.gov/rules/distr-localrules.html (last visited July 15, 2011).

[2] FED. R. CIV. P. 83(a).

[3] Susan J. Becker, *Discovery of Information and Documents from a Litigant's Former Employees: Synergy and Synthesis of Civil Rules, Ethical Standards, Privilege Doctrines, and Common Law Principles*, 81 NEB. L. REV. 868, 881 n.57 (2003) ("Federal judges may develop standing orders imposing detailed requirements on attorneys and others appearing before them pursuant to courts' inherent power to manage dockets and control decorum during the litigation process.").

litigation.[4] Fourth, some rules of the road have evolved from custom or practice without formal codification as rules or as orders.[5] The common denominator of these four sources of local practice standards is that they each reflect the culture of practice within a given district.

A. Local Rules

Local rules represent a classic manifestation of local practice culture. First and foremost, local rules serve as gap-fillers, fleshing out the details missing in the Federal Rules. Local rules may cover a variety of subjects: the timing of a motion and the deadlines for filing supporting or opposition papers, whether oral arguments are permitted on motion, format for papers filed with the court, page limitations on briefs, admission to practice, discipline of attorneys, related case rules, electronic service and filings with the court, pro se procedures, mandatory scheduling orders and exemption therefrom, the mode for raising discovery disputes with the court, court-annexed arbitration or mediation, adjournments, assignment of matters to magistrate judges, cameras in the courtroom, and student practice rules.[6]

Local rules may vary from district to district. This variation may be burdensome and perhaps confusing for attorneys who maintain multi-district practices. That fact alone, however, does not present a strong case for development of uniform local rules. It is not important that local rules be uniform, particularly since by their very nature they are not outcome determinative. As long as attorneys have ready access to local rules, differences among districts are unlikely to cause undue hardships. Moreover, variations in local rules may have side benefits by permitting districts to experiment with varying approaches to specific problems. Local rules that work are likely to be adopted in other districts.

Second, in addition to filling in the details where the Federal Rules are silent, local rules may prescribe "best practices." For example, some

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[4] *See* Peter J. Ausili, *Summary Judgment in Employment Discrimination Cases in the Eastern District of New York*, 16 TOURO L. REV. 1403, 1422-23 (2000) (noting the prevalence of chambers rules in the Eastern District of New York).

[5] For example, in the Southern District of New York, it is customary to grant the adversary at least one extension of time in which to answer the complaint.

[6] *See generally Local Court Rules*, *supra* note 1.

courts mandate court-annexed mediation for certain kinds of cases.[7] At least one court provides for a super fast discovery period—the so-called "rocket docket."[8] Prior to the 1993 Amendments to the Federal Rules, some districts, by local rule, imposed presumptive limits on the number of interrogatories that could be propounded in a given case.[9] Unlike gap-fillers, which simply flesh out broader national rules, local rules in the best practice category may be challenged as conflicting with the Federal Rules. The Federal Rules did not, prior to 1993, limit the number of interrogatories that could be served in a case, nor did they specify a time period for completion of discovery or setting of a trial date.[10] Thus, one could argue that any local rule limiting the number of interrogatories would be contrary to the Federal Rules and thus void.[11] The counter-argument is that such local rules are not at odds with the Federal Rules because they deal with subject matter not specifically addressed by the Federal Rules; that is, the fact that the Federal Rules do not themselves provide limitations does not mean that imposition of any limitations by local rule is somehow contrary to the Federal Rules. Another, perhaps more persuasive, argument is that such local rules limiting discovery are authorized by the trial court's managerial powers under Rules 16 and 26 of the Federal Rules.[12]

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[7] E.D.N.Y. CIV. R. 83.8 (formerly E.D.N.Y. CIV. R. 83.11).

[8] E.D. Va. Loc. Adm. R. 16(B) (In the Eastern District of Virginia, the discovery period is ordinarily 90-120 days.).

[9] *See* A. Leo Levin, *Local Rules as Experiments: A Study in the Division of Power*, 139 U. PA. L. REV. 1567, 1575 (1991).

> The use of local rules to curtail abuse in the use of interrogatories is particularly illuminating, underscoring basic discrepancies in the attempt to define consistency. I refer specifically to limiting the number of interrogatories to a figure specified in the local rule, in some instances to as few as twenty, in others thirty or even fifty. There is no such limit in Rules 26 or 33 of the Federal Rules of Civil Procedure. Moreover, the advisory committee specifically refused to impose a limitation in terms of numbers and they further refused to provide for local option, which would have authorized such limitations. The advisory committee opted for case by case controls on the use of interrogatories.

Id. (footnote omitted).

[10] *Id.*

[11] *Id.*

[12] *See* FED. R. CIV. P. 16, 26(b).

Indeed, courts have typically upheld these types of local rules on that latter basis.[13] That approach, in turn, creates potentially significant ancillary benefits. Where such local rules improve the conduct of litigation, they become candidates for national rules. That is precisely what happened with respect to local rules providing presumptive numerical limits on interrogatories. Now, Rule 33 of the Federal Rules presumptively limits the number of interrogatories in all cases to twenty-five.[14] A similar development has occurred with respect to the proposed Amendments to Rule 56, which have been circulated for comment by the Advisory Committee.[15] Drawing on the experience of many district courts, the proposed Amendments would require parties to specifically identify facts not in dispute, together with record citations, as part of a motion for summary judgment.[16] The proposed Amendments are designed to assist in the process of determining whether a genuine dispute of fact exists. Similarly, the "meet and confer" obligation prior to filing a motion for judicial intervention into a discovery dispute was initially a product of local rule.[17] The success of this procedure at the grass roots level led to its adoption as part of the Federal Rules.[18]

On the other hand, some local rules may never gather a national following, simply because their benefits are quite district-specific. In short, best practices local rules can provide a laboratory which gives the Advisory Committee and the legal profession an opportunity to observe, analyze, and evaluate best practices for possible inclusion in the Federal Rules at some point down the road.

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[13] *See* Valdez v. Ford Motor Co., 134 F.R.D. 296, 298-99 (D. Nev. 1991); Myers v. U.S. Paint Co., 116 F.R.D. 165, 165-66 (D. Mass. 1987) (order denying a motion to file more than thirty interrogatories); Clark v. Burlington N. R.R., 112 F.R.D. 117, 120 (N.D. Miss. 1986) (order denying a motion for a protective order).

[14] FED. R. CIV. P. 33(a)(1).

[15] *See* Letter from Comm. on Rules of Prac. & Proc. of the Jud. Conf. of the U.S. to Hon. John G. Roberts, Chief Justice of the U.S., 1 (Dec. 16, 2009), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Supreme%20Court%202009/rulessctsummary2009letterhead.pdf.

[16] *Id.* at 3.

[17] *See, e.g.*, W.D. Mo. R. 37.1.

[18] FED. R. CIV. P. 37(a)(1).

B. Standing Orders

Standing orders are judicial orders designed to apply in all civil cases.[19] They may be issued by a particular judge, in which case the standing order applies to all of that judge's cases, or they may be issued by the chief judge for application to all cases within a district. Standing orders have the obvious potential for improving the efficiency of case management by eliminating the need for repetition of the same paragraphs in orders routinely issued case after case. There are, however, downsides to standing orders. Where standing orders are employed district-wide, they become the functional equivalent of local rules, but without the formalities required by Congress for the adoption of local rules.[20] Noticeably missing in such cases is an opportunity for the bar to comment on the provisions before they are adopted as standing orders.[21] In addition, standing orders provide one more level of diffusion in federal practice. Lawyers must be on the alert to look beyond the local rules in determining the rules of the road in a particular district. Standing orders, depending on their content, may make practice in federal courts more fractured and less unified.

C. Chambers Rules

In some districts, it is not unusual for individual judges to have their own set of chambers rules in addition to any local rules or standing orders.[22] For examples, judges may require that litigants file all papers electronically.[23] Judges may also specify the time and day upon which motions are returnable.[24] Chambers rules may also specify the appropriate manner in which to communicate with chambers and, equally important, what not to do.[25]

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[19] *See* Becker, *supra* note 3.

[20] *See* FED. R. CIV. P. 83.

[21] *Id.*

[22] *E.g.*, Ausili, *supra* note 4.

[23] *E.g.*, Judge Dora L. Irizarry, *Individual Motion Practice and Rules of Judge Dora L. Irizarry* (Apr. 8, 2008), http://www.nyed.uscourts.gov/pub/rules/DLI-MLR.pdf.

[24] *Id.*

[25] *Id.*

Chambers rules are useful in that they inform the bar of a particular judge's preferences in handling litigation. On the other hand, chambers rules are a source of controversy. As a threshold matter, the *raison d'etre* for chambers rules is unclear. Do litigants really need another set of prescribed practices piled on the Federal Rules of Civil Procedure, local rules, and standing orders? Chambers rules serve to fragment federal practice even further, and for that reason alone, they tend to complicate litigation in the federal arena.

In addition, both the validity and wisdom of chambers rules may be subject to question. Take the case where a judge requires a pre-motion conference before a summary judgment motion can be made. In that situation, the moving party must essentially argue the motion twice—once to get the judge to entertain the motion and a second time to get the judge to decide in its favor. Does that really save time, or does it simply create more work and thereby actually *discouraging* dispositive motions? More importantly, does the judge actually have the authority to require permission to file dispositive motions in light of the fact that no such prerequisite exists under the Federal Rules?

A second example to consider is the practice of making all motions returnable on a given day and time, such as 9:30 a.m. on Fridays. On any given Friday, as many as twenty or thirty motions may be theoretically scheduled for the same time. Under this protocol, a number of lawyers would be sitting around the courthouse waiting for their cases to be called when they could otherwise be productively engaged. There has to be a better way to operate the courtroom. Judges need to be sensitive to the fact that for lawyers, time is money, and thus, time wasted is money lost. While it is true that a lawyer should not keep a judge waiting, it is also true that the judge could adopt less burdensome scheduling policies without risking a waste of the court's time. For instance, the court could stagger return times for motions throughout the day or require attorneys to be on call on thirty minutes notice.

Practitioners may not like chambers rules, but they rarely challenge them. This reluctance to challenge is colored by the view that Article III judges are akin to absolute monarchs in their respective courtrooms. What they say in the courtroom goes, pure and simple. Few lawyers are willing to incur the wrath of the court by challenging chambers rules. Thus, for better or for worse, chambers rules generally go uncontested and diffuse federal practice even further.

D. Custom and Practice—Unwritten Rules

Finally, written rules of conduct that evolve from custom and usage further reflect the culture of practice in a given district. Custom plays a significant role in shaping behavioral standards for attorneys. Attorneys are expected to be on time for court dates, to dress appropriately, to speak respectfully, and to act with courtesy toward the court as well as adversaries. None of these precepts is written down, nor is there any real need to do so. Culture likewise plays a pivotal role in developing standards in other areas, including extensions of time to answer pleadings, adjournment of court dates, manner and mode of communicating with chambers, and use of letter briefs. Similarly, some judges feel culturally constrained from limiting the amount of discovery in civil cases, although they are clearly authorized by the Federal Rules of Civil Procedure to do so.[26]

III. Changing the Rules: Cultural Barriers

Where a particular practice is deeply rooted in the legal culture, its codification as a rule, whether national or local, is generally not controversial. More problematic is the process of introducing rules to change culturally ingrained practices. The introduction of notice pleading and of pretrial discovery in civil cases under the Federal Rules reveals the strength of culturally ingrained practices and the resistance to changing those practices through rulemaking.

A. Pleading

1. Pleading Standards

Rule 8(a) of the Federal Rules,[27] governing pleadings in federal court, marked an abrupt departure from common law pleading standards, which had evolved through custom and practice through many generations.

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[26] FED. R. CIV. P. 26(b)(2)(C). This is not to suggest that parties are entitled to unlimited discovery. *Id.*

[27] FED. R. CIV. P. 8(a).

Originally, pleadings were oral, and attorneys literally pleaded their cases to the court.[28] Common law courts developed highly technical pleading rules requiring the plaintiff to plead both the theory of recovery and the facts supporting that theory.[29] As states began to codify procedural rules in the nineteenth century, the newly developed pleading codes de-emphasized the theory of recovery and emphasized the factual basis of the claim.[30] In the twentieth century, the Federal Rules further eased pleading standards, requiring that a complaint need only contain "a short and plain statement showing that the pleader is entitled to relief."[31] Gone was any requirement that the plaintiff allege "facts" sufficient to make out a "cause of action." Gone also was any need to incorporate into the complaint any theory of recovery to which the facts would give rise.

a. Common Law Pleading

At common law, trials were disfavored.[32] To assure that trials would be few, common law courts developed abstruse, hyper-technical pleading rules; any breach of which could lead to dismissal of the case on the merits. Common law pleading was characterized by almost endless rounds of paper exchanges, between plaintiff and defendant, designed to reduce the matter to one question of law or fact that could then be resolved by the court as a matter of law without a trial.[33] Minimizing the

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[28] *See* William H. Lloyd, *Pleading*, 71 U. PA. L. REV. 26, 27 (1922).

[29] *See* N.Y. STATE COMM'RS ON PRACTICE & PLEADING, FIRST REPORT TO THE NEW YORK LEGISLATURE 75-76 (Albany 1848).

[30] *See* Robert G. Bone, *Mapping the Boundaries of the Dispute: Conceptions of Ideal Lawsuit Structure from the Field Code to the Federal Rules*, 89 COLUM. L. REV. 1, 19-22, 101 n.345 (1989) (detailing the history of pleading rules); *see also* CHARLES E. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING 150-79 (West 2d ed. 1947) (criticizing code pleading).

[31] FED. R. CIV. P. 8(a)(2).

[32] *See generally* Charles E. Clark, *Simplified Pleading*, 27 IOWA L. REV. 272, 275 (1942).

[33] *See generally* FREDERIC WILLIAM MAITLAND, THE FORMS OF ACTIONS AT COMMON LAW: A COURSE OF LECTURES (A.H. Chaytor & W.J. Whittaker eds., Cambridge University Press 1936); *see also* Paul Stencil, *Balancing the Pleading Equation*, 61 BAYLOR L. REV. 90, 109 (2009) ("[P]arties shoehorned legal claims into one of a series of preexisting writs and responses, sequentially narrowing the issues subject to trial.").

number of trials, rather than achieving just outcomes, was the guiding principle of common law pleading rules.[34]

Common law pleading rules had two main requirements: (1) pleading facts sufficient to make a legally cognizable cause of action, and (2) identifying and alleging the legal theory under which the facts so pleaded would entitle the plaintiff to relief. There were nine recognized legal theories of recovery at common law.[35] Plaintiffs' pleading had to sound in one of these theories or it would be adjudged legally defective.[36] Similarly, if the legal theory of recovery was misidentified—that is, the plaintiff sued in trespass when it should have sued in case—the complaint would likewise be dismissed, even if all the factual allegations were true and the plaintiff would otherwise be entitled to recovery.[37]

Not surprisingly, common law pleading rules presented the plaintiff with a veritable legal minefield. One misstep and the plaintiff's complaint would be dismissed with prejudice.[38] This hyper-technical system honored form over substance and rewarded the party with the pleading-savvy attorney rather than the party with the meritorious claim.[39] Common law pleading rules did achieve outcomes, but not necessarily just outcomes.

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[34] Clark, *supra* note 32, at 274-75. By the mid-nineteenth century, common law pleading had become "an abstruse and involved science, based upon such technicalities that the movement for the so-called reform or code pleading necessarily followed." *Id.*

[35] MAITLAND, *supra* note 33, at 49-51.

[36] *Id.*

[37] *See* Scott v. Shepard, 96 Eng. Rep. 525 (K.B.); 2 Black. W. 892. In *Scott*, an individual threw a lighted squib into a crowded market house during a fair. *Id.* at 525-26; 2 Black. W. at 892-93. The squib landed near an individual who threw it near a second individual who threw it near the plaintiff, where it exploded, causing serious bodily harm. *Id.*; 2 Black. W. at 892-93. The court debated at length whether the case had been properly stylized as trespass rather than case. *Scott*, 96 Eng. Rep. 525; 2 Black. W. at 892; *see also* Clark, *supra* note 32, at 277 (noting the risk of dismissal based on a "lawyer's mistake, induced perhaps by technical ignorance or even by lack of clarity of the decisions").

[38] Clark, *supra* note 32, at 277.

[39] *Id.*; *see also* Stencil, *supra* note 33, at 138 (Under common law pleading, "justice might be denied by complex, confusing, overly technical and sometimes unpredictable pleading requirements.").

b. Fact Pleading

Notwithstanding the manifest shortcomings of common law pleading, it was not until the mid-nineteenth century that the critical mass necessary to achieve reform in common pleading rules was achieved. In 1848, New York adopted the Field Code, so named in honor of Judge David Dudley Field of the New York Court of Appeals, who chaired the commission that drafted and recommended the Code.[40] It was New York's first procedural code and not only replaced existing pleading practices, which had evolved under the common law, but it also became a model for pleading reform in many states.[41]

The Field Code simplified common law pleading rules and de-emphasized the role of legal theory in pleading.[42] The endless exchange of paper was replaced with three pleadings—the complaint, the answer, and the reply to any counterclaim.[43] The Field Code required plaintiffs to plead facts necessary to make out a cause of action.[44] It was not necessary to plead a theory of recovery.[45] The key to recovery was in the facts. If the plaintiff could plead and prove any set of facts that would entitle him to recovery, the court would grant that relief, even if the plaintiff espoused either no theory or the wrong theory.[46] In effect, the burden of matching a legal theory to the facts of the case was lifted from the plaintiff's shoulders.

This style of pleading under the Field Code became known as "fact pleading."[47] The complaint had to set forth all facts necessary to make

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[40] Katherine A. Rocco, *Rule 26(A)(2)(B) of the Federal Rules of Civil Procedure: In the Interest of Full Disclosure?*, 76 FORDHAM L. REV. 2227, 2230 (2008) ("The first major step toward procedural reform was with the Field Code of Civil Procedure of New York, which helped to close the chasm between actions in equity and at law.").

[41] GENE R. SHREVE & PETER RAVEN-HANSEN, UNDERSTANDING CIVIL PROCEDURE § 45, at 176 (3d ed. 2002).

[42] 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1202 (3d ed. 2008).

[43] CLARK, *supra* note 30, § 127.

[44] WRIGHT & MILLER, *supra* note 42.

[45] *Id.*

[46] *See, e.g.*, CHARLES M. HEPBURN, THE HISTORICAL DEVELOPMENT OF CODE PLEADING IN AMERICA AND ENGLAND 67-83 (Cincinnati, W.H. Anderson & Co. 1897).

[47] *See* Lloyd, *supra* note 28, at 34.

out a cause of action.[48] There was a one-to-one relationship between the allegations in the pleading and proof at trial.[49] The emphasis in pleading was on the facts, rather than the theory of recovery.[50] The complaint had to set forth facts, not conclusions or matter that was merely evidence of facts.[51] Thus, the great Achilles heel of fact pleading was born—trying to distinguish facts from conclusions from matter that is only evidence of facts.[52] As a result, nineteenth century (and even twentieth century) courts became bogged down in this fruitless exercise.[53] Even if one could successfully sort fact from conclusion, pleading remained a poor vehicle for ascertaining the truth of allegations in the complaint.[54]

c. The Federal Rules of Civil Procedure

Prior to the adoption of the Federal Rules of Civil Procedure in 1938, pursuant to the Conformity Act,[55] actions in federal court were governed by the procedural rules of the state in which the federal court sat. With the introduction of the Federal Rules, federal practice and procedure were to be governed by a uniform set of national rules. The Federal Rules introduced a number of changes into existing civil practice standards. Perhaps no change was more profound than the introduction of a simplified pleading system, commonly described as "notice pleading."[56] Under the Federal Rules, a complaint need only contain: (1) allegations of jurisdiction; "(2) a short and plain statement of the claim showing that the pleader is entitled to relief; and (3) a demand for the relief sought."[57]

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[48] WRIGHT & MILLER, *supra* note 42.

[49] *Id.*

[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] *Id.*

[54] Edson R. Sunderland, *The Theory and Practice of Pre-Trial Procedure*, 36 MICH. L. REV. 215, 216 (1937) ("The great weakness of pleading as a means for developing and presenting issues of fact for trial lay in its total lack of any means for testing the factual basis for the pleader's allegations and denials.").

[55] Act of June 1, 1872, ch. 255, § 5, 17 Stat. 197; Rev. Stat. § 914 (repealed 1948).

[56] WRIGHT & MILLER, *supra* note 42, § 1202.

[57] FED. R. CIV. P. 8(a).

This liberalized pleading regime rejected both the common law's theory of recovery model and the codes' fact-pleading model in favor of a simplified system, which put the opposing party on notice of a claim or defense. Gone were the overly technical pleading rules that typified common law and the rigidity that earmarked pleadings under the codes.[58] Under the Federal Rules, "[p]leadings must be construed so as to do justice"[59] as the objective is not to avoid trial but rather to make sure that litigants with meritorious claims and defenses have their day in court.

The Federal Rules effectively demoted the role of pleadings in federal litigation.[60] No longer would a detailed factual recitation be required in the complaint to avoid dismissal at the pleading stage. The principal function of pleadings would be to give the other side notice of the claims or defenses being asserted, and the underlying supporting facts could be developed through pretrial discovery.[61] In one fell swoop, the drafters of the Federal Rules inflicted two culture shocks on the federal civil justice system—notice pleading and pretrial discovery.

2. Challenging Notice Pleading

Although the term notice pleading has been used almost universally to describe pleading under the Federal Rules, the precise meaning of that term has remained elusive. It is noteworthy that the drafters rejected that label, fearing that officially embracing that terminology would encourage shoddy pleading practices, a concern that the United States Supreme Court echoed in *Bell Atlantic Corp. v. Twombly*[62] some seventy years later.[63] From the beginning, many litigators were uncomfortable with

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[58] *See* FED. R. CIV. P. 8(d)(1) ("No technical form is required.").

[59] FED. R. CIV. P. 8(e).

[60] Richard L. Marcus, *The Puzzling Persistence of Pleading Practice*, 76 TEX. L. REV. 1749, 1749 (1998) ("[P]leadings are not of great importance in a lawsuit. . . . [The drafters] clearly intended to curtail reliance on the pleadings and minimize pleading practice.").

[61] *Id.* at 1755-56.

[62] 550 U.S. 544 (2007).

[63] *Twombly*, 550 U.S. at 555 n.3 (noting that, although the Federal Rules eliminated setting out facts in detail, Rule 8(a)(2) still requires a showing of entitlement to relief and not merely a blanket assertion).

the concept of notice pleading. Early attacks on notice pleading were repelled, convincingly, by the Second Circuit in *Dioguardi v. Durning*.[64] *Dioguardi* involved claims by the pro se plaintiff, an immigrant with poor English language skills, against a United States customs agent for unlawfully seizing goods, which the plaintiff had imported into the United States.[65] The defendant moved to dismiss the plaintiff's inartfully drafted and barely literate complaint.[66] The Second Circuit, although acknowledging that the complaint was not a model of clarity, nevertheless held that the allegations were sufficient to withstand a motion to dismiss.[67] Clearly, the appellate court was influenced by the fact that the plaintiff was proceeding pro se, untrained in the law, and unfamiliar with the civil justice system.[68] But, the ruling also makes it clear that under the Federal Rules, pleadings will not be dismissed merely because they are poorly or even inartfully drafted, and that pleadings do not have to spell out each of the elements of the cause of action.[69] Still, dissatisfaction with notice pleading persisted.[70]

Dioguardi has spawned its share of criticism but has never been overruled. A decade later, the Supreme Court, in *Conley v. Gibson*,[71] without specific reference to *Dioguardi*, underscored the minimal formal requirements of Rule 8(a)(2) of the Federal Rules, noting that "[t]he Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on

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[64] 139 F.2d 774 (2d Cir. 1944).

[65] *Dioguardi*, 139 F.2d at 774.

[66] *Id.* at 775.

[67] *Id.*

[68] *Id.* at 774-75.

[69] *Id.*

[70] *See, e.g.*, O.L. McCaskill, *The Modern Philosophy of Pleading: A Dialogue Outside the Shades*, 38 A.B.A. J. 123 (1958); *see also Claim or Cause of Action: A Discussion on the Need for Amendment of Rule 8(a)(2) of the Federal Rules of Civil Procedure*, 13 F.R.D. 253, 253 (1952); ADVISORY COMM. ON RULES OF CIVIL PROCEDURE, REPORT OF PROPOSED AMENDMENTS TO THE RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS 18-19 (1955), *available at* http://www.uscourts.gov/uscourts/ RulesandPolicies/rules/Reports/CV10-1955.pdf.

[71] 355 U.S. 41 (1957), *abrogated by* Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007).

the merits."[72] Accordingly, a complaint may not be dismissed unless it is clear that there is "no set of facts" which would support a legally cognizable claim for relief.[73] A few sentences later, in an apparent effort to rein in the "no set of facts" language, the Court stated a complaint must provide "fair notice of what the plaintiff's claim is and the grounds upon which it rests."[74]

Nevertheless, the "no set of facts" language in *Conley* became firmly etched in federal litigation practice for a half-century. That is not to say that *Conley* enjoyed universal support. As litigation grew even more complicated and expensive with the dawn of the "Big Case Era," *Conley* and the principle for which it stood—notice pleading—came under increasing attack in the courts.[75] In part, the counterattacks on notice pleading reflected concerns that liberal pleading standards and broad discovery had combined to make litigation in the federal courts prohibitively expensive and time-consuming.[76] In part, the counterattacks on notice pleading represented an effort to turn the clock back and return to fact pleading in the federal courts.[77]

Some lawyers and their clients continue to resist notice pleading after seventy years.[78] That persistence has paid them dividends. In 2007, the Supreme Court in *Twombly*[79] retired *Conley* and redefined notice pleading in a way, which would have been both unrecognizable and puzzling to the drafters of the Federal Rules.[80]

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[72] *Conley*, 355 U.S. at 48.

[73] *Id.* at 45-46.

[74] *Id.* at 47.

[75] *See, e.g.*, Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1106 (7th Cir. 1984), *cert. denied*, 470 U.S. 1054 (1985); *see also* Geoffrey C. Hazard, Jr., *From Whom No Secrets Are Hid*, 76 TEX. L. REV. 1665, 1685 (1998) ("*Conley v. Gibson* turned Rule 8 on its head . . . .").

[76] *See, e.g.*, *Twombly*, 550 U.S. at 558. "It is one thing to be cautious before dismissing an antitrust complaint in advance of discovery, but quite another to forget that proceeding to antitrust discovery can be expensive." *Id.* at 546.

[77] *See* Marcus, *supra* note 60, at 1750-51.

[78] *See id.* at 1752.

[79] 550 U.S. 544.

[80] *Twombly*, 550 U.S. at 555, 557.

Twombly arose in the wake of the settlement resulting in the break up of AT&T in 1984.[81] Under the Consent Decree, AT&T agreed to divest itself of ownership of local telephone exchanges.[82] The Consent Decree created seven regional companies known as Regional Bell Operating Companies (RBOCs) that would provide local telephone services.[83] Each company had exclusive rights to provide local services within its area, and each was barred from providing long distance services.[84] Subsequently, Congress enacted the Telecommunication Act of 1996, which sought to create competition among the four remaining RBOCs for the provision of local phone services.[85] The Act required the RBOCs to provide prospective rivals, such as the re-formed AT&T, with technological assistance so that the new rivals could effectively compete.[86]

However, in the wake of the enactment of the Telecommunications Act, competition in local phone services did not flourish as Congress had expected. The RBOCs allegedly showed little interest in competing for business in each other's previously exclusive territories.[87] Moreover, Verizon, in particular, had been singled out for not cooperating with potential new entrants.[88] William Twombly and Lawrence Marcus brought a class action alleging that the four existing RBOCs, designated as Incumbent Local Exchange Carriers (ILECs), had conspired in violation of § 1 of the Sherman Act to prevent new entry new service providers, known as Competitive Local Exchange Carriers (CLECs), from entering their respective territories, and to not compete with each other for local telephone services.[89] The complaint alleged no facts

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[81] *Id.* at 549.

[82] *Id.*

[83] *Id.*

[84] *Id.*

[85] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.).

[86] *Id.*

[87] *Twombly*, 550 U.S. at 550-51.

[88] *Id.* at 549 (citing Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004)).

[89] *Id.* at 550, 551 n.2.

making out any agreement not to compete; it simply pointed out the lack of competition and alleged that it resulted from a conspiracy.[90]

The defendants moved to dismiss the complaint.[91] They argued the complaint had made only conclusory allegations of conspiracy; failed to allege any *facts* showing an agreement in restraint of trade by the defendants; and, at most, alleged mere consciously parallel conduct among the defendants.[92] Conscious parallelism alone is not sufficient to constitute a violation of § 1 of the Sherman Act.[93] The defendants argued that the complaint was therefore defective as a matter of law.[94] The trial court agreed and granted the motion to dismiss—suggesting that its ruling could be viewed as contrary to *Conley* and the doctrine of notice pleading.[95] The Second Circuit, however, reversed, ruling that defendants were unquestionably on notice that they were being sued for conspiracy and that there is no requirement for antitrust conspiracy claims to be pleaded with particularity.[96]

The Supreme Court reversed and dismissed the complaint, but in so ruling, steered a middle course between the trial court and circuit court decisions.[97] The Court, reaffirming its holding in *Swierkiewicz v. Sorema, N.A.*,[98] held unequivocally that there is no "particularity in pleading" requirement in antitrust cases.[99] On the other hand, the Court held that particularity in pleading under *Swierkiewicz* was not the issue before it.[100] Instead, the Court focused on whether what it viewed as conclusory allegations of conspiracy, without more, met the requirement of Rule

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[90] *Id.* at 553-54.

[91] *Id.* at 552.

[92] *Id.*

[93] *Id.*

[94] *Id.*

[95] *Id.*

[96] Twombly v. Bell Atlantic Corp., 425 F.3d 99, 114, 118-19 (2d Cir. 2005), *rev'd*, 550 U.S. 544 (2007).

[97] *Twombly*, 550 U.S. at 553.

[98] 534 U.S. 506 (2002), *overruled by* Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007), *as recognized in* Francis v. Giacomelli, 588 F.3d 186, 192 n.1 (4th Cir. 2009).

[99] *Twombly*, 550 U.S. at 569 n.14.

[100] *Id.* at 569-70.

8(a)(2) that a complaint must contain a "short and plain statement of the claim showing that the pleader is entitled relief."[101] The Court held that under Rule 8(a)(2), the plaintiff must allege sufficient facts to make its claim "plausible."[102] In the context of an antitrust conspiracy claim, this means that the conspiracy complaint must plead factual matter that if taken as true, would suggest that the defendants have entered into an unlawful agreement.[103] The plaintiffs need not set forth detailed factual allegations, but the Court emphasized that the grounds showing "entitlement to relief" must be "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do."[104] Rather, a complaint must contain "plausible grounds to infer an agreement" and allege "enough fact[s] to raise a reasonable expectation that discovery will reveal evidence of illegal agreement."[105]

The *Twombly* Court went on to say that the "no set of facts" language in *Conley* had outlived its usefulness and assigned it to the scrap heap because it had been widely misconstrued and the object of judicial criticism[106] (although not by the Supreme Court).[107] The Court recognized that the Federal Rules inaugurated a simplified pleading system to replace fact pleading.[108] At the same time, the Court emphasized that the Federal Rules never intended to eliminate the need to plead facts in

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[101] *Id.* at 555-56 (quoting FED. R. CIV. P. 8(a)(2)).

[102] *Id.* at 556.

[103] *Id.*

[104] *Id.* at 555.

[105] *Id.* at 556.

[106] *Id.* at 562-63. On the other hand, the Court did not jettison *Conley* in its entirety. Indeed, the Court reaffirmed *Conley* to the extent it holds that a pleading must contain notice as well as grounds for the claim. *Id.* at 555.

[107] *Id.* at 577-78 (Stevens, J., dissenting). In his dissent, Justice Stevens stated:

> If *Conley*'s "no set of facts" language is to be interred, let it not be without a eulogy. That exact language . . . has been cited as authority in a dozen opinions of this Court and four separate writings. In not one of those 16 opinions was the language "questioned," "criticized," or "explained away." Indeed, today's opinion is the first by any Member of this Court to express *any* doubt as to the adequacy of the *Conley* formulation.

Id. (Stevens, J., dissenting) (footnote and citation omitted).

[108] *Twombly*, 550 U.S. at 544, 562-63.

the complaint and that indeed enough facts must be pleaded in order to make the plaintiff's case sufficiently plausible to escape a motion to dismiss and to proceed to discovery.[109] Curiously, the Court barely acknowledged the Official Forms in the Appendix to the Federal Rules, which illustrate the kinds of bare bones pleadings that are sufficient to survive a motion to dismiss.[110]

Twombly clearly demonstrates that the Supreme Court is having second thoughts about the simplified pleading system embodied in the Federal Rules. Specifically, the Court is concerned that upholding bare bones antitrust complaints at the motion to dismiss stage may put a defendant in the untenable position of having to spend large sums of money on discovery to defend against claims which may subsequently be proven infirm or pay money to settle what it considers to be a baseless claim.[111] Settling rather than fighting such claims may be the prudent economic move, but that approach may also invite others to bring similar hold up claims. Forcing the plaintiff to show the strength of its case up front mitigates the hardship to defendants.

Although the Court eschewed any notion of specificity in antitrust pleading, its endorsement of notice pleading was, at best, lukewarm. There could be no doubt that the defendants in *Twombly* had notice that the plaintiffs were alleging a conspiracy. Prior to *Twombly*, that would have been enough to sustain the complaint.[112]

Indeed, the defendants acknowledged awareness that they were alleged to have conspired.[113] Their objection to the complaint was not based on lack of notice but rather on lack of any factual allegations—as opposed to legal conclusions—tending to prove an agreement among defendants.[114] The Supreme Court agreed with that distinction and held that the

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[109] *Id.*

[110] *Id.* at 565 n.10.

[111] *Id.* at 559-60.

[112] *See* Conley v. Gibson, 355 U.S. 41, 48 (1957), *abrogated by* Bell Atlantic v. Twombly, 550 U.S. 544 (2007). "[A]ll the Rules require is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Id.*

[113] *See* Reply Brief for Petitioners, Bell Atlantic v. Twombly, 550 U.S. 544 (2007) (No. 05-1126), 2006 WL 3265610, at *1.

[114] *Twombly*, 550 U.S. at 556.

plaintiffs must allege facts that made their claim of conspiracy plausible.[115] It is not enough to make conclusory statements or formulaic recitations of the elements of a conspiracy claim.[116] The key, then, to *Twombly* is that a complaint will be upheld where it contains well-pleaded facts that make a claim of conspiracy plausible.[117] What the Court in *Twombly* meant in enunciating the plausibility standard is a matter of ongoing analysis and development in the lower courts and in the Supreme Court itself. In *Ashcroft v. Iqbal*, the Court stated that in analyzing the sufficiency of a claim, the trial court must first focus upon whether a particular allegation is factual or conclusory.[118] Second, the court, applying its common sense and experience, must determine whether the well-pleaded facts make out a plausible claim.[119]

Such an approach, accepting facts and ignoring conclusions, would be unfortunate because that was precisely the state of affairs prior to passage of the Federal Rules of Civil Procedure, where the courts seemed much more concerned about vindicating technical pleading rules than in achieving just outcomes. The Federal Rules tried to change the pleading culture in federal courts by adopting notice pleading principles. The genius of notice pleading is that it eliminates the need to focus on whether the plaintiff has alleged sufficient facts to make out a cause of action and thereby frees the courts from the nearly impossible task of distinguishing facts from conclusions. It also eases the plaintiff's route to trial. *Twombly* marks an important turning point and represents a backslide to the days of fact pleading. That development is not a positive one for the federal civil justice system, yet the decision is being hailed in many quarters.

Twombly illustrates the difficulty in changing attitudes towards pleading that have evolved over decades in the practice of law. The notice pleading revolution wrought by the Federal Rules has come to an end. We may not return to pure fact pleading, but it is clear that the evolving standards under *Twombly* will reflect legal culture as much as legal rules.

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[115] *Id.*

[116] *Id.* at 555.

[117] *Id.*

[118] 129 S. Ct. 1937, 1950 (2009).

[119] *Iqbal*, 129 S. Ct. at 1940-41.

B. Discovery

1. Introduction of Discovery

A second culture shock emanating from the promulgation of the Federal Rules was the introduction of pretrial discovery into federal litigation. Discovery was the "Cinderella of changes" under the Federal Rules.[120] Discovery was unknown at common law; it was a creature of equity.[121] It was designed to level the litigation playing field by equalizing access to proof prior to trial.[122] The drafters of the Federal Rules rejected the "sporting theory of justice" and sought to develop a litigation system turned on the merits of the claims and defense and not on the ability to withhold evidence.[123] Discovery was designed to "make a trial less a game of blind man's buff [sic] and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent."[124]

Conceptually, discovery makes sense. Assuring that the parties have access to all relevant information to present to the fact finder enables each party to put its best foot forward which, in turn, assists the court in reaching a just result.

In *Hickman v. Taylor*, the Supreme Court elaborated on the need for trial in the sunshine:

> The pre-trial deposition-discovery mechanism established by Rules 26 to 37 is one of the most significant innovations of the Federal Rules of Civil Procedure. Under the prior federal practice, the pre-trial functions of notice-giving issue-formulation and fact-revelation were performed primarily and inadequately by the pleadings. Inquiry into the issues and the facts before trial was narrowly confined and was often cumbersome in method. The new rules, however, restrict the pleadings to the task of general notice-giving and invest the deposition-discovery process with a vital role in the preparation for trial. The various instruments of discovery now serve (1) as a device, along with the pre-trial hearing under Rule 16, to narrow and clarify the

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[120] 8 CHARLES ALAN WRIGHT & MARY KAY KANE, LAW OF FEDERAL COURTS § 81, at 577-79 (7th ed. 2011).

[121] *Id.*

[122] *Id.*

[123] *Id.* at 578.

[124] United States v. Procter & Gamble Co., 356 U.S. 677, 682 (1958).

> basic issues between the parties, and (2) as a device for ascertaining the facts, or information as to the existence or whereabouts of facts, relative to those issues. Thus civil trials in the federal courts no longer need be carried on in the dark. The way is now clear, consistent with recognized privileges, for the parties to obtain the fullest possible knowledge of the issues and facts before trial.[125]

Practically speaking, however, the discovery process is fraught with pitfalls that are closely linked to the common law litigation culture. First, litigation in the Anglo-American tradition "was a battle of wits rather than a search for truth" in which each side was protected to a large extent against disclosure of its case.[126] In that setting, clients feel no need to help their opponents. Indeed, it is quite difficult for clients to give up information harmful to their position (or helpful to their opponent's position). Some litigants either do not respond to discovery or drag their feet until the court intervenes—tactics that delay the case and add to its costs. The answer to that, of course, is that discovery is a two-way street and that the opponent has the same obligations and must reciprocate. It may well be that the opponent must provide information that is equally harmful to its case or helpful to the other side. Still, the culturally engrained resistance to discovery is deeply rooted.

Second, attorneys learned quickly that the discovery rules could be manipulated to wear down an opponent financially and to delay the progress of the case. For example, a party could refuse to comply with discovery requests or interpose blanket objections which would then force the opponent to spend time and money seeking judicial intervention. On the other hand, a party might pursue a "scorched earth policy" on discovery, forcing the opponent to spend large sums merely complying with discovery demands. In 1975, the Supreme Court acknowledged the potential abuse of pretrial discovery.[127] Third, abusive tactics aside, the

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[125] 329 U.S. 495, 500-01 (1947) (footnote omitted), *superseded by rule*, FED. R. CIV. P. 26(b)(3), *as recognized in* Seal v. Univ. of Pittsburgh, 135 F.R.D. 113 (W.D. Pa. 1990).

[126] WRIGHT & MILLER, *supra* note 42, § 2001.

[127] In *Blue Chip Stamps v. Manor Drug Stores*, the Supreme Court stated:

> The potential for possible abuse of the liberal discovery provisions of the Federal Rules of Civil Procedure may likewise exist in this type of case to a greater extent than they do in other litigation. The prospect of extensive deposition of the

cost of *legitimate* discovery escalated substantially as the cases in federal court grew more complicated and the stakes rose to unprecedented levels. By the 1980s, discovery practices came under full-scale attack and at the very least were in need of significant repair.[128] More recently, with the dawning of the digital age, the potentially astronomical costs of retrieving documents from cyberspace has led the Advisory Committee to adopt rules specifically designed to limit the costs of electronic discovery.[129] Moreover, long before discovery costs became a hot topic for debate, critics questioned the fundamental rationale for discovery.[130]

> defendant's officers and associates and the concomitant opportunity for extensive discovery of business documents, is a common occurrence in this and similar types of litigation. To the extent that this process eventually produces relevant evidence which is useful in determining the merits of the claims asserted by the parties, it bears the imprimatur of those Rules and of the many cases liberally interpreting them. But to the extent that it permits a plaintiff with a largely groundless claim to simply take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value, rather than a reasonably founded hope that the process will reveal relevant evidence, it is a social cost rather than a benefit.

421 U.S. 723, 741 (1975); *see also* Amendments to the Rules of Civil Procedure, 85 F.R.D. 521, 522 (1980). Justice Powell, joined by Justices Stewart and Rehnquist, dissented from promulgation of the 1980 Amendments to the Federal Rules. "When the Federal Rules first appeared in 1938, the discovery provisions properly were viewed as a constructive improvement. But experience under the discovery Rules demonstrates that 'not infrequently [they have been] exploited to the disadvantage of justice.'" Amendments to the Rules of Civil Procedure, 85 F.R.D. 521, 522 (Powell, J., dissenting) (citing Herbert v. Lando, 441 U.S. 153, 179 (1980) (Powell, J., concurring)).

[128] *See, e.g.*, Seattle Times Co. v. Rhinehart, 467 U.S. 20, 34-35 (1984) ("It is clear from experience that pretrial discovery . . . has a significant potential for abuse. This abuse is not limited to matters of delay and expense; discovery also may seriously implicate privacy interests of litigants and third parties." (footnote omitted)); *see also* SECTION OF LITIGATION, AM. BAR ASS'N, REPORT OF THE SPECIAL COMM. FOR THE STUDY OF DISCOVERY ABUSE 22 (1977), *reprinted in* 92 F.R.D. 149 (1982).

[129] *See, e.g.*, FED. R. CIV. P. 34.

[130] Professors Wright & Miller observed:

> The draftsmen held a utopian combination of hopes about the gains from discovery. They expected that the exchange of information between the litigants would bring to the court more facts, better reasoned arguments, and a fuller knowledge of the merits of the suit. Part of their hopes has been fulfilled: in an adversarial situation, each side is motivated to introduce all important—and many unimportant—documents and witnesses. It was thought that better mutual knowledge would enable the two sides to agree on the facts and issues, settle more cases, and reduce the number of issues and length of trials. But in an adversarial situation, informa-

2. Discovery Reform Efforts

Congress and the Supreme Court share coordinate jurisdiction over the federal court system. The Court, through the Advisory Committee, resisted calls for broad discovery reform in the 1960s and 1970s.[131] The Advisory Committee did sponsor what Justice Powell described as "tinkering changes" to Rules 33 and 34 in 1980 but declined to narrow the scope of discovery.[132] Stung by Justice Powell's criticism, the Advisory Committee revisited discovery; and the Supreme Court approved a new package of rules in 1983 designed to attack abusive behavior in pleadings and motions, in pretrial discovery, and at pretrial conferences by amending Rules 11, 16 and 26 of the Federal Rules.[133] A unifying theme of the 1983 Amendments was that noncompliance with the newly promulgated rules would be sanctionable.[134] Rule 11 was redrafted and fortified to provide for mandatory sanctions against parties and lawyers who prosecuted baseless claims or defenses or made frivolous motions.[135] Rule 16 as amended gave the court discretionary power to sanction parties who did not cooperate at pretrial conferences and augmented the court's powers to use Rule 16 as a vehicle to manage the pretrial phase of the case.[136]

> tion is an asset: instead of concluding that the adversary's position is just and strong, each side may think that it can gain victory from the new information. Consequently trials do not seem to diminish in number, become more orderly, or become shorter. The total judicial system may be better off because of the greater amount of information before the court, but it may have acquired these gains at additional net costs in work and money. Discovery is a method enabling adversaries to acquire information. Litigation can be made more economical and better focused only by other techniques specifically designed for the purpose.

WRIGHT & MILLER, *supra* note 42, § 2201 (quoting WILLIAM A. GLASER, PRETRIAL DISCOVERY AND THE ADVERSARY SYSTEM 234 (1968)).

[131] SECTION OF LITIGATION, AM. BAR ASS'N, REPORT OF THE SPECIAL COMM. FOR THE STUDY OF DISCOVERY ABUSE, at 22 (1977), *reprinted in* 92 F.R.D. 149 (1982).

[132] Amendments to the Rules of Civil Procedure, 85 F.R.D. 521, 523 (Powell, J., dissenting).

[133] FED R. CIV. P. 11.

[134] *Id.*

[135] *Id.*

[136] FED. R. CIV. P. 16.

The 1983 Amendments to Rule 26 marked the first time that the Advisory Committee imposed limits on discovery.[137] Again, the Advisory Committee chose not to address the breadth of discovery but instead addressed its depth.[138] The 1983 Amendments provided that discovery must be proportional to the needs of the case.[139] From that point forward, it became clear that litigants could no longer follow a "no stone unturned" discovery program. Moreover, Amended Rule 26 also directed the court to limit discovery where

> (i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;
>
> (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or
>
> (iii) the burden or expense of the proposed discovery outweighs its likely benefit. . . .[140]

The 1983 Amendments also marked a change in philosophy in dealing with discovery abuse by inaugurating a get-tough policy featuring mandatory sanctions for misconduct on discovery. Even though federal courts have had the power both inherently[141] and statutorily,[142] as well as under the Federal Rules[143] to deal with abusive conduct during the pretrial phase of a case, that power had rarely been utilized. Rule 11 had been notably underutilized.[144] Moreover, courts had been reluctant to sanction misbehavior on discovery, preferring instead to use gentle

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[137] Among other things, the 1983 Amendments deleted the final sentence of Rule 26(a), which had read: "Unless the court order[s] otherwise . . . 'the frequency of use' of use of the various discovery methods was not to be limited . . . ." FED. R. CIV. P. 26(a) advisory committee's note.

[138] *See generally* WRIGHT & MILLER, *supra* note 42, § 2003.1.

[139] FED. R. CIV. P. 26 advisory committee's note.

[140] FED. R. CIV. P. 26(b)(2)(C)(i)-(iii).

[141] *See* Chambers v. Nasco, Inc. 501 U.S. 32, 43-44 (1991).

[142] 28 U.S.C. § 1927 (2006).

[143] FED. R. CIV. P. 26(c). Courts may limit discovery "to protect a party . . . from annoyance, embarrassment, oppression, or undue burden or expense." FED. R. CIV. P. 26(c)(1).

[144] *See* Edward D. Cavanagh, *Developing Standards Under Amended Rule 11 of the Federal Rules of Civil Procedure*, 14 HOFSTRA L. REV. 499, 503-11 (1986).

persuasion, a tactic that rarely worked.[145] The 1983 Amendments charted a new course for discovery reform.

a. Congress

Despite the landmark changes embodied in the 1983 Amendments to the Federal Rules, criticism of civil discovery persisted. The concerns were that the 1983 Amendments had not gone far enough. In the late 1980s, Congress, armed with a report from the Brookings Institute[146] that criticized the federal civil justice system as too costly and too slow, began debating court reform proposals.

The result of that debate was the enactment of the Civil Justice Reform Act of 1990 (CJRA),[147] which was then signed into law by President Bush in December 1990. The CJRA contained a detailed game plan intended to address the twin-evils of unnecessary cost and delay, which Congress viewed as the root causes of the problems affecting the federal civil justice system.[148] The key elements of this game plan were: (1) the legislative "findings" that federal litigation is unnecessarily costly and takes too long; (2) the problems of cost and delay are best addressed on a district by district level, and therefore, reform should proceed from the bottom up and not the top down; (3) judges should utilize a variety of management techniques as appropriate; (4) judges should be held accountable for the status of their dockets; (5) plans implemented in each district pursuant to the statute should be monitored and amended as appropriate; and (6) courts should consider adoption of court-annexed Alternative Dispute Resolution (ADR) programs to assure that court-houses are truly multi-door institutions, open to all litigants and not only the very wealthy.[149]

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[145] *See* Edward D. Cavanagh, *The August 1, 1983 Amendments to the Federal Rules of Civil Procedure: A Critical Evaluation and a Proposal for More Effective Discovery Through Local Rules*, 30 VILL. L. REV. 767, 775-78 (1985).

[146] *See* BROOKINGS INSTITUTE, JUSTICE FOR ALL: REDUCING COSTS AND DELAYS IN CIVIL LITIGATION, REPORT OF A TASK FORCE (1989).

[147] Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (codified as 28 U.S.C. §§ 471-482 (2006)).

[148] *Id.*

[149] S. REP. NO. 101-416, at 6-28 (1990).

The statute required that each of the ninety-four federal district courts appoint an advisory group to assess the state of civil and criminal dockets in its district and to report to the chief judge on the causes of unnecessary delay and expense in civil cases within the district, along with proposals for remedial action.[150] The CJRA also required that membership be "balanced" and include lawyers as well as "other persons who are representative of major categories of litigants" in each court.[151] No member could serve on an advisory group for more than four years.[152]

In reporting to their respective courts, the advisory groups were required to consider (but need not adopt) six "principles and guidelines of litigation management and cost and delay reduction:"

(1) "systematic, differential treatment of civil cases that tailors the level of" judicial management to the needs of the case;

(2) "early and ongoing control of the pretrial process through involvement of a judicial officer . . . ;"

(3) use of case management conferences in complex cases to (a) explore settlement possibilities, (b) identify disputed issues, (c) schedule discovery, and (d) set deadlines for motions;

(4) "encouragement of cost-effective discovery through voluntary exchange of information . . . ;"

(5) requiring that no discovery motion can be entertained unless the parties have first made a good faith effort to resolve their differences; and

(6) "authorization to refer appropriate cases to alternative dispute resolution."[153]

After reviewing the work of its advisory group, each court was then required to promulgate a civil expense and delay reduction plan, which had the force of local rule. Local district courts were encouraged to address specific causes of unnecessary cost and delay within their particular districts.[154] To this end, courts were encouraged to experiment and innovate.[155] Congress hoped that this process would identify pro-

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[150] 28 U.S.C. § 472(c)(1)(C) (2006).

[151] *Id.* § 478(b).

[152] *Id.* § 478(c).

[153] *Id.* § 473(a).

[154] *Id.* § 472(c)(1)(C).

[155] *Id.* § 477(a).

cedures that are effective in reducing cost and delay that could then be implemented on a national scale.

Many of these guidelines were not controversial. For example, many courts already required that the parties meet and confer prior to making any discovery motions.[156] Similarly, many courts recognized the need to treat complex cases as sui generis, as well as the possible value of the ADR alternatives.[157] Other guidelines—most notably, those calling for voluntary exchange of discovery materials—were quite controversial.

b. Advisory Committee

Having lost the reform momentum to Congress, the Advisory Committee struggled to catch up and in 1993 promulgated a series of amendments further designed to address the perceived shortcomings of pretrial discovery: (1) a provision for mandatory automatic disclosure (M/A/D) requiring parties to disclose certain "core" information at the outset of the case prior to any discovery request by the adversary;[158] (2) presumptive limits on the numbers of interrogatories in each case;[159] (3) a mandatory discovery conference at which the parties are to agree upon a plan mapping out discovery for the case;[160] and (4) prohibition of any discovery until the court has approved the discovery plan established by the parties.[161]

However, the 1993 Amendments to the discovery rules came with a caveat. Recognizing that some district courts, in promulgating the CJRA plan, might have adopted procedures inconsistent with the 1993 Amendments and further recognizing that Congress intended that district courts be permitted to experiment, Rule 26(a)(1) contained provisions that allowed district courts by local rule to opt-out of the new rule's require-

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[156] *See, e.g.*, W.D. Mo. R. 37.1; C.D. Cal. R. 7.15; E.D. Cal. R. 37-251; E.D. Tex. Civ. R. 7(h); *see generally* Edward D. Cavanagh, *The Civil Justice Reform Act of 1990: Requiescat in Pace*, 173 F.R.D. 565, 591 (1997).

[157] Cavanagh, *supra* note 156, at 592-93.

[158] FED. R. CIV. P. 26(a)(1).

[159] FED. R. CIV. P. 33(a)(1).

[160] FED. R. CIV. P. 26(f).

[161] FED. R. CIV. P. 26(d)(1).

ments.[162] Roughly one-half of the ninety-four districts did just that.[163] While the opt-out provision was well intended and perhaps necessary in light of the CJRA, it led to a great deal of confusion for attorneys trying to ascertain the applicable rules in a given district.

Moreover, as discussed below, it does not appear that litigants took M/A/D obligations seriously, nor is there significant evidence that M/A/D achieved the hoped-for efficiencies in pretrial discovery.

3. Assessment of Reform Efforts

a. CJRA

The CJRA was a failure by almost any measure.[164] The RAND Report, an empirical study based on data gathered during the life of the CJRA and commissioned by the Judicial Conference pursuant to the CJRA, concluded that, as implemented, the CJRA as a whole had no impact on the problem of unnecessary cost and delay in the federal civil justice system.[165]

The CJRA failed, in part, because the guidelines and principles of litigation management and cost and delay reduction embodied in the statute did not necessarily address the root causes of undue delay and expense. For example, fundamental causes of delay in civil cases in the Eastern District of New York (E.D.N.Y.) were identified by the E.D.N.Y. advisory group as (1) a heavy criminal docket, which because of the Speedy Trial Act,[166] had the effect of pushing civil cases to the back of the line, and (2) judicial vacancies caused by the slowness of the political machinery in appointing new judges.[167]

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[162] *See* FED. R. CIV. P. 26(a)(1)(A)-(E) (stipulating, "unless otherwise stipulated or ordered by the court").

[163] *See* Cavanagh, *supra* note 156, at 605.

[164] James S. Kakalik et al., *Just, Speedy, and Inexpensive? An Evaluation of Judicial Case Management Under the Civil Justice Reform Act*, 49 ALA. L. REV. 17, 17 (1997) [hereinafter RAND Report].

[165] *Id.* at 18.

[166] 18 U.S.C. §§ 3161-3174 (2006).

[167] *See* E.D.N.Y. ADVISORY GROUP, FINAL REPORT TO HON. THOMAS C. PLATT, CHIEF JUDGE, PURSUANT TO THE CIVIL JUSTICE REFORM ACT OF 1990, CONCERNING

In part, the failure of the CJRA can be explained by the unwillingness of the bench and bar to embrace the reform devices proposed by the statute. In large measure, the lack of enthusiasm for the CJRA reform, notably systematic differential case treatment, active case management, and voluntary disclosure[168] were contrary to existing litigation cultures. Nor were lawyers comfortable with experimental procedures to effectuate bottom-up reform. Lawyers and judges like to do things the way that they have always been done. The notion of grass roots reform did not strike a responsive chord in the professions. Mercifully, the CJRA was permitted to die a natural death in 1997.

b. Federal Rules of Civil Procedure

The 1993 Amendments to the Federal Rules faced similar culturally based resistance. By far, the most controversial items of proposed discovery reform under both the CJRA and the 1993 Amendments to the Federal Rules were those calling for mandatory disclosure of information prior to the commencement of formal discovery.[169] There was widespread opposition to M/A/D for several reasons.[170] First, M/A/D fundamentally altered attorneys' obligations in pretrial litigation.[171] Traditionally, the conduct of pretrial discovery has been tethered to the

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THE CAUSES OF UNNECESSARY DELAY AND EXPENSE IN CIVIL LITIGATION IN THE EASTERN DISTRICT OF NEW YORK, 142 F.R.D. 185, 201 (1992).

[168] The RAND Report observed that lawyers expressed negative attitudes toward voluntary disclosure but further observed that lawyers tended to be significantly more satisfied "when they actually participate[d] in early disclosure on *their* case." RAND Report, *supra* note 164, at 34.

[169] *Compare* George F. Hritz, *Plan Will Increase Cost, Delay Outcomes*, N.Y.L.J., Apr. 13, 1993, at 3 (predicting that automatic disclosure will prove costly and inefficient) *and* Griffin B. Bell et al., *Automatic Disclosure in Discovery—The Rush to Reform*, 27 GA. L. REV. 1, 39-48 (1992) (questioning viability of mandatory disclosure) *and* Laura A. Kaster & Kenneth A. Wittenberg, *Rulemakers Should Be Litigators*, NAT'L L.J., Aug. 17, 1992, at 15 (commenting that mandatory disclosure impinges on work product and attorney/client protections) *with* Charles P. Sifton, *Experiment a Bold and Thoughtful Step*, N.Y.L.J., Apr. 13, 1993, at 3 (noting that automatic disclosure in most cases will make civil discovery less adversarial) *and* Ralph K. Winter, *In Defense Reform*, 58 BROOK. L. REV. 263, 271 (1992) (arguing that mandatory disclosure amendments to Rule 26 will reduce costs and delay).

[170] *See* Cavanagh, *supra* note 156, at 594–95.

[171] *See id.*

litigation process. Litigation is an adversarial proceeding, and attorneys are obligated to represent their client "with reasonably diligence and promptness."[172] Introduction of M/A/D takes disclosure out of the adversary process and transforms it into a matter of professional responsibility. Put another way, attorneys must answer not only to their clients but also to the courts. Not surprisingly, this shift in obligation left many attorneys uncomfortable.[173]

Second, M/A/D *extended* obligations to produce (at least initially) at a time when many were calling for limits on the amount of pretrial information exchange.[174] M/A/D opponents feared that disclosure would add significantly to the cost of litigation. Third, it was not clear what precisely had to be disclosed as part of M/A/D.[175]

The CJRA (perhaps unrealistically) seems to leave it up to the parties to decide the categories of information to be disclosed. The Federal Rules were more specific about the categories of M/A/D but then left it up to the parties to determine whether certain information was relevant and useful to the adversary. In short, the introduction of M/A/D ran strongly against long-established litigation culture.

This is not to suggest that M/A/D is a frivolous concept. The intellectual foundation for M/A/D was provided in separate articles by Judge William Schwarzer[176] and Magistrate Judge Wayne Brazil.[177] In their view, M/A/D could significantly increase efficiency and reduce the cost of pretrial discovery.[178] First, M/A/D would eliminate the need for a party to request information that all parties recognize is clearly relevant to the claims and defenses in a case.[179] Second, initial disclosures pursuant to M/A/D could shape subsequent discovery by focusing the pretrial

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[172] MODEL RULES OF PROF'L CONDUCT R. 1.3 (2007).

[173] *See* Cavanagh, *supra* note 156, at 595.

[174] *See* Hritz, *supra* note 169, at 3.

[175] *Id.*

[176] William W. Schwarzer, *The Federal Rules, The Adversary Process, and Discovery Reform*, 50 U. PITT. L. REV. 703 (1989).

[177] Wayne D. Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1295 (1978).

[178] *See id* at 1332-33; Schwarzer, *supra* note 176, at 722-23.

[179] *Id.* at 722.

inquiry on truly pertinent information and reducing "shot in the dark" discovery requests.[180]

The reality of M/A/D has proven much different from the theory. Attorneys and their clients strongly resisted M/A/D, unconvinced that M/A/D would benefit them and fearful that it would give opponents an undeserved leg up in the litigation.[181] Indeed, M/A/D has failed to catch on, and in its post-mortem on the CJRA, the RAND Corporation recognized that M/A/D had been a bust.[182] Congress did not dispute that assessment and mercifully allowed the CJRA to die a natural death. The Advisory Committee also recognized that M/A/D had not worked but was unwilling to abandon the concept entirely. In 2000, the Federal Rules were amended to provide for a significantly scaled back M/A/D obligation.[183] In the decade since, it is not clear that M/A/D has had any significant impact in reducing the costs of discovery.

A quite different example of culturally based resistance to discovery reform can be drawn from the Supreme Court's decision in *Bell Atlantic Corp. v. Twombly*.[184] The majority in *Twombly* reasoned that the high cost of discovery in antitrust cases made it imperative that the trial court carefully scrutinizes complaints at the motion to dismiss stage.[185] It rejected arguments that active judicial management of the pretrial process can control discovery costs.[186] The Court held that dismissal at an early stage is the only effective vehicle for controlling litigation costs.[187] To support this view, the Court relied on a 1989 law review article by Judge Frank Easterbrook[188] that characterized trial courts as helpless in efforts to rein in litigation costs because both the pleadings and the tools of discovery are controlled by the parties, not the courts.[189] The Court con-

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[180] *Id.* at 722-23.

[181] *See* Bell et al., *supra* note 169.

[182] RAND Report, *supra* note 164, at 17.

[183] FED. R. CIV. P. 26(a).

[184] 550 U.S. 544 (2007).

[185] *Twombly*, 550 U.S. at 559.

[186] *Id.*

[187] *Id.*

[188] Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. REV. 635, 638 (1989).

[189] *Twombly*, 550 U.S. at 559.

cluded that any effort by the trial courts to control discovery is necessarily "hollow" because "[j]udicial officers cannot measure the costs and benefits" of discovery because they "always know[] less than the parties, and the parties themselves may not know very well where they are going."[190]

That is manifestly not the case. Courts can control discovery in a variety of ways, notably by enforcing presumptive limits on interrogatories[191] and depositions[192] under the Federal Rules. What the Court in *Twombly* is really saying is that judicial management does not work and that the Federal Rules creating the managerial judge model have failed and (apparently) should be ignored.

Again, cultural factors are at the root of the resistance to mandatory automatic disclosure. As discussed above, litigation is an adversarial process and any attendant discovery is part of that process. There are well-established procedures for initiating, challenging and compelling discovery, none of which exists for mandatory automatic disclosure. These procedures are equally important because mandatory automatic disclosure shifts discovery away from the adversarial realm and into the field of professional responsibility. Attorneys and their clients both become uncomfortable and decidedly less confident in mandatory automatic disclosure as a vehicle to frame pretrial discovery. In the end, there has been and continues to be a great reluctance to embrace mandatory automatic disclosure.

IV. Overcoming the Cultural Divide

Cultural barriers may impede procedural reform efforts, but those barriers can be overcome. Litigation culture can be transformed so as to allow new procedures to flourish. Two approaches are discussed below. The first involves effectuating change at the local level through court-sponsored committees. The second involves the work of the Sedona Conference to create a dialogue and action plans on issues involving complex litigation.

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[190] *Id.* at 560 n.6 (quoting Easterbrook, *supra* note 188, at 638-39).

[191] FED. R. CIV. P. 33(a).

[192] FED. R. CIV. P. 30(a)-(d).

Then, perhaps the best example of such cultural transformation is the work done in the E.D.N.Y. under the aegis of then-Chief Judge Jack B. Weinstein with respect to the conduct of pretrial discovery in the wake of the 1983 Amendments to the Federal Rules of Civil Procedure.[193]

A. Court-Sponsored Committee

In the fall of 1982, the Advisory Committee of the Federal Rules was putting the final touches on amendments—later to become the 1983 Amendments to the Federal Rules—that would provide for mandatory sanctions for discovery abuse and for filing baseless claims or defenses.[194] Judge Weinstein viewed these changes with some skepticism, questioning whether a sanctions regime would be the most effective way to eliminate perceived abusive practices and, in particular, asking whether the costs of sanctions might outweigh any benefits.[195] Judge Weinstein then appointed a blue-ribbon Committee of practitioners, academics, and judges to investigate, inter alia, (1) the existence of discovery abuse within the eastern district, (2) the causes of such abuse, and (3) how these problems could be best addressed.[196] The Special Committee on Discovery was chaired by Edwin J. Wesely, a senior partner at Winthrop Stimson Putnam & Roberts. Under Chairman Wesely's leadership, the committee undertook extensive fact-finding during which members consulted widely with members of the bench and bar.[197] The special committee issued its final report in January 1984 in which it concluded: (1) discovery proceeds most efficiently where the parties cooperate;[198] (2) certain practices, such as speaking objection and directions to witnesses not to answer questions on deposition impeded the progress

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[193] *See generally* REVISED REPORT OF THE SPECIAL COMMITTEE ON EFFECTIVE DISCOVERY IN CIVIL CASES FOR THE EASTERN DISTRICT OF NEW YORK TO THE HONORABLE JACK B. WEINSTEIN, 102 F.R.D. 339 (Jan. 31, 1984) [hereinafter REVISED REPORT OF THE SPECIAL COMMITTEE].

[194] *See id.* at 359.

[195] *See* Tamar Lewin, *A Legal Curb Raises Hackles*, N.Y. TIMES, Oct. 2, 1986, at D-1.

[196] REVISED REPORT OF THE SPECIAL COMMITTEE, *supra* note 193, at 359.

[197] *See id.* at 361-63.

[198] *See id.* at 365-66, 369.

of discovery;[199] (3) objectionable behavior in the conduct of discovery is best remedied through education of the bar;[200] (4) a more effective way to raise and decide discovery disputes was needed;[201] and (5) use of sanctions, mandatory or otherwise, was not an optimal way to address attorney behavior or discovery.[202]

The final report made the following recommendations: (1) adoption of Guidelines on Discovery, which identified best practices and presumptively proper behavior on discovery; (2) assignment of a magistrate judge to each civil case to hear and decide all non-dispositive matters in the case; (3) creation of mechanisms to facilitate (a) raising of disputes on discovery before the magistrate judge and (b) resolution of those disputes by the magistrate judge; and (4) institution of periodic continuing legal education programs on discovery issues.[203]

Prior to submitting the report to the board of judges for approval in final form, a draft was circulated to the public, and thereafter the special committee held a series of public hearings on the report and also invited written comments from individuals as well as from bar associations.[204] The board of judges adopted the final report in February 1984, and the court promulgated its recommendations as standing orders.[205] Shortly thereafter, the Special Committee sponsored a daylong widely publicized and well-attended conference on the new standing orders at the eastern district courthouse in Brooklyn and subsequently, a similar program at the Long Island courthouse.[206]

The standing orders took effect amid some skepticism. Critics expressed concern that (1) the standing orders would have little impact on attorney behavior; (2) the simplified procedures for raising and deciding discovery disputes unfairly prejudiced the parties; (3) use of magistrates judges to supervise discovery would be imprudent because

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[199] *See id.* at 380.

[200] *See id.* at 367-68.

[201] *See id.* at 369.

[202] *See id.* at 364.

[203] *Id.* at 362-71.

[204] *Id.* at 362-64.

[205] *Id.* at 342.

[206] *Id.*

magistrate judges lack sufficient clout to deal with attorneys in an authoritative manner; and (4) appeals from dispositions by magistrate judges to the judge presiding over the case were inevitable and would add to, not save, costs.[207]

Experience under the standing orders, however, quickly muted these criticisms. Litigants soon found that magistrate judges were more than up to the task of managing the pretrial phase of civil litigation. Litigants also embraced the simplified procedure for raising and resolving discovery disputes. Parties were more concerned about resolving discovery disputes so the case could move forward than with retaining the right to file formal, and perhaps lengthy, motion papers. Appeals were almost non-existent. Most importantly, with the standing orders in place, attorneys fought less with discovery issues. These developments in the Eastern District did not escape the notice of the Advisory Committee, which did not hesitate to draw on the standing orders in promulgating the 1993 Amendments to the discovery rules.[208]

The blueprint for overcoming cultural barriers to reform to practice and procedure in the federal courts may be summarized as follows: (1) identify the issues that need to be addressed; (2) appoint a committee to study, debate and propose solutions to the problems identified; (3) make sure that the committee represents a broad cross-section of lawyers and legal expertise, including small firm and large firm practitioners, public and private sector lawyers, public interest lawyers, administrative personnel from the court, and judges; (4) task the committee to prepare a report; (5) publicize the existence of the report in draft through bar associations and other channels and solicit public comment; (6) hold public hearings on the draft report at which interested individuals and organizations can be heard; (7) reconvene the committee to consider public comments and finalize the report; (8) submit the final report to the board of judges for approval; (9) following approval by the court but prior to the effective date of any new practices proposed by the report, convene an "education day" at the federal courthouse(s) in the district to appraise the bar of the new procedures; and (10) after implementation of the new

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[207] REVISED REPORT OF THE SPECIAL COMMITTEE, *supra* note 193, at 364-67.

[208] *See, e.g.*, FED. R. CIV. P. 30(c)(2) (stating circumstances where directions not to answer questions on a deposition are presumptively appropriate).

procedures create an ongoing oversight committee to monitor and evaluate the new procedures.

B. The Sedona Conference

The Sedona Conference was established to promote dialogue among judges, lawyers and academics on ways to improve the conduct of complex litigation and to propose principles and best practices.[209] The Sedona Conference has been notably successful in raising awareness of and proposing solutions to problems arising in retention and production of documents stored in electronic form.[210] In 2003, it promulgated the Sedona Principles Addressing Electronic Document Production.[211] These principles have been embraced by the courts and were an important source for the 2006 Amendments to the Federal Rules of Civil Procedure. More recently, the Sedona Conference has sought to revive the debate on cooperation in discovery by issuing the Sedona Conference Cooperation Proclamation, which calls on lawyers and judges to rethink the contentious practices that have developed on discovery in civil litigation and redirect the litigation process toward resolution of legal claims.[212]

Unlike the E.D.N.Y. model, the Sedona Conference is not court-sponsored and its agenda is devoted to issues arising in complex litigation.[213] Nevertheless, the approaches are very similar. The Sedona Conference identifies important issues, provides a forum for discussion, seeks to establish common ground, develops principles and guidelines for practice, and advocates for those principles and guidelines.[214] The E.D.N.Y. and Sedona approaches have succeeded by raising awareness of issues and creating an exchange of ideas in a way that gives some

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[209] The Sedona Conference, http://www.thesedonaconference.org/ (last visited Sept. 25, 2011).

[210] *Id.*

[211] *Id.*

[212] The Sedona Conference, *The Sedona Conference Cooperation Proclamation* (July 2008), http://www.thesedonaconference.org/content/tsc_cooperation_proclamation/proclamation.pdf.

[213] The Sedona Conference, *supra* note 209.

[214] *Id.*

ownership of the proposed procedures. Rulemaking, by its very nature, does not offer similar ownership.

V. Conclusion

Culturally based practices are firmly embedded in the federal civil justice system. These practices are not easily dislodged, and a mere amendment to the Federal Rules is unlikely to effect significant behavioral modification. Indeed, culture trumps rules. Meaningful change comes about only after concerted and comprehensive educational efforts, and even then cultural changes are incremental and proceed at a glacial pace.