



SUMMARY OF 2010 CONFERENCE ON CIVIL LITIGATION AT DUKE LAW SCHOOL

The 2010 Conference on Civil Litigation drew approximately 200 representatives from the judiciary, practicing bar, academia, research institutions, and the business community to Duke Law School on May 10-11, 2010. The conference, technically a meeting of the federal Advisory Committee on Civil Rules, was convened in an effort to re-examine the rules and procedures that govern the federal civil justice system, and offer recommendations for improvement.

Attendees arrived at the conference armed with information and ready to work. Several organizations – representing different users of the system – had surveyed their own membership or other key constituencies in order to identify areas in which the system was working well, and areas in which improvement was necessary. These organizations presented a wealth of new data, including survey results from the ABA Section of Litigation, American College of Trial Lawyers (ACTL), National Employment Lawyers Association (NELA), corporate general counsel, and state and federal judges, as well as cost data collected by the Federal Judicial Center (FJC), RAND Corporation, and Lawyers for Civil Justice (LCJ). The breadth and depth of the empirical evidence was such that the conference organizers dedicated the first morning of the conference exclusively to the presentation and analysis of the collected data.

Many organizations and individuals also arrived at the conference with thoughtful, detailed proposals for improving the efficiency, cost-effectiveness, and trustworthiness of the civil justice system. Five different organizations – the ABA, NELA, ACTL (in conjunction with the Institute for the Advancement of the American Legal System), LCJ, and the Federal Courts Committee of the Association of the Bar of the City of New York – submitted extensive and far-ranging white papers with earnest and innovative suggestions for improving the system. Other conference participants offered their own detailed proposals regarding specific aspects of the pretrial process, such as class actions and pattern discovery requests.

Judge John G. Koeltl, the conference chair, requested that the experts on each conference panel try to reach consensus about next steps in their topic area. Many of the panels did reach consensus. For example, the panel on electronic discovery unanimously recommended that the Advisory Committee develop a new rule to address preservation and spoliation of electronically stored information. Other panels did not agree on the need for formal rule changes, but did agree that improvements to the system were warranted, and consequently offered detailed and concrete recommendations for sharpening the pretrial process. During the panel on discovery, for example, Houston attorney Stephen D. Susman presented a list of informal stipulations that promote attorney cooperation; Kansas City attorney Patrick J. Steuve suggested that attorneys refrain from deposing experts and third-party witnesses (even if the rules allow it); and Judge David G. Campbell described a new process he developed in which attorneys make a 15-minute “opening statement” during the initial

scheduling conference in order to educate the court about the case and help focus the parties on the issues that are truly in dispute.

Consensus was also evident in many parts in the empirical research. There was overwhelming agreement in the surveys that the system is too expensive and that cooperation between opposing counsel leads to faster and less costly resolution for their clients. The surveys also showed very strong support for early and active judicial management of the case. Furthermore, there was a widespread consensus that the issues in dispute are not adequately narrowed by the end of the pleading stage, and that the federal rules relating to initial disclosures are not working. And many of the surveys suggested that for at least some types of cases, the cost of litigation was not proportional to the needs of the case. The proportionality theme was carried throughout the two days of the conference, with panelists and participants recommending a variety of methods – from rule changes to judicial case management to more frequent implementation of existing procedures – to assure that the cost of every civil case is not disproportionate to the case’s monetary value, complexity, or importance.

The survey findings gave life to a theme that grew throughout the conference: procedure should be tailored to the needs of each case early in the pretrial process, through a combination of attorney cooperation, judicial management, and case type-specific rules and protocols. While there was no final agreement about how these factors should be optimally balanced, several suggestions and recommendations made at the conference emphasized procedural tailoring. For example, several different attendees argued in favor of staged discovery for more complex cases, and the ABA recommended completely exempting complex cases from initial disclosure requirements. Furthermore, a panel of representatives from different segments of the bar generally endorsed the idea of rules-based “defaults” from which judges could depart if needed, in order to customize the process for each case.

The theme of narrowing issues through individualized tailoring of the pretrial process was further supported by the experiences of state court systems. Although the conference focused primarily on the federal system, organizers made the deliberate choice to include perspectives from state courts with different civil rules. Representatives from Arizona and Oregon explained how their rules are designed to narrow issues and focus discovery by requiring extensive initial disclosures (Arizona), mandating the pleading of material facts (Oregon), and presumptively limiting discovery devices (both). Surveys of the Arizona and Oregon bench and bar, and a study of Oregon state dockets, showed that the state rules were preferred by the attorneys practicing in those states, and that the state rules were consistent with faster and more focused litigation. Conference attendees took this information to heart. During both formal discussions and informal conversations after the state panel, participants expressed strong interest in learning more about the state procedures and how those procedures might provide lessons for the federal system.

At the end of the conference, Judge Lee H. Rosenthal praised the “momentum, energy, and optimism” in the room, and promised that the issues raised throughout the two-day session would be at the front burner of the federal rules process in the coming months. The Standing Committee on Rules of Practice and Procedure intends to discuss the outcomes of the conference during its June 2010 meeting, and expects to provide a report to Chief Justice Roberts and the Administrative Office of the United

States Courts. Pilot projects and workshops will be explored (some of which are already underway at both the state and federal level). Moreover, the Federal Judicial Center will be conducting additional studies related to pleading rules, and will be planning new judicial education programs to emphasize focused judicial case management.

The 2010 Conference was an extraordinary undertaking in which the decision-makers of the federal civil rules process reached out to hear from the users of that system about areas of needed improvement. They approached the conference with an open-minded willingness to explore the depth of any problems and the shape of any solutions. Participants presented creative, thoughtful, and well-organized ideas. There is much work to be done, of course, but there is every indication that the process to bring the civil justice system closer to its stated goals of a “just, speedy, and inexpensive” resolution to every case is marching ahead at full speed.