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Committee on Rules of Practice and Procedure
Judicial Conference of the United States
One Columbus Circle N.E., #7-240
Washington, DC 20544

Dear Members of the Committee:

Thank you for this opportunity to comment on the proposed civil rule amendments.

I have been practicing civil rights law in Alexandria, Virginia since 1976. My work routinely pits my (typically) individual clients, with limited resources, against companies and governmental entities willing and able to defend seemingly without regard to cost. Short of death, a courtroom is the only forum in which these adversaries are able to stand – or are supposed to be able to stand – on an equal footing. It is from this perspective that I assess the proposed changes to the federal discovery rules. I respectfully submit the following for your consideration:

Rules Should Help Level an Uneven Playing Field

> The law, in its majestic equality, forbids rich
> and poor alike from sleeping under the bridge.
> Anatole France

The same rules should apply to all in court. But court rules must reflect the fact that all litigants do not enter court equally armed. Courts must permit legal contests to proceed on a fair basis regardless of wealth or capacity to control evidence. There are rules to prevent lightweight boxers from fighting heavyweights, and rules for ensuring that racehorses carry the same weight. In like manner, court rules must help ensure that contests in the courtroom are not distorted by inequalities outside the courtroom.

In many cases, the parties will be relatively equally situated with regard to their ability to develop evidence and fund litigation. But routinely in certain types of cases – and the civil rights work I do exemplifies this – the parties are not similarly situated in this regard. There are several reasons for this, in addition to a common disparity in assets available to develop evidence:

* Seriously problematical affirmative defenses, not bearing directly on the events giving rise to the claim, must be nullified by most civil rights plaintiffs. This includes, specifically, the qualified immunity defense in cases arising under 42 U.S.C. §1983, and the *Faragher/Ellerth* defense in Title VII cases. It routinely happens that more discovery is spent on avoiding these defenses than on advancing a plaintiff's claim. This burden falls uniquely on the plaintiffs.

* Civil rights plaintiffs routinely lack extra-judicial access to witnesses on an even basis with their opponents.

- In a typical employment case, the plaintiff is normally unable to develop co-worker witnesses save through depositions, whereas the employer has its employees at its beck and call. Again, challenged adverse employment actions are often made by more than one person, *e.g.*, a line supervisor, a department head and a representative of human resources. Each of these persons is freely available to the defense, but must be deposed by the plaintiff.

- It is standard procedure for law enforcement personnel to operate in teams and to secure prompt back-up. This is reflected in the supportive testimony that is routinely available to the defense in police and correctional misconduct cases. (I do not address the "blue wall of silence" that creates its own discovery issues.) In my experience, it is the rare case against police or correctional personnel where there are not more officers prepared to offer testimony about what allegedly happened than there are witnesses for the plaintiff. Each of these persons is freely available to the defense yet must be deposed by the plaintiff.

– Most pertinent documentation is normally within the possession or control of the defense. For the plaintiff, it must be identified, explained as needed, and turned into usable evidence through the discovery process. The defense puts in none of this work.

Ordinarily, it is only on the issue of damages that a plaintiff will have information unavailable to the defense without discovery. But even this is rapidly addressed by the medical or psychological examinations secured by the defense, which then typically give rise to more depositions and expenses.

As most civil rights plaintiffs operate under financial handicaps typically foreign to the defense, plaintiffs' counsel in particular must make difficult compromises about how to go about getting the information needed for trial – where their client will bear the burden of proof. In this regard, requests for admission and interrogatories are invaluable, since properly used they can eliminate the need for outlier depositions or limit the scope of necessary ones. Further limiting such paper discovery will greatly burden these plaintiffs. So too will further limiting the number (or time) of presumptively available depositions. While discovery avails both sides of a case, it constitutes one of the greatest tools for leveling the playing field between adverse parties of unequal means. The leveling should be enhanced, if anything, not reduced by woodenly "equal" formulas that pay no heed to the gross inequality in information-gathering that already obtains outside the courthouse door.

"Proportionality" and "Cost-Benefit" Analysis
are Improper and Unworkable Standards

Which case is more significant to the litigants and more important to be litigated in court: the contract claim of a multimillionaire executive suing an income peer for hundreds of thousands (or millions) of dollars, or that of a minimum wage worker fired for being the wrong sex or color and suing for less than one tenth that amount? How does one assess "proportionality" and compare "cost" and "benefit" here? As a real life matter, the marginal value of an additional $25,000 to the low-wage worker and the worker's family likely surpasses that of an award of ten times that amount to the millionaire. (I do not address the unique moral claims that the poor have to secure justice in court.) Again, what if the executive has a smoking gun document and a locked-in case (and an unreasonable defendant), whereas the unskilled worker's case, which may be far more morally compelling but worth less money, must be constructed brick by discovery brick? And this is without reference to how one establishes proportionality when injunctive relief is at issue. Nor does it address cases where the complained-of conduct is so egregious that substantial punitive damages would be appropriate in the event of a plaintiff's verdict, even if the actual damages are modest.

If proportionality or cost-benefit analysis is to figure in discovery entitlement, it would have to take into account the life circumstances of the plaintiff and what success would mean to him or her – not merely the dollar value of the plaintiff's actual damages. I don't believe that a judge (or anyone else) is capable of making such a calculation, or that it should be demanded of any judge. Many years ago, at a continuing legal education seminar, I chided a federal district judge who had, as he explained, a policy of awarding deposition hours based on how much money was at issue in a case. I deemed (and still deem) such a protocol outrageous. The potential for something like a plaintiff's "means test" lurks behind the proportionality and cost-benefit analyses being considered for civil discovery. This demeans our judicial system and the very concept of equal justice under law. If courts pretend that all parties are equally situated as litigants as well as being equal before the law, the inevitable result will be to facilitate unfairness and injustice to the weaker side. I hope that your committee will recognize this fact and act on it.

Responsibility for Lengthy and Expensive Discovery and Motions Practice Rests With Judges Who Tolerate Procrastination and Excess

From my experience, it is unclear that any rule changes are needed to render litigation more efficient or cheaper. What is needed is judges who will move cases to trial and not put up with lawyerly nonsense.

In the Alexandria Division of the Eastern District of Virginia where I have almost all of my practice – the so-called "Rocket Docket" – a case will go to trial typically within ten months of filing. There are virtually no exceptions. Discovery motions are routinely heard on one week's notice (scheduled by counsel), with decisions typically handed down orally at the hearing. After four months of discovery, a pretrial conference is held. Trial is then scheduled within 1-3 months of the pretrial conference. All this is spelled out in a form scheduling order that is issued normally within less than two months of filing of the complaint. It is the rare case in which a continuance is granted. Prudent counsel consider the schedule set in stone.

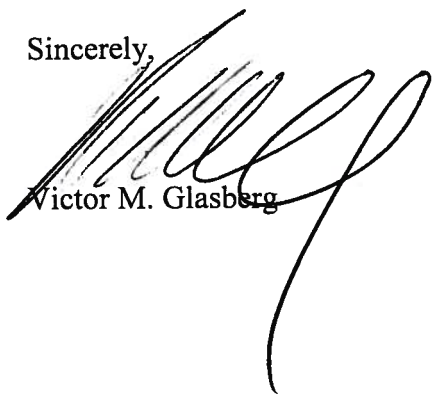
It is the inexorable speed of the litigation, not rules or rulings, that principally compels focus on central rather than peripheral issues, requiring litigating counsel to make choices and compromises calculated to advance the claims or defenses at issue rather than scouring the environment for possible support. While the speed of litigation is discomforting to counsel unused to it, I am not aware that the quality of justice meted out in Alexandria is inferior to that in courts where cases drag on and on and expenses mount accordingly.

If judges would impose hard and fast deadlines, rule promptly, deny continuances except in the case of true emergencies, sanction frivolous and vexatious posturing and dilatory behavior, and otherwise ensure that cases move forward apace, litigation under our current rules would be greatly enhanced quite without any need to revise the rules of practice.

You have received and will receive abundant commentary regarding discrete proposed revisions to the rules, and I do not propose to add to that discussion. Rather, as you consider the proposals before you, I hope that you will remain mindful of the need for rules that facilitate equal justice being done between unequally situated litigants.

Thank you for your consideration.

Sincerely,



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