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## **2015 Year-End Report on the Federal Judiciary**

In 1838, John Lyde Wilson, a former governor of South Carolina, made a grim contribution to the literature of dispute resolution by publishing *“The Code of Honor; or Rules for the Government of Principals and Seconds in Duelling.”* That 22-page booklet, sized to fit comfortably alongside a gentleman’s matched pair of dueling pistols, specified the procedure for issuing a challenge, the duties of seconds, and the proper conduct of the duel itself. More detailed than its predecessors, the Irish and French dueling codes, Wilson’s rulebook set out time limits, the form and methods of written communications, the obligation to attempt reconciliation without bloodshed, and—if attempts at mediation failed—how to pace off the field of battle. Wilson professed that he was not advocating that adversaries settle their disputes through duels, but he claimed that dueling was inevitable “where there is no tribunal to do justice to an oppressed and deeply wronged individual.” He suggested that laying out practices and procedures to ensure that duels would be conducted fairly—including

provisions for resolving disputes through apology and compromise—would in fact save lives.

It may be that Wilson's code had exactly the opposite effect, glorifying and institutionalizing a barbarous practice that led to wanton death. Our Nation had lost Alexander Hamilton to a senseless duel in 1804. Abraham Lincoln and Mark Twain could have perished in duels if their seconds, in each instance, had not negotiated an amicable solution. But others were not so fortunate; one historian has calculated that, between 1798 and the Civil War, the United States Navy lost two-thirds as many officers to dueling as it did to more than 60 years of combat at sea.

Public opinion ultimately turned against dueling as a means of settling quarrels. By 1859, eighteen of the 33 States of the Union had outlawed duels. Following the Civil War, a public weary of bloodshed turned increasingly to other forums, including the courts, to settle disputes. But reminders of the practice persist. When Kentucky lawyers are admitted to the bar, they are required, by law, to swear that they have not participated in a duel.

Today, Wilson's pamphlet stands on the bookshelf as a largely forgotten relic of a happily bygone past. But it is also a stark reminder of government's responsibility to provide tribunals for the peaceful resolution

of all manner of disputes. Our Nation's courts are today's guarantors of justice. Those civil tribunals, far more than the inherently uncivilized dueling fields they supplanted, must be governed by sound rules of practice and procedure.

The Rules Enabling Act, 28 U.S.C. §§ 2071 *et seq.*, empowers the federal courts to prescribe rules for the conduct of their business. The Judicial Conference—the policy making body of the federal judiciary—has overall responsibility for formulating those rules. Consistent with that charge, Congress has directed the Conference to “carry on a continuous study of the operation and effect of the general rules of practice and procedure.” 28 U.S.C. § 331. The primary work is done through the Conference's Committee on Rules of Practice and Procedure (known as the Standing Committee), which in turn enlists guidance from advisory committees that focus on the specialties of appellate, bankruptcy, civil, and criminal procedure, and the rules of evidence. Those committees solicit recommendations, conduct public hearings, draft proposed rules, and propose amendments for the Judicial Conference's consideration. If the Judicial Conference concurs, the proposed rules and amendments, together with a report on their promulgation, are submitted to the Supreme Court for its approval. If the Court approves, the rules are then laid before Congress,

by the annual deadline of May 1, for its examination. Unless Congress intervenes by December 1, the new rules take effect.

This process of judicial rule formulation, now more than 80 years old, is elaborate and time-consuming, but it ensures that federal court rules of practice and procedure are developed through meticulous consideration, with input from all facets of the legal community, including judges, lawyers, law professors, and the public at large. Many rules amendments are modest and technical, even persnickety, but the 2015 amendments to the Federal Rules of Civil Procedure are different. Those amendments are the product of five years of intense study, debate, and drafting to address the most serious impediments to just, speedy, and efficient resolution of civil disputes.

The project goes back to 2010, when the Advisory Committee on Civil Rules sponsored a symposium on civil litigation, which brought together federal and state judges, law professors, and plaintiff and defense lawyers, drawn from business, government, and public interest organizations. The symposium, which generated 40 papers and 25 data compilations, confirmed that, while the federal courts are fundamentally sound, in many cases civil litigation has become too expensive, time-consuming, and contentious, inhibiting effective access to the courts. The symposium specifically identified the need for procedural reforms that

would: (1) encourage greater cooperation among counsel; (2) focus discovery—the process of obtaining information within the control of the opposing party—on what is truly necessary to resolve the case; (3) engage judges in early and active case management; and (4) address serious new problems associated with vast amounts of electronically stored information.

The Advisory Committee on Civil Rules set to work on those problems. Over the next three years, the Committee drafted proposed amendments and published them for public comment. It received more than 2,300 written comments and held public hearings in Dallas, Phoenix, and Washington, D.C., eliciting input from more than 120 witnesses. The Committee then revised the amendments in response to the public recommendations. The proposed amendments received further scrutiny from the Standing Committee, the Judicial Conference, and the Supreme Court, before submission to Congress. The amended rules, which can be viewed at <http://www.uscourts.gov/federal-rules-civil-procedure>, went into effect one month ago, on December 1, 2015. They mark significant change, for both lawyers and judges, in the future conduct of civil trials.

The amendments may not look like a big deal at first glance, but they are. That is one reason I have chosen to highlight them in this report. For example, Rule 1 of the Federal Rules of Civil Procedure has been expanded

by a mere eight words, but those are words that judges and practitioners must take to heart. Rule 1 directs that the Federal Rules “should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.” The underscored words make express the obligation of judges and lawyers to work cooperatively in controlling the expense and time demands of litigation—an obligation given effect in the amendments that follow. The new passage highlights the point that lawyers—though representing adverse parties—have an affirmative duty to work together, and with the court, to achieve prompt and efficient resolutions of disputes.

Rule 26(b)(1) crystalizes the concept of reasonable limits on discovery through increased reliance on the common-sense concept of proportionality:

“Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.”

The amended rule states, as a fundamental principle, that lawyers must size and shape their discovery requests to the requisites of a case. Specifically, the pretrial process must provide parties with efficient access to what is needed to prove a claim or defense, but eliminate unnecessary or wasteful discovery. The key here is careful and realistic assessment of actual need. That assessment may, as a practical matter, require the active involvement of a neutral arbiter—the federal judge—to guide decisions respecting the scope of discovery.

The amended rules accordingly emphasize the crucial role of federal judges in engaging in early and effective case management. The prior rules—specifically Rule 16—already required that the judge meet with the lawyers after the complaint is filed, confer about the needs of the case, and develop a case management plan. The amended rules have shortened the deadline for that meeting and express a preference for a face-to-face encounter to enhance communication between the judge and lawyers. The amendments also identify techniques to expedite resolution of pretrial discovery disputes, including conferences with the judge before filing formal motions in aid of discovery. Such conferences can often obviate the need for a formal motion—a well-timed scowl from a trial judge can go a long way in moving things along crisply.

Recognizing the evolving role of information technology in virtually every detail of life, the amended rules specifically address the issue of “electronically stored information,” which has given birth to a new acronym—“ESI.” Rules 16 and 26(f) now require the parties to reach agreement on the preservation and discovery of ESI in their case management plan and discovery conferences. Amendments to Rule 37(e) effect a further refinement by specifying the consequences if a party fails to observe the generally recognized obligation to preserve ESI in the face of foreseeable litigation. If the failure to take reasonable precautions results in a loss of discoverable ESI, the courts must first focus on whether the information can be restored or replaced through alternative discovery efforts. If not, the courts may order additional measures “no greater than necessary” to cure the resulting prejudice. And if the loss of ESI is the result of one party’s intent to deprive the other of the information’s use in litigation, the court may impose prescribed sanctions, ranging from an adverse jury instruction to dismissal of the action or entry of a default judgment.

The rules amendments eliminate Rule 84, which referenced an appendix containing a number of civil litigation forms that were originally designed to provide lawyers and unrepresented litigants with examples of proper pleading. Over the years since their publication, many of those forms



have become antiquated or obsolete. The Administrative Office of the United States Courts assembled a group of experienced judges to replace those outdated forms with modern versions that reflect current practice and procedure. They have largely completed their work. The Administrative Office has already posted 12 revised forms on the federal judiciary's website, with three more to follow in the next month. See <http://www.uscourts.gov/forms/pro-se-forms>.

The 2015 civil rules amendments are a major stride toward a better federal court system. But they will achieve the goal of Rule 1—"the just, speedy, and inexpensive determination of every action and proceeding"—only if the entire legal community, including the bench, bar, and legal academy, step up to the challenge of making real change.

I think we are off to a good start. The Federal Judicial Center, which is the educational and research arm of the federal judiciary, has created a training program for federal judges to ensure they are prepared to introduce the procedural reforms in their courtrooms. Training is necessary for lawyers too, and the American Bar Association and many local bar organizations have initiated educational programs and workshops across the country. The practical implementation of the rules may require some adaptation and innovation. I encourage all to support the judiciary's plans to

test the workability of new case management and discovery practices through carefully conceived pilot programs. In addition, a wide variety of judicial, legal, and academic organizations have supplied key insights in the improvement of both federal and state rules of practice, and they are continuing to provide their perspectives and expertise on the rollout of the new rules. I am confident that the Advisory Committee on Civil Rules will continue to engage the full spectrum of those organizations in its ongoing work.

The success of the 2015 civil rules amendments will require more than organized educational efforts. It will also require a genuine commitment, by judges and lawyers alike, to ensure that our legal culture reflects the values we all ultimately share.

Judges must be willing to take on a stewardship role, managing their cases from the outset rather than allowing parties alone to dictate the scope of discovery and the pace of litigation. Faced with crushing dockets, judges can be tempted to postpone engagement in pretrial activities. Experience has shown, however, that judges who are knowledgeable, actively engaged, and accessible early in the process are far more effective in resolving cases fairly and efficiently, because they can identify the critical issues, determine

the appropriate breadth of discovery, and curtail dilatory tactics, gamesmanship, and procedural posturing.

As for the lawyers, most will readily agree—in the abstract—that they have an obligation to their clients, and to the justice system, to avoid antagonistic tactics, wasteful procedural maneuvers, and teetering brinksmanship. I cannot believe that many members of the bar went to law school because of a burning desire to spend their professional life wearing down opponents with creatively burdensome discovery requests or evading legitimate requests through dilatory tactics. The test for plaintiffs’ and defendants’ counsel alike is whether they will affirmatively search out cooperative solutions, chart a cost-effective course of litigation, and assume shared responsibility with opposing counsel to achieve just results.

I am hardly the first to urge that we must engineer a change in our legal culture that places a premium on the public’s interest in speedy, fair, and efficient justice. But I am motivated to address the subject now because the 2015 civil rules amendments provide a concrete opportunity for actually getting something done.

In the nineteenth century, a change in culture left dueling by the wayside and left us with lessons learned. Joseph Conrad’s novella “*The Duel*” tells the tale, taken from fact, of two gallant French cavalry

officers, D'Hubert and Feraud. Estranged by a trifling slight, they repeatedly duel over a 15-year period. According to newspapers of the era, the real-life antagonists, Dupont and Fournier, would cross swords and draw blood whenever their military service brought them near to one another. Conrad's characters, like the real ones, relentlessly persist in their personal feud through the rise, fall, reemergence, and ultimate exile of Napoleon, as the world transforms around them. In the end, these soldiers, who should have been comrades in a patriotic cause, spent much of their adult lives focused on a petty squabble that left them with nothing but scars. We should not miss the opportunity to help ensure that federal court litigation does not degenerate into wasteful clashes over matters that have little to do with achieving a just result.

Another year has quickly passed, and once again, I am privileged and honored to be in a position to thank all of the judges, court staff, and judicial personnel throughout the Nation for their continued excellence and dedication.

Best wishes to all in the New Year.

## Appendix

### Workload of the Courts

In the 12-month period ending September 30, 2015, caseloads decreased in the Supreme Court, the regional appellate courts, the district courts, the bankruptcy courts, and the pretrial services system. Growth occurred, however, in the number of persons under post-conviction supervision.

#### *The Supreme Court of the United States*

The total number of cases filed in the Supreme Court decreased by 4.65 percent from 7,376 filings in the 2013 Term to 7,033 filings in the 2014 Term. The number of cases filed in the Court's *in forma pauperis* docket decreased by 5.50 percent from 5,808 filings in the 2013 Term to 5,488 filings in the 2014 Term. The number of cases filed in the Court's paid docket decreased by 1.47 percent from 1,568 filings in the 2013 Term to 1,545 filings in the 2014 Term. During the 2014 Term, 75 cases were argued and 75 were disposed of in 66 signed opinions, compared with 79 cases argued and 77 disposed of in 67 signed opinions during the 2013 Term. The Court also issued eight per curiam decisions during the 2014 Term in cases that were not argued.

### *The Federal Courts of Appeals*

In the regional courts of appeals, filings dropped four percent to 52,698. Appeals involving pro se litigants, which amounted to 51 percent of filings, fell four percent. Total civil appeals decreased seven percent. Criminal appeals rose three percent, as did appeals of administrative agency decisions, and bankruptcy appeals grew seven percent.

### *The Federal District Courts*

Civil case filings in the U.S. district courts declined six percent to 279,036. Cases involving diversity of citizenship (i.e., disputes between citizens of different states) fell 14 percent, largely because of a reduction in personal injury/product liability filings. Cases with the United States as defendant dropped seven percent in response to fewer filings of prisoner petitions and Social Security cases. Cases with the United States as plaintiff went down 10 percent as filings of forfeiture and penalty cases and contract cases decreased.

Filings for criminal defendants (including those transferred from other districts) held relatively steady, declining one percent to 80,069. Defendants accused of immigration violations dropped five percent, with the southwestern border districts receiving 79 percent of national immigration defendant filings. Defendants charged with property offenses (including

fraud) fell six percent. Other reductions were reported for filings involving traffic offenses, general offenses, regulatory offenses, and justice system offenses. Drug crime defendants, who accounted for 32 percent of total filings, rose two percent. Increases also occurred in filings related to firearms and explosives, sex offenses, and violent crimes.

### *The Bankruptcy Courts*

Bankruptcy petition filings decreased 11 percent to 860,182. Fewer petitions were filed in all bankruptcy courts but one—the Middle District of Alabama had three percent more filings this year. Consumer (i.e., nonbusiness) petitions dropped 11 percent, and business petitions fell 12 percent. Filings of petitions declined 14 percent under Chapter 7, eight percent under Chapter 11, and three percent under Chapter 13.

This year's total for bankruptcy petitions is the lowest since 2007, the first full year after the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 took effect. From 2007 to 2010, bankruptcy filings rose steadily, but they have fallen in each of the last five years.

### *The Federal Probation and Pretrial Services System*

A total of 135,468 persons were under post-conviction supervision on September 30, 2015, an increase of two percent over the total one year earlier. Of that number, 114,961 persons were serving terms of supervised

release after leaving correctional institutions, a three percent increase from the prior year.

Cases activated in the pretrial services system, including pretrial diversion cases, fell five percent to 95,013.