

CONTROVERSIES SURROUNDING DISCOVERY AND ITS EFFECT ON THE COURTS



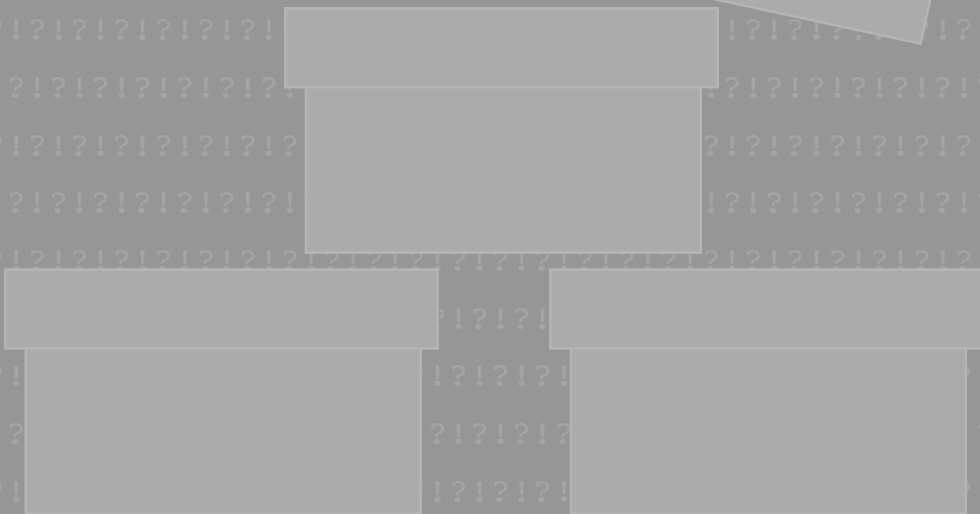
Report of the 1999 Forum for State Court Judges



**ROSCOE POUND
INSTITUTE**

FORUM REPORT ENDOWED BY HABUSH, HABUSH, & ROTTIER, S.C.

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Table of Contents

EXECUTIVE SUMMARY	III
FOREWORD	1
INTRODUCTION	3
PAPERS, ORAL REMARKS, AND COMMENTS	19
“Discovery: Facts and Myths” <i>Dean Robert Gilbert Johnston, John Marshall Law School</i>	19
Oral Remarks of Dean Johnston	28
Comments by Panelists; Response by Dean Johnston; Questions and Comments	33
“Recent Efforts to Change Discovery Rules: Do They Advance the Purposes of Discovery?” <i>Professor Paul D. Carrington, Duke University Law School</i>	51
Oral Remarks of Professor Carrington	67
Comments by Panelists; Response by Professor Carrington; Questions and Comments	72
THE JUDGES’ RESPONSES	87
POINTS OF AGREEMENT AND CLOSING COMMENTS	127
PARTICIPANTS’ BIOGRAPHIES	143
JUDICIAL ATTENDEES	149
FORUM UNDERWRITERS	155
ABOUT THE ROSCOE POUND INSTITUTE	157



Executive Summary

On July 14, 1999, in San Francisco, California, 115 judges, representing 36 jurisdictions, took part in the Roscoe Pound Institute's Forum for State Court Judges. The judges examined the current controversy over the discovery process in litigation and its impact on the courts.

Two legal scholars presented papers addressing different facets of this controversy:

- Dean Robert Gilbert Johnston, of the John Marshall Law School in Chicago, delivered a paper titled "Discovery: Facts and Myths." He began by placing the role of myths in context, both in the legal process as a whole and specifically with regard to discovery. He also reminded readers of two important qualifications to the "fact" and "myth" labels: that changing circumstances can turn what had been merely a myth in the past into fact in the present, and that the same body of data can sometimes be used to prove both the myth and the apparently contradictory fact. Dean Johnston then discussed five myths that are frequently invoked on behalf of changes to discovery rules and that, he argues, should be viewed with suspicion if not debunked entirely: (1) "discovery use and abuse are the cause of unnecessary cost and delay"; (2) "a short discovery period, by itself, leads to faster case dispositions"; (3) "there are too many depositions, and depositions take too long"; (4) "initial disclosure reduces costs, delays, and other discovery"; and (5) "discovery will be more efficient and effective if attorneys meet and confer about discovery issues." He cited empirical research that undercuts those claims. Finally, Dean Johnston urged continuing empirical research in the area of discovery, and he appealed to those who have duties in the development of rules of procedure to consult the existing empirical evidence carefully before making changes in their court systems' rules.
- Professor Paul D. Carrington, of Duke University Law School, presented a paper titled "Recent Efforts to Change Discovery Rules: Do They Advance the Purposes of Discovery?" He began by comparing discovery, as a unique American system, with earlier code pleading and with the judge-managed systems of other countries. He demonstrated that, although discovery is intended to support court decisions rooted in facts and law, it also has enhanced the law-enforcement powers and practices of courts and reduced reliance on administrative regulation. That development has led to increased interest in the courts, and lobbying of judicial institutions, by business organizations that would otherwise be facing regulatory agencies. The result has been a conflation of substantive tort "reform" issues and proposals with the process of procedural reform. Professor Carrington compared recent proposals for changes in discovery to the original purposes of discovery. He then considered "judicial case management," which he views as a costly, radical departure from legal tradition that has failed to reduce cost and delay substantially, that has diverted courts from law enforcement and judges from their central role of judging cases, and that has increased pressures on judges to control many aspects of litigation that can and should be left to lawyers. Addressing a proposal to restrict the scope of discovery to matters related to the parties' "claims and defenses," he warned that it endangers the notice

pleading regime and lends tacit approval to resistance to discovery. Finally, Professor Carrington discussed other avenues of reform that he believes would produce real benefits, and he commended them to state rules committees for consideration.

Following the authors' presentations, panels consisting of both judges and trial attorneys scrutinized the papers. After commentaries from the panelists and responses by the paper presenters, the judges divided into seven discussion groups to give their own responses to the papers and to discuss a number of standardized questions under a guarantee of confidentiality.

At the closing plenary session, the discussion group moderators reported that agreement emerged from the dialogue within individual groups, along the following lines:

- There is no general discovery problem that is applicable to all cases and all courts. There are, of course, discovery problems related to particular cases and types of cases, to the personalities of lawyers and judges, and to particular issues. However, such problems do not warrant broad changes to the present rules. They can be addressed at present through, *inter alia*, tailoring discovery to the case and using existing court powers over lawyers and causes. For example, attorneys who intentionally conceal discovery materials already can be sanctioned, and courts can exert leverage over discovery practice by setting a firm trial date and holding to it.
- Discovery practice should be uniform across the entire federal system, but it is neither necessary nor desirable that it be made uniform between the federal and state systems, or among the states as a whole. Within individual states, tailoring discovery approaches to the case is useful, but judges already have the power to do so.
- Judicial management of discovery matters is necessary in some, but by no means all, cases. Experienced lawyers handling average cases can manage most discovery issues, but high-stakes, "big discovery" cases tend to require court intervention. Trial court judges reported that they have often had to intervene in discovery disputes, whereas the volume of discovery rulings that reached appellate judges varied considerably. There were opinions both for and against allowing appeals of discovery rulings by trial courts.
- On several specific discovery issues agreement emerged as follows:
 - 1) Depositions may appropriately be limited in time or number, but they should not be restricted with "one size fits all" rules. Initial (or early) disclosure of facts may help move cases along faster and with less cost.
 - 2) The utility of "meet and confer" rules varies greatly with the attorneys involved.
 - 3) There is no need to change the scope of discovery to a "claims and defenses" standard.
 - 4) Shifting costs to the losing party in discovery disputes can be effective,



but judges must be wary lest they impose the sanction where a reasonable disagreement, not misconduct, has caused the dispute.

- With some reservations, the judges were generally favorable to Professor Carrington's suggestions for future discovery reforms (limiting the number of depositions, reserving objections to deposition questions, reopening of depositions, using videotaped depositions at trial, confidential production of documents, and imposing greater restrictions on suppression of discovery materials as a condition of settlement).
- Discovery per se is not a major contributor to cost and delay. The high cost of discovery that is often noted usually results from the high stakes of the litigation. When discovery is the biggest cost item in litigation, such cost is usually attributable to the development of substantial information that permits informed settlement decisions, thus eliminating trial and appeal costs.
- Overall, discovery has a positive effect on the administration of justice in the United States.





Foreword

The Roscoe Pound Institute's sixth Forum for State Court Judges was held in July 1999, in San Francisco, California. Like all of our past forums, it was both enjoyable and thought-provoking. In the forum setting, judges, practicing attorneys, and legal scholars were able to consider a number of recent controversies about discovery that have led to numerous proposals to reform the Federal Rules of Civil Procedure.

We recognize that the state courts have the principal role in the administration of justice in the United States and that they carry by far the heaviest of our judicial workloads. We try to support them in their work by offering our annual forums as a venue where judges, academics, and practitioners can have a brief, pertinent dialogue in a single day. These discussions sometimes lead to consensus, but even when they do not, the exercise is bound to be fruitful. Our attendees always bring with them different points of view, and we make additional efforts to include panelists with outlooks that differ from those of most of the Pound Institute's Fellows. That diversity of viewpoints always emerges in our Forum Reports.

Our previous five Forums for State Court Judges were devoted to other cutting-edge topics such as the impact on state courts of the Long Range Plan for the Federal Courts, the impact of the budget crisis on judicial functions, the American Law Institute's Restatement on products liability, the scientific evidence controversy, and judicial independence. We are proud of our forums and are gratified by the increasing registrations we have experienced since their inception, as well as by the very positive comments we have received from judges who have attended in the past.

The 1999 Forum's topic, *Controversies Surrounding Discovery and Its Effect on the Courts*, is not a "federal" subject, despite its origin in proposals to amend the federal civil rules. It is equally topical in all of the states. What happens in the federal courts today will inevitably affect state courts in the future—for instance, through state rulemaking activities inspired by changes in the Federal Rules—even if the states determine that they are satisfied by their current rules. Nor is discovery a "trial court" topic. It affects the justice that emerges from every court in the country, at every level.

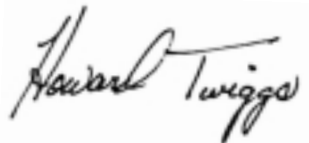
The Pound Institute is indebted to many people for the success of the 1999 Forum for State Court Judges:

- To Dean Robert Gilbert Johnston, of the John Marshall Law School, and to Professor Paul D. Carrington, of Duke University Law School, who wrote the papers that started our discussions.
- To our panelists, Gerson Smoger, Francis "Brother" Hare, Honorable Paul Niemeyer, Honorable Gerald Elliott, Andy Scherffius, Kathryn Clarke, Lloyd Milliken, and Honorable Shirley Strickland-Saffold. We were particularly pleased to have Judge Niemeyer with us, as he was at that time the Chair of the Advisory Committee on Civil Rules of the Judicial Conference of the United States, which is responsible for developing rule change proposals.
- To the moderators of our small-group discussions for helping us to arrive at the essence of the forum, which is what experienced state court judges think about the issues we discussed.


- We enjoyed greatly the lunchtime companionship of the late Judge Sam Ervin III from the United States Court of Appeals for the Fourth Circuit, who, in the space of a few minutes, reminded us how important it is to be able to laugh—even to laugh at ourselves on occasion.

It goes without saying that we appreciated the attendance of the distinguished group of judges who took time from their busy schedules so that we might all learn from one another.

We hope you enjoy reviewing this Report of the Forum, and that you will find it useful in your future consideration of discovery matters.



Howard F. Twiggs
President
Roscoe Pound Institute
1997–1999



Larry S. Stewart
President
Roscoe Pound Institute
1999–2001



BACKGROUND ON THE CONTROVERSY SURROUNDING DISCOVERY AND ITS EFFECT ON THE COURTS

Five hundred years ago, the law was a game, the processes of which were continually and openly employed by means of obscure technicalities, serving no useful purpose.... Recently, with increasing frequency, the bar and the courts have taken radical steps... to simplify and develop promptly, and dispose of, finally and clearly, the real issues in the case.... It is clearly the duty of the bar to cooperate wholeheartedly in developing all such new procedures and in making them work practically.¹

“ADEQUATE, EFFECTIVE, AND MEANINGFUL” ACCESS TO JUSTICE

Guaranteed access to justice for redress of legally cognizable harms has long been recognized as one of the foundational principles of the legal system of the United States. In the seminal case of *Marbury v. Madison*,² Chief Justice John Marshall declared that “[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.”

That guarantee is still recognized and enforced by American courts. In a very recent case with implications for discovery, the United States Court of Appeals for the District of Columbia Circuit affirmed that deprivation of the right of access to the courts, by itself, is actionable:

“[T]he right to sue and defend in the courts,” the Supreme Court long ago said, “is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship.” The right not only protects the ability to get into court, but also ensures that such access be “adequate, effective, and meaningful.”³

The right to sue and defend in the courts not only protects the ability to get into court, but also ensures that such access be adequate, effective, and meaningful.

1. HENRY S. DRINKER, LEGAL ETHICS 83 (1953). See Forum paper of Professor Paul D. Carrington, fn.32.
2. 5 U.S. (1 Cranch) 137, 163 (1803).
3. *Harbury v. Deutch*, 233 F.3d 596, 607 (D.C. Cir. 2000) (citations omitted). In *Harbury*, a widow brought a *Bivens* action, claiming that U.S. government officials participated in the torture and murder of her husband, a Guatemalan citizen, and that, for more than a year and a half after his death, government officials systematically concealed information from her and misled her about her husband’s fate. The district court dismissed her suit, but the court of appeals reversed and remanded, holding, *inter alia*, that the widow had stated a claim for deprivation of her right of access to the courts, and that National Security Council and State Department officials were not entitled to qualified immunity from that claim.



It is around these first principles that the American civil justice system has developed—a system that purposefully facilitates access to the courts through notice pleading, liberal discovery, an inviolate guarantee of trial by jury, and evidentiary rules designed and predicated on the notion that evidence that can assist the fact finder in making determinations will be admitted so that it may be scrutinized. The discovery and evidence regimes that have evolved from the early American courts are critical components of this system. Used properly, they contribute substantially to fair trials and to the early settlement of actions that are amenable to resolution without trial. Used improperly, they can contribute to profound, irreparable injustice.

For parties who go to court to resolve disputes, the availability of discovery is critical. Yet its proper use requires that lawyers recognize that they owe a public duty as officers of the court to look beyond narrow client interests and to act responsibly to assist the court in the fair resolution of litigation. Judges, of course, are required to abide by even higher standards that require neutrality in the decision-making process.

The proposals to alter the discovery process of the federal courts that were the subject matter of the 1999 Roscoe Pound Institute's Forum for State Court Judges were part of a broad, national, long-term conversation about the discovery system that includes a number of related issues: the conduct of current discovery practice; the costs and benefits of the current discovery regime; discovery's role in unearthing evidence of hazards to public health, dangerous product defects, unfair business practices, and personal and corporate irresponsibility and negligence; discovery as an adjunct to or substitute for the types of government regulation of industry found in many other western countries; pressures from industry in the United States and throughout the world to change the American discovery system; and discovery's overall role in the pursuit of justice. The conversation has also included questions about the federal courts' rulemaking process and particularly the critical question of whether that process was changing from a remote, disinterested expert analysis of the needs of the federal courts and the litigants who are their "customers" to merely another exercise in lobbying by partisan interests.

The conversation on discovery has yet to conclude, and it has reached fundamental issues of access to justice in America's courts. The Roscoe Pound Institute is gratified that its 1999 Forum for State Court Judges could serve as a part of that continuing conversation.

RULEMAKING FOR THE FEDERAL COURTS⁴

Some grasp of the governance of the federal courts and of the federal rulemaking process is helpful to understand how the discovery amendments discussed at the forum came to be proposed and how they moved toward adoption. It may also shed light on similar proposals to amend state court rules and the arguments most likely to be made in their support.

4. The general information on federal rulemaking in this Introduction is *adapted* from the Federal Judiciary's Internet site visited Feb. 1, 2001<www.uscourts.gov>.

The federal court system governs itself on the national level through the Judicial Conference of the United States,⁵ whose institutional predecessor was created by Congress in 1922 to “serve as the principal policy making body concerned with the administration of the United States Courts.” Through the Rules Enabling Act,⁶ Congress has authorized the Conference to recommend amendments and additions to the rules to promote “simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay”—subject to the ultimate legislative right of the Congress to reject, modify, or defer any of the rules the Conference recommends.

The Conference operates through a network of committees created to address and advise on a wide range of subjects. The Conference’s rulemaking responsibilities are coordinated by its Committee on Rules of Practice and Procedure, commonly referred to as the “Standing Committee,”⁷ which in turn relies on five Advisory Committees on Appellate Rules, Bankruptcy Rules, Civil Rules, Criminal Rules, and Evidence Rules to assist it.⁸ The Standing Committee reviews and coordinates the recommendations of the five advisory committees and recommends to the Judicial Conference such proposed rules changes “as may be necessary to maintain consistency and otherwise promote the interests of justice.”⁹

The Conference describes its process of amending federal court rules as follows:

The pervasive and substantial impact of the rules on the practice of law in the federal courts demands exacting and meticulous care in drafting rule changes. The rulemaking process is time-consuming and involves a minimum of seven stages of formal comment and review. From beginning to end, it usually takes two to three years for a suggestion to be enacted as a rule.

The process, however, may be expedited when there is an urgent need to amend the rules.

All interested individuals and organizations are provided an opportunity to

Congress has authorized the Conference to recommend amendments to the rules to promote “simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay.”

5. The Judicial Conference is composed of 27 federal judges: the Chief Justice of the United States (who serves as the presiding officer); the chief judges of the 13 courts of appeal; the chief judge of the Court of International Trade; and 12 district judges from the regional circuits, who are chosen by the judges of their circuit to serve terms of three years. The Conference meets twice yearly to consider policy issues affecting the federal courts, to make recommendations to Congress on legislation affecting the judicial system, to review proposed amendments to the federal rules of practice and procedure, and to consider administrative problems of the courts.
6. 28 U.S.C. §§ 2071–2077.
7. 28 U.S.C. § 2073(b).
8. 28 U.S.C. § 2073(a)(2). Both the Standing Committee and the Advisory Committees are composed of federal judges, practicing lawyers, law professors, state chief justices, and representatives of the Department of Justice. Each committee has as its Reporter a prominent law professor, who is responsible for coordinating the committee’s agenda and drafting appropriate amendments to the rules and explanatory committee notes.
9. 28 U.S.C. § 2073(b).



comment on proposed rules amendments and to recommend alternative proposals. The comments received from this extensive and thorough public examination are studied very carefully by the committees and generally improve the amendments. The committees actively encourage the submission of comments, both positive and negative, to ensure that proposed amendments have been considered by a broad segment of the bench and bar.¹⁰

Meetings of the rulemaking committees are open to the public. Records of the committees, including minutes of committee meetings, suggestions and comments submitted by the public, statements of witnesses, transcripts of public hearings, and memoranda prepared by the Reporters, are public and are maintained by the Standing Committee's secretary.¹¹

THE 1998 DISCOVERY PROPOSALS

The nature and process of federal court rulemaking, and the particular process for the 1998 amendments¹² that were discussed at the 1999 Pound forum, were subjects of considerable discussion during the rulemaking debate. Many details of both the general and particular processes are discussed in the papers and commentary set out in this report. Accordingly, there is no need to describe them in detail in this introduction.

The key concepts behind the 1998 discovery proposals originated in the late 1970s; both the American Bar Association's Section of Litigation and the American College of Trial Lawyers played roles in their promotion.¹³ At the 1999 Pound forum, the design of the Advisory Committee's inquiry, the course of its study, and its debate on the suggestions were reviewed in condensed form by forum speaker Honorable Paul V. Niemeyer, who served as chair of the Advisory Committee during its consideration of the 1998 proposals.¹⁴ He described the inquiry as beginning with the rhetorical question: Is there a problem with the discovery system? The inquiry was then broken into several questions more amenable to empirical research: What does discovery contribute to the civil justice system? What are its costs and benefits? and, Is discovery too expensive for what it contributes?¹⁵

10. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, *THE FEDERAL RULES OF PRACTICE AND PROCEDURE: A SUMMARY FOR BENCH AND BAR* (1997). This pamphlet may be viewed at the Federal Judiciary's Internet site visited Feb. 1, 2001 <<http://www.uscourts.gov/rules/proceduresum.htm>>.
11. The latest proposed amendments may be viewed on the Federal Judiciary's Internet site visited Feb. 1, 2001 <<http://www.uscourts.gov>>.
12. Hereinafter 1998 Proposals. The proposals were published for public comment in August 1998. See Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure and Evidence, Request for Comment, August 1998.
13. "A scope revision was originally proposed by the ABA Section of Litigation more than 20 years ago. It has been revived a number of times since then, most recently by the American College of Trial Lawyers." Proposed Amendments presented to Standing Committee, Summary of Comments at 86 [hereinafter Proposed Amendments]. Those finalized proposals may be viewed at <<http://www.uscourts.gov/rules/archive/1999/propcivil.pdf>> (visited Feb. 1, 2001). Cf. *The Discovery Rules Are Changing: What To Do Now?*, 41, CIVIL RIGHTS AND EEO NEWS Aug. 16, 2000 (Lawyers' Committee for Civil Rights Under Law), at 1: "The changes in the Federal Rules of Civil Procedure that will go into effect on December 1, 2000, originated in the prodding of two groups dominated by defense lawyers: the American Bar Association's Section of Litigation and the American College of Trial Lawyers."
14. See pp. 33 to 37 of this Report.
15. "The Committee determined expressly not to review the question of discovery abuse, a matter that had been the subject of repeated rules activity over the years." Advisory Committee Report to Standing Committee, May 11, 1999, at 3 [hereinafter Advisory Committee 1999 Report] (emphasis in original). The report is viewable at <<http://www.uscourts.gov/rules/archive/1999/repcivil.pdf>> (visited Feb. 1, 2001).



Studies, Conferences, Hearings and Debate

To broaden the available empirical knowledge about discovery and to assist the Advisory Committee with its inquiry, the committee commissioned two new studies:

- The Committee asked the RAND Institute for Civil Justice¹⁶ to conduct further analyses of data it had previously compiled on the effects of the 1992 Civil Justice Reform Act (CJRA),¹⁷ to see if additional light could be shed on discovery management.¹⁸
- The Committee also asked the Federal Judicial Center (FJC) to conduct a study of the extent to which discovery was used in civil cases and what costs were associated with it.¹⁹

Another major component of the Advisory Committee's study of the issue was a conference held at Boston College Law School in 1997, to which the rulemakers invited "a most distinguished group from the academic community, the bench, the bar, and representatives from various bar associations."²⁰ The conference included panel discussions and presentations of academic papers.²¹

For a third source of information, the Advisory Committee solicited public comments on its August 1998 Preliminary Draft of its proposals and received more than 300 responses. The Committee also conducted hearings in San Francisco, Chicago, and Baltimore, at which numerous witnesses made written and oral statements about the discovery system and the proposed amendments, and members of the Advisory Committee questioned them further about their views.²²

16. A profile of the Institute for Civil Justice appears on RAND's Internet site visited Feb. 1, 2001 <www.rand.org/centers/icj>.
17. 28 U.S.C. §§ 471–482 (Supp. IV 1992).
18. RAND had published its previous analysis of the CJRA as JAMES A. KAKALIK ET AL., RAND INSTITUTE FOR CIVIL JUSTICE, JUST, SPEEDY AND INEXPENSIVE? AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT (RAND Institute for Civil Justice 1996). An independent review of the CJRA's effects was required under the terms of the Act. The later study commissioned by the Advisory Committee is DISCOVERY MANAGEMENT: FURTHER ANALYSIS OF THE CIVIL JUSTICE REFORM ACT EVALUATION DATA (RAND Institute for Civil Justice 1998). It was published at 39 B.C. L. REV. 613 (1998).
19. The study is Thomas E. Willging et al., *Discovery and Disclosure Practice, Problems, and Proposals for Change* (Federal Judicial Center 1997). It was published as *An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments*, 39 B.C. L. REV. 525 (1998).
20. Advisory Committee 1999 Report, *supra* n. 15, at 3. The organizations included the American Bar Association Section of Litigation, the American College of Trial Lawyers, the Association of Trial Lawyers of America (ATLA), the Defense Research Institute, Trial Lawyers for Public Justice, and the Product Liability Advisory Council. *Id.*
21. The commissioned studies and the Boston College conference papers were later published in the *Boston College Law Review*: Paul V. Niemeyer, *Here We Go Again: Are the Federal Discovery Rules Really in Need of Amendment?* 39 B.C.L. REV. 517 (1998); Thomas E. Willging et al., *An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments*, 39 B.C. L. REV. 525; Bryant G. Garth, *Two Worlds of Civil Discovery: From Studies of Cost and Delay to the Markets in Legal Services and Legal Reform*, 39 B.C. L. REV. 597; James S. Kakalik et al., *Discovery Management: Further Analysis of the Civil Justice Reform Act Evaluation Data*, 39 B.C. L. REV. 613 [hereinafter RAND]; Linda S. Mullenix, *The Pervasive Myth of Pervasive Discovery Abuse: The Sequel*, 39 B.C. L. REV. 683; Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691; Richard L. Marcus, *Discovery Containment Redux*, 39 B.C. L. REV. 747; Judith A. McKenna & Elizabeth C. Wiggins, *Empirical Research on Civil Discovery*, 39 B.C. L. REV. 785; Honorable Edward Becker, Honorable Wayne Brazil, Professor Paul Carrington, John Frank, Mark Gitenstein, Honorable Patrick Higginbotham, Honorable Robert Keeton, Professor Arthur Miller and Honorable Thomas Phillips, *Transcript of the "Alumni" Panel on Discovery Reform*, 39 B.C. L. REV. 809.
22. See Advisory Committee 1999 Report: Summary of Public Comments, viewable at <<http://www.uscourts.gov/rules/archive/1999/summary.pdf>> (visited Feb. 1, 2001) [hereinafter Public Comments]. *Caveat*: Language set out below within quotation marks is verbatim from the source cited. Comments that do not appear within quotation marks are taken directly from the Advisory Committee's Summary of Public Comments and may or may not represent the verbatim comments of the cited organization or individual.



COMMENTARY ON THE PROPOSALS

Although all of the 1998 proposed amendments prompted a number of comments, two specific proposals were the most controversial:

- A proposal to narrow the scope of civil discovery defined in Rule 26(b)(1) from “the subject matter involved in the pending action” to “the claim or defense of any party”;
- A proposal to “make explicit,” by additional language in Rule 26(b)(2), the authority of federal courts to impose costs on those seeking discovery of material that was found to be outside the limits set out in Rule 26(b)(1).²³

Numerous comments were filed both for and against the proposals, and they were both supported and opposed vigorously by practitioners, judges, and legal organizations.

A representative of defense organizations commented that the amendments do not go far enough to address some genuine concerns, but are a well-balanced package that recognizes the failures of modern discovery.

General Comments

Some comments were addressed to the entire 1998 package of civil rules amendments.

Advisory Committee:

- “[The Committee] acted most selectively to adopt a modest, balanced package to address identified problems in a manner comfortable to the practicing bar and to the courts.”²⁴

Supporters:

- **Alfred W. Cortese, Jr.:** Even though they do not go far enough to address some of the genuine concerns of our members, the amendments are a well-balanced package that recognizes the failures of modern discovery and should set the system on a corrected course toward greater certainty, more precise standards, and a workable structure for discovery that will help correct some of the most serious problems.²⁵

- **John G. Scriven, General Counsel, Dow Chemical Company:** The proposed amendments are balanced and will contribute significantly to restoring order and predictability to the civil justice system.²⁶

- **State Bar of Arizona:** Its Civil Practice and Procedure Committee voted unanimously to recommend adoption of the discovery package. The State Bar’s Board of Governors endorsed the committee’s view.²⁷

23. This proposal was originally conceived as an amendment to Rule 34(b), but the Advisory Committee relocated it to Rule 26.

24. Advisory Committee 1999 Report, *supra* n. 15, at 2.

25. Public Comments, *supra* n. 22, at 178. Mr. Cortese stated that his comments were made on behalf of the Chemical Manufacturers Association, the Defense Research Institute, the Federation of Insurance and Corporate Counsel, the International Association of Defense Counsel, Lawyers for Civil Justice, the National Association of Manufacturers, and the Product Liability Advisory Council. See Public Comments at 39. Mr. Cortese heads Cortese PLLC, which “supplies legal services to companies interested in reforming the legal system as well as strategic advice concerning legislation and regulations that impact their businesses.” See Facing Up To the Challenge of Electronic Discovery, METROPOLITAN CORPORATE COUNSEL, Nov. 2000, at 51.

26. Public Comments, *supra* n. 22, at 188.

27. *Id.* at 181.



Opponents:

■ **Honorable Avern Cohn, U.S. District Court for the Eastern District of Michigan:** Based on 19 years as a judge, there is no need for a change in the rules if discovery is working fine in most cases. Rule changes won't solve the problem in cases that have gotten out of control; that's for the judge to handle.²⁸

■ **ATLA:** Out of an undifferentiated concern about expense and other matters whose significance has been exaggerated, the Committee has developed proposed rules that would impair access to justice for a wide variety of plaintiffs. Although the proposals emphasize cost and delay, the changes will not improve matters in these regards, and they may increase costs for plaintiffs. Yet the greatest problem with discovery—failure to comply with proper discovery demands—goes unremedied.²⁹

■ **New York State Bar Association, Commercial and Federal Litigation Section:** Major changes should not be made when discovery is working well in most cases. There are problem cases, but the changes do not target only those cases.³⁰

■ **NAACP Legal Defense Fund:** The proposals would work an unintentional but substantial shift in substantive advantage in favor of defendants in the discovery process, especially in suits brought under the federal civil rights statutes.³¹

A federal judge commented that, based on 19 years as a judge, he saw no need for changes: "Rule changes won't solve the problem in cases that have gotten out of control; that's for the judge to handle."

Scope-of-Discovery Proposal

Advisory Committee:

■ "At the Boston conference in particular, the Committee heard a nearly universal demand from the bar for national uniformity in discovery rules and a profound wish that the judiciary could be encouraged to engage in discovery issues earlier in each case and more completely. Both anecdotal and survey data seem to demonstrate that early judicial supervision of discovery reduces the cost of discovery and increases the parties' satisfaction with it."³²

■ "The Committee has heard that in some instances, particularly cases involving large quantities of discovery, parties seek to justify requests that sweep far beyond the "claims and defenses" of the parties on the ground that they nevertheless have a bearing on the 'subject matter' involved in the action.... The rule change signals to the court that it has the authority to confine discovery to the "claims and defenses" asserted in the pleadings, and signals to the parties that they have no entitlement to discovery to develop new claims or defenses that are not already identified in the pleadings."³³

28. *Id.* at 178–79.

29. *Id.* at 182.

30. *Id.* at 179.

31. *Id.* at 184.

32. Advisory Committee 1999 Report, *supra* n. 15, at 4.

33. Proposed Amendments, *supra* n. 13, committee note at 83, 84.



Document discovery imposes huge costs on companies like Ford Motor Company, and the scope of discovery is one reason why this is so.

Supporters:

- **Maryland Defense Counsel, Inc.:** The Amendment would be at least a directionally correct step towards reducing unnecessarily burdensome and costly pursuit of information.³⁴
- **Robert Biskup, representing Ford Motor Company:** Document discovery imposes huge costs on companies like Ford, and the scope of discovery is one reason why this is so.³⁵

- **Frederick C. Kentz, III, General Counsel of Roche Pharmaceuticals:** The development of a drug can take 15 years and result in creation of hundreds of thousands of pages of documents. Many of these relate to indications of adverse events unrelated to plaintiff's claim. These documents are then fodder for discovery battles. This results in an enormous expenditure of time and money on matters that do not further the litigation.³⁶

Opponents:

- **National Association of Consumer Advocates:** It will cause defendants to resist legitimate discovery.³⁷
- **Lawyers' Committee for Civil Rights Under Law:** This change is not supported by empirical research. Constricting discovery will have an impact on substantive rights.³⁸
- **ATLA:** This will generate satellite litigation. ATLA doubts that the [federal district courts] can realistically handle the resulting disputes.³⁹
- **United States Department of Justice:** The department does not support bifurcating discovery between attorney-managed and court-managed discovery.... There is often a serious imbalance of information regarding access to relevant facts at the pleading stage, and this change would worsen that problem and might be inconsistent with notice pleading. To limit discovery to claims pled could make discovery a game of pleading skill.⁴⁰

Cost-Shifting Proposal

Advisory Committee:

- "For many years... the Committee had received complaints from the bar and the public that discovery costs too much."⁴¹
- "The amended rule... makes explicit the authority that the Committee believes already exists under subdivision (b)(2) to condition marginal discovery on cost bearing—to offer a party that has sought discovery beyond the limitations of

34. Public Comments, *supra* n. 22, at 75.

35. *Id.* at 101–02.

36. *Id.* at 79.

37. *Id.* at 77.

38. *Id.* at 82.

39. *Id.* at 112.

40. *Id.* at 87–88.

41. Advisory Committee 1999 Report, *supra* n. 15, at 3.



(b)(2)(i), (ii), or (iii) the alternative of bearing part or all of the cost of that peripheral discovery rather than to forbid it altogether.... It is not expected that this cost bearing provision would be used routinely.... In determining whether to order cost-bearing, the court should ensure that only reasonable costs are included, and... it may take account of the parties' relative resources in determining whether it is appropriate for the party seeking discovery to shoulder part or all of the cost of responding to the discovery."⁴²

Supporters:

- **Frederick C. Kentz III, General Counsel of Roche Pharmaceuticals:** In pharmaceutical litigation, plaintiffs routinely seek discovery of all reported adverse events, clinical trials, and other documents not relevant to the core issues in the case. It would be preferable if the discovery of these materials were not permitted.⁴³
- **John G. Scriven, General Counsel, Dow Chemical Company:** [The committee note] should stress that the primary goal should be for the judge to carefully scrutinize any [requests for] discovery beyond the initial disclosure, and that the presumption should be toward barring that discovery.⁴⁴
- **G. Edward Pickle, General Counsel, Shell Oil Company:** Document production abuses are at the core of most discovery problems, particularly in larger or more complex matters. Shell strongly urges that the rule or the [Committee] note state that "court-managed" discovery on a good cause showing under Rule 26(b)(1) presumptively be subject to cost shifting, absent a showing of bad faith on the part of the responding party.⁴⁵

Opponents:

- **New York State Bar Association, Commercial and Federal Litigation Section:** If attorneys' fees, client overhead, and the like are included, the proposal involves funding an adversary's case.⁴⁶
- **Lawyers' Club of San Francisco:** [The proposed amendment would] increase the prevalence of cost-bearing orders. Doing so would increase financial disincentives for individuals to conduct litigation against corporate and institutional defendants. As such, it would impede and restrict discovery unnecessarily by individual clients.⁴⁷
- **ATLA:** ATLA generally opposes proposals to institute cost-shifting measures as leading to abrogation of the American rule that parties bear their own expenses of litigation. Even if the proposal only makes explicit authority that was already in the rules, it appears a move in the wrong direction.⁴⁸

A lawyers' club predicted that the proposed amendment would increase the prevalence of cost-bearing orders.

42. Proposed Amendments, committee note on Rule 26(b)(2), *supra* n. 13, at 91–92.

43. Public Comments, *supra* n. 22, at 159.

44. *Id.* at 171–72.

45. *Id.* at 167.

46. *Id.* at 155.

47. *Id.* at 157.

48. *Id.* at 159–60.



- **Lawyers' Committee for Civil Rights Under Law:** This will establish what some judges will view as a presumption that documents should only be produced on payment of the other party's costs of production. It would also establish a two-track system of justice based on wealth.⁴⁹

Suggestions for Other Amendments

In addition to supporting or opposing the 1998 proposals themselves, some commentators, in some cases asserting that the amendments did not address the "real" current problems of discovery, suggested other areas for the attention of the Advisory Committee.

An organization of plaintiff lawyers suggested a specific examination of the recalcitrance of litigants to make reasonable and necessary discovery in good faith.

- **ATLA:** Suggested a specific examination of the recalcitrance of litigants in both tort and business litigation to make reasonable and necessary discovery in good faith. The problem includes allegations of spoliation of evidence, which have been prominent in litigation involving alleged deceptive life insurance sales practices and alleged contamination of an agricultural fungicide.⁵⁰

ATLA also suggested examination of the practice of some tort defendants (sometimes concentrated in particular industries) to impose delays and excessive costs on plaintiffs, evidently as a purposeful litigation strategy.⁵¹

- **Defense Research Institute:** Believes that there should be presumptive time limits placed on discovery of documents and electronic materials. It notes that E-mail messages are more akin to telephone conversations than to written memoranda, and suggests that they should be treated as such.⁵²

49. *Id.* at 161.

50. Letter from ATLA president Mark S. Mandell to the secretary of the Standing Committee, Feb. 1, 1999 (citing *In re* the Prudential Ins. Co. of America Sales Practices Litig., 169 F.R.D. 598 (D.N.J. 1997) and *In re* E. I. DuPont de Nemours & Co.-Benlate Litig., 99 F.3d 363 (11th Cir. 1996)).

51. Letter from ATLA president Richard H. Middleton, Jr., to Chief Justice William H. Rehnquist (in his role of Chair of the Judicial Conference), Sept. 7, 1999, citing *Smith v. R.J. Reynolds Tobacco Co.*, 630 A.2d 820, 826 n.7 (N.J. Super. 1993), in which the court noted a memo from a tobacco company attorney, uncovered through discovery, that acknowledged that

the aggressive posture we have taken regarding depositions and discovery in general continues to make these cases extremely burdensome and expensive for plaintiffs' attorneys, particularly sole practitioners. To paraphrase General Patton, the way we won these cases was not by spending all of Reynolds' money, but by making that other son of a bitch spend all his.

See also letter from ATLA president Mark S. Mandell to the secretary of the Standing Committee, Feb. 1, 1999, citing *Traxler v. Ford Motor Co.*, 576 N.W.2d 398, 400 (Mich. App. 1998), in which the appellate court quoted the trial judge's statement that

[f]or over two years, Ford had concealed very significant documents and information, and, worse, had blatantly lied about those documents and about the information in them; any word other than "lied" would understate what Ford did... [T]his Court had to agree that an outrageous fraud has been perpetrated by Ford... and that the sanction of a default... is the appropriate response.

But see comments of Robert T. Biskup, Esq., on behalf of Ford Motor Co., made at the Chicago hearing:

The amorphous subject matter standard [for scope of discovery] is being used a lot for tactical advantage.... The problem is not limited to complex cases, and it has given birth to a roll-the-dice mentality on the part of plaintiffs' counsel. Ford regularly finds itself in the same boat, and in part because judges feel handcuffed by the current rules. That's why the change [in the definition of the scope of discovery] that has been proposed is needed.

52. Public Comments, *supra* n. 22, at 190. The Advisory Committee has since taken up this question with assistance from Federal Judicial Center researchers.



- **ATLA:** Suggested consideration of the distinctive approaches to expert witness discovery employed in New York and Oregon, where there are no pretrial depositions of expert witnesses. Proponents of that discovery regime argue that problems of excessive delay and cost in discovery in those states are negligible.⁵³
- **Alfred W. Cortese, Jr.:** Urged further attention to methods of reducing the burdens and delays attendant on the review of documents to avoid producing privileged materials.⁵⁴

Academic Criticism

A strong argument can be made, of course, that support and opposition of individuals and groups with obvious interest in the outcome is inevitable and, therefore, must be discounted. In the case of the 1998 amendments, however, the opposition included several well-qualified, nonpartisan academics who were long-time observers of discovery matters and in some cases had been integrally involved in the rulemaking process. Several of those scholars asserted that no need for the proposed changes was supported by, and indeed was contradicted by, the best empirical understanding of the way discovery actually works in the great majority of cases. They also noted what they considered to be the politicization of the rulemaking process and questioned the motives of some of its participants.

- **Professor Elizabeth G. Thornburg:** Elizabeth Thornburg, a professor at Southern Methodist University School of Law, argued emphatically in a substantial law review article against the adoption of the discovery amendments package.⁵⁵ Over and above criticisms of specific amendment proposals, she questioned the utility of the amendment effort itself:

All of the 1998 proposed amendments assume that the source of “discovery abuse” is overdiscovery: parties trying to extract from their opponents more than they are entitled, or more than a cost/benefit analysis would warrant. Nowhere in the proposals are changes designed to limit abusive resistance to discovery, even though empirical research has consistently identified resistance as a bigger problem than overbroad requests. For example, the empirical research commissioned by the Advisory Committee and done by the Federal Judicial Center reported that the most common problems in document production were failure to respond adequately and failure to respond in a timely fashion. Nevertheless, it is doing discovery rather than resisting discovery that the Committee proposes to limit.⁵⁶

It is doing discovery rather than resisting discovery that the Committee proposes to limit.

53. See N.Y. C.P.L.R. 3101(d)(1)(iii) (McKinney 1998); OR. R. CIV. P. 47E (1995); OR. EVID. CODE 503 (1995).

54. Public Comments, *supra* n. 22, at 193 (representing organizations listed in n. 25 above).

55. Elizabeth G. Thornburg, *Giving the “Haves” a Little More: Considering the 1998 Discovery Proposals*, 52 SMU L. REV. 229 (1999).

56. Thornburg, *supra* n. 55, at 240 (footnotes omitted).



She also noted that the Federal Judicial Center's study had observed that

costs were higher when one of the law firms involved in the case had more than eleven lawyers. Is there something about the economics or culture of law firms that contributes to discovery disputes? If so, it is again unlikely that the proposed discovery amendments will make any difference.⁵⁷

Professor Thornburg summarized her thinking about the discovery amendment package as a whole as follows:

[T]he proposals are unwise and should be withdrawn by the Committee. Taken together, they would create new problems in the vast majority of cases in which there currently are no problems. They would create one-sided advantage, tending to favor defendants over plaintiffs. And they would not eliminate "abuse" in the small percentage of problematic cases that tend to generate concern about discovery; the causes of those discovery disputes stem from the incentive structure within the adversary system and the current role of attorneys in litigation. There is no rule amendment that the Advisory Committee, no matter how well-intentioned, can implement to eliminate discovery controversies. The proposed changes are not neutral; they are not even efficient, and they should be rejected....⁵⁸

■ **Bryant G. Garth:** Another paper presenter at the Boston College conference was Bryant G. Garth, director of the American Bar Foundation and former dean of the Indiana University School of Law. Without passing judgment on the merits of the 1998 amendments per se, Dr. Garth considered the evidence of the economic and cultural forces he believed were at work in the discovery controversy, and he called for further research to enhance knowledge of problem areas. In so doing, he may have provided a tentative answer to the question of the interplay between law firm economics and legal culture to which Professor Thornburg had alluded:

Only a fraction of lawyers can claim the fees or attract the cases that justify investment in litigation as full-scale warfare. These are typically the lawyers who appear at conferences and on committees examining questions of civil discovery.

[L]awyers in the ordinary cases have learned how to manage time and expense. They have had to do so, since their clients will not pay for scorched earth tactics. On the other hand, the high-stakes, high-conflict cases involve clients who pay for the services of lawyers as warriors, and that is what they usually get. In terms of the legal services market and the civil discovery problem, it appears that clients seek the elite of the bar only when they believe that the nature of the problem and the stakes are sufficiently high to justify a major investment in legal services (or, in the contingent fee area, are sufficient for the lawyer to invest substantially in the case). It is likely that only a fraction of lawyers can claim the fees or attract the cases that justify (in terms of the stakes) investment in litigation as full-scale warfare, characterized by numerous depositions, discovery conflicts, charges of stonewalling and the like, but these lawyers are very prosperous and very prominent. [T]hese are typically the lawyers who have the national reputations that also make them appear at conferences and on committees examining questions of civil discovery.⁵⁹

57. *Id.* at 258–59 (citations omitted). *See also* the following remarks of Bryant Garth.

58. *Id.*, *supra* n. 55, at 231 (citation omitted).

59. Bryant G. Garth, *Two Worlds of Civil Discovery: From Studies of Cost and Delay to the Markets in Legal Services and Legal Reform*, 39 B.C. L. Rev. 597, 605 (1998) (citations omitted).



■ **Professor Linda S. Mullenix:** Linda Mullenix, Bernard J. Ward Centennial Professor of Law at the University of Texas Law School, followed the rulemaking efforts directed at discovery throughout the 1990s. She cited a finding of the RAND study that “[d]iscovery is not a pervasive litigation cost problem for the majority of cases.”⁶⁰ She characterized the results of the empirical research commissioned by the Advisory Committee as

disorienting or disconcerting [to advocates of revisions to the current discovery regime] because they subvert advocacy efforts to vilify current discovery rules and practice by means of the horrible anecdote. Hence, these numbers are startling for those who choose to see the glass half-empty and who focus on the bad news about American over-litigiousness. The fact remains, however, that there still is a lot of civil litigation where there is not a lot of discovery, or no discovery at all...⁶¹

[T]he rulemakers still do not have a working definition of what constitutes appropriate discovery and, by implication, what constitutes discovery abuse, apart from attorneys’ and judges’ subjective opinions. As RAND restates this question: There “has been [a] failure of reformers to carefully identify the problem they are seeking to remedy and the sources of that problem.”⁶²

At the 1997 conference Professor Mullenix also predicted accurately that, despite the lack of need she had observed and the weaknesses she identified in the premises, the Advisory Committee would nevertheless seek to amend the rules further:

[T]he Advisory Committee will further amend the discovery rules—even if this is neither necessary nor desirable—because it is in the nature of bureaucracy that committees, once called into existence, do something....⁶³

The results of the empirical research are disconcerting to advocates of revisions because they subvert efforts to vilify current discovery rules and practice by means of the horrible anecdote.

FINAL RULEMAKING ACTION ON THE 1998 PROPOSALS

In 1999 the Advisory Committee’s process of study, review of public comments, and debate wound down and the committee concentrated on making its final recommendations to the Standing Committee. Several themes voiced by the proposals’ critics during the public comment period were evident in the last debates of both committees.

Objections to the controversial proposals on scope of discovery and cost shifting were reiterated during the Advisory Committee’s final meeting in April 1999, by at least two

60. Linda S. Mullenix, *The Pervasive Myth of Pervasive Discovery Abuse: The Sequel*, 39 B.C. L. REV. 683, 685 (hereinafter *Sequel*), citing *RAND*, 39 B.C. L. REV. 613 (1998).

61. *Id.* at 684–85.

62. *Id.* at 688 (citing *RAND*, 39 B.C. L. REV. 613 (1998) (footnote omitted)).

63. *Id.* at 689.



individuals who had been full participants in the rulemaking process. Formal motions were made to delete both of the amendments, based on the same concerns voiced by consumer, civil rights, and environmental organizations.

■ One member of the Advisory Committee, Professor Thomas D. Rowe of Duke University School of Law, made a motion to strike the scope-of-discovery proposal. He argued that such a change “will lead to satellite litigation, ‘stonewall resistance,’ and overpleading. He observed that support for the change is spotty and that other means to curb discovery are preferable... .” Professor Rowe’s motion was defeated by a vote of 9 to 4.⁶⁴

■ Committee member Myles V. Lynk, then a practitioner in Washington, DC, and now a professor at Arizona State University College of Law, made a motion to delete the cost-shifting proposal. He argued that “there was no need to add an explicit provision to the rules because judges already have the authority,” that the change “would encourage courts to permit excessive discovery on the condition that costs be paid,” and that “the result would be differential justice: the party who cannot afford to pay will not get this discovery, while the one who can pay—who may be eager to pay—will get the discovery.”⁶⁵

Following the April 1999 meeting, the Advisory Committee sent its final proposals to the Standing Committee for review.

At its meeting in June 1999, the Standing Committee was apprised of the earlier internal dissent through the report of the Advisory Committee’s April meeting and also heard from other opponents.

■ An unidentified member of the committee argued that, taken together, the scope-of-discovery and cost-shifting proposals would be “the most radical change in the civil rules in 60 years.”⁶⁶

Associate Attorney General Raymond C. Fisher outlined the Department of Justice’s arguments against both proposals.

■ On the scope-of-discovery proposal, “Mr. Fisher pointed out that the Department of Justice sues on behalf of the public interest, and its career litigators have sincere objections to the proposed amendment, as do the American Trial Lawyers Association [sic] and civil rights and environmental organizations. In short, he said, Department lawyers are satisfied with the existing standards and believe that they work very well.... The Department believes that the [scope-of-discovery proposal] will shift the burden to plaintiffs and require them to seek judicial intervention to obtain information that they now receive regularly.... The amendment will cause particular problems in civil rights and environmental cases, and the public interests of the United States will not be served.”⁶⁷

■ A member of the Committee argued that the cost-shifting proposal would “cause havoc, especially in employment discrimination cases.”⁶⁸

Taken together, the scope-of-discovery and cost-shifting proposals would be the most radical change in the civil rules in 60 years.

64. Advisory Committee 1999 Report, *supra* n. 15, at 5–6.

65. *Id.* at 6.

66. Draft Minutes of Standing Committee meeting of June 14–15, 1999, at 24 [hereinafter Standing Committee Minutes]. The minutes are viewable at <<http://www.uscourts.gov/rules/pracproc1.pdf>>

67. *Id.* at 22–23.

68. *Id.* at 25.

- Mr. Fisher argued that the Department of Justice

was concerned that the proposed [cost-shifting] amendment might be applied by the courts to require requesting parties to pay for “court-managed” discovery, vis-a-vis “attorney-managed” discovery.⁶⁹

The Standing Committee approved the amendments with near unanimity and forwarded them to the Judicial Conference.⁷⁰

At its September 1999 meeting, the Judicial Conference approved the scope-of-discovery amendment but not the cost-shifting proposal. The conference then forwarded the remaining proposals to the United States Supreme Court, which has rarely if ever disapproved a proposed change in the civil rules that has been recommended by the Judicial Conference. The Supreme Court approved the amendments in April 2000, and forwarded them to Congress, which has a final opportunity to reject amendments. Congress took no action, and the new amendments to the Federal Rules of Civil Procedure took effect on December 1, 2000.⁷¹

THE FORUM

One hundred fifteen judges, representing 36 jurisdictions, took part in the Roscoe Pound Institute’s 1999 Forum for State Court Judges. Their deliberations were based on original papers written for the forum by Dean Robert Gilbert Johnston of the John Marshall Law School in Chicago (“Discovery Facts and Myths”) and by Professor Paul Carrington of Duke University Law School (“Recent Efforts to Change Discovery Rules: Do They Advance the Purposes of Discovery?”). The papers were distributed to participants in advance of the meeting, and the authors also made less formal oral presentations of their papers to the judges. A panel of distinguished commentators discussed each paper after its presentation. A break between the morning and afternoon sessions provided time for lunch and a humorous talk by the late Judge Sam Ervin III of the United States Court of Appeals for the Fourth Circuit.

Responding to Dean Johnston’s paper were the Honorable Paul V. Niemeyer, U.S. Court of Appeals for the Fourth Circuit (who at the time served as chair of the Advisory Committee on Civil Rules of the Judicial Conference of the United States); Gerson Smoger, a plaintiff’s lawyer based in Oakland, California; Francis H. “Brother” Hare, Jr., of Birmingham, Alabama, chief legal officer of the Attorneys Information Exchange Group (a not-for-profit cooperative organized by plaintiffs’ attorneys to assist one another in preparation for trials of product defect cases); and the Honorable Gerald Elliott, Johnson County District Court in Olathe, Kansas.

Responding to Professor Carrington’s paper were Kathryn H. Clarke, an appellate lawyer and complex litigation consultant in Portland, Oregon; Lloyd Milliken, a civil litigation defense lawyer in Indianapolis, Indiana (and at the time president-elect of the Defense Research Institute); Andrew Scherffius, a plaintiff’s lawyer in Atlanta, Georgia (and at the time a member of the Advisory Committee on Civil Rules); and the Honorable Shirley Strickland-Saffold, judge of the Cuyahoga County Court of

69. *Id.* at 25.

70. Standing Committee Minutes at 24.

71. Order of the Supreme Court of April 17, 2000, ¶2, 192 F.R.D. at 341. The current full text of the Federal Rules of Civil Procedure as they stood after December 1, 2000, is viewable on the Internet at a number of sites, including those of the U.S. Congress’s House Judiciary Committee <<http://www.house.gov/judiciary/civil00.pdf>> and Cornell Law School <<http://www.http://www.law.cornell.edu/rules/frcp/overview.htm>> (both visited Feb. 1, 2001).



Common Pleas in Cleveland, Ohio (and at the time the immediate past president of the American Judges Association).

After each paper presentation and commentary, the judges separated into seven small groups to discuss the issues raised in the papers; Fellows of the Roscoe Pound Institute served as group moderators. The paper presenters and commentators visited the groups to share in the discussion and respond to questions. The discussions were recorded on audio tape and transcribed by court reporters, but, under ground rules set in advance of the discussions, comments by the judges were not made for attribution in the published report of the forum. A selection of the judges' comments appears in this report at pp. 87 to 126.

At the concluding plenary session, the moderators summarized the judges' views of the issues under discussion, and all participants in the forum had a final opportunity to make comments and ask questions.

This report is based on the papers written and presented by Dean Johnston and Professor Carrington and on transcripts of the plenary sessions and group discussions.

James E. Rooks, Jr.

Forum Reporter



DISCOVERY: FACTS AND MYTHS

Robert Gilbert Johnston

In section I of his paper, Dean Johnston places the role of myths in context, both in the legal process as a whole and specifically with regard to discovery. He defines the terms “myth” and “fact” and also mentions the prevalence of the “evil twins” of facts: “factoids” and “factlets,” both of which have had considerable impact in debates on the civil justice system. He then cites several substantial empirical studies of discovery, carried out by nonpartisan academics and professional researchers working for the judiciary. Finally, he reminds his readers of two important qualifications to the fact and myth labels: first, that circumstances change over time, and thus what has been merely a myth in the past can become the present fact; and second, that the same body of data can sometimes be used to prove both the myth and the apparently contradictory fact.

In section II, Dean Johnston discusses five myths that are frequently invoked in favor of changes to discovery rules and that, he argues, should be viewed with suspicion if not debunked entirely: (1) “discovery use and abuse are the cause of unnecessary cost and delay”; (2) “a short discovery period, by itself, leads to faster case dispositions”; (3) “there are too many depositions, and depositions take too long”; (4) “initial disclosure reduces costs, delays, and other discovery”; and (5) “discovery will be more efficient and effective if attorneys meet and confer about discovery issues.” Citing the available empirical research, he shows that it does not support these claims.

Finally, in section III, Dean Johnston urges continuing empirical research in the area of discovery, and he appeals to those who have duties in the development of rules of procedure to consult the existing empirical evidence carefully before making changes in their court systems’ rules.



I. INTRODUCTION

Myths relating to the legal process are nothing new. Accordingly, nobody should be surprised that there are numerous myths relating to the civil justice system generally and to discovery specifically.¹ Before discussing some of the more pervasive myths regarding discovery, terms need to be defined and the process by which myths and facts are being distinguished must be articulated.

Nobody should be surprised that there are numerous myths relating to the civil justice system generally and to discovery specifically.

A “myth” is a popular belief or tradition that has grown up around something; an unfounded or false notion; or a thing having only an imaginary or unverifiable existence.² In contrast, a “fact” is something that has actual existence; or is a piece of information presented as having objective reality.³ “Mythical” and “factual” are antonyms.⁴ Of course, some may argue that myths are merely a different perception of facts, or that perceptions can be more important than either myths or facts.⁵

Fortunately, those who want to know the real facts about discovery and its role in the overall civil justice system, especially those who have a need to sort out the facts from the myths as part of their professional activities as judges, court administrators, and lawyers, have access to a large body of information, compiled over the last thirty years by nonpartisan academics and professional researchers working for the judiciary. This is especially

1. For an excellent discussion of myths regarding discovery abuse, see Linda S. Mullenix, *Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences for Unfounded Rulemaking*, 46 STAN. L. REV. 1393 (1994).
2. WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY 785 (1983).
3. WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY 444 (1983).

The evil twins of facts are “factoids” and “factlets”:

Factoids are statements that sound like facts, that seem as though they are conveying some information, but that, on examination, turn out to be either false or meaningless. Factlets are bits or pieces of real information about the problem, pieces one may hope can be sewn together into a serviceable quilt, but which by themselves leave much more unknown than known.

Michael Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—and Why Not?* 140 U. PA. L. REV. 1147, 1163 (1992). According to Professor Saks’s definition, an example of a factoid could be an opinion survey that reported that “four percent of attorneys believe too many depositions are conducted.” (*Cf.* note 28 herein.)

Saks continues, “While factoids seem to be facts but are not, factlets present a different problem. They are true in a literal sense, but they lead directly to conclusions that are not justified by the data.” *Id.* at 1164. Thus an example of a factlet might be a statement that “Over two million depositions were taken last year!” Absent a context in which to place it, the raw figure of two million depositions seems huge—but only because two million is by definition a very large number.

Saks concludes,

Numerous publications on the subject of the tort litigation system consist of nothing more than a melange of loose conclusions, anecdotes, factoids, and factlets. Those who think they already know the truth are unlikely to invest much effort in the search for answers. For two wonderful examples of such writing and logic, see William H. Mosberg, Jr., *The Liability Insurance Crisis*, 19 NEUROLOGY 857 (1986), and WALTER K. OLSON, *THE LITIGATION EXPLOSION: WHAT HAPPENED WHEN AMERICA UNLEASHED THE LAWSUIT* (1991).

Id., p. 13, n. 53.

4. THE DOUBLEDAY ROGET’S THESAURUS IN DICTIONARY FORM 446 (1977).
5. *Cf.* Edward D. Cavanagh, *The Civil Justice Reform Act of 1990: Requiescat in Pace*, 173 F.R.D. 565, 567–68 (1997) (asserting that the problems with the civil justice system were perceived and not real) [hereinafter *Cavanagh*].



true on the federal side, where more resources are available for court management research.⁶ Also, two recent reports have provided voluminous empirical data regarding the discovery process, one by the RAND Institute for Civil Justice,⁷ and another comprehensive study by the Federal Judicial Center⁸ regarding the Civil Justice Reform Act of 1990 (CJRA).⁹ Use of such materials should help to make the process of rulemaking more scientific and less of a guessing game.¹⁰

With these definitions and this foundation for determining myth or fact, this article will address several myths relating to discovery. The designation of the following matters as myth rather than fact, of course, is contingent upon the constancy and reliability of the facts. Facts may change over time, and what was previously a “myth” may come to be legitimate fact. Also, the same data can sometimes be used to prove both the myth *and* the fact!¹¹

6. See, e.g., Judith A. McKenna & Elizabeth C. Wiggins, *Empirical Research on Civil Discovery*, 39 B.C. L. REV. 785, 787 n.11 (1998), citing to the “Columbia Project” reported by William A. Glaser in PRETRIAL DISCOVERY AND THE ADVERSARY SYSTEM (1968), a report of the Federal Judicial Center discussed by Paul R. Connolly in JUDICIAL CONTROLS & THE CIVIL LITIGATIVE PROCESS: DISCOVERY (1978). See also a series of reports by Judge Wayne D. Brazil discussed in numerous articles: Brazil, *Views from the Front Lines: Observations by Chicago Lawyers about the System of Civil Discovery*, 1980 AM. B. FOUND. RES. J. 217; Brazil, *Civil Discovery: Lawyers’ Views of Its Effectiveness, Its Principal Problems and Abuses*, 1980 AM. B. FOUND. RES. J. 787.
7. JAMES S. KAKALIK, ET AL., JUST, SPEEDY, AND INEXPENSIVE? AN EVALUATION OF CIVIL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT (RAND Institute for Civil Justice 1996) [hereinafter RAND REPORT]. For an excellent discussion of the RAND REPORT, see Cavanagh, *supra* n. 5.
8. THOMAS E. WILLGING ET AL., DISCOVERY AND DISCLOSURE PRACTICE, PROBLEMS, AND PROPOSALS FOR CHANGE (Federal Judicial Center 1997) [hereinafter FJC STUDY]; see also Thomas E. Willging et al., *An Empirical Study of Discovery and Disclosure Practice under the 1993 Federal Rule Amendments*, 39 B.C. L. REV. 525 (1998) [hereinafter *Empirical Study*].
9. 28 U.S.C. § 471. For an authoritative analysis of the CJRA, see Leonidas Ralph Mecham, *Civil Justice Reform Act of 1990—Final Report*, 175 F.R.D. 62 (1997) [hereinafter *CJRA Final Report*]. (The author is the Secretary of the Judicial Conference of the United States.)
10. See Richard L. Marcus, *Discovery Containment Redux*, 39 B.C. L. REV. 747, 778 (1998) [hereinafter *Containment*]; Cavanagh, *supra* n. 5, at 606 (arguing that, before any further changes are made to the Federal Rules of Civil Procedure, there should be empirical data showing that a problem exists).

Of course, there are limits to the use of social science methodologies for determining facts in the context of discovery, see *Containment*, 39 B.C. L. REV. at 780; Garth, *Two Worlds of Civil Discovery: From Studies of Cost and Delay to the Markets in Legal Services and Legal Reform*, 39 B.C. L. REV. 597, 612 (1998) (“Social scientific research, of course, also has its limits, and its own self-serving rhetoric, but it could serve to bring new concerns and insights that, at the very least, can open the discussion to a broader and more fundamental set of issues.”). As Professor Cavanagh has noted, there is a natural tendency to be critical of reports such as the RAND REPORT. Cavanagh, *supra* n. 5, at 583.

Additionally, one person’s scientific research is another person’s junk science. For example, in passing the CJRA, Congress relied upon a publication by the Brookings Institution, JUSTICE FOR ALL: REDUCING COSTS AND DELAYS IN CIVIL LITIGATION (1989) and an opinion survey, Louis Harris & Associates, PROCEDURAL REFORM OF THE CIVIL JUSTICE SYSTEM: A STUDY CONDUCTED FOR THE FOUNDATION FOR CHANGE (March 1989). See Cavanagh, *supra* n. 5, at 567 n.4. However, Professor Mullenix described the Harris survey as “little more than anecdotal evidence gussied-up in pseudo-scientific garb.” Linda S. Mullenix, *The Pervasive Myth of Pervasive Discovery Abuse: The Sequel*, 39 B.C. L. REV. 683, 684 (1998) [hereinafter *Pervasive Myth*].

11. Cf. *Pervasive Myth*, 39 B.C. L. REV. at 683 (“[P]roponents and opponents of further discovery reform will mine these studies to support whatever conclusions they wish to advance, and selective interpretations of the data will accomplish many ends.”).

II. FIVE MYTHS RELATING TO DISCOVERY

Five myths relating to discovery are frequently offered to justify changes in the rules of civil procedure, but should be viewed with suspicion if not debunked entirely.

Although more could be cited, the following five myths relating to discovery are frequently offered to justify changes in the rules of civil procedure, but should be viewed with suspicion if not debunked entirely: (1) “discovery use and abuse are the cause of unnecessary cost and delay”; (2) “a short discovery period, by itself, leads to faster case dispositions”; (3) “there are too many depositions, and depositions take too long”; (4) “initial disclosure reduces costs, delays, and other discovery”; (5) “discovery will be more efficient and effective if attorneys meet and confer about discovery issues.” The myths include both claims about discovery as it relates to the civil justice system and claims about specific discovery processes and their supposed effect on the system as a whole, often using the elapsed time from filing to final disposition as an indicator of efficiency.

A. “Discovery Use and Abuse Are the Cause of Unnecessary Cost and Delay”

For years, discovery has been the lightning rod for claims that resorting to the civil justice system is too expensive and takes too long.¹² Anecdotal evidence of the frustration regarding discovery practice is readily available and is frequently cited as justifying rules changes.¹³

However, this anecdotal evidence appears to be true of only a tiny minority of the cases.¹⁴

Empirical data show that, contrary to anecdotal information, discovery use and alleged abuse is not the cause of unnecessary cost and delay that many assert.¹⁵ To many litigators and civil procedure professors, the following evidence may be shocking. The RAND Report found that *absolutely no discovery* was conducted in 38 percent of the

12. See *Cavanagh, supra* n.5, at 571.

13. One author sums up the anecdotal experience of many litigators as follows:

Many litigators—even those who are not otherwise abusive—tend to overuse the discovery process, which can become a vehicle for harassing the opposition. In proposing the 1993 amendments to the Federal Rules of Civil Procedure, the Advisory Committee noted two principal problems with the way pretrial discovery is conducted:

First, a no-stone-left-unturned (sometimes no-grain-of-sand-left-unturned) philosophy governs much litigation and imposes costs, usually without corresponding benefits. Costly discovery undertaken with only a marginal effect on the outcome of the case constitutes an economic loss to society.

Second, discovery is sometimes used as a club against the other party. Unlimited discovery allows a party to impose costs upon an adversary solely to increase the adversary’s expenses. The anticipation that bringing a lawsuit will be costly, regardless of the merits, may cause a party with a meritorious claim or defense either not to sue, to give up early, or to settle for an amount less than defense costs. Excessive discovery is not only costly and inappropriate; it also tends to anger the court and provoke the other side into retaliation.

Bartlett H. McGuire, *Reflections of a Recovering Litigator: Adversarial Excess in Civil Proceedings*, 164 F.R.D. 283, 288 (1996).

14. *Pervasive Myth*, 39 B.C. L. REV. at 683 (asserting that complex, high-stakes litigation, handled by big firms with corporate clients are the cases most likely to involve the problematic discovery that skews the discovery debate); James S. Kakalik et al., *Discovery Management: Further Analysis of the Civil Justice Reform Act Evaluation Data*, 39 B.C. L. REV. 613, 636 (1998) [hereinafter *Discovery Management*].

15. *Empirical Study*, 39 B.C. L. REV. at 531 (“Anecdotal information—and the occasional horror story—suggest that discovery expenses are excessive and disproportionate to the informational needs of the parties and the stakes in the case. Our research suggests, however, that for most cases, discovery costs are modest and perceived by attorneys as proportional to parties’ needs and the stakes in the case.”).



cases its researchers examined.¹⁶ In comparison, the FJC Study found that there was no discovery in about 50 percent of civil cases.¹⁷ The findings of these two studies roughly confirmed the results of earlier studies that found that there was no discovery in over half the cases reviewed.¹⁸ Similarly, a National Center for State Courts study reviewed by the RAND researchers found that 42 percent of general civil litigation cases did not have recorded discovery, and that 37 percent of the cases in which there was discovery had three or fewer discovery documents.¹⁹ Thus, in over three-quarters of the reviewed state-court cases, three or fewer discovery tools were used.

In sum, the empirical data show that absolutely no discovery is conducted in approximately half the cases litigated. It simply does not follow that crowded court dockets are a result of a process that is not even used in half the cases and is used only a few times in about one-quarter of the remainder of the cases. The repeated claim that discovery is the ill causing major perceived problems of the civil justice system has worn thin, and thus claims that the system can be remedied by reigning in abusive discovery are illogical.²⁰ At least in the federal courts, researchers have identified several other reasons for the perceived delay in the resolution of cases, to the extent that one even exists.²¹

B. “A Short Discovery Period, by Itself, Leads to Faster Case Dispositions”

Even with the most recent amendments to the rules of civil procedure, in both the federal and state systems, the parties themselves control most of the discovery process, through their attorneys. It is rare that one hears of a judge ordering an attorney to serve production requests and interrogatories and take depositions. To the contrary, if the parties choose not to use the procedures available, the court will not interfere so long as the choice does not delay the disposition of the case. Judges do wield the ultimate control, however, by determining how much time is allowed for discovery in each case. Perhaps it is this control that has led to the belief that short discovery periods, by themselves, lead to faster dispositions of civil cases. However, researchers

16. *Discovery Management*, 39 B.C. L. REV. at 682.

17. *Pervasive Myth*, 39 B.C. L. REV. at 684.

18. *Discovery Management*, 39 B.C. L. REV. at 622; *Containment*, 39 B.C. L. REV. at 790.

19. *Discovery Management*, 39 B.C. L. REV. at 622.

20. *Cavanagh*, 173 F.R.D. at 602.

21. *See CJRA Final Report*, 175 F.R.D. at 86–89 (suggesting the glacial pace of filling judicial vacancies and the impact of federalization of criminal laws delays civil case disposition in federal court).

In fact, the assertion that there is a problem with delay to disposition in federal court appears to be a myth itself. *CJRA Final Report*, 175 F.R.D. at 108–09 (from the late 1980s through the mid-1990s the median time from filing to disposition remained fairly constant—about eight months). Further, Professor Cavanagh observed that

The underlying assumption in each of these reform efforts was that that federal civil justice system was in serious crisis, a view shared by some legal scholars and lawyers and many corporations who normally are sued as defendants. Yet, there were no empirical data supporting the premise that the system was in critical condition, raising the question as to whether the movement for “procedural” reform was in reality a disguised effort to change results under existing substantive law.

Cavanagh, 173 F.R.D. at 574–75 (citations omitted).



The evidence is insufficient to state with certainty that shorter discovery periods result in shorter dispositions of cases.

have found conflicting evidence on this point, and so the evidence is insufficient to state with certainty that shorter discovery periods result in shorter dispositions of cases.²² By the same token, the evidence does not address whether arbitrary discovery cutoffs have an impact on the fair administration of justice by adversely affecting a plaintiff's right of access to the courts.

C. "There Are Too Many Depositions, and Depositions Take Too Long"

The 1993 Amendments to the Federal Rules provided courts with explicit authority to limit both the number of depositions and the length of each deposition.²³ Additionally, the 1993 Amendments established a presumptive limit of ten depositions per side.²⁴ The 1998 proposed amendments would set a presumptive time limit on depositions of "one day of seven hours."²⁵ State courts have already been experimenting with time limits for depositions.²⁶

22. The RAND REPORT found that a shorter discovery cutoff predicts shorter time to disposition. *Discovery Management*, 39 B.C. L. REV. at 666–67. However, the FJC Study found no relationship between the length of time the parties are given for discovery and the length of time before disposition of the case. *Empirical Study*, 39 B.C. L. REV. at 558. The authors of the FJC Study offer two possible bases for the difference in the studies: first, the populations studied were different and, second, the research methods used were different. *Id.* In any event, because the findings of the FJC STUDY contradict those of the RAND REPORT, as mentioned at the outset of this section, this may be an example of a factual basis available to support either side of a controversy.
23. FED. R. CIV. P. 26(b)(2) ("By order or by local rules, the court may alter the limits in the rules on the number of depositions and may also limit the length of depositions under Rule 30 and the number of requests under Rule 36."). According to the Advisory Committee notes, the rule was amended "to enable the court to keep a tighter rein on the extent of discovery.... Amendments to Rules 30, 31, and 33 place presumptive limits on the number of depositions and interrogatories, subject to leave of court to pursue additional discovery.... The revision also dispels any doubt as to the power of the court to impose limitations on the length of depositions under Rule 30 or on the number of requests for admission under Rule 36." Advisory Committee notes to 1993 amendments to Rule 26(b).
24. FED. R. CIV. P. 30(a)(2)(A) ("A party must obtain leave of court, which shall be granted to the extent consistent with the principles stated in Rule 26(b)(2), if the person to be examined is confined in prison or if, without written stipulation of the parties... a proposed deposition would result in more than ten depositions being taken under this rule or Rule 31 by the plaintiffs, or by the defendants, or by third-party defendants."). The Advisory Committee notes state that "One aim of this revision is to assure judicial review under the standards stated in Rule 26(b)(2) before any side will be allowed to take more than ten depositions in a case without agreement of the other parties. A second objective is to emphasize that counsel have a professional obligation to develop a mutual cost-effective plan for discovery in the case. Leave to take additional depositions should be granted when consistent with the principles of Rule 26(b)(2), and in some cases the ten-per-side limit should be reduced in accordance with those same principles." Advisory Committee notes to 1993 amendments to Rule 30(a).

The factors a court is to consider when determining to change the presumptive limit of ten depositions per side are the following: (1) whether the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (2) whether the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; and (3) whether the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues. FED. R. CIV. P. 26(b)(2).

25. *See Proposed Amendments to the Federal Rules of Civil Procedure and Evidence*, 181 F.R.D. 18, 83. ("Unless otherwise authorized by the court or stipulated by the parties and deponent, a deposition is limited to one day of seven hours.")
26. *See, e.g.,* ILL. S. CT. R. 206(d) ("No discovery deposition of any party or witness shall exceed three hours regardless of the number of parties involved in the case, except by stipulation of all parties or by order upon showing that good cause warrants a lengthier examination."). The Committee succinctly stated that the basis for this amendment was that "The Committee is of the opinion that the vast majority of all discovery depositions can easily be concluded within three hours." Committee Comments to Illinois Supreme Court Rule 206(d).



The rationale given by the Advisory Committee for its 1998 proposal may provide a good example of the practice of judicial rulemaking by consulting the current myths. The Advisory Committee notes state that the basis for this proposed amendment was that “the Committee has been informed that overlong depositions can result in undue costs and delays in some circumstances.”²⁷ The justification given for the proposed amendment is perplexing for three reasons.

First, unlike several of the other amendments proposed in 1998, there is no citation to authority for the claimed justification.

Second, the statement of justification is written in elusive language. For example, it is written in the passive voice. The reader is told that the Committee was informed of something but not who did the informing. Further, the justification states that “overlong depositions can” cause undue costs and delay, not that these results necessarily follow. Moreover, the justification contains the qualifying language “in some circumstances.” Thus, by implication, there are other circumstances in which “overlong depositions” do *not* cause undue delay and costs.

Third, and more important, the justification given is contrary to the available empirical data. As to the number of depositions, the FJC Study found that 75 percent of attorneys reported that in their cases seven or fewer individuals were deposed, and only 4 percent of attorneys reported a belief that too many depositions were conducted.²⁸ One quarter of the attorneys reported only one or two individuals being deposed.²⁹ As to the length of depositions, only 12 percent of the attorneys who took depositions in their cases complained that the depositions were too long.³⁰ The median length of the longest deposition was four hours, and 75 percent of the attorneys reported that the longest deposition was no longer than seven hours.³¹ A separate Federal Judicial Center study of local rules that either imposed time limits on depositions or authorized judges to impose time limits found that there was no reliable evidence that such limits achieved the intended results of reducing cost and delay.³² The empirical data again show that a small minority of cases generate a very high number of hours for depositions.³³

D. “Initial Disclosure Reduces Costs, Delays, and Other Discovery”

There appears to be a generally held belief that initial disclosure and discovery will reduce the costs of litigation. This belief is tenuous. The RAND Report found that the data and analyses do not support strongly the policy of using mandatory early disclosure to reduce costs of litigation and time to disposition.³⁴ The RAND researchers found that requiring initial disclosures produced no statistically significant effect on the number of lawyer hours worked.³⁵ A recent American Bar Association survey of

27. Proposed Amendments, 181 F.R.D. at 85. In 1991, the Advisory Committee had proposed a six-hour time limit on depositions. Proposed Amendments to the Federal Rules of Civil Procedure, 137 F.R.D. 53, 111–12.

28. *Empirical Study*, 39 B.C. L. REV. 525, 538 (1998).

29. *Id.* at 571.

30. *Id.* at 538.

31. *Id.* at 571.

32. *Id.*, citing MARIE CORDISCO LEARY & THOMAS E. WILLGING, FEDERAL JUDICIAL CTR., NUMERICAL AND DURATIONAL LIMITS ON DISCOVERY EVENTS AS ADOPTED IN FEDERAL LOCAL RULES AND STATE PRACTICES 10–11 (1998).

33. *Id.*

34. *Discovery Management*, 39 B.C. L. REV. at 678.

35. *CJRA Final Report*, 175 F.R.D. at 98.



lawyers reported similar results. According to this survey, there was no evidence that disclosure had reduced discovery costs or delays; and in fact, to the extent disclosure had any effects, most were negative.³⁶

In contrast to the RAND Report's conclusions, the FJC Study is less damning of the belief that initial disclosure results in reduced discovery costs and delays.³⁷ But its results are, at best, ambiguous on this question. For example, the FJC researchers identified seven hoped-for results of initial disclosure, but their survey found that at least a plurality, and usually a majority, of respondents said they believed that initial disclosure did *not* have the intended effect.³⁸ Specifically, as to the hope that requiring initial disclosure would decrease the amount of discovery, 47 percent of the responding attorneys said that initial disclosure had no effect—slightly higher than the percentage of attorneys who said they believed that initial disclosure did decrease discovery.³⁹ Apparently, even if attorneys engage in initial disclosure, they will still conduct the discovery that they believe it is necessary.

E. “Discovery Will Be More Efficient and Effective If Attorneys ‘Meet and Confer’ about Discovery Issues”

There is a pervasive myth that, if attorneys meet and confer about discovery issues prior to involving the court, litigation will proceed more efficiently. The popularity of this myth is manifested in “meet and confer” requirements for both planning discovery and resolving discovery disputes.⁴⁰ These requirements and the myth that has engendered them may have their origins in judicial dislike for presiding over discovery squabbles. No judge likes being drawn into a battle until it is clear that the two sides have actually reached an impasse. Nevertheless, this understandable reaction by overworked judges should not be confused with empirical evidence that such “meet and confer” requirements actually streamline discovery planning and reduce the number of discovery disputes. In fact, it appears that “meet and confer” requirements are not successful in many respects.

The 1993 amendments to Rule 26(f) provided that the parties were to “meet to discuss the nature and basis of their ‘claims and defenses’... and to develop a proposed discovery plan.”⁴¹ The 1993 revision directed the parties to meet in person.⁴²

Unfortunately, this ostensibly sensible requirement may not produce the results expected. The RAND Report found no consistently significant change in predicted time to disposition resulting from the requirement of a joint discovery plan, nor was there a significant change in predicted lawyer work hours even if only complex cases were considered.⁴³

36. *Discovery Management*, 39 B.C. L. REV. at 679, citing KATHLEEN L. BLANER ET AL., AMERICAN BAR ASSOCIATION, MANDATORY DISCLOSURE SURVEY: FEDERAL RULE 26(A)(1) AFTER ONE YEAR 1 (1996).

37. *Empirical Study*, 39 B.C. L. REV. at 562.

38. *Id.* The seven hoped-for results were (1) reduced overall litigation expenses; (2) reduced time to disposition, (3) increased overall procedural fairness, (4) increased fairness of case outcome, (5) increased prospects of settlement, (6) reduced amount of discovery; and (7) reduced number of discovery disputes. *Id.* at 563.

39. *Id.*

40. FED. R. CIV. P. 26(f); FED. R. CIV. P. 37.

41. FED. R. CIV. P. 26(f).

42. Advisory Committee notes to 1993 amendments to Rule 26.

43. *CJRA Final Report*, 175 F.R.D. at 103.



The FJC Study is less clear on whether a requirement that parties meet and confer to develop a joint discovery plan is effective.⁴⁴ The FJC Study did find, however, the majority of attorneys who had met and conferred did not think meeting and conferring had any effect on litigation expenses, disposition time, fairness, or the number of issues in the case.⁴⁵

The 1993 amendments also required that, prior to filing a motion to compel with the court, the party must have conferred in good faith, or attempted to confer, with the person or party that failed to make discovery.⁴⁶ The bases for this amendment were claims that similar local rules had been successful.⁴⁷ Similarly, state courts had also maintained such rules.⁴⁸ Whether a “meet and confer” requirement actually reduces cost and delay is questionable, however. The RAND Report found no statistically significant reduction in attorney work hours, time to disposition, attorney satisfaction or perceived fairness in cases for which “good faith effort” rules were in force.⁴⁹

The judiciary’s faith in requiring attorneys to meet and confer to discuss both discovery plans and disputes may be misplaced. The empirical data suggest that such requirements do not have the effect that one would expect. The explanation may lie in the relatively narrow spectrum of cases in which discovery abuse occurs. Outside of that spectrum, counsel apparently cooperate. In the problematic cases in which abuse does occur, no requirement to meet and confer will change the equation. Only a strong judicial hand will.

III. CONCLUSION

The civil justice system is in an era in which both horror stories and innocent and sensible concepts take on mythical proportions. Coincidentally, and fortunately, there happens to be a large, new supply of empirical data regarding discovery, at both the federal and state levels. As individuals who all have an interest in seeing that our courts’ discovery procedures meet the universal goal of providing “just, speedy, and inexpensive” determination of civil cases, we should carefully review the empirical data before our court system’s rules of discovery are amended. Moreover, further empirical research on these issues should be conducted so that future decisions will not be based upon outdated or misleading information.

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44. *Empirical Study*, 39 B.C. L. REV. at 537–38.

45. *Id.* at 570.

46. FED. R. CIV. P. 37(a)(2)(B). *See generally* Johnston, *Amended Rule 37 Requires Parties to Meet and Confer*, FEDERAL DISCOVERY NEWS 4 (May 1996).

47. Advisory Committee Notes to 1993 Amendments to Rule 37.

48. *See, e.g.*, ILL. S. CT. R. 201(k).

49. *Discovery Management*, 39 B.C. L. REV. at 662–63, 680.



ORAL REMARKS OF DEAN JOHNSTON

We are fortunate that those who want to know the facts about discovery and its role in the civil justice system, especially those who have a need to sort out the facts from the myths as part of their professional activities, have access to a large body of information compiled over the last thirty years by nonpartisan academics and professional researchers who actually work for the judiciary. This is especially true on the federal side, where more resources have been made available for court management research.

In particular, two recent studies have provided voluminous empirical data regarding the discovery process—one conducted by the RAND Institute for Civil Justice, and the other by the Federal Judicial Center.

Having looked at those studies and having read some of the literature, we discover that there is a range of disagreement, perhaps on what are facts and what are those things that I have described as myths. But the range of disagreement is somewhat hedged in by many of the findings themselves. The findings themselves sometimes relate to things that seem to be very, very easily verifiable, if we get the information correctly and objectively, such as hours attorneys spend on a matter. But then again the *feelings* that attorneys have are not so easy to define. Those feelings might reflect the moment, might reflect an experience of just one case or several cases. I myself have my own impressions about these matters based upon the experiences I have had as a trial attorney over the years. So that much is still in flux, much still needs to be worked on, and we have to get into this matter much more closely.

I believe these two empirical studies provide most of the factual basis upon which we are carrying on our discussion today of the proposed changes, their effect on the discovery rules, and their effect on the overall civil justice system. We have to keep those two aspects in mind—sometimes the impact is only upon the rules of discovery themselves, sometimes it's upon the entire judicial system.

What I have picked are five areas which I would say are myths—things that are basically anecdotal information that we have worked from and collected as a body. [This information] may turn out to be accurate as we continue to work with it and try to develop it to see where [we] are going with it. It may turn out that some defects that I have identified disappear as we work with the material some more. But at this moment, I think we rely upon those studies as to what we are working with and accept the findings that they have made because it's the best we have at the moment. And it's a credit to those who have conducted the studies that we have even gotten as far as we have.

The various things that I have identified as the five myths are set out in the paper, and they are

1. Discovery use and abuse are causes of unnecessary cost and delay.
2. A short discovery period by itself leads to faster case dispositions.
3. There are too many depositions, and depositions take too long.
4. Initial disclosure reduces costs, delays, and other discovery.
5. Discovery will be more efficient and effective if attorneys meet and confer about their discovery issues.

I'm sure you are either in agreement or disagreement with me right now based upon your own experience, because experience is basically what we have been working on.



But again, as we put in some caveats as to what we are working with, it seems to me that much of what we are saying has to be put in broader perspective so that we can go back and look at the material that we have and decide how valid most of the commentary is today.

To start off with, most of the studies are devoted to the discovery provisions of the Federal Rules of Civil Procedure. Many of those rules are different from the state rules, many of the problems in the federal courts are different from those in the state courts, and that difference has to be taken into account as you make your own judgments in this matter.

I would think also that when we look at some of these conclusions we are drawing, we have to consider the particular kind of litigation we are dealing with. Obviously, certain complex litigation is entirely different from some rather simple litigation. Even if the litigation is not complex in and of itself substantively, some of that litigation, simply by its very nature, is going to entail far more discovery. I don't know if it has to, but it seems to. Personal injury litigation and civil rights litigation of all sorts seem to entail an awful lot of discovery over who did what to whom and when and how, which then requires an awful lot of work, as opposed to some contract litigation, where you have documents you can work on that are readily available to everybody. So we have to put that into the equation.

I do believe we also have to take into consideration such things as civility among the lawyers. Again, I suspect that those of you who sit on appellate courts, some of you having sat in the lower courts I'm sure, probably understand that whether the rules indeed work has an awful lot to do with civility. There are perhaps a small percentage of lawyers who can make sure that no conceivable set of rules will work the way they're supposed to work if they put their mind to it. (I think I've run into a couple like that. I hope I've never done that.)

Then, of course, there is the market effect, and that goes back to the complexity of the litigation. Quite obviously no attorney, unless he's one of these ones that you have a problem with, no attorney is going to put more time and expense into a case than the case can possibly recoup for him. It's just not going to happen that way.

And then again, the last thing that you have to take into consideration is the impact that some of these things we're talking about have in combination in any particular case—a federal case as opposed to a state case, complex litigation as opposed to simple litigation, civil or uncivil lawyers, etc. Various combinations increase the impact.

So I'm aware of all those things as I go through this, but I have picked on these five points and have tried to isolate them for purposes of discussion and for clarification, in hopes that it will engender rules that are more focused on the vast majority of cases that we deal in.

There are perhaps a small percentage of lawyers who can make sure that no conceivable set of rules will work the way they're supposed to work if they put their mind to it.



COST AND DELAY

The first one I talked about was whether discovery use and abuse are the cause of unnecessary cost and delay generally in the civil system. The two reports that I have referred to, the RAND Report and the [Federal] Judicial Center report, address this issue, because obviously this is something that many people believed for many years.

The RAND Report began to focus in on the amount of discovery that is actually done, which presumably can tie up the judicial system. And the nature of my practice led me to be somewhat surprised by this very proposition itself, because the RAND Report found that in 38 percent of the cases they reviewed there was *no* discovery, which eliminates an awful lot of litigation from the discovery problem. The Federal Judicial Center study addressed that same issue and came up with the figure of 50 percent. And a study done for the state courts came up with 42 percent, and, indeed, found further that in about 37 percent of the cases only three pieces of discovery were involved.

So discovery appears to be heavily used in only a limited number of cases. And I think that has to be taken into account if you're concerned about discovery, in and of itself, overwhelming the judicial system. As to whether discovery *abuse* causes unnecessary cost and delay, it may or may not have an impact. I am unable to draw a strong conclusion on that one.

SHORT DISCOVERY PERIODS

The next myth is that a short discovery period, by itself, leads to a faster case disposition. In this one we have some equivocation, I would say, between the two studies. The RAND Report would say yes; the Federal Judicial Center, as I understand it, has no significant finding in this area, so we are not sure here. And it seems to me that this is the kind of statement that needs further inquiry and development before we can rely on that conclusion in making our rules. Maybe we could say that statement is all we have, so we've got to go with it. But again here is one of the uncertainties about the study, too, because some of the commentators said the answer about this particular issue may vary because of the types of cases in the population they looked at and the method of inquiry. So that here I would say we have nothing to rely upon now on whether a short discovery period, in and of itself, will shorten the time to disposition.

DEPOSITIONS

The next myth is that there are too many depositions, and depositions take too long. In 1993, the amendments set a presumptive limit on the number of depositions and also gave the courts authority to control the number of depositions—which, curiously enough, I thought they always did have. In 1998, the proposal is to limit depositions presumptively to one day of seven hours. Of course some states are already following this particular proposition.

When we begin to look at that problem, there's not much to work with on this particular question. The committee reports say that they have been informed that there are too many depositions and that they take too long, but I cannot find in the committee reports a source of that information—which, you know, would be helpful for the academician so that we could work on it a bit.

And, you know, overly long depositions may cause undue cost and delay, but that means you have defined the problem in and of itself. If you simply say an over-long



deposition caused delays and dollars, it's obviously because it was over-long, so I don't know what magic hour limitation solves the problem.

Here again, it seems to me that in many cases the market will define how long a deposition is and how appropriate any one deposition is to take. Obviously, I know as a plaintiff's attorney that you can't afford to take numerous depositions, with the cost of typing up, but it always seems the defense counsel wants to, and no, they do not want to waive signature, so you have to get it typed up if you're going to make use of it later on. You can't take a long and needless deposition if you are plaintiff's counsel.

So again, this goes back to two thoughts that I had immediately when I saw that particular proposition: this probably turns on the question of civility, and the question of the market for the case, the economics of the case. Those are the issues that should be addressed, because apparently the vast majority of lawyers do not take too many depositions and depositions that are too long.

And when we take a look at the specifics of it, the studies find that 75 percent of the attorneys took seven or fewer depositions in their cases, and only 4 percent said too many depositions were taken—a matter of opinion, certainly. So again, we don't have a tremendous number of depositions being taken at great length in the bulk of cases.

Once again, I think there is probably a difference between the nature of the cases, and we might even reflect upon the types of cases you ordinarily find in federal court as opposed to the types of cases you find in state court.

INITIAL DISCLOSURE

The next proposition was that initial disclosure reduces costs, delays, and other discovery. The RAND study, when it addressed this particular point, found that there was no significant reduction in the lawyers' hours when initial disclosure is required. Discovery goes on apparently pretty much the way it always goes on regardless of initial disclosure.

The Federal Judicial Center study found that the results that had been hoped for from utilizing initial discovery (which they listed) were not necessarily achieved. Some of them were, but not all of them. So that is rather inconclusive.

As a plaintiff's counsel, my personal opinion is that I think you're foolish not to provide initial disclosure, particularly if you're getting along with your defense counsel, because the case is going to move along a lot easier.

MEETING AND CONFERRING

Then you come down to the last myth I addressed, and that is that discovery will be more efficient and effective if attorneys meet and confer about discovery issues. In 1993, amendments to Federal Rule 26 required meeting and conferring, and required that a plan be worked out, and that all sorts of information be disclosed back and forth, with the court not involved initially, but then involved in the later stages.

Once again, the RAND study found there was no significant change in the disposition or in lawyers' hours from such a requirement—that it had little, if any, impact on the overall progress of the litigation. The Federal Judicial Center's report was somewhat inconclusive about this, but said that most lawyers found no impact from this



particular rule. Again, it's hard to tell now why that is, and perhaps it would be a legitimate inquiry for somebody else to try to find out why this is so. I can speculate on it myself, because I did engage in meeting initially with opposing counsel, without the rule, in state practice.

Now, the next issue is, of course, enforcement of sanctions. The Federal Rules adopted the practice that was found in several state rules beforehand, that before you go to the court to resolve a discovery dispute, the attorneys indeed must confer with each other. Some rules say they must confer "in good faith."

*Call up your opponent
and say, "Where are the
answers to interrogatories?"*

That kind of rule does not seem to help at all. Call up your opponent and say, "Where are the answers to interrogatories? They're overdue, and the time for closing out discovery with this very difficult judge is coming fast and we need that information." If they are a reasonable, civil opponent, they will immediately get you the information.

However, my suspicion is if they are the other type of attorney, you will probably spend more time trying to meet the technical requirements of that rule than you would if you just had been able to go to court in the first instance and say, "I need an order to compel," or some other sort of sanction in this particular case.

Again, in my own experience, it's a pleasure to work with attorneys who are going to cooperate in discovery. Attorneys who don't want to cooperate are going to find a way to make the rules nonfunctional, and this is one of the rules that is a particular problem. Since I don't practice anymore, if I could just make a little pitch to the judges, if you wouldn't apply this rule so technically sometimes you'd probably find things moved along a little better on discovery and you could resolve the matter.

Those are the facts and myths that I have identified for discussion purposes, and I would hope that over time, maybe even here today, we could resolve some of them a little better and move along and get things done. Again, I don't think that the Federal Rules should drive state rules entirely because there are different problems, different cases naturally in the courts, and different attitudes as to how they should work.

I say that because I know that many of the states, particularly the smaller states, principally use the Federal Rules as their models for their rules and for developing a body of case law that they can rely upon when they are faced with a dispute in their courts. Some of you judges here are in a position to affect those state rules. Before you do, I would urge you to take a close look and decide what sort of impact the change would have. Is the change supported by the findings in these two studies and the other studies that are available? Or would the change merely be driven by anecdotal information that has been relayed to you and to other judges, by attorneys who may have, at that very moment, an aggravation and who are not actually dealing with a problem that is before them.



COMMENTS BY PANELISTS

Honorable Paul V. Niemeyer
Gerson Smoger, Esq.
Francis H. “Brother” Hare, Esq.
Honorable Gerald Elliott

HONORABLE PAUL V. NIEMEYER

It’s an enormous pleasure to be here. I’m grateful to be here. I’m grateful to Andy Scherffius and Howard Twiggs for inviting me.

And as you know, it gives me a little bit of a platform as chair of the Advisory Committee on Civil Rules to discuss with you problems that have occupied the Federal Rules committee for several years now, and I think you might be interested in knowing some of our experiences.

I should say that whether a state follows the discovery process or not should obviously be an independent judgment, but the question inevitably leads to some bigger questions that I’d like to talk about very briefly before I respond to Dean Johnston, because I think there are some answers and there are some things that we don’t have answers to.

But the first question that we really have to ask is, “Is there a problem, and if there isn’t a problem, why are we fixing it?” And of course the question “Is there a problem?” sort of begs the question, because we really have to ask what discovery is, and why we have it. We’re probably the only country in the world that has discovery as we have it now. There are other countries that have it to a lesser degree, and many countries look at the American civil justice system and find it peculiar.

The first question we have to ask is, “Is there a problem, and if there isn’t a problem, why are we fixing it?”

Two Fundamental Questions

So in the Advisory Committee on Civil Rules, which I chair, we did ask these fundamental questions before we began. Number one is, “What does discovery contribute to the civil justice system?” And number two is, “How much does it cost and is it too expensive for what it contributes?” And those are tough questions. They can be subjective. And anybody looking at those questions has to look at it with a larger view rather than an individual constituency. What we learned was that the American civil justice system is indeed different, and the idea of discovery is a fairly novel one. It came, as you know, with the 1938 experiment in revising the rules of procedure. It was an *experiment* when the civil rules were adopted. Before then, we had code pleading, very little discovery; you had to basically dig out what you could get. And as many of the old time lawyers say, trial was by ambush.

In 1938 the experiment, which still hasn’t been revisited, was this: We’re going to require the attorneys to file only notice pleading, sufficient to put the defendant on notice, and we’re going to develop the issues through discovery, and the discovery is going to be committed to the attorneys to manage, and you go to court only when you have a problem. It’s an interesting experiment and at the time there was a fair amount of writing urging the bench and the bar to get engaged in that process, have



this notice pleading and have the cases developed by this accommodation among attorneys in developing their cases through discovery.

Well, if you think of our system as an adversary system and you commit the resolution of discovery problems to the attorneys, you can expect that at some point in time when the discovery process gets to be really used, there's going to be a problem. It's a little bit like the fox guarding the chickens—there's going to be a fight.

I think with the growth in use of discovery (actually with the growth of litigation following the Second World War), we have found that attorneys are the most entrepreneurial group in our country, and they have learned that discovery is a very useful process. They have learned that class action is a very useful process, and we have these judicial mechanisms now being used to their fullest, and everybody is asking, "What have we wrought?" And so when we ask the question, "Is it broke?" I'm not sure there's a good answer. I'm not sure we can go and conduct a survey or a study and say, "Discovery is broke." What we can conclude is we can find out how much it costs and we can make a judgment about whether that cost is too much for what it contributes.

Discovery does regulate. We've asked the general counsel of the big businesses who think they're regulated through discovery if they'd rather be regulated by an agency process in Washington. The response was very quick—"We prefer the discovery process."

As you'll probably hear this afternoon from Professor Paul Carrington, our system of discovery is in effect somewhat a displacement of the regulatory state. Discovery does regulate. And we've asked actually the general counsel of the people who think they're regulated, which would be big business, and asked them the question, "Would you rather be regulated by discovery, broad discovery, or by an agency process in Washington?" And the response was very quick, "We prefer the discovery process." Well, I don't know what that says because at the same time these same general counsel are complaining about responding to document requests that cost them in the hundreds of thousands of dollars.

What Won't Change

The Advisory Committee at the federal level has bypassed these questions. After we've taken the short look, we've concluded it is not our role to reverse the tide on this. We have accepted two notions: number one, that discovery is an important part of our process; and number two, that anything we do will not be intended to undermine the policy of full disclosure. So that, as part of the litigation process, full disclosure will remain the policy.

Now, whether the states continue to do that, that's a question of course that each of your rules committees can examine, but if you continue the model that was set up by the 1938 experiment, then the process is still easy access to court through notice pleading, and full disclosure through discovery.

That still doesn't answer the question of whether it's too expensive, and so we did set about to try to make that finding and we have found some interesting things. As you may recall, there were some numbers being tossed around by the President's Council on Competitiveness years ago that discovery cost 80 percent of the litigation process. I've never seen where that number came from or what the basis was for it. I think *Fortune* magazine sort of came up with that number and it may have been "eyeballing" something. But it's provocative. Eighty percent sounds like a very expensive cost for disclosure. Now, maybe it's worth it. But that's one of the ideas that was facing us.



We did conduct some studies, and I think we're fairly confident of what we can talk about now about the cost of discovery. The data that Dean Johnston has referred to, the main data that we looked at, came in two studies we conducted.

RAND and Federal Judicial Center Studies

The RAND Institute for Civil Justice had conducted a study following the Civil Justice Reform Act in 1990, and they collected enormous amounts of data. They still haven't crunched all the data, but they were responding to Congress's request in that act to find out what was going on in the civil justice system. We asked the RAND Institute to relook at some of that data and answer some questions about discovery, which was only a small part of the study.

The second thing we did was we asked the Federal Judicial Center to conduct a study specifically for us in which they were to find out what's going on and how much it cost. The data are very interesting. Number one, I can confirm, at least from what I know, confirm what Dean Johnston said, that discovery is not a problem in every case. As a matter of fact, we heard anecdotal data that says, "It's not broken, don't fix it." In the vast majority of cases discovery is not a problem. And we learned that the reason it isn't a problem is that it's not used!

In about 40 percent of the cases in federal court there is no discovery. In about, and I don't remember the exact number, another 25 percent, maybe 30 percent, discovery is used to the extent of three hours. So we're looking at 60, 70, maybe even 80 percent of the cases where discovery is not a factor. It's just basically the attorneys take a deposition, there is a little bit of exchange of documentation, and they try their cases. The attorneys who are talking to us from those cases say it's not broke, don't fix it.

But that doesn't tell the whole story. I don't think it's good rulemaking to say simply that, because a rule is not used, it doesn't need to be fixed. If a rule is used in 10 percent of the cases and it proves to be inefficient, it seems to me that rule ought to be fixed. And what we did learn is that discovery is *actively* employed in a small number of cases. But in that small number of cases, discovery can get as high as 90 percent of the litigation costs.

We also learned anecdotally that attorneys from both plaintiffs and defendants said the cost was too great. They did not like it. Eighty-three percent of the attorneys we polled said, "We want some change." Now the kind of change they wanted differed. It was all over the ballpark, but they did want some change.

We learned that in all federal cases (which takes into account those cases where there is no discovery) the average cost of discovery is 50 percent of the litigation cost. You may say that's *not* too expensive or you may say that it is too expensive, but you can't overlook the fact that it is a substantial part of the cost of litigation. In our civil justice system—where we're resolving disputes not by dueling but by going to court—in the average case we're spending 50 percent of the litigation costs, and in some cases up to 90 percent, in trying to find out what the case is about.

If a rule proves to be inefficient in 10 percent of the cases, it seems to me that rule ought to be fixed.



Goals of Rulemaking

I think responsible rulemaking can respond to that data and determine whether we can reduce the cost, make the discovery more efficient, without giving up the policy of full disclosure. And not only do I think we can determine it, I think at this point in time, the 1990s, we have to do that. Let me explain why.

I read in the *Baltimore Sun* the other day that Martin Marietta, a company in Maryland, generates 30 million documents every month within its company on the computers. A million documents a day, one company. If you as a plaintiff were to ask that company to produce each and every document over a period of seven years that refers or relates to a particular subject matter, the volume would be enormous. With computers having access not only to corporate documents, but also to Internet documents, Library of Congress documents, et cetera, in a few years the data within any company may be

unlimited, and the question now is, "What are we going to discover when we want to resolve a dispute? What information can we ask for? What information are we going to draw on?" I think that's the "\$64,000 question" that we haven't answered yet.

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But the one thing I'm confident of is that the rulemaking personnel have to start focusing on the fact that discovery is not opening everything up and asking for everything. If it is, it will just kill the system of justice. We have to start thinking about discovery being tailored to issues, tailored to the dispute before the court, and I think that is the goal that the federal civil rules committee tried to focus on.

Rulemaking Process

We're fortunate to have with us today Rick Marcus, who is our Special Reporter. He's sitting there in the audience. Rick led the subcommittee that looked at this question and drafted over forty possible changes to the Federal Rules. They were brought up to the committee, and we ended up selecting about five or six which we thought were modest and balanced, that would not favor plaintiffs over defendants, and that would go forward in this direction.

Also, we looked at what we thought politically would be attainable at this point. But as chair of that effort, my view is that we've got to take this step. And it's foolhardy for any particular interest group to try to block it when we're facing the bigger question in the information age of how we are going to conduct discovery. In the United States we do not want to give discovery up. When we litigate a dispute, we want to have that disclosure. And if we want to have the disclosure, it's going to have to be rational. We can't make litigation cost millions.

What we end up doing is we start looking for alternative dispute mechanisms—mediation, arbitration. And all of those are fine, but I think from time to time that all of those are a slap in the face of the judiciary, saying "You can't handle the cases." And so the big effort is to try to find a way to provide full disclosure with more efficiency and less cost.

Now, if you have that outlook, I don't know if you can conclude that the rules are broken. They may not be broken. But if you ask attorneys who have practiced in the '50s, '60s or '70s, they'll tell you that back then, you'd get a file a couple of inches thick and you'd think it was a big file. Most cases were that thick *after* discovery. But in a case that has been fully discovered today, you're looking at warehouses, discovery rooms,



offices that are devoted entirely to documents and document sorting. And now that you have computer data that is being selected, you have banks of documents—industry banks maintained both by plaintiffs and defendants. If we’re going to continue this process in the information age, we need to do something. And I think the process that our civil rules committee has begun is a small step, but I think it’s a necessary step.

Limitations of the Data

And so when I answer Dean Johnston about whether it’s “broke” or whether it costs too much, the data aren’t going to show all of this. The data are going to show certain things. One thing we do know is that it’s costly, and I think our anecdotal data will confirm that. We do know, for instance, that depositions go on for days in highly discovered cases, and the attorneys think it’s perfectly appropriate. A seven-day deposition in an antitrust case? They say, “What’s wrong with that? It takes seven days to answer the questions.” In any of these big cases, the depositions go on for *weeks*. And the complaint we heard from the plaintiffs was, “The depositions are killing us financially.” The complaint we heard from the defendants was, “The documents are killing us.” And so the question is how to address both of those concerns.

We did find from our data that depositions were the single largest cost items in discovery. You might think, from all the anecdotal data, that documents would be the biggest cost items, but it turned out that depositions were. We also learned that, in various states—and some of you here can supply better information than we probably had, but I think in Arizona and I think in Illinois and some other places (Florida, maybe)—there are state rules that put a presumptive limit on depositions. You may say, “How arbitrary! How can you make one size fit all?” Most people in those states told us that that was the presumption they went into the debate with.

I think both Arizona and Illinois have a three-hour presumptive limit. And in those situations, three hours turns out to be fine. Every one of the people we talked with said it’s working fine. They get together and agree for longer times, but at least there’s a norm. And our purpose was to establish a seven-hour norm.

Where Rulemaking Stands

Anyway, we have various rules changes. They’re in publication now, they’re being debated now, they’ve cleared the Advisory Committee on Civil Rules and the Committee on Rules of Practice and Procedure (what we call the “Standing Committee”), and they go to the Judicial Conference of the United States, which is the legislative body of the federal judiciary, in September. I’ll be happy to talk more about these—not to talk about the *federal* rules, but more to talk about the rules of discovery and the rules process that you have in your states and what ought to be appropriate.

GERSON SMOGER, ESQ.

Let me talk about three of the myths Dean Johnston referred to. Are they myths or not? Myths are things we know are wrong. The reality now is that we *don’t* know very much about the important issues in discovery under the most recently implemented changes to the Federal Rules. The problem I have about the new proposed changes to the Federal Rules is that they’ve been made without an adequate base of information. That’s because the

The proposed changes to the federal rules have been made without an adequate base of information.



two studies that have been talked about relate primarily to discovery as it existed before the most recent changes.

In any case, the two studies Dean Johnston talked about don't appear to conclude that there is a problem with discovery. The question, then, is whether the two studies are right. If so, then the alleged problem is a "myth," because we *do* know the empirical data say there's no problem.

If somebody is working for me and they're preparing the case and discovery expenses aren't a substantial percentage of our costs, I want to know what they're spending their money on.

Generally, I thought that the process used by the Advisory Committee on Civil Rules was a wonderful process. The Committee brought in a lot of people, and they held at least two conferences that I attended in San Francisco and Boston. But at the end of that process I was surprised, to be frank, that changes were proposed at all, except those to achieve uniformity, which is the one thing almost everybody agreed was necessary in the federal court system.

Cost and Delay

My response to the complaint that 50 to 90 percent of litigation costs arise from discovery, to be honest, is that if somebody is working for me and they're preparing the case and discovery expenses *aren't* a substantial percentage of our costs, I want to know what they're spending their money on. Because discovery is *all* you're spending your money on when you start a new case. That is the substance of the case. What else would they be spending money on?

On the other hand, when we look at the *benefits* of discovery, the Federal Judicial Center [FJC] report clearly said that 69 percent of the attorneys said that they benefitted from discovery, while 8 percent said there was too little information, and 9 percent said there was too much information.

So is the cost of discovery right? The FJC reports that 54 percent of their respondents thought that the expense was about right. I was surprised that more people (20 percent) thought the expense was too low, and only 15 percent thought it was too high. I think probably we're all surprised at that finding in the FJC report.

Initial Disclosure

Initial disclosure is really a planned agreement on interrogatories and requests to produce documents that the courts impose, basically establishing ahead of time that this is the type of information courts are going to require to be disclosed.

I practice in quite a number of states. I have offices in Texas and in California. Texas just came out with a new proposal on initial disclosure. All initial disclosure is, in my mind, an agreement that's made, legislatively or by the judiciary, to say in essence, "We're not going to hear motions to compel on these items. These are the things that the other side can request legitimately, and when they do that, you can't object to their request." For instance, in California we have form interrogatories, and the form interrogatories can't be objected to.

The fight then comes over what *specific* material is going to be required to be disclosed. Now there are proposed changes to the Federal Rules that would shift to requiring disclosure only of what supports your side in the litigation, and you don't have to make initial disclosure of matters that *don't* support your claims or defenses. But



obviously the things that don't support your claims or defenses—the things that *hurt* you—are where the discovery fight is. Essentially, this, in my opinion, will render the initial disclosure requirement somewhat meaningless.

Depositions

One of those people with “anecdotal evidence” whom Professor Johnston referred to, and who are referred to in the report's discussion of limitations on depositions, was *me*. I once sat through a *fourteen-day* deposition of a quadriplegic in a civil rights case. We went through everything about his life, almost minute by minute. And when we got into court, thirteen and a half days' worth of deposition testimony were struck by a one-paragraph motion *in limine*. So I do support some limits on depositions.

Trial Date

The last comment, and I think this is the most important thing, is the one thing that both the FJC and the RAND reports say that reduces costs and time and improves the amount of information in discovery—the only thing they agree on—namely, a firm and early trial date. There are some corollaries to Murphy's Law that lend support to this idea. My favorite corollary is that Murphy was an optimist. But my next two favorite corollaries are (1) “An early, firm trial date saves money, because work expands to fill available time”; and (2) “Ninety percent of the work in cases tends to be done prior to the last month before trial, and the *other* ninety percent of the work is done in the last month!”

FRANCIS H. “BROTHER” HARE, JR., ESQ.¹

Dean Johnston's paper reveals four things to me about him: (1) he is well read and fully prepared to address the topic; (2) he is essentially a philosopher; (3) he correctly perceives the overarching purpose of the discovery process; and (4) he is utterly objective and impartial in his approach to the resolution of the “problem” affecting the current-day conduct of discovery.

Now let me turn to the five myths he identified about discovery:

“Discovery Use and Abuse Are the Cause of Unnecessary Cost and Delay”

Dean Johnston's paper primarily addresses “overutilization” as an abuse of discovery. As they relate to this variant of discovery abuse, I agree with his observations. But in fact there are *two* variants of discovery abuse: (1) overutilization, and (2) stonewalling. Virtually everything that Dean Johnston was talking about in his discussion of the five myths assumes that discovery abuse equals overutilization.

Dean Johnston is to be forgiven for overlooking stonewalling because in fact “discovery abuse equals overutilization” is a common misperception. And there is a corollary perception that plaintiffs' counsel are the primary perpetrators of the overutilization variety of discovery abuse. Why is that?

It is a common misperception that discovery abuse equals overutilization.

1. Mr. Hare prepared an extensive written critique of Dean Johnston's paper, with accompanying projected graphics. These edited remarks are an amalgam of his oral remarks, his written critique, and points made through his graphics.



First, the great majority of the legal literature dealing with discovery abuse focuses solely on overutilization. Stonewalling is virtually ignored.² Second, all but one or two amendments to the federal discovery rules since 1970 have dealt with overutilization and ignored stonewalling.

I've been going to judicial conferences for many, many years. I wasn't a participant, I was sitting out there in the audience, but the speakers would talk about "discovery abuse, discovery abuse, discovery abuse." And every time they said "discovery abuse," they meant "overutilization." They utterly, completely, totally ignored the other variant of discovery abuse—stonewalling. And that's the one I got lots of spears in me about, and that's the one that troubles me.

Going back into the '60s and '70s, the literature that talked about discovery abuse did indeed equate it with overutilization, but most of the articles in the early days—really about 95 percent of the articles in the early days—were dealing with commercial litigation. Believe me. It is an utterly different animal when big companies sue other big companies and hire battalions of lawyers to conduct this punitive war of discovery.

In cases like that, discovery is not a means to an end, *it is the end!* In a commercial suit, if you can get the other fellow to disclose his commercial information and customer list, it makes no difference what the outcome of the lawsuit is. You have acquired, through discovery, everything you need to know. So what is the lawsuit for?

It's different in tort cases, especially product liability cases. Just please take it as a given for the moment that the dynamics that affect discovery in a defective product case are just completely different from the dynamics in other kinds of cases. You don't have battalions of lawyers who already know what kind of documents the other side has. You have some ignorant lawyer like me who not only doesn't know what the answers are, but doesn't know what the questions are, and has to look *real hard* to prove the case.

Stonewalling has a much greater debilitating effect on the judicial process than overutilization.

So the literature talks about overutilization, and the court rule amendment proposals, which are in part a function of the pressure applied by the literature, are addressed almost solely to overutilization. There are one or two since 1970 that have addressed stonewalling, but the great majority of them solely address overutilization.

I believe that if Dean Johnston had addressed the second variant of discovery abuse (*viz.* stonewalling), he would be led to several conclusions:

1. That defendants in defective-design product litigation often (if not routinely) engage in stonewalling;
2. Whereas overutilization is patent when it happens, stonewalling is difficult or impossible to detect;
3. Whereas overutilization is simple to prevent, stonewalling is difficult or impossible to prevent;
4. That stonewalling has a much greater debilitating effect on the judicial process than overutilization, and that that debilitating effect is not limited to unnecessary cost and delay (as overutilization is), but often is actually outcome-determinative; and

2. See Francis H. Hare & James L. Gilbert, *Discovery in Product Liability Cases: The Plaintiff's Plea for Judicial Understanding*, 12 AM. J. TR. ADVOC. 413 (1989).



5. That courts can and should be more aggressive in taking appropriate steps to discourage the use of stonewalling tactics. The dynamics that produce stonewalling cannot and will not be altered unless and until the courts provide an equal and countervailing force to offset the powerful motivation and opportunity to suppress the disclosure of critical information.

“A Short Discovery Period, By Itself, Leads to Faster Case Dispositions”

I agree fully with Dean Johnston’s observations on this one, as far as they go. But his paper addresses only the truth or myth of the assertion, not the implications if the assertion were true. I would add the comment that even if shorter discovery periods *did* hasten case disposition, it would achieve a goal of expediency only at the expense of justice, which is (or should be) the primary goal of our civil justice system.

I am strongly of the view that, in defective-design product liability litigation, defendants routinely suppress critical discovery materials. So stonewalling is effective in the short run. Plaintiffs therefore must carefully and skillfully employ the discovery process to uncover stonewalling and the relevant facts that have been concealed. A shorter and limited discovery period will prevent plaintiff’s counsel from acquiring the information that she must have to fairly and adequately prepare her client’s case for trial.

Although my information is admittedly anecdotal, as chief legal officer of the Attorneys’ Information Exchange Group, I regularly receive complaints from AIEG members that a court has prematurely cut off the plaintiff’s discovery and scheduled a hearing on the defendant’s motion for summary judgment.

“There Are Too Many Depositions, and Depositions Take Too Long”

I agree fully with Dean Johnston’s observations, but I must add that I am strongly opposed to the imposition of arbitrary limits on the number or length of discovery tools. In my judgment, arbitrary limits are *conceptually wrong*.

First, this remedy is based on a misdiagnosis of the “problem,” because it presupposes, again, that overutilization is the sole problem, that overutilization is “inherent” in the system, and it ignores stonewalling. What is frequently called “overutilization” has a *cause*, and it is primarily caused by stonewalling. Second, even if it were correct that overutilization is the problem, the remedy of imposing arbitrary limits is still wrong. It’s like cutting off an arm to cure a hangnail. That may very well remedy the hangnail, but it inflicts greater harm than the malady it relieves.

So any approach to the resolution of discovery abuse that presupposes that the problem is solely or primarily overutilization is fundamentally flawed. The assumption is simply false. Stonewalling is a more prevalent and more debilitating problem than overutilization. Indeed, the omnipresent threat of stonewalling actually *impels* “overutilization.”

Any such remedy is flawed on three accounts. First, it will not solve the problem. Second, by ignoring stonewalling, the remedy fails to correct the cause of the problem. Third, and most important, the remedy frustrates or defeats the fundamental purpose of discovery. The overarching purpose of discovery is to allow both parties to acquire a *mutual knowledge of all relevant facts* pertaining to the dispute in controversy, so that

In defective-design product liability litigation, defendants routinely suppress critical discovery materials.



the resolution of the dispute can be said to be based on the *truth*. Arbitrary limits on discovery (like mandatory initial disclosure and the proposed amendment to restrict the scope of discovery) unnecessarily and unfairly prevent the plaintiff from acquiring critical information. Without this information, plaintiff's counsel cannot fairly and adequately prepare the client's case for a just resolution. For this reason, these approaches are in direct conflict with the purpose of the discovery rules and, indeed, with the purpose of the rules of civil procedure in general.

Finally, concerning the imposition of arbitrary limits, in addition to Dean Johnston's comments that the empirical data clearly show (1) that overutilization only occurs in a small percentage of cases and therefore limits are not needed and (2) that arbitrary limits do not solve the problem, I would add the observation that there are other and better solutions to the problem which do not have the injurious effects wrought by the arbitrary limits approach.

“Initial Disclosure Reduces Costs, Delays and Other Discovery”

I agree with Dean Johnston's observations, but I must comment that, in my judgment, the initial disclosure approach is primarily a one-way street favoring the defendant. The plaintiff voluntarily discloses most of what the defendant needs to prepare to defend the case, and then the defendant discloses little or none of the information the plaintiff needs to fairly prepare for trial.

The dynamics of stonewalling work exactly the same way. If a manufacturer will stonewall on critical information in the face of a specific discovery request, the manufacturer will certainly withhold critical information under an initial disclosure approach. Furthermore, the initial disclosure approach actually *exacerbates* the problem of stonewalling. First, the plaintiff's ability to identify critical information that is exclusively in the corporate defendant's possession (e.g., the manufacturer's internal

documents) is greatly limited and impaired, as is the plaintiff's ability even to uncover the fact that the defendants *are* stonewalling!

Specific discovery requests are delayed and limited under the initial disclosure approach. Second, courts are typically loath to compel further specific disclosure, even if the plaintiff knows what to ask for. The manufacturer will often furnish a mass of irrelevant material, giving the impression of a comprehensive initial disclosure but really doing nothing more than establishing a kind of “reading room” for the plaintiff's lawyer to waste time in.

In short, the initial disclosure approach is another myth based on the assumption that overutilization constitutes the sole or primary discovery abuse problem. Initial disclosure is essentially an attempt to deal with overutilization, but it has little or no remedial effect on stonewalling. So this approach is flawed for the same reasons the approach to depositions is flawed.

“Discovery Will Be More Efficient and Effective If Attorneys Meet and Confer About Discovery Issues”

I am *reluctantly* compelled to agree with Dean Johnston's observations about meeting and conferring. I do it reluctantly because I vividly and pleasantly remember a time not so long ago when opposing counsel could and did get together and work out all kinds of issues,

including discovery issues, and I still think meeting and conferring is a powerful tool left to us if we can change the dynamic that has grown up in recent years.

I vividly and pleasantly remember a time not so long ago when opposing counsel could and did get together and work out all kinds of issues, and I still think meeting and conferring is a powerful tool left to us.



The meeting-and-conferring mechanism broke down with the advent of litigation involving defects in the design of products. Back in the old days when we were trying one and two and three cases a week, we didn't need discovery. The biggest question was likely to be, "Who got to the intersection first?" So I could go to 22nd Street and 2nd Avenue and talk to the witnesses, and we didn't need documents. The evidence was equally available to everybody. The same was true even in most premises liability cases.

Effect of Products Liability Litigation

Then products liability litigation came along, but the first wave of products cases involved manufacturing defects. It was mainly an anecdotal case—say, they left a nut off a bolt on a wheel of a vehicle. There was no other car with that same problem, so we didn't need to get a whole bunch of documents from the defendant. The manufacturer violated its *own* standards. There were no smoking guns, and there was no need for the plaintiff to engage in any kind of document discovery from the defendant. So discovery abuse really wasn't a problem in those days, either.

And then along came the mid- to late 1970s when we got into design-defect litigation. I see many of you nodding your heads. You've been there. I feel like Winston Churchill, who said about World War II, "All of this I saw, and much of this I was." I'm a country boy from south Alabama, but I was in the MER/29 and Thalidomide and swine flu litigation. I was in all those cases. I had a fifty-yard-line seat to see how this change in the nature of the litigation had an impact on discovery abuse.

When you got to design-defect litigation in products cases, the defendant had many documents, internal reports, the things they do in the ordinary course of business that relate to the relative safety or danger of a product. That is critical evidence. It ain't equally available to me as the plaintiff's lawyer. I can't go out to 22nd Street and 2nd Avenue and find a witness. That critical information, which is always the best evidence (and sometimes the only evidence) relative to the defect in the case, is exclusively in the defendant's possession. I just cannot overemphasize the significance of that, because the only way the plaintiff is going to get this evidence, which he must have in order to fairly and adequately prepare this case, is by an effective use of the discovery tools.

But defective-design litigation put corporate management into the box because it *challenged the decisionmaking of the highest executives of the corporate defendant*. At that point, the manufacturer's in-house personnel (as opposed to the local defense counsel) took over the case-management activities—particularly the selection of the company's internal documents that would be furnished in response to the plaintiff's discovery requests. Those developments provided the defendant with a powerful motive to suppress evidence and a perfect opportunity to do so, and it was at that point that the temptation to stonewall became irresistible to defendants and the dynamics of stonewalling as we see it today emerged.

"It's the Plaintiff's Fault"

Now please remember that I mentioned a second corollary to the myth that discovery abuse equates to overutilization—that it's the plaintiff's fault. You read about overutilization, in these commercial cases, like in the folding carton antitrust case where the plaintiff sends over a gazillion interrogatories. And the plaintiff does that because it's trying to cripple his commercial opponent in this case and the plaintiff's lawyer, paid on an hourly basis, has a very powerful motive to do it.



*I don't get paid by the hour.
I have no reason in the
world to overutilize
discovery. Every time I
spend an hour in discovery,
it comes right out of my fee.*

But I'm in a product liability case. I don't get paid by the hour. I have no reason in the world to overutilize discovery—I really don't, except for the fear that I have to find that smoking gun to prepare my case. Every time I spend an hour in discovery, it comes right out of my fee. I don't get paid until the end, out of a percentage. And if I spend \$100,000 on discovery, I ain't got nobody paying for it. So it's ironic that the literature leads to the conclusion that it's the plaintiff's fault, because I have got no motivation to do it.

And there are some very bad consequences of that. If the judge thinks the problem is overutilization, and thinks I'm the one doing it, then I'm in trouble. Do you remember that story about the time when a newscaster came up to Vince Lombardi, the coach of the Washington Redskins? He was talking about how Willie Davis used to make very vicious tackles when he was on the left side of the field.

The newscaster said "Coach Lombardi, why does Willie Davis make these vicious tackles when he's on the left side of the field?" Lombardi said, "Well, Willie plays right defensive tackle, and if Willie has to run all the way across the field to make a tackle, he arrives mad."

Well, here I come into court, and I need help because all these critical documents are in the defendant's possession and the defense lawyer is not real eager to give them to me voluntarily, and in fact he *won't* give them to me voluntarily, and I go to the judge, but the judge is mad because he thinks the problem with discovery is overutilization, and he doesn't help me because he thinks it's all my fault to begin with!

So my pitch is, please let's do a little redirecting of this focus back on stonewalling instead of on overutilization and do something about *that* problem.

God bless you severally, jointly, and collectively.

HONORABLE GERALD ELLIOTT

Thirty years ago, here in San Francisco, I think, I promised myself I would never be suckered into following Brother Hare again. I've failed.

Civil discovery certainly does present institutional issues to the state courts. We've started talking about those today, and it's very appropriate that we, as state court judges, would come together and think about the institutional issues. So I commend the Pound [Institute], not only for these forums generally, but for this forum in particular, because it is important that we address these issues on an institutional basis, and I'm glad to be a part of it.

I also say to Dean Johnston and Professor Carrington, I commend you for the papers that you've presented and the information that you have brought to us. It certainly is true that there are myths surrounding discovery just as there are myths surrounding the whole judicial and litigation process. I think Dean Johnston identifies five of them that each one of us has seen, depending upon our own jurisdiction and our own local rules.

Limitations of RAND and FJC Studies

Some of these myths are going to be more or less present in different courts, depending on what our local rules are, but we've heard these myths and they're very pervasive, and they do rear their heads from time to time. However, having read both papers and some of the supporting material, I would be very reluctant as a state court



judge to consider adjusting the rules that I follow on the basis of either the RAND study or the FJC study.

Those studies, as I perceive them, dealt with, and were motivated in large part by, the Civil Justice Reform Act of 1990, in which Congress attempted to adopt a number of new strategies for managing civil litigation and assigned particular courts to try those new strategies. These studies were evaluations of the success of those specific strategies that were mandated for several *federal courts*, and so they did not necessarily review the sorts of things that we as state court judges might be more interested in. So I think that, as state court judges, we need to be very, very careful in evaluating our own procedures or making any adjustments based solely on either one of these studies.

A lot of state court rules, of course, follow the Federal Rules in some part, and some things that happen in the federal courts are fairly taken into account when we try to set our state courts' discovery rules and procedures. But the fact is that the federal courts really undertake a different type of case—certainly the larger case. Let's just be realistic about it. The federal court dockets are different from the state court dockets. There is a certain group of lawyers who practice more in the federal courts than they do in the state courts. Different kinds of cases come up, different kinds of controversies. There's a whole different legal culture. So I'm very reluctant as a state court judge to make too many decisions on the basis of these studies, which were intended to examine the responses of the federal courts to their own kinds of problems.

On the other hand, based on my experience in my court and in my state's courts, I agree absolutely that by and large these "myths" are just that. I don't think we really need to dwell on it any longer. Every one of us has some anecdotal information based on our experience with cases that are over-discovered or abusively discovered, whether it's overuse or stonewalling. We've all had that experience. But according to my experience, it has been very, very limited. And I'd be very reluctant to make particular rules to try to combat that very, very minor part of the litigation that comes before state courts.

Context of Discovery

We do need to recognize some things when we take a look at the myths, though. The first is what Judge Niemeyer pointed out—that discovery is merely one part of our entire judicial system, in which we have notice pleading, and proving the truth of a particular proposition or disproving the truth of it to an impartial fact finder, either a jury or a judge. And it is an adversary system, where we require two different sets of lawyers to gather that evidence and bring it to the courtroom. Any time we start to touch on the discovery part, we're going to impact all of the other parts of this system. And I think we need to look at the system very carefully and we have to see it in its entire context, or we're going to do what we so often do otherwise, which is to generate a lot of unintended consequences that we haven't even really thought about.

One of the points that hasn't been brought out here this morning, that I think needs to be brought out, is that in discovery, what is "necessary" and what is "relevant" are very subjective. No two judges in this room, let alone two lawyers at a legal convention, ever agree 100 percent on discovery issues—whether something is necessary, whether something is justified by the expense. I think we don't want to get caught in the trap of supposing that these discovery judgments are going to be objective judgments, because they're very subjective, and I'm certain that they always will be.



I see a change in philosophy here—away from allowing (and requiring) the lawyers to do the work and toward the point where the court and the rules are now getting involved in managing and dictating the discovery.

Attempt to Restrict Discovery?

To my way of thinking, this whole discovery issue stems from an attempt to see how successfully discovery can be restricted. Somebody has mentioned here a couple of times that it's a part of a "big business" effort to restrict discovery; it's a part of the "tort reform" agenda; it's a part of the securities litigation reform agenda. I think you have to see it for what it really is, and that it seems to be what it really is.

The last point that I would make is that I see more and more court involvement in these Federal Rules and in these federal responses to perceived problems. First we established in Rule 26 that the court is going to require certain disclosures. The disclosures aren't ordinarily onerous and they don't really damage either side to any great extent, but the rules are starting to impose themselves on what the lawyers are doing.

The new proposal discussed by Dean Johnston and Professor Carrington would provide, in Rule 26(b)(1), for different classes of "attorney-managed" discovery and "court-managed" discovery. I don't think the rule as it's drafted is going to do any particular harm, but I see a change in philosophy here—away from allowing (and requiring) the lawyers to do the work and toward the point where the court and the rules are now getting involved in managing and dictating the discovery, and I urge that we keep that in mind. I doubt that it's something that we really intend to be doing, and that it's desirable.

State Courts Are Different

I think clearly there are myths, and I think the myths are on quite a different footing in the state courts than they are in the federal courts. And before we take any steps I'd say that we ought to look at it much more carefully than we have already.

RESPONSE BY DEAN JOHNSTON

I just have a couple of very brief responses.

To Brother Hare I would say that, for the attorneys who are civil, helpful, and courteous, there probably is no need to have a discussion with them as to why they haven't complied with the discovery, because as soon as you talk to them they're going to start complying. I think that's true in the majority of cases. But for the few who don't want to comply, the proposed rule requiring meeting with your opponent before seeking sanctions is going to take you down the line for several arguments and several letters before you can somehow get relief. So I'm not so sure that that rule really does much for you.

As to the comments about an early trial date, there are other consequences that come from these rules that are very, very nice. I once was a solo practitioner with about a third of my practice devoted to modest personal injury cases. I was the happiest man in the world when I found out that the chief justice of my jurisdiction was threatening everybody who was tying up the court, so that we got our cases tried within a year—even a substantial case, out within a year. That's a good practice aside from the



discovery issue. It was a real benefit to somebody who was just starting off in practicing law.

As to Judge Niemeyer's thoughts about tailoring the solutions to the problems, it's got to be done. I hope I'm retired and spending my time fishing by the time they really have to get into the questions of electronic discovery and how discovery is going to work when the "documents" are electronic. That just boggles my mind right now.

But I do have a couple of quick questions that maybe Judge Niemeyer could help me out with.

First, on the finding that 50 to 90 percent of the costs on the bigger cases go to discovery, did that include both trial and settlement? I could certainly see that in a case that was settled, but not necessarily in a case tried to verdict.

The other question is, going right to the thrust, why have disclosure at all, Judge Niemeyer?

Judge Niemeyer: I'm probably not as up to date as you are on what the data include. I think they included both types of cases, but I think the more significant observation about that is that when discovery is employed in a case, it's a fairly expensive process.

As to Brother Hare's comments, he's observing something that is a problem everywhere, and that's abuse. We didn't address that at all. That's been addressed over the years and there's no good answer as to how to address abuse. We were addressing different questions: What should be the architecture of the rules if used properly? What is an appropriate way to make it more efficient?

And that leads to the second question, which is, why have disclosure at all? That's a good question. It really arose out of some of the experiments under the Civil Justice Reform Act, but I would like to elevate it a little further into a philosophical question, revisiting the 1938 notion that notice pleading was adequate. Disclosure puts flesh on the complaint without having discovery. Under the proposed change that we would make under these rules, a person would only have to supply that information which supports his claim or defense. So the plaintiff provides basic information that supports his complaint, and the defendant discloses the matters that support the defense or the denial in the case. And if you really want hostile information or further information, then you go into the discovery process.

Why have disclosure? I think the answer is that the attorneys like it. All our data show that the attorneys like it. It has not generated satellite litigation, and we think we probably ought to continue with disclosure. It's probably a move in the right direction toward the resolution of disputes on a more efficient basis.



QUESTIONS AND COMMENTS

Question from the floor: Judge Elliott talked about the philosophical change from attorney- managed to court-managed discovery, and he seemed to indicate that may not be a proper change. I would like some response from others on the panel. Is this a philosophical change? Is it enough that the judge set a firm and early trial date?

Judge Niemeyer: It is a deliberate and philosophical change. We learned, first anecdotally from the attorneys, that the biggest gripe they had about the federal system was that the judges wouldn't get involved in discovery disputes, or wouldn't get involved early. They complained that they were left out there to twist and hang in their fights with the other side, and it cost them money.

Then the data we collected proved that out—that when judges got involved early and actively in discovery the costs were reduced. That was one of the affirmative findings. So we did make a deliberate effort to try to get the judge involved—the trial judge, involved early in the discovery disputes and the problems in order to manage the case.

Gerson Smoger: I think it's more than that. I mean California does have early intervention by the trial judge, while Texas doesn't. Those are the two places where I practice most. Intervention is very beneficial in very high stakes cases, because you're getting an audience with the court that drives the case early.

As the stakes go down, though, intervention increases the cost and increases the time in cases that the attorneys don't need the time involvement in. They're driven to do discovery that's unnecessary. So it has to be looked at very carefully and with some guidance as to the value and what's at stake in the matter.

Judge Elliott: But you have to keep in mind the distinction between a judge getting involved in different situations. It's perfectly proper and very useful in my experience to have an early discovery or scheduling conference where you allow the attorneys to exchange their points of view about what the issues are, and in what direction and how long the discovery should take. That's one thing. But to specify in Rule 26 what items are going to be disclosed, and to require with the force of the rules and with the force of the court that certain matters be disclosed, is another. More importantly, to say in Rule 26 that discovery that reaches beyond the claims or defenses of the parties embracing the subject matter involved in the action remains available, but only on court order for good cause, involves the court in making decisions about what areas discovery can go into in terms of specific and substantive points. It seems to me that that may be useful on some occasion and it may be necessary, but my point is it involves the judge more in the substantive discovery process than I happen to think is appropriate.

Francis Hare: Well, how are you going to get by the stonewall if you don't have a judge? I don't think that across the board it requires it. I think that only a small

It is a deliberate and philosophical change. We learned, first anecdotally from the attorneys, that the biggest gripe they had about the federal system was that the judges wouldn't get involved in discovery disputes, or wouldn't get involved early.



percentage of cases require it. *Then* one of the great methods of resolving it is by judicial intervention. As an alternative, I would suggest maybe involving a magistrate or a special judge who has special gifts and talents and experience in handling discovery disputes—maybe not the trial judge. I don't think it happens that much. And if you had to do it, I would use a master or a judge with special gifts who knows how to conduct discovery and does it full time. Because there are some times when the judge needs to point a gun at somebody and say, "Behave. Deal with me, or deal with somebody else."

Question from the floor: Mr. Hare said that plaintiffs don't want to overutilize discovery—at least those who are functioning on a contingent fee. If they don't want to, I would think normally they're not going to do it. But do you think, Mr. Hare, or perhaps Mr. Smoger, that there is overutilization of discovery by defendants and, if so, what is the reason, what is the incentive to do that?

Francis Hare: I didn't mean to say that plaintiffs don't overutilize discovery. They do. The point that I would make is that stonewalling and the threat of stonewalling is the major cause of the plaintiff's overutilization. If the plaintiff thinks that he's not going to get this document, or if the defendant is going to construe a narrow request in a fashion that doesn't get it to [the plaintiff]—there are all kinds of techniques that [the defendant] can use for stonewalling. If [the plaintiff] is convinced that the defendant is going to stonewall him, then he's going to hunt it with a shotgun. If he's not, doesn't have that fear, if he's got a narrower range of documents, then he doesn't have the motivation to do it.

Plaintiffs do overutilize discovery. But stonewalling and the threat of stonewalling is the major cause of the plaintiff's overutilization.

So I'm admitting that plaintiffs do overutilize discovery. But the remedies that are addressed only to overutilization and ignore stonewalling ain't going to solve the problem because you've still got the threat of stonewalling that provides the motivation. So you've got to approach it systemically. If you want to deal with overutilization, you've got to deal with stonewalling also. That's my first point.

And yes, the defendants sometimes overutilize, but only rarely in tort litigation, because we haven't got anything they want so much that they can't get on their own through Rule 45 sources that are equally available. Sometimes, but rarely, does the plaintiff have anything that the defendant really needs to prepare his case that he can't get from another source.

Gerson Smoger: I wanted to go to the FJC report itself, because excessiveness of document discovery was part of the myth. When the FJC polled attorneys, 28 percent of the attorneys responded that the biggest problem with document discovery was when a party failed to respond adequately. Only 15 percent said an excessive number of documents were asked for. So the people who had the problem with stonewalling were double the attorneys that had a problem with excessiveness in discovery.

In products liability, medical malpractice suits, antitrust suits against a company, the plaintiff is necessarily the one seeking the vast majority of the documents. You'd think that plaintiffs would have the greatest problem with stonewalling. But when you look at the FJC study and you just look at defendants, you find that 24 percent of the defendants said some party failed to respond adequately, while 19 percent said an excessive number of documents were asked for. So even among defendants, the bigger



difficulty they had was the failure to respond adequately.

And yes, we have to deal with the fact that people can ask for too much. And the biggest problem, you know, at the end, is the experience of the counselor that you're dealing with. Because as the stakes go down, the more experienced the counsel is, the less problem you have. And when you get to somebody who doesn't know what's important for trial, then you have a lot of problems. But I don't know if there is a remedy that we can have for people being inexperienced.

Comment from the floor: As a plaintiff's practitioner who does some very small cases on occasion, personal injury cases, there's cases where they're straightforward and I wouldn't do any discovery. And I don't know what their motivation is, but the problem for me in those cases is that often the opposing counsel decide they have to take everyone's deposition, including all the doctors, and subpoena all the documents, and it takes all of the income or profit for the plaintiff's attorney out of the case. So that is a problem, I think, in terms of the small cases for plaintiff practitioners where the defendants do discovery that really is not necessary. I don't know what the remedy for that would be, though.

Francis Hare: And in the big, mature defective-design litigation, if it's mature, plaintiffs that come into it later on in the case often don't do any discovery. They'll come to a group like mine, the Attorneys' Information Exchange Group, or ATLA, or some other person who's got an inventory of documents and just live off that. They simply can't afford to conduct that kind of discovery and so they go to a litigation support group or a central depository, and they don't do any discovery.



RECENT EFFORTS TO CHANGE DISCOVERY RULES: DO THEY ADVANCE THE PURPOSES OF DISCOVERY?

Paul D. Carrington

In his paper, Professor Carrington begins by looking at discovery as a historical phenomenon unique to the American system of justice in both federal and state courts, contrasting it with code pleading and judge-managed systems in force in other countries. Discovery, he demonstrates, is intended to support the notion that cases should be decided on their facts and law, and it is an antidote to dependence on advocacy skills and litigation strategy. As such, discovery has also enhanced considerably the law-enforcement powers and practices of courts, with a concomitant reduced reliance on executive-branch administrative regulation of numerous activities. This phenomenon is observable in state courts as well as their federal counterparts because states have tended to adopt procedures very similar to those in force on the federal side. This shift has resulted in increased interest in and scrutiny of the courts and civil litigation, and discovery in particular, by organizations that otherwise would likely be lobbying administrative regulatory agencies. One part of this scrutiny has involved a conflation of substantive tort “reform” issues with procedural reform.

Professor Carrington then reviews a number of changes proposed or adopted recently for the rules of discovery, with an eye to how they advance or defeat the original purposes of the American discovery regime. One such change is the abolition of most local court rules relating to discovery, which have added complexity and confusion to federal practice. Another is the recent requirement to make advance disclosure of evidence relevant to the pleadings in civil cases.

He then moves to the body of practices termed “judicial case management,” which constitute a response to use of the discovery rules by lawyers to gain illicit advantage, in derogation of the bar’s public duty to cooperate in the investigation of disputed facts. Professor Carrington views this trend as a costly and radical departure from the American legal tradition that has failed to reduce substantially cost and delay and that has diverted courts from law enforcement and judges from their central role of judging cases while increasing pressures on them to control many aspects of litigation that can and should be left to lawyers.

Addressing proposals to restrict the scope of discovery to matters related to the parties’ “claims and defenses,” Professor Carrington finds that they endanger the notice pleading regime and, more seriously, that they lend tacit approval to resistance to discovery.

Finally, Professor Carrington discusses other avenues of reform that he believes would produce real benefits and commends them to state rulemaking committees for consideration: exchange of adopted statements, several restrictions on depositions (limiting the number of depositions, reserving objections to deposition questions, reopening of depositions, and using videotaped depositions at trial), confidential production of documents, and greater restrictions on suppression of discovery materials as a condition of settlement.



Readers of this paper will know that there have been for some time movements afoot to reform the discovery provisions in the Federal Rules of Civil Procedure. Sometimes unclear have been the purposes of reform, and indeed of discovery itself.

Indeed, why do American courts, virtually alone in the world, empower lawyers to investigate disputed facts? The reality is that discovery is more deeply rooted in our legal and political culture than many who bear its costs notice, or care to acknowledge.

THE ADVENT OF DISCOVERY, AND OF PRIVATE LAW ENFORCEMENT

While much of the practice and diction of discovery was known to the English Court of Chancery, discovery was not a major feature of American law until the 1938 Rules were promulgated. The 1934 Rules Enabling Act¹ had been a political triumph of the American Bar Association.² Its primary goal was the unification of the federal judiciary to serve the common purpose of enforcing rights and duties of citizens challenged or endangered in civil litigation. On that account, it enjoyed the support, indeed the zealous advocacy, of nationalists as diverse in their politics as the arch conservative William Howard Taft and Charles Edward Clark, a committed New Dealer.

Anyone writing procedure rules on a clean slate in 1936 would have done as Judge Clark and his drafting committee chose to do in rejecting the traditional practice of code pleading then prevalent in most states. In adapting discovery for general use,³ the draftsmen acted on a premise supplied us in the eighteenth century by the

Enlightenment. That premise is that cases ought be decided on the facts and the law, and not as a consequence of the skill or luck of the parties' representatives in jousting or sumo, a sport initially devised as a method of dispute resolution,⁴ or a word game such as common law, or later code, pleading. That idea of the Enlightenment has been notably celebrated by Max Weber.⁵ Few if any advocates of discovery reform would question that premise.

The discovery rules elevated the law-enforcing role of the federal courts.⁶ Not only were federal courts committed to enforcing law in civil cases, but they were assured of being more able to investigate and discern facts in dispute than any courts had ever been. The private bar serving as officers of the courts were effectively commissioned to use the courts' subpoena power to investigate a wide range of conduct that may be tortious or even unlawful.⁷

While some critics doubted that the increased accuracy in the application of the law was worth the cost to the litigants of the new methods of investigation,⁸ by the mid-1960s, the

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1. Pub. L. No. 73-415, 48 Stat. 1064.
2. Steven B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1043-98 (1982).
3. FED. R. CIV. P. 26-37.
4. P.L. CUYLER, SUMO: FROM RITE TO SPORT 22 (1985).
5. See, e.g., MAX WEBER, ECONOMICS AND SOCIETY 657 (G. Roth & C. Wittich eds., 1968). Cf. FROM MAX WEBER: ESSAYS IN SOCIOLOGY 218-20 (H. H. Gerth & C. Wright Mills eds., 1946).
6. Edson A. Sunderland, *Scope and Method of Discovery Before Trial*, 42 YALE L. J. 863 (1934); Sunderland, *Improving the Administration of Civil Justice*, 167 ANNALS OF AM. ACAD. POL. & SOC. SCI. 60 (1933); Sunderland, *Discovery Before Trial Under the Federal Rules of Civil Procedure*, 15 TENN. L. REV. 737 (1939).
7. See generally WILLIAM A. GLASER, PRETRIAL DISCOVERY AND THE ADVERSARY SYSTEM (1968).
8. William H. Speck, *The Use of Discovery in the United States District Courts*, 60 YALE L. J. 1132 (1951).



federal courts had replaced administrative agencies as the preferred means of enforcing much of our national law. Unlike administrative agencies and other political bodies in any government anywhere, the federal courts, their juries, and the private bar serving them were almost invulnerable to political manipulation, intimidation, or bribery in any of their many forms.⁹ The federal district court was therefore as close to a level playing field as any public forum has ever been.¹⁰ Armed with the contempt power,¹¹ the federal courts were indeed a daunting threat to anyone considering a possible violation of the national law potentially injurious to the rights of others.¹² Law enforcement in civil cases, not mere dispute resolution, became the primary business of the federal courts.¹³ Primarily enforced through civil litigation were laws deterring trade practices injurious to markets in goods and fraud injurious to investment markets, laws protecting civil rights and civil liberties, and laws protecting the environment. Where other countries relied upon administrative bureaucracies to protect the public interest in these large and important areas, America relied primarily upon its courts because they proved to be more effective.

State courts and legislatures in most states soon perceived this effect and replicated the federal practice in their state courts.¹⁴ We have by means of Rules 26–37 and their analogues in state law, privatized a great deal of our law enforcement, especially in such fields as antitrust and trade regulation, consumer protection, securities regulation, civil rights, and intellectual property. More frequently than before, American lawyers were giving their clients the unwelcome advice that unlawful conduct harmful to others would likely be detected and the law enforced. In short, American law became surprisingly effective. Private litigants in America thus do, and do more effectively, much of what is in other industrial states done by public officers working within an administrative bureaucracy.¹⁵ This development coincided with the steady rise in the rights-consciousness of the American people.

We have privatized a great deal of our law enforcement.

This development was entirely consistent with American political traditions. At least since the time of Andrew Jackson,¹⁶ many and sometimes most Americans had been

9. *But compare* John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823 (1985) with Samuel Gross, *The American Advantage: The Value of Inefficient Litigation*, 85 MICH. L. REV. 734 (1987).
10. They were “a quantum leap toward equality in fact.” Jack Weinstein, *The Ghosts of Process Past: The Fiftieth Anniversary of the Federal Rules of Civil Procedure*, 54 BROOK. L. REV. 1, 25 (1988).
11. The contempt power to enforce injunctions is not available elsewhere, and is generally regarded as “a legal technique which is not only unnecessary to a working legal system but also violative of basic philosophical approaches to the relations between government bodies and people.” RONALD GOLDFARB, *THE CONTEMPT POWER* 2 (1971).
12. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).
13. Hal S. Scott, *Two Models of the Civil Process*, 27 STAN. L. REV. 937 (1975); Jack Coffee, *Understanding the Plaintiff’s Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669 (1986).
14. “The [Federal] Rules may be Bleak House, but everyone wants to live there.” Geoffrey Hazard, *Undemocratic Legislation*, 87 YALE L.J. 1284, 1287 (1978).
15. I made this point more elaborately in Paul D. Carrington, *A New Confederacy? Disunionism in the Federal Courts*, 45 DUKE L.J. 929, 933–44 (1996) [hereinafter *Disunionism*].
16. Jackson’s most famous utterance was his bank veto message of 1832:
It is to be regretted that the rich and powerful too often bend the acts of government to their selfish purposes.... [W]hen the laws undertake to add to [their] natural and just advantages artificial distinctions, to grant titles, gratuities and exclusive privileges, to make the rich richer and the potent more powerful, the humbler members of society—the farmers, mechanics, and laborers—who have neither the time nor the means of securing like favors



skeptical about the ability of bureaucratic government to protect the individual interests of ordinary citizens from predations by those with greater wealth and economic power. That skepticism was repressed during the Progressive era and by the New Deal when most of our federal bureaucracies were created. But it was confirmed a thousand times in the first half of this century that regulatory agencies tend to be co-opted by those whom they regulate.¹⁷

As a result, we have since about 1950 acted on the belief that if individuals of modest standing and resources are to be secured protection from predation by those possessing the means of exploitation, private civil litigation is the best means available to them. Congress and state legislatures have therefore been disinclined to create new regulatory bureaucracies and have generally expressed regulatory purposes by imposing civil liability on predatory conduct they mean to deter. Legislators and their constituents have known that, however numerous their many deficiencies, the private bar and the jury cannot be bribed, intimidated, or socialized by the incentives of status and class association, and are more likely than bureaucracies to enforce the rights of individuals without fear or favor.¹⁸ Discovery has been an essential instrument in that shift from bureaucratic to private regulation.

Unsurprisingly, those receiving the unwelcome advice that their misdeeds are detectable by private counsel find discovery and the uniquely American form of private law enforcement to be objectionable. Many American firms perceive themselves to be victims of discovery. And the knowledge that discovery can result in exposure of corporate misdeeds is a major reason why foreign firms doing business in the United States tend to despise American courts, and why they strenuously resist the introduction of that practice in their home countries.

Not so many years ago, our economy seemed to be in disarray. Vice President Quayle was put in charge of a commission to restore the competitiveness of American business. Among the concerns his group expressed was the high legal costs inflicted on our entrepreneurs. The longstanding grievance of the Chamber of Commerce and like organizations against discovery was again voiced. Not observed by the Quayle Commission was the fact that the higher legal costs paid by American firms are balanced by higher taxes paid in Europe and Japan by firms in those countries that are more heavily regulated by administrative offices and agencies. Senator Biden seemingly sought to steal a march on the Vice President and sought the help of the Brookings Institution to prepare a quick study leading to enactment of the ill-considered Civil Justice Reform Act of 1990.¹⁹ The principal effect of that legislation was to encourage local experimentation by federal district courts in their management of pretrial litigation. The discovery rules were modified in 1993 to accommodate the experiments being conducted pursuant to that act. The period prescribed for such experiments having come to an end, it is again time for those responsible for the federal civil rules to revise them to reflect current understanding and practice. It seems almost certain that revisions will be made next year, and proposals to effect change are presently percolating through the elaborate system by which rule changes are accomplished.

to themselves, have a right to complain of the injustice of their government. There are not necessary evils in government. Its evils exist only in its abuses. If it would confine itself to equal protection, and as heaven does its rain, shower its favours alike on the high and the low, the rich and the poor, it would be an unqualified blessing.

2 COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 590 (J. D. Richardson comp., 1908).

17. JAMES M. LANDIS, REPORT ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT, S. REP. NO. 86-26 (1960).

18. WILLIAM O. DOUGLAS, WE THE JUDGES 389 (1956): “[The jury] is one governmental agency that has no ambition.”

19. 28 U.S.C. §§ 471–482 (1990).



As the Quayle Commission report²⁰ tended to demonstrate, there is a chronic tendency of business firms who are inviting targets for litigation to conflate procedural reform with tort reform. Those who cannot hope to secure relief by the legislative abrogation of the rights of the citizens who are suing them may seek to achieve that result by the more devious means of impeding their adversaries' access to the evidence needed to establish their claims. Nevertheless, there may be merit in some proposals for substantive law reform intersecting with discovery. For example, there is at least some merit in eliminating the occasion for expensive document searches in product liability cases.²¹ It is in the public interest that corporate officers have discussions of risks unfettered by the threat of liability imposed on the basis of intramural discussions. Tort liability, I do not doubt, is a useful incentive to manufacturers to make prudent decisions about the risks to users of their products. But it may be counterproductive to that purpose to impose or increase liability on the basis of communications between officers of manufacturing firms discussing such risks candidly. Neither liability nor damages ought be framed in such a way that candid internal discussion has substantial adverse consequences for the firm. For that reason, the substantive law of product liability should perhaps be reformed to make the manufacturer's subjective state of mind irrelevant. Such a reform would materially reduce the cost of discovery in products liability cases, for there would be no point in searches through storehouses of documents looking for the proverbial smoking gun that is nothing more than an expression of concern or an acknowledgment of apparent hazards.

There is a chronic tendency of business firms who are inviting targets for litigation to conflate procedural reform with tort reform.

It is, however, contrary to the public interest to allow manufacturers' legitimate concern for the consequences of socially counterproductive document searches to drive a substantial procedural reform of discovery practice having broader ramifications for the enforceability of the rights of citizens. We ought keep clearly in mind that discovery is the American alternative to the administrative state. Unless corresponding new powers are conferred on public officers, constricting discovery would diminish the disincentives for lawless behavior across a wide spectrum of forbidden conduct.

THE CASE AGAINST LOCALISM

Among federal judges, the most heated issue regarding the present proposals to reform federal discovery practice is one of no more than modest interest to state judges, but requires brief note here. As a result of Senator Biden's Civil Justice Reform Act,²² and local plans promulgated pursuant to that legislation, there remains detritus of local rules or standing orders bearing on the subject of discovery. While the official study of the local plans by the RAND Institute for Civil Justice (ICJ) was not designed to measure the effects of local differences in discovery rules, its data tend to confirm a high level of dissatisfaction with localism in discovery rules.²³ A loose survey conducted by the ABA Section of Litigation speaks strongly to this same issue.²⁴

20. PRESIDENT'S COUNCIL ON COMPETITIVENESS, AGENDA FOR CIVIL JUSTICE REFORM IN AMERICA (1991).

21. Litigation against both tobacco manufacturers and breast-implant manufacturers has entailed an intense search for correspondence between executives manifesting knowledge of dangers not disclosed to the public.

22. 28 U.S.C. § 471 note § 105(c)(2)(C).

23. JAMES A. KAKALIK ET AL., JUST, SPEEDY AND INEXPENSIVE? AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT (RAND Institute for Civil Justice 1996).

24. A.B.A. SEC. OF LITIG., MANDATORY DISCLOSURE SURVEY: RULE 26(a)(1) (1996).



*There are few if any
redeeming benefits of
localism in procedure rules.*

The data produced by these inquiries accord with common sense. The costs of localism in discovery practice are apparent. Local discovery plans and rules, including standing orders or, as they are sometimes called, local rules, create clutter impeding the efforts of lawyers, and sometimes even judges, to know what their rights, powers, and duties might be.²⁵ They add complexity, and thereby add to the investment of lawyer time required to move cases. They are especially a burden to lawyers and litigants who appear episodically in court, or in more than one district court, and they confer an inappropriate benefit on local repeat players. In some cases, it may be necessary for litigants to retain local counsel merely to secure guidance through the maze of local discovery rules.

There are, on the other hand, few if any redeeming benefits of localism in procedure rules. There are no differences among federal districts, or among counties within a state system, to warrant differences in discovery practice to reflect local conditions. Whatever differences may exist in the professional cultures of different districts, there are none that bear any rational connection to the present law of discovery.

This was the position of the Congress of the United States in 1988 when it enacted legislation to constrain the local rulemaking power.²⁶ The Judicial Conference in response to Congressional concern established the Local Rules Project²⁷ resulting in the reconsideration and elimination of many local rules and in the promulgation of revised Rule 83 in 1995.²⁸ Among the local rules that were not consistent with the national rules were scores bearing on discovery. After enactment of the 1988 revision of the Rules Enabling Act, all such rules were forbidden by Congress and it was a task for the Civil Rules Committee to help make that clear to district judges. The most common kind of local rule invalidated by the 1988 law were standard restrictions on the number of interrogatories a party could serve except by leave of court;²⁹ almost every district had such a rule, and after 1988, all of them were invalid.

The 1990 Act was a puzzling but momentary reversal of direction by Congress. While directing the district courts to establish local plans to reduce cost and delay, it did not explicitly or by necessary implication repeal the 1988 proscription on deviant local rules, and hence did not authorize a local plan to violate a national rule.³⁰ There was never any thought by those who write procedure rules that localism was desirable for its own sake. Indeed, the Civil Rules Committee continued to strive in the direction of national uniformity. This was evidenced by the revision of Rule 83 to make it conform to the Rules Enabling Act as modified in 1988. Now, however, come many federal judges who, having imbibed the intoxicating drink of local rulemaking, wish not to give it up.

I do not perceive that local rulemaking is a serious problem in state courts. But the present imbroglio in the rulemaking process of the Judicial Conference of the United

25. *Disunionism*, *supra* n. 15 at 944–52; COMMITTEE ON THE JUDICIARY, RULES ENABLING ACT OF 1988, H. R. REP. NO. 99-422 at 14–16 (1985).

26. Act of Nov. 19, 1988, 102 Stat. 4648, 28 U.S.C. §§ 2072–74 (1994).

27. The Judicial Conference of the United States authorized the Standing Committee on Rules of Practice and Procedure to undertake the Local Rules Project in 1986.

28. FED. R. CIV. P. 83.

29. DANIEL R. COQUILLETTE ET AL., REPORT OF THE LOCAL RULES PROJECT 95-99 (1988).

30. *Disunionism*, *supra* n. 15, at 952–65.



States suggests the wisdom of a state policy never, never to commission local groups of judges to make their own rules.

PROS AND CONS OF MANDATORY DISCLOSURE

Much of the brouhaha in federal rulemaking has to do with the provision of Rule 26(a)(1) requiring parties and their attorneys to disclose at the outset evidence in their possession bearing on the issues raised by the pleadings. That provision was introduced into the rules in 1993 as a device for enabling lawyers to plan and to manage discovery. The 1993 provision contained a local opt-out provision and was promulgated chiefly because several local districts wanted to experiment with such a requirement that would have been in violation of the rules, absent the 1993 provision. The evidence on the utility of the disclosure requirement suggests that the reform was mildly useful where tried, but had no major consequence. The rulemakers now propose to make a modified disclosure provision a part of the national rules. Some lawyers and judges are strongly opposed.

Lawyer opposition is generally rooted in their attachment to the adversary tradition. It is the fear of some that their clients will feel betrayed if they turn over to adversaries evidence harmful to their clients' causes. That objection is one that has been advanced to prior reforms designed to pursue the Enlightenment aim of applying law to facts. Those clients who would be justly exposed to liability tend to be the first to insist on the adversary tradition that allows counsel to impede the presentation of just claims or defenses by opponents.

One answer to that concern was expressed in 1814 by Justice Brackenridge of the Supreme Court: "I disclaim as lawyers those who avail themselves of the slips of counsel and would take advantage of a mistake.... They are not lawyers, but rather assassins of other peoples' rights."³¹ More recently, another Pennsylvania lawyer, Henry Drinker explained:

Five hundred years ago, the law was a game, the processes of which were continually and openly employed by means of obscure technicalities, serving no useful purpose.... Recently, with increasing frequency, the bar and the courts have taken radical steps... to simplify and develop promptly, and dispose of, finally and clearly, the real issues in the case.... It is clearly the duty of the bar to cooperate wholeheartedly in developing all such new procedures and in making them work practically.³²

The duty of the lawyer is to be an adversary within such rules as may be prescribed; it is not a proper purpose of procedural rules to pit adversaries against one another or to reward the party with the most effective advocate.

Some states are ahead of the federal courts in the use of disclosure requirements. I have no data on their experience. Unless further study reveals costs or benefits that are so far unrevealed, a state ought to consider adopting the disclosure requirement of Rule 16(a)(1), but without expectation that its use will bring any substantial change in the cost or delay experienced by litigants.

31. HUGH HENRY BRACKENRIDGE, *LAW MISCELLANIES* xviii (Philadelphia, Byrne 1814).

32. HENRY S. DRINKER, *LEGAL ETHICS* 83 (1953)

Clients justly exposed to liability tend to insist on the adversary tradition that allows counsel to impede the presentation of claims or defenses by opponents.



DRAWBACKS OF “JUDICIAL CASE MANAGEMENT”

Judicial case management is a misnomer; it is more accurately denoted as judicial management of lawyers.

Anxiety about the requirement that parties disclose evidence before it is requested by an adversary raises a separate issue regarding the proper role of court and counsel in preparing cases for trial. In recent decades, federal judges have with increasing frequency practiced case management. The practice is not unknown to state courts. It requires that cases be assigned to individual judges promptly at filing so that each judge can manage his or her cases. The aim is to prevent the metastasization of disputes, perhaps especially disputes over discovery matters.

As Judith Resnik points out, judicial case management is a misnomer; it is more accurately denoted as judicial management of lawyers.³³ Few would contend for a return to the adversary tradition as it was known prior to the advent of discovery.³⁴ It was implicit in the 1938 rules that the role of the advocate was modified to impose a limited duty of cooperation in the investigation of facts in dispute.³⁵ Such a duty was not novel, but had been long known to equity practice.³⁶ Nevertheless, the breadth of the discovery rules substantially enlarged the duty of counsel as an officer of the court to cooperate.

Of course, there have always been clients who preferred lawyers who neglected public duty to protect their private interest, and the lawyers for such clients have powerful incentives to neglect their duties. That is especially likely to be so for lawyers representing parties asserting groundless claims or defenses. By enlarging their professional duty, the 1938 Rules enlarged the pressures on such counsel to misuse the process. There seemed to have been as a result a gradual erosion of the conduct of lawyers engaged in discovery practice that became noticeable in the 1960s.³⁷ Judicial case management has been the judges' response to the diverse tactical ploys employed by lawyers to gain illicit advantage.³⁸ Among the illicit means sometimes employed were the imposition of costs on adversaries by excessive and pointless discovery, stonewalling, and burying adversaries in a blizzard of useless disclosures.³⁹ Such tactics can be controlled and even eliminated by prudent case management of big and bitterly contested cases in which they are most likely to appear.

Judicial case management is, however, in its more extreme forms, a costly, radical transformation of the American legal tradition.⁴⁰ It is sometimes explained as a mere

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33. Judith Resnik, *Changing Practices, Changing Rules: Judicial and Congressional Rulemaking on Civil Juries*, *Civil Justice and Civil Judging*, 49 ALA. L. REV. 133 (1997).
 34. Arthur R. Miller, *The Adversary System: Dinosaur or Phoenix?*, 69 MINN. L. REV. 1 (1984).
 35. ROBERT W. MILLAR, *CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE* 217–19 (1952).
 36. POMEROY'S EQUITY JURISPRUDENCE § 204 (5th ed. 1941).
 37. Maurice Rosenberg, *Sanctions to Effectuate Pretrial Discovery*, 58 COLUM. L. REV. 480 (1958).
 38. Robert F. Peckham, *A Judicial Response to the Cost of Litigation: Case Management, Two-Stage Discovery Planning and Alternative Dispute Resolution*, 37 RUTGERS L. REV. 253 (1985); William W. Schwarzer, *The Federal Rules, The Adversary Process, and Discovery Reform*, 50 U. PITT. L. REV. 703 (1989).
 39. Charles Yablon, *Stupid Lawyer Tricks: An Essay on Discovery Abuse*, 96 COLUM. L. REV. 1618 (1996); John K. Setear, *The Barrister and The Bomb: The Dynamics of Cooperation, Nuclear Deterrence, and Discovery Abuse*, 69 B.U. L. REV. 569 (1989).
 40. Judith Resnik, *Managerial Judging*, 96 HARV. L. REV. 374 (1982).



adaption of the judicial practices commonly found on the continent of Europe or in Japan.⁴¹ And so, in important respects, it is. But the suitability of civil law practice in the United States is dubious. Courts in civil law countries are not generally used for the wide range of political and regulatory purposes for which American courts are employed. Judges in those countries are selected at a very early stage in their professional careers and therefore have no political roots⁴² and no connections to “interest groups.” And there is no right to jury trial in civil cases, underscoring the importance of individual access to a disinterested finding of fact by lay persons. For these reasons, the civil law example is one to be followed only with the greatest caution.

The Civil Justice Reform Act was not cautious in promoting more aggressive case management;⁴³ its authors appeared to suppose that judicial management might be the key to the presumed, if non-demonstrable, problem of cost and delay. The votes are now in and it is clear that judicial management is not a magic bullet to achieve the stated aims of the Act. The data generated indicate that judicial management has been oversold, that heavy management in the mine run of cases is a waste of time or worse.⁴⁴ The misdirection of a district judge’s time and energy is a waste with extended consequences. Because judges are a scarce resource, their misuse results in losses felt elsewhere. The one most important and indispensable duty of trial judges is to try cases, thus to enforce the law and to concentrate the minds of parties on the settlement of their disputes “in the shadow of the law.”⁴⁵ If judicial case management reduces the availability of judges to conduct trials, that is an important loss.

There are other adverse effects of case management that are ineffable. A secondary and unwelcome effect is a modification of the courts’ focus away from the task of law enforcement. The primary concern of judges who manage cases is to achieve dispositions, that is, to move cases through the court to whatever disposition the parties can be induced to accept. This is a different mission from that of courts trying cases, whose primary task is to achieve correct results, that is, results conforming to the law.

Another unwelcome secondary effect of judicial management is to increase the moral responsibility of the individual trial judge. Whereas the institution of discovery expanded the temptations of counsel, case management expands the temptations of the judge because it increases the range of discretion exercised. When combined with the diminishing intensity of appellate review in the federal system,⁴⁶

41. Benjamin Kaplan et al., *Phases of German Civil Procedure I and II*, 71 HARV. L. REV. 1193, 1443 (1958).

42. John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823 (1985).

43. 28 U.S.C. § 473(a)(1): “In formulating the provisions of its civil justice expense and delay reduction plan, each United States district court, in consultation with an advisory group appointed under section 478 of this title, shall consider and may include the following principles and guidelines of litigation management and cost and delay reduction: systematic, differential treatment of civil cases that tailors the level of individualized and case specific management to such criteria as case complexity, the amount of time reasonably needed to prepare the case for trial, and the judicial and other resources required and available for the preparation and disposition of the case ...”; see also BROOKINGS TASK FORCE ON CIVIL JUSTICE REFORM, JUSTICE FOR ALL: REDUCING COST AND DELAY IN CIVIL LITIGATION 11 (1989).

44. KAKALIK, *supra* n. 23, at 68.

45. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case for Divorce*, 88 YALE L.J. 950 (1959).

46. Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631, 643–44; Arthur D. Hellman, *The Shrunken Docket of the Rehnquist Court*, 1996 SUP. CT. REV. 403; William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273 (1996).



The hidden effect of case management is a transfer of power away from individual parties and their lawyers, and also from juries or appellate courts.

it has helped to make federal district judges more like chancellors sitting on the woosack of autocratic power, and less like officers of the law accountable for their exercise of official power.⁴⁷ The hidden effect of case management is a transfer of power away from individual parties and their lawyers, and also from juries or appellate courts who would review decisions on the merits when and if rendered.

However, these unwelcome consequences of judicial case management do not suggest the wisdom of a return to the days when counsel were free to abuse or impede discovery. Rather, they suggest that case management techniques should not be employed routinely in the absence of evidence that there are abuses to be prevented that cannot be controlled by other means and thus that real benefits can be secured. Judicial involvement in pretrial litigation should be the exception, not the rule.

Given appropriate incentives, lawyers can manage pretrial litigation in most cases with minimal involvement of judges. As the RAND ICJ data suggest, the first and most essential incentive to be provided by the court is a reasonably firm trial date.⁴⁸ Such a date should with rare exception be set by conference call within hours after an issue is joined. While it is generally desirable that the date be sooner rather than later, there is no need or justification for haste so urgent that it deprives the parties of a full opportunity for discovery. Nor is there justification for refusing modest postponements necessitated by a surprise in discovery. But with those qualifications, it can be said that the single most important deed a district judge can perform in the administration of pretrial litigation is to set a trial date and stick as closely to that date as possible.

With a credible trial date, the lawyers can in most cases plan discovery without the participation of a judge. The RAND ICJ study confirms that this is so. The discovery conference prescribed for federal practice by Rule 26(f)⁴⁹ generally works when employed for its intended purpose.⁵⁰ Especially does it work if counsel comply with the disclosure requirements set forth in Rule 26(a)(1).⁵¹ Those disclosures, however much they may be despised by lawyers who perceive them as undermining their relations with clients,⁵² establish a framework for planning discovery without undue delay. If such disclosures are not made, planning by lawyers is impeded and the obvious alternative is for the court to step in and manage the case, a step that is in the end more a derogation of the role of counsel and parties than is compliance with modest disclosure requirements. The RAND ICJ data suggest that a state revising its practice rules in light of recent federal experience should retain the substance of both Rules

47. Paul D. Carrington, *An Unknown Court: Appellate Caseload and The "Reckonability" of the Law of the Circuit*, in *RESTRUCTURING JUSTICE: THE INNOVATIONS OF THE NINTH CIRCUIT AND THE FUTURE OF THE FEDERAL COURTS* 209 (Arthur D. Hellman ed., 1990); Disunionism, *supra* n. 15, at 932–40.

48. KAKALIK, *supra* n. 23, at 57–58, 91–92.

49. FED R. CIV. P. 26(f).

50. KAKALIK, *supra* n. 23, at 55–58; Rogelio E. Lasso, *Gladiators Be Gone: The New Disclosure Rules Compel a Re-examination of the Adversary Process*, 36 B.C. L. REV. 479, 494–96 (1995); Joseph E. Stevens et al., *Practical Aspects of the Revisions to the Federal Rules of Civil Procedure Effective 12/1/93*, 50 J. MO. B. 341 (1994).

51. FED R. CIV. P. 26(a)(1).

52. E.g., Lawrence J. Fox, *Money Didn't Buy Happiness*, 100 DICK. L. REV. 531 (1996); Griffin B. Bell et al., *Automatic Disclosure in Discovery—The Rush to Reform*, 27 GA. L. REV. 1, 30 (1992); Laura Kaster & Kenneth A. Wittenberg, *Rulemakers Should Be Litigators*, NAT'L L.J., August 17, 1992, at 15.



26(f) and 26(a)(1), making them the source of a discovery plan fitted to the case that will control the conduct of pretrial litigation in all but the rare case.

As a concession to the concerns of lawyers who despise the idea of voluntary disclosure, a state's rules committee ought to consider rewriting those provisions. One change might be to make explicit the duty of parties and counsel to cooperate in discovery. Lawyers know of their duty, but parties often do not, and lawyers should be given all available help in explaining to their clients why disclosures must be made to adversaries without requiring rulings by the court at each point of revelation.

Another revision might be to change the diction of the disclosure requirements, perhaps to state them in the form of questions, as "standard interrogatories" to be answered as a predicate to the formulation of a discovery plan wrought by counsel.⁵³

In addition, as an aid to parties and counsel in planning, a state's rules might provide some presumptive parameters to be extended by agreement whenever good cause is shown. The most important parameter is a time within which discovery will be completed. The RAND ICJ data suggest that 120 days is generally a suitable presumptive norm.⁵⁴ Other parameters that might be useful include a presumptive limit on the number of interrogatories, and on the number and length of depositions.

To make it clear that discovery planning is a duty of counsel, it might also be prudent to relieve the court of the authority to intercede and manage a case that the parties are managing to their own satisfaction without intervention of the court, save perhaps in exceptional circumstances to be stated by the court. At the same time, the court must make it clear that the duty of parties to cooperate in planning discovery is a duty that the court will enforce and enforce so promptly that no counsel or party will be tempted to delay proceedings by making matters unnecessarily difficult for an adversary. To that end, practice rules might wisely provide that motions respecting discovery shall unless otherwise specifically ordered be made orally and ruled upon "forthwith." Judges who effectively and promptly enforce rights with respect to discovery are much less likely to be burdened with frequent interruptions of their work by frivolous discovery disputes than those who take such motions under advisement and await opportunities to read briefs and transcripts of depositions. Because delays in ruling create incentives for counsel to bicker over trifling discovery issues, judges who do not rule quickly make more work for themselves while imposing costs on the parties.

It might also be useful for the rules explicitly to authorize counsel to record discovery conferences as well as depositions. A recording would better enable a party to demonstrate a lack of cooperation by an adversary, and thus enhance the threat of sanctions against a party who does not cooperate in planning discovery.

Practice under the 1938 Rules was characterized by an absence of the application of sanctions under Rules 37.⁵⁵ Weak enforcement by courts contributed to the problem of abuse and delay by counsel.⁵⁶ While the sanctions provisions were strengthened by

53. Local Rule 33, U.S. District Court for the District of South Carolina.

54. KAKALIK, *supra* n. 23 at 183–84.

55. Rosenberg, *supra* n. 37.

56. For a striking example, see JONATHAN HAAR, *A CIVIL ACTION* 149–193 (1995).



Federal judges have been reluctant to punish lawyers for playing hostile games with discovery.

the addition of Rule 26(g),⁵⁷ it remains true that federal judges have been reluctant to punish lawyers for playing hostile games with discovery. A likely reason for this weakness is that judges were lawyers once and identify with pressures felt by lawyers to aggressively protect interests of clients even at the expense of performance of duties to the court. Another reason is that an application of sanctions creates satellite litigation on the appropriateness and measure of the sanction. The unhappy federal experience with sanctions under Rule 11⁵⁸ has likely reinforced the disinclination of many judges to impose sanctions on the abuse of discovery.

A state considering these issues should therefore give serious attention to other possible incentives to cooperate. In particular, consideration should be given to a limited application of the English rule⁵⁹ on shifting attorneys' fees to the resolution of discovery disputes. This would mean that whenever a court ruled on a discovery issue, the prevailing party would be entitled automatically to a reasonable attorney's fee to compensate for the cost of litigating the issue. The demerit of this English rule in its application to final judgments is that it unduly chills the assertion of "claims and defenses." But that is just the result desired when it comes to discovery disputes. The possibility of an additional cost associated with an unsuccessful contention would provide counsel with an additional reason to give her or his client for not contesting a discovery issue. If the English rule were adopted for this limited purpose, the Advisory Committee on Civil Rules ought to consider the use of an English-style taxing master⁶⁰ to relieve the court of the burden and authority to fix the fee.

Moreover, in that rare case in which irrationally contentious parties are frequently resorting to the court over discovery issues, the court should be encouraged to appoint a special master to manage the case.⁶¹ The merit of the special mastership is that it imposes the cost of childish bickering on sometimes infantile counsel and their clients rather than on the public, and leaves the judge accessible to those who need decisions on the merits or who need prompt attention to legitimate discovery disputes. Experience in California suggests, however, the importance of regulating the fees of attorneys appointed as special masters.⁶²

57. FED. R. CIV. P. 26(g) was added in 1983, and with Rule 37 represents "the principal enforcement power to punish discovery abuse." Gregory Joseph, *Current Issues in Discovery*, in CURRENT PROBLEMS IN CIVIL PRACTICE 1994 at 321, 377 (PLI Litig. & Admin. Practice Course Handbook Series No. 498).

58. Melissa L. Nelken, *Sanctions Under Amended Rule 11—Some "Chilling" Problems in the Struggle Between Compensation and Punishment*, 74 GEO. L. J. 1313 (1986). And see JEROLD S. SOLOVY & CHARLES M. SHAFFER, JR., *RULE 11 AND OTHER SANCTIONS: NEW ISSUES IN FEDERAL LITIGATION* (1987); GREGORY P. JOSEPH, *SANCTIONS: THE FEDERAL LAW OF LITIGATION ABUSE* (2d ed. 1994); GEORGENE M. VAIRO, *RULE 11 SANCTIONS: CASE LAW PERSPECTIVES AND PREVENTIVE MEASURES* (2d ed. 1992).

59. For a recent account of the rule and suggestions of its possible applications in the United States, see Thomas D. Rowe, *Background Paper, American Law Institute Study on Paths to a Better Way: Litigation Alternatives and Accommodation*, 1989 DUKE L.J. 824, 887-92 (1989).

60. "In modern practice, the English courts have developed an elaborate system of taxing costs. Under this system, the solicitor representing the winning party prepares a bill of costs, detailing each item of taxable expense. If the losing party agrees, it pays the bill; parties, however, seldom agree. When disputed, the parties present their itemized expenses to a taxing master who decides the appropriate amounts after a hearing." John F. Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice*, 42 AM. U. L. REV. 1567, 1571 (1993); see also William W. Schwarzer, *Fee-Shifting Offers of Judgment—An Approach to Reducing the Cost of Litigation*, 76 JUDICATURE 147, 148 (1992); REPORT OF THE FEDERAL COURTS STUDY COMMITTEE (1990).

61. FED. R. CIV. P. 53; see also Linda J. Silberman, *Masters and Magistrates, Part I: The English Model and Part II: The American Analogue*, 50 N.Y.U. L. REV. 1070, 1297 (1975); Silberman, *Judicial Adjuncts Revisited: The Proliferation of Ad Hoc Procedure*, 137 U. PA. L. REV. 2131 (1989).

62. *Ruisi v. Thieriot*, 61 Cal. Rptr. 2d 598, *withdrawn* 1997 WL 88913 (1997).



NARROWING THE SCOPE OF DISCOVERY

Twenty years ago, the Advisory Committee on Civil Rules of the Judicial Conference of the United States proposed to narrow the scope of discovery by requiring that it be directed to matters relevant to the claim or defense of a party. This was thought to be narrower than the present language requiring that discovery be relevant to the subject matter of the action. After hearing comments on this proposal, the committee withdrew it,⁶³ reaffirming its doubts whether such a change would do more than replace one very general term with another.⁶⁴ The proposal had originated in the American College of Trial Lawyers, who desultorily renewed the suggestion from time to time. During my eight years as reporter to the committee, the idea was briefly considered, and rejected for the same reason that it had been rejected before.

Now, in 1999, the proposal has found new life. With slight changes, it is now proposed to revise Rule 26(b)(1) in essentially the same form so often rejected in the past. The proposal is resisted by thoughtful and disinterested groups such as the Federal Courts Committee of the Association of the Bar of the City of New York. It is supported chiefly if not exclusively by litigants who are “habitual defendants.” The argument for the change is that it will “send a message” to judges to be more aggressive in restraining excessive discovery. The arguments against it are more numerous. They are that the new rule is vague, will encourage satellite litigation, and will shelter unwarranted resistance to discovery. “Sending a message” by vague language is not an effective means of achieving the aim. Moreover, the revised rule is inconsistent with notice pleading and a throwback to the code-pleading practices found to be so unsatisfactory sixty years ago. The response will be prolix pleading that will be even less helpful to lawyers trying to manage discovery efficiently.

Recognizing the desire of the defense bar to promote this idea, I suggested a compromise that would append the desired language to Rule 34 bearing on document discovery. Because the problem of excessive discovery, to the extent that it exists, is chiefly a problem with documents,⁶⁵ it seemed prudent to limit the questionable change to that rule. For perspective, it may be useful to recall that the original 1938 version of Rule 34 did provide for narrower discovery with respect to documents.⁶⁶ The fact that this suggestion has gained no consideration confirms to me that the aim of the proponents of the rule is indeed to give tacit

The scope-of-discovery proposal is resisted by thoughtful and disinterested groups. It is supported chiefly if not exclusively by litigants who are “habitual defendants.”

63. Revised Preliminary Draft of Proposed Amendments, 80 F.R.D. 323, 332 (1979).

64. Preliminary Draft of Proposed Amendments, 77 F.R.D. 613, 627 (1978).

65. Michael A. Pope, *Rule 34: Controlling the Paper Avalanche*, 7 LITIGATION 28 (1981); William D. Underwood, *Divergence in the Age of Cost and Delay Reduction: The Texas Experience with Federal Civil Justice Reform*, 25 TEX. TECH. L. REV. 251, 261-62 (1994).

66. FED. R. CIV. P. 34 (1938):

Upon motion of any party showing good cause therefor and upon notice to all other parties, the court in which an action is pending may order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged, which constitute or contain evidence material to any matter in the action and which are in his possession, custody, and control.



approval to resistance to discovery. I would hope that if the change is indeed adopted that no state would follow suit with a similar change to its practice rules.

SOME OTHER AVENUES FOR REFORM

There are other changes to the discovery rules worthy of consideration by state rulemakers.

Exchange of Statements

First, it would be wise to require exchange of signed or adopted statements, or perhaps statements of possible witnesses in any form that could be presented as evidence. The existing federal rule protects such statements as trial preparation material,⁶⁷ but requires that copies of such statements be supplied to the witnesses who adopted them,⁶⁸ from whom, of course, they are discoverable under Rule 45.⁶⁹ While an adopted statement is technically trial preparation material, it is much more than the mental impressions and thinking of counsel—it is potentially a prior inconsistent statement, and the thinking it reflects is primarily that of the party or witness, not the lawyer.⁷⁰ The protected retention of such statements in the present Rule disserves the aims of the process in other ways. It enables counsel to impose unnecessary costs on adversaries and to engage in sharp practice by misleading hints of the content of the statements. The present practice therefore gives too little service to the values of the work product protection and too much harm to the duty of cooperation to merit its continuation.

Limits on Number of Depositions

States might also consider creating a presumptive limit on the number of depositions and restricting depositions in three other respects:

1. *Objections to questions.* The federal experience suggests that it should be explicit that all objections to questions asked at a deposition are automatically reserved, unless examining counsel otherwise directs.⁷¹ The purpose of this practice is to save the time of lawyers and deponents presently devoted to bickering over the form of questions. Absent such a non-waiver provision, the time limits on depositions will be made inappropriate in a particular instance by prolonged bickering. Counsel for the deponent should, of course, be expected to assert applicable evidentiary privileges,⁷² but should otherwise remain silent during the examination by other parties, unless the examining counsel wishes assurance that a particular question and answer are in a form allowing them to be used at trial.

2. *Reopening depositions.* Second, states might prudently provide that a deposition can be reopened at the request of any party, provided

States might prudently provide that a deposition can be reopened at the request of any party.

67. Hickman v. Taylor, 329 U.S. 495 (1946); FED. R. CIV. P. 26(b)(3).

68. FED. R. CIV. P. 26(b)(3); Jeff A. Anderson et al., *The Work Product Doctrine*, 68 CORNELL L. REV. 760, 811–12 (1983).

69. FED. R. CIV. P. 45.

70. Kathleen Waits, *Work Product Protection for Witness Statements: Time for Abolition*, 1985 WIS. L. REV. 305; Lawrence S. Feld, *Privilege and Confidentiality*, in LITIGATING COMMERCIAL CASES UP TO TRIAL 231, 253 (PLI Litig. & Admin. Practice Course Handbook Series No. 507, 1994); see also Virginia Elec. Power Co. v. Sun Shipbuilding & Dry Dock Co., 68 F.R.D. 397, 403 (E.D. Va. 1975).

71. Frank H. Penski, *Defending Depositions*, in LITIGATING COMMERCIAL CASES, 65 n.66, 70–71 (1994); Jay D. Blumenkopf, *Deposition Strategy and Tactics*, 10 AM. J. TRIAL ADVOC. 15, 23 (1987); Steven B. Stein, *Oral Depositions in Federal Civil Practice*, in DEPOSITION TECHNIQUES IN COMMERCIAL LITIGATION 47, 76–78 (PLI Litig. & Admin. Practice Course Handbook Series No. 328, 1987).

72. FED. R. EVID. 501.



however that unless the deponent agrees, or the court for good cause so orders, a secondary examination shall be conducted by teleconference or telephone, and further provided that such a discontinuous deposition shall not exceed the time allowed by the schedule, except for good cause. One effect of this change would be to diminish the need to modify the discovery plan every time there is a surprise at a deposition. A second purpose is to allow for more efficient depositions and more efficient preparation by counsel, who could under such a revised rule prepare for a deposition with reduced concern for surprise testimony or revelation of documents not previously seen. If a surprise occurs during a deposition, a surprised party can discontinue the deposition and return to it at a later time, after further investigation and preparation has been pursued.

3. *Trial use of videotaped depositions.* Third, experience suggests the wisdom of a rule allowing any deposition recorded on videotape or other comparable technologies can be used at trial, even though the deponent is within reach of a subpoena. The present federal rule requiring the use of live testimony⁷³ was written on the assumption that the deposition would have to be read into the record at trial by some person other than the deponent. That is no longer the case; indeed it would be appropriate to require the exhibition of videotape when available in order to preserve demeanor evidence that is lost when a substitute witness reads a deposition into the record. Moreover, it will save costs if litigants can be educated to expect that videotaped depositions will be the usual form in which testimony is taken and in which it is presented at trial. Videotaped depositions can be edited to eliminate useless banter as well as inadmissible evidence. And evidentiary rulings regarding testimony can be made *in limine*.⁷⁴

Confidential Production of Documents

A suggestion pertaining to document discovery is to afford a producing party the option of making a production of documents confidential for the scrutiny only of adversary counsel. A party making a confidential production would waive no evidentiary privileges with respect to documents so produced.⁷⁵ No document so produced would be filed with the court or otherwise used or publicized by counsel receiving the documents in confidence without the express approval of the producing party. The purpose of such a provision would be to enable the disclosing party to produce vast quantities of material without the expense of thorough pre-screening of every document produced. Much expense is incurred in present practice as a result of producing counsel's fear that a privilege may be waived by improvident disclosure of a privileged document. Such a mistake would be very injurious to the reputation of counsel and could expose a law firm to enormous liabilities.⁷⁶ The purpose of my suggestion would be to relax those fears.

Of course, prudent counsel would, despite such a rule, not disclose in confidence material that was known to be sensitive. All care would not be abandoned. But there are situations in which very substantial savings might be effected. This

73. FED. R. CIV. P. 43.

74. FED. R. CIV. P. 16(c)(4), (16).

75. *E.g.*, *Harding v. Dana Transport, Inc.*, 914 F. Supp. 1084, 1098–99 (D.N.J. 1996); *Gorgenzo v. Maguire*, 62 F.R.D. 617, 621 (S.D.N.Y. 1973); *Independent Productions v. Loew's, Inc.*, 22 F.R.D. 266, 277 (S.D.N.Y. 1958).

76. *Dacey v. Penn*, No. 77-3410, slip op. at 10–11 (S.D.N.Y. Oct. 6, 1978); *Mendenhall v. Barber Greene Co.*, 531 F. Supp. 951, 955 (N.D. Ill. 1982); *see also* Robert M. Harding, *Waiver: A Comprehensive Analysis of a Consequence of Inadvertently Producing Documents Protected by the Attorney-Client Privilege*, 42 CATH. U. L. REV. 465 (1993).



would be so where, for example, a haystack is not known to contain any needles, and is unlikely to contain even a simple straight pin. A party might then reasonably calculate that the saving in the cost of prescreening is worth a slight risk that (1) prejudicial but privileged evidence will be discovered, and (2) adversary counsel will in violation of the rule refuse to return the privileged item and refrain from using it. In some commercial litigation, the savings resulting from such confidential disclosure could run to seven or even eight figures. A risk in this proposal is that it might facilitate the tactic of burying a requesting party in an avalanche of documents.

Negotiated Suppression of Discovery Materials

Another outstanding issue of discovery meriting discussion by state rulemakers is the controversy regarding the practice of suppressing discovery material as part of a settlement, especially in mass tort litigation.⁷⁷ It is argued in favor of the practice that parties should not be permitted a free ride on expensive discovery conducted in earlier like cases involving the same adversary. To preserve such material for use in subsequent similar cases deprives the party against whom it is used of the settlement bargaining chip represented by the cost of discovery. But the diseconomies of redundant discovery ought to be avoided if possible. The bargaining chip in question is not one the law ought to be at pains to protect because it has no relationship to the merits of “claims and defenses.” It reflects, instead, the unavoidable but regrettable deficiencies of the legal process. For this reason, I

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suggest that the discovery rules should generally obligate parties to produce discovery materials produced in other like cases even if those cases were resolved short of trial. I have particularly in mind transcripts of depositions and responses to interrogatories, data compilations, tangible things, and other like items that are not privileged and not subject to work-product protection.

In the short term, this last reform would eliminate one of the incentives to settlement of some cases, especially those that might be described as “test” cases. On the other hand, it could reduce materially the cost of litigating later cases of the same type. It would therefore increase the settlement value of meritorious “claims and defenses.”

Taken together, the changes suggested above would substantially reduce the involvement of judges in the conduct of pretrial litigation. While it is unlikely that these changes would materially reduce the evils of cost and delay, they might effect marginal improvements, and it seems almost certain that they would not contribute to any increase in cost or delay. It bears reiteration that the most important steps to be taken by judges are to set a reasonably firm trial date, provide reasonable and tailored parameters to the time for discovery, and rule promptly on discovery disputes. Beyond those steps the judges should not go, except in the rare case too complex to be managed by counsel. They should then concentrate their efforts on judging cases, not managing lawyers.

77. E.g., *Short v. Western Electric*, 566 F. Supp. 932 (D.N.J. 1982); but see *In re Agent Orange*, 821 F.2d 139, 145–48 (2d Cir. 1983).



ORAL REMARKS OF PROFESSOR CARRINGTON

It's a privilege to be here. Thank you for inviting me.

Since my paper was written before the Advisory Committee on Civil Rules really took any action on the various proposals that were before them, I thought it probably appropriate that I update a little bit and inform you about what they had done with at least some of the things that I discussed in that paper. I want to salute one thing that they have done very strongly, which is to restore some measure of national uniformity to the discovery rules.

Background of the Disclosure Requirements

I don't think the Advisory Committee would ever have put forward the disclosure package at the time that it did, had it not been for Senator Biden and his Civil Justice Reform Act of 1990, which directed the district courts to establish local plans for reducing cost and delay.¹

In 1988, I was serving as Reporter for the Committee. Before hearing of the Biden scheme, we had put out for comment a disclosure proposal. We got a lot of negative comments. In fact, we were convinced that our proposal, in that 1988 form, was not very good. But when Senator Biden came along and said, "Well now, every district court is going to go out and have its own discovery process, everybody is going to have their plan for reducing civil costs and reducing delay," about twenty-five district courts announced that they were going to adopt our 1988 draft. We were concerned about that. As a consequence, you see the rule in its present form, which is a "local option" rule. We corrected some of the problems that we had with the 1988 draft, and proposed it as a local option rule. "If you don't like this rule, you can do something else," was the message.

The 1993 idea was thus to get in line with the Civil Justice Reform Act. I don't think anybody associated with the rulemaking process was very enthusiastic about the Civil Justice Reform Act, but there was no reason to be in collision with it, so we were trying to reconcile the rules to what the Congress of the United States had decreed.

I thought it was unfortunate that we had the local option provision. It had to be there in part because something had to be done with regard to old local rules that had been invalidated. Shortly before they passed the Civil Justice Reform Act, Congress had passed the Rules Enabling Act of 1988, forbidding the promulgation of local rules that were inconsistent with the Federal Rules. There were a lot of local rules that were. So it was a snake pit of problems.

But I am very pleased to see that we are now going to have national uniformity again. I can't see that there is anything about differences in local practice that dictates a need for differences from one United States district court to the next. The whole idea of the 1938 rules was to make procedure rules that are more or less constant, while at the same time allowing plenty of room for judicial discretion for individual judges to do what needs to be done with particular cases.

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discovery rules.*

1. See Paul D. Carrington, *Recent Efforts to Change Discovery Rules: Do They Advance the Purposes of Discovery?*, reprinted herein at 51, 55-56 nn.22-30 [hereinafter Carrington].



The original purpose of Rule 83,² as I understand it, was simply to enable district courts to control admissions to the bar. It was not envisioned that they would be elaborate local rules. Well, there are district courts in the United States that have quite elaborate local rules that are excrescences on the Federal Rules of Civil Procedure and are a burden for lawyers who are practicing in more than one district. So local rules are an institution having very marginal utility. Also, the local rules are not very enforceable. Appellate courts aren't much interested in enforcing local rules.

I had a research assistant pull up all the state practices to see how many of them have local rules, and found that quite a few do. And I just raised the question, "Why? Is there some need for a state rule like Federal Rule 83 that authorized local rulemaking in county by county in state courts?" I'm very skeptical.

In the proposed new rules, the disclosure requirements were modified. And I understand the need to modify them, because the form in which we originally promulgated them in the 1993 rules generated a good deal of mistrust and hostility on the part of lawyers—most of them representing defendants, but not all—who found the idea of having to disclose information that might be hurtful to their client a serious and grave trespass on the adversary process. Some believed that their clients would surely fire them if they just gratuitously turned over information to the other side.

The purpose of disclosure was to enable the lawyers to get together and manage the discovery process collaboratively.

I thought that complaint was greatly overborne and misdirected, but it was something that a lot of people felt very strongly about. In the interest of national uniformity, it was appropriate to concede that point and to do what the rulemakers have done, which is to say you only have to produce stuff that you are likely to want to use at trial, or that you might want to use at trial.

That does, however, diminish the effect of the disclosure rule in a significant way that I would like to call to your attention. The purpose of disclosure was to enable the lawyers, if they were so inclined and if we could induce them to do it, to get together and manage the discovery process collaboratively. And in order to get that process started, it seemed to be important for both sides to have some idea of the information base from which they had to operate.

2. Rule 83. Rules by District Courts; Judge's Directives.

(a) Local Rules.

(1) Each district court, acting by a majority of its district judges, may, after giving appropriate public notice and an opportunity for comment, make and amend rules governing its practice. A local rule shall be consistent with—but not duplicative of—Acts of Congress and rules adopted under 28 U.S.C. §§ 2072 and 2075, and shall conform to any uniform numbering system prescribed by the Judicial Conference of the United States. A local rule takes effect on the date specified by the district court and remains in effect unless amended by the court or abrogated by the judicial council of the circuit. Copies of rules and amendments shall, upon their promulgation, be furnished to the judicial council and the Administrative Office of the United States Courts and be made available to the public.

(2) A local rule imposing a requirement of form shall not be enforced in a manner that causes a party to lose rights because of a nonwillful failure to comply with the requirement.

(b) Procedures When There Is No Controlling Law. A judge may regulate practice in any manner consistent with federal law, rules adopted under 28 U.S.C. §§ 2072 and 2075, and local rules of the district. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or the local district rules unless the alleged violator has been furnished in the particular case with actual notice of the requirement.



Now, under the latest proposed amendments, it appears that you won't have that sort of complete information about what the database is, and so you have to have an interrogatory or something of that general description which will say, "Now give me, tell me what information you have that would help my side"—which puts an additional step in and impedes to some degree the idea of a collaborative process. We realized the goal of achieving a collaborative process was optimistic, but this latest proposal diminishes that effect of the disclosure rule.

The Arizona courts have been experimenting with a much more aggressive disclosure rule. I don't know anything about the experience there, but those of you who are interested in thinking about rules might want to take a look at the Arizona disclosure practice.

But, as Professor Marcus says,³ the change that the federal rulemakers are making does take the heartburn out of disclosure for lawyers who are being asked to produce something that they think may be injurious to the interest of their client.

SCOPE OF DISCOVERY PROPOSAL

The more controversial aspect of the present proposals has to do with limiting the scope of discovery. That is something that's been fermenting on the docket of the Advisory Committee for twenty years now. In 1979, the American College of Trial Lawyers proposed something very much like some of the language that's incorporated in the present draft Rule 26, and the Advisory Committee actually circulated some of that for comment in 1979. In light of the comment received, they "tubed" the idea.

The American College of Trial Lawyers, to my knowledge, has brought that back now four or five times, and every time the Advisory Committee said, "No, it's not a good idea." Now, finally, the Committee has been persuaded.

You heard Judge Niemeyer earlier today explain that, to some extent, he was influenced by the concern that the information revolution is creating a huge base of discoverable material, and that we need to begin to find ways to cut back on the discovery process. I take his point about the abundance of material that is increasingly available, but I must say I'm not convinced that the present proposal is a particularly useful response to it. And I have a concern that is shared by other academic observers and some members of the Advisory Committee that this proposal is likely to produce more of what Brother Hare was referring to this morning as "stonewalling"—that it equips people who are the recipients of discovery requests with another level of argument to use in opposing them.

What is the new argument? Well, it is that the standard for discovery—the scope of discovery—is a little less. It's been cut back a little. We don't know exactly how much. The existing rule speaks about discoverable material being "relevant to the subject matter involved in the pending action."⁴ So that material is all still available *by court order, on a showing of good cause*, but the only thing you have a *right* to is

3. See Carrington, *supra* n. 1 at 67, n.10.

4. FED. R. CIV. P. 26(b)(1).



The new rule on scope of discovery may create a fair amount of mischief in the form of stonewalling by parties who are saying, “Hah! It doesn’t fit a claim or defense!”

stuff that is “relevant to the claim or defense of any party.”⁵ And the supposition is that this is a narrower standard, although it’s not entirely clear what difference it will really make in any particular case. I don’t see very much connection between that shift and the nature of the database that would be searched through a discovery process, given all the material that’s electronically stored.

So the new rule does not seem to me to be a particularly useful response. It may create a fair amount of mischief in the form of stonewalling by parties who are saying, “Hah! It doesn’t fit a claim or defense! It may be relevant to the subject matter in the dispute, but you didn’t fit it to the claim or defense.” It may also induce a certain amount of overpleading.

The notice pleading system is called into question by this process. You will want to plead with omnibus pleading in order to make sure that you’ve got a claim or defense in there that will be relevant to any information that the other side might have that might help your case.

If I were in Congress, I certainly wouldn’t vote down the whole package simply because of that provision, but it does give me a little of Professor Marcus’s heartburn to think about how that particular provision is going to play out.

EMPIRICAL STUDIES

The committee was struggling—and we were struggling earlier today—with the question of whether or not there really is a problem in the discovery area that needs to be resolved. I think the national uniformity problem was one that did cry out for some attention, and that the Committee had to do something with that. Some of these other things have been done, really, in order to facilitate that. The empirical question we were discussing earlier today is one that certainly deserves attention. The rulemakers, as Judge Niemeyer described, have been attentive to such empirical information as is available or can be gathered. On the other hand, it’s hard stuff. My late dear friend Maurice Rosenberg had an account of empirical studies that I think bears mention in this connection.⁶ He said there are two kinds of empirical research that are done on legal institutions, only two kinds. In the first kind, the lawyers listen to your data and listen to your conclusions and they say, “Why the hell did you study that? We already knew that, we didn’t need your data to confirm our previous understanding of this important problem.” In the other kind, you describe your data, and you describe your conclusion, and the lawyers say, “That must be wrong. You must have had the wrong method, because that does not comply with our anecdotal data that we have assimilated, and therefore we’re going to disregard that.” I think we have a little bit of both kinds of empirical data in the mix with regard to discovery.

One point I would make about the question of whether there is a problem is that the percentage of cases in which discovery is used may be a bogus datum, because there may be information being exchanged outside the discovery process, and therefore

5. Proposed amendment to Rule 26(b)(1). COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, REQUEST FOR COMMENT 41–42 (August 1998).

6. Carrington, *supra* n. 1 at 67, n.37.

those cases wouldn't show up. There is also another category of cases, in which there are only legal issues, and no factual issues. There would be no discovery in those cases, so I'm not sure what those numbers mean.

Also, when you think about percentage of the cost of litigation, I think that is problematic in a different way. Remember that the original vision of the 1938 rules was that the new system would cause a lot of cases to settle. So in cases that settle after discovery, 100 percent of the cost is pretrial discovery. Is there some inefficiency in that? Well, surely not. If what you've done is induce a settlement, that is a very economic achievement.

COST-SHIFTING PROPOSAL

One other thing I ought to mention, and then I will subside. The Advisory Committee has tinkered a little with the cost-shifting provisions within the discovery rules. And Sol Schreiber, a practitioner in New York City who served on the Standing Committee for a number of years, and who is a very knowledgeable man, seems to be rather alarmed about those changes. Let me say that I am not. I don't think that they will make very much difference. One is always a little hesitant to say that because sometimes there are unintended consequences. But there has been a lot of cost shifting over the years through the protective order device—"Yes, you can take this discovery provided you pay some part of the cost." Or, "You'll have to make this disclosure, but we'll make the other side pay some part of what you're having to bear." I don't think that the change in Rule 26 is going to modify that substantially, but there may be some consequence there of which you should be aware.

There was a provision, and still is a provision, about cost shifting *for discovery abuse*. It may interest you to know, to make my point about unintended consequences, that the people who wrote the 1983 rules (which included the famous Rule 11, which provides for sanctions for filing frivolous claims), thought Rule 11 was a matter of very little consequence and that there would be very few Rule 11 motions. They didn't think that was a big deal. But they put in Rule 26(g) a similar provision, and they thought people would be using the daylight out of that, that there would be all kinds of discovery motions about discovery costs. Well, they were absolutely wrong on both counts. And it's just an illustration of how very difficult it is, sometimes, to anticipate how people will react to a change in a legal text.

But in any event, that change has been proposed,⁷ and it may be consequential. I don't see it, but I'm not one to say that Sol Schreiber doesn't know what he's talking about, and maybe it will be of some greater consequence than I would foresee. But, on the whole, and particularly because of the need for national uniformity, I hope the package will be approved.

In cases that settle after discovery, 100 percent of the cost is pretrial discovery. Is there some inefficiency in that? Surely not. If you've induced a settlement, that is a very economic achievement.

7. At its meeting in September 1999, the Judicial Conference voted not to recommend the cost-shifting proposal to the Supreme Court. See "Final Rulemaking Action" section of the introduction to this Report at 15-17.



COMMENTS BY PANELISTS

Kathryn H. Clarke, Esq.
Lloyd Milliken, Esq.
Andrew M. Scherffius, Esq.
Honorable Shirley Strickland-Saffold

KATHRYN H. CLARKE, ESQ.

Uniformity vs. Experimentation

I'd like to begin by commenting on the need for uniformity. Whatever may be said for the need for uniformity among the federal district courts or across the courts, or within a particular state's courts, there is something to be said also for the experimentation that goes on and the variations in the adoption of the pattern of the Federal Rules within the states.

There is something to be said for the experimentation that goes on within the states.

In Oregon, for example, we may be one of the few jurisdictions, if not the only jurisdiction, that does not have expert discovery. I'm here to report that the sky has not fallen, and that indeed there are certain sentiments that we hear repeatedly that this is saving in time and in cost in the discovery process.

Indeed, because there are firmly held beliefs on both sides of the question, there is an almost ritualistic reappearance of this issue before our rulemaking body from time to time. Approximately six years ago it came up again, as it will come up again and again. And this time we had the unusual experience of having a senior federal district judge come to our state council on court procedures to testify and urge us *not* to adopt expert discovery in the state of Oregon, arguing that it is not cost efficient, that it does cause delay, and saying in essence "Please stay away from that particular procedure that the Federal Rules provide for."

Similarly, regarding the latest proposal on the scope of discovery, to limit discovery to matter that is relevant to a claim or defense, we've had that in Oregon now for twenty years, I believe. I don't think it has changed since the institution of our state rules, which follow the model of the Federal Rules. And there is no distinction in scope of discovery that I'm aware of between federal court actions and state court actions. We get exactly the same information—ask for the same information and are given the same information.

That may change, of course, if now the argument is going to be made that that language is in fact more restrictive. We may see some arguments by opposing counsel that we aren't anticipating. But at this time, in state court, we get exactly the same information we get in federal court. I will point out, however, we do have a different pleading system in state court, and we do have ultimate fact pleading, not notice pleading, so there is that difference. Nevertheless, the scope of discovery is pretty consistent between the two court systems.

Documents Are the Sine Qua Non

I want to address another thing that Professor Carrington hasn't talked about this afternoon, but [did] in his paper, that concerned me. It goes along with the suggestion that there is a problem having to do with document discovery in product liability actions. I think we've heard already suggestions that this may not be the problem that some people suggest it is, that there isn't any empirical basis for it, and that there are



indeed differences of opinion as to whether there is a problem even in a *minority* of cases—certain product liability actions and toxic tort cases. So I’m wondering, from what we’ve heard here today, is there in fact a problem?

Then there is the suggestion that the possibility of scrutiny of internal corporate and manufacturers’ communications is going to somehow impede candid discussion, and that we would encourage candid discussion by corporate officers if we were to limit document discovery. I seriously question that proposition. It reminds me very much of the kind of peer review privileges that exist in the states for medical professionals. And I question whether, indeed, immunizing the processes of individuals or corporations from scrutiny encourages them either to be candid or to respond to discovery on the subjects they candidly discuss, which is more the point.

We currently get those documents. They are subject to scrutiny, and indeed the discussions are candid. And if they weren’t candid, I submit that we wouldn’t be hearing objections to their production, and that really gets to the core of it. What we find are documents that show that the defendants knew the risks, talked about the risks, *and proceeded to ignore the risks* and not do anything about them, and not redesign the products, and *that’s* why there’s such resistance to the scrutiny of these internal corporate communications. So I suggest that we ought to be very careful about proposing that, in order to increase candid discussion, we should limit document discovery.

Further, the documents themselves are critical. And I think Brother Hare addressed this already this morning, so I really don’t have to reiterate what he said. I’m going to give a couple of examples, though, and they’re the same examples that were footnoted in the discussion in Professor Carrington’s paper:¹

- *The breast implant litigation.* There was a very large breast implant verdict in Oregon a few years back. It was taken away on a motion for new trial, and the case was settled on appeal. I was involved in the appeal of that case. I can tell you, from preparing the brief, that the documents in the case were critical. The case, essentially, was all about the documents. Without the documents, the plaintiff really wouldn’t have been able to prove the case.
- A more recent example is *the recent tobacco case* in Portland, with the \$79.5 million punitive damage award. A reporter from *The Oregonian* interviewed a juror after that verdict came in, and what did the jury say? “It was the documents.” That’s virtually a quote: “It was the documents that led to the verdict.” So without the documents in a products liability case, typically we *don’t have* a case. The documents are critical to the plaintiff’s case.

So ultimately what I’m suggesting is this: It’s not the *search* for the documents that the critics of the process may find so troubling. It’s the fact that the documents *are found*.

1. Paul D. Carrington, *Recent Efforts to Change Discovery Rules: Do They Advance the Purposes of Discovery?*, reprinted herein at 51, 55 n. 21 [hereinafter Carrington].

In our state we currently get the documents on internal corporate communications. They are subject to scrutiny, and indeed the discussions are candid. If they weren’t candid, we wouldn’t be hearing objections to their production.



Impact of Changes on Substantive Law

I suggest that some changes in the rules relating to document production would have the effect of changing the underlying *substantive law*. That is a very radical notion. I'm not sure what those changes would look like, but I came up with two possibilities, both of which I suggest are awe-inspiring in their scope:

- One would be to take the word “knew” out of the phrase “knew or should have known” in negligence actions, so that the plaintiff has a right only to discovery of the documents that contain evidence of *actual knowledge*. It's only important to the plaintiff to be able to prove that the defendant “should have known” something, and for that they don't need to show the corporate officers actually “knew” it. It seems to me that to do that is to consign the plaintiff to the weaker proof when stronger proof may well be available. It's a lot easier to prove “Well, they knew or they should have known this, it was out there somewhere in the stratosphere,” when in fact you ought to be able to prove that “They knew it, and we can show they knew it.” Such a change would help *the plaintiff*.
- Secondly, making such a change in the language of the rule would effect a radical change in the law of punitive damages by depriving the plaintiff of a means of showing or proving that the manufacturer proceeded with deliberate and conscious disregard of *known* risks. Such a change would help *the defendant*.

So I suggest that the document searches we've been discussing are not, in fact, socially counterproductive. Or at least if you're going to say that, then we have to ask “For whom?” and I don't think it's counterproductive for the civil justice system or for the claimants in these cases.

Disagreement vs. Misconduct

The last thing I wanted to mention was the suggestion in the paper about automatic fee shifting—discovery motions are brought, and the losing party automatically pays the fees of the winning party. That troubles me, also. It assumes that requests for the court to rule on discovery motions are always somehow frivolous or superfluous. We have a rule that can be used to respond to frivolous motions. We don't need an extra rule that automatically shifts fees, even when motions are *not* frivolous. Such a rule is a penalty. It shouldn't be imposed in the absence of some sort of misconduct. People can genuinely disagree about the scope of discovery and the discovery process, and that's why we're in court. Having a genuine disagreement with the lawyer for the other side is not misconduct. We need the judge to rule on that, and there should not be any kind of automatic fee shifting as a penalty for involving the court in negotiating the process of discovery.

There is already a rule that can be used to respond to frivolous motions. We don't need an extra rule that automatically shifts fees, even when motions are not frivolous.

LLOYD MILLIKEN, ESQ.

Let me start out by saying that it is not true that my nickname is “Stonewall” Milliken. But I will tell you this: When I get a discovery request that says, “State all the facts and give me all of the documents about the manufacture and design of your seat belt,” for instance, “for the vehicle in question and any other similar vehicle, and any vehicle similar to the similar vehicle, from 1969 to the present,” I object to that as being overbroad, burdensome, and



sometimes harassing. Now, if that is stonewalling, then I'm guilty, but the rules provide for that.

And ordinarily what happens in that kind of a situation, at least in my practice, is that we do have a conference about those kind of requests and we generally can reach some accord. If we can't, then we go to the court and the court decides.

So I reject the idea that either defense lawyers, or for that matter corporate America, are engaged in one big conspiracy of stonewalling and denying discovery. If you would see the millions and millions and millions of documents that are produced every day in this country in response to discovery requests, you would wonder how such a statement could be made.

I reject the idea that either defense lawyers, or, for that matter, corporate America, are engaged in one big conspiracy of stonewalling and denying discovery.

Judges Should Try Cases

I studied Professor Carrington's paper very carefully. He is a very erudite and well-informed individual. There are some things that I want to first say that I vehemently agree with him about. The first is that the most important and indispensable duty of a judge is to try cases. And I would add to that, that judges must guarantee a fair and level playing field. I think that's all plaintiff lawyers and defense lawyers really want. We will soon learn, I believe, that that was *not* the case in a recent trial in Los Angeles that resulted in a \$5 billion punitive damage verdict—which, by the way, I think is bad for everybody. I think it's bad for plaintiff lawyers, I think it's bad for defendants and defense lawyers, and I think it's bad for our system. It's going to raise the cry again for great reforms that are needed and all that stuff. There wasn't a level playing field there, I don't believe.

Another thing I agreed very strongly with Professor Carrington about is that the jury system, when not tampered with by a partisan judge, can produce acceptable results free of political and economic influence. I think it is the greatest system for resolving civil disputes that there is.

Thirdly, I agree with him that judicial case management can be overdone. It can force a tremendous amount of wasted time and money on both sides. One example is this penchant for some judges to say that every case must be mediated. Well, there are some cases in which there is just no chance for a settlement, and we're forced into mediation to spend four, five, six hours, and it's just silly. So that is one example, I think, of overbroad judicial management. But I hasten to add that judicial management is sometimes necessary to control out-of-control lawyers on both sides, and to rein in unethical conduct on both sides.

Protection of "Self-Critical Analysis"

The last thing—and I'm going to disagree with Kathryn a little bit here—is that I agree with Professor Carrington's view that critical analysis and honest discussions about alternatives in the development of products should be given more protection.² I didn't say absolute protection. What we're really talking about here is the "self-critical analysis" privilege. I have written about that, and if ever that is adopted widely by the courts there must be great constraints on it so that true hiding of documents is prevented. But on the other hand, discussions among engineers about alternatives

2. *Id.* at 55 n.20.



should be privileged, because engineering is not an exact science. Every time they make a decision in one area of a vehicle, that affects another part of the vehicle, and it's not easy. There may be a document out there that says, "Well, we should do this," and maybe the engineer says, "...and if we do this, this will make this car safer." I don't buy the idea that, if they didn't do it, that makes them criminals.

Now, let me talk about the thing that I really have a little disagreement with Professor Carrington on, and that is on the recommendations of the Advisory Committee on Civil Rules, which Judge Niemeyer chairs. I want to discuss Rule 26(b)(1) first.

My clients don't make a habit of getting sued.

First of all, Professor Carrington uses the term "habitual defendant," which I think is a little pejorative. That tends to reflect a rather extreme antibusiness bias, which, by the way, the rest of his writing does not reflect at all—witness the "critical analysis privilege" discussion. And, as a matter of fact, I believe there was a case in South Carolina where that term was used by a judge, and the judge was reversed and was severely criticized for using that term.³ I guess I just want to say that my clients don't make a habit of getting sued.

The Need for Balance

And let me tell you that I think the Advisory Committee has attempted to balance the competing interests of the plaintiffs and defendants in cases. The Defense Research Institute, my organization, of which I am president, presented what I think was a very good paper with our proposals in it to the Advisory Committee. It was scholarly and authoritative, but I want to tell you that we certainly didn't get everything we wanted. Some of the things we proposed seem to have made it into the proposals; others did not.

There *has* been overbroad and abusive discovery. I want to tell you about one case that I think illustrates that. About three years ago I was involved in a case in federal district court in Denver, Colorado. The plaintiff in this case was a woman who had been rendered a quadriplegic as a result of a one-vehicle rollover accident involving a Jeep Cherokee. She sued both the manufacturer of the vehicle and the seat-belt manufacturer, which I represented. The plaintiff was represented by a very well known, a very talented and resourceful plaintiff's attorney. In fact, he was so talented that Brother Hare collaborated with him in the writing of the book *Full Disclosure*.⁴ I speak, of course, of your friend and mine (and he is my friend, by the way, I believe), Jim Gilbert—a great lawyer.

About three months before the scheduled trial date Jim notified the defendants that he intended to take more than twenty depositions of individuals who had been involved in what he called "similar rollover accidents" all over the country, from California to Texas to Maine. You name it, that's where we were going. There were going to be depositions of either individuals involved in these accidents or of policemen who investigated them.

We went into district court and said, "Judge, there need to be some guidelines on this. We think that the relevancy of this is really quite questionable." And you know what that judge, that federal judge, said? He said "Under the present rules, I have no control over this type of discovery, none whatsoever, because it's relevant to the subject matter of the case."

3. *Hathcock v. Navistar Int'l Transp. Corp.*, 53 F.3d 36 (4th Cir. 1995) (Ervin, C.J.) (taken together, several factors, including district judge's speech at an educational seminar sponsored by an organization of plaintiffs' attorneys, at which he referred to defendants in three cases under discussion as "habitual defendants" warranted order for case to be assigned to another judge on remand). See also *McBeth v. Nissan Motor Corp. U.S.A.*, 921 F. Supp. 1473, 1479–80 (D.S.C. 1996), in which the same district judge, referring *inter alia* to the same incident in a written opinion declining to recuse himself, characterized his earlier remarks as "patently intended to be humorous."
4. FRANCIS H. HARE, JR., ET AL., *FULL DISCLOSURE: COMBATING STONEWALLING AND OTHER DISCOVERY ABUSES* (ATLA Press 1994).



Effect of Proposed Changes

I believe the rule proposed by the Advisory Committee says in effect that initial discovery—attorney-managed discovery—will be limited to “claims and defenses” of the parties, and then, if you can show good cause, you can go on and get broader discovery. I do not believe that under the proposed rules with a proper showing (but with judicial intervention), when you get beyond the claims and defense stage, discovery will be inhibited at all when it’s actually necessary.

Let’s face it. In our system today, defense lawyers may go out and take overly long depositions to harass plaintiffs. Plaintiff lawyers file what I consider to be really broad and intrusive and overly broad discovery requests. To comply with them you start out having your client try to search for the documents, but at the same time you’re preparing objections and starting the fight.

So I think these new rules are going to be salutary in effect, and I think it’s going to force lawyers to get together and try to be fair among themselves and between their clients. There *are* going to be these very, very hard-fought cases that will still engender some acrimony when you’re trying to change social policy—which our courts are engaged in a lot more than maybe was intended by the founders, but unfortunately our legislative bodies and maybe our executive bodies haven’t been willing to do it, so the courts have done it. So we *are* going to have those cases. But in many of the cases that are complex—but not acrimonious like that quadriplegia case I just told you about—I think these proposed rules will have a positive effect.

Our courts are engaged in a lot more attempts to change social policy than maybe was intended by the founders, but unfortunately our legislatures and maybe our executive branches haven’t been willing to do it, so the courts have done it.

ANDREW M. SCHERFFIUS, ESQ.

I think I was asked to be here today because I have the privilege of serving on the Advisory Committee on Civil Rules of the Judicial Conference of the United States. That honor and privilege came to me in October of 1998 after an unbelievable amount of work had already been done by the Committee on discovery issues.

I guess I would compare my experience to taking a bath. If you get in a warm bath, it feels great, and as the water cools off, well, you’ll get out when it gets a little uncomfortable. On the other hand I was thrown into a *cold* bath and it was *never* comfortable. I always seemed to have my foot in a bucket, running along behind everybody else, and I’m not sure I’ve caught up yet. When I was first appointed to the Committee I received boxes and boxes of information—literally. I think six banker’s boxes were sent to me that had already been generated on these relatively “few” changes in a very elaborate rulemaking process, rule review process. I immediately dove into it, and to the best of my ability tried to bring myself up to speed.



Impetus for Proposals to Amend Discovery Rules

I will tell you, after reviewing all of that information, as I stand here today I don't know why many of these rule proposals are coming about, if one were to look at the empirical data, statistics, reliable sources of information, or other than anecdotal information. And from that I have concluded that there of course are, as there are in many walks of life, other forces that may be driving a lot of these proposals. I would commend to you the comments of Professor Carrington at page five of his paper,⁵ where he is discussing the Quayle Commission, one of our more famous commissions, where he says,

I don't know why many of these rule proposals are coming about, if one were to look at the empirical data. There are other forces that may be driving a lot of these proposals.

As the Quayle Commission report tended to demonstrate, there is a chronic tendency of business firms who are inviting targets for litigation to conflate procedural reform with tort reform. Those who cannot hope to secure relief by the legislative abrogation of the rights of the citizens who are suing them may seek to achieve that result by the more devious means of impeding their adversaries' access to the evidence needed to establish their claims.

Now that's a strong statement, and it is certainly not made, either by Professor Carrington or by me, to question the motives of everyone who has commented on or who has recommended changes to these rules. But, on the other hand, I think it emphasizes the very political nature of activities like revising as complex a document as the Federal Rules of Civil Procedure.

(By the way, I believe most of these changes will eventually find their way into your state rules. Most states already incorporate very similar, if not identical, rules of civil procedure, and the move seems to be in favor of states adopting Federal Rules rather than the other way around. So I think this is a very timely discussion for state courts.)

Anecdotal Evidence for Change

Of course, there are several levels of review these rules have to go through to be approved, and, as is healthy in any public debate, there were dissents from various parts. One of the more interesting parts of the whole process is the public hearing and public comment period. There were three very well-attended hearings that I attended, and then of course there is a public record that includes letter writing and briefs and the like.

When we would have a public hearing, the microphone would be taken by one party who favored a change and then the next one wouldn't favor it, and almost all the comments were anecdotal in nature. Everybody wanted to tell you about a case. And of course the questions I had when I was sitting there at the hearings were, "Well, what about the other 99, or 999, or however many cases you handled last year—didn't they go rather smoothly? Weren't you able to close a remarkable amount of business? Aren't you talking about the exception to the rule? And are you recommending a major change that is going to have repercussions throughout the country, based on one or two anecdotal problems?"

I also heard and saw no persuasive evidence that the cost of litigation is out of line with what is at stake. That is, when the cases are small and what's at stake is small, generally the costs are low. And at the other end of the spectrum, when the cases are

5. Carrington, *supra* n. 1, at 73.



huge and the stakes are high, the costs are high. But there doesn't seem to be anything out there to tell us that the costs are *too* high in general, when compared to the stakes.

I must say that Professor Carrington has much more articulately stated my dissenting views, which completely underwhelmed the majority on the Advisory Committee, on two subjects primarily: the cost-shifting proposal and the proposal to change the scope of discovery.

Cost-Shifting Proposal

The courts' authority to order payment of the other party's costs if there is discovery abuse is already present in the current rules. If it has not been utilized much in the past I would assume that that is for very good reasons. It *certainly* isn't because of the lack of very capable defense lawyers. Lloyd Milliken is an example of someone who certainly can present an argument for an award of costs to the court, if it's necessary, and do so extremely well. The fact that the courts have not utilized their authority very many times has nothing to do with the absence of a rule. It has more to do, I'm sure, with the merits of each case.

If we put this cost-shifting proposal—or, as it's called in the proposals, the “cost-bearing” proposal—into the rules in the form that it's in, I think it's going to be used—primarily by the defense bar, but also by the plaintiff's bar—to hammer home efforts similar to what's happened under Rule 11: demands that the other party ought to pay, pay, pay before they can get a particular piece of paper.

The other thing I saw in the rulemaking process that I found objectionable is that the emphasis seems to have shifted almost completely to efficient case management. There seems to be a lack of concern, at least in Committee discussions and in the testimony at our hearings, where you get tangling with the details of these rules, for assuring what the justice system is all about—and that is access to the courts and assuring equal justice to everyone regardless of one's ability to pay, regardless of one's power, regardless of one's position. That was the primary reason that I objected to the cost-shifting proposal.

Scope-of-Discovery Proposal

I really could find no objective basis for the proposal to change the scope of discovery. If the scope of discovery is shifted from the subject matter of the case to “claims and defenses” in the case, I'm afraid you're going to find a lot more fact pleading rather than notice pleading, a lot of motions to amend pleadings, and a lot of ancillary litigation, particularly at first. You'd be putting the court in an almost untenable position in many cases, trying to decide early in litigation what relates to “claims and defenses” and what doesn't.

It amazed me at our Committee's hearings that, of all the very erudite and sophisticated people who attended them, hardly any speaker could come up with an example of what would be the difference between “claims and defenses” and “subject matter” in discovery; yet everyone felt that “claims and defenses” is much more restrictive.

The emphasis seems to have shifted to efficient case management. There seems to be a lack of concern for assuring access to the courts and equal justice to everyone regardless of one's ability to pay, regardless of one's power, regardless of one's position.



So, in my mind, what we have is a question of reality versus perception, and I think the perception is going to be pushed very hard, particularly by the defense bar, with these rules sending a message that discovery is to be restricted rather than broadened, or even maintained in its present position.

HONORABLE SHIRLEY STRICKLAND-SAFFOLD

Being the last speaker allows you to listen to everyone else's presentation, and of course as you're listening you're hearing all of your ideas being discussed by others, and so you don't have to use your whole time.

Case Management and Judicial Involvement

Let me just begin by saying that Professor Carrington discussed in his paper a great deal about case management and the effect that it has on discovery, and the importance of case management in discovery. I believe that case management actually sets the stage for how an action will proceed. It allows judges to set guidelines and deadlines, and shows the other party what an adversary may be contemplating. I believe in open discovery, and I also believe in an open process for judicial proceedings.

If a judge sets a stage whereby the attorneys have free access to the judge on any problems with the discovery process, that will cut down on dilatory tactics as well as abuses of process.

In terms of judicial involvement, I agree with the professor that judges should limit their involvement. However, I believe that if a judge sets a stage whereby the attorneys have free access to the judge on any problems with the discovery process, then that will cut down on dilatory tactics as well as abuses of process. In terms of the exchange of documents, I believe that a trial is simply a search for the truth and therefore everything should be disclosed. I agree with the professor that there should be an exchange of documents, but the discovery process should also include an exchange of all *statements* that may be attributable to witnesses or particular parties involved in the litigation.

Professor Carrington discussed the importance of judges setting a firm trial date, particularly in terms of the impact it can have on the discovery process. I think that in most situations that's absolutely true. However, I thought [the late] Judge Ervin made an interesting point when he spoke to us at lunch today, that we should not take ourselves too seriously in some situations and should be able to be flexible in many situations, so we can help the process along.

How Big a Problem?

As I listened to my colleagues I heard many ask, "If it is not broken, then why fix it?" and I agree. I think many of the individuals who find problems with the discovery process now fail to focus upon the fact that most cases proceed without difficulty, that most civil proceedings occur without big interruptions and discovery issues. Therefore, I think that what we're doing, in attempting to focus on a discovery process, is limiting ourselves to those cases we hear about in the press or through some of the publications and pamphlets that we read, where you see "poor vs. rich," or "large law firms vs. sole practitioners," and you see that there are abuses that occur, or appear to occur, as a result of the inequity of the sides that are being presented.



I don't think that's the usual situation. As a matter of fact, I believe that in 90 percent of the cases that appear in courts throughout this country, most lawyers and litigants adhere to the discovery process and actually proceed through the judicial process without many difficulties.

Scope of Discovery and Limits on Depositions

By narrowing the scope of discovery, I believe we would limit lawyers in their efforts to effectively and thoroughly represent their clients in some situations, and we would cause judges to proceed from a neutral basis to sometimes taking a position on a case, and I think we need to be very careful about how we narrow the scope of discovery.

Ohio does not have a limit on the number of depositions, but as I listened to some of the information that was provided today, I was sitting there thinking, "Oh, my God, if I had a deposition that went that long—I think someone said three days or something like that—I don't know what I would do." However, I think depositions are important, as they can actually help to arrive at a conclusion on a case. And so, therefore, I think they should be able to proceed as long as they abide by the rules of case management and what lawyers indicate should take place during the course of the case.

I guess my reaction is basically that I don't believe the discovery process is broken, and that we should not attempt to fix it.

By narrowing the scope of discovery, I believe we would cause judges to proceed from a neutral basis to sometimes taking a position on a case.

RESPONSE BY PROFESSOR CARRINGTON

I'm heartened to have everybody in solid agreement that the process is not so broken that any radical surgery need be performed on it. As I tried to emphasize in my paper (and I was pleased to hear Judge Niemeyer pick up on it this morning), the discovery process is a very important part of American government, and we ought not to be tinkering too radically without being very careful about what we're doing. We depend on the army of lawyers out there with the subpoena power to investigate a great deal of wrongdoing and mischief that we would not be able to correct by any other means.

PRIVATE LAW ENFORCEMENT

I teach a course in international litigation, and I sometimes have contact in that regard with lawyers from other countries. They're always just appalled by discovery. They hate it. And I'm sure their clients—Japanese automobile manufactures, Japanese clients, European clients—despise the discovery process, too. They think it's just a terrible thing. But I have no trouble at all in telling them, "Well, you guys just don't understand. In your countries you're relying on a bunch of bureaucrats to protect the people, and they're not doing it very well, and it's costing more money at the end of the day than the more efficient privatization of law enforcement that we are able to effect in a wide variety of areas."



There was an article in the *UCLA Law Review*⁶ in 1998, that I think is quite interesting, about civil rights litigation, which suggests that, basically, the private lawyers are a whole lot more efficient than the federal government's Equal Employment Opportunity Commission is in terms of the results they get and the effect they have on the conduct of employers. So I believe in private law enforcement, and I think I made that point in the paper and I welcome the opportunity to reiterate it. And everybody who has spoken to the question here today, I think, has subscribed to that view.

USES OF EXPERIMENTATION

I want to defend one point that Kathryn Clarke picked up on, having to do with fee shifting. I am opposed to the English rule, under which the losing party often is required to pay the litigation costs of the party that prevails. I don't think that's generally a very good rule. But I think it would be kind of interesting to have a state or two experiment with this, in a way limited to discovery—and here I agree with another thing Kathryn said, about the value of experimentation in the state courts with different approaches to the rules. I don't think every state ought to adopt all of the Federal Rules, but I think there is room for some differences among states as to how we conduct these things.

I'd like to have a systematic way in which the lawyers would have to say to their clients, "Look, if I try to fight that battle, I'll just lose, and not only will I lose, but there will be an adverse consequence associated with losing."

One of the things I'd like to see some state do, in a very serious and deliberate and articulate way, is to try to say to the lawyers, "This is your responsibility to try to work this out. If you've got to come to a judge with a discovery problem, you ought to understand that the appropriate reaction of the judge is to say 'One of you guys probably—not necessarily, but probably—is either stonewalling or overusing the process, and there ought to be a little consequence to that.'" Because I think a lot of lawyers are reacting to their client's expectations that they will fight at every bridge, burn every bridge, erect every possible barrier to prevent people from getting information. And I'd like to have a systematic way in which the lawyers would have to say to their clients, "Look, if I try to fight that battle, I'll just lose, and not only will I lose, but there will be an adverse consequence associated with losing."

So that's the sort of prejudice that I bring to it. The adequacy of the sanction is one of the problems. If all you're talking about is the cost of prosecuting or defending the discovery motion, those are going to be pretty trivial in any event, so they may

6. Michael Selmi, *Public vs. Private Enforcement of Civil Rights: The Case of Housing and Employment*, 45 *UCLA L. REV.* 1401, 1458–59 (1998). Professor Selmi's article concludes:

We can never know how much of a difference stronger governmental enforcement would have made toward our progress on civil rights, nor can we know what kind of difference a treble damage provision, or some other private enforcement incentive, might have made. Instead, all we know is that the federal government's efforts have been inadequate throughout both Republican and Democratic administrations. As reported in this study, the federal government brings too few cases. Moreover, the cases it brings and the damages it obtains are unlikely to have a substantial impact on social change. What is necessary for vigorous enforcement is a vigorous advocate, and the government has demonstrated repeatedly that it will not adopt such a role. Accordingly, if we are to hope for more progress, the government needs to shift its priorities. In particular, legislative efforts ensuring that civil rights cases are sufficiently lucrative to attract private counsel may be necessary. Equally important, before we condemn the notion that law can lead to social change, we should keep in mind that the failures often have more to do with how the law is implemented rather than its inherent limitations.



not offer any effective way to create an incentive. But it does seem to me we ought to be trying to design rules that push the discovery process back on the lawyers insofar as it is possible to do so. There is a role for the judge in that when the lawyers are behaving like children, for example, to say, “No, children, you can’t do that anymore. You’ve got to behave yourself.” And Judge Strickland-Saffold’s suggestion that the judge ought to be accessible, I think, is a marvelous thought.

JUDICIAL INVOLVEMENT

One judge, whom I know and admire greatly, tells me that he tells lawyers, “If you have a discovery problem, call me off the bench. I will come down off the bench to go into my chambers and listen to you on a telephone conversation and rule on a discovery matter so there will be no delay. You’re not going to win even an hour’s delay by having a discovery argument. It’s going to be all over in a very short period of time. And not only that, but you’re going to know that I am dislocating somebody else’s trial in order to deal with it.” Now, that creates a good deal of moral pressure on the lawyers to try to work things out, and it seems to me that’s a good thing to do—that we don’t want to have the judges in there engaged in day-to-day, routine management of the discovery process in every case. And most of the time the lawyers ought to be able to work it out.

*The system ought to say,
“Insofar as you can, work
it out. Be adults and
get together and solve
your problems.”*

Now, sometimes, granted, they can’t, and we have to be humane and tolerant about that. But the system ought to say, “Insofar as you can, work it out. Be adults and get together and solve your problems. And if you do that, we’ll get through this process in a much happier and more convivial way and a more professional way.”

QUESTIONS AND COMMENTS

WHAT IS “MATERIAL”?

Chief Justice Richard Thomas, Wyoming Supreme Court: I’ve been struggling with the possible conflict between the definition of what must be disclosed under the rules and the definition of “material fact” for purposes of summary judgment.⁷ There are definitions of material fact that say a material fact is one that’s “relevant to a claim or defense.”

Professor Carrington: There certainly is a tie-in between the standard about what is relevant to a claim or a defense and the pleading rules. And I take it the same is also true to some degree with disclosure. In order to make the disclosure you have to look at the complaint in order to figure out what it is that you have to disclose, and unquestionably those two things are very closely related. The problem with the

7. F. R. Civ. P. Rule 56(c) provides that summary judgment “shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.”



proposed change in the language of Rule 26, about moving to a “claim or defense” standard, is that it may require a revisitation of all the experience and law we have under our present practices as to what you have to disclose. The suggestion is that somehow the standard has been changed, but we don’t know how it’s been changed. And so where does that leave us? I don’t know.

Chief Justice Thomas: I guess my pragmatic self would ask if judges are going to look back at things that have been identified narrowly as material facts for purposes of summary judgment and say, “That’s what we’re talking about in terms of disclosure.”

Professor Carrington: Well, I don’t see a necessary connection between disclosure and summary judgment.

Comment: At least in our jurisdiction, relevancy to claim or defense or subject matter *in discovery* is broader than relevancy *for trial*. So even though I think there are times when discovery is excessive, I think the discovery standard is broader than just the standard of relevancy or materiality that we use for purposes of summary judgment.

COST SHIFTING

Comment from the floor: It appears, to me, at least, that the imposition of costs for discovery disputes is a fairly blunt instrument to use to force attorneys to resolve the problems they have in discovery. And the example you gave of the friend who is a judge, who creates this moral persuasion, suggests that that would be perfectly adequate to ensure that the parties bring only serious issues to the court, but nonetheless allow those serious issues to be addressed, and not impose an unbearable burden to get a resolution of something that they simply cannot resolve.

Professor Carrington: Well, it may be. I’m diffident about how to deal with this, and I suggest that the sanction I was suggesting for overuse of discovery or stonewalling is really a pretty modest one. I wasn’t talking about the cost of *discovery*. I was talking about the cost of a *discovery motion*, which is likely to be pretty trivial. I’m not sure a sanction that light works, and I don’t see how you can write a rule that gets the judges to impose the kind of moral sanction of which I spoke. One thing that I think would be helpful to have in the rule is an explicit statement saying, “It is the responsibility of the lawyers to work this out, and the parties are supposed to make these disclosures.” Then the lawyer has something to show to the client and say, “Look, this is what we’re expected to do.” We don’t deal with it quite directly in the text of the present rules, but it seems to me that might be helpful.

Comment from floor: I’m just not sure that those costs will *not* be significant to people. And I understand it does relate only to the cost of the motion, but I’m not sure that will not be a significant matter to people. And at least as I understood the draft of the rule, it was to *require* the imposition of those costs. And I don’t know why that’s not made discretionary with the court so that when the court is really struck that this is inappropriate, the court could then decline to impose costs.

Professor Carrington: I certainly think there ought to be some discretion in the administration of any such rule.



Comment from panel: With regard to the proposal by the Advisory Committee for the cost-bearing provision, I believe (Andy [Scherffius] can correct me, he's been closer to it than I have by far), they indicate that this should only be used in the rarest of circumstances, that this is not going to be a routine practice of people running in and saying "Ha, ha, ha, you went a little far, so I get costs." I don't believe that's what is intended by the proposal in Rule 34 that's under consideration by the Judicial Conference.

Andrew Scherffius: Let me just comment on this. While the Advisory Committee was debating this proposal, I suggested that it should be moved to Rule 26. It was initially published as part of the proposal to amend Rule 34 and was later moved to Rule 26. But the proposal says "On motion under Rule 37(a) or Rule 26(c), or on its own motion, the court shall—if appropriate to implement the limitations of Rule 26(b)(2)(i), (ii), or (iii), limit the discovery or require the party seeking discovery to pay part or all of the reasonable expenses incurred by the responding party."⁸

We had the head counsel of a Fortune 100 company appear at the Advisory Committee's hearing in Chicago who said that they can routinely expend (internally for the corporation, outside of attorneys' fees) \$200,000 on certain types of document productions. So you may say these are trivial costs to the other side, but in the context of the type of litigation that's likely to trigger this provision they are *not* trivial costs. They are significant costs. One comment we heard at the hearing was, "Well, these big-time plaintiff's lawyers can fund all of this out of their own pocket." But the fact is that there aren't a whole lot of "big time plaintiff's lawyers" who can afford that type of cost shifting when the opponent is a Fortune 100 company.

But in any event, that's what the rule says, and there is no comment from the Advisory Committee in there about using it only in "the rarest instances." That's what the rule says.

Question: I'd like to return to the question about disclosure and summary judgment. If the discovery pertains to something that would be regarded as a material fact for summary judgment purposes, does it relate not only to a claim or a defense, but is it not also relevant to the subject matter? So with respect to Lloyd Milliken's "parade of horrors," consider a products liability action where there is a genuine issue of material fact regarding notice of a defect, and what you're trying to prove is that there were twenty similar incidents of which the defendant had notice. You know that if you don't take the depositions, at trial defense counsel is going to be arguing that you haven't laid sufficient foundation as to similarity. What's the difference whether the standard is "relevant to the subject matter" or "relevant to a claim or a defense"?

At one of the Advisory Committee's hearings, the head counsel of a large company said they routinely expend \$200,000 on certain types of document productions. We may think these are trivial costs to the other side, but in the type of litigation that's likely to trigger this provision they are not trivial costs.

8. Proposed amendment to Rule 34. COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, REQUEST FOR COMMENT 65-66 (August 1998).



Comment from panel: I'd like to respond to that, because I agree with exactly what you've just said. And, in fact, I thought of that when Lloyd [Milliken] was speaking, because he was talking about a product liability action involving a rollover of a Jeep Cherokee and twenty "OSIs," or other similar incidents. We've had exactly that situation in one of the product liability actions that I'm working on right now, and exactly the same evidence has been explored. And our standard for the scope of discovery is "relevant to the claim or defense." And of course that evidence is relevant to the claim or defense. The other similar incidents are relevant to *notice*, and that's relevant to the claim or defense of the parties. And the same exact discovery has occurred with that formulation for the scope of discovery as would have occurred in the federal court action under the "relevant to the subject matter" standard. So I fail to see much difference there.

Lloyd Milliken: Well, let me just say something there. You will recall my client in that case was the seat-belt manufacturer, not the car manufacturer. Now, maybe you can make a case that these other accidents are relevant to the design of the roof in that Jeep. But our point was that to drag us through this when there was just simply no showing that *the seat belt* was going to be a factor in many of those, or any of those, incidents was excessive *as it related to my client*. And I would add this: After those twenty-some depositions were taken and my client spent thousands and thousands and thousands of dollars defending them, we were dismissed without payment.

Professor Carrington: I just want to clarify again that the costs I was talking about shifting were not the costs that are involved in the Rule 26 proposal. I was talking about the costs associated with making and responding to a motion, which are not \$200,000. It would be a very rare case, yes, in which you had a \$200,000 fee for preparing a discovery motion.



The Judges' Responses

Participants in seven discussion groups were invited to consider a number of standardized questions related to the papers and oral remarks. Their discussions led the judges to afford some of the questions more attention than others and to consider a few related matters as well.

Remarks made by judges during the discussions are excerpted below, arranged by topic, edited for clarity, and summarized in the *italicized* sections at the beginning of each new topic. Asterisks divide comments of different participants. Where they appear, paragraphing within comments and footnote content have been provided by the Forum Reporter. Although some comments may appear to be responses to those immediately preceding them, they usually are not.

The excerpts are individual remarks, not statements of consensus. No attempt has been made to replicate precisely the proportion of participants holding particular points of view, but all of the viewpoints expressed in the discussion groups are represented in the following discussion excerpts.¹

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1. The questions used in the discussion groups were presented in the following form:

Morning

1. Is there a “discovery problem”? If so, what is it, and how big is it? Does it affect all cases similarly? If not, should the cases that tend to involve major discovery issues be treated differently from others? Does one set of discovery rules for all cases make sense?
2. Is discovery a major contributor to delay and cost in litigation?
3. Do you believe shortened periods for discovery will lead to faster case dispositions? Would shortened discovery periods adversely affect some parties more than others?
4. How much of a problem are depositions? Are there too many? Do they take too long?
5. Do you believe initial disclosure will reduce cost and delay and the necessity for other discovery?
6. How much does (or would) it help if opposing attorneys met and conferred more often about discovery issues?
7. What should (or could) be done about attempts to conceal discoverable material? Conversely, are “fishing expeditions” a problem?
8. As a trial judge, how often have you had to intervene in discovery disputes? As an appellate judge, how often do discovery issues come before you?

Afternoon

1. In your experience, how has the availability of discovery affected the administration of justice overall?
2. Should discovery practice be made uniform within a state? Within the federal system? Does it make any difference if discovery in state courts is different from discovery in federal courts? Should different rules apply to different types of cases?
3. Will (or would) increased judicial “management” of discovery contribute to speedy, fair resolution of cases?
4. How well do opposing lawyers “manage” discovery in their cases without judicial intervention?
5. Should the scope of discovery generally be narrowed to matters related to the parties’ “claims and defenses”?
6. Will more readily available cost-shifting in discovery disputes help? When cost-shifting is invoked, should one party’s greater resources and custodianship of critical information, as against another party’s lack of substantial resources, be taken into consideration?



MORNING DISCUSSIONS

THE “DISCOVERY PROBLEM”

Is There a “Discovery Problem”?

Not surprisingly, the judges had a variety of viewpoints. Some felt there was a serious discovery abuse problem, but that it involved complex cases and matters of abuse by attorneys. Others felt that there was no significant problem at all.

Discussion Excerpts

Based on over seventeen years of private practice, three years on the trial court, and over seven on the appellate court, my sense is that in the overwhelming run of cases discovery is not a meaningful problem, at least in our state.

At least in our state, in the overwhelming run of cases discovery is not a meaningful problem.



Some of the problems I see are that there is too much discovery; there's discovery in cases that are too minor to justify discovery; there's stonewalling. I see a lot of needless discovery filed in hope of developing a case. I see a lot of stuff coming where lawyers, for whatever reason, aren't answering interrogatory requests in twenty days, so the motions to compel come in. I see a lot of overdiscovery, where lawyers use form interrogatories without tailoring them to the needs of the case. Then there's the compulsion

to take the deposition of everyone in the case to try to gain a tactical advantage. Those are all reasons why I think there is a discovery problem.



I was a trial judge for seventeen years, and I think we've all faced discovery issues, but, to be quite frank, I didn't know it was a hot topic until just recently. In our border state I think it's probably the same as everywhere else. The perception is that plaintiffs overuse and defendants stonewall, and that's the way it's been since I've been on the bench and in the practice of law.



7. What do you think of Professor Carrington's suggestions for reform?

- exchange of adopted statements
- limits to the number of depositions
- reserving objections to deposition questions
- reopening of depositions
- use of videotaped depositions at trial
- confidential production of documents
- greater restrictions on suppression of discovery materials as a condition of settlement



In our southwestern state we have had a huge problem with discovery over the last several years. The discovery process got completely out of hand. The defense firms were using it to starve out the small plaintiff lawyers. The large wealthy plaintiff lawyers were using it to oppress and abuse the defendants. We had situations in complex cases where discovery would go on for as long as *ten years or more*.

In our state the discovery process got completely out of hand.



I personally resolve about 2,500 cases a year, and I really haven't seen any problem with discovery abuse. I have found that bigger litigation is where you're most likely to have discovery abuses, but I found also that, if you're consistent in imposing sanctions when it's appropriate, the abuse begins to go away. As long as you articulate sufficient facts and findings supporting the sanction, regardless of what it is, the appellate court generally will support you.



To the credit of the trial bench in our state, we don't have discovery abuse.

Is There Enough of a Discovery Problem to Warrant Changing the Present Rules?

For the most part, the judges did not feel that any existing problems warranted changes in the discovery rules.

Discussion Excerpts

The problems we're hearing about are all problems our rules are currently designed to deal with. Use protective orders. Dismiss them. Grant summary judgment. Good judges can handle those problems. No question about it.



I think it's mythology that substantially drives the undertakings to rewrite the rules, and it's substantially driven by horror stories—not that every jurisdiction doesn't encounter discovery problems. You don't ignore them, but you also don't let the tail wag the dog so that you rewrite the rules to deal with the aberrational instance.



There are problems, but it's up to the trial judge to ferret it out. No more revisions of the codes. It's hard enough to understand our existing codes.



If we had a moratorium on rule changes for about five years, we'd have more claims settled and litigation done with.



One thing I've learned after forty years of being a trial lawyer, a trial judge, and an appellate judge is that the more rules you change and the more new rules you pass, the more litigation you create. The cost goes up and up and up. Every one of these rules means judges have to make that many more judgments based on purely subjective grounds. So I have a basic feeling right from the beginning that this isn't a problem other than what we have created for ourselves.



I'm concerned about the politics that may be driving some of these rule change proposals.

I'm concerned about the politics that may be driving some of these rule change proposals.



Isn't all this a legislative attempt to remove discretion from judges? Aren't we really down to that?



We need to think about the relationship between the discovery rules themselves and *abuse* of the discovery rules. It's like "Guns don't kill, people do." The question is: Are the rules of discovery in their present form inherently dangerous instrumentalities, or are they abused because people are acting unethically, unprofessionally, and otherwise unjustifiably? And if so, what's the remedy for that? Do you amend the instrumentality which in itself is innocuous? Or do you try to modify the behavior of the abuser?



These are not rule problems. If people aren't going to follow the rules in good faith, it doesn't matter what kind of rule you have.

If There Is a "Discovery Problem," What Is It?

The judges mentioned several sources of problems they had discussed, but they were most often critical not only of the professionalism of a small percentage of lawyers but also of judges themselves.

Discussion Excerpts

"The problem is the judges"

I think the problem is inconsistent enforcement by trial judges and even the interpretation of the trial judges' sanctions by the appellate courts. We approve this and we don't approve that. We send uncertain messages to the people who need to learn, and that is the lawyers.



You don't have a problem if the judge doesn't collapse under pressure, and if the judge yells at them and runs the whole operation. If they don't comply with the discovery order, you bring them in and you cite them and order them to pay attorney fees for wasting people's time. I think it's a judicial problem for letting them get away with it.

*You don't have a problem
if the judge doesn't
collapse under pressure.*



The typical reaction I get from lawyers is, "You judges won't do it." It's a fair complaint, and it's also related to the system of judicial selection. If your state has partisan elections, the judge really doesn't want to be bullying around the lawyers one week and then going to them next week for campaign contributions.



I tend to think the problem is *not* the judge—it's the fact that the judiciary is a stepchild of the legislature in so many states financially, so that there are not enough judges to do all that work. The judges we have are overworked, and they don't have the staff or the equipment the lawyers have in their offices. So one solution to a lot of these problems of getting judges more active would be to give the judges more tools to work with.



I've been doing judicial education for nineteen years on the supreme court and I think it's really important that when you go home, to talk to your judicial educator in your home state. We do many judicial education programs in our southern state, but frankly I don't recall any programs on discovery. I'm going home with all kind of ideas. It helps to make uniform an efficient operation of the courts throughout your state. So don't forget education. I think that's a really important thing.

"The problem is appeals"

Our supreme court allowed review of discovery orders by mandamus. They said that rulings on discovery requests can and often do destroy the litigant's ability to try the case, or to prove the case, and making the litigant try the case without the discovery materials is going to make that side lose. So in order not to "prejudge" the case, they allow the interlocutory appeal so the litigants can get the evidence they think they need to win the case.



If you permit interlocutory review in discovery issues, you dramatically increase the likelihood that lawyers and litigants will argue about discovery.

"The problem is all that computer-based material"

The new problem is culling out the documents you don't want to give up when they're in electronic form. Before, it would be thousands of papers sitting in one place. A disk drive can hold an enormous amount of information, but it's still not a problem to just copy it. But then which documents in there are covered by attorney-client privilege, and what is there in a given document do you *not* want to turn over?



Let's assume I send you an E-mail and say, "Let's go out to lunch at 1:00. I need to talk to you about this Mississippi market." You write back and say, "I'll see you in the lobby at 1:00." We both delete it because it was a surrogate for a telephone call. It's off both of our local computers. Yet, it's in our central computer system. Is that a document? And does a request for it call for every document that refers or relates to that luncheon meeting that occurred? And how do you go search it out when it's in a backup file in a warehouse that has millions and millions of documents?



Not only does the computer revolution generate more materials, but it also makes it easier to conceal them.

Not only does the computer revolution generate more materials, but it also makes it easier to conceal them. Part of our discovery problems, and part of the lack of civility, I think, stems from the concealment of materials.

"The problem is the use of inexperienced lawyers and law students in discovery matters"

Discovery is often terribly inefficient, and it is used to train junior litigators who often are not really focused on their task.



I find there is more discovery being propounded in the summertime, when you get all of these law students who are working in law firms.



I totally agree they should be teaching this in law schools. But attorneys get out of law school and they get into different types of practices. For instance, you might have a very small specialty bar where everybody knows one another. They're not about to do anything out of line within that particular group, because they know it's going to come back to haunt them. But if it's two lawyers who will probably never see each other again, they can really go crazy. I have found that many times when you get a young attorney who is playing those types of games, you can call the senior partner of the law firm and just say, "Hey, we will not tolerate what this person is doing."



There is an ethics issue that we should not lose sight of here. Everyone recognizes that law firms, perhaps large firms in particular, use the discovery process to farm out young lawyers to learn the process of litigation, and those lawyers engage in extremely wasteful tactics. And it is unethical for any lawyer to bill a client for more than a reasonable fee. I think this is worth mentioning, because the abuse that you see in court results in *stealing from clients*. It produces unreasonably large fees through a process that is wasteful and produces nothing of benefit to the litigation. For me at least, *that is a kind of white-collar crime*.

"The problem is over-discovery and stonewalling"

There is a discovery problem, I think. There is a small minority of lawyers who create fantastic discoveries. I'm a trial judge in a western state, and unfortunately I have to spend too much of my time on eliminating the stonewall kind of approach, all those kind of things.



You have overuse when there is a questionable cause of action. The lawyer is trying to develop a factual base for a questionable cause of action.



Overuse sometimes happens, but it's rare. I don't see it as a problem.



At least in our courts, stonewalling is a greater problem than overuse of discovery is.

“The problem is lawyers' lack of professionalism”

I don't think our system works unless the attorneys are working. Unless they are working together to the benefit of the system, I don't know how it can ever turn out well.



I've never seen a case where the lawyers were professional and there was a problem. I've seen countless cases where incivility caused anguish and aggravation. We have to raise the level of professionalism.



Lawyers don't talk to each other anymore. They may need to be *compelled* to talk.



Without going into a whole sociological discussion, what we're talking about here is a *society* that is less civil—not just lawyers. It's a society that is cynical, that is sarcastic, and it's getting what it asked for. Even in the “small potato” cases, people don't want a lawyer who's going to go in and try to work it out with the other lawyer. They want to get down and dirty. So I think the problem comes from society as a whole.



Some lawyers use Rambo tactics—things like getting every single document, taking the deposition of every single witness, taking lengthy depositions, extending no courtesies to the other side, ever. The list goes on.



Sometimes when I get a Rambo lawyer in my court I issue an order and make him or her discuss it at the office, and have every lawyer, partner, associate, and paralegal in the firm review it and sign a declaration that they've read it and understand it.



*There are “Rambo” clients
that demand “Rambo”
tactics from their lawyers.*

There are also Rambo *clients* that demand Rambo tactics from their lawyers.



Our county bar actually has a “Rambo Committee.” They will identify lawyers who are behaving badly and can sit down with them on a nonjudgmental basis and try to bring those folks along professionally. I have been practicing law for thirty years and in my view civility is improving. I’m in the minority, I think, but I think lawyers are getting better again.



It seems to me that, from the law schools, to the culture of the law firms, to dealing with the courts, what has to be emphasized to practicing lawyers is that they are officers of the court. That has to be reinforced by the courts, and when they violate that, I don’t think it’s going to take too many million-dollar sanctions to make even the big companies or the esteemed lawyers who are directing the litigation to pay attention.



I found that you can trick the lawyers with dignity—not beat them up in front of their clients. But when someone abuses discovery you can still slam-dunk them a sanction. You only have to do it to a couple of lawyers.



I wonder if it would be appropriate for members of the judiciary to spell that out for those folks that, not only are we going to enforce our written rules, but that we’re also going to expect professional performance.

If There Is a “Discovery Problem,” How Big Is It?

The judges generally did not consider the problem to be “big,” but they affirmed that the courts must have recourse to rules that will be effective in dealing with problems of any significance.

Discussion Excerpts

Maybe our southern state is atypical, but at the general jurisdiction trial level in the overwhelming majority of cases there is little or no discovery—probably less than 10 percent of all cases. During the six years I was a trial judge, I bet I didn’t handle more than two or three discovery problems a year.



It really doesn’t make any difference what the percentage of cases with discovery problems is, unless you’re talking about a number so low that it is negligible. You need to have some kind of rules to address whatever problems come up in a case in the discovery department whether it’s stonewalling or the inability to get documents or Rambo-type litigation. I’m troubled by the notion of the paper that the statements are myths because the numbers are low. That doesn’t seem to me to be the relevant inquiry.



All of the cases we see that involve discovery are problems, because we *don't see* the ones where the lawyers are working it out civilly. So my sense is that there *are* discovery problems out there, but I don't see the hundreds of cases where they're working it out.

If There Is a “Discovery Problem,” Does it Affect All Cases Similarly?

The judges identified as problem areas complex cases, lawyers litigating on an “open checkbook” basis, and the use of discovery mechanisms as a strategic weapon rather than as a means of obtaining information about the case.

Discussion Excerpts

The more complex the case, like the products liability case, the more contentious it's going to be. You have to deal with them differently.



One problem is the lawyers I call the “open checkbook” lawyers—the ones who have a client that will pay a large hourly fee and are not concerned with how much attorney costs they're paying. With those lawyers, discovery can just go on forever. Depositions can be two or three days long. Short of that, in a routine case where it's a contingent fee on one side and an insurance company paying the bill on the other, discovery is minimal.



I am the law and motion judge in a trial court in a western state, and I can tell you which firms in our large county use discovery as a strategic tool to be used against plaintiffs—particularly [against] small firms.



The effect depends on the parties. If there's some big multinational corporation, I know that's going to be a problem, because of all the data they're going to want.



The effect of discovery depends more on the personality of one or both of the lawyers than it does on the nature of the case.



A national insurance company wrote to our court and actually wanted to meet with us. (We didn't do it.) They wanted to inform us that they were adopting a policy that in any case where suit was brought and where a certain level of medicals were not met, there would be no settlement, but all this discovery would take place and all of this energy would be spent! It's simply a scorched-earth policy—punish the litigants, and deny them the forum, unless they've got financial resources that almost exceed the amount that's in dispute.

All of the cases we see that involve discovery are problems, because we don't see the ones where the lawyers are working it out civilly.



If the Discovery “Problem” Does Not Affect All Cases Similarly, Should the Cases That Tend to Involve Major Discovery Issues Be Treated Differently from Others?

The judges felt cases that, by their nature, are more likely to involve complex discovery should be managed differently from ordinary cases.

Discussion Excerpts

At the very outset, somebody has to take a diagnostic approach to what type of case fits in where. Separate the fender benders from the big malpractice cases and that type of thing. Then you can apply particular rules of discovery to the appropriate type of case.



We are going to face more and more problems, I think, with the intensive documentation cases, like the tobacco case we had, where there was something in excess of two million documents and they appointed a special master because it would take two years for all the examination of those documents to determine privilege. We're finding that there are more and more cases that require sophisticated examination.



We have six hundred medical malpractice cases filed every year, but I would not put a medical malpractice case into the same category as the complex case that causes discovery problems. Maybe 10 percent of those medical malpractice cases really are complex, and those usually have an element of products liability in it. I find that the complex cases that [have] discovery problems are commercial litigation or fraud or something having to do with securities or having to do with insurance coverage.

IS DISCOVERY A MAJOR CONTRIBUTOR TO DELAY AND COST IN LITIGATION?

Judges stated that they believed discovery costs to be inevitably high, but that the costs tended to encourage settlements. Exceptions were cases whose lawyers were attempting to find liability, rather than information, through the discovery process, and cases in which lawyers conducted extensive discovery in order to generate fees. As to delay, they felt that court caseloads, not discovery, are the greatest factor.

Discussion Excerpts

I'm going to say no, it's not a major contributor to cost and delay. In my city of about 35,000 people in our southern state, the civil caseload has backlogged and has pretty much eradicated itself. The problems that I've seen are not caused by discovery—the number of cases the judge has, yes, but not discovery problems.



I think that discovery is a major cost item because discovery is expensive. I think the delay depends a lot on the judge. If the judge controls a case fairly well, the delay can be controlled a lot easier than the expenses can.



Discovery itself doesn't cause delays; it's the sheer volume of the cases.



We're talking about litigation. Cases settle. The fact of a certain amount of cost being spent on a case is what's going to drive settlement and reduce delay. If you manage them properly, depending on the type of case, that is going to be the net result.



If you lump together all the discovery costs and say it was 80 percent of the total cost of the case, that might be because you've settled a whole lot of cases and didn't have very many trials.



Why should it surprise anybody that it's the bulk of the cost? Filing the complaint doesn't cost much. What else is there, unless it goes to trial? So I don't see how we can conclude, just because it amounts to 60 or 90 percent of the cost of litigation, that it's driving the costs up. That's the essence of what litigation is.



What percentage of those high costs we've heard about result from stonewalling? It's kind of unfair to blame the plaintiffs for it if a high percentage of that is a result of stonewalling by insurance companies and manufacturers.



It all depends on how strong a case they have. Did they file a case where they had injury and liability, or did they file a case where they had injury and then went out in search of liability? In the latter case, the plaintiff's lawyer is going to stretch it out forever until he can find that theory. In the former case, he wants to go to trial right away.



I have a radically different point of view on this. These cases aren't our cases, they're the parties' cases. If the parties don't want to go to trial, if they don't want to move for an early trial date, if they agree that the case should be continued, so what? What difference does it make? Why not let the parties utilize the judicial system as they see best?



In our court, the problem in our jurisdiction is not the trial date being delayed by discovery; it's getting a trial date in the first place. So from the time you file your case until a trial date is available, there is no reason why any amount of discovery can't be completed.



These cases aren't our cases, they're the parties' cases. If the parties don't want to go to trial, if they don't want to move for an early trial date, if they agree that the case should be continued, so what?



In our state, our defense bar is changing the dynamics. You find now that there's lots more in-house counsel. I'd be fascinated to know whether in-house counsel is doing the same kind of aggressive discovery that the defense used to do. I have a feeling they aren't. They don't get paid by the hour, so there's less motivation to conduct heavy discovery. If I get paid the same salary every day, every week, what do I want to do that for?



At these national seminars we all like to talk about the biggest problems and the biggest cases. But the numbers of small cases are much greater. And yet we tinker with these rules because there's a problem in all these *big cases*. I'm more concerned about losing the support at the middle than worrying about taking care of the multimillion dollar verdicts. I'm concerned that we're developing courts for the very wealthy and for the very poor. I visit with lawyers who tell me they cannot afford to try a case to me unless the verdict is likely to be \$10,000, or to a jury unless it's likely to be \$50,000. Now, I've got a lot of trouble talking to my taxpayer friends and saying, "You're paying me \$100,000, but you can't come to my court with those cases?" I don't know how long we can keep doing that. So, I'm interested in the discovery process as an overall cost of our civil justice system, but if we're starting to deprive all those people of access to us when they have potential bench-trial verdicts of only \$10,000, and potential jury-trial verdicts of only \$50,000, why should they pay us?

WHAT WOULD BE THE EFFECT OF SHORTENED DISCOVERY PERIODS?

The judges felt that shorter periods tend to drive settlements because they encourage efforts to develop the information on which a settlement can be based. They also recognized that case characteristics and other circumstances made strict time limits impractical.

Discussion Excerpts

The judge cannot be draconian in setting a short period for discovery. The judge has to be flexible. If the judge is draconian, you're going to have bad results. There are time parameters that are set up so that the case should be to trial in so many days, but if it's a big case, you have to allow more time. You have to use a flexible standard.

*If the judge is draconian,
you're going to have
bad results.*



I believe that a shorter discovery period does lead to quicker disposition, because most cases settle—many of them on the courthouse steps. The settlement depends on the opponent knowing the case. When both parties know their case they settle. But if they wait until they're on the courthouse steps to *really* know their case, then the settlement is going to be later on. So I think the earlier the discovery is completed, the earlier they know the case, and the better the chance of settlement. Very complex cases, obviously, are in a category by themselves.



HOW MUCH OF A PROBLEM ARE DEPOSITIONS?

Are There Too Many Depositions?

The judges had observed many instances in which too many depositions had been taken, and they agreed that some control is needed, but that arbitrary limits are unfair and impractical.

Discussion Excerpts

I've been an appellate judge since 1982. I don't know whether the lawyers are paid by the pound or because they are fearful of malpractice suits, but it seems to me that there are far too many depositions, across the board. I believe there has to be some intervention early in the case by the trial judge to decide who is going to be deposed and what the limits of the deposition will be.



In our jurisdiction, we run an expedited case docket where there are no depositions allowed. Many, many times a lawyer will come and say, "Look, I need to take depositions." When we ask why, some of them will say, "Well, frankly I'm worried about malpractice."



You can't just set an arbitrary number of depositions. But if you set an *expectation*, what decent trial judge, in a \$10 million products liability case, is going to tell the plaintiffs they can't depose fifteen people because they're limited to twelve and they've used those up? It's just not going to happen. But it's really much *more* likely for a defendant to say, "Judge, they sued me, and I'm entitled to depose these people." The judge is going to say, "Well, all right, go ahead"—even if the plaintiff's lawyer is saying "This is the end of it. I can't hang on to this."



Some assume that the only reason a party is taking the deposition is for use at trial. When I practiced law, my number-one objective was that I *wasn't* going to trial. I proceeded on the assumption that every witness was going to drop dead. The idea was to get the whole thing on the table and say to the other side, "Okay, let's settle." When you've got them, defendants pay; otherwise, they pay nuisance value. And the only way you get them to pay is to have a record that is in admissible form for trial, *right now*.



My belief is that those of us who have to deal with these thousands of cases ought to take the position that discovery is a means to an end. That end is to dispose of cases, and, hopefully, along the way dispose of them *fairly*.



Many, many times a lawyer will come and say, "Look, I need to take depositions." When we ask why, some of them will say, "Well, frankly I'm worried about malpractice."



In our state, we thought that, as between a maximum *number* of depositions and a maximum *total time* for depositions, the latter was better. If you are in a case where there is an accident and there are quite a few eyewitnesses, but none of them knew more than thirty minutes or two hours' worth of testimony, you would be better off taking fifteen depositions that only took twenty hours to take than you would if you could only take six depositions, or ten.

Do Depositions Take Too Long?

The judges observed that time limits can actually encourage stonewalling by parties in order to "run out the clock" but also acknowledged that time limits in some jurisdictions appear to have had a beneficial effect on discovery practice and to have lessened the need for court intervention.

Discussion Excerpts

At one point when I was a practicing attorney I got involved in a fairly substantial case. My thought was to make the depositions as long as possible, to ask as many questions as I could, and generally to draw it out for as long as the other side would allow. Now, in our western state, we have adopted rules that limit depositions to just a few hours, and that seems to work well with the lawyers. Of course, as with any other rules, lawyers, being as creative as they are, find ways to get around the rules and to modify them and to deal with them in their own peculiar way.



If you limit the time for depositions, that will give the respondent's side an incentive to stonewall. So when you limit the time you really have to provide something in addition that will limit stonewalling in that context.



In our southwestern state, the biggest change we made, that the bar reacted to most violently, was our six-hour limit on depositions—yet that's now the one they like the best. They say it tends to make depositions more focused, that lawyers quit asking questions about where were you born, where did you go to high school, etc., and wandering around because they don't know what to ask and are afraid to get to the meat of the matter. It's had a profound change on the practice. The trial judges report that they hear almost no motions to extend time length of depositions, because either the lawyers agree to extend, knowing that they are each going to need that accommodation, or else they just finish them in six hours.

DO YOU BELIEVE INITIAL DISCLOSURE WILL REDUCE COST AND DELAY AND THE NECESSITY FOR OTHER DISCOVERY?

Voluntary disclosure, it seems to me, goes along with what the practice of law should be.

The judges generally favored some form of initial discovery, but several believed it should be incorporated into most cases informally by the lawyers as a matter of course and not imposed on every case.

Discussion Excerpts

Voluntary disclosure, it seems to me, goes along with what the practice of law should be.



I've heard from various people that it's working in most cases, but I think the jury is still out on it. It's really too new.



It's really just an automatic thing that any good lawyer would ask for in a discovery request such as an interrogatory. So we're just leveling the playing field and requiring everybody to start with all this good stuff at the beginning.



In our southwestern state we opted for *voluntary* disclosure so that, if the parties don't want to conduct discovery, they ought not to have to produce information at their own expense early on in the case.



We have the initial disclosure rule. If everybody knows what the other side has or doesn't have, theoretically the case gets settled. That's the ideal. So although the disclosure isn't perfect, and there are problems with it from time to time, it at least gives folks a running start and a requirement to meet the disclosure standards with the idea in mind that the case may settle earlier than it might otherwise.



There is such a thing as a demand letter. If you are a plaintiff, you are going to disclose in your demand letter your case up to that point, and you're going to put in statements from experts that you've consulted with, and you are going to make your demand letter dramatic so that you can support your ad damnum clause. That's a form of initial disclosure.

We have experienced almost a generation of what I call "lawyers substituting activity for thought." I think the initial disclosure rule makes them think about their case.



I'm in favor of disclosure, simply because I think that we have experienced almost a generation of what I call "lawyers substituting activity for thought." I think the initial disclosure rule makes them *think* about their case, and that ought to facilitate things.

HOW MUCH WOULD IT HELP IF OPPOSING ATTORNEYS MET AND CONFERRED MORE OFTEN ABOUT DISCOVERY ISSUES?

The judges felt strongly that cooperation between opposing attorneys is highly desirable but generally felt that imposing it by uniform rule is impractical.

Discussion Excerpts

People don't meet and confer. They talk on the phone or they send nasty letters to each other. One of the things that I want to do is have them meet eye to eye. I think that's an important thing.



In our western state we adopted a rule that also requires the lawyers to sign an affidavit that they truly tried to work it out. We only saw a limited number of court appearances after that.



I think there ought to be a meet-and-discuss rule in most *complex* cases—that probably is more appropriate for judges to impose than a general rule.



What about the parties? I was wondering about bringing in the principals right up front and spelling out what this whole thing is about and how we are going to proceed.



I don't think judges ought to be in the business of talking to lawyers' clients, even with the attorneys present. I think that is totally inappropriate for judges.



Meeting and conferring is not a waste of time. *Requiring* it is a waste of time. We never see the people who actually do it. If the lawyers themselves are the kind that get along, they know they might be able to settle their dispute. To require *personal* presence might be a little different twist.



Lawyers say, "He won't meet with me." If they file a motion, though, they're going to have to meet in court. Then I just tell them, "Don't talk to each other. Talk to me. I'm the judge."

I've got lawyer friends who have *shared discovery* with the other side in cases involving certain industries. It saves the defendants thousands of hours of search by their own employees. You create a depository. If you're talking about design defect litigation, you've got one hundred plaintiffs that are going to depose the same engineers one hundred times. You avoid that problem by creating a central depository. So it has a beneficial effect on the cost aspect of litigation.



If you require them to meet eyeball to eyeball, you'll hear, "He won't meet with me." Then you have to ask the other side, "*How come* you can't meet with them?" If they file a motion, though, they're going to have to meet in court. Then they don't have to talk to each other—they can just argue the motion. I just tell them, "Don't talk to each other. Talk to me. I'm the judge."



CONCEALMENT OF DISCOVERABLE MATERIAL, OVERUSE OF DISCOVERY, AND FISHING EXPEDITIONS

The judges had observed all of these types of abuses and felt they should be dealt with firmly, but the judges also acknowledged that the appearance of stonewalling and overuse of discovery can be misleading.

Discussion Excerpts

In our southwestern state we found that there is a serious problem, but it is both overuse *and* stonewalling. There were some overuse problems, but we thought we shouldn't react too extremely. The stonewalling is harder to fix, but we should try.



Generally, litigants are going to spend time and money on discovery in proportion to the stakes involved in the litigation. If it's the plaintiff's lawyer trying to get information, they ought to at least be able to articulate some kind of good faith reason for needing it. And the same thing on the other side, too. There ought to be some articulable reason for holding it back.



It's terribly draconian, but the answer to concealment is telling the lawyers, "You do that and you lose. Period. You lose the case." Strike the offender's pleading and let the client sue him for malpractice.



How do you *know* that somebody is intentionally hiding, accidentally hiding, or in good faith thought it wasn't relevant? Maybe some client sent some underling to look for requested evidence and the employee didn't know how to do it. To me, deciding that is the problem, not deciding on a sanction.



The judge can tell the jury that somebody has engaged in discovery abuse. It's an option that is seldom used, but it seems to me it would be effective. I'd rather pay a fine.



There are a few little pockets of lawyers who actually work together—plaintiff lawyers working with good defense lawyers that they know and trust.

In our midwestern state, if they observe active concealment of evidence, our trial and appellate judges have an obligation to report it to disciplinary counsel. There are several possible levels of discipline ranging from public reprimand to suspension to disbarment, depending on the severity of the offense.



We've gotten into a culture where the plaintiff mistrusts that the defendant is going to produce what is needed. Because of that mistrust, they ask for all kinds of things trying to get to what they think the defense is going to burn—or at least to uncover the tracks of stonewalling. But there are a few little pockets of lawyers who actually work together—plaintiff lawyers working with good defense lawyers that they know and trust. The great benefit is that it helps to dissolve the mistrust.



COURT INTERVENTION IN DISCOVERY MATTERS

As a Trial Judge, How Often Have You Had to Intervene in a Discovery Dispute?

Trial judges reported that they frequently have to rule on discovery disputes.

Every week I have to hear a motion to compel discovery.

Discussion Excerpts

Every week I have to hear a motion to compel discovery.



I'm a trial court judge in a southern state. I've got three counties in my circuit, and we constantly have discovery disputes. I spend probably 30 to 40 percent of my time doing discovery issues. But the problem usually comes in the bigger cases.



I'm on the court management team in my court, and we manage 4,000 cases. We are in discovery at least one morning and sometimes into the afternoon every week. I don't know if that's a lot or a little.



As a trial judge, I have to intervene often. It's a regular part of weekly activities. I just finished a big land case with numerous cases consolidated. I spent three or four months going over documents. Parties claimed privilege on maybe 250 documents out of 30,000. I had to take them *in camera*, read over them all on my own, get their arguments on both sides, and then make a ruling on every one. But that was discovery that was *really absolutely necessary* because it was going to have a great effect on all the cases.



Ninety-five percent of trial court interventions are unnecessary.

As an Appellate Judge, How Often Do Discovery Issues Come Before You?

Appellate judges said they see discovery-related appeals rarely. One judge pointed out the different accounts given by trial and appellate judges, but didn't believe they were contradictory, noting that, "We are all feeling the elephant from a different spot, but it's still an elephant."

Discussion Excerpts

I've looked at close to 2,000 cases in the two years I've been on our state supreme court, and we've never had a discovery issue. Those issues are within the discretion of the trial court, and they never get up to us.



I've been in my court in a southwestern state for many years, and I have not run across a reported case on discovery. That doesn't surprise me, because I'm not so sure the cases that involve discovery disputes ever get to appeals. Trial judges have very broad discretion. So the fact that you don't find reported cases doesn't mean the problem doesn't exist. Only the trial judge could know that—and the attorneys involved, of course.



Since 1982, I don't think we've had more than a dozen cases in regard to discovery. Interestingly, most of them come out of criminal and mental discovery issues.



I came to this conference believing that discovery abuse was a systemic problem and that we all had some experience with it. Clearly that's not the case. Now I'm wondering what it is about our state that makes our practice different.

I think our state supreme court hears too many discovery cases.



We see very few discovery cases at the appellate level in our state.



In the intermediate appellate court in our state, where parties have an appeal as a matter of right, you see many more discovery issues than you do in the state supreme court. But I don't believe the discovery issues in our state are taking up an overly large amount of the docket.



I'm the chief justice of the court of appeals in our southwestern state, and I came to this conference believing that discovery abuse was a systemic problem and that we all had some experience with it. Clearly, that's not the case. In our state, though, just in my court alone, I would say probably 10 percent of our filings involve discovery issues that we hear on a regular basis. I'm sitting here wondering what is it about our state that makes our practice different. I think we have a lot to learn from some of these other states in the way they do things.



I'm not sure I'm hearing anything really different from the trial judges than I am from the appellate judges. We are all feeling the elephant from a different spot, but it's still an elephant.



AFTERNOON DISCUSSIONS

IN YOUR EXPERIENCE, HOW HAS THE AVAILABILITY OF DISCOVERY AFFECTED THE ADMINISTRATION OF JUSTICE OVERALL?

Judges said they felt discovery has definitely contributed to the administration of justice, but they pointed out that the discrete discovery and trial processes must not be confused with a “search for the truth.” Some cautioned that, whereas helping to make results more fair, discovery inevitably slows the process, while others saw no inherent conflict between efficiency and justice. Still others expressed concern that, partly as a result of successful discoveries that have uncovered dangers to the public in the past, the courts were being asked to “fix” numerous social problems when other responses to them have failed.

Discussion Excerpts

Discovery has generally made the system better. It used to be trial by ambush, and I don't think that's a good system. It's certainly very imperfect, but I couldn't imagine going in and trying a case without discovery.

I think discovery has generally made the system better. It used to be trial by ambush, and I don't think that's a good system. It's certainly very imperfect, but I couldn't imagine going in and trying a case without discovery. The advantage would be completely with the defense. It seems to me that we're well beyond saying we could eliminate discovery.



If the function of our system is to provide a forum for litigating disputes between parties and providing a level playing field, then what are we doing acting like a super social agency, trying to resolve all the ills of society that the legislatures can't figure out how to resolve themselves, like ensuring safe products for consumers? As a judge I'm delighted to hear that we are more efficient at doing this, and maybe we are more impartial. But that's not really our job. They keep giving us jobs that really aren't our job. We are supposed to solve the domestic abuse problem and crisis in America. “Give it to the judges, they'll fix it.” Same for the

“right to die” problem, and the defective product problem. Is it our job to fix these things, or is it our job to try cases and do so fairly? To the extent that we then end up adjudicating cases, what is critical is that the information be available to accomplish that. Discovery's role is in ensuring that we have that information, and in that process it also has that significant social effect. As long as we have this role of making decisions on all these social issues, I think we need to ensure that the mechanisms that are used to permit us to perform the role are effective.



I think Professor Carrington is right when he says discovery has made our system function in the way that it does to advance justice. It's truly essential, and that's why I personally am uncomfortable with the idea that there's a need to scale it back in some way out of a concern that there's a problem with the way it's presently being administered.



As working stiffs of the justice factory, we probably need to ask ourselves, “Does discovery actually help us to move cases in a fairer way, in a more effective way, in a less dilatory way?” If the purpose of a trial is to seek the truth, which seems to be the current philosophy—and it sounds like a good one—rather than a gamesmanship thing where the lawyers battle with wits over technicalities to get guilty clients off the hook, then, yes, discovery is a good thing because it helps to uncover the truth. But if your idea is to move the widgets through the line as quickly as possible, then no, discovery is not in the interest of the administration of justice.



Think about judicial independence for a moment. I was a plaintiff’s lawyer, and now I’ve been a judge for thirteen years. We would like to feel that we elect judges, or appoint judges, who will then separate themselves from advocating partisan positions. They will look at the case and apply the law to the facts of the case. They will recognize that it’s in the defendant’s interest to allow or resist certain evidence, or certain documents, to come out. And the plaintiff also has an interest. But what’s in the interest of the search for the truth?



Discovery is *not* a truth-finding process. Discovery’s function is to set the table for the judge or the jury that is responsible for determining the truth. Discovery allows me to learn about the facts upon which the case is based, and to see how you intend to establish the facts. It’s not up to me to determine whether that information is true or not.



The more good information you have, the better decision you will have. Discovery helps both sides.



Discovery is more beneficial to the plaintiff. The plaintiff has the burden of proof and, through discovery, is able to obtain some proof. When each side starts out even and they just stay that way, the defense wins.



Discovery doesn’t matter.

Discovery doesn’t matter.



It seems to me that discovery rules should be able to work in an *adversary* system, and give the adversaries an incentive to do the right thing. It’s similar to judges trying to produce a just result, and I think in discovery “producing a just result” means to get the relevant facts out. I see a real problem when the rules contemplate that trial judges are going to micromanage discovery with arbitrary—there isn’t any other word for it—limitations on how long a deposition can be, how many questions can be asked, things of that nature.



*I say there is no conflict
between efficiency
and justice.*

I say there is no conflict between efficiency and justice. The question is what the public is willing to pay for, what the public is willing to accept as the baseline, below which they will not go. It strikes me that our responsibility as judges is to protect what the public deserves and expects.



Let's face it, we're all human beings. I like to feel comfortable that when I handle an appeal of a discovery issue that I ask, "What's the interest of justice here?"

UNIFORMITY AND CONSISTENCY IN DISCOVERY PRACTICE

Should Discovery Practice Be Uniform Within the Entire State?

Some judges thought the need for uniformity was clear, while others pointed out that rural and urban areas have different needs. Others mentioned that local rules have potential for being abused.

Discussion Excerpts

What reason could you possibly give on why it shouldn't be uniform?



Well, of course, the rules should be the same, but at the same time those rules require us to give broad discretion to the judges—and the judges are all different.



It seems to me that you have to distinguish between rules which pretty obviously have to be uniform and others that make allowances for variations between urban and rural areas.



For lawyers from different parts of the state, and from outside the state as well, the prospects of getting whacked by some local rule are just too high, and our appellate court has had to intervene and resolve some situations that were, I think, pretty unfair. Our state supreme court has required all the chief judges from the different districts to submit any proposed local rules so they can be examined, and now the local rules are not enforced to the degree that they perhaps once were.



If you don't let the local courts experiment, even *procedurally*, they are never going to improve on the product.



The big argument against local rules is that they are a maze of byzantine practices that we don't put in writing, and we don't share them with anyone except members of the local bar, that are really designed to keep foreigners from practicing law in our jurisdiction. Put your local rules on the Internet. As long as you publish them, and make them accessible, you are not thwarting statewide practice or multidistrict practice.

Does it Make Any Difference If Discovery in State Courts Is Different from Discovery in Federal Courts?

In the judges' experience, the Federal Rules have often influenced the adoption and interpretation of state rules, but the judges said they do not follow the Federal Rules slavishly. They also noted that amendments to federal rules often lead rapidly to proposals to bring state rules into line. Several noted that state courts tend to deal with cases that are quite different from those handled by federal courts.

Discussion Excerpts

You can't assume that the quality and kinds of cases that we hear in state court are equivalent to cases in the federal courts. We hear a different kind of case, broader range of cases, and you can't assume the federal solution will work.



Our state has enacted uniform trial court rules, so we do have statewide uniformity with a few exceptions. But I hope we would never adopt the Federal Rules as some sort of a mantra that we must follow. I'm not so sure that the Federal Rules are all that wonderful, especially in certain areas such as the sanctions against attorneys.



We should be consistent, but not uniform. Uniformity is not consistency. Consistency is.

We should be consistent, but not uniform. Uniformity is not consistency.



I think you're going to see a greater and greater divergence between the direction of the federal courts and state courts because of the different ways the two judiciaries are selected. I think the state judges are closer to the practicing bar.

Consistency is.



If they change the Federal Rules, there's going to be an impetus to change the state rules. Legislatures and interest groups will say, "Look what they've done on the federal level. Why don't we go the same way?" I'm troubled by that. I'd much prefer for it just to be a broad scope of discovery and be able to argue to the judge on both sides why it should be broadened or why it should be restricted, and go with the judge's discretion.



In our midwestern state, the discovery rules are more liberal than the Federal Rules are. And I think also that, in the nature of federalism and the nature of a democratic society, there should be more liberality in discovery. If we are encouraging settlements, we are assumably encouraging intelligent and *informed* settlements.

In our state we look to federal courts for guidance. But if we think it doesn't make sense, and there's an alternative, we choose the alternative.



In our state we adopted the Federal Rules of Civil Procedure, so we look to federal courts for guidance. They can be helpful to us. That's pretty standard in the states. Even if the commentary to new Federal Rules doesn't cite a single case, there's always got to be a first case; so if it makes sense, we may follow it. But if we think it doesn't make sense, and there's an alternative, we choose the alternative. If the rule changes are going to happen, knowing that that's the way we view them might alleviate the fears of those who are worried about them.

Should Different Discovery Rules Apply to Different Types of Cases?

A number of judges favored treating different cases in different ways, reflecting both complexity and, often, geographical considerations.

Discussion Excerpts

From an appellate standpoint, it seems to me that our responsibility is to be lawgivers and tailor the rules to meet the kind of dispute. I think we ought to get away from a one-size-fits-all approach that the federal courts seem to be heading toward. On the state level, that wouldn't accommodate the different kinds of litigants who come into court to get their disputes resolved.



Yes. There should be different rules of discovery.



In our eastern state, we assign all complex cases in a given geographical area to a certain judge. It's cleared up a lot of the problems and it's been most helpful. We even do it with some domestic cases where the parties are willing to finance lots of deposition work. If they *want* a case to be considered complex, they make a motion, and the judge in charge of complex cases reviews it and decides whether or not it is actually complex.



I've tried a lot of mass tort litigation, and to be honest we really *loosened up* the discovery procedure and the rules of evidence in those cases. The things we let into evidence in mass litigation I've never let in in a regular medical malpractice case. And I agree that they have to be handled a little differently, because if they aren't, then the impetus becomes disposition more than justice.



It's a fallacy that the problems of the big cases will someday become the problems of the little cases. A long time ago in our state we had people in our largest city telling us, "What are now our problems will be your problems in the smaller towns." And I say, "No, they *aren't* going to be my problems in our town. Those are *your* problems." The same goes for this discussion of some of the changes to the Federal Rules. Those big problems that the federal courts have are never going to be problems in our town.

People in our largest city telling us, "What are now our problems will be your problems in the smaller towns." And I say, "No, they aren't going to be my problems in our town. Those are your problems."

JUDICIAL MANAGEMENT OF DISCOVERY

Will (Or Would) Increased Judicial Management of Discovery Contribute to Speedy, Fair Resolution of Cases?

Some judges favored early involvement in litigation that involved substantial discovery, whereas others did not feel that is a proper role for the court. Several felt that what was really being "managed" was not the discovery process itself but rather the lawyers engaged in it. Others made a point that much depends on judicial resources.

Discussion Excerpts

I still believe in the importance of lawyers and judges working together in managing these cases. In my judgment it's really, really important. So my sense of solving a lot of these problems is to meet with lawyers when the case is in its infancy, roughly when it's five months old, and talk about the case, see what discovery issues are in the offing, and see what hidden agendas may arise. I've been able to reduce a whole lot of the time I spend on law and motion and discovery hearings because I meet with counsel early on.



I think we as judges do need to get involved—and *stop the whining*. I believe in the overwhelming run of cases that it is not a problem, and the court will never see the case except when there is a substantive motion, because the case is going to go away spontaneously after proper discovery is done. The cards are on the table, and the parties settle.



Judicial management help move cases? Just the exact opposite.



Reviewing discovery is mind-numbing work. Absolutely mind numbing. I've sat in court and said, "Okay, counsel. Let's go to your objection to question 23(A)(3)(b)(1)..." That drives the judge absolutely crazy. Absolutely crazy. It causes you to make all kinds of spur-of-the-moment decisions that sometimes are not quite



well thought out, just out of exasperation to get rid of these motions. You may do it with or without a hearing. I see people nodding off while that is going on.



It depends on what you mean by “judicial management.” If, by judicial management you mean quickly and aggressively responding to discovery *abuses*, then I think that’s the most critical function—good tactics used to deal with problems.



I don’t think it is appropriate to involve courts more actively in the discovery process. I don’t see a value to that. I think the goal is achieved by simply setting the trial dates, making them meaningful trial dates that the parties know that they have to work with, and then trying the case by that date. For the most part, I think the management of discovery is for the attorneys to do, not for the court to do.



I liked the statement by Judith Resnick that was quoted in Professor Carrington’s paper—that it really isn’t judicial management of *cases*, it’s judicial management of *lawyers*.²



I think it would be best if these management techniques were self-initiating. What I have in mind is some sort of tickler system where there is actually some indication in the file that this was the time when interrogatories or requests for production were due, the time has come and gone, and nothing has happened.



*If you’re going to have
“judicial management”
you’ve got to have
enough judges.*

If you’re going to have “judicial management,” you’ve got to have enough judges.



I’m from a small rural state. Our discovery deadlines and limits on discovery are set from the beginning of the case, but we only have sixteen general jurisdiction trial judges in the whole state. So we don’t have enough trial judges to give them individual assignments to follow the case. One thing we’ve done recently, though, is to set up a system whereby discovery disputes can be resolved almost immediately, anywhere in the state, by a rotating trial judge who will be available to resolve it by phone—for example during a deposition. It gets resolved on the phone immediately to try to cut down on the number of disputes that take up court time when they’re presented in a more formal way.



2. Judith Resnik, *Changing Practices, Changing Rules: Judicial and Congressional Rulemaking on Civil Juries, Civil Justice and Civil Judging*, 49 ALA. L. REV. 133 (1997), cited in Paul D. Carrington, *Recent Efforts to Change Discovery Rules: Do They Advance the Purposes of Discovery?*, *supra* herein 58 n.33.



I'm a trial judge. Once a case has reached my desk for case management, I tell both sides, "If you have problems in discovery, come in on any afternoon. I will be free. *But you must have both parties present*, and present to me any problems you are having with discovery." I've been on the bench for thirteen years, and I've probably had about five people come in and say they've had a problem—but it cuts down on dilatory tactics and it cuts down on excessive discovery, and it's really worked in a very fundamental way for me. So I think that if you just give the appearance that you're not *too* busy, that you are able to handle a problem if it should arise, I think it will cut back on some of the lawyers' tactics.



We had a late federal judge in our district that I had great respect for. He had a rule that, if you had to come to him for a discovery dispute more than once, you better next time come and be ready to settle; otherwise you can just stop practicing in his court.



When I sat as the motion judge for a while in our midwestern state and there were two pit bulls who couldn't agree on anything, my management method was to say, "Fine, you'll be heard at the end of the motions." They didn't want to wait for the end of the call, so they'd resolve half of their disputes right then. Then I would say, "Well, Friday afternoon you be in my contested discovery call." No one ever appeared for my discovery call! They would resolve all those terrible problems they had, because who the hell wants to go in front of me at 3:00 on Friday afternoon?



I think a lot depends on the skill of the judge involved.



In my state we have several newly appointed judges. When you talk about whether it's lawyer-managed discovery or judge-managed discovery, I would rather have two experienced lawyers running their discovery than an inexperienced judge who knows nothing about complicated litigation or running things.



You can tailor the approach, but I think discovery is going to have to be controlled by the judges.



I've been on the bench for thirteen years. When people come in for a case management conference I always tell them, "I have an open door policy. Come any day between 1:00 and 4:00. I'll be here and see you." Surprisingly enough, in those thirteen years I have had maybe five people come in and say, "I have problems." My cases proceed—never delayed, never a problem, because they know. They'll look at each other and there's waggling of the eyes and that kind of thing, but then they adhere to the discovery issues. Once you make yourself available, it's just not a problem. And the truth of it is that you may *not* be available every time, but if you say that you are—and if you are available *enough* times—then it works.



There's an old concept of the judge who arrives at 11:00 a.m., leaves at 3:00 p.m., and plays golf in between. But everybody I've met at this conference really is working hard. If lawyers interrupt whatever I had scheduled to do with their very important, significant discovery request, well, that means a settlement conference may have had four interruptions—and when I get back to that conference I'm still thinking, "Was that decided correctly?" So the reality is that if you are always available, you're taking away from other lawyers and other cases.



I think the thing lawyers react against is *mechanical* judicial management. If you are going to get involved, then you need to sit down and ask, "What's the problem?"

My response to complaints like "Nobody meets the deadlines" is that nobody meets deadlines if the judges let them not meet them.



It's really the *lack* of court management that harms the good attorney. The attorney who is following the rules is doing it right and is being harmed by the attorney who's not following the rules. Unless you have that court intervention when necessary, you really hurt the good attorney.



My response to complaints like "Nobody meets the deadlines" is that nobody meets deadlines if the judges *let them not meet them*. We get petitions for extraordinary relief to change deadlines and we deny them, and—surprise!—the lawyers manage to do it.

Use of Special Masters, Discovery Commissioners, and Referees

Judges were enthusiastic about the use of others to handle discovery disputes, in particular because too much direct involvement by the eventual trial judge can affect the trial. They expressed concern about excessive judicial workloads, but a few suggested management techniques that do not require substantially more time, personnel, or court funding.

Discussion Excerpts

Is there a problem? Yes. Where does it lie? Complex cases. What can you do about it? Get a complex discovery master or something and save yourself some brain cells and the aggravation of having to do this kind of work. It is totally aggravating. It's a painstaking, agonizing, mind-numbing process. That's the big problem.



Applying a cookie cutter to every case doesn't work. Trial judges ought to have available to them a master or a magistrate who will handle the discovery part. Otherwise, judges aren't going to get their work done.



If you've got problem attorneys, and you send the discovery disputes out to a referee or a master, you end the problem. You make special findings that you're doing it because of the hostility between the attorneys. You give them a choice of referees, and if they can't pick it, you pick it. It ends the hostility, and the trial judge is not in the middle of the case—which is very important, because when that happens it affects the case. You just send it to a referee and they battle it out in that forum, and they come back with a finding. It's one way of ending the hostility.



We have a personnel problem. In our court we have five circuit court judges, one secretary, and one law clerk for the five of us. We don't have the ability to utilize masters in any respect, but we do set early trial court deadlines and we hold the lawyers' feet to the fire. I very seldom grant a motion for a continuance. If I block off the time, I hold their feet to the fire unless there's a severe problem. They will complain but they'll generally meet the trial deadline. I have found that to be helpful in resolving cases in a timely way.



I was a trial judge for twenty years in a very litigious circuit. We utilized a discovery commissioner system that I learned of at the National Judicial College. We appointed a couple of commissioners, who were just lawyers and they developed an expertise in discovery issues. We figured \$100 an hour was decent pay for them. When there was a discovery issue, we made each side deposit \$100. They took the matter before the discovery commissioner, who would report to the judge, and generally we would rubber-stamp the commissioner's ruling. Then the losing party paid the commissioner, and if they were dissatisfied with the commissioner's ruling they could always appeal directly to the judge. The result was that, when we got to the point where they would have to deposit the fee, normally the lawyers said, "Hey, let's try to resolve this instead of going to the commissioner." I think it reduced the amount of discovery hassles by 70 or 80 percent, and it didn't really add another layer to the judiciary or impose another layer of costs.

HOW WELL DO OPPOSING LAWYERS MANAGE DISCOVERY IN THEIR CASES WITHOUT JUDICIAL INTERVENTION?

Judges said that, in the great majority of cases, lawyers manage discovery without involvement of the courts. There are, however, instances in which intervention is essential.

Discussion Excerpts

Almost all of them do it, all the time, without judicial intervention.



In our court we don't have the ability to utilize masters, but we do set early trial court deadlines and we hold the lawyers' feet to the fire.



I think the reason some states can make do with very limited discovery is that their lawyers tend to be pretty civil. For most matters, the lawyers can agree to do whatever they want *outside* the court process. But if you're going to come to court, there are some presumptions that you have adhered to the rules, and if you haven't, and it's brought to the judge's attention, the judge is going to come down on you.

*How well opposing lawyers
manage discovery depends
entirely on the lawyers.*



How well they do it depends entirely on the lawyers.



When I was on the trial bench, if the file started to get thick, the clerk would come in and say, "Judge, we've got a file that's generating a lot of paper." So we'd set a pretrial conference and the lawyers would come in, and I'd ask, "Everybody doing all right?"

"Yes, we're doing fine."

"Need any help?"

"We don't need any help."

"Everybody going to be ready for trial?"

"We're going to be ready. Don't bother us."

"God bless you and go on."

But then you'd get a bunch of cases where a lawyer would come in and say, "Judge, this is sliding off in a ditch. We can't get along. We're fussing with each other all the time. We just need a little guidance here one way or the other and we'll be better." And that worked pretty well, too.



I don't think lawyer-managed discovery and judicially managed discovery are mutually exclusive. I think it works well if, very early on, especially in complex litigation, you get the lawyers in and say, "Okay now, folks, this is what we're going to do. Your trial is going to be at such and such time and we're going to work together here to set the schedule. For discovery issues I'll be available to you, but I want to be sure you understand that we're not going to have a lot of fiddling around." I think if you set the tone early and then work somewhat compassionately with the lawyers as you go down the line with them on discovery problems, you avoid some of the game playing. I don't think you should look at it as being mutually exclusive, that either the lawyers run it or the judge runs it. I think it's a combination, but the court has to set the tone.



SHOULD THE SCOPE OF DISCOVERY GENERALLY BE NARROWED TO MATTERS RELATED TO THE PARTIES' "CLAIMS AND DEFENSES"?

Judges thought there was little real difference between "subject matter" and "claims and defenses." Some voiced concern that such a change would exacerbate existing stonewalling problems, and others mentioned that it had potential for misuse as a means for limiting either evidence that would prove the case or evidence that would support higher awards of damages.

Discussion Excerpts

Hasn't the scope always been limited that way?



"Claims and defenses" is all there is.



I think the words "relevant to subject matter" have been interpreted to mean that you can seek information which leads to discoverable material. So "relevant to subject matter" is much broader than "claims and defenses."



Regardless of the standard, it seems to me the result is the same.



"Subject matter of the case" must be different from "claims and defenses," because otherwise we wouldn't be talking about it so much. But we don't know what they are different from or similar to.



This change would be based on the presupposition that the only discovery abuse you really have to deal with is overutilization.



The change in the scope of discovery has nothing to do with stonewalling. Changing it will even make it worse. But in the small plaintiff's case, I think limiting discovery is essential because frequently, plaintiffs get deluged with discovery requests from the defense.



Regardless of the standard for scope of discovery, it seems to me the result is the same.



If you limit discovery to “claims and defenses,” you’ll have the habitual defendant saying, “I can limit damages by limiting the evidence. And one of the ways is not to allow it to be discovered in the first instance.”

I’m very concerned that if you limit discovery to “claims and defenses,” you’ll have the habitual defendant saying, “One of the ways that I believe that I can limit damages is to limit the evidence. And one of the ways that I can assure myself that something won’t get into evidence is not to allow it to be discovered in the first instance.”



The fact that we can only speculate about what the change means speaks for itself. I mean, if it was actually intended to be a change, it’s not very effective if we don’t understand what the difference is—because ultimately it’s going to be left up to people like us to decide what the difference is!

COST-SHIFTING

Will More Readily Available Cost-shifting in Discovery Disputes Help?

Many judges were wary of the cost-shifting proposal because of its potential to chill use of legitimate discovery mechanisms. Others thought adequate means already exist to address discovery abuses, but that their proper use requires consideration of specific facts of the case, militating against mandatory imposition of cost shifting.

Discussion Excerpts

I believe cost shifting would significantly increase litigation and motion practice, and encourage the prevailing party in a discovery dispute to try to recover some or all of the costs. More time, in my view, would be spent litigating that question than is spent on the underlying discovery.



Can’t the issuance of a timely protective order or an order granting a motion to compel accomplish the same thing as cost shifting?



Cost shifting could chill approaches to discovery, and matters that should be discovered that are not ironclad but are legitimate.



Cost shifting can be used by judges for bullying. Having been on the other side before I became a judge, that could be a poor tool, and it would have a negative impact on the image of the judiciary if one judge uses it for bullying.



I have one rule for lawyers, and those who practice in my court understand it: “If, whether through neglect, intent, or simply discourtesy, you cause the other side to expend resources unnecessarily, you pay.” It’s real simple. That’s the way I handle all of the expense.



There are already plenty of tools for handling abuse. I think any kind of abuse needs to be brought to the judge’s attention, and the judge has the tools right now.



I don’t think there is very much thought behind just saying, “Okay loser, you pay up.”



When I see abuse in my court, I will assess the sanctions not only against the attorney but also against the *party*. Once that party finds out that they have been sanctioned as well, the attorney usually will curtail his or her conduct.

I don’t think there is very much thought behind just saying, “Okay, loser, you pay up.”



To me it’s a ham-handed way of getting parties to resolve issues without involving the court. There are many instances in which the lawyers have legitimate differences. The lawyers may be uncomfortable with simply accepting the other side’s proposal for how discovery should be done and think they have a proper basis to ask the court to reach a different result. But to me, the fact that the court is persuaded not to reach that result doesn’t mean they should then bear the cost of having to ask the court to get involved.



I have a lot of concern about the proposal making cost shifting mandatory through the use of the word “shall.” We already have the discretion to award sanctions without looking to this new standard, which I consider to be much stricter. And I do think it can be used—or misused—as a “loser pay” kind of scheme.



Would this mean that, if the big insurance company law firms come in with an elite lawyer and two bag carriers, you have to pay for the time of all three of them?



Cost shifting will throw a bucket of cold water on the lawyers coming into court for the first time.

Cost shifting will throw a bucket of cold water on the lawyers coming into court for the first time.



I don't see the use of having sanctions be automatic. Look at a discovery defense in an environmental case, where the items the other side is seeking are trade secrets—they could lead from what's going out of the smokestack all the way back to how the process works. A judge has to take these matters in chambers and look through them all and say, "As to this you win, as to that you lose."

Then you are going to make the one who loses pay for that? I mean, it doesn't make any sense. Now, if one side or the other is engaging in stonewalling or using discovery as extortion, then sanction them—but that has to be decided on a case-by-case basis, not on an automatic basis.



If all judges were Solomon it might be okay, but that ain't going to happen.



Fee shifting is not going to fly in this country. Maybe it will fly in fifty years, but it's not going to fly today. That's the thing that I find troubling about this proposal. It would be better to be a little more up-front about what the goal really is, to make a substantial change in public policy, than to attempt to do it with administrative rules. And I think the states will really have to be careful with that.

When Cost Shifting Is Invoked, Should One Party's Greater Resources and Custodianship of Critical Information, as Against Another Party's Lack of Substantial Resources, Be Taken into Consideration?

Judges thought the courts need to be on guard against imposing inequities in cost shifting.

Discussion Excerpts

If we do use cost shifting, there are going to be inequities. So should we have another rule that helps with the inequities? My answer is, if you don't change the rule at all, the trial court already has complete discretion to do what needs to be done and will do the right thing.



That's obviously a loaded question. The answer is supposed to be yes.



Unless the federal courts in your states are a lot different from the others I've seen, the advantage is for the big law firms. The insurance industry wants this "loser pays" rule, which is really good if you want to stifle people's initiative to file litigation.



WHAT DO YOU THINK OF THE SUGGESTIONS FOR REFORM MADE BY PROFESSOR CARRINGTON IN HIS PAPER?

Judges were generally positive toward Professor Carrington's suggestions, with the only significant differences of opinion being related to use of video recordings and other rapidly changing media in the courtroom. They acknowledged that conditioning settlement on suppression of the fruits of discovery creates serious problems for lawyers and their clients, but the judges also pointed out that it can put the courts in an ethical dilemma as well.

Exchange of Adopted Statements

Discussion Excerpts

Once you get an adopted statement like that it can save you from having to take a deposition or engaging in other discovery.



I think that, as the discovery process wends its way along, it usually results in something like an adopted statement. So maybe it's just as well to have it occur early rather than late.



I've read too many things written by lawyers to think that an adopted statement is going to accomplish anything if the lawyers don't want it to.



An adopted statement would only be as good as the people who sign it.

Limits To the Number of Depositions

Discussion Excerpts

I favor limitation of the number of depositions for two reasons. One is that it requires some analysis of what's really significant and makes you prioritize what you need to do. And the other thing is that by and large lawyers who are practicing in good faith aren't a problem. It's the problem lawyers that generate difficulties in the discovery area, and laying a limitation on those folks may not be a bad thing.



If you have a big case, you may need more depositions than if you have a rear-ender. Universal rules will fluctuate with the situation sometimes, but most of the time they won't.



If you set a number, maybe some attorneys will think, "Gee, if I don't do all the depositions allowed, I might be setting myself up for some claim of malpractice."



Arbitrarily setting a number of depositions is whistling in the wind.

Arbitrarily setting a number of depositions is whistling in the wind.



A legitimate question might be why a lawyer would take more depositions than they think they need. Insurance defense lawyers might, because they've got to send in the damn bills. That's the only way they can get paid.



We want to encourage the lawyers to go do investigation rather than discovery—go out and interview the witnesses. If both sides interview a witness there should be no need for a deposition, and the clients would save all that money.



Rather than limiting the number of depositions, why not limit the amount you can charge? Limit the number of dollars that can be expended and then you'll get some action.



Let as many depositions be taken as there could be good cause shown for it.

Reserving Objections to Deposition Questions

Discussion Excerpts

That's pretty standard.



The more lawyers talk at depositions, the less you get to hear what the witnesses have to say. But they do it at depositions to coach the witness. The more you do to restrict that, I think, the better off you are.



To restrict attorneys is like putting Jell-O on a wall. You're asking for a lot of discovery motions and problems. Theoretically it's good, but I see a lot of practice problems.



I think this idea is directed mostly toward those real contentious depositions where the people were sitting there fighting over every single question. You read them and it's "Question.— Objection.— Go ahead, you can answer.— Question.— Objection." I think the idea is that you make a single objection and it will be noted, and then you can contest it before it comes in at trial.



Well, if you say, "I'm going to object for the record to this question," unless you bring that before the court for a ruling, it doesn't make any difference whether you objected or not.



Most lawyers in the defense bar are grumbling somewhat, and saying "We can't protect our witnesses with this new restriction on objections." But by and large it seems to be working pretty well.

Reopening Depositions

Discussion Excerpts

For newly discovered evidence, yes.



It's fine if everybody agrees or if there's a showing of good cause.

Using Videotaped Depositions at Trial, and Other Technological Advances

Discussion Excerpts

Video depositions obviously help. Reading the old style depositions is absolutely horrible.



In our southern state, we've been using video depositions for a long time. When they first said they were going to do it I was a trial judge, and I thought, "Well, this is going to be awful." But the jurors are used to watching television. When a doctor is testifying live they fall asleep. But put him on a video and they watch every word. It's a strange thing to watch.



Videotape prolongs the trial. It bores the jury. Nobody wants to sit there and listen to a videotaped deposition. The jurors don't get that personal touch. A lot of them are going to doze out, sitting there "watching television."



More use of videotape would be preferable to having someone read a deposition. At least the jury can make a credibility call as to the witnesses' demeanor, as opposed to giving a transcript to somebody in court and saying, "Read this."



People are used to watching TV and seeing action. Sitting there watching a doctor in one seat talking to a camera is worse than the lawyers reading it.



I have this fear of having a court where the whole file is on television, and there's nothing for the lawyers to do until closing arguments.

The lawyers' job will be editing television!

Some way or another we need to make sure that, as judges and as attorneys, we hone it down better for the jurors. If a witness can't say something to a juror in two or three hours at the most, it's lost.



I have this fear of having a courtroom where the whole file is on television, and there's nothing for the lawyers to do until closing arguments. The lawyers' job will be editing television!



With the video-conferencing feature, eventually you'll have witnesses who are being questioned live in New York on a screen that the jury sees in Arizona.



Have any of you seen the "twenty-first century courtroom" at William and Mary Law School?³ There's going to come a time in the not-too-distant future when there won't be any live witnesses in any courtroom in this country. They'll be sitting in their offices. And they'll be able to take the testimony of someone in a foreign country, with simultaneous translations. All the jurors will have their own video. A piece of evidence can come in and be shown to all of the jury, and jurors who can't speak English can be shown it in their language.



That would be a great thing, but we don't even have the money to get a good amplification system in the courtroom.



I'm concerned about that. If you're sitting in your office, you're going to act differently in response to questions, etc., than you will if you're sitting in the majesty of the courtroom. And I think it affects the nature of testimony, the appearance and the demeanor of the witnesses. I'm glad I'm going to be retired by the time we get to the twenty-first century courtroom.

Confidential Production of Documents

Discussion Excerpts

I assume we're talking about documents that are actually covered by a privilege that you would otherwise waive by producing them. This must be an agreement to limit dissemination of confidential information to the lawyers in the case or the experts. I thought that, under the Federal Rules for a long time now, the district judges had discretion to fashion the protective order, or the parties could do that by agreement. I didn't know that was a burning issue. I'm sort of surprised.

3. "Courtroom 21" is a joint demonstration project of the College of William and Mary and the National Center for State Courts, both located in Williamsburg, Virginia. It is physically located in the McGlothlin Courtroom of the William and Mary Law School. Information about the project may be found on the Internet at <<http://www.courtroom21.net>> (visited February 1, 2001).



Greater Restrictions on Suppression of Discovery Materials as a Condition of Settlement

Discussion Excerpts

It's been a tradition in American jurisprudence that we want to promote settlement. To the extent that this helps people agree on a settlement, then I think it's useful, in terms of both our jurisprudence and the disposition of our cases.



This is a difficult problem for the practitioner. The lawyer has somebody making an offer, and the client wants to accept it, but there's a condition that the discovery material be suppressed. The client is willing to go along with that, and it may speed the resolution of your particular case. But it can adversely affect other litigants by prolonging the resolution of a number of other cases. So, it's a difficult problem for the lawyer.



From the *judge's* perspective, what do you do when the first case comes to you and they want to seal up all the records and settle the case, and you let that happen, and there's a baby who got \$20 million, and then another case comes along, and that baby is getting \$20,000 because that lawyer never got some documents that you know exist? What kind of position does that put the court in?



I will approve a confidential settlement up till the time when the jury is picked. I sort of use that as an encouragement to settle a little earlier. But also philosophically, I think once the jury is picked, you have now made it into a public event, and it's not going to be sealed.



This presents the question of the court's role in effecting social policy. If the court steps in and says, "No, as a matter of promoting efficiency in litigation, or achieving better social justice, or better civil justice, we are not going to permit that," then that basically involves the courts becoming social engineers. It may advance good social policy, but you still have to consider whether that's a proper role for the court to play.



Why isn't there a social purpose to be gained from allowing manufacturers to frankly discuss what went wrong when the Ford blew up, so that they can do it better in the future, without their discussions becoming discoverable? Again, it's a policy decision.



To the extent that an agreement to suppress discovery material helps people to agree on a settlement, then I think it's useful.



It's one thing for the peer reviewers at the hospital to say, "Let's figure out what went wrong, and then not let the fact that we've determined what went wrong be used against the people who did what was wrong." The next step, and it's another thing entirely, is for them to say, "Having determined what went wrong, we have decided that it's an acceptable social cost. We don't want to do something different because it's too much of a burden to protect people in the operating room against that, versus the likelihood that they'll be harmed." To insulate that second step is what I think presents the most difficulty. Again, it's a social policy question, and it really isn't for the courts to sort out.



I think it is the responsibility of the final lawgiving court—or the legislature—to take some responsibility and say, "Here are the available parameters, and they do not include sealing up every document and having confidentiality in every situation."

I think the law enforcement aspect of private litigation and discovery in the United States works quite well. But it is completely undermined when you have all this sealing and confidentiality.



Everyone we've heard from today at this forum—including plaintiff counsel, defense counsel, judges, and academics—has emphasized the law enforcement aspect of private litigation and discovery in the United States. We have substituted that system for the bureaucratic regulatory system that many other countries have. And I agree. I think it works quite well. But it is completely undermined when you have all this sealing and confidentiality.



As a practitioner, in bargaining to increase the amount of the settlement for my clients, I used to offer confidentiality agreements. But, as a judge, I've taken the position since day one that I will not dismiss a case, rescind the findings of fact, or sign off on a settlement agreement that requires confidentiality—neither as to the amount of the settlement, nor as to the discovery material. I'm not sealing the record at all. I believe it's a matter of public policy, I believe it's in the public domain, and I refuse to sign off on it. The parties know that when they come in, and they don't even ask me, except for occasional out-of-town counsel. In the four and a half years I've been on the bench, I have not signed one.



Points of Agreement and Closing Comments

In the discussion groups, the moderators were asked to seek out consensus—to the extent that it was achieved—on the issues raised by the standardized questions and to characterize their groups' points of agreement in a few sentences, which would be announced during the Closing Plenary Session. The moderators' informal summaries of their groups' discussions of the standardized questions that merited significant consideration follow. They have been edited for clarity. Most, but not all, of the standardized discussion questions were mentioned by the moderators as having been discussed significantly, and several other relevant topics not covered specifically in the standardized questions also received attention. While some moderators summarized discussion of some questions very briefly (sometimes in one word), others elaborated more fully.

THE “DISCOVERY PROBLEM”: IS THERE A “DISCOVERY PROBLEM”?

Our group felt that there's no significant discovery problem in the judges' respective states.



There may be some problems in some areas, but for the most part our group agreed that, for the vast majority of cases, we don't have real discovery problems. Some problems do arise in particular types of cases—either by the nature of the case, or because some lawyers engage in uncivil or unprofessional behavior, or simply because of personality problems.



Yes, there are problems, but they are limited to certain kinds of cases—e.g., big cases, commercial cases, products cases, medical malpractice cases.



Our group reached a consensus that there is no general discovery problem applicable to all cases, but that there are specific discovery problems, depending upon the personalities involved, or the types of cases, or issues that may arise such as confidentiality involving third parties.



There may be some problems in some areas, but for the vast majority of cases, we don't have real discovery problems.



Our group's consensus was that there's certainly no epidemic. There are problems with certain kinds of cases—mass tort cases, complex discovery, etc.—but generally there was no ground swell opinion that there's a pressing problem that needs fixing.



Our judges came to the conclusion that there wasn't a problem. By and large they were somewhat incredulous about what all the to-do was, and they said they are handling the problems of discovery in their states under the rules they have now without a tremendous problem and without tremendous cost or delay.



Our group believed discovery problems are on the rise in state court because more litigation, more high-stakes litigation, and more big-discovery litigation is being moved into the state courts.



It's ironic that these groups are composed of judges who sit all day and listen to evidence and make decisions on that, because the basic decision in our group was that they haven't heard enough evidence that there needs to be a change in what they're doing or in the system, because there isn't a problem.

IS THERE ENOUGH OF A DISCOVERY PROBLEM TO WARRANT CHANGING THE PRESENT RULES?

There should be no broad rule changes.



We don't need to change a whole bunch of rules to change the way we conduct discovery. We can't modify behavior by changing rules. We're just going to create more intense problems or more litigation. The trial court judge needs to take control. If the judge doesn't take discovery disputes seriously and take control of them, that's an abrogation of responsibility.

*We can't modify behavior
by changing rules.
The trial court judge
needs to take control.*



One judge suggested a five-year moratorium on any new rules whatsoever and believed that the federal courts have exacerbated problems rather than solving them.



One judge said, "We need to realize that each new rule change that we look at spawns a whole new wave of litigation and its own set of problems, and it's important for judges to just enforce the rules that they have rather than to continually create new rules to deal with some of the same problems."



The clear message from our group was that the best way to deal with discovery abuse is not to make more changes to the rules, not to do anything different, but for the trial judge to intervene early, intervene consistently, and intervene firmly. The discovery problems in the case will go away.



There seems to be an urge to change or to fix undefined problems, and we shouldn't be tinkering with something that's not broken.



We shouldn't lose sight of the political agendas behind some of these proposed rule changes, and beware of unintended consequences if changes are made.



There should be continuing experimentation in rule changes.



The bottom line from our group is, the discovery rules are not broken and they don't need fixing.

IF THERE IS A “DISCOVERY PROBLEM,” WHAT IS IT?

Our group identified stonewalling (concealing information) as an area where there seems to be an increasing problem, particularly with electronically stored information. While computer storage capabilities have increased the amount of information available, they have also made it more difficult for litigants to obtain that information and easier for their opponents to conceal that information or make it more difficult to get it. The other side of the coin is overuse of discovery tools by various litigants—fishing expeditions. In our group it was suggested that, at a minimum, there should be a good faith reason for looking for information, or that the requestor should at least be able to articulate the reason why particular information is being sought. But the vast majority of cases do not involve discovery problems.



Our judges mentioned several problems: overuse of form discovery requests that sometimes aren't even relevant to the case; holding back information for fear it will be put on the Internet and go all over the place; hourly attorneys running up the clock; deposing witnesses beyond anything that's reasonable, and unreasonable and unnecessary objections to discoverable information in an attempt to conceal information.



There are problems with what one judge referred to as the “Rambo litigators.” Apparently there is one jurisdiction that has a special “anti-Rambo” task force to



deal with those problems. There was an absolute consensus in our group that there is a greater need for collegiality and professionalism in litigation. Some judges felt that was one issue that was improving, while others felt that there is certainly a need for more improvement.



Early intervention by the court and a heightened sense of civility among litigants would probably solve a lot of the problems (or perceived problems) that we now have.



It depends on the attorneys, and the nature of the case, and how they conduct themselves.



Rewarding civility and professionalism, and punishing incivility, appeared to be very important factors in controlling some of the discovery abuse we see.

IF THERE IS A “DISCOVERY PROBLEM,” DOES IT AFFECT ALL CASES SIMILARLY?

No.

IF THE DISCOVERY “PROBLEM” DOES NOT AFFECT ALL CASES SIMILARLY, SHOULD THE CASES THAT TEND TO INVOLVE MAJOR DISCOVERY ISSUES BE TREATED DIFFERENTLY FROM OTHERS?

Yes.

IS DISCOVERY A MAJOR CONTRIBUTOR TO DELAY AND COST IN LITIGATION?

Our group did not find that it is. The finding was that most of the cases are coming before the judges under the rules that we presently have, and that the judges are able to handle them.



Discovery does not generally contribute to unreasonable delay or to unnecessary costs.

Discovery does not generally contribute to unreasonable delay or to unnecessary costs. In fact, people in our group appeared to agree that 90 percent of the cost in litigation should be for discovery. That's what it's all about. However, there is one area where costs are exorbitant. That's in the expert witness fee area, but there weren't many ideas about how to fix that. From the doctor in the small fender-bender case all the way up to experts in the more complex cases, experts are really running litigation and discovery expenses up.



Everybody in our group thought that that question should be addressed to the lawyers.

WHAT WOULD BE THE EFFECT OF SHORTENED DISCOVERY PERIODS?

Shortened periods for discovery would lead to faster case dispositions.

HOW MUCH OF A PROBLEM ARE DEPOSITIONS?

Nobody in our group felt that there was enough concrete information to the effect that there is a general problem with depositions. There doesn't seem to be enough research to make a decision as to whether something needs to be done about the numbers of depositions that can be taken and the length of time allowed for those depositions.



Ask the lawyers.

DO YOU BELIEVE INITIAL DISCLOSURE WILL REDUCE COST AND DELAY AND THE NECESSITY FOR OTHER DISCOVERY?

It may.

HOW MUCH WOULD IT HELP IF OPPOSING ATTORNEYS MET AND CONFERRED MORE OFTEN ABOUT DISCOVERY ISSUES?

It depends on the attorneys, and the nature of the case, and how they conduct themselves.



Our group had a real difference in opinion on the value of "meet and confer" rules that some of us have been living with. Some judges felt it is really useful to insist that lawyers actually do meet "knee to knee under the table" to refine the issues before they are presented to the judge. However, some judges feel that often, under rules like these, the lawyers merely exchange voice-mail messages and angry letters, and then go ahead and file the motion to compel discovery. So some judges feel that the "meet and confer" rules don't really solve much of a problem.

CONCEALMENT OF DISCOVERABLE MATERIAL, OVERUSE OF DISCOVERY, AND FISHING EXPEDITIONS

Sanction violators of discovery rules!



Our group talked about the need for the judges to be tough with sanctions. However, there has to be

*Sanction violators of
discovery rules!*



a record. If the lawyers ask for sanctions, don't use them for a minor problem, and make sure you make your record. The appellate courts will support sanctions if the record is there, but obviously, if there isn't a record, they can't support a sanction.

COURT INTERVENTION IN DISCOVERY MATTERS: AS A TRIAL JUDGE, HOW OFTEN HAVE YOU HAD TO INTERVENE IN A DISCOVERY DISPUTE?

Our group's judges said, "Too often"—more often than they would like. They have to do it a lot in both the bigger jurisdictions, metropolitan areas, and even in the smaller areas. And they felt that 90 to 95 percent of those disputes were unnecessary.

AS AN APPELLATE JUDGE, HOW OFTEN DO DISCOVERY ISSUES COME BEFORE YOU?

We heard about one appellate judge in an urban area who hears three to four discovery matters a week, and that other jurisdictions have established special masters just to deal with discovery. So the feeling is that it's a problem that's coming to the state courts, if it's not already there.



The appellate judges who were present in our group generally do not see many appellate issues on discovery.



Some appellate judges encounter discovery matters once or twice a week, or even more.



The general feeling in our group was that interlocutory appeals should not be allowed—at least not for the run-of-the-mill case. For those exceptional issues that really need resolution because they would affect the ultimate outcome of the case, some judges discussed using mandamus or the collateral order doctrine, which are already available to them. They felt that in the extraordinary case, appeals of critical discovery issues should be allowed, but for most cases they thought any appeals should be left to the end of the case.

IN YOUR EXPERIENCE, HOW HAS THE AVAILABILITY OF DISCOVERY AFFECTED THE ADMINISTRATION OF JUSTICE OVERALL?

No one in our group had a working memory of going to trial before the discovery rules were in place, but they thought it couldn't have been done fairly at any other time in history.



There was a nice warm and fuzzy feeling about discovery. Aside from the obvious facts that it's expensive and it takes time, it can be a contributor to the early resolution of



cases and the reduction in trial costs, so long as the discovery is conducted in a purposeful way and serves to educate the parties on the facts and promotes exchanging information.



A judge in our group suggested that liberal discovery encourages intelligent and informed settlements, versus forcing litigants into trial by ambush.



It depends on how you define “administration of justice.” If administration of justice means resolving conflict (meaning, in most cases, settlement), do you really need all this discovery? Some judges observed that, in the “old days,” before there was so much discovery, cases still got settled without it. The majority of judges felt that discovery has helped to the extent that truth-seeking is part of the administration of justice. You need that information. The general feeling appeared to be that it has improved the administration of justice overall.



Having discovery in our civil justice system does have a positive effect on the overall administration of justice.

UNIFORMITY AND CONSISTENCY IN DISCOVERY PRACTICE: SHOULD DISCOVERY PRACTICE BE UNIFORM WITHIN THE ENTIRE STATE?

Generally the consensus was there should be uniformity within the state. There were caveats about the differences between rural and urban areas, where there are some differences in culture and logistics, but to the extent that there are differences among counties, for instance, the different rules should not be so much of a mystery that you have to get local counsel to help decipher them. Also, the rules should all be available on the Internet so that, if there’s a legitimate reason for a difference in local rules, the rules are available to all litigants and there are no secrets.



We heard a resounding “Yes.”



The discovery rules within a state should be uniform, but they should reflect different types of cases. So even within one state there have to be differences. Urban judges and rural judges felt that the rules for their courts just couldn’t be exactly the same because of the different types of practice in their respective areas.



Liberal discovery encourages intelligent and informed settlements, versus forcing litigants into trial by ambush.



Related to differences among counties, one judge in our group, who favored allowing differences among counties, said his court is encouraging telephone conferences so lawyers wouldn't have to drive 100 miles for a court conference. That's happening already, and there appeared to be a consensus that that process shouldn't have to be just a local matter, that there should be a statewide policy that you can have a phone conference. Where it's used it certainly saves money for all parties.

DOES IT MAKE ANY DIFFERENCE IF DISCOVERY IN STATE COURTS IS DIFFERENT FROM DISCOVERY IN FEDERAL COURTS?

The state rules could differ from the federal rules, although there shouldn't be very many inconsistencies.



Our judges felt that uniformity is probably good within the federal system and good within a particular state, but uniformity between all states or as between the state and the federal systems might violate principles of federalism and may not be the best idea.

Our group was adamant in feeling that, "If the federal courts want to tinker with their rules, that's their prerogative—but leave us alone."



Our group was adamant in feeling that, "If the federal courts want to tinker with their rules, that's their prerogative, but leave us alone. And just because you mess with the federal rules doesn't mean we're going to change the rules in our states. And even if they change the rules in our states, we're still going to use our discretion in doing what's fair. And if the bottom line is that we're supposed to do what's fair, it doesn't matter a tinker's damn what you do with these rules." That was basically what we talked about.



Should there be uniformity between the state and federal courts? Absolutely and unequivocally, no.



Not only is there no sense of a need of uniformity between the state and federal rules, but our judges felt it would be interesting if there was no uniformity among the states—not too much collaboration as to what course to take with the rules. Then, if you don't think a particular proposal is a good idea in your state, you can hope that some other state is going to try it out and all the states can learn by others' mistakes—and by their good judgment as well.



Should the state rules follow the Federal Rules if the federal courts start screwing around with them again? No, absolutely not. There's already too much trickle-down from the Federal Rules to the state rules. The quality, complexity, and types of cases are



different in state courts from the cases in the federal courts. Federal solutions won't necessarily work in the state courts.



There shouldn't be wholesale adoption of any of the Federal Rules by the states.

SHOULD DISCOVERY PRACTICE BE MADE UNIFORM WITHIN THE FEDERAL SYSTEM?

Within the federal courts, of course they should be uniform. Everybody was in agreement on that.



In our group there was another resounding "Yes."

*Within the federal courts,
of course the rules should
be uniform.*

SHOULD DIFFERENT DISCOVERY RULES APPLY TO DIFFERENT TYPES OF CASES?

Should there be uniformity for all cases? Should you have separate categories for more complex cases? Our group did not think so. Again, the rules are set up with plenty of protection, and if the trial courts enforce the rules as stated, they will work across the board.

Some states have had some success with more structured discovery plans or multistep plans—in other words, different treatment for different types of litigation—and with reasonable time limits or guidelines left to the sound discretion of the trial judge.



We should continue to try to appreciate the differences in large and small cases and how the discovery rules affect them differently.

WOULD IT MAKE SENSE TO HAVE ONE SET OF DISCOVERY RULES FOR ALL CASES?

Maybe.



One of the most astute observations in our group was that what we might be trying to do here is, through the influence of the Federal Rules, to approach discovery problems from the perspective of the huge case and then design the rules around those cases. That just isn't the way our group thought things should be handled, and they were adamant about it.



JUDICIAL MANAGEMENT OF DISCOVERY: WILL (OR WOULD) INCREASED JUDICIAL MANAGEMENT OF DISCOVERY CONTRIBUTE TO SPEEDY, FAIR RESOLUTION OF CASES?

To help solve discovery problems on many, many questions, our group said the answer is to set the date for the trial and stick to it, if at all possible.

The answer to speedy, fair resolution of cases is to set the date for the trial and stick to it, if at all possible.



With regard to increased management of discovery, it really depends on the skill of each trial judge.



The first trial date was pointed out to be of the very important factors in speeding a resolution of cases.



Our judges did not want more judicial management of discovery, but they do want the lawyers to have *access* to the judges. Micromanaging of discovery by judges doesn't seem to be the answer.



Several of our judges said they used a kind of "track" system to differentiate among different types of cases needing different treatment. There seemed to be a consensus that that was very effective. For complex cases, more traditional intervention is needed; more time is needed. Some judges appeared to feel that you could adjust the amounts of discovery time, but you don't have to necessarily have hands-on involvement. Other judges took a more personal approach, meeting with the parties at the outset of the litigation to deal with the whole gambit of discovery issues and getting them on the table from the beginning. We heard about one southwestern state where the rules actually specify how to begin a case and what different discovery issues to address at the beginning, and that might be very effective.



The consensus from everyone in our group was that a firm trial date is probably the best way to get cases settled expeditiously or resolved in one way or the other.



The trial judge has to be available, has to find the time, has to be willing to listen and work out the problems. More often, if the judge is available and the lawyers know the judge is going to take control of discovery and is going to resolve problems, the problems dissipate and the lawyers work it out themselves.



Trial judges need to get creative. One of our judges said when he was on the trial bench he scheduled hearings on discovery disputes for 3:00 Friday afternoon, at a time



when lawyers didn't want to come and argue for three or four hours before the court. When he did that, he said, the lawyers found ways to work it out, and he'd get a phone call right before 3:00 saying, "It's over!"



Judges need to do whatever it takes—appoint masters, strike portions of pleadings, and then, of course, sanction, sanction, and sanction.



Trial judges often are reluctant to sanction lawyers. Often they have to run for election. Their likely supporters are the members of the local bar there. Often they're friends, and it's difficult for the trial court judge to impose sanctions on them. Perhaps the appellate courts can give some direction to help create a formula, create some standard. The trial judges know there should be uniformity in sanctions—not changing the rules, but just providing some guidance about how the trial judges can apply the rules.



We need consistent appellate decisions enforcing the rules. We need consistent enforcement throughout the state, and we need consistent appellate decisions upholding that enforcement. Our group felt that you should do away with local rules. Local rules make it more complex and are more difficult to enforce consistently.



The big, complex cases comprise a very small percentage of the state court cases, yet they provide almost all of the discovery problems. Our judges believe that, when there are problems in those cases, they are being dealt with very effectively by the trial judges, using the existing rules. The trial court can set parameters when necessary. They issue case management orders, they control timing, they set dates, and they have the ability to do what it takes to control discovery abuses.



Being a good trial judge is like being a good parent. If the parent sets the rules, is available to resolve disputes, enforces the rules with appropriate discipline, and always sticks to it, discovery abuses are going to dissipate and they're almost always going to disappear.



Our group believes that resolution of discovery disputes is one of the most critical services trial court judges ever provide, and judges have to take that seriously and make themselves available. If discovery abuse is going to be eliminated, the trial court is going to have to be active in doing it.



HOW WELL DO OPPOSING LAWYERS MANAGE DISCOVERY IN THEIR CASES WITHOUT JUDICIAL INTERVENTION?

One clear consensus in our group was that lawyers can't be trusted to manage the discovery in the big-stakes, big-discovery cases. The court is going to have to continue to intervene. That is probably because of the advent of national law firms with so-called "parachute lawyers," and judges in our group saw that problem on both the plaintiff and defense sides.

Lawyers can't be trusted to manage the discovery in the big-stakes, big-discovery cases.



It usually depends upon the lawyers. Our judges feel that too many times junior lawyers in a firm are given the discovery part of cases to learn at their client's expense. That costs the client, and some judges actually referred to billing a client for unnecessary discovery as "white-collar crime." It also makes the discovery process more inefficient. Frequently, if something comes up in a court hearing just a little bit different from what they prepared for, junior attorneys don't know what to say. So you need to have an experienced lawyer in each case who is designated to be responsible for discovery.

SHOULD THE SCOPE OF DISCOVERY GENERALLY BE NARROWED TO MATTERS RELATED TO THE PARTIES' "CLAIMS AND DEFENSES"?

Our group felt the scope of discovery should not be narrowed to just matters relating to "claims and defenses." The feeling was, the more information available, the better justice for all. The judges felt there shouldn't be *any* changes in the rules, but particularly that there shouldn't be any narrowing.



Our group felt that cases are supposed to be decided upon what the facts reveal, and a trial judge should have the discretion to allow full discovery as appropriate. For the resolution of a case, and for justice to be done, you really don't need to change the rule to make it discovery relevant to "claims or defenses." It really isn't going to affect the outcome.



Our judges did not think the scope of discovery should be narrowed. We had a mixed response on whether the wording should be changed to "claims and defenses" versus "related matters." Most of them felt that that might be opening up a can of worms that's not a problem.



COST SHIFTING: WILL MORE READILY AVAILABLE COST SHIFTING IN DISCOVERY DISPUTES HELP?

Some in our group thought cost shifting might significantly increase litigation and the cost of litigation, and also that it has the potential to chill litigation in areas of discovery where a litigant hasn't yet developed an ironclad case. In other words, lawyers in such situations might be facing severe sanctions. There are already methods to deal with problems of discovery abuse. Also, in the hands of the wrong judge, cost shifting has the potential to be a tool for judicial bullying.

There are already methods to deal with problems of discovery abuse.



Our judges did not feel cost shifting would really be helpful in solving discovery problems.



There was certainly no ground swell in our group that there should be such a policy. But we still have to be flexible in order to address problems like the “Rambo” litigator and a few other exceptions.

WHAT DO YOU THINK OF THE SUGGESTIONS FOR REFORM MADE BY PROFESSOR CARRINGTON IN HIS PAPER?

Exchange of Adopted Statements

Some states already have this, and apparently it works very well as long as everyone is aware of the rule—they know that when they produce a statement it might be used. That's apparently working pretty well.



That should happen early in the process. In fact, our judges would like to see more definitive demand letters prior to filing the lawsuit. On the other side of that coin, there should be a real response to the demand letter, treated as an adopted statement, to help narrow the issues. Demand letters shouldn't just go into “File 13.”

Limiting the Number of Depositions

This really depends on the case. One judge suggested that there should be reasonable guidelines, but another felt discovery should simply be left to the sound discretion of the trial court. There should not be arbitrary rules imposed by the legislature.



Most of our judges were interested in learning more about the “trifurcated” system now used in Texas. In other states, some of our judges said, there are different ways to decide how many depositions will be permitted in different types of cases.



Reactions to this depended on where the judge came from. In those states where there already are limitations, the feeling was, “Yes, it works, this is a good thing.” But judges who were from states where there were no limitations did not feel any pressing need to limit depositions.

Reserving Objections to Deposition Questions

Yes.



Everyone in our group agreed that lawyers should not be taking witnesses out of the room while there are pending questions and coaching them, and there should not be instructions not to answer. That was the general consensus, but it varied with the judge’s philosophy and with the procedures in the particular state.

Reopening Depositions

Yes.

Using Videotaped Depositions at Trial, and Other Technological Advances

The increased use of videotaped depositions in place of live witnesses may serve to save time and money for some litigants.

Everyone agreed they should be allowed. Some judges felt it is already happening with great regularity, particularly with depositions of treating physicians.



Yes.



While this involves some technical problems that need to be solved, the increased use of videotaped depositions in place of live witnesses may serve to save time and money for some litigants.

Confidential Production of Documents

Yes.

Greater Restrictions on Suppression of Discovery Materials as a Condition of Settlement

Our group’s consensus was that one particular kind of discovery problem that needs to be dealt with, through statute or rule, is the abuse of protective orders and



confidentiality orders where discovery is sealed up and can't be used in other cases, so that discovery has to be reinvented in every jurisdiction where the problem comes up again.



Our group appeared to feel that if a contract to settle a case is offered, conditioned on keeping discovery information secret, that's all right, even if there are public policy issues involved. However, for the purposes of expediting discovery in later cases, when a plaintiff lawyer in a later case says, "Judge, please order them to produce all discovery produced in case number one," then there is no reason why that shouldn't happen. That's efficient, it will save cost, facilitate discovery, and it wouldn't be violating the settlement contract in case number one, because that contract was with the first plaintiff's lawyer. This is a different case, and that would be a very effective way of avoiding reinventing the wheel.



Our judges felt it's okay to allow that in some settlements, but that that should be trumped if it is in the public interest to have particular information opened up.

OTHER MATTERS OF INTEREST

Professional Education

Judges in our group observed that judges who have participated in this forum can go back to their states and suggest holding judicial education programs on discovery.

Expert Witnesses

There seemed to be a consensus that it was a good idea to limit the discovery available on each side's expert witnesses, because that can accumulate cost that is usually visited unfairly on the side with fewer resources.

It's okay to allow suppression of discovery materials in some settlements, but that should be trumped if it is in the public interest to have particular information opened up.





Participants' Biographies

PAPER PRESENTERS

Robert Gilbert Johnston is Dean of the John Marshall Law School, an independent law school with more than 1,300 students, founded in 1899. He graduated from the University of Chicago Law School in 1960 and began teaching at the John Marshall Law School in Chicago in 1963. He has taught administrative practice, civil and appellate procedure, and conflicts of law, among other subjects, and has served as the school's dean since 1995. From 1969 to 1975, he worked in legal services in Hawaii and served as Reporter for the Penal Procedures Project of Hawaii, a project to revise the state's criminal procedure rules. After returning to John Marshall, he continued to perform legal services work, including civil rights and immigration litigation, and has served as Reporter for numerous state and local judicial conferences. In recent years he has lectured on the U.S. legal system before university and legal groups in China, Lithuania, and the Czech Republic. Among his other writings, Dean Johnston is coauthor of a text on state and federal discovery practice in Illinois.

Paul D. Carrington is Chadwick Professor of Law, and former dean, of the Duke University Law School. He received his BA from the University of Texas and his LLB from Harvard Law School. He has taught at more than a dozen American law schools, as well as several in other countries, and has engaged briefly in private practice, served as a military lawyer, and performed occasional pro bono services through such organizations as the American Civil Liberties Union and the American Association of University Professors. He has been at Duke since 1978, serving as dean from 1978 to 1988. From 1985 to 1992, Professor Carrington served as Reporter to the Advisory Committee on Civil Rules of the Judicial Conference of the United States, and in that role he observed closely the workings of the rulemaking process for the Federal Rules of Civil Procedure. He teaches civil procedure, international civil litigation, and lawyers in American history. His most recent work is *Stewards of Democracy: Law as a Public Profession (New Perspectives on Law, Culture, and Society)* (Westview Press 1999).

LUNCHEON SPEAKER

The late **Honorable Samuel J. Ervin III** served as a judge of the North Carolina Superior Court from 1967 to 1980. He was a member of the United States Court of Appeals for the Fourth Circuit 1980–99, and was its Chief Judge from 1989 to 1996. He received his BS from Davidson College and his LLB from Harvard University. Judge Ervin served in the U.S. Army infantry and JAG Corps in 1944–45 and 1951–52, and was a member of the North Carolina House of Representatives in 1965–67.



PANELISTS

Kathryn H. Clarke is an appellate lawyer and complex litigation consultant in Portland, Oregon. She specializes in medical negligence, products liability, punitive damages, and constitutional litigation in both state and federal courts. She received a BA from Whitman College and an MA from Portland State University and is a graduate of the Northwestern School of Law at Lewis and Clark College. She served as president of the Oregon Trial Lawyers Association in 1995–96 and is a Fellow of the Roscoe Pound Institute.

Honorable Gerald Elliott has been a judge since 1972. He currently sits on the Johnson County District Court in Olathe, Kansas, and has chaired several judicial district committees and activities. He received his AB and LLB from the University of Kansas and practiced law in Kansas City from 1965 to 1990. Judge Elliott is a member of the American Judges Foundation and the American Judicature Society and has served on the executive committee of the Kansas State Bar. He has held numerous offices in the American Judges Association and served as its president-elect in 1998–99.

Francis H. “Brother” Hare, Jr., is of counsel to the Birmingham, Alabama, law firm of Hare, Wynn, Newell & Newton and is chief legal officer of the Attorneys Information Exchange Group, a not-for-profit cooperative organized by plaintiffs’ attorneys to assist one another in preparation for trials of product defect cases. He received his BS from the University of Alabama and his JD from the University of Virginia. He is a Fellow of the Alabama Bar Foundation, the American Bar Foundation, and the American Board of Trial Advocates. Among other publications, he is coauthor of *Full Disclosure: Combating Stonewalling and Other Abuses* (ATLA Press 1994), *The Preparation and Trial of a Products Liability Case, 2nd Edition* (Little, Brown and Co. 1992), and *Confidentiality Orders* (Wiley 1988). Since 1975, he has served as Associate Professor of Law at Cumberland School of Law, Samford University.

Lloyd Milliken practices law in Indianapolis, Indiana, with the firm of Locke Reynolds LLP. He represents defendants in general tort litigation involving serious injury and death, including products liability cases. He received both his BS and JD from Indiana University. He has served as president of the Indiana Defense Lawyers Association and is president-elect of the Defense Research Institute. He is a Fellow of the American College of Trial Lawyers and has been a faculty member of the National Institute of Trial Advocacy.

Honorable Paul V. Niemeyer sits on the United States Court of Appeals for the Fourth Circuit and previously served as United States District Judge for the District of Maryland. He received his AB from Kenyon College and his JD from Notre Dame, where he was an editor of the *Notre Dame Law Review*. Following graduation, he joined the Baltimore law firm of Piper & Marbury, where he practiced commercial litigation. He chaired a project to rewrite the Maryland rules of procedure and coauthored the *Maryland Rules Commentary*, receiving for his work the Special Merit Citation of the American Judicature Society. He served as Chair of the Advisory Committee on Civil Rules of the Judicial Conference of the United States at the time of the forum. In addition to his judicial activities, he is a member of the American Law Institute and the American College of Trial Lawyers, is a Fellow of the American Bar Foundation, and serves as a senior lecturing fellow on appellate advocacy at Duke University Law School.



Andrew M. Scherffius practices law in Atlanta, Georgia, concentrating on medical malpractice, products liability, and aviation litigation on behalf of plaintiffs. He received both his BBA and JD from the University of Georgia in 1971 and 1974, respectively, and was a senior editor of the *Georgia Law Review*. He currently serves as a member of the Advisory Committee on Civil Rules of the Judicial Conference of the United States and has served as an officer of the Georgia Trial Lawyers Association and as a governor of the State Bar of Georgia. He is also a member of the American College of Trial Lawyers, the American Board of Trial Advocates, and the Association of Trial Lawyers of America.

Gerson Smoger practices law in Oakland, California, and Dallas, Texas, with a concentration in environmental and toxic tort cases. Before attending law school, he received an interdisciplinary PhD from the University of Pennsylvania; he later worked at the United Nations Commission on Human Rights. He served as lead counsel in the Times Beach, Missouri, toxic pollution litigation, and he represented a group of veterans' service organizations as *amici*, in *In re Agent Orange Product Liability Litigation*, before the U.S. Supreme Court in 1994. He is a member of the board of governors of the Association of Trial Lawyers of America, a director of Trial Lawyers for Public Justice, and vice-chair of the Toxic Torts and Environmental Law Committee of the American Bar Association's Tort and Insurance Practice Section. He has lectured on litigation and environmental subjects throughout the United States (including at the National Judicial College in Reno, Nevada) and in Russia, Austria, and Vietnam. He is a Fellow of the Roscoe Pound Institute and chair of its Roscoe Hogan Environmental Law Essay Contest.

Honorable Shirley Strickland-Saffold serves on the Cuyahoga County (Ohio), Court of Common Pleas. She received her BA from Central State University in Wilberforce, Ohio, in 1973, and her JD from Cleveland Marshall College of Law, and she practiced criminal law as a public defender before her election to the bench. She is a member of, among other organizations, the National Bar Association and the National Association of Women Judges and was the first African American woman to be elected president of the American Judges Association.

DISCUSSION GROUP MODERATORS

Donald H. Beskind is of counsel to the law firm of Twigg, Abrams, Strickland, & Trehly in Raleigh, North Carolina, where he specializes in complex personal injury, professional negligence, business tort, and products liability litigation. He received his AB from George Washington University, his JD from the University of Connecticut, and his LLM from Duke University. He is coauthor of *Problems and Cases in Trial Advocacy* (CLE edition, rev. 1993) and *North Carolina Evidentiary Foundations* (Lexis 1998). In addition to his practice, he has taught at Duke University Law School since 1975, where he is currently a Senior Lecturer in Law and director of the Trial Practice Program, and in the programs of the National Institute for Trial Advocacy. He is a sustaining member of the Association of Trial Lawyers of America, a trustee of ATLA's National College of Advocacy, a Fellow of the Roscoe Pound Institute, and Vice President for Education of the North Carolina Academy of Trial Lawyers.



David N. Bossart practices law in Fargo, North Dakota, specializing in personal injury law. He received his BA and JD from the University of North Dakota. He is a past president of the North Dakota Trial Lawyers and a governor of the Association of Trial Lawyers of America. He is a Fellow of the American College of Trial Lawyers and of the Roscoe Pound Institute.

Marie Estes Collins practices law in Deer Park, Texas, representing plaintiffs in personal injury and insurance litigation and serving as a consultant on structured settlements. She received her BS from the University of Houston, her MEd (in mathematics education) from Sam Houston State University, and her JD from South Texas College of Law. She is coauthor of *Structured Settlement Handbook for Attorneys* (ATLA Press 1993). She is a sustaining member and governor of the Association of Trial Lawyers of America and a Fellow of the Roscoe Pound Institute.

Paul N. Gold practices law in Houston, Texas, where he is certified in personal injury trial law by the Texas Board of Legal Specialization. He received his BA from the University of Texas and his JD from Southern Methodist University. He served as a member of the Texas Supreme Court's Task Force on Discovery Reform, 1991–1993, and on the Supreme Court Advisory Board Discovery Subcommittee, 1994–1995. He is a sustaining member of the Association of Trial Lawyers of America and a Fellow of the Texas Bar Foundation and of the Roscoe Pound Institute.

Gisele Nadeau practices law in Portland, Maine, specializing in the trial of personal injury and commercial litigation. She received her BA from Colby College and her JD from the University of Maine, where she served as articles editor of the *Maine Law Review*. She is an officer of the Maine Trial Lawyers Association, a governor of the Association of Trial Lawyers of America, and a Fellow of the Roscoe Pound Institute.

Mary A. Parker practices law in Nashville, Tennessee. She is a Fellow of the Roscoe Pound Institute. He is a past president and board member of Trial Lawyers for Public Justice and is a sustaining member of the Association of Trial Lawyers of America.

Ellen Relkin practices law in New York City, where she concentrates on pharmaceutical products liability, toxic torts, medical malpractice, and women's health issues. She received her BA from Cornell and her JD from Rutgers, where she served as executive editor of the *Women's Rights Law Reporter*. She is a Fellow of the Roscoe Pound Institute.

A. Russell Smith practices law in Akron, Ohio. He is a Fellow and Trustee of the Roscoe Pound Institute. He is certified as a civil trial advocate by the National Board of Trial Advocacy. He is a sustaining member and governor of the Association of Trial Lawyers of America and a past president of the Ohio Academy of Trial Lawyers.

Kenneth M. Suggs practices law in Columbia, South Carolina. He is a member of the American Board of Trial Advocates, the American Inns of Court, and the American College of Trial Lawyers. He is a past president of the South Carolina Trial Lawyers Association, a sustaining member of the Association of Trial Lawyers of America, and a Fellow of the Roscoe Pound Institute.



PLENARY SESSION MODERATOR

Robert E. Cartwright, Jr., practices law in San Francisco, California, concentrating on products liability, sports injuries, premises liability, and public entity cases. He received his BA from the University of Puget Sound and his JD from Golden Gate University. He is a trustee of the Roscoe Pound Institute and a governor of both the California Trial Lawyers Association and the Association of Trial Lawyers of America. He is a founding member and secretary of the Diversity in Law Foundation and a past president of the Barristers Club of San Francisco.

PRESIDENT, ROSCOE POUND INSTITUTE

Howard F. Twiggs is past president of the Roscoe Pound Institute in Washington, DC, and is senior partner of the firm of Twiggs, Abrams, Strickland, & Trehy in Raleigh, North Carolina, where he has a civil trial practice representing plaintiffs. He is a graduate of both the undergraduate and law schools of Wake Forest University and served in the U.S. Army JAG Corps. He was a member of the North Carolina House of Representatives from 1967 to 1974, completing his service there as chair of the Judiciary Committee. In that capacity he was principally responsible for, among other actions, a complete revision of the state's laws relating to mental health and legislation resulting in the removal of all references to race from North Carolina's statutes. Mr. Twiggs is a past president of both the North Carolina Academy of Trial Lawyers and the Association of Trial Lawyers of America and serves on the Board of Visitors of the Wake Forest Law School.





Judicial Attendees

ALABAMA

Honorable Eddie Hardaway, Jr., Presiding Judge, 17th Judicial District
Honorable Tennant M. Smallwood, Circuit Judge, Jefferson County Court
Honorable Eugene R. Verin, Circuit Judge, 10th Judicial Circuit of Alabama
Honorable Marvin Wayne Wiggins, Circuit Judge, Hade County Court

ARIZONA

Honorable William E. Druke, Chief Judge, Court of Appeals, Division Two
Honorable Robert D. Myers, Presiding Judge, Maricopa County

CALIFORNIA

Honorable Stanley Mosk, Associate Justice, Supreme Court
Honorable Gary E. Strankman, Presiding Justice, Court of Appeals, First Appellate District, Division One
Honorable Arthur G. Scotland, Presiding Justice, Court of Appeals, Third Appellate District
Honorable Lawrence Crispo, Judge, Superior Court
Honorable Malcolm Mackey, Judge, Superior Court
Honorable Thomas I. McKnew, Jr., Judge, Superior Court
Honorable James M. Sutton, Jr., Judge, Superior Court

COLORADO

Honorable Gregory Kellam Scott, Justice, Supreme Court

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The Roscoe Pound Institute seeks to support and strengthen the US civil justice system. The Institute was established in 1956 to honor and build upon the works of Roscoe Pound, one of the law's greatest educators. The Institute sponsors programs, publications, awards, and grants that encourage open, ongoing dialogue with the academic and judicial communities and the public that are critical to the civil justice system. The Institute initiates and guides the debate that brings wide-ranging positive changes to American jurisprudence and solidifies the achievements that guarantee access to justice.

WHAT PROGRAMS DOES THE INSTITUTE SPONSOR?

Forum for State Court Judges—Judges from state supreme courts and intermediate appellate courts come together with Pound Fellows, academics, legislators, and the media to analyze issues affecting state courts. Recent topics include: secrecy in the courts, controversies surrounding discovery, and scientific evidence.

Pound Institute Grants to Legal Scholars—Grants for research on a variety of topics of concern to the trial bar are awarded by a jury of academics, jurists, and lawyers. Our most recent projects have examined juror perception of connective tissue injury lawsuits and potential anti-plaintiff juror bias.

Trial Court Judges Forum—Sponsored regionally, these programs bring the materials and ideas from our annual State Court Judges Forums to trial court judges.

The *Civil Justice Digest* is a quarterly publication that discusses news, research, and recent court decisions on the US civil justice system. It is currently distributed to more than 12,000 federal, state supreme court, and intermediate appellate court judges, as well as to law libraries, law schools, law professors, attorneys, state and federal legislators, members of the media, and other interested groups.

Richard S. Jacobson Award for Excellence in Teaching Trial Advocacy—Each year an outstanding full-time law professor receives this prestigious award during the annual Fellows Dinner.

Elaine Osborne Jacobson Award for Women Working in Health Care Law—This award is given each year to a woman law student who is committed to a career in health care law, working to support women, children, the elderly, or the disabled.

Roscoe Hogan Environmental Law Essay Contest—The Pound Institute administers this contest, founded in 1970, which annually honors a law student's writing ability in the area of environmental law.



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Papers of the Roscoe Pound Institute—Reports of the Pound programs on health care and the law, injury prevention in the American workplace, the safety of the blood supply, and other topics are made available to jurists, academics, regulators, legislators, the media, and others.

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Report of the fifth Forum for State Court Judges. Discussions include the background of the controversy over scientific evidence; issues, assumptions, and

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Report of second Forum for State Court Judges. Discussions include the impact on judicial independence of two contemporary issues: judicial selection processes and resources available to the judiciary. (09R) \$35

1992 ■ Protecting Individual Rights: The Role of State Constitutionalism.

Report of the first Forum for State Court Judges, in which more than 100 judges of the state supreme and intermediate appellate courts, lawyers, and academics discussed the renewal of state constitutionalism on the issues of privacy, search and seizure, and speech, among others. Also discussed was the role of the trial bar and academics in this renewal. (08R) \$35

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Report on the 1993 Roundtable, examining the issues surrounding the current funding crisis in American courts, including the role of the government and public perception of the justice system, and the effects of increased crime and drug reform efforts. Moderated by Chief Justice Rosemary Barkett of the Florida Supreme Court. (10R) \$20



Safety of the Blood Supply.

Report on the Spring 1991 Roundtable, written by Robert E. Stein, a Washington, DC, attorney and an adjunct professor at Georgetown University Law Center. The report covers topics such as testing for the presence of HIV and litigation involving blood products and blood banks. (06R) \$20

Injury Prevention in America.

Report on the 1990 Roundtables, written by Anne Grant, lawyer and former editor of *Everyday Law* and *TRIAL* magazines. Topics include "Farm Safety in America," "Industrial Safety: Preventing Injuries in the Workplace," and "Industrial Diseases in America." (05R) \$20

Health Care and the Law.

Report on the 1988 Roundtables, written by health policy specialist Michael E. Carbine. Topics include "Hospitals and AIDS: The Legal Issues," "Medicine, Liability and the Law: Expanding the Dialogue," and "Developing Flexible Dispute Resolution Mechanisms for the Health Care Field." (37B) \$20

Health Care and the Law II—Pound Fellows Forum.

Report on the 1988 Pound Fellows Forum, "Patients, Doctors, Lawyers and Juries," written by John Guinther, award-winning author of *The Jury in America*. The forum was held at the Association of Trial Lawyers Annual Convention in Kansas City and was moderated by Professor Arthur Miller of Harvard Law School. (35B) \$20

Health Care and the Law III.

Report on the 1988–1989 Roundtables, written by health policy specialist Michael E. Carbine. Topics include "Drugs, Medical Devices and Risk: Recommendations for an Ongoing Dialogue," "Health Care Providers and the New Questions of Life and Death," and "Medical Providers and the New Era of Assessment and Accountability." (02R) \$20

RESEARCH MONOGRAPHS

Demystifying Punitive Damages in Products Liability Cases: A Survey of a Quarter Century of Trial Verdicts. This landmark study, written by Professor Michael Rustad of Suffolk University Law School with a grant from the Institute, traces the pattern of punitive damage awards in U.S. products cases. It tracks all traceable punitive damage verdicts in product liability litigation for the past quarter century and provides empirical data on the relationship between amounts awarded and those actually received. (07R) \$22

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