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Title: Once More into the Breach: More Reforms for the Federal Discovery Rules

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The Advisory Committee on Civil Rules (Advisory Committee) is again turning its attention to the federal rules regulating discovery. The prospect of further reforms and changes to those rules may cause some consternation, particularly among judges who must learn and then administer any new provisions. The discovery rules were changed in dramatic ways in 1993—including the adoption of controversial provisions requiring disclosure of information at the incipiency of a case, before the onset of formal discovery—and the question fairly may be put as to why the Advisory Committee finds it necessary to return to these rules so soon, particularly when the majority of cases in the federal system involve little discovery and pass through the system without difficulty.

Part of the answer lies in the process of reform started by the Civil Justice Reform Act of 1990 (CJRA). The CJRA required all federal districts to implement “civil justice expense and delay reduction plans,” and required the Judicial Conference of the United States (Judicial Conference) to study the results of these experiments with the assistance of an independent consultant. That consultant, the RAND Corporation, issued its report in late 1996, and the Judicial Conference in turn made its final report to Congress in mid-1997. In its report, the Judicial Conference called upon the Advisory Committee to examine the discovery rules and, in particular, to consider the scope of discovery, whether specific time limitations on discovery should be adopted as part of a national rule, and whether the current system permitting local variation of disclosure provisions prescribed in Rule 26(a)(1) should be continued or whether the rule should be changed to require a greater degree of national uniformity.1

Before receiving this directive from the Judicial Conference, the Advisory Committee had already begun to reex-
amine the discovery rules. It began this process primarily because of its concern about the growing lack of uniformity among the districts, particularly as to disclosure provisions, but also because of a sense among some bar organizations that the 1993 amendments may not have sufficiently addressed a small but important group of cases involving intensive discovery, especially voluminous document discovery.

For better or worse, the Advisory Committee does not write on a clean slate in its current efforts. Few topics have received more attention in civil justice reform efforts than discovery. The current examination of the discovery rules takes place against a considerable backdrop of efforts to find some workable and fair restraints on the broad discovery that the Federal Rules envision. This article accordingly begins with a review of the past three decades of reform efforts, particularly the 1990s changes both in the Civil Rules and pursuant to the CJIRA. Against that background, it sketches the Advisory Committee’s efforts to date to identify and evaluate possible further changes, and then describes the areas in which those changes are presently being contemplated. It closes with a forecast on the timing and course of this latest reform effort.

THE LEGACY OF PAST REFORM EFFORTS

Until the mid-1970s, the Federal Rules were a force for broadening the scope and availability of discovery. The original rules, adopted in 1938, built on prior practices in some state courts, but they went well beyond those practices and offered an array of discovery opportunities unparalleled in previous state practice. For three decades thereafter, amendments to the federal discovery rules generally broadened discovery. These changes were capped by an extensive revision of the discovery rules in 1970 that removed some remaining restraints, such as a requirement that an order be obtained to mandate production of documents.

By the mid-1970s, substantial concern had arisen about whether this expansion might have gone too far. At the 1976 National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice—sponsored by the Judicial Conference, the Conference of Chief Justices, and the American Bar Association, and convened on the 70th anniversary of the famous 1906 speech by Roscoe Pound on the same subject—a prominent topic was the desire to change discovery practices. In the wake of that conference, the ABA Section of Litigation established a distinguished Special Committee on Discovery Abuse that recommended three changes to the Civil Rules: (1) narrowing the scope of discovery to remove the “subject matter” provisions of Rule 26(b), (2) creating a discovery conference to provide an occasion for judicial involvement in discovery, and (3) limiting the number of interrogatories.

In 1978, the Advisory Committee circulated proposed amendments to the Civil Rules containing each of these ingredients.

The wisdom of these changes was challenged by many, and in 1979 the Advisory Committee circulated more modest proposed changes that did not include a constricting of the scope of discovery or numerical limits on interrogatories. Although Justice Powell dissented from promulgation of these amendments in 1980 on the ground that they did not go far enough, the Advisory Committee had already by then embarked on a different approach to the problems of civil litigation, namely, case management. In 1981, it circulated proposed amendments to Rule 16 and 26 designed to stimulate this judicial activity. These amendments, effective in 1983, directed judges to enter scheduling orders in most civil litigation and gave the courts explicit power to limit disproportionate discovery demands. Satisfied with these measures, the Section of Litigation’s Special Committee disbanded, and there matters stood for the remainder of the 1980s.

An important component of discovery innovation in the 1990s has come from various districts’ CIRA plans, a topic partly examined elsewhere in this special issue. The rules process also contributed to the mix. Probably the most noteworthy feature of this rules effort was initial disclosure, but it was hardly the only one. To the contrary, in 1991 the Advisory Committee also proposed to amend the discovery rules, among other things, to (1) preclude formal discovery until initial disclosure had occurred, (2) require a detailed report from most expert witnesses, (3) expand the duty to supplement discovery responses, (4) place presumptive numerical limits on interrogatories and depositions and a durational limitation on depositions, and (5) forbid various kinds of misconduct during depositions.

As many readers know, the initial disclosure proposal generated great controversy, was almost removed from the amendments package by the Advisory Committee, and was nearly removed thereafter by Congress before...
the amendments went into effect in 1993. Most of the other changes mentioned above were adopted as well. Even though the disclosure and other amendments did go into effect, they were riddled with provisions authorizing local “opting out.” Thus, as it views further changes to these rules, the Advisory Committee confronts a history of considerable recent innovation. In addition, as part of the retrospective review of the CJRA experience, it has been directed to consider rule amendments addressing the implementation of various CJRA principles.

REASSESSING THE DISCOVERY SITUATION

Given the completion of the CJRA period and the extensive study of CJRA activities by RAND and the Federal Judicial Center (FJC), further review of discovery and of the rule changes made in 1993 became an important objective. The need for review was particularly urgent because many of the ninety-four districts had adopted their own disclosure and discovery rules. As a result, the continued uniformity of practice in all federal districts—one of the underlying objectives of the Rules Enabling Act and the Federal Rules of Civil Procedure—had been placed in the balance. Indeed, the FJC has found it appropriate since 1993 to publish annually a chart setting forth the various practices of each district. Moreover, in April 1996, the American College of Trial Lawyers urged that the Advisory Committee again consider narrowing the scope of discovery as proposed but not adopted in 1978. In October 1996, the Advisory Committee formed a Discovery Subcommittee (Subcommittee) to organize a review of the functioning of discovery and to evaluate possible further changes.

Investigating Discovery: Findings from an FJC Study

By Donna Stienstra

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As mentioned in the accompanying article, the Discovery Subcommittee of the Judicial Conference's Advisory Committee on Civil Rules asked the Federal Judicial Center (FJC) to conduct research on discovery. Working with Judge Levi and Professor Marcus, the FJC determined that the Committee’s questions could be addressed through a national survey of counsel who had litigated civil cases in federal courts. Below are selected findings in each of the broad areas of interest to the committee.

DISCOVERY FREQUENCY AND ITS COST

In a sample drawn to garner cases likely to have discovery, 85 percent of the responding attorneys said some discovery—e.g., discovery planning, formal discovery, or disclosure—had occurred in their cases. The most frequent form of discovery was document production, undertaken by 84 percent of those who said there was some discovery or disclosure in their cases. Interrogatories and depositions also occurred at relatively high rates—81 percent and 67 percent, respectively—while 58 percent of the attorneys reported that initial disclosure occurred in their cases and 29 percent said expert disclosure did. The incidence of initial disclosure was unexpectedly high, given that about half of the district courts, including many of the largest, have “opted out” of the rule. Further examination confirmed that the cases in the sample did not overrepresent districts that had opted into the rule, but also found, surprisingly, that more than one-third of the attorneys who had engaged in initial disclosure had litigated their cases in a district that had opted out of Rule 26(a)(1)'s requirements, suggesting that individual judges may be ordering disclosure or that attorneys may be doing it voluntarily.

Of long-standing concern have been the cost of discovery and the relationship of that cost to the overall cost of litigation and the amount at stake in the case. In this national sample, the median cost of litigation reported by attorneys was about $13,000 per client. (Keep in mind that these are costs that flow through the attorney, not those that may have been incurred by the client apart from attorney-related expenses.) Statistical analyses revealed that the monetary stakes in the litigation were the strongest factor associated with total litigation cost: as the monetary stakes increased, so did the cost of litigation.

Generally, discovery expenses represented 50 percent of litigation expenses and 3 percent of the amount at stake in the litigation for both plaintiffs and defendants. Depositions accounted for by far the greatest amount of discovery expense. Document production—often said to be the most burdensome and costly part of discovery—typically involved rather modest costs, at least in costs involving the attorney.

DISCOVERY PROBLEMS AND THEIR COST

Considerable concern has developed over what are perceived to be widespread problems with discovery. In our sample, 48 percent of the attorneys who had some discovery in their cases reported at least one discovery problem. Document production generated the highest rate of reported problems—44 percent of those who had used discovery—with somewhat fewer attorneys reporting problems with initial disclosure (37 percent), expert disclosure (27 percent), or depositions (26 percent). When attorneys reported
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els made up of distinguished lawyers from around the country addressed a variety of discovery reform issues. A number of judges attended, and the conference ended with a panel of esteemed "veterans" of past reform efforts: Judge Edward Becker (moderator), Magistrate Judge Wayne Brazil, Prof. Paul Carlington, John Frank, Judge Patrick Higginbotham, Mark Gitenstein, Judge Robert Keeton, Prof. Arthur Miller, and Chief Justice Thomas Phillips of the Texas Supreme Court.

CONSIDERING POSSIBLE AMENDMENTS

As might be expected, some uncertainties remain despite the empirical data, and disagreements continue among the lawyers. Nevertheless, the empirical assessments and lawyer opinions have given the Advisory Committee a well-informed start in addressing the issues. In addition, it would probably be correct to say that the Advisory Committee was most often told that problems centered in the area of document discovery and unduly long depositions, although there was certainly disagreement about both the nature of those problems and the ways to solve them.

Armed with this input, the Advisory Committee met in October 1997 and initially assessed a long list of possible amendments. Based on this initial review, the Subcommittee gave more detailed attention to a narrower list of possible amendments with an eye to presenting specific language to the Advisory Committee in the Spring of 1998. What follows is a review of the areas currently receiving most attention. This presentation of possible amendments is a work in progress, just as discovery reform has been for three decades, and the emphasis and particulars may change considerably. We hope nonetheless that this interim report proves informative, and that it may prompt further participation by members of the judiciary as the amendment process moves forward.

National Uniformity. All are aware that national uniformity has been a concern since the Judicial Conference's Local Rules Project began its work in the mid-1980s. Whether or not it was proper to interpret the CJRA to legitimate local innovation in contravention of the Civil Rules, the CJRA does seem to have fostered tendencies in that direction. Moreover, and reportedly partly in reaction to the effects of the CJRA, the 1993 amendments explicitly authorized districts to "opt out" of several key innovations, thus installing local deviation in the scheme of the national rules. Almost half of the districts opted out to some degree, and even those districts that did not have often modified the disclosure rule in some respects. (For a discussion of such a local rule modification, see the sidebar on page 60.) These local deviations address not only the disclosure and discovery process but also could affect other matters, such as the application of Rule 8's pleading standards in various districts.

The Advisory Committee has received strong support for restoring national uniformity. In this respect, the support dovetailed with the 1995 amendment to Rule 83 and the Judicial Conference's later directive that the numbering of local rules be organized to correspond to the national rules. Of course, lawyers often tempered their enthusiasm with concern about the specific content of those national rules, but it appears that consistency among districts still commands substantial support from the bar as well as from judges, academics, and those who have been most involved in the rules process over the past twenty or more years.

Initial Disclosure. Initial disclosure is probably the most contentious issue confronting an effort to achieve national uniformity, and pervading discovery reform generally. Frankly, the returns are mixed. Empirical data do not unequivocally show that early disclosure has had any major effects. RAND concluded that a comparison of districts that employed some version of disclosure with those that did not failed to show that it had a desirable effect on cost or duration of litigation. However, its study related to cases filed before the 1993 amendments went into effect, and it did come very close to showing such an effect in some regards.

RAND accordingly recognizes that its work does not tell the empirical story of current Rule 26(a)(1). Moreover, attorneys and judges surveyed by RAND about disclosure supported the versions under which they were operating at the time of the study, even though the hard data did not show firm results. The FJC study indicates that attorneys found the effects of the disclosure requirements to be predominantly in the direction intended by the drafters (i.e., reducing costs, delays, amount of discovery, and the number of discovery disputes, while increasing the sense of fairness and prospects for settlement). The FJC authors were unable to confirm that disclosure was associated with estimated cost savings, but they were satisfied that cases in which disclosure was used were resolved more quickly.

At least it can be said that many of the most fearsome possible consequences of disclosure have not come to pass. Pervasive satellite litigation has not occurred, and there has not as yet been an outburst of draconian sanctions on parties alleged to have disregarded their obligations. At the same time, the present version of disclosure clearly has very fierce opponents within the bar—and few fierce proponents.

Against this background, the Subcommittee has undertaken to develop a middle ground on disclosure that might suitably be applied nationwide. In this way, the disclosure experiment may be permitted to continue without destroying the nationwide consistency of the Civil Rules. Such a middle ground would probably exclude from the disclosure regime those cases that typically have no discovery, such as Social Security cases, and, at the other end of the spectrum, would permit judges to modify or eliminate disclosure requirements in particular cases as a part of case management. Additionally, the middle ground could entail narrowing the required disclosure to "favorable" information, and thereby removing one of the features...
found most objectionable by many. With the Subcommittee’s middle
ground draft in hand, the Advisory
Committee will be left to determine
during its Spring meeting or meetings
(scheduled to occur before publication of
this article) whether to make the
current version of Rule 26(a)(1) bind-
ing nationally, abrogate it entirely
( seemingly precluding local require-
ments of the sort), or embrace a modi-
fied form as the nationally binding
rule. That decision lies in the future as
of this writing. Depending on the out-
come of the initial disclosure question,
the Advisory Committee may also alter
or abolish the moratorium on formal
discovery currently contained in Rule
26(d).

Rule 26(f) Meet-and-Confer Ses-
sions. The discovery conference added
in 1980 was almost eliminated in
1991, but returned in 1993 as part of
the package including initial disclo-
sure. Whatever the fate of initial dis-
closure, it seems clear that lawyers
generally report that the meet-and-con-
fer session has proved helpful. It bears
reporting that RAND found that such
requirements did not correlate with ei-
ther cost or time savings. Nevertheless,
it does not appear that there will be
any proposal to curtail Rule 26(f) sig-
nificantly. Indeed, it may be that the
meet-and-confer session will be
expanded.

The Scope of Discovery. For more
than twenty years, there have been se-
rious proposals to remove the “subject
matter” language from Rule 26(b)(1). The
Advisory Committee’s attention has
also been focused on the last sen-
tence of Rule 26(b)(1), which was
added in 1946 and uses the phrase
“reasonably calculated to lead to the
discovery of relevant evidence.” A
number of experienced lawyers have
argued that this provision can swallow
any limitations on scope articulated
earlier in the rule.

To date, no action has been taken
on this topic. One concern is whether
removal of the subject matter language
actually would cause a change in be-
havior by judges and litigants and, if
so, what that change might be. Another
is that any changes to the scope of dis-
covery in a particular case may be best
addressed under the proportionality
limitations in Rule 26(b)(2). Yet some
lawyers have advised the Subcommit-
tee that the bench has not much appreci-
ated the importance of the limitations
in Rule 26(b)(2) on the scope of dis-
covery in Rule 26(b)(1), and it is prob-
ably fair to say at least that the single
importance accorded Rule 26(b)(2) by
the drafters when that provision was
added in 1983 has not been realized.
Thus, whether it finally adopts the
long-standing proposal to remove the
subject matter language from Rule
26(b)(1), the Advisory Committee may
propose that the final sentence be modi-
fied to cabin its effect, and it might
also or alternatively propose that a
more explicit invocation of Rule
26(b)(2) limitations be included in
Rule 26(b)(1).

Yet another possibility would be to
try to narrow the scope of discovery
only with regard to document disco-
very, but there may be no principled
basis for such a limitation.

Discovery Cutoff. RAND’s study
of the CJIA endorsed discovery cut-
offs as desirable when coupled with
early setting of trial dates and judicial
management. But such cutoffs may,
standing alone, not provide significant
advantages, and they could generate
additional costs and have other under-
sirable consequences. Moreover, the
FJC survey of discovery in cases
closed in 1996 failed to find differ-
ences in case duration or attorney esti-
mates of costs due to the time permit-
ted for discovery. Rule 16(b)(3)
already directs the court to set a cutoff
for discovery, so it would seem that
the next step would be to direct a specific
duration. But absent prompt firm trial
dates following discovery cutoffs, such
a provision may be unwise, and it
might instead be preferable to modify
Rule 16(b) to encourage courts to link
their discovery cutoffs to trial dates.

Deposition Length. In 1991, a pro-
posal to limit all depositions to six
hours was circulated, but it was with-
drawn in 1992. Recent concern about
overlong depositions has again brought
this possibility to the fore. The FJC
study showed that depositions were the
most costly form of discovery, but it
did not necessarily show that overlong
depositions were a particular problem.
Given the possibility that time limits
could provide incentives for various
kinds of misbehavior, the Advisory
Committee may conclude that this
change is not warranted. Connected to
consideration of limiting deposition
duration is the possibility of further
curtiling objections during deposi-
tions, but it may be that the 1993
amendments went as far as currently is
indicated on that score.

Privilege Waiver. Another concern
of many lawyers has been the burden
of reviewing large numbers of docu-
ments to remove privileged ones.
Some provision to authorize a court to
guard against privilege waiver to facili-
tate document discovery is under con-
sideration. The wisdom of including
this idea in the rules is open to debate,
however, and there might even be
questions about the Advisory Commit-
tee’s authority to do so.

Other Possible Amendments. The
foregoing list hardly exhausts the vari-
ety of possible changes to the rules
that might prove advantageous, and
the Advisory Committee’s study of the
area is ongoing. It would seem worth-
while, therefore, to touch on some
other areas that have been mentioned.
Cost shifting has been suggested, for
example, as a middle ground between
absolute prohibition of discovery and
carte blanche for the discovering party.
Developing standardized or pattern
discovery tools has been urged upon
the Advisory Committee as a way of
providing guidance about what is ap-
propriate. Further emphasis on issue
definition has been suggested. Modify-
ing the numerical limitations on dis-
covery events imposed in 1993 has also
been proposed. In addition, a se-
ries of “technical” amendments de-
signed to cure slight oversights or dis-
continuities in the rules has been
circulated and is still the subject of
consideration.

ANTICIPATING THE POSSIBLE
RULE AMENDMENT PROCESS

The Subcommittee and the full Ad-
visory Committee have begun evaluat-
ing and winnowing the many propos-
als they have received. Some of the
complaints about abusive discovery or
bad faith failures to make discovery
cannot be addressed by rule language
but can only be resolved by individual
judges exercising supervision over the discovery process in particular cases. Although there are many possible scenarios for further development, we should mention that concrete action may occur in the relatively near future. Proposed amendments may well be reviewed by the Standing Committee on Rules of Practice and Procedure in June 1998 and could be circulated for public comment as early as August. Readers should therefore keep their eyes open. They should also not hesitate to relay their views to the Advisory Committee about the above possibilities (and other ideas that occur to them). Much remains to be done.

In closing, we should emphasize something that may not be clear from this presentation: by and large, the advice the Advisory Committee has received indicates that discovery is functioning well in most cases. The JIC survey indicated that the relationship between discovery costs and stakes in most litigation seemed appropriate to lawyers, and lawyers who have provided advice to the Advisory Committee have often made such comments. This is not mentioned to downplay the very real problems we have been told exist in a subset of cases. The task for the future is to see what changes might be beneficial without raising a risk of adverse effects in cases that are moving smoothly under the existing regime.

NOTES


10. The microphone conference included panels involving Sheila Birenbaum (New York), Barbara Castfield (San Francisco), James Finberg (San Francisco), Melvin Goldman (San Francisco), Robert Heim (Philadelphia), John Kelker (San Francisco), John Kobayashi (Denver), John True (San Francisco), Bruce Vanyo (Palo Alto), and H. Thomas Wells (Birmingham, Ala.). A number of other judges and lawyers also attended and participated, although not on panels.

11. These groups (and their representatives) were the ABA Section of Litigation (Gregory Joseph, New York), the American College of Trial Lawyers (Jeffrey Barist, New York), the Association of Trial Lawyers of America (Gerson Snerger, Oakland), the Defense Research Institute (Stephen Morrison, Blythwood, S.C.), the Product Liability Advisory Council (John Scriven, Midland, Mich.), and the Trial Lawyers for Public Justice (Paul Bland, Washington, D.C.). The moderator for this panel was Prof. Stephen Burbank of the University of Pennsylvania.

12. Besides the bar group representatives mentioned in the previous note and the panel described subsequently, other panels and participants included: document discovery (moderated by Prof. Geoffrey Hazard, University of Pennsylvania), Allen Black (Philadelphia), George Davidson (New York), Joseph Garrison (New Haven), Arthur Greenfield (Irvine, Cal.), Magistrate Judge Zachary Karol (Mass.), Richard Manetta (Dearborn, Mich.), Chilton Varner (Atlanta), and Bill Wagner (Tampa); uniformity and disclosure (moderated by Prof. Arthur Miller, Harvard University); Patricia Benissi (Pepria), Elizabeth Cabraer (San Francisco), Harvey Kaplan (Kansas City), Robert Klein (Annapolis), Hugh Plunkett (Minneapolis), Richard Willard (Washington, D.C.); and reform proposals (also moderated by Prof. Arthur Miller, Harvard University), Stuart Gerson (Washington, D.C.), Patricia Hynes (New York), William Jentes (Chicago), Philip Lacovara (New York), Peter Langrock (Middlebury, Vt.), Alan Morrison (Washington, D.C.), Jerold Solovy (Chicago), and Stephen Sussman (Houston).


14. See JAMES S. KARLINS ET AL., THE RAND INSTITUTE FOR CIVIL JUSTICE, AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT 64-67 (1997). RAND did find that attorney work hours were lower in three districts it studied that required disclosure of unfavorable information, but that the p-value for this difference was .06, noting that “[t]his is a large effect but not significant at the p = .05 level” that it had concluded should be shown to support its conclusions. Id. at 201-02. In addition, RAND was concerned about extrapolating from the experience of three districts. It should also be noted that the disclosure provisions in effect in those three districts were not the same as the national Rule 26(a)(1) as ultimately adopted in 1993.

15. See id. at 261 (78.2 percent of judges surveyed said that required early disclosure was generally desirable) & 274 (58 percent of surveyed attorneys said that required early disclosure was generally desirable in 1991 cases and 65 percent said so in 1993).


17. Id. at 26-28.

18. Id. at 54-55.

19. The current language of Rule 26(b)(1), with the American College of Trial Lawyers’ proposed change removing the subject matter language shown with strikethroughs, is as follows:

(1) In General. Parties may obtain discovery regarding any matter not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.


21. Id. at 36-39.

22. Thus, 28 U.S.C. § 2074(b) says that rules “creating, abolishing or modifying an evidentiary privilege” are not effective unless approved by an Act of Congress. Granting a court authority to guard against privilege waiver would not seem to do those things, but the question is not entirely clear.