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HERE WE GO AGAIN: ARE THE FEDERAL DISCOVERY RULES REALLY IN NEED OF AMENDMENT?

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Why is it that the Civil Rules Advisory Committee is again addressing questions about the adequacy of the discovery rules? Has the path to this site not been well traveled, and should not the Committee simply let the discovery rules settle into a harmony that comes from repeated practice? Indeed, are we not aware of the persuasive indicators that the discovery rules are not broken? These questions are appropriate to ask about the Committee's recent overture into the discovery rules, and the answers provide not insubstantial reasons for leaving discovery alone, even with its warts. Notwithstanding that intuition, questions have persisted for the last twenty-five years, suggesting that the Committee take another look at repeated complaints about the discovery rules and that its look be a comprehensive examination because the complaints reach directly to the nature and quality of the dispute resolution process in America. These persisting questions are:

1. When fully used, is the discovery process too expensive for what it contributes to the dispute resolution process; and
2. Are there rules changes that can be made which might reduce the cost and delay of discovery without undermining a policy of full disclosure?

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Also, because of recent changes in the law, another look at the discovery rules may be warranted. Because of local district court management plans required by the Civil Justice Reform Act of 1990, and the changes to the discovery rules adopted in 1993 on an experimental basis to provide authority for district courts to opt out of certain discovery rules, a third question has arisen:

3. Should the federal rules for discovery, applying to cases involving national substantive law and procedure, be made uniform throughout the United States?

In the judgment of lawyers outside the United States, American rules providing for expansive and extensive discovery are an oddity. Even to American observers of the legal system, the cost of pretrial discovery often appears to be out of proportion to the contribution it makes to the dispute resolution process. Indeed, in August 1991, the President's Council on Competitiveness issued a report claiming that "[o]ver 80 percent of the time and cost of a typical lawsuit involves pre-trial examination of facts through discovery."¹ While I am not aware of any empirical data to support this claim, the fact that the claim was made and is often repeated by others, many of whom are users of the discovery rules, raises a question of whether the system pays too high a price for the policy of full disclosure in civil litigation.

The authority for expansive discovery comes from a series of amendments to the Federal Rules of Civil Procedure, adopted in 1946, 1963, 1966 and 1970 to give greater effect to the 1938 rules experiment characterized by notice pleading coupled with broad discovery to flesh out claims. While the 1938 rules shifted procedural battles, perhaps unwittingly, from pleading to discovery, they deliberately hoped to shift resolution of these disputes from court disposition of pleadings and motions to attorney-managed discovery. As enigmatic as this idea might be in the context of an adversarial system, it was accepted as a well-intentioned experiment to replace the highly formalistic code pleading. The idea, however, has now evolved into an expensive procedural process because of both the continual expansion of discovery rights and the recent explosion of information, data and record-keeping. By 1970, when the breadth of discovery had reached its zenith, the discovery mantra of the rules and court decisions was full disclosure with error resolved on the side of requiring more disclosure. When such a policy is applied to the geometrically increased number of records and

¹ See generally President's Council on Competitiveness, *Agenda for Civil Justice Reform in America* (1991).

amount of data now maintained, the foreseeable problems based on burden began to appear. Since 1970, efforts have been undertaken to curtail the expansiveness of discovery, but they have either failed or been so diluted as to have little effect. The rules changes in 1980, 1983 and 1993 were aimed in this direction.

In 1977, the American Bar Association ("ABA") embarked on a major effort to persuade the Civil Rules Advisory Committee to restrict the broad scope of discovery defined by Rule 26, but its recommendation, even though initially accepted, was later rejected by the Committee in 1980, a rejection that three Justices of the Supreme Court thought to be a mistake. Those same proposals were made again in 1996 by the American College of Trial Lawyers, and that organization now proposes a singular change that revisits the ABA proposal by amending Federal Rule of Civil Procedure 26(b)(1) as follows:

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 [a] party.

Under this proposal, instead of gearing relevancy for discovery purposes to "the subject matter" of litigation, the American College proposal would gear relevancy to a specific claim or defense.

In addition to the amendments in 1980, 1983 and 1993, Congress sought to reduce costs and delay in litigation—largely thought to emanate from discovery—by enacting the Civil Justice Reform Act of 1990.² That Act encouraged experimentation in pilot districts with case management plans, including discovery plans. Indeed, it was in tandem with that effort that the Civil Rules Advisory Committee adopted its 1993 changes, providing for mandatory initial disclosure with a local opt-out provision.³ Unfortunately, the experimentation undertaken pursuant to the Civil Justice Reform Act and the 1993 rules amendments has resulted in a balkanization of discovery rules such that discovery procedures among the ninety-four districts of the country are diverse. Of necessity, this lack of uniformity in procedural rules must at times result in a lack of uniformity in the enforcement of substantive rights.

Many urge that the scope of discovery be left as broad as possible, arguing that broad discovery has enhanced, and perhaps even expanded, enforcement of substantive rights. Particularly in the area of

² 28 U.S.C. §§ 471-482 (1994 & Supp. 1 1995).

³ See FED. R. Civ. P. 26(a)(1)-(4).

products liability, employment discrimination and consumer protection, claims have multiplied with the expectation that proof can be established from the broad discovery authorized by the rules. Because of the exposure to broad discovery, some argue, an unintended regulatory effect on conduct has resulted. While defendants, mostly corporations, have decried the intrusiveness, disruption and expense of such broad discovery, some acknowledge, when pressed, that they would retain broad discovery if the alternative was an additional layer of government regulation that might follow if the full disclosure requirement was eliminated.

Despite any temptation to engage in this debate, the Civil Rules Advisory Committee cannot, in any practical way, now attempt to undo the 1938 experiment of notice pleading coupled with broad discovery because that formula has become embedded in the infrastructure of American civil procedure. Thus, as a matter of prudence, the Committee must begin any endeavor with the assumptions (1) that notice pleading is here to stay, and (2) that full disclosure through discovery is an essential and accepted element of the dispute resolution process. But even accepting these assumptions, questions remain about whether full disclosure can be accomplished more efficiently. Indeed, it is that very inefficiency that has been used as a tool to accomplish other ends, leading to complaints of abuse.

Against this historical backdrop, one can readily conclude that the rules of discovery are not at rest and that harmony will not reasonably follow their continued use in the present form. In a survey of lawyers conducted in 1997 by the Federal Judicial Center, eighty-three percent of those responding thought that changes to discovery rules were required.⁴ While it may be a sufficient reason to reexamine the discovery rules simply to end the 1993 experiment and address the balkanization of discovery procedure that resulted from it, it is the persistence of complaints and questions about the merit of broad discovery and its expense that, at bottom, has caused the Committee to take another look. The Committee must determine once and for all whether discovery is, indeed, too expensive and whether its cost can be reduced without substantial compromise of the full-disclosure policy. For these reasons, as chair of the Civil Rules Advisory Committee, I initiated a fundamental reexamination of the discovery rules in the fall of 1996 to find out if the procedure in place for providing full disclosure is too

⁴ See Thomas E. Willging et al., Federal Judicial Ctr., *An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments*, 39 B.C. L. REV. 525, 543 (1998).

expensive to justify its contribution to civil process and whether amendments can be adopted to make discovery more efficient and satisfying to parties to litigation.

It should be expressly noted that I did not initiate this reexamination in order to review discovery abuse once again. While this subject has been studied frequently and is not the object of the reexamination, I expect that a reduction of abuse will surely follow from any beneficent changes addressing cost and delay caused by discovery procedures. In addition, it should be expressly noted that the Advisory Committee is not charged to make changes for change's sake or simply because a problem may have been discovered. The amendment process must include two disciplined inquiries: first, to determine whether there is a substantial problem that cannot be handled by the courts on a case by case approach and, second, to determine whether amendments can be made to correct the problem without causing reactive earthquakes that would shake the foundations of civil procedure.

To pursue the Committee's efforts, I appointed a discovery subcommittee, naming Judge David Levi as chair and Professor Rick Marcus as special reporter. The discovery subcommittee ably organized the Boston Conference which took place at Boston College Law School on September 4-5, 1997, to receive data, opinions, ideas and proposals in preparation for the Committee's reexamination.

At the Conference, academic experts presented papers on the historical background of discovery and the Federal Rules' approach to it, as well as the historical efforts to constrain it. Panels of experienced lawyers, representing both plaintiffs and defendants, discussed current discovery practice and its weaknesses, observing principally that problems of expense centered on the length and cost of depositions and the breadth of document production.⁵ Plaintiffs' lawyers tended to complain more about the cost of depositions, while defendants' lawyers focused more on the cost of document production. A panel of experienced lawyers discussed the effect that the lack of uniformity has had on discovery practice, and another panel presented proposals for reform.

The Committee engaged the Federal Judicial Center to study the expense of discovery as well as related questions and to report to the Boston Conference. The Center conducted a survey of 2000 attorneys, receiving almost 1200 responses, analyzed the data, and reported on the results. The data revealed, among other things, that discovery costs

⁵ See generally Transcript of Panel on The Advisory Committee's History of Discovery Containment, 39 B.C. L. REV. 809 (1998) [hereinafter Transcript].

represent about fifty percent of litigation expenses and that depositions were the single greatest item of cost. As already noted, the study also revealed that eighty-three percent of those responding wanted changes made to the discovery rules, involving principally: (1) better access to judges; (2) greater uniformity of discovery rules; (3) greater sanctions for abuse; and (4) adoption of a code of civility.

The Committee also asked the RAND Institute for Civil Justice to review its broad database collected in connection with its work under the Civil Justice Reform Act and to conduct a further analysis of that data in order to report how well discovery works and how it might be improved. The RAND Institute specifically analyzed the effect on discovery costs of (1) early case management, (2) early disclosure, (3) good faith efforts in resolving discovery disputes, (4) limiting interrogatories, and (5) shortening discovery cutoff time. Reviewing a database slightly different from that reviewed by the Federal Judicial Center, the RAND Institute found that for cases that were closed after having been pending for nine months, thirty-six percent of the total lawyer costs were attributable to discovery.⁶ It also found that in thirty-seven percent of general civil cases, lawyers conducted no discovery, and in a *majority* of the cases, they devoted three hours or less to discovery.⁷ The RAND Institute's report thus revealed that in the typical case, the expense of discovery was not a problem and that such a problem appeared only in a minority of cases. It confirmed, however, that in that minority, discovery was extensively used and the lawyers using it presented an "anecdotal 'parade of horrors.'"

National associations of lawyers also presented proposals for discovery reform. The Conference heard from representatives of the ABA Section of Litigation, the American College of Trial Lawyers, the American Trial Lawyers Association, the Defense Research Institute, the Trial Lawyers for Public Justice and the Product Liability Advisory Council.

Finally, the Conference heard from a distinguished group of "alumni" who had worked in the past on discovery reform efforts. This panel included former chairs and reporters of the Civil Rules Advisory Committee, as well as others who have been involved in reform efforts over the years.⁸

⁶ See JAMES S. KAKALIK ET AL., RAND INST. FOR CIVIL JUSTICE, DISCOVERY MANAGEMENT: FURTHER ANALYSIS OF THE CIVIL JUSTICE REFORM ACT EVALUATION DATA § II(B) (1998), reprinted in 39 B.C. L. REV. 613 (1998) (in this issue).

⁷ See *id.* at § II(A).

⁸ See generally Transcript, *supra* note 5.

During the Conference, which was unprecedented both in scope and in the experience of its presenters, the current members of the Civil Rules Advisory Committee were listeners. In particular, I took notes with the single idea of distilling a Conference consensus about the data, opinions, ideas, and proposals presented. The following is a summary of my conclusions:

1. The desire for information in connection with the resolution of civil disputes was nearly universal. No one at the Conference seemed to advocate the elimination of requiring full disclosure of relevant information.

2. Discovery is now working effectively and efficiently in a majority of the cases, which represent the "routine" cases.

3. In cases where discovery was actively used, it was thought to be unnecessarily expensive and burdensome. Plaintiffs' lawyers seemed most concerned with the length, number and cost of depositions, and defendants' lawyers seemed most concerned by the number of documents required in document production and the cost of selecting and producing them.

4. In districts where initial mandatory disclosure has been practiced, it is generally liked, and the users believe that it lessens the cost of litigation. In one sense, participants viewed initial disclosure as a device aimed at filling the vacancy created by notice pleading.

5. There was an overwhelming and emphatic support for national uniformity of the discovery rules, and almost all participants favored the elimination of the local options afforded by Rule 26. There was substantial disagreement, however, on what the national rule should be.

6. The belief was almost universal that the cost of discovery disputes could be reduced by greater judicial involvement and that the earlier in the process that judges became involved, the better.

7. Many observed that the necessarily strict observance of the attorney-client privilege, and the current principles defining how that privilege is waived, added substantial time to discovery compliance. Lawyers felt that a relaxation of the waiver rules for purposes of discovery would significantly lessen costs.

8. Most believed that discovery costs could be reduced without reducing full disclosure by adopting presumed limits on the number and length of depositions and on the scope of discovery, particularly in connection with the production of documents.

9. Early discovery cutoff dates and firm trial dates were recognized as the best court management tool to reduce the costs of discovery,

and the RAND Institute data appears to have confirmed that conclusion.

The Boston Conference provided the Civil Rules Advisory Committee and, indeed, the larger legal community with an unprecedented single source of data, historical information, ideas and proposals for discovery reform, and this important issue of the *Boston College Law Review* makes available the academic groundwork laid for that Conference. The materials included in this issue, coupled with the Committee's work-papers, which will be published shortly, will further enlighten the work further of the Committee and rules commentators.

While the Committee appears to be headed toward some form of change to provide national uniformity in discovery procedures, other changes are by no means foregone. If the Committee decides to address the consensus distilled from the Conference proceedings, it could consider a three-level discovery process—a Neapolitan Plan—in which mandatory disclosure of some type is the first layer, core discovery under attorney management is the second, and customized more extensive discovery, approved by the court pursuant to a plan submitted by the parties, is the third. The core discovery could be restricted by presumed limits on the length and number of depositions and the scope of documents subject to production, beyond which a party would have to submit a plan to the court for approval. The Neapolitan Plan would thus substantially leave in place, subject to attorney management, the present discovery practice used for the vast majority of cases, and would commit customized discovery to a procedure by which the parties would have to develop a plan and submit it to the court for approval. This would have the beneficial effect of engaging the court in management over complex discovery where that management is most needed.

What appears certain is that no change will be made to the discovery rules without some consensus of approval from both plaintiffs' and defendants' attorneys. Moreover, if a change appears to be indicated, the Committee will pursue it only if the Committee reasonably expects that the benign effects of change will clearly outweigh the negative consequences of making change. For now, the Committee must retire to its work and take counsel from the product of the Boston Conference and the materials in this issue of the *Boston College Law Review*.