

TWO WORLDS OF CIVIL DISCOVERY: FROM STUDIES OF COST AND DELAY TO THE MARKETS IN LEGAL SERVICES AND LEGAL REFORM

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The recent studies of civil discovery by the RAND Institute for Civil Justice¹ and the Federal Judicial Center² ("FJC") establish beyond any reasonable doubt that we have two very distinct worlds of civil discovery. These worlds involve different kinds of cases, financial stakes, contentiousness, complexity and—although not the subject of these studies—probably even lawyers. The ordinary cases, which represent the overwhelming number, pass through the courts relatively cheaply with few discovery problems. The high-stakes, high-conflict cases, in contrast, raise many more problems and involve much higher stakes. It is therefore essential to understand the distinction and to try to explain why it operates. Unfortunately, despite the quality of the RAND and FJC studies, they do not help us to gain a strong empirical understanding of the rarified world of big cases and big lawyers. Empirical studies of cost and delay have a limited power to explain the markets that generate the high-stakes, high-conflict cases. Nevertheless, we can suggest some preliminary explanations, and some research approaches that might help provide this necessary context for a better-informed debate.

One of the challenges for researchers is to get beyond the information that tends to be produced by the elite lawyers themselves or by lawyers and journalists parroting those lawyers. The available information, unfortunately, typically lines up according to professional and client interests. Each side provides an almost stylized account of the world of big litigation—alleged "strike suits" and settlements induced

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¹ See JAMES S. KAKALIK ET AL., RAND INST. FOR CIVIL JUSTICE, DISCOVERY MANAGEMENT: FURTHER ANALYSIS OF THE CIVIL JUSTICE REFORM ACT EVALUATION DATA (1998), reprinted in 39 B.C. L. REV. 613 (1998) (in this issue) [hereinafter RAND REPORT].

² See Thomas E. Willging et al., Federal Judicial Center, *An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments*, 39 B.C. L. REV. 525 (1998) [hereinafter FJC Study].

by the "blackmail" of discovery expense on one side, alleged "stonewalling," hiding documents and harassing the plaintiffs on the other. These adversarial positions, which are extensions of the positions that each side argues in court, tend to dominate debate. There are at least two consequences of this dominance. The first is that the voices of those who either do not litigate in the federal courts or, if so, do not constitute the legal elite, tend not to get heard. Their particular complaints or lack of complaints go unnoticed. The empirical studies, in fact, serve to give them a voice that they otherwise might not have had.

The second consequence, which is related but more subtle, is that the reform agenda may be distorted by the domination of the paradigm promoted collectively by the contending elites. It is relatively easy to see that each side is seeking to shape the agenda to be favorable to its own particular interests. The danger is to let the partisan fights fool us into missing the complementary positions in the debates. These elite lawyers—despite or perhaps even because of their very visible fights—produce a view of the world that serves to shape it toward their collective interests. Both of these consequences support the necessity for a research strategy that can address both the market for legal services and the market for reform.

The first part of this Article will highlight and compare the RAND and FJC studies. These are important studies, and it is useful to make clear what they have shown. There are several notable differences between the studies and in the policy implications that seem to emerge from them, but the overwhelming lesson is that the current system of discovery in the federal courts works well for the vast majority of cases.

The RAND and FJC data also provide some material for addressing the questions of the high-stakes, high-conflict cases, but the data provide only a beginning for an understanding of the two worlds of discovery. Going somewhat beyond the data, I will offer a theoretically derived hypothesis that the two general kinds of cases can best be explained as the result of two different legal services products. Depending on the clients and the cases, the product that is purchased will be either a variety of routine litigation or a product associated with litigation as warfare. Clients or referring lawyers select their lawyers according to the stakes as they perceive them and as they want their adversaries to see them. This market hypothesis, I suggest, explains a number of the otherwise puzzling findings of the two studies.

The next part of this Article will elaborate this working hypothesis and suggest some means to investigate it further. In terms of contemporary social science, I am suggesting a more institutional focus than the approaches characteristic of the RAND and FJC surveys. This kind

of focus—which requires a combination of social science theory and aggressive journalism—could help us understand much better the systems of incentives that lead to particular investments in civil discovery. One key to this research is to move beyond the federal rules and issues of cost and delay to research about more fundamental issues in the evolving market for legal services—and legal reform.

Finally, shifting the analysis slightly, my conclusion will return to the question of the framing of the issues in debates about discovery reform. Civil discovery is a major problem by definition: the key legal actors in the debates—lawyers and judges—all report serious dissatisfaction. The challenge is to recognize the conflict but also understand the various biases in the framing of the issues. If we get lost in the debates conducted by the elite partisans, we run the risk of enacting reforms that are useless, harmful or even inimical to fundamental legal values. Social science research along the lines I suggest can supplement the RAND and FJC studies to provide a different and hopefully strong new entry into the market of ideas about civil discovery reform.

I. TWO EMPIRICAL STUDIES—THE BASIC PICTURE OF CIVIL DISCOVERY IN FEDERAL COURTS

The best way to see the power of the conclusions of the two studies of cost and delay is to review what they did and what they found. The RAND study builds its detailed analysis out of a selection of the cases used for the evaluation of the Civil Justice Reform Act. It is based on 5222 cases filed in the 1992–93 period in twenty federal districts. The investigators sent questionnaires to lawyers and judges involved in the cases, and they received responses from 67% of the judges and 47% of the lawyers. In real terms, 4061 lawyers out of 9423 responded. The percentage is not as high as we would like for the lawyers, but we do not have evidence of any particular bias in the characteristics of respondents versus non-respondents.

Most of the analysis presented in this study of discovery is based on two aspects of the data—the lawyers' reports of the hours that they worked, and certain objective aspects of the cases as determined from the case files and interviews. The governing ideas are that lawyer time is the best indicator of cost, and that lawyers are probably able to give fairly reliable counts of their own hours.³

³ There are no doubt other costs that may not be captured by this figure (paralegals, secretaries, costs borne in-house by company personnel), but it would add further uncertainty to try to get lawyers to provide this information about others.

The RAND statistics on discovery must be placed in the context of the cases they examined and those they left out. The RAND study excluded from the sample cases those "that usually receive minimal or no management," defined to mean "prisoner cases . . . , administrative reviews of Social Security cases, bankruptcy appeals, foreclosure, forfeiture and penalty, and debt recovery cases."⁴ It is worth noting that these are cases that involve quite a number of individuals, and indeed they represent a substantial portion of the civil docket. Second, the RAND study eliminated from the discovery analysis the one-quarter of cases in its sample that closed before the issue was joined. No discovery took place in those cases. Third, the median discovery in the one-quarter of cases that concluded after the issue was joined but prior to 270 days after filing was only three hours.

Over half of the RAND sample—which excluded "minimal management cases"—thus involved little or no discovery on the way to some kind of resolution. Overall, as the report states, "lawyer work hours are zero for 38 percent of general civil cases, and low for the majority of cases."⁵

The 45% of cases that were terminated after issue was joined and after 270 days from the filing date provided most of the discovery activity. From the RAND sample, data were available on 1624 cases that fell into this category. The median number of hours spent on discovery in these cases was still relatively low. The 20 hours represented one-fourth of the median lawyer work time of 80 hours.

We now begin to see the importance of the high-stakes, high-conflict cases. The pull of the big cases is evident from the fact that the mean number of hours on discovery was 83 and the total number of hours 232, a somewhat higher discovery hours-to-total-hours ratio. The median was much lower than the mean.

Given the weight and significance of a relatively low percentage of cases, it is also useful to examine the top ten percent of the cases in terms of discovery. The median for those 162 cases in discovery hours was 300 and for total hours was 950. This figure represents fifteen times the median for discovery of the active cases. Again, however, the mean is much higher than the median even for this top ten percent. The mean number of hours was 601 for discovery and 1452 for total hours. A rather small number of cases thus generated a very large amount of discovery.

⁴ RAND REPORT, *supra* note 1, § I(C)(2) n.7.

⁵ *Id.* § II(A).

The FJC study followed a somewhat different methodology. The investigators began with 1000 cases closed in the last quarter of 1996. In selecting their cases, they also excluded a relatively high percentage of the federal civil docket—"Social Security appeals, student loan collections, foreclosures, default judgments and cases that were terminated within sixty days of filing."⁶ They were blessed with a very high response rate by the attorneys that they sought to sample. For the 1000 civil cases, they wrote to the 2000 attorneys they identified from the cases and they received responses from 1178—59%. Unlike the RAND analysis, the FJC based its analysis on the lawyer reports of the actual costs of litigation. As we shall see, this method provides a quite comparable picture to what was reported in the RAND study.

The FJC reported that the median in costs was a total of \$13,000 per client, with roughly half of those costs spent on discovery. Interestingly, as a rough comparison to RAND, we can divide the FJC figure by the RAND median hours—80—and get a billing rate that would be \$160 per hour. The top 5% of the FJC cases involved total costs of \$170,000 per client, which at \$160 per hour would be just over 1000 hours, which again is roughly comparable to the picture given by RAND. We can confirm the fact of a relatively small number of huge cases with great amounts of discovery and expense.

Another perspective on these high-stakes, high-conflict cases comes from the description of the eightieth percentile (in overall expense) of cases in four categories—antitrust, patent, securities, and trademark. These categories tended to create high costs according to the FJC. The number of cases in this group was quite small, representing 4.5% of the sample or 53 cases out of the 1178. The total expenses on discovery per client of the cases at this percentile were \$305,000, with depositions comprising \$135,000.

These major studies thus establish the point that the problem of civil discovery is not a phenomenon of ordinary federal civil litigation. Most of the federal cases are still relatively circumscribed, and there are quite a few "minimal management" cases in the system. The RAND median for the active cases was 80 hours of lawyer work and 20 hours of discovery. It is true that there could be other expenses in ordinary litigation not captured by the RAND focus on lawyer time, but there is no doubt that lawyer time remains the largest expense in litigation. The high-stakes, high-conflict cases generate many lawyer hours, considerable overall expense and—worth noting—high lawyer revenues.

⁶ FJC Study, *supra* note 2, at 528.

This story's emphasis on the importance of the ordinary cases is completely consistent with other studies of federal and state litigation. The Civil Litigation Research Project ("CLRP"), centered at the University of Wisconsin in the late 1970s, similarly found that the median number of lawyer hours per client in a federal case was 45.⁷ The median stakes as defined in the CLRP were only \$15,000. It is significant that the stakes clearly have risen over the past fifteen years, and lawyer time has risen with the stakes. The point here, however, is that the major problems¹ mainly occur outside of the ordinary course of federal litigation.

Unfortunately, while we have identified the unique importance of the relatively few cases in creating the "discovery problem," we do not know as much about the very large and complicated cases as we would like. Aggregate studies of federal litigation can only say so much about these problematic cases, and therefore we cannot account very easily for the source of the reported problems or even the expense. We know only that the stakes are very high, that they are deemed to be more complex and that they are also characterized as more contentious.

The evidence also supports the idea that these are precisely the cases handled by the elite national bar—which is the group that tends to dominate meetings organized to discuss problems with civil discovery. The two studies do not precisely correlate particular lawyers or types of lawyers with the cases in the samples. The RAND study states only that there was more likely to be discovery conflict and expense in cases involving lawyers from law firms with more than five lawyers—we would like more precision in these numbers. The study also suggests that 20% of the cases in the sample involved lawyers from law firms with more than fifty lawyers.

Despite no specific focus on lawyers, the introduction to the RAND Report raises the issue of whether, in certain cases, litigants may prefer to hire "larger firms to handle the more complex and more costly cases."⁸ This suggestion in my opinion is the key to understanding the phenomenon of the two worlds of civil litigation.

As Wayne Brazil suggested in a Chicago study in the early 1980s,⁹ the phenomenon may be an aspect of the "two hemispheres" of the

⁷ For the CLRP data, see HERBERT M. KRITZER, *THE JUSTICE BROKER: LAWYERS AND ORDINARY LITIGATION* 86 (1990).

⁸ RAND REPORT, *supra* note 1, § II(G).

⁹ See Wayne D. Brazil, *Civil Discovery: Lawyers' Views of Its Effectiveness, Its Principal Problems, and Its Abuses*, 1980 AM. B. FOUND. RES. J. 789 (1980); Wayne D. Brazil, *Views from the Front Lines: Observations by Chicago Lawyers About the System of Civil Discovery*, 1980 AM. B. FOUND. RES. J. 217 (1980).

legal profession described in the Heinz and Laumann study of the Chicago bar published in 1982.¹⁰ The essential idea was that there are two entirely different sectors of the bar—one serving personal plights, the other handling business problems. Before elaborating some of the implications of this suggestion, it is useful to see how it can explain some of the seemingly contradictory or paradoxical findings of the two studies.

Both studies, for example, addressed the issue of mandatory early disclosure, seeming to come to very different conclusions. The FJC study suggests some enthusiasm for mandatory early disclosure. Almost 40% of the respondents, for example, thought that it decreased the expenses of the client. In contrast, the RAND study was very skeptical about any benefits of mandatory disclosure. The study reports that cases with early mandatory disclosure had no significant difference in the number of hours worked or the time to disposition. The FJC study found more negatives associated with early mandatory disclosure mainly with the very large and contentious cases. The differences might be explained by the more objective measures of the RAND study, but we can perhaps do better by focusing on timing and the nature of the markets.

The RAND study, it may be recalled, is older than the FJC study. It tracked cases filed in 1992–93, whereas the FJC examined cases closed in the last quarter of 1996. Most of the RAND cases were completed well before late 1996. For reasons already suggested, it is likely that the timing was especially important for the ordinary cases. The ordinary cases had relatively few problems to begin with, and early mandatory disclosure undoubtedly caused some adjustment difficulties (captured by RAND). But since this area of practice is characterized by more cooperation in managing the scope of the case, the lawyers could adjust. They probably became more familiar with the procedure and therefore more accepting by the time of the FJC study. The process may indeed have saved some time and money, but more relevant is the fact that lawyers incorporated it into their way of handling the ordinary cases.

In the high-stakes, high-conflict cases, however, early mandatory disclosure (along with everything else) was simply another matter for conflict. The lawyers reported little success with the new procedure in those cases, and it is not surprising that the reform was unable to reduce discovery expenses substantially.

¹⁰ See JOHN P. HEINZ & EDWARD O. LAUMANN, *CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR* (1982).

The division between the ordinary cases and the high-stakes, high-conflict cases may also help explain other findings. The RAND study, for example, found that "the requirement of a discovery/case management plan is beneficial in reducing time to disposition, especially if a trial schedule is not set early."¹¹ The result was slightly different for the more complex cases: "the top 25% most costly cases appear to especially benefit from the early setting of a trial schedule (early management of those top 25% of the costly cases without a trial date scheduled was not associated with significantly reduced time to disposition)."¹² Further, "cases that are high in complexity, high in discovery difficulty, or high in stakes appear to benefit especially from the use of discovery/case management plans."¹³

Consistent with our working hypothesis of the existence of two types of cases and lawyers, early management without an early trial date did not save in costs (i.e., lawyer hours worked) for those high-stakes cases. The lawyers who handle these cases know how to turn management in their interests. They still work the hours they would have worked and litigate with a strategy of no-holds barred. But case management with a trial date works better with this elite group. The pressure of time facilitates a reduction in the lawyer time that can be invested.

Curiously, however, the ordinary cases were more likely to terminate sooner if there was case management *without* an early trial date. One hypothesis consistent with the story so far is that these lawyers will only invest so much in a case, and judicial management may raise the costs and make a negotiated settlement occur sooner. These lawyers, as suggested, are more likely to cooperate (toward resolution) once they have invested a reasonable amount and learned enough of the other's case. An early trial date, however, may lead some lawyers to focus their investment on preparation for the trial—even if the likely result is still a negotiated resolution with roughly the same amount of lawyer investment as there would be in a case resolved more in the shadow of discovery.

Finally, the RAND study also found that the shortening of the discovery cutoff date was a kind of "win-win" solution since it reduced the commitment of lawyer time and therefore the expense of litigation generally.¹⁴ This finding may be true in all cases, but note that the

¹¹ RAND REPORT, *supra* note 1, § III(B)(2).

¹² *Id.*

¹³ *Id.*

¹⁴ *See id.* § III(G).

implications are different in our two types of cases. In the high-stakes, high-conflict cases, the time limitations probably reduce the possibilities of conflict and therefore what could be characterized as "waste" (even though clients are willing to pay for it in the particular case). In the ordinary cases, however, the result might be that reduced investment saves money by cutting out some of the factual investigation that might contribute to a fair resolution. If the ordinary cases had no problems to begin with, this seemingly "win-win" solution might not be a real improvement—even if it successfully reduces costs.

To summarize, the pattern is consistent with the observation that lawyers 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. As noted before and discussed more below, these are typically the lawyers who have the national reputations that also make them appear at conferences and on committees examining questions of civil discovery.

II. SUGGESTIONS FOR A COMPLEMENTARY RESEARCH AGENDA

There is a kind of impasse at this stage of the research and politics of civil discovery reform. The ordinary cases work pretty well as far as the empirical evidence tells. We know that the lawyers in the high-stakes, high-conflict cases claim to have enormous problems, and the evidence confirms dissatisfaction, delay and expense associated with these cases. The temptation therefore is to try to find some way of reforming the rules of discovery to solve this very contentious problem. The obvious danger, however, is that reforms designed for the relatively few cases will impose burdens on the more ordinary cases. For a number of reasons, therefore, it would be useful to know more about the markets and institutional settings that produce these cases.

The kind of research that is called for is both more institutional and more historical, trying to capture the way that the institutions are changing over time in relation to internal structures and external transformations in the state and the economy. I have conducted research consistent with this approach, but I cannot claim to have done the research that would answer the questions that I have about civil discovery.¹⁵ I will therefore make what I hope will be educated speculations about the complex and so far not well-studied institutional worlds of lawyers, courts, and litigation. At the very least, the speculations suggest what an approach seeking to go beyond the federal rules and questions of expense and delay might reveal.

The first requirement of this research is to reject the tendency—typical in debates about civil discovery and procedural reform—to assume that “civil litigation” has meant the same thing forever.¹⁶ We know that different types of cases come into the system at different times, however, and the same type of case may be enormously complex and difficult at one time and routine at another time.¹⁷ Of particular importance is the fact—often stated but not often taken into account—that high-stakes business litigation is a relatively recent phenomenon. As Marc Galanter and others have shown, major corporations did not sue each other until the 1960s and 1970s; and, when they did, they transformed the world of large corporate law firms that served them.¹⁸

Litigation became prestigious and extremely lucrative. Corporations were willing to pay for anything that would work to eliminate a competitor, prevent a merger or acquire a prize prey. Lawyers escalated their tactics and the clients paid for that escalation. One indicator of the change over time is the fact that in Chicago in 1994, there were four times as many corporate litigators as there were in 1974.¹⁹ There was a boom in high-stakes, high-conflict corporate litigation, and it translated into considerable soul searching about the costs of litigation and discovery abuse—and a very prosperous decade for large law firms.

¹⁵ See, e.g., YVES DEZALAY & BRYANT G. GARTH, *DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER* (1996).

¹⁶ See generally Yves Dezalay & Bryant G. Garth, *Fussing About the Forum: Categories and Definitions as Stakes in a Professional Competition*, 21 L. & SOC. INQUIRY 285 (1996).

¹⁷ See DEZALAY & GARTH, *supra* note 15, at 100–13 (describing how commercial arbitration became more routine).

¹⁸ See, e.g., MARC GALANTER & THOMAS PALAY, *TOURNAMENT OF LAWYERS* (1991); William E. Nelson, *Contract Litigation and the Elite Bar in New York City, 1960–1980*, 39 EMORY L.J. 413 (1990).

¹⁹ Preliminary data from John Heinz, reporting on an American Bar Foundation project about change in the Chicago Bar from 1975 to 1995.

At the same time, the rise of corporate litigation helped to promote the status of in-house counsel. More money was being spent on litigation and legal affairs, and that made corporate counsel more important. During the 1980s, the new breed of corporate counsel recognized that the "arms race" in business litigation needed to be curbed, and, working through the Center for Public Resources, the organization of corporate counsel and other entities, they got to know each other and also exchanged ideas on how to control the expense of litigation—and the litigators. They learned increasingly how to manage with less investment in scorched earth litigation as a tactic in business warfare.

But there are still cases—probably different ones in the late 1990s—where businesses are willing to invest in full-scale warfare, and for those cases they turn to the elite litigators who are now very well-trained and well-armed. Perhaps the class action resurgence exemplifies this new generation of "uncontained" litigation, now that mergers and acquisitions are now much more routine and peaceful. Whatever the character of the current high-stakes, high-conflict cases, we can be sure that the current practice arrangements also will not stand still. They will evolve with or without reform of the federal rules, and the evolution of the market might even cut into the prosperity of the elite litigators.

The likely trajectories of litigation practices could be better understood if we knew more about how cases get into the rarified world of elite lawyers and high-stakes, high-conflict litigation. It is obviously not simply a matter of the size of the investment or deal. What shapes the stakes is the difference between what one side will pay and the other will accept. It is as much a matter of collegiality and communication between potential adversaries—informal rules—as about any other indicator of financial stakes or the formal rules of procedure. Better personal relations and communication can mean the difference between warfare and managed dispute resolution.

For these reasons, it is difficult for reformers to assert with any confidence that cases that are classified a certain way—whether business litigation, products liability, or something else—are going to represent the cases of high conflict. The FJC study suggests that antitrust, patent, securities and trademark are in this high-conflict category for the moment, but the situation will undoubtedly change. Rules that single out such categories are doomed to mistakes. Once matters become more routine, they no longer require the services of the elite, highly expensive and highly skilled national bar. The top litigators

move on to new topics and new kinds of conflicts, or they drop out of the elite category.

In order to understand these transformations and the general phenomenon, it is not enough to focus on the federal rules, lawyer attitudes and the issues of cost and delay. It is necessary to understand better the legal services market. If there is an elite sector, as the available evidence suggests, how do particular cases reach these lawyers, and how are decisions about the investment in litigation made—by clients and by lawyers? Rather than assume that there are “abuses” that need to be regulated, it may be more fruitful to ask why highly professional, well-trained lawyers find it in their interests, and in those of their clients, to engage in what—from outside—appears to be litigation warfare. And why do their clients make the investment? It is possible that the clients are deluded, investing more than they thought would be optimal at the outset, but it is probably more likely that the sophisticated clients—or, in the case of referrals from other attorneys, peer lawyers—have good information about how to select the particular combination of lawyer and legal services. In the high-stakes world of personal injury litigation, networks of referrals probably assure that certain cases get to certain attorneys.²⁰

Similarly, if the ordinary cases seem to be handled in a more stable and less adversarial manner, how does the market produce these results? Again, it is probably not very helpful to assume that these lawyers are more ethical or professional than the others. It makes more sense to see how the lawyers in both types of cases operate in the context of their law firms and their clients. One benefit of these kinds of analyses is that it puts the economic and other incentives for behavior in clear focus. From this kind of perspective, it may be completely understandable why some lawyers—acting on behalf of their clients—turn invitations to cooperate into opportunities for conflict (and lawyer fees), while others need no invitations to cooperate to manage the case jointly in the interests of a reasonable result.

This focus also looks outside of the lawyer practices to the clients who retain them. The business settings of clients change. In some business environments, the incentive is to fight with all the tools available—“lawyers, guns and money.” In others, the incentive is to contain the conflict, manage the expenses, and find a result in a relatively short

²⁰ See Stephen Daniels & Joanne Martin, American Bar Foundation, *That's 95% of the Game, Just Getting the Case: Markets, Norms and How Texas Plaintiffs' Lawyers Get Clients* 10-26 (paper prepared for the 1997 Annual Meeting of the Law and Society Association, St. Louis, May 26-June 2, 1997) (on file with the BOSTON COLLEGE LAW REVIEW).

period of time. The federal rules, lawyer ethics and the pressure for billable hours are all factors that may be important, but we must recognize also that the client has much to say about what the lawyers do and how they do it. Clients with more sophisticated general counsel—now much more common than in the past—are also better able to understand and control their lawyers—for good or evil.

An institutional focus is also helpful in assessing the role of judges. My focus has been on the political economy of lawyers, but it also may be helpful to situate judges in a kind of market setting.²¹ For example, the FJC study found that the most favored solution to discovery problems was to increase the availability of judges or magistrates to solve discovery problems.²² There is certainly a common sense appeal to the idea that judicial or magistrate availability helps both resolve and prevent disputes, and several participants at the conference at Boston College Law School stated that their own experiences supported that idea. But obviously judges and magistrates are either not embracing this finding, or, if they are, the impact has not been felt in many of the very large and hotly contested cases. If judges complain about lawyer tactics and discovery abuse, why do they not act more aggressively to stop it?

The answer is probably found in the sets of incentives and opportunities that shape judicial behavior. There has no doubt been a major shift in the incentives that ambitious judges face. Once, their careers depended on the quality of their opinions and their olympian detachment from the proceedings. Now, judges are judged by how they process cases, and the incentive is not necessarily favorable to involvement in the details of discovery disputes. Again, however, the incentives may be changing.

One evident change is in what is considered as the paradigmatic case for the federal courts. By paradigmatic case, I mean the case that is in the minds of those who are imagining what the federal courts are supposed to do. This vision of proper cases is in the minds of judges and, as I will suggest below, also lawyers. A generation ago the paradigmatic case was the civil rights case celebrated by such writers as Abram

²¹ See generally Bryant G. Garth, *Observations on an Uncomfortable Relationship: Civil Procedure and Empirical Research*, 49 ALA. L. REV. 103 (1997).

²² See FJC Study, *supra* note 2, at 542. The FJC study, however, sought to measure objectively what difference certain judicial behavior made in time and expense, and the finding was that early management with planning saved expense, while early management without planning was more expensive. The difference was not huge, however, and might even be explained by the fact that planners tended to be more available to the lawyers for discovery disputes.

Chayes, Owen Fiss and later Judith Resnik.²³ Fiss argued that business cases did not even belong in the federal courts, since they did not require judges to elaborate legal values. Probably, the participants in discussions about the reform of the rules and the conduct of litigation in the 1970s focused on the civil rights cases and on the lawyers who handled them.

The focus has changed, as has the role of the state and business, and the paradigmatic case now appears to be the high-stakes, high-conflict business dispute or products liability case. This change—if I am right—has major implications that are not addressed at all by the literature. Instead, we find, the debates are conducted as if litigation remains the same throughout history, and that what really matters is fine-tuning the federal rules to plug loopholes. Indeed, the debate is also framed in terms of how the results can be measured in terms of time and expense. The debates would be much better informed if we had systematic information about the changes and how they have proceeded.

III. EMPIRICAL RESEARCH AND LEGAL VALUES

This kind of empirical research is important because it allows us to get a much better picture of what is happening and what is at stake in debates about reform. I will suggest a few examples in the nature of a conclusion. First, if it is true that the agenda for reform and the vision of civil litigation have changed, shifting the focus to the high-stakes, high-conflict cases at the expense of the ordinary cases, it is useful to remember who is left out of the discussion. Those who are now using the federal courts effectively with relatively few problems of discovery abuse should not be forgotten, nor should those who do not now have access to first-class justice.

It is not only a matter of who is left out of the discussion and may be hurt by "reform." It is also a matter of keeping the courts available for future changes. From a long-term perspective, it is important that the courts not be locked into the agenda and vision of litigation that is dominant at a particular time. The central position of the federal courts in the United States comes from the fact that they have been able to shift their roles to accommodate different social and economic agendas with different cases and types of conflicts. Listening only to

²³ See Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979); Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494 (1986).

the elite at any particular time will distort the reform process. Although some distortion is natural, we have to remember that the importance of the federal courts comes from avoiding the uncritical adoption of one vision—no matter how many voices seem to call for that vision.

In this respect, the adversarial nature of the debate may be quite misleading. Each side takes a strong position on behalf of their own practice and clientele, condemning the other side for discovery abuse, stonewalling, strike suits or other misconduct. The different sides fight over the rules of the game in order to better their own positions. It is tempting to think that this adversary presentation exhausts the arguments pro and con, suggesting that the solution is to find a way to bridge the voices. If both sides are in fact operating with the same paradigmatic vision of what the federal courts should be, however, the conflict may be a kind of charade. It has the effect of promoting competing reforms that only serve one vision of the federal courts. The debate itself helps to build courts that serve the interests mainly of those who are conducting the debate.

We should also be careful to remember that there is more to reform than “problems” and “solutions” framed in terms of cost and delay. I have so far emphasized that there are relatively few discovery problems in the ordinary cases, but I would rather have some deeper knowledge to back that assertion. If there is a tacit understanding not to invest too much or behave too adversarially in these cases, there may be some hidden costs from that informal system of regulation. It is probably fair to assume that the clients in these cases are able to monitor their lawyers reasonably well, but better information would tell us more about lawyers, clients and the investment in litigation.

Suppose that the high-stakes, high-conflict cases start to settle down. The costs appear more manageable and the time to resolution shortens. It would be tempting to celebrate whatever reform “produced” this felicitous result. It is possible, however, that as the elite lawyers get to know each other better, they may work out some informal rules in the interests of all attorneys and perhaps some or all of the clients. If this development means the same results as before, it would be difficult to find grounds to criticize. But if, for example, the result is that class action settlements are good for class action lawyers and contrary to the interests of class members, then the outcome is more problematic. We would like to know more about the conduct of the litigation and also what role the judges actually played.

The idea behind the research is that we cannot ascertain whether the result is fair or just—admittedly difficult terms—until we know more about the behavior of those involved in bringing the lawsuits to

a close. If we know the economic and other incentives that shape the behavior, we are less likely to be fooled by what sometimes may be nothing more than self-serving rhetoric. 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. The two important studies establish that there are two worlds of civil discovery, but research on the markets that produce those worlds is necessary to understand why we have particular problems—and why we have so much trouble inventing and imposing certain solutions.