

THE PERVASIVE MYTH OF PERVASIVE DISCOVERY ABUSE: THE SEQUEL

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As the Advisory Committee on Civil Rules ("Advisory Committee" or "Committee") once again contemplates revision to the federal civil discovery rules, it is encouraging that the Advisory Committee this time around has commissioned empirical research in advance of possible rulemaking. With that research in hand, three findings are striking in these RAND and Federal Judicial Center ("FJC") studies.

First, the constancy of the data relating to civil discovery is impressive. Second, the studies reaffirm our common sense notions about discovery—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. Third, there is at best ambiguous evidence concerning the efficacy of mandatory disclosure in courts that have voluntarily adopted the rule.

These comments briefly explore the import of the RAND and FJC data for further amendment of the federal discovery rules. As with all proposed rule revision, the Advisory Committee ought to be protective of its rule-making role, given its shared authority with Congress. Thus, prudence counsels against rule amendment unless reform is necessary to fix a problem. Rulemakers ought first to ask, "is there a problem?" If so, they ought next to ask, "can a rule amendment fix it? Will it make things better?" And—in an unanswerable conundrum—rulemakers ought to ask if it is possible to anticipate any unintended consequences of their rule reform.

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Obviously, there is a wealth of statistical information in the new RAND and FJC empirical studies, providing a kind of inkblot Rorschach-test for rule revisionists. Hence, proponents and opponents of further discovery reform will mine these studies to support whatever conclusions they wish to advance, and selective interpretation of the data will accomplish many ends. Nonetheless, these studies suggest—

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from the broadest neutral perspective—that discovery data have remained surprisingly constant over time.

As the FJC and RAND studies point out, proposals for discovery reform repeatedly have resurfaced during the last fifty years, typically impelled by anecdotal evidence and rhetorical, but highly compelling, reports of discovery abuse.¹ During this time, however, there have been few empirical studies. Some of these projects have been objective analyses of discovery events, such as those conducted by the FJC in the 1970s and 1980s,² the Civil Litigation Research Project in 1983³ and the state-based discovery study conducted by the National Center for State Courts in the early 1990s.⁴ On the other hand, more prominently reported “studies” have consisted of subjective inquiries asking lawyers and judges for their impressions of discovery practice—the Harris surveys of the late 1980s, which are little more than anecdotal evidence gussied-up in pseudo-scientific garb.⁵

At any rate, over a twenty-year span of empirical research in federal and state courts, using different databases in different local legal cultures, both before and after the Civil Justice Reform Act of 1990 (“CJRA”) and the 1993 discovery rule reforms, the essential statistics relating to discovery have remained remarkably the same.

The following statistics have remained true, no matter how much or in what manner the rulemakers have tinkered with the rules. First, there is no discovery in anywhere from 38% (RAND) to approximately 50% (FJC) of civil cases. No discovery. The RAND data here is especially interesting. For fully half of their survey cases—cases that “close” within nine months—the median time lawyers report spending on discovery is only three hours. Undoubtedly, most lawyers who work on big case litigation will find these numbers to be absolutely stupefying.

Clearly, these numbers are disorienting or disconcerting 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

¹ See generally 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 See, e.g., PAUL CONNOLLY ET AL., FEDERAL JUDICIAL CENTER, JUDICIAL CONTROLS AND THE CIVIL LITIGATION PROCESS: DISCOVERY (1978); JOSEPH L. EBERSOLE & BARLOW BURKE, FEDERAL JUDICIAL CENTER, DISCOVERY PROBLEMS IN CIVIL CASES (1980).

³ See generally David M. Trubek et al., *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72 (1983).

⁴ See generally Susan Keilitz et al., *Attorneys' Views of Civil Discovery*, JUDGES' J., Spring 1993, at 2; Susan Keilitz et al., *Is Civil Discovery in State Trial Courts Out of Control?*, STATE CT. J., Spring 1993, at 8.

⁵ See Mullenix, *supra* note 1, at 1410–15 (describing and criticizing the Harris surveys).

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.

Moreover, it is still true that, in the remaining universe of cases in which discovery occurs, there are few discovery "events." As RAND reports: "Overall, lawyer work hours per litigant on discovery . . . [are] low for the majority of cases."⁶ Also constant over time is the RAND finding, congruent with all past studies, including the FJC studies, that: "Discovery is not a pervasive litigation cost problem for the majority of cases."⁷

Also unchanging is the RAND finding, congruent with all past studies, including the FJC studies, that: "The empirical data show that any problems that may exist with discovery are concentrated in the minority of cases."⁸ And RAND further finds: "It is the minority of the cases with high discovery costs that generate[s] the anecdotal 'parade of horrors' that dominates much of the debate over discovery rules and discovery case management."⁹

Without belaboring these points, it seems legitimate then to question why the rule reformers again are considering universal discovery reform when there continues to be no universal discovery problem. For more than twenty years, in a variety of bean-counting studies conducted by different organizations, the data keep telling us that if there are problems with discovery—and *what constitutes "problematic discovery" is itself highly questionable*—this phenomenon occurs only in a small segment of the litigation landscape.

These data also suggest that perhaps scholars have been studying the wrong phenomenon; maybe more effort should be devoted to studying those cases that are resolved with little or no discovery at all. What can these attorneys teach us about resolving disputes through cooperative lawyering, or without recourse to extensive use and abuse of the discovery process?

Second, the studies reaffirm common sense notions about discovery: that complex, high stakes litigation, handled by big firms with corporate clients, are the cases most likely to involve the kind of problematic discovery that skews the discovery debate. As the FJC concludes: "Both the likelihood of problems and the total incidence

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

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

of problems increased as stakes, factual complexity, and contentiousness increased."¹⁰ It further concludes that problems in these cases were not limited to a particular procedural area, such as disclosure or document production, but occurred in most or all aspects of discovery.¹¹

The RAND study deviates somewhat, to the extent that it concludes that complex cases are more likely to consume higher median lawyer work hours—including more hours devoted to discovery—but that the overall percentage of time devoted to discovery is no different than other cases.¹² There's just more of it.¹³

What are the rulemakers to do with these findings? Just as the data have remained relatively constant, most of its interpreters consistently have counseled that targeted problems call for targeted responses. If complex litigation is the source of more problematic discovery practice, then rule reform ought to be tailored to the universe of this particular litigation that inspires complaint. But here, again, the RAND study rightly notes that existing rules already provide means for regulating, conducting and controlling discovery in complex litigation¹⁴—so the rulemakers ought to give some pause before adding yet new rules to existing rules supposedly designed to deal with complex cases.

Third, because the Advisory Committee in 1993 chose to promulgate the first "opt-out" rule of civil procedure, the Committee now is in the awkward position of having to decide whether to universalize Rule 26(a)(1) concerning mandatory disclosure. The FJC findings conclude that the initial disclosure rule is being widely used and working as intended¹⁵ and that there is a strong trend among attorneys favoring adoption of a uniform federal rule that requires initial disclosure.¹⁶ But the FJC study also reveals that more than half of the survey respondents either disfavor a mandatory initial disclosure rule or desire maintaining the status quo that now allows district courts to opt-out.¹⁷

The RAND study also is less sanguine about the efficacy of the 1993 mandatory disclosure provision. Hence, the RAND study con-

¹⁰ Thomas E. Willging et al., *Federal Judicial Ct., An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments*, 39 B.C. L. REV. 525, 532 (1998) (in this issue) [hereinafter FJC Study].

¹¹ *See id.*

¹² *See* RAND REPORT, *supra* note 6, § II(C).

¹³ *Id.*

¹⁴ *See id.* § I(G)(4).

¹⁵ *See* FJC Study, *supra* note 10, at 534.

¹⁶ *See id.*

¹⁷ *See id.* at 588.

cludes that mandatory early disclosure is not "associated with [either] significantly reduced lawyer work hours . . . [or] with significantly reduced time to disposition."¹⁸ The RAND study also has found that highly "managed" cases that are supervised through early case management under CJRA requirements paradoxically have a higher likelihood of more lawyer hours being spent on discovery.¹⁹

It should be kept in mind that the FJC and RAND projects investigated the mandatory disclosure rule as it has been developed and used in two different time periods. Thus, RAND studied the use of this procedure in federal courts under the authority of CJRA plans, beginning in 1991, while the FJC studied the use of the rule after the 1993 federal rule amendment. Nonetheless, the studies do seem to suggest ambiguous reactions to the mandatory disclosure provision, and the heated controversy that accompanied its initial proposal remained through 1997.

Thus, at this juncture, and in light of such ambiguous data concerning the initial disclosure rule, the Advisory Committee probably should do that which is hardest to do: nothing. Because, however, the Advisory Committee is loath to leave the federal judiciary with a patchwork of early disclosure provisions, it seems highly likely that the Committee will proceed with promulgating some version of a universal disclosure provision.

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In assessing these empirical studies, it seems equally important to comment on what was not studied and who was not surveyed. Although it is important to go forward with reform proposals against a backdrop of factual information, it seems equally important not to go forward with rule reform when the empiricists have studied one phenomenon²⁰ but the Advisory Committee is considering completely different rule revisions.²¹

¹⁸ RAND REPORT, *supra* note 6, § II(C)(1)-(2).

¹⁹ See *id.* § II(B)(1).

²⁰ I make the following comments guardedly—and not critically of either the FJC nor the RAND Institute. I understand that the Advisory Committee gave both organizations specific directions concerning the nature and scope of their tasks in this project, and both have performed exemplary work using their access to very large databases. Both were asked to assess the effects either of the CJRA and/or 1993 discovery rule changes on practice in the federal courts. Specifically, they were not asked to ascertain views on possible, additional new proposed rule amendments.

²¹ For example, the various proposals to change the definition of the scope of discovery.

Thus, the 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."²² Moreover, the academicians, critics and rulemakers also have failed to identify the sources of these problems that have not been defined. As RAND quite accurately notes: "Understanding the source of the problems is important because without such an understanding reformers run the risk that the fixes they choose will be ineffective."²³

Additionally, these empirical studies have failed to investigate the need for proposed rule reforms that have been circulated among Advisory Committee members and interested participants since last year and are now on the Committee's agenda.²⁴ In recent years there have been several calls for the Advisory Committee to conduct empirical research prior to consideration and promulgation of rule revisions.²⁵

Thus, it is rather ironic that the Advisory Committee has now conducted empirical studies after-the-fact of their 1993 rule reform to assess the impact of the implemented rule changes (such as Rule 26(a)(1)) but did not do so prior to promulgating the rule revisions. And, the Advisory Committee now seems poised on the verge of repeating this history.

These studies also did not investigate, or chose not to investigate, the central theoretical attack against the early mandatory disclosure requirements. That challenge was based on the prediction that the mandatory disclosure requirements would compromise the adversarial litigation process, compromise the attorney-client relationship, impair the attorney-client privilege, impair the attorney work product and subvert the attorney's duty of zealous representation.²⁶

²² RAND REPORT, *supra* note 6, § I(H) (citing to numerous examples of this failure).

²³ *Id.*

²⁴ See Memorandum from Richard L. Marcus, Special Reporter, Discovery Subcommittee to Participants in Conference on Discovery of the Advisory Committee on the Civil Rules (June 2, 1997) (describing proposals for changing discovery rules, such as narrowing the scope of discovery, reducing the burden of document discovery, etc.) (on file with the *Boston College Law Review*).

²⁵ See generally, e.g., Mullenix, *supra* note 1; Laurens Walker, *Perfecting Federal Civil Rules: A Proposal for Restricted Field Experiments*, LAW & CONTEMP. PROBS., Summer 1988, at 67.

²⁶ See generally, Griffin B. Bell et al., *Automatic Disclosure in Discovery—The Rush To Reform*, 27 GA. L. REV. 1 (1992). Cf. Linda S. Mullenix, *Adversarial Justice, Professional Responsibility, and the New Federal Discovery Rules*, 14 REV. LITIG. 13 (1994).

In light of the centrality of that challenge to our underlying jurisprudence of pleading and discovery, it might have been useful to learn whether the recently promulgated discovery reforms have indeed affected the way in which lawyers conduct their practices.

CONCLUSION

It is difficult to get excited about rule reform when the data suggest that the best prudential course is to do nothing. Inevitably, however, the Advisory Committee will proceed with another round of discovery reform, for at least two reasons.

First, the Advisory Committee precipitated a dilemma of its own making (i.e., the Committee shot itself in the proverbial foot) when it created the first-ever opt-out federal rule in 1993. Having thus balkanized procedure, the Advisory Committee now feels compelled to fix the Rule 26(a)(1) opt-out rule in the interests of preserving the primary value underlying the civil procedure rules: federal uniformity.

And, having precipitated its own crisis of disuniformity, the Committee thereby engendered the problem of determining the content of the uniform rule. Hence, the original combatants in the discovery wars will now replay the same debate surrounding the mandatory disclosure provisions. Ironically, both sides will deploy this new after-the-fact empirical data to support and attack the efficacy of Rule 26(a)(1). The combatants will fight to a draw, and the Advisory Committee will universalize Rule 26(a)(1).

Finally, the 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. Max Weber probably said that, someplace.