

DISCOVERY CONTAINMENT REDUX

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Here we go again. In a sense, this century's efforts at procedural reform can be traced to Roscoe Pound's famous speech about popular dissatisfaction with the administration of justice at the 1906 American Bar Association convention in St. Paul.¹ But broad discovery was missing from Pound's world, and today's push toward discovery containment can be more properly traced to the 1976 Pound Conference convened to commemorate and reflect on the 70th anniversary of the original speech.² That conference did deal significantly with discovery problems, and since 1976, proposals for amendment to the rules have generally involved retreats from the broadest concept of discovery—in essence to try to contain the genie of broad discovery without killing it.

Those who would carry these efforts forward need to know about the work of the last twenty years. Accordingly, this Article chronicles that recent history.³ It is based on published materials and the files of the Advisory Committee on the Civil Rules (the "Committee"). Although one could presumably exhume more detail about this history, these sources should suffice for present purposes. To set the scene, this

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¹ See Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 REP. OF THE A.B.A. 395 (1906). Dean Wigmore recalled 20 years later that the speech "struck the spark that kindled the white flame of high endeavor, now spreading through the entire legal profession . . ." John H. Wigmore, *Roscoe Pound's St. Paul Address of 1906*, 20 J. AM. JUD. SOC. 176, 176 (1936). In his address at the 1976 Pound Conference, Chief Justice Burger called Pound's speech "the first truly comprehensive, critical analysis of American justice." Chief Justice Warren E. Burger, Agenda for 2000 A.D.—A Need for Systemic Anticipation, Keynote Address at the 1976 Pound Conference (Apr. 9, 1976), in 70 F.R.D. 83, 83 (1976). For a catalogue of Pound's contributions in the general area, see Austin W. Scott, *Pound's Influence on Civil Procedure*, 78 HARV. L. REV. 1568 (1965).

² This conference was sponsored by the Judicial Conference of the United States, the Conference of Chief Justices and the American Bar Association. See generally Addresses Delivered at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (Apr. 7-9, 1976) in, 70 F.R.D. 79-246 (1976).

³ For another such survey of the amendment activity of the 1970s and 1980s, see Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 428, 453-63 (1991).

Article begins with a description of the way things were twenty years ago and then examines the two major rounds of discovery containment that have already occurred. Reflecting on these two rounds, it also offers some insights that may be pertinent to the third round that lies before us.

I. THE WAY THINGS WERE

In a sense, the 1970 amendments to the rules completed what one could call a cultural cycle in American procedural reform, a cycle that could be traced back to Pound (and before him to Field),⁴ and which was characterized by increased relaxation and expansion of procedure. This generalization overlooks many counter-tendencies, and after the highwater mark in 1970 those competing tendencies became ascendent. But before turning to them it is useful to sketch the landscape.

Much as the Federal Rules of Civil Procedure broke new ground in allowing broad discovery, they did not, as adopted in 1938, make it entirely open. Document discovery, in particular, was until 1946 subject to a narrow scope permitting discovery of documents "which constitute or contain evidence material to any matter involved in the action," and until 1970 available only on motion based on a showing of "good cause."⁵ More generally, the rules provided separately for the different discovery devices rather than combining coverage of general provisions concerning relevancy and the like.⁶

In 1963, the Advisory Committee began what it described as "the first comprehensive review of the discovery rules undertaken since 1938."⁷ The work produced a draft set of proposed amendments four years later. During that time, the Project for Effective Justice of Columbia Law School conducted an extensive field survey of discovery (the "Columbia Survey")⁸ that led the Committee to conclude that "there is no empirical evidence to warrant a fundamental change in the philosophy of the discovery rules."⁹ Accordingly, the 1970 amendments rearranged the rules and, to some extent, expanded their availability,

⁴ See Stephen Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691, 709 (1998).

⁵ 8A CHARLES A. WRIGHT ET AL., *FEDERAL PRACTICE & PROCEDURE* § 2201 (2d ed. 1994) [hereinafter *FEDERAL PRACTICE & PROCEDURE*].

⁶ See generally 8 *id.* § 2003.

⁷ Advisory Committee's Explanatory Statement Concerning Amendments of the Discovery Rules, in *Proposed Amendments to the Federal Rules of Civil Procedure Relating to Discovery*, 48 F.R.D. 487 app. at 487 (1970) [hereinafter *Advisory Committee*].

⁸ For a report of the results of the Columbia Survey, see WILLIAM A. GLASER, *PRETRIAL DISCOVERY AND THE ADVERSARY SYSTEM* (1968).

⁹ Advisory Committee, *supra* note 7, at 489.

including elimination of the requirement for a motion to obtain document production and of the "good cause" standard for production of documents.¹⁰ It also made other changes generally relaxing the operation of the discovery rules.¹¹

Party-controlled discovery reached its high-water mark in the 1970 amendments in terms of rule provisions. As the Columbia Survey had demonstrated, "[d]iscovery has become an integral part of litigation."¹² It might even be argued that broad discovery put pressure on the substantive law to expand as well. Thus Dean Friedenthal contended as follows in 1981:

[O]ver the years developments in areas such as products liability, employment discrimination, and consumer protection have been the result at least partly of broad-ranging discovery provisions. For example, lawyers would not have pushed in the courts and in the legislatures for expanded causes of action hinged on proof that defendants knew or should have known of a product's danger, if such proof were normally unavailable. The ability of plaintiffs' attorneys to obtain a corporate defendant's records, to depose corporate employees, and to send searching interrogatories has had a substantial impact in particular areas of law, and is one important factor in the dramatic increase in cases filed.¹³

It seems undeniable that broad discovery has benefitted plaintiffs attempting to prove certain types of claims by enabling them to obtain both "smoking guns" and less inflammatory but critical evidence.¹⁴ The great importance of discovery to some plaintiffs is obvious. Incidents

¹⁰ See *id.* at 526 (describing one "major change" of amendments as "to eliminate the requirement of good cause").

¹¹ The Advisory Committee's introduction to this package of amendments also identified the following changes: (1) making insurance policies discoverable and thereby resolving a pre-existing dispute about the question; (2) providing by rule for the handling of work product and expert information; (3) allowing interrogatories and requests for admissions to seek matters of opinion; (4) directing that answers and objections be served together; (5) putting the burden on the party seeking discovery rather than the objector to seek court intervention; and (6) tightening sanctions. See *id.* at 487-88. See generally 8 *FEDERAL PRACTICE & PROCEDURE*, *supra* note 5, § 2003.1.

For an attack on the "radical changes" made by the 1970 amendments, see George M. Vetter, *Changes Ahead in the Federal Rules*, 56 A.B.A. J. 568 (1970). Among other things, Vetter observes that "[w]ith the good cause requirement of Rule 34 gone, practically everything becomes discoverable." *Id.* at 571.

¹² GLASER, *supra* note 8, at 51.

¹³ Jack H. Friedenthal, *A Divided Supreme Court Adopts Discovery Amendments to the Federal Rules of Civil Procedure*, 69 CAL. L. REV. 806, 818 (1981).

¹⁴ See, e.g., MICHAEL D. GREEN, BENEDICTIN AND BIRTH DEFECTS: THE CHALLENGES OF MASS TOXIC SUBSTANCES LITIGATION 15 (1996). Professor Green explains that plaintiffs' attorneys in product liability cases rely on "civil discovery . . . [as] their best hope of obtaining information

involving efforts to purge corporate files to remove potentially harmful evidence provide further support for the conclusion that discovery unearths such evidence.¹⁵ One of the striking things about American discovery is that parties often do reveal damaging information, and the importance of that discovered material in litigation cannot be overstated. It would be wrong, however, to believe that discovery only benefits plaintiffs. To the contrary, the Columbia Survey concluded that "[d]iscovery is less profitable for plaintiffs than defendants,"¹⁶ although that conclusion seemed to be geared to garden-variety cases.¹⁷

Courts have come to recognize the centrality of broad discovery in providing evidentiary support for certain kinds of cases. As the Second Circuit stated in holding that a district judge improperly denied a plaintiff discovery:

Because employers rarely leave a paper trail—or "smoking gun"—attesting to a discriminatory intent, disparate treatment plaintiffs often must build their cases from pieces of circumstantial evidence which cumulatively undercut the credibility of the various explanations offered by the employer.¹⁸

Indeed, on one level one could say that certain types of discrimination claims are only possible with such discovery. As the Fifth Circuit put it in 1973:

Our wide experience with cases involving racial discrimination in education, employment, and other segments of society have led us to rely heavily in Title VII cases on the empirical data which show an employer's overall pattern of conduct in determining whether he has discriminated against particular individuals or a class as a whole.¹⁹

that would reveal whether their clients had meritorious claims and, if so, provide the evidence to enable their clients to prevail." *Id.* Professor Green illustrates: "In asbestos litigation, plaintiffs' lawyers obtained more and more memoranda, correspondence, scientific studies, and testimony of industry officials that demonstrated the industry's awareness of the hazards of asbestos and their acts to suppress that information." *Id.*

¹⁵ See, e.g., *Carlucci v. Piper Aircraft Corp.*, 102 F.R.D. 472, 481 (S.D. Fla. 1984), *aff'd in part, rev'd in part*, 775 F.2d 1440 (11th Cir. 1985) (purge of files for the stated purpose of eliminating documents that would be detrimental to Piper in a lawsuit).

¹⁶ GLASER, *supra* note 8, at 90.

¹⁷ See *id.* at 85 (reporting that the advantages of discovery for defendants were most pronounced in auto tort cases, where the plaintiff knows the basic facts).

¹⁸ *Hollander v. American Cyanamid Co.*, 895 F.2d 80, 84-85 (2d Cir. 1990) (citation omitted) (holding that the district court in an age discrimination action improperly refused to require the employer to disclose the name of every person over 40 terminated during a six-year period).

¹⁹ *Burns v. Thiokol Chem. Corp.*, 489 F.2d 300, 305 (5th Cir. 1973); see also *Sweat v. Miller*

Whether broad discovery has had considerable impact on the content of substantive law is debatable. Employment discrimination cases provide some support for finding such an impact, for the Supreme Court has twice invoked the existence of broad discovery as pertinent to its handling of substantive issues of employment discrimination law. In 1989, it held that plaintiffs must demonstrate that challenged employment practices actually caused racial imbalances in the workplace.²⁰ It rejected arguments that this was unfair by pointing to discovery: "Some will complain that this specific causation requirement is unduly burdensome on Title VII plaintiffs. But liberal civil discovery rules give plaintiffs broad access to employers' records in an effort to document their claims."²¹ Similarly, when the Supreme Court placed on the employee the burden of rebutting the employer's nondiscriminatory justification, it observed that its ruling would not "unduly hinder the plaintiff," invoking "the liberal discovery rules applicable to any civil suit in federal court."²² Thus, the very structure of employment discrimination law seems to have been founded partly on the availability of broad discovery.

Making a similar claim for other areas of law is both problematic and beyond the scope of this Article. Certainly it could be that common law breakthroughs occur because parties obtain evidence through discovery that moves judges to modify the law in their favor—a variant of the old saw about hard cases making bad law. But in at least one important area mentioned by Dean Friedenthal, it is not clear that this sort of evolution has occurred. Much as discovery may be crucial for product liability plaintiffs to prove their cases, it does not seem to have had an important influence on the evolution of that law. To the contrary, modern doctrine seems ordinarily to be the work of judges dealing with abstract legal issues little dependent on broad discovery.²³

Brewing Co., 708 F.2d 655, 658 (11th Cir. 1983) ("Statistical information concerning an employer's general policy and practice concerning minority employment may be relevant to a showing of pretext, even in a case alleging an individual instance of discrimination rather than a 'pattern and practice' of discrimination . . ."); *Lineen v. Metcalf & Eddy, Inc.*, No. 96 Civ. 2718(HB)(MHD) 1997 WL 73763, at *2 (S.D.N.Y. Feb. 21, 1997) ("discovery may be important to develop data reflecting the intent behind the defendant's employment decisions and suggesting whether the defendant's justification for its challenged actions is pretextual").

²⁰ See *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 657–58 (1989). In the Civil Rights Act of 1991, Congress arguably codified this feature of *Wards Cove*, but there is debate on the impact of the statutory provision. See 42 U.S.C. § 2000e-2(k)(1)(A)(i) (1994).

²¹ *Wards Cove*, 490 U.S. at 657. The Court added that employers are required to maintain records that would provide the sort of information needed to prove causation. See *id.* at 657–58.

²² *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 258 (1981). The Court also pointed out that the claimant would have access to the investigative file compiled by the Equal Employment Opportunity Commission. See *id.*

²³ For example, in *Henningsen v. Bloomfield Motors, Inc.*, the court said that "[t]he facts are

More significantly, the adoption of section 402A of the Restatement of Torts, which prompted much further legal development facilitating plaintiffs' claims,²⁴ hardly turned on the fruit of discovery; some view it as the work of a cabal of law professors.²⁵

Besides substantive impact, however, it is important also to mention that broad discovery has assumed a prominent role in facilitating trial preparation. As reflected in the 1993 addition of Rule 26(a)(3), many districts require that parties provide detailed information about trial exhibits and witnesses through the final pretrial process. The handling of the trial itself thus assumes considerable pretrial familiarity with the evidence. Indeed, the discovery rules did not on their face take account of the assumptions about discovery underlying the handling of trials until 1993, when Rule 26(b)(4) was amended to authorize depositions of expert witnesses as a matter of right. The Federal Rules of Evidence, however, had long allowed an expert witness to state a conclusion without providing its factual predicate on the assumption that full discovery could be had before trial.²⁶

Much as discovery had thus become central to American litigation, it is equally clear that very broad opposition to the liberality of discovery grew in the early 1970s. Many complained that the rule amendments of the 1960s created procedural tools that eclipsed, or even subverted, the substantive law.²⁷ Furious attacks were levelled at class actions in the wake of the 1966 amendment, as Professor Arthur Miller has chronicled.²⁸ But the breadth of activity concerning discovery, starting with the Pound Conference, is even more striking. That conference led directly to the creation of a Special Committee on

not complicated" in holding that a disclaimer in small print did not overcome an implied warranty. 161 A.2d 69, 73 (N.J. 1960). Similarly, in *Greenman v. Yuba Power Prod., Inc.*, the court upheld strict liability in a case in which plaintiff's proof of a defect seemed to have come from expert witnesses and not to have relied on discovery. 377 P.2d 897, 899 (Cal. 1963).

²⁴ In the words of one leading torts casebook, "[s]ection 402A has literally swept the country." WILLIAM L. PROSSER ET AL., *CASES AND MATERIALS ON TORTS* 718 (8th ed. 1988).

²⁵ See George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461, 464-65 (1985).

²⁶ See FED. R. EVID. 705 (stating that the hypothetical question is no longer necessary). The Advisory Committee Note explains that this provision "assumes the cross-examiner has the advance knowledge which is essential for effective cross-examination" through discovery. FED. R. EVID. 705 advisory committee's note.

²⁷ See, e.g., Stephen Berry, *Ending Substance's Indenture to Procedure: The Imperative for Comprehensive Revision of the Class Damage Action*, 80 COLUM. L. REV. 299, 300 (1980); Milton Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits: The Twenty-Third Annual Antitrust Review*, 71 COLUM. L. REV. 1, 4-5 (1971).

²⁸ See Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem,"* 92 HARV. L. REV. 664 (1979).

Discovery by the American Bar Association ("ABA") Section of Litigation, as explained in the next section. It was also followed by the creation of several other groups as well, including: the Discovery Abuse Committee of the National Conference of Special Court Judges, the Ninth Circuit Judicial Conference Ad Hoc Civil Discovery Committee, a Special Advisory Committee on Discovery of the Conference of Metropolitan Chief Judges and the Arizona State University Discovery Conference. In addition, in creating the National Commission on Revision of the Antitrust Laws, President Carter directed it to consider "revision of discovery practices in order to limit expensive and time-consuming inquiry into areas not germane to contested issues."²⁹ Both the Second Circuit and the Eighth Circuit devoted all or part of the programs at their respective judicial conferences to litigation cost and discovery in 1976 and 1977.³⁰ Finally, in 1982 there was a National Conference on Discovery Reform sponsored by the ABA Section of Litigation.³¹ Such pervasive concern about discovery abuse is striking from twenty years' remove, and was sufficient to fuel two rounds of rule changes designed to contain discovery.

II. THE FIRST ROUND OF DISCOVERY CONTAINMENT: THE WAKE OF THE POUND CONFERENCE

Barely a month after the Pound Conference, the Advisory Committee received a report on the Conference emphasizing concerns about discovery and the Chief Justice's assurance that the Committee would hold hearings on "any proposals the legal profession considers appropriate."³² The conferees themselves formed a Follow-Up Task Force to carry forward the work,³³ and the Task Force recommended that the ABA Section of Litigation accord discovery a high priority.³⁴ The Section of Litigation in turn formed a Special Committee on

²⁹ Exec. Order No. 12,022, 42 Fed. Reg. 61,441 § 2(1)(iii) (1977).

³⁰ These are mentioned in a letter from Hon. Walter Mansfield, Chair, Advisory Committee on Civil Rules to John P. Frank, Lewis and Roca 2 (June 29, 1978) (on file with author).

³¹ See *Proceedings of the National Conference on Discovery Reform*, 3 REV. LITIG. 1-221.

³² Agenda for the Meeting of the Advisory Committee on Civil Rules (May 17, 1976) (on file with author). Item 2 on the agenda was a report on the Pound Conference. See *id.*

³³ The members of the Task Force were Hon. Griffin B. Bell, Chairman, Hon. William H. Erickson, Jane L. Frank, Francis R. Kirkham, Hon. Wade H. McCree, Prof. Maurice Rosenberg and Hon. Walter V. Schaefer. See *Report of the Pound Conference Follow-up Task Force*, 74 F.R.D. 159, 164 (1976) [hereinafter *Report of the Pound Conference Task Force*].

³⁴ See William H. Erickson, *The Pound Conference Recommendations: A Blueprint for the Judicial System in the Twenty-First Century*, 76 F.R.D. 277, 288 (1977); *Report of the Pound Conference Task Force*, *supra* note 33, at 171.

Abuse of Discovery³⁵ (hereinafter the "ABA Special Committee") to study the problems and report back its recommendations.

The ABA Special Committee embarked on a review of the Federal Rules of Civil Procedure in August 1976,³⁶ and by April 1977, it had presented its tentative recommendations to the Conference of Metropolitan Chief Judges.³⁷ As eventually issued by the Special Committee and officially approved by the ABA Board of Governors in December 1977, the proposals had three main ingredients: (1) narrowing the scope of discovery to material "relevant to the issues raised by the claims or defenses of any party"³⁸; (2) providing that after "joinder of issue" the court should hold a discovery conference if requested by any party³⁹; and (3) limiting interrogatories to thirty.⁴⁰ As later explained

³⁵ The members of the Committee were Joseph A. Ball, Chair, Barbara A. Babcock, Hon. Fred M. Winner, Hon. Warren J. Ferguson, W. Robert Brown, Richard C. Casey, Philip H. Corboy, Morton R. Galane, Peter Gruenberger, Robert F. Hanley, Weyman I. Lundquist, William J. Manning, George B. Mickum III, Edward W. Mullenix, Ronald L. Olson, Louis Paisley, Walter A. Steele, John A. Tomlinson, and Steven M. Umin. See Special Committee on Abuse of Discovery, *Report to the Bench and Bar*, 92 F.R.D. 137 app. at 153-54 (1977).

³⁶ As explained in its *Report to the Bench and Bar*, the Special Committee decided: to consider only revisions to the Federal Rules of Civil Procedure. While the Pound Conference Follow-Up Task Force Report did not confine its criticism of discovery practice to the federal court system, the Committee felt that if it were able to undertake successfully a revision of the Federal Rules of Civil Procedure, it would have created a model from which further efforts could be directed to state rules. *Id.* at 152-53.

³⁷ Thus, the Advisory Committee files contain drafts of the proposals eventually offered by the Special Committee to narrow the scope of discovery and add provisions for a discovery conference called by a party. See Letter from William E. Foley, Secretary, to Hon. Elbert P. Tuttle, United States Senior Circuit Judge (Apr. 21, 1977) (on file with author) (relaying "proposals for changes in the Federal Rules of Civil Procedure submitted by lawyers making a presentation on the abuses of discovery to the Conference of Metropolitan Chief District Judges meeting at Carmel, California on April 18 and 19").

³⁸ Specifically, the Special Committee recommended that Rule 26(b)(1) be amended 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 issues raised by the claim or defense~~ claims or defenses of the any party, seeking discovery or to the claim or defense of any other party, including The discovery may include 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; and the oral testimony of witnesses. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

92 F.R.D. at 157.

³⁹ See *id.* at 159.

⁴⁰ See *id.* at 173. The Special Committee also proposed other changes. See *id.* at 165-66 (amending Rule 30 to allow non-stenographic recording of depositions); *id.* at 177 (amending Rule 34 to require that a party producing documents do so either as kept in the usual course of

by the Chair of the Section of Litigation, who was also a member of the ABA Special Committee, that Committee viewed these three as the key ingredients to its proposal.⁴¹

In November 1977, Attorney General Bell, who had been the Chair of the Pound Conference Follow-Up Task Force, wrote that these proposals were "a welcome response," and added that "I am particularly pleased with the proposed change to Rule 26 which narrows the scope of discovery to the 'issues raised.'"⁴² In addition, the Attorney General directed the Department of Justice's Office for Improvements in the Administration of Justice to "undertake a careful review of the entire discovery process with a view toward determining whether additional changes should be accomplished."⁴³ In early January 1978, Assistant Attorney General Daniel Meador, head of that office, wrote to Judge Tuttle, Chair of the Advisory Committee, to update the judge on review of the ABA Special Committee proposals at the Department of Justice and relay his views that the Department was "pleased that the committee is moving ahead to consider the salutary proposals" and to express the "hope that every effort will be made to expedite consideration and adoption of changes along these lines."⁴⁴ Mr. Meador also enclosed a memorandum from his staff outlining ideas that the Advisory Committee might consider.⁴⁵

business, or labeled to correspond with the requests); *id.* at 178-79 (amending Rule 37 to authorize sanctions for unjustified discovery).

⁴¹ See Prepared Statement of William J. Manning on Behalf of the Section of Litigation of the American Bar Association, attached to Letter from William J. Manning, Special Committee Member and Chair, ABA Section of Litigation, to Hon. Walter R. Mansfield, Second Circuit United States Court of Appeals 3 (Sept. 22, 1978) (on file with author).

⁴² Letter from Griffin Bell, United States Attorney General, to William J. Manning, Chair, ABA Section of Litigation 1 (Nov. 4, 1977) (on file with author).

⁴³ *Id.* at 2.

⁴⁴ Letter from Daniel J. Meador, Assistant United States Attorney General, to Hon. Elbert P. Tuttle, Chair, Advisory Committee on Civil Rules 1 (Jan. 6, 1978) (on file with author).

⁴⁵ Mr. Meador emphasized that the memorandum did not represent the formal position of the Department. See *id.* It suggested further measures, including: (1) allowing the judge to call a discovery conference, or providing by local rule that such a conference be held in each case; (2) forbidding discovery until a responsive pleading is filed or a conference with the court is held; and (3) strengthening supplementation requirements. See United States Dep't of Justice, Office of Improvements in the Admin. of Justice, Comments on Proposed Discovery Rules Changes Promulgated by the ABA's Section of Litigation in December 1977 (Jan. 6, 1978), attached to Letter from Daniel J. Meador to Hon. Elbert P. Tuttle, *supra* note 44.

A. *The 1980 Amendments—Flirting with Changing the Scope of Discovery*

Against this background, the Advisory Committee met in January 1978 and moved rapidly toward implementing all three of the ABA Special Committee's central recommendations. From the outset, the Reporter, Professor Bernard Ward, opposed the revision of the scope of discovery.⁴⁶ At a minimum, he cautioned that attempting to limit discovery to "issues" would be undesirable, and he proposed instead that if the Committee went forward with narrowing the scope of discovery it should do so in terms of claims or defenses.⁴⁷ Neither did the Reporter favor a numerical limitation on interrogatories.⁴⁸ He did, however, favor the addition of the discovery conference, with the hope that its use would be restricted to complex cases.⁴⁹

The members of the Advisory Committee debated the choice between Professor Ward's language on the scope of discovery and the ABA Special Committee's version, eventually voting to propose Professor Ward's version.⁵⁰ The Committee also decided to proceed with the discovery conference. After much debate, however, the Committee decided not to adopt a national limit on the number of interrogatories and chose instead to propose that any district court could by a majority vote limit the number of interrogatories.⁵¹

The resulting Preliminary Draft of proposed amendments⁵² invited "the responses of the bench and bar to the points of disagreement

⁴⁶ In his pre-meeting memorandum to the members of the Committee, Ward concluded that "the change is unwise" and that it would lead to "endless wrangling." Memorandum from Bernard Ward, Advisory Committee Reporter, to the Advisory Committee on Civil Rules Agenda Item One 3 (Jan. 12-13, 1978) (on file with author). At the meeting, he said the change "is purely psychological and does not change anything." Minutes of the Jan. 12, 1978 Meeting of the Advisory Committee on the Civil Rules 3 (Jan. 12, 1978) (on file with author) [hereinafter Minutes of Jan. 12, 1978 Meeting].

⁴⁷ "I do not favor such a change. I simply prefer it to the term 'issues.'" Memorandum from Bernard Ward to Advisory Committee on Civil Rules, *supra* note 46, at 4.

⁴⁸ See *id.* at 21-22.

⁴⁹ See Minutes of Jan. 12, 1978 Meeting, *supra* note 46, at 6.

⁵⁰ See *id.* at 3-5.

⁵¹ See *id.* at 13-15.

⁵² See Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, 77 F.R.D. 613 (1978). The Advisory Committee notes cited the ABA Special Committee report and stated that "[t]he Advisory Committee is deeply grateful for the work of the Section of Litigation, and several of the changes it proposed are incorporated in the proposed amendments." *Id.* at 626.

between it and the Section of Litigation."⁵³ The Committee was notably agnostic regarding its proposal for narrowing the scope of discovery:⁵⁴

The Committee doubts that replacing one very general term with another equally general one will prevent abuse occasioned by the generality of language. Further, it fears that the introduction of a new term in the place of a familiar one will invite unnecessary litigation over the significance of the change. As the [ABA Special Committee] Report notes, "Determining when discovery spills beyond 'issues' and into 'subject matter' will not be easy. Nevertheless, the Committee recommends the change if only to direct courts not to continue the present practice of erring on the side of expansive discovery."

If the term "subject matter" does in fact persuade courts to err "on the side of expansive discovery," it should be eliminated, and that is the course recommended by the Committee.⁵⁵

Besides proposing a new Rule 26(f) containing the ABA Special Committee's recommendation on the discovery conference and authorizing districts to limit the number of interrogatories, the draft also included other recommendations made by the ABA Special Committee, including videotaping of depositions⁵⁶ and the addition of a provision to Rule 37 that would authorize sanctions against parties who make unreasonable discovery requests.⁵⁷

⁵³ *Id.* at 627.

⁵⁴ As proposed by the Advisory Committee in 1978, Rule 26(b)(1) would be amended 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. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Id. at 623-24.

⁵⁵ *Id.* at 627-28.

⁵⁶ See *id.* at 631-32.

⁵⁷ See Preliminary Draft of Proposed Amendments to Federal Rules of Civil Procedure, *supra* note 52, at 652-53.

Eventually there were numerous responses to the Advisory Committee's invitation for comment.⁵⁸ Professor Charles Alan Wright questioned whether there was any need for narrowing the scope of discovery, saying that "[n]either the Section [of Litigation] nor the Advisory Committee offers a scintilla of proof that the term 'subject matter' does in fact persuade courts to err on the side of expansion of discovery."⁵⁹ John Frank wrote that he agreed with Professor Wright about the change in the scope of discovery, adding that he had questioned many lawyers but could find none who felt that the rewording of the scope of discovery would make any difference.⁶⁰ The Arizona State University Discovery Conference later reported that the luminaries⁶¹ assembled by Mr. Frank and Judge Schroeder to discuss the proposal voted against it.⁶² On the other hand, the Attorney General criticized the Advisory Committee for not going far enough in restricting discovery.⁶³ Others divided on the central proposal regarding scope of discovery.⁶⁴ As

⁵⁸ At the initial meeting to discuss the Special Committee's proposals, in January 1978, Judge Tuttle began the discussion by announcing that any recommended changes would be circulated to the bench and bar promptly enough to be reviewed in light of the comments received by the anticipated June meeting of the Committee. See Minutes of Jan. 12, 1978 Meeting, *supra* note 46, at 1-2.

There was much chafing over the brief time the Committee allowed for comment. For example, Professor Charles Alan Wright expressed surprise that the time for comment was so brief, noting that he had received the proposals only a week before and that the Committee's deadline allowed "far too short a period to obtain responsible reaction from the profession." Letter from Charles Alan Wright, Professor, University of Texas at Austin School of Law, to Committee on Rules of Practice and Procedure 1 (May 5, 1978) (on file with author). John Frank and Judge Mary Schroeder asked for more time to comment so that the Ad Hoc Committee on Discovery Reform (later the Arizona State Discovery Conference) could prepare input. See Memorandum from John P. Frank and Hon. Mary Schroeder to the Ad Hoc Committee on Discovery 1 (May 26, 1978) (on file with author).

Eventually the Committee decided to extend the comment period and also to hold hearings, evidently the first time it had held hearings on proposed rule amendments.

⁵⁹ Letter from Charles Alan Wright to Committee on Rules of Practice and Procedure, *supra* note 58, at 4.

⁶⁰ See Letter from John P. Frank, Lewis and Roca, to Committee on Rules of Practice and Procedure 1 (May 8, 1978) (on file with author).

⁶¹ The participants were Peter Anderson, Joseph Ball, Hugo Black, Jr., Dean Paul Carrington, Richard Chernick, Professor Edward Cooper, Albert Jenner, Hon. Frank Kaufman, Samuel Langerman, Robert Mills, Edward Mullinix, Robert Murphy, Professor Maurice Rosenberg, Hon. Alvin Rubin and Kenneth Sherk. See Arizona State Univ. Discovery Conference, Report on the Advisory Committee's Proposed Revision of the Rules of Civil Procedure 3-4 (Nov. 1978) (on file with author).

⁶² See *id.* at 9-12. According to the report, the eventual vote was 10 to 6 against the proposal. See *id.* at 10. There was also a discussion of deleting the last sentence of Rule 26(b), which "was rejected by an almost unanimous vote." *Id.*

⁶³ See Letter from Griffin B. Bell, United States Attorney General, to Hon. Roszel Thomsen, Chair, Committee on Rules of Practice and Procedure of the Judicial Conference of the United States 1 (June 27, 1978) (on file with author).

⁶⁴ See, e.g., Arizona State Univ. Discovery Conference, *supra* note 61, at 9-12 (opposing

tabulated by Judge Mansfield, Chair of the Committee, forty individuals and five bar groups opposed any change, five individuals or groups approved of the Committee's tentative draft, and eight individuals or groups endorsed the ABA Special Committee's proposal.⁶⁵ Professor Wright concluded that he empathized with the Committee's position:

I recognize the difficult position that the Civil Rules Committee and its distinguished Chairman and Reporter were in. The ABA Section had come up with a series of ill-considered proposals. Before the ink was dry on these they had the endorsement of the Chief Justice and the Attorney General. The Committee must have felt under great pressure to take prompt action in these respects. It has minimized, so far as it felt able, the damage that the Section's proposals would have caused, but even so it has given us hasty solutions to what may or may not be problems.⁶⁶

In January 1979, having received this input, the Advisory Committee decided to withdraw its proposal to narrow the scope of discovery and its proposal to authorize districts to limit the number of interrogatories, and in their place it circulated a more modest set of proposals for further comment.⁶⁷ In its comments, it explained that it "believes that abuse of discovery, while very serious in certain cases, is not so general as to require such basic changes."⁶⁸ In February 1979, the ABA Special Committee issued a long memorandum supporting its original

change in Rule 26(b)(1)); Committee on Fed. Courts of the Ass'n of the Bar of the City of N.Y., Report on Proposed Amendments to the Federal Rules of Civil Procedure 2-3 (Oct. 12, 1978) (on file with author) (favoring Advisory Committee version over ABA Special Committee proposal); Discovery Abuse Comm. of Nat'l Conference of Special Court Judges and the Liaison Comm. of the Nat'l Council of U.S. Magistrates, Comments on the Preliminary Draft of the Proposed Amendments to the Federal Rules of Civil Procedure 3 (June 27, 1978) (on file with author) (preferring reference to "issues" rather than "claim or defense"); Ninth Circuit Ad Hoc Civil Discovery Comm., Report of Ninth Circuit Ad Hoc Civil Discovery Committee, Ninth Circuit Judicial Conference, 9-10 (June 1978) (on file with author) (favoring ABA Special Committee's focus on "issues"); *Report to the President and Attorney General of the National Commission for the Review of the Antitrust Laws and Procedures*, 80 F.R.D. 509, 547-48 (1979) (favoring narrowed scope of discovery).

⁶⁵ See Memorandum from Hon. Walter Mansfield, Chair, Advisory Committee on Civil Rules, to Hon. Roszel Thomsen, Chair, Committee on Rules of Practice and Procedure of the Judicial Conference of the United States (June 14, 1979), reprinted in 85 F.R.D. 521 app. at 542 (1980).

⁶⁶ Letter from Charles Alan Wright to the Committee on Rules of Practice and Procedure, *supra* note 58, at 6.

⁶⁷ See Committee on Rules of Practice and Procedure of the Judicial Conference of the U.S., Revised Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, 80 F.R.D. 323 (1979).

⁶⁸ *Id.* at 332. It also dropped the proposals for non-stenographic reporting of depositions, and the proposed change to Rule 37 to authorize sanctions for initiation of discovery. Judge

proposals and denouncing the revised amendments as too cautious.⁶⁹ The amendments nevertheless went forward in 1980. Justice Powell (a former President of the ABA), joined by Justices Stewart and Rehnquist, dissented on the ground that the amendments did not go far enough, and that "acceptance of these tinkering changes will delay for years the adoption of genuinely effective reforms."⁷⁰

B. *The 1983 Amendments—The Shift to Case Management and Proportionality*

Justice Powell need not have worried, for even before he issued his dissent the seeds of more aggressive changes were being sown. Shortly after the Supreme Court promulgated the 1980 amendments over Justice Powell's objection, Judge Walter Mansfield, Chair of the Advisory Committee, met with representatives of the ABA Section of Litigation and informed them that further amendments dealing with

Mansfield, Chair of the Committee, later explained the decision not to proceed with narrowing the scope of discovery as follows:

Comments received in response to the *Preliminary Draft* were generally opposed to any change in Rule 26(b)(1). Many believe the present rule is working well. A number disputed the assumption that there was general abuse of discovery. Others believe that abuse is limited to big or complex cases, which represent a small percentage of all litigation and can be better managed through use of the Manual for Complex Litigation, which is specially designed to deal with discovery in such cases. It was thought that a change in language would lead to endless disputes and uncertainty about the meaning of the terms "issues" and "claims or defenses." It was objected that discovery could not be restricted to issues because one of the purposes of discovery was to determine issues (e.g., in wrongful death, product liability and medical malpractice suits). Many commentators feared that if discovery were restricted to issues or claims or defenses there would be a return to detailed pleading or a resort to "shotgun" pleading, with multitudes of issues, claims and defenses, leading to an increase in discovery motions without any reduction in discovery. Some suggested that the better way of avoiding abuse of discovery would be to increase judicial supervision from the outset, fixing limits on the time and extent of discovery to be permitted according to the needs of each case.

Memorandum from Hon. Walter Mansfield to Hon. Roszel Thomsen, *supra* note 65, at 541.

⁶⁹ See Special Comm. for the Study of Discovery Abuse, ABA Section of Litig., Memorandum in Support of Proposed Amendments to the Federal Rules of Civil Procedure (Feb. 1979) (on file with author). Compare *id.*, with Memorandum from Federal Courts Committee, State Bar of California, to the Board of Governors of the California State Bar 3-4 (Apr. 25, 1979) (on file with author) (applauding abandonment of changes to scope of discovery).

⁷⁰ Amendments to the Federal Rules of Civil Procedure, 85 F.R.D. 521, 523 (1980) (Powell, J., dissenting). Justice Powell's words echo the dissenting views of the ABA Special Committee:

Mindful that the rules which are ultimately adopted will likely govern discovery proceedings for the next decade, we urge the Advisory Committee to give further consideration to the amendments initially proposed and to other ways by which discovery abuse can be deterred and the expense of civil litigation can be reduced.

Special Comm., Comments on Revised Proposed Amendments to the Federal Rules of Civil Procedure, *quoted in* Memorandum from Professor Bernard Ward to the Chairman and Members of the Committee on Civil Rules 1 (May 25, 1979) (on file with author).

discovery were contemplated in the near future. In view of these assurances, the Chair of the Section said it was "prepared to acquiesce now in the adoption of interim measures pending priority consideration of such studies and additional remedial measures."⁷¹ Thereafter, the President of the ABA wrote to Senator Edward Kennedy, the Chair of the Senate Judiciary Committee, to report that even though the ABA agreed with Justice Powell's dissent, given Judge Mansfield's assurances, the ABA did not believe Congress should intervene to prevent the pending amendments from taking effect.⁷²

Meanwhile, the ABA Special Committee issued a Second Report, reflecting "our committee's judgment that the 1980 amendments to the discovery rules, while making important improvements, were an insufficient response to a serious problem."⁷³ Accordingly, the ABA Special Committee circulated drafts of further proposed amendments and held "public hearings" on them during the ABA Annual Meeting. Based on this input, it again urged narrowing the scope of discovery by removal of the "subject matter" language of Rule 26(b)⁷⁴ and imposing a thirty-question limit on interrogatories.⁷⁵ It also proposed the addition of a new Rule 26(g) regarding the signing of discovery papers, making the signature on such a paper a certification of the bona fides of the positions taken, and authorizing the striking of papers signed in violation of the rule.⁷⁶ It proposed as well that Rule 26(a) be amended to make the frequency of discovery subject to the limitations of the proposed Rule 26(g) certification.⁷⁷ Addressing a different concern, it proposed amending Rule 30(d) to sanction improper questioning during depositions.⁷⁸

⁷¹ Letter from Philip Corboy, Chair, ABA Section of Litigation, to Hon. Walter Mansfield, Chair, Advisory Committee on Civil Rules 2 (June 27, 1980) (on file with author) (adding that the Section was "particularly pleased to note that your committee does not view the present amendments as closing the book on reform of the discovery process").

⁷² See Letter from Leonard Janofsky, President of the ABA, to Hon. Edward M. Kennedy, Chair, Committee on the Judiciary 1-2 (July 9, 1980) (on file with author).

⁷³ Special Comm. for the Study of Discovery Abuse, ABA Section of Litig., Second Report of the Special Committee for the Study of Discovery Abuse, 92 F.R.D. 137, 137 (1980) [hereinafter Second Report].

⁷⁴ See *id.* at 140.

⁷⁵ See *id.* at 145.

⁷⁶ See *id.* at 141.

⁷⁷ See *id.* at 140.

⁷⁸ See Second Report, *supra* note 73, at 144. The Special Committee pointed out that "the rule does not expressly permit an award of expenses incurred by the deponent confronted with hour after hour of unjustifiably repetitive questions or questions far beyond the bound of any arguable relevance." *Id.* at 144-45. It therefore proposed addition of the following new Rule 30(d)(2):

On motion of a party or of the deponent made at any time during the taking of the deposition or after the completion of the deposition and upon a showing that

In fact, the Advisory Committee had long since begun to shift toward a direction that dovetailed with some of the ABA Special Committee's objectives. In mid-1979, newly-appointed Reporter Arthur Miller began his outline of possible issues for the Committee with consideration of expanding Rule 16 to bring that rule "into closer conformity with current practices relating to pretrial conferences."⁷⁹ He suggested that "[w]ork on Rule 16 should be thought of as a natural outgrowth of the Committee's recent efforts in the discovery context, particularly the proposal of Rule 26(f)."⁸⁰ These Rule 16 practices were, of course, what we now know as case management, a practice that became increasingly prominent in the 1970s.⁸¹ Discussing Reporter Miller's suggestions, the Committee grappled with the extent to which the rules should direct judges to engage in case management, and tried to develop methods for identifying complex cases for which this treatment was to be prescribed.⁸² It also heard from members of the ABA Special Committee⁸³ and from the Department of Justice.⁸⁴

a party, the deponent or an attorney has unreasonably hindered or prolonged the taking of a deposition, the court shall require the party, deponent or attorney whose conduct necessitated the motion to pay the moving party the reasonable expenses incurred by reason of such conduct, including attorney's fees. The court may make such other orders as are just. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

Id. at 144. Eventually the 1993 amendments added current Rule 30(d)(1) and (2) to address problems of improper conduct during depositions, but these were more focused on frustration of the deposition by the attorney representing the witness than improper conduct by the examining party.

⁷⁹ Memorandum from Arthur R. Miller, Reporter, Advisory Committee on Civil Rules, to Members of the Advisory Committee on Civil Rules 1 (May 14, 1979) (on file with author) (re: Agenda for Future Advisory Committee Inquiry).

⁸⁰ *Id.* at 2.

⁸¹ See, e.g., Robert F. Peckham, *The Federal Judge as a Case Manager: The New Role in Guiding a Case from Filing to Disposition*, 69 CAL. L. REV. 770 (1981); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

⁸² See Minutes of the December 1979 Meeting of the Advisory Committee on the Civil Rules 1-5 (Dec. 1979) (on file with author).

⁸³ See Agenda of the Oct. 2-3, 1980 Meeting of the Advisory Committee on Federal Rules of Civil Procedure 2 (Oct. 1980) (on file with author) (reporting that Weyman Lundquist, Co-Chair of the ABA Special Committee, would speak in favor of its proposals). After this meeting, the Rule 26(g) certification requirement, which the Second Report of the ABA Special Committee had endorsed, was added to the drafts before the Advisory Committee. See Memorandum from Arthur R. Miller, Reporter, Advisory Committee on Civil Rules, to Members of the Advisory Committee on Civil Rules (Nov. 26, 1980) (on file with author) (attaching Rule 26(g) as a new matter that "was discussed at length at the last meeting").

⁸⁴ See Letter from Maurice Rosenberg, Assistant United States Attorney General, to Hon. Walter Mansfield, Chair, Advisory Committee on Civil Rules (Sept. 11, 1980) (on file with author) (enclosing the agenda and minutes of a meeting of an "informal group" consisting of Robert

In 1981, the Committee circulated a set of proposed amendments⁸⁵ building on this background that contained a number of features not bearing directly on discovery. Most notable of these were a substantial expansion of Rule 11 and comprehensive revision of Rule 16 to make scheduling orders and further case management much more prevalent.⁸⁶ It also proposed three changes to Rule 26: (1) deleting the final sentence of Rule 26(a), which had said "[u]nless the court orders otherwise under subdivision (c) of this rule, the frequency and use of these methods is not limited";⁸⁷ (2) adding a paragraph to Rule 26(b) directing the court to limit disproportionate discovery;⁸⁸ and (3) adding Rule 26(g) requiring the signing of discovery requests as a certification of their bona fides and permitting sanctions for violation.⁸⁹ The Advisory Committee Notes explained that the changes contemplated "greater judicial involvement in the discovery process,"⁹⁰ and that the sanctions provision paralleled the contemporaneous amendment to Rule 11.⁹¹ The ABA Special Committee generally favored these amendments but proposed clarifications.⁹² Others had varying views.⁹³

Begam, Paul Carrington, C. Ronald Ellington, William Eldridge, John Frank, Seth Hufstедler, Frank Kaufman, A. Leo Levin, Weyman Lundquist, Thomas Martin, Alan Morrison, Daniel Meador, Edward Mullinix, Maurice Rosenberg, Alvin Rubin, Mary Schroeder and John Schenefeld). Among other things, the minutes say that the group supported court managerial treatment from the beginning for discovery-heavy cases, but divided on how to identify such cases. See Minutes of Conference on Improving Pretrial Discovery 2 (Aug. 28, 1980) (on file with author). It also endorsed efforts to end disproportionate discovery. See *id.* at 3.

⁸⁵ See Committee on Rules of Practice and Procedure of the Judicial Conference of the U.S., Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, 90 F.R.D. 451 (1981) [hereinafter Preliminary Draft of Proposed Amendments to the Federal Rules].

⁸⁶ For a discussion of these amendments, see Richard L. Marcus, *Reducing Court Costs and Delay: The Potential Impact of the Amendments to the Federal Rules of Civil Procedure*, 66 JUDICATURE 363 (1983).

⁸⁷ Preliminary Draft of Proposed Amendments to the Federal Rules, *supra* note 85, at 478.

⁸⁸ See *id.* at 479.

⁸⁹ See *id.* at 479-80.

⁹⁰ *Id.* at 482.

⁹¹ See *id.* at 482-83.

⁹² See Digests of Comments Received (attached to Letter from Hon. Walter Mansfield, Chair, Advisory Committee on Civil Rules, to Joseph Spaniol, Deputy Director, Administrative Office of the United States Courts (Dec. 11, 1981) (on file with author)).

⁹³ Compare Letter from Professor Charles Alan Wright, Reporter, Advisory Committee on Civil Rules, to John P. Frank and Hon. Mary M. Schroeder 1 (Oct. 8, 1981) (on file with author) (characterizing the package of proposed amendments as "devoid of substance" and "almost a parody of the great work done by the Civil Rules Committee in earlier days"), and Memorandum from Committee on Federal Rules, American College of Trial Lawyers, to Committee on Rules of Practice and Procedure of the Judicial Conference of the U.S. 14-18 (Nov. 17, 1981) (on file with author) (questioning use of "values at stake" as a criterion for limiting discovery), with Statement of Hon. Mary M. Schroeder and John P. Frank to the Advisory Committee on Civil Rules of the Judicial Conference of the United States 12-13 (Nov. 6, 1981) (on file with author).

At the completion of the commentary period, the Advisory Committee fortified Rule 26(g) by changing the authorization for sanctions from "may" to "shall" and the amendments went into effect in 1983.⁹⁴ The ABA Special Committee, believing its work to be finished, disbanded after five years of activity. As one of its members put it in 1982 during the National Conference on Discovery Reform, the 1983 package of amendments "takes one of the themes of the Special Committee's work [judicial hands-on management] and carries it much further than we had contemplated."⁹⁵

III. THE SECOND ROUND OF DISCOVERY CONTAINMENT—THE 1993 AMENDMENTS

If the first round was characterized by a possible failure of resolve by the Advisory Committee in 1979 regarding scope of discovery,⁹⁶ the second round might be characterized as involving too much resolve by the Committee, at least on certain points. In considering this resolve, however, it is important to understand (at the outset) that the chief features of the 1991-93 package of proposals had antecedents. Indeed, several had emerged during the first round of discovery containment but had not been adopted. Presumptive numerical limitations on discovery events, as the ABA Special Committee proposed for interrogatories in 1977, were much in evidence in the Advisory Committee's 1991 draft of proposed amendments. A memorandum sent to the Advisory Committee by Assistant Attorney General Meador in January 1978 suggested deferring discovery until after a conference with the court.⁹⁷ Broadened discovery regarding experts who would testify at trial appeared to have become the reality in many places, although the rules did not so provide.⁹⁸ The *Manual for Complex Litigation* already

(supporting changes to Rules 26(a) and (b) but not addition of Rule 26(g) and attaching similar views of Hon. Alvin Rubin and Professor Edward Cooper).

⁹⁴ See Amendments to the Federal Rules of Civil Procedure, 97 F.R.D. 165, 213-20 (1983).

⁹⁵ Frank F. Flegal, *Discovery Abuse: Causes, Effects, and Reform*, 3 REV. LITIG. 1, 43 (1982) (quoting Steven Umin). Praise, however, has not been universal. Writing in 1989, the Brookings Task Force on Civil Justice Reform asserted that it "believes that time has proven Justice Powell's 1980 prediction to be entirely correct. Although well-intentioned, past changes in the rules failed to alleviate the dual problems of litigation costs and delays." THE BROOKINGS INST., JUSTICE FOR ALL: REDUCING COSTS AND DELAYS IN CIVIL LITIGATION 9 (1989).

⁹⁶ See the later comments of Judge Mansfield, *quoted in text* accompanying note 125 *infra*.

⁹⁷ See Comments on Proposed Discovery Rules Changes Promulgated by the ABA's Section of Litigation in December 1977 1 (Jan. 6, 1978) (enclosed with Letter from Daniel J. Meador, Assistant United States Attorney General, to Hon. Elbert Parr Tuttle (Jan. 6, 1978) (on file with author)).

⁹⁸ See William W. Schwarzer, Guidelines for Discovery, Motion Practice and Trial, 117 F.R.D.

recommended expert reports.⁹⁹ Strengthening the supplementation provisions was also proposed in early 1978.¹⁰⁰ Initial disclosure, the lightning-rod for so much else, had been proposed by a state court judge in the ABA Journal in March 1983.¹⁰¹ Even in the 1960s the Columbia Survey found that voluntary disclosure was widespread.¹⁰² Indeed, as Professor Subrin's article in this symposium shows, the original draft of discovery provisions for the Federal Rules of Civil Procedure contained provisions for disclosure of core information.¹⁰³

In 1991, the Advisory Committee brought out an array of proposed amendments: (1) requiring initial disclosure of the identity of any witness or document with information "that bears significantly on any claim or defense"; (2) precluding formal discovery until after this initial disclosure; (3) directing exclusion of any evidence not disclosed as required; (4) requiring preparation of a report detailing the testimony and background of any expert trial witness; (5) expanding the duty to supplement discovery responses and applying this expanded duty to disclosures as well; (6) placing presumptive numerical limits on both interrogatories and depositions; (7) limiting depositions to six hours; (8) authorizing videotaping of depositions without advance court approval; and (9) requiring that parties who withhold material on grounds of privilege supply details about the withheld materials sufficient to permit evaluation of the claim of privilege.¹⁰⁴ A number of further changes were also proposed.¹⁰⁵

273, 276 (1987) ("experts who are prospective witnesses are normally produced for deposition by the opposing party as a matter of course").

⁹⁹ See FEDERAL JUDICIAL CTR., MANUAL FOR COMPLEX LITIGATION (SECOND) § 21.481 (1986).

¹⁰⁰ See Comments on Proposed Discovery Rules Changes Promulgated by the ABA's Section of Litigation in December 1977, *supra* note 97, at 2 (pointing to absence of sanctions for failure to supplement and suggesting that "the Committee might want to consider providing for appropriate sanctions for such failure").

¹⁰¹ See Gerald G. Glaser, *A New Law of "Supply and Demand" in Discovery*, 69 A.B.A. J. 320, 320-21 (1983). For a review of the development of the initial disclosure proposal, see Richard L. Marcus, *Of Babies and Bathwater: The Prospects for Procedural Progress*, 59 BROOK. L. REV. 761, 805-12 (1993).

¹⁰² Forty-five percent of attorneys who used formal discovery, and 40% of attorneys who did not, reported that their adversaries "voluntarily made disclosures of the sort normally made during discovery." GLASER, *supra* note 8, at 100-01. Glaser noted that the disclosures seemed to be more complete and candid in the absence of formal discovery. See *id.* at 101.

¹⁰³ See Subrin, *supra* note 4, at 718-19.

¹⁰⁴ See Committee on Rules of Practice and Procedure of the Judicial Conference of the U.S., Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure and the Federal Rules of Evidence, 137 F.R.D. 53, 87-135 (1991) [hereinafter 1991 Preliminary Draft].

¹⁰⁵ A full catalogue of the changes seems unwarranted, for many were conforming or technical. A sampler is in order: (1) addition of Rule 26(a)(3), requiring disclosure of details about witnesses and exhibits a party would use at the trial; (2) authorization in Rule 26(b)(2) for local rules changing the limitations on number of discovery events provided in the national rules for

The acrimonious general reception of some of these proposals is well known and not worth rehearsing here.¹⁰⁶ But it is worth pausing to reflect a moment on what the initial disclosure proposal seemed to be on its face. To begin with, the limit on initial disclosure to material that "bears significantly on any claim or defense" sounds like an effort to narrow the scope of this obligation compared to the general scope of discovery. Thus, it does not involve the much-reviled "subject matter" terminology of Rule 26(b)(1), and might have been taken as a step toward narrowing the scope of discovery to claims and defenses. Requiring that the material "bear significantly" on claims and defenses seems designed to narrow the obligation further and to avoid incursion into peripheral matters. Certainly the direction is consistent with the claimed limitation of disclosure to "core information."

Additionally, the amendments seemed designed to give teeth to the proportionality provisions added in 1983. Thus, a court asked to permit a party to exceed the numerical or time limitations prescribed should determine whether that would be "consistent with the principles stated in Rule 26(b)(2)."¹⁰⁷

Given the "flood of objections unprecedented in fifty plus years of rule-making,"¹⁰⁸ the Advisory Committee reconsidered the disclosure requirement. First it decided to withdraw the proposal altogether, much as it had done with narrowing the scope of discovery in 1979.¹⁰⁹ But a number of districts had adopted disclosure provisions modeled on the draft amendments pursuant to the Civil Justice Reform Act, and we are told that there seemed some need to "put the sidewalks where the people were walking."¹¹⁰ On reconsideration, the Advisory Commit-

categories of case; (3) changing Rule 26(b)(2)(iii) to direct the court to limit proposed discovery when its "burden of expense" outweighs its "likely benefit"; (4) changing Rule 26(b)(3)(A) to authorize depositions of right of all experts who will testify at trial; (5) requiring a party moving to compel discovery or for a protective order to certify having tried to meet and confer with the opposing party to resolve the discovery dispute; (6) amending Rule 30(a)(2) to preclude a second deposition of any person who has already been deposed in the case; (7) providing in Rule 30(e) that the deponent has a right to review the transcript of the deposition only if he or she so requests before completion of the deposition; (8) changing Rule 33(b) to direct a responding party who objects to an interrogatory to state the objection with specificity and answer to the extent the interrogatory is not objectionable. *See id.*

¹⁰⁶ For a review, see Charles W. Sorensen, Jr., *Disclosure Under Federal Rule of Civil Procedure 26(a)—"Much Ado About Nothing?"*, 46 HASTINGS L.J. 679, 729-92 (1995).

¹⁰⁷ *See, e.g.*, Proposed Rule 30(a)(2), 1991 Preliminary Draft, *supra* note 104, at 107.

¹⁰⁸ Ann Pelham, *Judges Make Quite a Discovery: Litigators Erupt, Kill Plan To Reform Federal Civil Rules*, LEGAL TIMES, Mar. 16, 1982, at 1.

¹⁰⁹ *See* Minutes of the February 21, 1992 Meeting of the Advisory Committee of the Civil Rules 3-4 (May 11, 1992) (on file with author).

¹¹⁰ This was the explanation offered by Paul Carrington, Reporter of the Advisory Committee

tee adopted a revised approach to disclosure. It permitted any district to opt out, and permitted the parties to stipulate not to disclose. Additionally, although disclosure would apply to the full scope of discovery, it would only apply as to disputed facts alleged with particularity, thereby reducing the burden resulting from vague complaints. In addition, there should be a conference between counsel early in the case to develop a discovery plan before the Rule 16 conference with the court. The Committee also deleted the six-hour limitation on depositions,¹¹¹ but it added further limitations on conduct during them, forbidding instructions that a witness refuse to answer unless based on a privilege or a limitation on discovery imposed by the judge in the case.

With a less ambitious disclosure plank, the amendments were cautiously adopted by the Supreme Court.¹¹² The disclosure provision

at the time of these actions. See Memorandum from Rick Marcus, Special Reporter, to Discovery Subcommittee, Civil Rules Committee 19 (Feb. 6, 1997) (quoting Carrington) (on file with author).

¹¹¹ Because this proposal may surface again, it is worthwhile to review the ambivalence of the Advisory Committee in 1991-92. Before the proposal was ultimately scotched, Committee members repeatedly voiced misgivings about it. Among the concerns were the possible need for a timekeeper to measure the number of hours and time spent on colloquy (Minutes of the November 29-December 1, 1990 Meeting of the Advisory Committee on the Civil Rules (Nov. 29-Dec. 1, 1990) (on file with author); Minutes of the February 21-23, 1991 Meeting of the Advisory Committee on the Civil Rules 5 (Apr. 5, 1991) (on file with author)); problems of dividing the time between counsel and generating excessive motion practice (Minutes of the May 22-24, 1991 Meeting of the Advisory Committee on the Civil Rules 4 (June 26, 1991) (on file with author)). Finally, at the meeting on February 21, 1992, the following transpired:

Judge Winter argued against the limitation on the length of depositions as an inducement to strategic behavior. Judge Keeton argued for the limit as long as it is subject to extension by agreement of the parties. Judge Pointer noted that it works in ND Georgia. The Reporter noted that the purpose of the rule was to give some bargaining power to the party seeking to constrain overlong depositions. Judge Phillips noted the concern that an evasive expert may succeed in stonewalling for six hours. The Reporter noted that one purpose of the proposal was to protect the deponent. Judge Brazil thought that the limit will not be easily negotiated in cases in which there is a serious imbalance of information. Judge Winter reiterated that it will produce a lot of traffic in the judges' chambers. The Committee voted 5-2 to eliminate the limit on length of depositions. It was agreed that local rules should be authorized.

Minutes of the February 21, 1992 Meeting of the Advisory Committee on the Civil Rules 4-5 (May 11, 1992) (on file with author).

¹¹² The Chief Justice's letter of transmittal to Congress said that "[w]hile the Court is satisfied that the required procedures have been observed, this transmittal does not necessarily indicate that the Court itself would have proposed these amendments in the form submitted." Letter from Hon. William H. Rehnquist, Chief Justice, Supreme Court of the United States, to Hon. Thomas Foley, Speaker of the House of Representatives (Apr. 22, 1993) *reprinted in* 146 F.R.D. 401, 403 (1993).

Justice Scalia, joined by Justices Thomas and Souter, dissented. In his opinion, Justice Scalia

almost did not go into effect. The ABA opposed it,¹¹³ the Clinton Administration opposed it,¹¹⁴ the House of Representatives passed a bill deleting it from the package of amendments,¹¹⁵ and the bill failed to pass the Senate only because of a last-minute concern about other aspects of the package. Virtually nobody believes that disclosure would have survived an actual vote.¹¹⁶

IV. TENTATIVE LESSONS FROM THE DISCOVERY CONTAINMENT EXPERIENCE

Besides learning what has been tried before, this review of twenty years of discovery containment provides food for some tentative lessons to be kept in mind as we enter what may be a third round of attempts to contain discovery. At least the following areas seem pertinent.

A. Leadership and Controversy

Nowadays one often hears calls for leadership. To what extent should the Advisory Committee be a leader? The question seems im-

excoriated this decision on the ground it would add another costly layer to litigation, and that disclosure "does not fit comfortably within the American judicial system . . . [b]y placing upon lawyers the obligation to disclose information damaging to their clients." 146 F.R.D. at 510-11.

¹¹³ At its August 1993 convention, the ABA House of Delegates approved by a voice vote a recommendation of the ABA Young Lawyers Division as follows:

BE IT RESOLVED, That the American Bar Association urges Congress to reject amendments to Rule 26(a) of the Federal Rules of Civil Procedure approved by the Judicial Conference of the United States, Advisory Committee on Civil Rules, requiring disclosure of discovery materials without specific written requests.

ABA, Young Lawyers Division Report to the House of Delegates 38 (Aug. 1993).

¹¹⁴ See Randall Samborn et al., *Administration Opposes New Disclosure Rule*, NAT'L L.J., July 26, 1993, at 5 (describing letter from Associate Attorney General Webster Hubbell to House Judiciary Committee opposing Rule 26(a)(1)).

¹¹⁵ See H.R. 2814, 103d Cong., 1st Sess. (1993). This bill would also have deleted the provision permitting unilateral videotaping of depositions.

¹¹⁶ As described by Paul Carrington, Reporter of the Committee during consideration of the disclosure provisions, the brouhaha was as follows:

The United States House of Representatives voted unanimously to derail the Committee's proposal and substitute one of its own. The House bill was brought before the Senate Judiciary Committee on the day before adjournment when that committee was acting under a rule requiring unanimity. When Senator Metzenbaum objected to the House bill, that killed it. And so Rule 26 became law as the result of its support by a single Senator voting against a unanimous House, a House that would have been joined by an almost unanimous Senate if the matter had even reached the Senate floor. The final vote was thus one Senator against the world, with the one Senator prevailing. It would therefore be preposterous to argue that Congress in any degree approved Rule 26.

Paul D. Carrington & Derek P. Apanovich, *The Constitutional Limits of Judicial Rulemaking: The Illegitimacy of Mass-Tort Settlements Negotiated Under Rule 23*, 39 ARIZ. L. REV. 462, 485 (1997).

portant only with regard to proposals that are controversial; it is easy to lead in an uncontroversial direction. At least the Advisory Committee needs to be cautious about being a follower; one criticism levelled at the 1978 proposals was that they were largely developed by another group—the ABA Special Committee.¹¹⁷ Yet, in the words of the Federal Courts Committee of the State Bar of California, “[f]ew proposals have engendered so much controversy as the proposed limitations on the scope of discovery.”¹¹⁸ In 1992, at least one member of the Advisory Committee urged promulgation of Rule 26(a)(1) at the critical meeting on the ground the Committee should provide leadership.¹¹⁹ As we all know, that proposal led to far more controversy and was nearly aborted by Congress.

Although controversy does not necessarily mean that a proposed rule change should be resolved by Congress,¹²⁰ it provides at least one considerable reason for caution in the discovery area. Discovery reforms that excite widespread opposition in the profession face an uphill battle to have any positive effect. As Professor Wright put it thirty years ago, “it would be a mistake to impose on the profession a procedure to which it has strong opposition, for the rule will work only as those who must employ it want it to work.”¹²¹ Yet that lesson can be overlearned. Rule 26(a)(1) is not the only rule to have survived congressional review by the skin of its teeth.¹²² That sort of tumultuous past does not mean necessarily a rule will fail,¹²³ and the considerable support for disclosure among lawyers surveyed by the Federal Judicial Center and the Rand Corporation¹²⁴ suggests that Rule 26(a)(1) could

¹¹⁷ See Letter from Charles Alan Wright to Committee on Rules of Practice and Procedure, *supra* note 58, at 3 (expressing “grave reservations about the process by which the proposed amendments came into being”).

¹¹⁸ Memorandum from Federal Courts Committee, State Bar of California, to the Board of Governors of the California State Bar, *supra* note 69, at 8.

¹¹⁹ See Minutes of the April 13–15, 1992 Meeting of the Advisory Committee on the Civil Rules 7 (May 11, 1992) (on file with author) (“Judge Phillips urged that the Committee had a duty to provide leadership in light of its study and hearings.”).

¹²⁰ “In the absence of consensus, the Advisory Committee is apt to equate controversy with politics, which is for Congress.” Stephen B. Burbank, *Ignorance and Procedural Law Reform: A Call for a Moratorium*, 59 BROOK. L. REV. 841, 843 (1993).

¹²¹ Charles Alan Wright, *Procedural Reform: Its Limitations and Its Future*, 1 GA. L. REV. 568, 575 (1967).

¹²² When Rule 71A was adopted, both houses of Congress passed resolutions designed to prevent it from going into effect, but because these resolutions differed in detail the rule went into effect anyway. See 12 FEDERAL PRACTICE & PROCEDURE, *supra* note 5, § 3041, at 189 n.13 (2d ed. 1997).

¹²³ Rule 71A, despite its brush with death, has operated smoothly since its adoption four decades ago. See *id.* §§ 3042–56.

¹²⁴ In its survey of lawyers in 1000 cases closed in late 1996, the Federal Judicial Center found

prove effective despite the level of expressed opposition to it when it was adopted. One of the Advisory Committee's most difficult tasks is to weigh the commentary it receives, a point that Judge Mansfield made to his successor:

Based on my rule-making experience, I think it is important not to give too much weight to the fact that those opposing a proposed change . . . often far outnumber responding supporters. History shows that supporters rarely voice their views, whereas opponents often do. In 1979, for instance, early in my chairmanship, the Advisory Committee, responding to vigorous opposition to its proposed changes in the discovery rules, watered down the proposals . . . only to be met with a blistering dissent by three Justices . . . on the ground that the changes were not strong enough. As a result, in 1983 we made much more drastic changes in Rules 7, 11, 16 and 26, which were adopted without incident and are now in effect.¹²⁵

B. Uniformity

The passage of the Rules Enabling Act, which authorized a single system of federal procedure to supplant varying state systems applied in federal court pursuant to the Conformity Act, represented an act of leadership that can be traced back to Pound.¹²⁶ The adoption of the

that responding lawyers who believed that disclosure had an effect in their cases generally concluded that this effect was in the desired direction. For example, 32% felt that disclosure decreased the duration of the case, while only 7% believed that it increased delay, and 39% found a decrease in client litigation expenses, as opposed to 16% who found the reverse effect. See Thomas E. Willging et al., Federal Judicial Cir., *An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments*, 39 B.C. L. REV. 525, 563 (tbl. 17) (1998) [hereinafter FJC Study]. Similarly, 36% of responding lawyers believed that disclosure increased the prospects of settlement, while only 6% thought it reduced them, and 25% believed that it improved the fairness of the outcome, while only 5% saw a negative effect. See *id.* Overall, 41% of respondents favored a national rule requiring disclosure in every district. See *id.* at 588 (tbl. 38).

The RAND survey of lawyers in cases in 1991 and 1993 (before the effective date of Rule 26(a)(1)) found a similar level of support among lawyers. Thus, approximately 60% of responding lawyers favored requiring early disclosure without a formal discovery request in cases of the type that was involved in this study. See JAMES S. KAKALIK ET AL., AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT 274 (1997).

¹²⁵ Letter from Hon. Walter Mansfield, Second Circuit, United States Court of Appeals, to Hon. Frank M. Johnson, Chair, Advisory Committee on Civil Rules 1 (May 9, 1985) (on file with author); see also Wright, *supra* note 121, at 575 ("This does not amount to a referendum. Comments on tentative drafts that come from lawyers, judges, or bar groups are considered on the basis of their inherent persuasiveness. No attempt is made to count noses.").

¹²⁶ See generally Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1045-48 (1982). The Rules' effect in creating uniformity can be overstated, however. Shortly after they came into effect, the Judicial Conference appointed a committee to examine existing local

Federal Rules of Civil Procedure as a model by many states testifies to that leadership.¹²⁷ Although there are other areas in which disuniformity has emerged,¹²⁸ discovery has become the heartland of local innovation and deviation since 1970.

The Advisory Committee has in large measure indulged this local innovation. For one thing, proposing authority for local rulemaking seems to be a common response to controversy. In 1978, for example, the Committee initially responded to the idea of limiting the number of interrogatories by proposing authority for district courts to do so by a majority vote of the judges therein.¹²⁹ As Assistant Attorney General Maurice Rosenberg protested in a letter to the Chair of the Standing Committee on Rules of Practice and Procedure, this "would encourage a Balkanization of discovery practice."¹³⁰

Although the 1978 proposal to authorize local regulation of the number of interrogatories was withdrawn, Balkanization has become the order of the day in a variety of respects.¹³¹ In recent years this tendency has been fortified to some extent by the Civil Justice Reform Act ("CJRA"),¹³² but the argument that the CJRA authorized overriding the Federal Rules of Civil Procedure is dubious at best.¹³³ Instead, local deviation has de facto become the Advisory Committee's experimental laboratory, albeit one without central direction. For example, given the Advisory Committee's refusal to impose numerical limitations on interrogatories, any local rule doing so violated Rule 83,¹³⁴ but the Advisory Committee's response never hinted at that. To the contrary, when

rules, and it found much divergence. See *Report on Local District Court Rules*, 4 FED. R. SERV. 969 (1940). See generally 12 FEDERAL PRACTICE & PROCEDURE, *supra* note 5, § 3152, at 496.

¹²⁷ See John B. Oakley & Arthur F. Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 WASH. L. REV. 1367 (1986).

¹²⁸ For example, even though the Judicial Conference concluded in 1971 that reducing civil juries below 12 members should be left to Congress, within a few years many districts had done so by local rule, and the Supreme Court upheld such a rule. See 12 FEDERAL PRACTICE & PROCEDURE, *supra* note 5, § 3153, at 520-22. Somewhat similarly, even before Congress authorized consensual reference to a magistrate for trial by adopting 28 U.S.C. § 636(c) in 1979, over half of the districts allowed such reference by local rule. See *id.* § 3071, at 391.

¹²⁹ See Committee on Rules of Practice and Procedure of the Judicial Conference of the U.S., Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, 77 F.R.D. 613, 646 (1978).

¹³⁰ Letter from Maurice Rosenberg, Assistant United States Attorney General, to Hon. Roszel Thomsen, Chair, Standing Committee on Rules of Practice and Procedure 2 (May 4, 1978) (on file with author).

¹³¹ See, e.g., Carl Tobias, *Civil Justice Reform and the Balkanization of Federal Civil Procedure*, 24 ARIZ. ST. L.J. 1393 (1993).

¹³² 28 U.S.C. §§ 471 *et seq.* (1994 & Supp. 1995).

¹³³ See Lauren Robel, *Fractured Procedure: The Civil Justice Reform Act of 1990*, 46 STAN. L. REV. 1447 (1994).

¹³⁴ See 8A FEDERAL PRACTICE & PROCEDURE, *supra* note 5, § 2168.1, at 258-59.

the Committee ultimately did adopt a national rule limiting the number of interrogatories in 1993, it not only invoked initial disclosure as a justification for reduced need for interrogatory practice, but also explained that "[e]xperience in over half of the district courts has confirmed that limitations on the number of interrogatories are useful and manageable."¹³⁵ Similarly, a number of districts required parties to meet and confer before filing Rule 37(a) motions to compel. At least one court of appeals held that such a local rule was invalid because establishing such a prerequisite to a motion authorized by the national rules was inconsistent with them,¹³⁶ but shortly thereafter Rule 37 was amended to introduce such a requirement. The Committee justified the change on the ground that "[t]his requirement is based on successful experience with similar local rules of court promulgated pursuant to Rule 83."¹³⁷

Much as we are informed that the Committee authorized opting out in 1993 with "great remorse,"¹³⁸ this history makes uniformity at best a tattered banner for discovery reform. Obviously, experience with innovative rule provisions is a sensible source of information about whether to apply them more broadly. But one who samples that fruit will later have a hard time condemning it on the ground that no authority has been given for other innovations that contravene the national scheme.

C. *Success and Failure*

Foremost among the lessons to take from the previous rounds of discovery containment should be whether it has worked. Complete success would mean, of course, that we would have no occasion to consider a third round of containment efforts. Assuming that complete success cannot be claimed, the question remains whether the effectiveness of the changes actually adopted provides reason to hope that further changes might achieve complete success.

It seems somewhat early to try to pass judgment on the 1993 amendments, but one who focuses instead on the 1980 and 1983 packages finds reason for considerable humility. Most prominent is the Rule 26(f) discovery conference, added in 1980 at the emphatic urging

¹³⁵ FED. R. CIV. P. 33 advisory committee's notes, 146 F.R.D. 401, 675 (1993).

¹³⁶ See *Wilson v. City of Zanesville*, 954 F.2d 349, 352-53 (6th Cir. 1992) (Rule 37 does not require a conference as a prerequisite for a motion to compel, so a local rule cannot either).

¹³⁷ FED. R. CIV. P. 37 advisory committee's notes, 146 F.R.D. at 690.

¹³⁸ See Memorandum from Rick Marcus to Discovery Subcommittee, *supra* note 110, at 19 (quoting Paul Carrington).

of the ABA Special Committee. As early as 1981, John Frank and Judge Schroeder told the Committee that in the Ninth Circuit judges were "making almost no use" of the new provision.¹³⁹ It may be that thereafter the 1983 amendments, with their emphasis on case management embodied in the scheduling and other requirements of Rule 16, diverted energies that would otherwise have flowed into use of the discovery conference. It seems undeniable that this early report continued to be accurate, and in 1991 the Committee itself gave up and proposed deleting the conference because it "has not proved to be an effective device to prevent discovery abuses."¹⁴⁰ Thereafter, a new Rule 26(f) was created to implement the 1993 requirement that counsel meet and confer about a discovery plan that is to be submitted to the judge before the initial Rule 16 conference, but this was quite a different creature.

Although not condemned to the ignominious fate of the discovery conference, other features of the first round of containment can be viewed as modest successes at best. The Reporter touted the proportionality provisions to Rule 26(b) and the deletion of the former invitation to unlimited frequency of discovery absent a protective order as a "180 degree shift" in orientation.¹⁴¹ Magistrate Wayne Brazil emphasized the new orientation in a 1985 opinion, pointing out that the 1983 amendments "superimpos[ed] the concept of proportionality on all behavior in the discovery arena."¹⁴² These descriptions of the changes in Rule 26 are accurate, and it further seems that the new orientation of the rule is precisely correct in seeking to calibrate the amount of discovery to the needs of the case.

But there is little evidence that a significant shift has actually occurred as a result of the amendment to the rule. For one thing, it could be said that the concept of proportionality was already intrinsic to Rule 26 before 1983, as some argued when the amendment was proposed.¹⁴³ In any event, "the amendment itself seems to have created

¹³⁹ Statement of Hon. Mary Schroeder and John P. Frank to the Advisory Committee on Civil Rules of the Judicial Conference of the United States, *supra* note 93, at 9.

¹⁴⁰ Committee on Rules of Practice and Procedure of the Judicial Conference of the U.S., Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure and the Federal Rules of Evidence, 137 F.R.D. 53, 105 (1991).

¹⁴¹ ARTHUR R. MILLER, THE AUGUST 1983 AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE: PROMOTING EFFECTIVE CASE MANAGEMENT AND LAWYER RESPONSIBILITY 32-33 (1984).

¹⁴² *In re Convergent Tech. Sec. Litig., Inc.*, 108 F.R.D. 328, 331 (N.D. Cal. 1985).

¹⁴³ See, e.g., Letter from Charles Alan Wright to John P. Frank and Hon. Mary M. Schroeder, *supra* note 93, at 3 ("I think the changes in [Rule 26] (a) and (b)(1) make no change whatever in the present rule or in what courts are in fact doing.").

only a ripple in the caselaw, although some courts now acknowledge that it is clearer than it was before that they should take responsibility for the amount of discovery in cases they manage."¹⁴⁴ Determining what is too much in a given case is often quite difficult for a judge,¹⁴⁵ and a rule change does not make it easier. As judicial management evolves, and if the discovery plan endorsed by new Rule 26(f) endures, it may become more manageable, and some accelerated implementation may be expected. For the present, however, it is not possible to say that this seemingly fundamental shift in the rules has had a major impact.

A somewhat similar fate befell another 1983 addition—the certification requirement of Rule 26(g). This provision seemingly was expected to be a tool for implementing the proportionality idea, by forcing lawyers to think about proportionality before undertaking discovery. It paralleled the 1983 amendment to Rule 11,¹⁴⁶ and it was thought that it would be used equally often. Although it is true that there are a considerable number of cases involving Rule 26(g),¹⁴⁷ this forecast has clearly proven wrong, as the Advisory Committee recognized when it issued its call for comments on Rule 11 in 1990.¹⁴⁸ Given

¹⁴⁴ 8 FEDERAL PRACTICE & PROCEDURE, *supra* note 5, § 2008.1, at 121.

¹⁴⁵ As Judge Higginbotham put it at the time the 1981 proposals were pending: "It's very difficult for the judge to ask, 'Well, you're spending too much time with John Jones, Sales Vice-President of the company. Why are you spending so much time with a salesman?' . . . He can't know that much about your case." Patrick E. Higginbotham, *Discovery Management Considerations in Antitrust Cases*, 51 ANTITRUST L.J. 231, 236 (1982).

At about the same time, Judge Schwarzer sounded a similar warning: "How is the judge to say with assurance that in this particular instance a lawyer is engaged in a fishing expedition? . . . Who can say with assurance that a far-fetched line of discovery may not promise pay dirt for a litigant?" Edward F. Sherman, *The Judge's Role in Discovery*, 3 REV. LITIG. 89, 104 (1982) (quoting Hon. William W. Schwarzer).

¹⁴⁶ As one court put it regarding Rule 26(g):

Like FRCP 11, its requirements are strict; the standard of care is objective; and the sanctions are mandatory. Due to the similarity, courts have applied the case law applicable to the 1983 version of FRCP 11 to the sanctions language in FRCP 26(g).

In fact, sanctions inappropriately imposed under FRCP 11 or 37 have been converted to FRCP 26(g) sanctions.

Lee v. Walters, 172 F.R.D. 421, 432–33 (D. Or. 1997) (citation omitted).

¹⁴⁷ See, e.g., *Oregon RSA No. 6, Inc. v. Castle Rock Cellular of Oregon LP*, 76 F.3d 1003, 1008 (9th Cir. 1996) (defendant's objection that document was confidential while failing to disclose that it had been made public warranted sanctions); *Resolution Trust Corp. v. Dabney*, 73 F.3d 262, 268 (10th Cir. 1995) (sanctions imposed on attorney for untimely filing of subpoena *duces tecum*); *Banco de Ponce v. Buxbaum*, No. 95–7469, 1995 WL 762983, at *2 (2d Cir. Dec. 27, 1995) (sanctions for false responses to interrogatories should be based on Rule 26(g)); *Zimmerman v. Bishop Estate*, 25 F.3d 784, 789–90 (9th Cir. 1994) (sanctions imposed on plaintiff for interrogatories and document requests that were intended to harass); *Chapman & Cole v. Ite Container Int'l B.V.*, 865 F.2d 676, 687 (5th Cir. 1989) (plaintiffs' years of discovery without any additional evidence show that plaintiffs are seeking to inundate defendant with discovery).

¹⁴⁸ The Committee commented then, somewhat ruefully:

the firestorm that surrounded the 1983 amendment to Rule 11, having less effect than that change may not be undesirable. But the modest overall effect of the 1983 discovery amendments justifies, in turn, considerable modesty about the prospective effects of further rule changes.

D. *The Payoff for Persistence*

There is no *res judicata* in rulemaking. Although adopted provisions may not accomplish as much as their proponents hope, rejected ones do often find favor on another day. This may be more true of discovery than other areas, since the topic has been near the center of the Committee's agenda for more than two decades and there are only so many different ideas available for dealing with discovery problems. Numerical limitations on interrogatories, rejected by the Committee in 1978 but embraced in many districts, were finally adopted nationwide, along with numerical limitations on depositions, in 1993. Electronic recording of right for depositions, first proposed in 1967¹⁴⁹ and proposed again in 1978, was finally adopted in 1993, albeit by the skin of its teeth.¹⁵⁰

For the future, the persistence champion is the idea of narrowing the described scope of discovery. Initially proposed by the ABA Special Committee in 1977 and circulated as a possible amendment in 1978, it was withdrawn as a Committee proposal in 1979.¹⁵¹ In 1989, the New York State Bar renewed the suggestion,¹⁵² but the Committee was not

An observation has been made, however, that the 1983 sanctions provisions have been used primarily in connection with alleged pleading abuses, although the ABA and the 1983 Committee were at least as concerned with discovery abuses. Perhaps the discovery abuse problem was overstated, or perhaps it has been remedied by the prophylactic effect of Rule 26(g), or perhaps the potential of that rule has not yet been realized by the bar. If the latter is the case, the Committee would welcome suggestions to enhance the effectiveness of Rule 26(g).

Committee on Rules of Practice and Procedure of the Judicial Conference of the U.S., Call for Written Comments on Rule 11 of the Federal Rules of Civil Procedure and Related Rules, 131 F.R.D. 335, 345 (1990).

¹⁴⁹ See Committee on Rules of Practice and Procedure of the Judicial Conference of the U.S., Preliminary Draft of Proposed Amendments to Rules of Civil Procedure for the United States District Courts Relating to Deposition and Discovery, 43 F.R.D. 211, 239-40 (1967).

¹⁵⁰ The bill passed by the House of Representatives to delete mandatory initial disclosure from the 1993 amendments also would have deleted videotaping of right from the amendment package. See *supra* note 115 and accompanying text.

¹⁵¹ See *supra* text accompanying notes 46-70.

¹⁵² See Committee on Discovery, N.Y. State Bar Ass'n, Section on Commercial and Fed. Litig., *Report on Discovery Under Rule 26(b)(1)*, 127 F.R.D. 625, 634-38 (1989).

then receptive.¹⁵³ In 1995, the American College of Trial Lawyers advanced the proposal again.¹⁵⁴

E. *The Shifting Sands of Litigation and Discovery Problems*

Although some proposed reforms persist as ideas, the nature of problem areas does not stay the same. Indeed, looking back twenty years provides a significant contrast to the areas of current ferment.

The most striking contrast is to the type of case that provoked concern then and now. In the 1970s, the avatar of problem litigation and the locus for discovery dissatisfaction was the private antitrust suit. At the 1976 Pound Conference, antitrust cases were often invoked as the source of contemporary evils. The concern with this sort of litigation was pervasive enough to prompt President Carter to appoint a National Commission to review antitrust law and propose solutions, including narrowing of the scope of discovery.¹⁵⁵ There was no mention of product liability cases as posing even a remotely similar concern. In the 1990s, by way of contrast, the antitrust case is a nonstarter and products liability cases occupy center stage.

Of course, these changes can be easily traced to other developments; after the installation of the Reagan Administration, the level of governmental antitrust enforcement declined considerably. Around the same time, asbestos and other mass tort litigation virtually burst

¹⁵³ As described in the Minutes of the November 17-18, 1989, Meeting of the Advisory Committee, at 9:

The Committee next considered the proposal of the New York State Bar. Magistrate Brazil reported that there has been a comparable debate in California on the scope of discovery, and that the Civil Rules Committee resisted heavy lobbying on the same proposal in the 1970s. There was then strong opposition from the plaintiffs' and civil rights' bar. On the other hand, it is not clear that there is a real difference between "claims and defenses" and "subject matter." The Reporter noted that the "claims and defenses" approach implies fact pleading. Magistrate Brazil pointed out that the original discovery rules drafted by Sunderland assumed that discovery would be self-executing. Judge Winter was of the view that the change would not be consequential, except perhaps to change the pleading practices. Magistrate Brazil acknowledged that after the 1983 rules, especially Rule 26(g), the question of relevance is no longer more than a threshold question, and no real change could be effected. There was no support for the proposal to adopt the "claims and defenses" language.

Advisory Comm. on the Civil Rules, Civil Rules Committee Minutes 9 (Nov. 17-18, 1989) (on file with author).

¹⁵⁴ See Letter from Kenneth J. Sherk, Federal Rules of Civil Procedure Committee of the American College of Trial Lawyers, to Hon. Patrick Higginbotham, Chair, Advisory Committee on Civil Rules 1-2 (Oct. 11, 1995) (on file with author).

¹⁵⁵ See Report of the National Commission for the Review of the Antitrust Laws and Procedures, 80 F.R.D. 509 (1979).

onto the stage. But the shift reminds us to beware of the assumption that today's problems will also be tomorrow's problems. Some problems, indeed, do seem to go away. Interrogatories, for example, were characterized in the 1970s as the discovery tool that caused the greatest difficulty, but today they arouse little or no concern (perhaps because districts began limiting their number even though that exceeded the proper scope of local rules).

F. *The Problem of Problem Cases*

A recurrent theme throughout the past twenty years is that in most cases discovery works smoothly, but there is some number of problem cases which are the true source of almost all genuine discovery difficulties. At the same time, it seems widely agreed that one of the biggest problems with problem cases is deciding which cases are problem cases.

This definitional dilemma should not come as a surprise. Confronting a related issue, the drafters of the *Manual for Complex Litigation* have vacillated over trying to define complex litigation. The first edition, published in 1969, described categories of "potentially complex cases," focusing either on the type of claim made (e.g., antitrust, patent or mass disaster) or the procedural characteristics of the case (e.g., multi-party cases, class actions or derivative actions).¹⁵⁶ The second edition, which appeared in 1985, declined even to try to define the term. Finding complete silence inadequate,¹⁵⁷ the third edition, published in 1995, adopts an arguably circular "functional definition" geared to the "need for [judicial] management."¹⁵⁸

¹⁵⁶ See MANUAL FOR COMPLEX LITIGATION § 0.22 (1969).

¹⁵⁷ The *Manual for Complex Litigation* (Third) states:

The *Manual for Complex Litigation*, Second, dropped this elusive definition [contained in the first edition] but made no effort to arrive at a substitute. Yet a definition is important to understanding the objective of this manual, for there is always a risk that complexity may be introduced simply by calling litigation "complex."

MANUAL FOR COMPLEX LITIGATION (THIRD) § 10.1 (1995).

¹⁵⁸ *Id.* It elaborates:

A functional definition of complex litigation recognizes that the need for management in the sense used here—judicial management with the participation of counsel—does not simply arise from complexity, but is its defining characteristic: The greater the need for management, the more "complex" is the litigation. Clearly, litigation involving many parties in numerous related cases—especially if pending in different jurisdictions—requires management and is complex, as is litigation involving large numbers of witnesses and documents and extensive discovery. On the other hand, litigation raising difficult and novel questions of law, though

The task of identifying problem discovery cases is similar. Thus, in its Second Report the ABA's Special Committee concluded that it was "not feasible" to identify such cases,¹⁵⁹ and the illustrious ad hoc committee convened by the Department of Justice that same year¹⁶⁰ strongly supported managerial treatment for "discovery-heavy cases" and believed these cases could be identified in advance, but "divided acutely" on how to do so.¹⁶¹ Accordingly, although the goal of segregating the relatively few problem cases for treatment not visited on other cases continues to be attractive, it may prove a chimera. Absent a way to distinguish, the Advisory Committee is left to decide whether measures designed to cure the ills of the problem cases will cause problems in the others.

G. *The Problem of an Empirical Base*

Another issue that emerges from the first two rounds of discovery containment is the growing importance of empirical input. An empirical element is intrinsic to much rulemaking, but often it is difficult to develop an adequate empirical base—a topic that has received increased academic attention in recent years.¹⁶² As a general matter, the Federal Rules of Civil Procedure have been drafted without the benefit of detailed empirical input.

The 1970 amendments were an exception, in that they had relatively firm empirical foundations in the Columbia Survey, which the Advisory Committee cited to explain some of what it did and did not

challenging to the court, may require little or no management, and therefore may not be complex as that term is used here.

Id.

¹⁵⁹ The Special Committee explained:

During our deliberations, we considered suggestions that the case prone to discovery abuse be identified by reference to the amount in controversy, the nature of the dispute, or some other readily identifiable characteristic. We have concluded that it is not feasible to do so. While we are aware of suggestions that modified discovery procedures be made available in a given class of cases and although we are monitoring experiments taking that approach, we are convinced that many of the problems and abuses cut across easily identifiable categories of cases.

Special Comm. for the Discovery of Discovery Abuse, ABA Section of Litig., Second Report of the Special Committee for the Study of Discovery Abuse, 92 F.R.D. 137, 138 (1980).

¹⁶⁰ See *supra* note 84 for a list of the members.

¹⁶¹ See Minutes of Conference on Improving Pretrial Discovery 2 (Aug. 28, 1980) (attached to Letter from Maurice Rosenberg, Assistant United States Attorney General, to Hon. Walter Mansfield, Chair, Advisory Committee on Civil Rules (Sept. 11, 1980) (on file with author)).

¹⁶² See, e.g., Richard A. Posner, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations*, 53 U. CHI. L. REV. 366 (1986) (also endorsing social science testing of new procedures to verify their effectiveness); Laurens Walker, *Perfecting Federal Civil Rules: A Proposal for Restricted Field Experiments*, 51 LAW & CONTEMP. PROBS., Summer 1988, at 67 (arguing for field experiments before rules are given general effect).

do.¹⁶³ At least Judge Mansfield wished that comparable information had been available to the Committee when it confronted the challenges of the 1970s, but felt that cost and the pressure for prompt action precluded compiling it.¹⁶⁴ By coincidence, as the review of these amendment proposals proceeded, then-Professor Wayne Brazil sent the Committee his early essay on discovery,¹⁶⁵ and Brazil's later empirical work¹⁶⁶ provided some such insights, as did a study by the Department of Justice's Office of Improvement in the Administration of Justice.¹⁶⁷ But it would be hard to conclude that this material, much of which became available only after completion of most of the substan-

¹⁶³ Thus, the Committee noted that the survey's overall results indicated that there was no need for "fundamental change." See Advisory Committee, *supra* note 7, at 489. With regard to the then-existing requirement in Rule 34 that a court order be obtained before document production, the Committee explained its deletion of this requirement by citing the study's conclusion that orders were not even sought in 75% of the cases where production occurred, and that in half of those cases in which orders were sought the motions were unopposed. See *id.* at 527.

¹⁶⁴ Thus, Judge Mansfield wrote as follows to John Frank:

After Professor Rosenberg's massive Columbia Project Study, which led to the 1970 amendments to the discovery rules, I did not anticipate that any new amendments would be needed at this early date. But beginning with the Pound Revisited Conference in St. Paul in April 1976 and continuing since that time we have encountered mounting protests by trial lawyers, clients and judges with respect to increasing cost, harassment, delay and waste attributable to discovery, particularly in complex litigation. At the [F]all 1976 meeting of the ABA Section on Litigation, for instance, which was attended by some 590 registrants, the matter was placed on the program for discussion and the attorneys present, who represent a broad spectrum of the trial bar (plaintiffs, defendants, large and small clients and firms), unanimously expressed the view that discovery was being abused in practice . . .

....

. . . I personally would have preferred to have reliable current empirical data comparable to that assembled over a period of years and at considerable expense by Professor Rosenberg's Columbia Project in the 1960's before deciding what amendments, if any, should be made in the discovery rules. But I recognized that the unanimous opinion of several hundred experienced trial lawyers from all walks of practice was not something to be ignored.

The cost of another Columbia Project would be prohibitive. By its very nature, moreover, the scope of discovery cannot be defined with a surgeon's precision.

Letter from Hon. Walter Mansfield, Chair, Advisory Committee on Civil Rules, to John P. Frank, Lewis and Roca 1-2 (June 29, 1978) (on file with author).

¹⁶⁵ See Letter from Wayne Brazil, Professor, University of Missouri School of Law, to Joseph Spaniol, Secretary, Committee on Rules of Practice and Procedure (July 27, 1978) (on file with author) (enclosing draft of essay later published as Wayne D. Brazil, *The Adversarial Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1295 (1978)).

¹⁶⁶ See Wayne D. Brazil, *Civil Discovery: Lawyers' Views of Its Effectiveness, Its Principal Problems and Abuses*, 1980 AM. B. FOUND. RES. J. 787; Wayne D. Brazil, *Improving Judicial Controls over the Pre-trial Development of Civil Actions: Model Rules for Case Management and Sanctions*, 1981 AM. B. FOUND. RES. J. 875; 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.

¹⁶⁷ See C. RONALD ELLINGTON, *A STUDY OF SANCTIONS FOR DISCOVERY ABUSE* (1979).

tive activity of the Advisory Committee, served a purpose comparable to the Columbia Survey.

No empirical undertaking attended the 1991-93 experience, and Professor Linda Mullenix upbraided the Advisory Committee in 1991 for its indifference to empirical inquiry about disclosure.¹⁶⁸ Professor Stephen Burbank observed in 1993 that the rulemakers' "studied indifference to empirical questions" put their work at risk of legislative override, and went so far as to call for a moratorium on further amendment proposals until this information gap could be filled.¹⁶⁹ As he also noted, such data might serve as an antidote to controversy and to efforts to have Congress reconsider the Committee's proposals.¹⁷⁰

While appreciating the need for empirical input, one needs to realize also that there are limits to what can be learned in this fashion. As Professor Mullenix has noted, repeated calls for empirical inquiry can lead down a slippery slope toward inaction.¹⁷¹ Furthermore, it is unlikely that such efforts can provide a "scientific" assurance that a given rule change will work.¹⁷² Even universally applauded techniques may not be vindicated by "hard" data. For example, although it found that a huge majority of lawyers supported the requirement that parties first try to resolve their discovery differences before filing a motion,¹⁷³ RAND could find no hard data that the requirement produced a measurable effect.¹⁷⁴ But measured in terms of *overall* litigation cost or

¹⁶⁸ See Linda S. Mullenix, *Hope over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. Rev. 795, 816-17 & n.114, 820-21 (1991).

¹⁶⁹ Burbank, *supra* note 120, at 841.

¹⁷⁰ See *id.* at 849 ("just as empirical data have been an effective antidote to crisis rhetoric in recent years . . . so could they provide a neutral counter to the special pleading of the future").

¹⁷¹ Professor Mullenix explains:

Requests for empirical study, although invariably well-intentioned by their proponents, also serve to postpone solving the problem. Empirical research is labor-intensive, slow, and prone to methodological problems that encourage disputes . . . [T]here should be more clear thinking about when such research truly will enhance rule revision."

Mullenix, *supra* note 164, at 829.

¹⁷² I have addressed this concern elsewhere:

[I]f procedural reform could only be adopted after being proved effective and safe in a manner similar to the way that the FDA determines whether a new drug can be sold, it seems unlikely that there would be any formal procedural reform. The challenge, then, is to appreciate and evaluate the pertinent policy concerns and make reasonable use of empirical information.

Marcus, *supra* note 101, at 770.

¹⁷³ Of 1991 respondents, 85.3% said that such a requirement was generally desirable, a number that had swelled to 90.3% among 1993 respondents. See KAKALIK ET AL., *supra* note 124, at 275.

¹⁷⁴ See generally JAMES S. KAKALIK ET AL., RAND INST. FOR CIVIL JUSTICE, DISCOVERY MAN-

delay, it would be well nigh impossible for this technique to produce an effect that would be measurable.

Moreover, survey results containing cold figures often cannot tell the full story, and an "experiential" basis that relies on anecdotal information is also important. That, indeed, is one possible function of the Committee's hearing process. At the same time, it is also important to be alert to the danger that individuals may inflate their own experiences beyond appropriate importance.¹⁷⁵ The Committee needs to resist that urge, while appreciating that there is always an evaluative element to assessing empirical input. As the Columbia Survey found: "The more often a lawyer reports having obtained new evidence and names of witnesses, the more often his adversary complains of aggressive discovery tactics. Also, the more often a lawyer reports gaining new information, the more likely he complains of attempted obstruction by the adversary."¹⁷⁶

H. *Judicial Activism Embraced: The Enduring Allure of Adult Supervision*

A final observation, in an era of managerial judging, is that turning to the judge for direction has become increasingly attractive and important to lawyers. Although in many quarters judicial activism is reviled, here it is not. From the beginning of this period of retrenchment, many have endorsed increased judicial involvement as the cure to discovery ills. Although judicial activism on the managerial front has undoubtedly increased in the last twenty years, the Federal Judicial

AGEMENT: FURTHER ANALYSIS OF THE CIVIL JUSTICE REFORM ACT EVALUATION DATA (1998), reprinted in 39 B.C. L. REV. 613 (1998) (in this issue).

¹⁷⁵ The Committee's own files provide an ironic example of seemingly overaggressive generalization. The very researcher who headed up the Columbia Study in the 1960s and concluded, contrary to fears expressed by some based on anecdotal information, that lawyers had not become unduly adversarial in their use of discovery, GLASER, *supra* note 8, at 233-34, wrote to the Committee in 1980 to ask whether further amendments to the discovery rules had been adopted. His reason for inquiring was revealing:

Recently I had an experience that none of us seemed to have had in 1966 [when the Columbia Study was being completed]—viz. I have been a client in a civil law suit. This is a perspective altogether different from the one we had then, and it is quite a shock. The behavior of lawyers in specific cases is appalling.

Letter from William A. Glaser, Columbia University, to Committee on Rules of Practice and Procedure 1 (June 20, 1980) (on file with author). He went on to urge consideration of the client perspective, often missing from attorney surveys. See *id.* Much as the client view would allow a valuable perspective, one nevertheless is inclined to conclude that even this veteran researcher leaped too quickly from his specific experience to a general conclusion about lawyer behavior.

¹⁷⁶ GLASER, *supra* note 8, at 87.

Center study found that it still ranks as the most popular method among lawyers for further improvement of discovery practice.¹⁷⁷

V. CONCLUSION

In 1906, Pound warned against "petty tinkering."¹⁷⁸ In his address entitled *Agenda for 2000 A.D.* at the 1976 Pound Conference, Chief Justice Burger invoked Pound: "[W]e must probe for fundamental changes and major overhaul rather than simply 'tinkering.'"¹⁷⁹ A month later, this message was relayed to the Advisory Committee, and linked to review of discovery.¹⁸⁰ The year 2000 will be upon us before further amendments to the discovery rules can go into effect.¹⁸¹ So it is fair to ask whether the changes thus far fit the Chief Justice's prescription.

The answer is fairly clearly yes, albeit in the sense of containment rather than rejection of the basic impulse toward full exchange of pertinent information. The 1980 amendments were criticized, of course, as falling far short of what was needed.¹⁸² The 1983 amendments, however, were considerably more ambitious. One of the members of the ABA Special Committee said that these were "grandchildren of Pound's thought."¹⁸³ He elaborated:

If our proposals were designed to sound the trumpet of a new day, the Judicial Conference has written a horn concerto. Whatever else may be said about them, it certainly cannot be said of these proposals that they tinker. On the contrary, if as

¹⁷⁷ See FJC Study, *supra* note 124, at 587 tbl. 36.

¹⁷⁸ Pound, *supra* note 1, at 403.

¹⁷⁹ Burger, *supra* note 1, at 93.

¹⁸⁰ See Agenda for the Meeting of the Advisory Committee on the Civil Rules, *supra* note 32, at 1 (Agenda Item 2 quoting Burger).

¹⁸¹ The earliest that a preliminary draft of proposed further amendments to the discovery rules could be published for public comment is mid-1998. That commentary period would likely include public hearings and be open into early 1999. Thereafter, the Advisory Committee would need to meet and consider the advice received during the commentary period. If it decided to proceed with amendments, those would be reported to the Judicial Conference's Standing Committee on Rules of Practice and Procedure, and if it concluded the amendments were worthwhile, the committee would forward them to the Judicial Conference for approval. Should the Judicial Conference also approve the amendments, they would probably be submitted to the Supreme Court no sooner than some time in the Fall of 1999, and the Court probably would not take action on them until the Spring of 2000. Thereafter, assuming the Court transmitted proposed amendments to Congress by May 1, 2000, those amendments could go into effect on December 1, 2000 unless Congress acted to change them or delay their effective date. See 28 U.S.C. § 2074(a) (1994).

¹⁸² See *supra* text accompanying notes 67-70.

¹⁸³ Flegal, *supra* note 95, at 48 (quoting Steven Umin).

Pound said "petty tinkering" is the product of a "lack of general ideas or legal philosophy," the Advisory Committee's proposals reflect Pound's kind of thinking in the large about the pretrial process as a whole and the role of courts in it.¹⁸⁴

Certainly the 1993 amendments went beyond tinkering as well, so that we can comfortably say that the rules regarding discovery have been fundamentally retooled in an effort to contain discovery without abandoning the fundamental commitment to affording broad access to needed information. Thus, compared to the rules as they existed before the 1980 amendments, the current rule provisions are markedly altered:

- No longer do the rules invite unlimited use of discovery absent a protective order; to the contrary, they direct the court to limit disproportionate discovery;
- Use of both interrogatories and depositions is subject to presumptive numerical limitations;
- Before formal discovery begins, counsel are directed to meet and confer to confect a discovery plan that should be submitted to the court before its Rule 16 conference;
- Rule 16 directs the court to enter a scheduling order that limits the time to complete discovery;
- Before formal discovery begins, the parties are directed to disclose material relevant to disputed facts alleged with particularity;
- Expert witnesses are required to provide highly detailed reports on their testimony and then are subject to depositions by the opposing party as a matter of right;
- During depositions, it is permissible to instruct a witness not to answer only on privilege grounds or other very narrow grounds;
- Parties who withhold material from disclosure or discovery on claims of privilege are required to provide a detailed basis for this action;
- Parties producing documents must do so either in the order in which the materials are usually kept or in the order of the discovering party's document requests;
- Supplementation of discovery responses, formerly quite narrow,¹⁸⁵ now applies to both disclosure and discovery whenever a party "learns that in some material respect the information is incomplete or incorrect."

¹⁸⁴ *Id.* at 47.

¹⁸⁵ Except for questions directed to the identity of witnesses, before 1993 Rule 26(e) required

The foregoing catalogues only some of the changes the Advisory Committee has made in the past twenty years. Whether it moved beyond tinkering in 1983 or 1993, the reality is that it has done so. Yet unhappiness about discovery endures; the Federal Judicial Center ("FJC") study in 1997 found that more than eighty percent of responding attorneys felt that further changes needed to be made to deal with enduring problems.¹⁸⁶ Perhaps that statistic can be partially attributed to something else Pound mentioned—that there is inherently some dissatisfaction with civil adjudication.¹⁸⁷ Given the scope of the changes to date, it suggests that rule revisions may never solve all discovery problems, or perhaps even most of those that remain. However that may be, the questions for the future are both whether to make further changes and whether to gravitate toward the tinkering or the fundamental end of the spectrum in any changes that are made.

correction only of responses "known" to be incorrect when made or, where correct when made, if failure to supplement would be "in substance a knowing concealment."

¹⁸⁶ See FJC Study, *supra* note 124, at 543.

¹⁸⁷ See Pound, *supra* note 1, at 395–97.

Dissatisfaction with the administration of justice is as old as law [A]ll legal systems among all peoples have given rise to the same complaints It is obvious, therefore, that there must be some cause or causes inherent in all law and all legal systems in order to produce this universal and invariable effect.

Id. at 395, 397.