

TRANSCRIPT OF THE “ALUMNI” PANEL ON DISCOVERY REFORM

MODERATOR: HONORABLE EDWARD BECKER

PANELISTS: HONORABLE WAYNE BRAZIL, PROFESSOR PAUL
CARRINGTON, JOHN FRANK, MARK GITENSTEIN, HONORABLE PATRICK
HIGGINBOTHAM, HONORABLE ROBERT KEETON, PROFESSOR ARTHUR
MILLER AND HONORABLE THOMAS PHILLIPS*

MR. FRANK:¹ Thank you, Arthur. Arthur has been duly reminding us from time to time that I am the most experienced member of this audience with this subject. And he has every possible way of knowing that—

[Laughter.]

MR. FRANK:—because when I went to work on this committee in 1960, he was the assistant to the reporter, so if there is any question about who has seniority here, it may well be that my friend does. And we can wrestle that one out later. I was put on the Alumni Committee for comment and would like to make a few observations, and I have to be in Phoenix tomorrow, so I do have to catch a plane.

Let me comment first that it seems to me important that whatever we do here that experience teaches that only drastic adjustments count, and the rest of them get lost. On the 26(a)(1), I personally supported that before the Senate Committee in the presence of the chairman of the Committee, and the reporter, I think, and Judge

* Judge Becker sits on the Third Circuit Court of Appeals and is past Chair of the Advisory Committee on Evidence Rules; Judge Brazil is a Magistrate in the Northern District of California and was a Member of the Advisory Committee on Civil Rules during the period when Rule 26(a)(1) was adopted; Professor Paul Carrington is a former Dean of Duke Law School and was Reporter to the Advisory Committee on Civil Rules from 1985–1992; John Frank Esq. is an attorney in Phoenix, Arizona and was a Member of the Advisory Committee on Civil Rules between 1963–1970; Mark Gitenstein Esq. is an attorney in Washington, DC and was Chief Counsel of the Senate Judiciary Committee when the Civil Justice Reform Act (“CJRA”) was adopted; Judge Higginbotham sits on the Fifth Circuit Court of Appeals and was Chair of the Advisory Committee on Civil Rules between 1993–1996; Judge Keeton sits on the District Court of Massachusetts, was a member of the Standing Committee on Rules of Practice and Procedure between 1988–1993, and Chair, 1990–1993; Professor Arthur Miller teaches at Harvard Law School and was Reporter to the Advisory Committee on Civil Rules between 1979–1985; Justice Phillips is Chief Justice of the Supreme Court of Texas, which is completing the process of reviewing and revising its civil procedure rules.

This transcript has been edited for continuity and syntactic clarity.

¹ Mr. Frank spoke before the full panel convened, due to other commitments.

Schwarzer, on the ground expressly that the language saying that disclosure would be required where pleading was made with particularity meant that that was a Rule 9 limitation on that rule. And this was a very hard-fought matter. The ABA, through its president, appeared and opposed the rule. Al Cortese² was there, and was in opposition. I think it is quite possible that if the Senate had not believed that this was to be a narrow rule, tightly limited to Rule 9 situations, that it would never have approved the rule at all. And yet, the plain fact is that from that day to this, nobody has ever paid the faintest attention to that particular limitation. Disclosure, where it exists, comes as accepted automatically without regard to whether there was a Rule 9 pleading limitation or whether there wasn't.

The other illustration I would give you is, in my memory, much sadder, because I didn't really care much about that one. But after Justice Powell's dissent,³ Maurie Rosenberg⁴ and I met at the Department and agreed that something really radical had to be done to meet the criticism of Justice Powell, whom we all respected very, very much. So as the radical revision, the sentence was added that discovery should be proportional and that it should be expressly taken into account so that people were not overwhelmed with grossly excessive discovery in cases that didn't warrant it.⁵ One of the most devastating documents that has been before us today is, if I remember correctly, the DRI report which shows that the proportionality rule which was meant to be the great savior, in fact, has been little or not at all handled or applied in the succeeding years. It simply disappeared.

What I'm saying to my successors of the committee, and they've been kind in letting me meet with them just because I'm interested, is that you have to weigh very heavily whether your particular change is going to make any difference. And I would suggest that only big changes make a difference. Subtle ones don't. The notes I regard as largely an affliction. But certainly, the nuances of arguing over this word or that, or this little detail or that little detail, are the proceedings of people who are aware that they are intensely interested, and they have forgotten that there are roughly 800,000 lawyers out there in the country, and they aren't quite as interested. The practical result is that

² Alfred Cortese, Esq., Washington, D.C.

³ Amendments to the Federal Rules of Civil Procedure, 85 F.R.D. 521 (1980) (Powell, J., dissenting).

⁴ Late Professor Maurice Rosenberg of Columbia Law School.

⁵ FED. R. CIV. P. 26(b)(2).

the subtler matters are very, very likely to disappear—even large matters are likely to disappear.

Now, let me turn more precisely to the matters at hand. It seems to me that the biggest task of the Committee at this moment is to try to achieve uniformity. The variance—not merely between states in the one case, but among districts, a matter that has been talked about throughout this discussion—makes us realize that what was meant to be the fundamental premise of the Rules, namely a uniform system for the federal courts, simply doesn't exist. It's not there. And we made that worse with the provision in the 1993 amendments which invited disuniformity in a particular area. But I would say that if there is one charge to the committee, it is to try to get us all back on the same train going to the same place.

Let me turn now to matters of some specifics. I think there has been an element of—there's a Santa Claus there in our discussion. Judge Vinson⁶ hit what is to me the vital matter that has to dominate this discussion, and that is that there simply is not enough judge time to do what we want done, which is to give us judicial management of all our cases. It isn't there.

I called my favorite judge just to confirm the figures this noon, thinking I would give them to you today. That judge, who is a member of the Court of Appeals, last week decided 200 cases and passed on 275 motions in a five day period. That is the kind of situation we are facing. The flood of criminal cases to which Judge Vinson refers means that for the bulk of the cases you've got to use what's pretty close to a form order because there isn't enough time to do anything else.

Judicial management in those circumstances, respectfully, becomes a fiction. I have a line in this morning's *Salt Lake Tribune*, oddly enough, in which I am saying that the failure of the White House to send in names and the failure of Senator Hatch to move hearings is a national disaster. And it seemed to me that putting that in the Salt Lake paper was a good idea because there was a better chance that Senator Hatch might notice it than if you put it in the *Washington Post*—

[Laughter.]

MR. FRANK:—The fact remains that if we had all of the hundred vacancies filled, it would still be an impossible situation. In my district, which has a fair number of judges, my office filed a simple motion the other day, and that motion was set for hearing eight months from the day in which it is filed. Clearly—and this is a problem in many, many

⁶ Honorable Roger Vinson, N.D. Fla., Member of Advisory Committee on Civil Rules.

parts of the country—the fact is that there are simply not enough judges and not enough magistrates to handle all of the problems we can dream up.

Where does that take me on the matters at bar? Although I supported Rule 26(a)(1) when it was before the Senate, and though it seems to me that the statistics that we have seen show that it has worked out rather well, it is clearly non-uniform, and I was terribly impressed by the show of hands in this room yesterday.⁷ I didn't accept the 50-50 count; my count was that you overwhelmingly wanted the elimination of Rule 26(a)(1). And I must say I cannot, myself, go against that much professional judgement. And since uniformity seems to me a high value, I personally, despite the fact that the rule works perfectly in my state, and nobody's having any troubles with it, I'm inclined to think that probably the rule ought to go.

What, then, do we take away from this conference that can be affirmative? The basic belief that I have formed is this. I was very persuaded by the observations of Jerry Soloun. But it is not directly applicable to this matter. It seems to me that the Committee has to face the problem of the five percent or so, whatever that number is, of cases that really need judicial handling, and get out of the way of the rest of them. And hence, I would be inclined to, on the one hand, ask the Committee to try to devise a sifting or classification device which will determine which are the cases which should be faced as probably involving excessive cost and difficulty in discovery from the beginning—the so-called “complex” cases. And I'm glad to say that Sheila Birnbaum⁸ tells me she has been appointed to this committee, and I would bank on it that she will dream up a way to do what I have in mind, because she usually does.

But it seems to me that the problem of classifying and finding which those cases are has to be a problem that has got to be solved, and I would be inclined to eliminate the compulsory pretrial proceedings for the rest of the cases, on the theory that that's a judicial burden and that it's not doing enough good to count, generally speaking. And in the five percent, it seems to me, we should ask the judges to take really a firm hand and make sure that there is not grotesque extravagance or cost.

Beyond that, with all deference to all the other proposals, it seems to me that we ought not to accept any of them. With the exception of

⁷ On September 4, 1997, there was a show of hands of those in attendance on whether to repeal initial disclosure.

⁸ Sheila Birnbaum, Esq., New York, Member of the Advisory Committee on Civil Rules.

the matter which has been discussed as really a flagrant, major, real problem, there's nothing else that very much seems to need fixing. The statistics, as they're given us from both sources,⁹ show a reasonably good customer satisfaction and a really good operation. And again, with deference to the College¹⁰ and the ABA, I think there we have a vintage suggestion that has been around for years but that, in fact, may have been useful at one time, but now, if we drop that sentence, we'll simply be starting a whole new war over what does it mean and what is the change.¹¹ And it's just going to cost money and not do much good.

So Francis's¹² problem has got to be faced. I am old enough to have been an acolyte of Charlie Clark,¹³ so I believe in notice pleading as a religious matter. Many of these suggestions that you are getting are sidewise ways to try to get rid of notice pleading and substitute fact pleading by calling it a discovery or a disclosure or something else. Personally, I'm unsympathetic to that. Francis may see it differently; we've discussed it for some years. I'm not too sure how he comes out, but on the whole, I would say that we ought to stay with notice pleading, and that the only change that is necessary in the discovery rules is something that is deliberately calculated and aimed at trying to put onto a track the cases which were so dramatically brought to our attention by a few of our commentators. And for the rest of it, let's change the subject and go back to other improvements in procedure.

[Applause.]

JUDGE BECKER: Let me call this session to order. This is billed as the Alumni Panel on Discovery Reform. An awful lot has been said over the last couple of days, but in this panel it's going to be said better.

[Laughter.]

JUDGE BECKER: Because it's going to be said by the sages. Not by the prophets, but by the sages. Everybody here has got at least a little grey hair. And my name, if your eyesight is bad, is Ed Becker. I'm a judge of the Third Circuit Court of Appeals.

⁹ See JAMES S. KAKALIK ET AL., RAND INST. FOR CIVIL JUSTICE, DISCOVERY MANAGEMENT: FURTHER ANALYSIS OF THE CIVIL JUSTICE REFORM ACT EVALUATION DATA (1998), reprinted in 39 B.C. L. REV. 613 (1998) (in this issue); Thomas E. Willging et al., Federal Judicial Center, *An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments*, 39 B.C. L. REV. 525 (1998) (in this issue).

¹⁰ American College of Trial Lawyers.

¹¹ Mr. Frank is referring to proposals to amend Rule 26(b)(1) regarding scope of discovery.

¹² Francis Fox, Esq., Boston, Member of Advisory Committee on Civil Rules.

¹³ Charles Clark, former Dean of Yale Law School, later judge on the Second Circuit and Reporter of the Committee that drafted the original Federal Rules of Civil Procedure.

And we have here Professor Arthur Miller, Magistrate Judge Wayne Brazil, Chief Justice Phillips of the Supreme Court of Texas, Judge Pat Higginbotham from the Fifth Circuit, Mark Gitenstein from Mayer, Brown and Platt, who is best known to U.S. District judges as the genius behind the Civil Justice—

[Laughter.]

JUDGE BECKER:—Reform Act. We won't say anything about being ridden out of town on a rail, except we thank you for the compliment. Professor and Judge Bob Keeton, from the District of Massachusetts, and former Dean Paul Carrington of the Duke Law School, a long-time reporter to the Committee. What I would like to do during this session is see if we can give some good counsel to the Committee, all dutifully sitting on the front row, bright-eyed, bushy-tailed and cheerful.

We thank so many of the rest of you for hanging in there, and if we misstate, or something occurs to you, or if you have a question, or anybody wants to challenge any of us, we'll leave the mike open for anybody who wants to jump in and challenge or ask a question.

So the first question is on the assumption that we should do something. Should we tinker, or should we go global? John Frank has told us that tinkering isn't worth a tinkerer's damn. Don't bother tinkering. But the urge to tinker—we're all lawyers, and a judge is nothing but a lawyer with a robe on—is great, so the first question that I'm going to put is, should we on the Committee, assuming we should do something, merely tinker, or should we go global?

At this juncture, one of the questions on the program was, whether the reforms of the past twenty years meaningfully improved matters. I don't see any point to discussing that—we are where we are, and the question is where do we go from here, where does the Committee go from here. Let's start with Arthur Miller who is, we now know, the veteran of this process, because being assistant reporter counts.

PROFESSOR MILLER: I think this is the first time in years that I've been allowed to sit down, let alone express an opinion. If those are my choices, tinker, global—and you're not allowing me to say do nothing—

JUDGE BECKER: Of course, you can say do nothing.

PROFESSOR MILLER: Well, I agree with John Frank that tinkering amounts to a tinkerer's damn. It doesn't mean anything. Many things result in tinkering that tend to get ignored.

John used the example which comes out of my tenure as Reporter, when we in 1983 put what might loosely be called the first two limitations on discovery scope. One was redundancy, and the other was

proportionality. It resulted from what passed for empiric work at that time, namely me wandering around the country like Diogenes with a lamp, looking for abuse. And after about six months of that, I formulated the perfect definition of abuse, which was abuse is what your opponent is doing. And I realized—and the Committee realized—that the only two things that we could agree were universals were, there was no place in the discovery regime for disproportionality or redundancy. And we stuck our toes in the water and put those into the rule, as well as changing some sort of philosophical orientations that encouraged the judge to be more active, and took some of the authority away from the individual parties in terms of control of the process.

Well, as John indicated, what is that? That was 1983. It's now 1997, and it has all been largely ignored. I think if you tinker, the chances are you will be ignored, and, worse, that you will become victim to the law of unintended consequences, and you'll do more harm than good.

Also, there is one proposition that Charles Alan Wright¹⁴ and I have agreed upon for the 33 years we've been co-authors,¹⁵ and that is that repetitive rule amendments are counterproductive. Amending the rules every three years or so is a mistake. You create confusion. You in effect encourage civil disobedience, in terms of ignoring the changes. The Bar, the 800,000 out there, can't keep up with it. Treatises like *Brand X*, which are done on a loose leaf basis. The changes never get posted into the treatise. And you end up tinkering, repeatedly, to no positive effect.

JUDGE BECKER: So do we do nothing, or do we do something global at this point?

PROFESSOR MILLER: I'll tell you, I happen to agree with Phil Lacovara.¹⁶ The world of the 30s is not the world in which we live. Whatever the brilliance of the people who constructed the Federal Rules of Civil Procedure in the 30s may have been, if you're going to do anything, it should be global. And don't misunderstand me. Think global. You may decide to do nothing, but we may have reached the point at which the entire body of rules might be rethought.

I mean, just listen to our discussion over the last two days. The head bone is connected to the neckbone, is connected to the backbone. We can't talk about discovery without talking about management, without talking about notice pleading. We never talked about parties, but I suggest to you that party structure is part of this. Some-

¹⁴ Professor Charles Alan Wright of the University of Texas Law School.

¹⁵ Professors Wright and Miller are co-authors of the *Federal Practice & Procedure Treatise*.

¹⁶ Philip Lacovara, Esq., New York City.

body should think about the possibility that the wheel has to be reinvented. At least think about it.

Tinkering, it ain't going to do anything. It just isn't going to do anything.

JUDGE BECKER: Pat Higginbotham, do you agree?

JUDGE HIGGINBOTHAM: I do. I guess my bottom line is that if you're going to do anything, I would do it globally and I wouldn't do that. I wouldn't make small changes for the reasons that Arthur has said so cleanly.

As I listened to the discussion, I question the reality of changes intended to reduce the amount of discovery. If we plow deeply, if we get past superficial, minor little "do this, do that" kinds of thing, we quickly encounter some bedrock assumptions of our whole system that I don't think you want to, nor can you really, deal with.

We've always pointed to the British model. I'm always impressed with the quality of the barristers and their glibness and their wit. But their system is so remarkably different. To the point, the world has changed, and it has changed dramatically in the underlying law we are enforcing by private suit. And it is the underlying law that is really causing this swirl and uncertainty and driving the disputes when we want to talk about discovery.

We're honest in talking about discovery, but disputes over discovery abuse are really a proxy for underlying disputes about the level of enforcement. The recent congressional legislation regarding securities¹⁷ was a debate about the particulars of pleading. That wasn't a clash among proceduralists about fine points of pleading at all. Rather, it was a fundamental clash of policy about the level of enforcement. One group of people felt strongly that the level of enforcement in the securities field was too high. But that's what the fight was about—there was no abstract concern with notice pleading. We must keep in the forefront that we are committed to a regulatory scheme in this country that is heavily dependent upon enforcement by private attorneys general.

Now, whether one likes that system or not, that's the reality. The calibration of discovery is a calibration of the level of enforcement. You can't escape it. So one need not probe very deeply in order to immediately generate ideological differences. We may not express them that way, but that's really what's going on—differences about the wisdom of some of these policies. The '38 rules may not have envisioned how

¹⁷ Private Securities Litigation Reform Act of 1995, passed over President Clinton's veto.

they would become wedded to this utilization of private attorneys general. But they have, and so the world is very different.

So I start my observations about what this Committee might consider by describing a very large limitation, I think a fundamental limitation against almost any "global proposition."

That said, I can envision a lot of "across the board" kind of changes that might be effective. One might be simply to create a presumptive limit across the board about the amount of discovery, meaning that across the board cases would not have greater than X number of depositions, or whatever, without leave of court, which would cause cases to self identify and multi-track.

That moves you toward the source of the problem, the problem of the lawyers, the legal culture, and the problem of judges themselves. I am not persuaded that there's not enough judicial time out there. I say that, and people say, well, Pat, you're 16 years away from the trial bench, and that's true, and I'm 22 years away from private practice. But I know this: when I look at the numbers, what I see is a declining docket in general civil litigation. Now, look at the appeals on our court, the second busiest court in the country. Civil appeals in general commercial cases have been on a steady decline for the past five years. The large numbers that are being batted about are accounted for in the main by prisoner litigation which are being processed by staff counsel, and magistrate judges—bless their hearts—are carrying a lot of work.

There is a decline in general civil litigation as a matter of fact. Criminal dockets are a problem, but in the time that I have been involved in this system, there's been a preference for judges to try criminal cases. Now, there are dockets like Roger's and others where they have simply a large volume of criminal cases, and I'm not speaking to those, but speaking across the country, I don't think that's a problem.

Now there is a serious problem with regard to access to judges. If a judge makes himself available by phone, and it's known, and he has a reputation for quickly resolving settlement disputes, a lot of those problems will go away.

JUDGE BECKER: I don't want to commit the crime of social science again, but I'll do an empirical survey of our alumni panel. Maybe part of the problem is the definition of what's global. To me, major scope limitation would be global. Major bright-line rules about presumptions or limitation of certain kinds of discovery would also be quite significant. Certainly a change which would, at least with respect to certain kinds of cases, require a showing of cause, i.e., so that you would have to go to the judge before you get the discovery would be

also. Is there any member of our alumni panel who thinks that it is time for a major or significant rules revision? Chief Justice Phillips.

CHIEF JUSTICE PHILLIPS: I do. Do you want me to say more?

JUDGE BECKER: You bet.

[Laughter.]

JUDGE BECKER: The eyes of this group are upon you.

CHIEF JUSTICE PHILLIPS: We haven't talked a lot about clients here today, although I know 5000 of them were surveyed by the RAND Survey. But I have enough gray hairs to remember when I tried some cases, and we won, and we sent a bill to the client for \$700. Those days are gone. I worry very much about access to justice being compromised today by the universal feeling among the Bar that extensive discovery must precede the resolution of any jury case.

It seems to me that mediation, indeed the whole ADR movement, has not been top down; it's been ground up. It hasn't come about because ADR is always a better way to resolve disputes. Instead, ADR has been a consumer revolt against the expense of our current system. Some of the added expense may have come about from lawyers' fear of malpractice, or of being second guessed if there's a bad result. But mostly, it's just been a change of culture about how much has to be done to be considered prepared to resolve a case.

JUDGE BECKER: What have you recommended in Texas? We know you haven't done it yet, but what has been recommended?

CHIEF JUSTICE PHILLIPS: Well, Steve Susman¹⁸ has chaired a subcommittee of our Rules Advisory Committee that has recommended a new system. The Texas Supreme Court has been seeking input from across the state from groups and individuals, and we are going to promulgate rules pretty soon based on those recommendations. In the federal courts it is believed that forty to sixty percent of the cases go away without any discovery event. We think that figure is closer to eighty percent in Texas courts. I suspect that's true in most state courts. The average Texas court has 1600 filings a year and most of those go away. We're trying to put a system into place that does not force any unnecessary work for lawyers or judges on the cases that are going to disappear.

So we are going to have some disclosure, but it's not going to be automatic. Only if information is specifically requested does it have to be produced. We will have a procedure similar to Federal Rule 16, but it will also be implemented only on request.

¹⁸ Stephen Susman, Esq., Houston.

We have put strict limits, with only a little flexibility, on the length and number of depositions. We put the usual limits on interrogatories.

We've tried to eliminate unnecessary steps that cost time and money. For instance, we decided that expert reports weren't always necessary. They won't be required unless a party can get a judge to order them. We don't require a log of privileged documents to be prepared unless the requesting party requests it after an assertion of privilege. When a party designates an expert witness, we require it to state two dates on which that expert will be available for deposition. We retain contention interrogatories, but don't allow parties to use them as traps to exclude evidence.

Finally, we hope to allow only a limited time for discovery, then provide a speedy trial thereafter. If the case can't be reached for trial, we have to reopen it. But I was part of an experiment in Harris County of cutting off discovery, and then putting cases in line for trial, and we found that they just don't stay still. They move.

Our vision is to make the preparation and trial of and throughout cases simpler. We want three tracks of cases. A simple track, to restore the notion that you can try a \$50,000 case for way less than the amount in controversy; an ordinary track, which has the limits I have mentioned, which can be exceeded only by court order in a particular instance; and a third track, for really complicated cases, where an individually tailored order must be crafted by the judge.

JUDGE BECKER: When you were a trial judge in Houston . . .

CHIEF JUSTICE PHILLIPS: We are going to write rules that are unique to Texas. Maybe some other state will follow them, maybe not. But the rules this Committee writes are not just for the two to five percent of cases that end up in federal court, because about half the states will model their own rules after the federal rules. So remember that the changes you make will have an impact in literally hundreds of thousands of cases across the country.

JUDGE BECKER: It may be that all of the district judges are not in the trenches as far as discovery management is concerned, but we know the magistrate judges are. Wayne Brazil, let's take these examples that Chief Justice Phillips gave. Is there a need for these kinds of changes, and how would they work?

JUDGE BRAZIL: Well, the one thing that I worry about, in terms of the suggestions he made, is the small case client who has a lawyer who doesn't push the case, or a claims representative who puts the case file at the bottom of the stack. And that's—I think there's a lot to be said, and a lot of thought ought to be given to injecting more room in

the system for parties to sort of self-select how much attention their case is going to be given.

But one of the things that I thought inspired some of the case management reforms—some of which go back to the 60s—was concern about cases sitting on a docket too long, because there wasn't a point in the case management system that forced people to get ready and do their homework. And what I'm talking about specifically is requiring a Rule 16 conference or something where you interact with the court, you have to do some homework, you have to interact with opposing counsel and you have to make some basic decisions.

And this probably isn't true. I thought this was true over the years. I thought it was true that a lot of small cases, modest-sized cases, get resolved before we have to deal with them because somebody has to prepare for that Rule 16 conference, and then they settle before the conference. That may not be true, based on what Tom was saying. But I am nervous about taking a point away that forces people in modest-sized cases to service their clients, because we all put out the hottest fires first, and if you don't have any fire, you don't do anything.

JUDGE BECKER: Well, let Tom Phillips answer, and then I want to go to the other side of the table for some questions.

CHIEF JUSTICE PHILLIPS: I see your point. That could happen. But in most cases, one side or the other is trying to push for some resolution. And most of our trial judges give these cases a push anyway through trial setting. So it seems to me that very few cases will fall through the cracks, other than the cases that are going to be dismissed for want of prosecution after four or five years anyway.

JUDGE BRAZIL: I defer to your experience. I mean I know nothing, literally, about state court practice. Even in my own state. But I am a little more nervous, I think, than you are about the possibility of a defense lawyer also being quite happy to have a plaintiff's lawyer sit on his hands for quite a while because of the prospect that the case will just go away, or that the witnesses will forget things, or whatever. I'm just a little more nervous about that.

Also if you have—I mean, the theory. I do a fair amount of case management with cases that are my own or somebody else's. And I do every single one of my Rule 16 conferences by phone, unless everybody demands that they show up in person. I do them all by phone, and every part of that conversation with counsel is about how can we get this done efficiently, fairly, quickly. How can we do this? Do you want ADR tomorrow? Do you want one deposition tomorrow? But having the conversation with me requires people to think about these things. It's distressing how often they haven't really thought about them.

JUDGE BECKER: I'd like to turn to Bob Keeton and then to Paul Carrington, and ask them to comment on what I thought was an absolutely fascinating suggestion. And that was Arthur Miller's suggestion, or Arthur's observation, that if you're talking about global reform, the focus of this conference is too narrow. The focus of this conference is Rules 26 to 37. But you can't meaningfully affect discovery reform without taking a look at at least some of the other Federal rules. Bob, how do you react to that?

JUDGE KEETON: I agree with that. Now, of course, before he said that, he also asked you to broaden your first question to include the do nothing option.

JUDGE BECKER: Okay.

JUDGE KEETON: I do not agree with the do nothing option. My answer to your first question is go global. Go. Now, I am also in favor of uniformity, but I have a condition on both going global and uniformity. Do it the way that is consistent with *my* thinking.

[Laughter.]

JUDGE KEETON: And I will be with you. And I'm talking about content.

Now, I think Arthur Miller is exactly right. You are now thinking about drafting rules that will not be used by the lawyers—and I do mean the lawyers, even before the trial judges—that will not be used by the lawyers and trial judges at the earliest before sometime around 2001 or later, except to the extent that some of us start using the ideas that you've put out for comment before they even become rules. And that's a possibility, too. So the rules you are putting out for comment and drafting should be rules designed to be used in the year 2001 and for at least five or ten years after that. And out there in the real world, which some other people here have talked about, the problems trial lawyers and trial judges will be thinking about in relation to discovery, and in relation to case management more generally, will not be the problems that have been our problems for which the present rules were designed.

Now, I know we have the futuristic studies that tell us that we don't know what the situation will be then and what the problems will be, but I would rather see some guidance come from this very wise Advisory Committee on your best guess about what the problems will be, and how you have some suggestions or mandates, if the Supreme Court and Congress go along, that will help us deal with the problems as well as you can anticipate them now. And when I think about that, I think again Arthur is absolutely right. You know, he was one of the greatest students I ever had.

[Laughter.]

PROFESSOR MILLER: He gave me the highest grade I got in law school.

JUDGE KEETON: He is absolutely right about the interconnection between all of these problems, you see. And so I cannot think about discovery and disclosure problems without thinking a bit more globally, about how those relate to all of the other case management problems.

And when I start thinking in those terms, I come to these conclusions that I'm in favor of going global and in favor of uniformity. I'm also in favor of leadership and humility, and putting those things all together, the global prescription and proscription should be done with restraint and humility. None of us, certainly not we trial judges now, but even with all the added wisdom that comes to the representation on the Advisory Committee and all of the advice that you get, you will not be able to understand particular cases that will come before the lawyers, and the courts in this period of time when these rules will be effective as well as the lawyer who first gets the case understands it, and as well as the lawyer who next gets it probably will understand it, if he or she does enough work. And neither one of them will understand it as well as the clients understand it, unless they do some probing, and of course the clients won't understand it as well as they should unless they have good advice from the lawyers.

So no system of rules, or rule-guided case management, will work well unless it is supported by the legal culture. And that legal culture is not the same all around the country, so when we're thinking about uniformity here, we need to be thinking with that element of humility that we recognize that nationally enforceable rules need to be rules that are drafted with a degree of generality and not too detailed particularization that will make them unsuitable in some of the legal cultures, because those will be different legal cultures.

Now, with all of that in mind, I have just a couple of more comments I want to make. It seems to me there is a sense in which the present rules, and in particular Rules 8 and 9, are focused on pleading. That's not where the action is and will be. Another set of the rules focuses on discovery and disclosure. That's not primarily where the action is and will be, and if we want to be where the action is, we need to be thinking about those problems of disclosure and discovery as a part of a larger problem of case management. Now, there's a sense in which Rule 16 comes closest to being focused on that, but not quite. And so that brings me to a couple of questions.

One is I wonder what would happen if we globally focused, that is focused with global thinking, basic rethinking of the system. Can we, can you, prescribe and proscribe something that is focused on the timing and method of formulating the issues, the substantive issues, both legal and factual, that have to do with the merits, and are aimed at helping the trial judges and the trial lawyers, who are using these rules, to use them more effectively to achieve that aim of reaching the earliest possible, and the least expensive, disposition of this particular case that is consistent with the appropriate outcome on the merits?

That's a good enough question all by itself. I won't try any more.

JUDGE BECKER: Paul, how do you react?

PROFESSOR CARRINGTON: It's always hard to disagree with Arthur, and all of his premises I share. I think it's a sound rule that you don't tinker with, you don't amend the Federal Rules of Civil Procedure very often. That ought to be a very occasional event at most. I agree with everything that's been said about globalism. If you're going to do it, you might as well step up and do something important and do it right so that it will have some consequence, and not on such a scale that it trivializes the event.

I would say, however, that now is not the time to be thinking global. One reason is that I think we are not yet ready to think very seriously about the implications of virtual civil litigation. I think we're about 20 years away from that, but my wife and I have four sets of grandchildren with whom we have video conferences. It's not very good video conferencing, but we're not very far away from a time in which every court house in America will be immediately accessible to every individual in their living room. Every individual in America can then be summoned to any court room over a video screen. And when you think about the implications of that for issues like jurisdiction, how the trial is conducted, what kind of evidence is admitted, it undermines almost every premise that I teach to my law students in Civil Procedure. There's hardly a single aspect of the transaction that isn't transformed when you don't have to get people in the same room to exchange the kind of information that we normally get at trial.

This is going to call into question everything that we now think about what we're doing, and it's going to transform the way in which litigation is conducted. We're not really ready to face up to that. So I would say if you can patch things up and get through the next decade or so, that would be a sufficient achievement.

I also agree with John Frank's point, and that is to get back to uniformity. And I bear some responsibility for the fact that the rules are as messed up as they are in that regard. We thought we didn't have

many choices with the 1993 amendments, and so they are what they are. But I don't think you want to leave the local option—provisions.

And then one final thought. I think the Committee would be prudent not to try to encourage more judicial involvement in more cases. The data suggests that we ought to be trying to get the lawyers to manage these cases as far as we can. And that suggests that you might try to create some kind of incentive system that works in that direction. I had a suggestion along those lines in my paper. There may be other ways to go at that, but at least in thinking about the discovery problems, I would be trying to think of ways to get the eighty percent up to ninety percent or ninety-five percent. There are always going to be some cases that trial judges are going to have to umpire very closely. But I would be trying to reduce the number of those cases and trying to find incentives for the lawyers to resolve their differences without coming to the judge.

JUDGE BECKER: Well, let me ask Mark Gitenstein about that, because he now comes to this from a litigator's point of view, but we all know his congressional background, and Congress generally is interested—well, maybe they are, maybe they aren't interested in uniformity. What do you think?

MR. GITENSTEIN: Well, first of all, I'm not a litigator. I am I guess more of a policy person than a litigator. But let me just make a few comments about the overall question you put to us, Judge.

I think the awkward position this Committee is in, and it's always been in since its creation, because of the Rules Enabling Act¹⁹ and the way you relate to the Congress, is if you tinker you always run the risk that Congress will totally ignore you and take on the reform and procedural issues itself, which is what it did in the Civil Justice Reform Act of 1990.²⁰ It did it in the Speedy Trial Act of 1974²¹ and the amendments in 1978. It did it with the securities litigation reform bill, which I was very active in as well. And I think that presents a particularly difficult dilemma to you. If you step into that thicket, you obviously are going to engage all the forces; the plaintiffs bar and the defense bar, which have a lot of money to spend on this.

I think you have no choice but to think globally and act globally, and I would not be shy about going beyond the discovery rules if you think that is necessary. What is the problem that you're trying to solve? I think the problem you are trying to solve is the problem that we

¹⁹ 28 U.S.C. §§ 2071–2074 (1997).

²⁰ 28 U.S.C. §§ 471–482 (1994 & Supp. I 1995).

²¹ 18 U.S.C. §§ 3161–3174 (1996).

focused on at the Brookings group,²² that was actually referred to a number of times here today. And ironically the solutions that people seem to be coming to are the very same solutions we arrived at at the Brookings group. I hope that doesn't totally doom the possibilities of ever accomplishing that in this committee.

As long as big business defendants feel that they are settling cases because of transaction costs driven by discovery, you are going to face a serious political problem on the Hill, and if you don't deal with it here, I think the Hill eventually, Congress will eventually deal with it. And I've always thought the appropriate forum for dealing with that was here. I think John Frank is on the right track when he talks about a tracking system of some sort. I think if you don't deal with that five percent of the cases, the complex cases, the tail that's wagging the dog here, the cases where there are at least serious allegations of abuse, where the expense of discovery, at least as business defendants believe, is driving their settlements, you have not dealt with the discovery problem.

Now, I think Judge Niemeyer²³ and the prior panel²⁴ were on the right track when they started talking about some sort of presumptive limits, in which either party can make a motion to the judge and sort of force the other five percent of the cases into the judge's hands, forcing some sort of judicial management, maybe combined with what Judge Vinson was talking about. If you can present that to the Congress and to the business community as having dealt with the problem of these complicated cases, I think that will be a major step forward. I would also encourage you to do it in a way, like we were trying to do in Brookings, that develops consensus between the plaintiffs' bar and the defense bar. It seems to me, in that prior panel,²⁵ that some sort of consensus was beginning to emerge in that respect, and so I would encourage you to go down that track.

Now, one last point about that. As I understand it, what you're trying to do, Judge Niemeyer, is to in effect self-select a tracking system. If you don't meet the presumptive limits and the parties argue that they belong in your court for you to manage the discovery, you by that

²² See Brookings Institution, *Justice for All, Reducing Costs and Delay in Civil Litigation* (1989). This report provided proposals included in the CJRA.

²³ Honorable Paul Niemeyer, Chair, Advisory Committee on the Civil Rules.

²⁴ The prior panel, entitled Lawyers' Panel on Reform Proposals, consisted of 'unaligned' lawyers, i.e. those who were not representatives of bar groups. Members of the panel included William Barr, Stuart Gerson, Patricia Hynes, William Jentes, Philip Lacovara, Peter Langrock, Alan Morrison, Jerold Solovy and Stephen Susman. The moderator was Arthur Miller.

²⁵ See description of prior panel.

definition have a complex case. But what are you going to do about the complex cases? There has got to be a set of rules that apply to those cases. I think Al Cortese, in referring to Lord Woolf's report²⁶, lays out some ground rules that ought to apply to those cases. So maybe you need to go down that track as well.

I think also that if you're going to reject the American College's recommendations regarding scope, you have to have a very good reason for doing that. If you're going to reject them, and I don't think you should, necessarily, you better have a good explanation for it, because, if you don't do that, I suspect that there will be people on the Hill who will try to amend your proposal to put those ideas in there. So you need to address them and make a compelling case against them, and I don't know what that is, other than it's an old idea. You better have a better explanation than that, or you're going to face that I think on the Hill. So that's my summary.

JUDGE BECKER: So then the eyes of Congress are upon you. Maybe if not now, five years from now.

MR. GITENSTEIN: And you asked me an interesting question at lunch which was does Congress naturally pay attention to this? And I can tell you as someone who was Chief Counsel of the Judiciary Committee and Minority Chief Counsel before that, no, not naturally. They don't. But when interests come to the Hill, like the business community, or the trial bar, and say you should look at this, they will look at it. And I'm telling you that problem is getting serious enough that it is going to happen. So they're definitely going to be looking over your shoulder, not because they're naturally interested in it. They've got a million other things they're looking at on that committee. But because people outside the Hill are going to be sure they do.

JUDGE BECKER: Let's focus for a few minutes on tracking. Is it doable? Can you do it by rule? Pat Higginbotham, what do you think?

JUDGE HIGGINBOTHAM: I don't think you can on an *a priori* basis select cases that are complex or not, but I don't think you need to. I think what you can do is to create a presumptive limit across all discovery, and then the parties themselves will self-select. If they do need the additional discovery, that will be the index of complexity that you're trying to identify, and they will identify it by coming to the judge.

I think that two things bear re-emphasis. All we need to do is be bold, re-write the '38 rules. I really think that's now getting into the

²⁶ LORD WOOLF OF BARNES, *ACCESS TO JUSTICE: FINAL REPORT TO THE LORD CHANCELLOR ON THE CIVIL JUSTICE SYSTEM IN ENGLAND AND WALES* (1996).

netherlands. We're getting a little ahead of Paul Carrington's vision of courts, which may occur, but we're not there yet.

We haven't dealt with the basic problem yet that the simple tools that everyone has come back to repeatedly during this one day that I've been here have been management tools, none of which are forbidden by the Federal Rules and all of which have been advocated for the twenty-two years I have been on the federal bench. The first thing I was preached to as a young district judge, and before that as a trial lawyer, was to set a firm trial date that works. I didn't hear a single suggestion with regard to practice that hasn't been around for twenty years.

What we're talking about here is a failure of personnel, and we're talking about a change of culture. You can't get your arms around that by the rules, and neither can the Congress. And if you're talking about five percent of the cases that are a problem, I don't see that in the data. I don't see any empirical data that identifies a problem out there that you can write a rule to respond to. Now, if it's there, somebody tell me what it is.

JUDGE BECKER: Arthur, you know a little bit about rules. What do you think about a tracking rule? Tracking identification, with a set of rules, or procedures that apply to cases in the heavy big case track?

PROFESSOR MILLER: As Yogi Berra said, it's *deja vu* all over again. And I think that's what Judge Higginbotham just said in effect.

Let me back up just a touch. There are three, at least three different kinds of uniformity when we speak of uniformity. One is geographic uniformity, which, of course, is what's been focused on here, because of the Up or Down provision in 26. One of the great dreams of the original drafters was that there was going to be geographic uniformity across the districts.

A second form of uniformity is what the Yalies call trans-substantive uniformity, namely that all substantive claims are created equally in terms of the procedural system. Now, the truth is that type of uniformity lost its virginity in the 1938 rules just by virtue of the fact that you have to plead fraud with particularity, and it slowly lost it over time, because we know RICO cases, and we know mail and wire fraud cases, and now as a statutory matter we know security cases are treated differently.

The third type of uniformity is case uniformity. When the people drafted the rules in the 30s, they thought a tort case was like a contract case was like a statutory case in terms of the master rules speaking with a single voice to all cases. Now, the Manual on Complex Litigation which came in in the early 60s was the first attempt to recognize that

all cases are not created equally. That something had happened between '38 and the early 60s that suggested that the phenomenon of the behemoth was not fictive and was probably going to be a constantly expanding and increasing phenomenon. The decision was made, it's a left hand, right hand problem. You have the rules over here, and you had the birth of the FJC over here, and Al Murrah,²⁷ who was in on the electrical supply cases, said we've got to do something outside the master rules to give judges guidance about these woolly mammoths.

And then in 1983, notice how recent this is. Do you realize, management as a matter of doctrine was not recognized in the Federal Rules of Civil Procedure until 1983 when Rule 16 was amended, and the signal went out which in a sense bridged to the Manual, legitimizing the Manual, and said to the district judges, "management is part of your job description." None of us during that era, and, remember, I lived the Manual with Bill Becker,²⁸ and I lived 16 in '83, because that was one of my rules. None of us wanted to breach the principle of uniformity. We wanted to keep the illusion, at least, that all cases are created equal, but your worship at the district bench level, you could take this tool, 16. It authorized you to reach over to the Manual, and basically track.

It was informal tracking. Now, it's '97. Have we reached the point in time when we want to go to formal tracking? Maybe. Maybe. Maybe we want to recognize a little more formally the notion that whether it's five percent or ten percent or one percent, a special effort should be made at the district judges level to pull out the woolly mammoth and give it a different kind of attention. Now, in an informal way, you're abandoning uniformity when you do that. But maybe, maybe the uniformity of the stripe of the 30s just isn't the uniformity that can survive in the late 90s, let alone the 21st century.

JUDGE BECKER: Pat, a rejoinder?

JUDGE HIGGINBOTHAM: Not a rejoinder, but just to piggy back a bit on Arthur's comment, which points up the relationship between the Manual and the Rules process. It's important that we keep in mind that in terms of governance the rules are but part of the package, and one of the most influential tools consists of the material that's in the Manual. The Manual may not have the authoritative, underlying sanction of the Congress, but it nonetheless is very influential.

²⁷ Honorable Albert Murrah, late judge of the Tenth Circuit and Head of the Judicial Panel on Multidistrict Litigation.

²⁸ Honorable William Becker, (D. Mo.), Member of Advisory Committee on Manual on Complex Litigation.

Now, one of the things that the Committee can do, if you conclude that there isn't a change in black letter law that responds readily to the problem, you have heard repeated at this conference the importance of management tools.

And Arthur spoke of taking the Manual and moving to rules. Also consider the opportunity to run in the other direction as well. We have another whole generation of United States district court judges and magistrate judges out there who apparently have not yet heard the sermon with regard to access. I came out of the Northern District of Texas as a trial judge, one of the large metropolitan districts in the country. It was a very complex docket of cases, securities and antitrust cases, et cetera. A practicing trial lawyer told me today that they have not been in the chambers of one of those courts in ten years. Now that—yes, there's a change in culture. And one of the changes in culture is closing the door, and if you call there what you get is an answering service. Now, maybe that's because they don't have the time. I don't know the answer to that. But part of what we have been hearing today really has more to do beyond rules, and there's a problem. I agree with Tom. I think I disagree with him on the federal side about how to respond to the problem.

I think part of the problem has to do with a reaffirmation of practices that have been around a while and encourage that to work. As I heard time after time, a firm trial date is something that lawyers look for, as well as cut off dates, et cetera. And Judge Rosenthal²⁹ practices that access by phone in Houston. And she can give you some testimony about one of the larger cities in the country, in that district, how well that works in today's world.

JUDGE BECKER: Is there any member of this alumni panel that thinks there ought to be a scope limitation? The principal one advocated as I see it is the one eliminating the "calculated to lead" language. Is there anybody that favors that? Bob?

JUDGE KEETON: With a qualification. And I think perhaps the moment has now arrived, the ideal moment for my stating that other question that I didn't get to state a while ago, and if I don't seize the moment, it will be lost forever.

But I'm going to take just a moment, first, for an illustration. I cite another one of my brilliant former students whose accomplishments have gone far beyond anything I ever taught him. Steve Subrin,³⁰ at the

²⁹ Honorable Lee Rosenthal, (N.D. Texas), Member of Advisory Committee on Civil Rules.

³⁰ Professor Stephen Subrin, Northeastern University Law School. See Steven N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691 (1998).

beginning of this conference, made an allusion to Charles Clark's central concern, as he called it, about issue formulation, and about the timing and method of issue formulation. Now, that ties in quite well with Pat's comments and Arthur's comments about the Manual for Complex Litigation. And yesterday afternoon we had a citation to the particular section that is worth looking at, 21.31, which says some things about the focus of issue formulation, or as it was called there, identification of issues. The identification of issues that's being discussed is legal issues, which in turn define the material factual issues.

Now, with all that as background, I have a very precise beginning of a draft. The question is would you think about whether it would be wise for you to adopt the following draft as a part of your globally-supported thinking about these rules:

There will be a stay on filing of discovery motions for three months after issue is joined, unless the parties file a stipulation or the court orders otherwise on motion, or on its own initiative.

What I have in mind is that this would help to meet the problem that the State of Texas is now thinking about. I don't know whether it's all eighty percent of those cases, or some smaller group as Wayne Brazil thinks it probably is, that would disappear even without having a timetable established for them. But whatever the number is, you see I'm preserving that timetable because now we can still have, after this three-month period, another period of time in which we add to the rule another sentence: the Rule 16(b) conference shall be held not sooner than six months after the issue is joined, with the same unless clause.

Now, putting those two things together, it gives a three month period after issue is joined—both lawyers are into it now—for them to get together and settle the case. But they have notice that if they don't do that they've got a deadline facing them. They're going to have to come before the court for the 16(b) conference, in another three months, unless somebody has decided, and unless they've stipulated, and the court, after looking at the stipulation which comes to its attention, has agreed that this is a case in which it ought to let them have a little more time to work it out without judicial intervention. But if on the other hand, either because when I look at that stipulation it doesn't look right, or because the case has already come to my attention, i.e., I have already identified it as a problem case, because of the motions that have come to my attention asking for emergency hearing and so forth, even before that first three month period came out, if that happens I may intervene and start the first conference with them earlier, to find out whether both sides would like to keep this case

going for reasons that are not consistent with our aim of early disposition, inexpensive disposition, consistent with disposition on the merits.

JUDGE BECKER: Are you going to take this back to Austin, Chief Justice Phillips, this rule? Are you going to have it written in next week?

CHIEF JUSTICE PHILLIPS: We normally move slower than that. I think I agree with those on the earlier panel who were nervous about any freeze on formal or informal activity. If the parties want to get going, I would not prevent that.

Can I respond to the first question about changing the scope?

JUDGE BECKER: I wanted to get back to scope, yes.

CHIEF JUSTICE PHILLIPS: Concerning what Phil Lacovara said and some others. It may be that a different scope is justifiable for different types of discovery. And I would particularly think about it on documents, after the basic disclosure documents have been exchanged. Whether we do it through scope, or by requiring parties to go to a judge for a discovery motion, we need to send a signal that the genie needs to be put into the bottle on these blanket document requests.

JUDGE BECKER: Phil Wittmann wants to pose a question.

MR. WITTMANN:³¹ Just one. One man's global is another man's tinker. And I hear Professor Carrington say with respect to the American College's proposal that that's something we should consider as a Committee. I'd be interested in the view of the alumni as to whether that proposal is a tinker or a global approach.

JUDGE BECKER: Paul, why don't we start with you?

PROFESSOR CARRINGTON: I think it's tinkering, because I don't think it's going to affect anything very much. I take Mark's point that there is a political thing to be thought about here. I don't have any confidence in my own political judgment about what needs to be done, or what should be done. So I'm not going to give you any advice about that, except to acknowledge that there may be some things you might think about putting in the rule, even though they're not going to make any difference. But if they're going to buy a little peace with people who care deeply about these things, well, I don't see any deep principle here that would preclude the possibility of doing that.

My hunch is these things are fairly harmless and inconsequential. In the written piece that I submitted some months ago, I did say that maybe in the documents area there may be a special reason for putting

³¹ Philip Wittmann, Esq., New Orleans, Member of the Advisory Committee on Civil Rules.

something in there about the scope of discovery. But I think it's very hard to be optimistic that if you put in language about scope in Rule 34, it would make a lot of difference in the way rulings are made.

JUDGE BECKER: How do you feel about the calculated lead to discovery of admissible evidence issue? Would you fiddle with that?

PROFESSOR CARRINGTON: Well, again, I guess my answer is the same.

JUDGE BECKER: It sounds like more than tinkering to me.

PROFESSOR CARRINGTON: Well, perhaps it is, although my guess is that it would not have very much effect, for reasons that John Frank stated. But I could be wrong about that. Again, if it would have a large effect in cutting back on discovery of documents that people need to litigate, then I would be opposed to it for the reason that Pat Higginbotham and others have stated.

This is a process that is pretty fundamental to our political system as it has evolved over the last half century and more, and I don't think you want to go far down the road of inhibiting people from getting information they need to assert their rights. So I'd be very cautious about that. And if that's what's at stake, then I would be opposed to it. But if it is a tinker, if all we're doing is giving a little bit of incentive to people to be a little bit more cautious about how many documents they're going to recover, then I can believe that might be a prudent thing to do, particularly given the political dynamics.

JUDGE BECKER: Mark, how do you feel about that?

MR. GITENSTEIN: I agree with what Paul just said.

JUDGE BECKER: Greg Joseph?

MR. JOSEPH:³² A question for the panel. You take the American College proposal, limit it to relevant to the claim or defense. Here's a situation. The party six years ago was convicted of perjury. Is that discoverable?

JUDGE BECKER: Arthur, do you want to take a shot at that one?

PROFESSOR MILLER: Answering the question? I usually ask the questions.

[Laughter.]

PROFESSOR MILLER: Or were you inviting a philosophical response?

JUDGE BECKER: What you would say on Good Morning America, Arthur.

[Laughter.]

³² Gregory Joseph, Esq., New York City, Chair, ABA Section of Litigation.

PROFESSOR MILLER: As we used to say in Brooklyn, Judge, touchy, touchy.

JUDGE BECKER: Joan Lunden, you're not.

PROFESSOR MILLER: I really don't know how Greg's hypothetical would come out. It might end up that the very permissiveness or embraciveness of the scope, particularly the last sentence in 26, for all of its hateful consequences in terms of over-discovery, if you ratcheted it back, you might breed a hell of a lot of motion practice. And you're robbing Peter to pay Paul. That's sort of the law of unintended consequences. I don't know. Again, all I can say on the larger issue is adjusting the scope, you could take the Steve Susman position which you heard, that it doesn't make any difference. Changing the word doesn't make any difference because lawyers will behave the way lawyers behave, and judges will react in terms of visceral feelings about what's fair or not fair to give up.

The last thought, to tie to Pat Higginbotham, ratcheting back on the scope provision in any form would be a monumental signal to the profession. The consequences you would get by doing that would have more to do with people reading tea leaves and saying, my God, this idea has been kicking around for twenty years. Suddenly they put it into the rule. As a strict constructionist or plain meaning person, I've got to give it effect.

And that will have access consequences. There are many things going on in our world outside of discovery whether it's some of these heightened pleading barriers, whether it's the advancement from trial to summary judgment, and then from summary judgment to the 12(b)(6). We are seeing movements and disposition that we would have thought unthinkable ten years ago. These are having serious access consequences. That's a deeply philosophical, mega-issue in terms of the American justice system, which I think should never be forgotten by the Committee.

JUDGE BECKER: Pat, did you want to add something to that?

JUDGE HIGGINBOTHAM: No, I think Arthur said it very well. I suspect, and this is purely a speculation, that in fact the proposal of the American College would, in fact, be read by many judges. Unfortunately it would be a very uneven reading, I think, because I think it is going to be read onto the underlying substantive law. And I think you're going to get a lot of unevenness in that interpretation. That's not a reason not to do it. I think it could be useful.

I repair to John Frank's reminder about the large fight over proportionality. Proportionality was a major blow, if you read the language. Yet what happened? I think what you're hearing from people

who have been around the rules process a while is not an opposition—at least not from me—to the American College proposal. There is a point of accommodation between the access to discovery and the level of discovery. I think there's some play in there. Cut back too much and it frustrates the enforcement of the underlying substantive law, which I think is the source of the problem.

JUDGE BECKER: We can't conclude this session without giving the committee some advice as to what to do about the chestnut that won't go away, namely, disclosure. We have a nation divided. Wayne Brazil, give us your take on that, coming from a district where disclosure works well.

JUDGE BRAZIL: I'd like to take two seconds to talk to my former colleagues on the Committee about the scope thing. I think that it's an extremely sensitive, important question. And the reforms in 1983 were philosophically and could have been practically extremely dramatic and important. And if you add—they're all in the direction of cutting back, as were earlier containments. Containment. That's been the thrust of most of the discovery, as opposed to the disclosure, changes, and even arguably disclosure. If you add to that a further much more philosophically obvious cut back, by changing the scope and/or taking out the sentence that leads to this, my fear is that you will create two bad effects.

One is you will create incentives for friction, create incentives for people to resist. And one of the big problems with discovery is there's a lot of friction in it. And be careful of writing rules that give people incentives to resist, because it's not clear that the most fundamental problem isn't resistance.

And the second thing, I think if you take the rules as they're currently crafted, if the judge does what he or she is supposed to do, and I realize that's a huge if, but if you do what you're supposed to do, you get in there at the Rule 16 conference, and you use 26(b) and 26(g) with the proportionality concept in it, you do that, you don't need to cut back any further. But if you do cut back further, there's a substantial risk in those few cases where there really is a subtlety to the process of proof, that you do injustice. So I think we have immense tools now to do everything if they're implemented, and I think changing the scope of discovery now, in addition to the cut backs that we've had over the last decade and a half, is an extremely philosophically sensitive thing to do.

JUDGE BECKER: Okay. What do they do about disclosure?

JUDGE BRAZIL: Well, it comes to no surprise to anyone, I think if I had to choose uniformity—and I like uniformity—it would come

three years from now, four years from now. Because we don't know enough, I think, about how disclosure is working. It works well in our court. Maybe that's a little sub-cultural phenomenon. But if you have to go to uniformity now, then I say make the national rule, take out the opt out and compel everybody to do it.

JUDGE BECKER: Make everybody do it.

JUDGE BRAZIL: And the notion that the culture can't change, that the culture can't accept things, I think is empirically inaccurate, because ninety-nine out of one hundred lawyers opposed disclosure. And now sixty out of one hundred lawyers are doing it. The good lawyers tell me in private, "you tell us what to do, and we'll do it."

But my final point about disclosure is this: Paul, if you're thinking about a system where you're going to use disclosure as basically a rationale for cutting back on the scope of discovery, even document discovery, please make sure that you at least think hard about whether the disclosure has to include adverse documents. Because one of the proposals is that the disclosure should be limited to supporting documents. And if you do that and cut back on other kinds of presumptive access to other kinds of discovery, I think you're going to defeat your purpose.

And disclosure of adverse documents should help drive early settlements. Not in these huge cases. And, by the way, you need input from patent lawyers. Intellectual property is a huge part. Intellectual property litigation is a huge part of American economic life, and I can tell you everything that's been said about economic incentives is baloney in that setting. There are no economic restraints or discipline.

JUDGE BECKER: My colleague Tony Scirica: our former district (Eastern District of Pennsylvania) does not have disclosure, isn't that right?

JUDGE SCIRICA:³³ They opted out.

JUDGE BECKER: They opted out?

JUDGE SCIRICA: And they do not use it for complex litigation. My question is this: some on the Committee would like to wrestle with 26(a). There's the DRI proposal offering a basis that we might be able to work through. Steve Susman said earlier that it was not plaintiff friendly. And it seems to me that some of these provisions could be revised that would probably make it fairly liberal. I wonder whether you gentlemen have had a chance to look at that proposal.

JUDGE BECKER: Paul Carrington?

³³ Honorable Anthony Scirica, Third Circuit, Member of the Advisory Committee on Civil Rules.

PROFESSOR CARRINGTON: I can't respond directly to the DRI proposal. It sounds reasonable to me on the face of it. I do say this about the disclosure, and that is if you are going in the direction I was advocating, of trying to get the lawyers to manage this stuff, then you do have to put some responsibility on them to be forthcoming early on or they never get anywhere. So you've got to state some kind of a duty to get the conversation going. And that was really the office of those disclosure requirements. It could be done in other ways.

I suggest in my written memo the South Carolina rule. As Reporter, I should have urged the Committee to go the South Carolina route, which was not a disclosure rule, but four or five standard interrogatories that everybody had to answer at the outset of the lawsuit. That sounded a little less threatening and a little less of a trespass on the adversary tradition, but it had the same outcome. But as I say, I think you do need some kind of disclosure in order to get the lawyers on track to manage their own affairs.

JUDGE BECKER: Paul, given the sentiment frequently expressed, particularly in the last session, that disclosure just ought to be done away with altogether, how would you characterize the decision before the Committee? Is it a political decision? I mean, how long can they let it sit? Is it a normative judgment in terms of what's best? Or do they simply face a political decision and will have to bite the bullet one way or the other?

PROFESSOR CARRINGTON: Well, I don't know. As I said before, I don't have a lot of confidence in my political judgment, and having listened to Wayne and Arthur and others speak to the question of whether you bend at all on the scope question, they may be right. My sense is a little different from theirs, that it probably wouldn't make much difference. But I could be wrong about that.

JUDGE BECKER: Justice Durham has a question.

JUSTICE DURHAM:³⁴ Speaking of politics, I would really like to hear from Professor Miller and Judge Higginbotham, given what they said about access and impact on substance, to respond to what Mr. Gitenstein told us about Congress's position, vis-a-vis, for example, the American College proposal.

JUDGE BECKER: We'll have a brief response from Professor Miller, and then one from Judge Higginbotham, and then the final word from Mark Gitenstein. Arthur?

PROFESSOR MILLER: Boy, this one hurts. You realize that the political wing, the Congress, really was not a participant in the rule-

³⁴ Honorable Christine Durham, Utah Supreme Court, Member of the Advisory Committee on Civil Rules.

making process until just a few years ago. The fact that the Congress is now a factor of some dimension reflects one of the great changes in the rule-making process. And that is it's politicized.

If you sat in on a committee meeting of the Ben Kaplan Committee—the Dean Acheson, Ben Kaplan Committee in the 60s—the politics were left at the door. The politics did not come in. And by politics, I don't mean Democrat-Republican. I mean left of the V and right of the V. Everybody seemed to leave it outside. And in those, I suppose some would say bad old days, external forces were not felt in that room. Now, nothing happens that isn't impacted by the left of the V and the right of the V. And my most depressing thought, as I reach the twilight of my senility, is that I may have been the reporter that began the process of dooming rule-making as we have known it since 1938.

I don't know how you function in this environment. I really don't. It's a problem not only that Congress is looking, that people are running to Congress. That the Committee discussions often reflect political reality, and decisions are made on that basis. With great, great deference to the most democratic branch, every time they get their God-damned hands on a rule, they screw it up, and I just cite Rule 4. Every worst nightmare that led to the delegation under the Rules Enabling Act has been proven in the last ten years, and I don't know how you unscramble that egg.

JUDGE BECKER: Pat?

JUDGE HIGGINBOTHAM: Well, I saw that when I was chair of the Committee. The idea that in 1966, when (b)(3) was added to Rule 23, that that meeting would have occurred in the Trust Company Building in Washington in the offices of Covington & Burling, with (b)(3)'s opt out feature being settled upon as people dashed off for their train, struck me as a state of nirvana, that we would like to regain in some fashion. It's quite clear that we're no longer there. The Committee has responded in the only way that I thought it could. I'm pleased to see that the Advisory Committee has continued to welcome people genuinely concerned, and is continuing to hold conferences of this kind. I know of no more effective manner of proceeding.

The final note is with regard to why this has happened. Remember that there was no overarching doctrine. The word "standing" only recently joined our legal lexicon. And that came in as our litigation model changed with the public law litigation model that Abe Chayes identified at Harvard some time ago.³⁵ This is in response to large

³⁵ See Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

public issues in which we no longer had the plaintiff and a defendant of the classic bipolar model. Rather we faced freestanding, independent and ongoing social disputes. We began to ask the question of what the plaintiff's relationship to our dispute is.

That change is mirrored in the code in the myriad social policies that the private bar is being asked to shoulder; the use of private suits to implement broadly stated norms. You cannot escape the dance of procedure and substance here, which is just as powerful here as it is in class actions. In many ways it is more powerful, so that the changes that the Advisory Committee has experienced in the openness of its business and in the level of interests of the Congress are a direct signal of the true substantive bite of rules of procedure.

The consequences of procedural changes here are enormous. Congress may not care about the little nits and gnats or what happened at the court house, lawyer kinds of problems. But their constituents care very much about large questions that we now are facing come to us dressed as procedural rules.

The dance of procedure and substance is now a very different looking dance. It's to quite different music than it was. Finally, I'd repair to the reality that we yet operate under the Madisonian compromise, at least the last time I looked. Under that compromise, the lower federal courts weren't created by the Constitution, but were created by the Congress. Congress has the ultimate power.

We have enjoyed a relationship with Congress that has left us alone, pretty much, and we still have that. And we want to maintain that kind of independence as best we can. Mark's observation is then astute and has to be accounted for. Not because we're making a political judgment in the sense that we're playing games with Congress, but because we're trying to do the right thing and to maintain our independence. To do so, we must deal with the realities of what's happening on the Hill.

If something is going to fall on us tossed from the Hill, we have to be aware of that, but we don't tack and shift immediately with that.

JUDGE BECKER: Mark Gitenstein, we'll give you the final word.

MR. GITENSTEIN: I think that, first of all, it is not a new phenomenon that Congress has interfered with this Committee. When I first came to the Hill in the 1970s, I recall a huge fight over the Rules of Evidence, which was even before the Speedy Trial Act if I'm not mistaken, Arthur. Wasn't it—

PROFESSOR MILLER: 1970s.

MR. GITENSTEIN: But it was in the early 70s, so that's over twenty years.

PROFESSOR CARRINGTON: Motivated primarily by states' rights interests.

MR. GITENSTEIN: Yes, but still—

PROFESSOR MILLER: You're absolutely right.

MR. GITENSTEIN: This was at least a twenty-year phenomenon. It's not something that's brand new. I think Patrick said it better than I can. I'm just telling you to be sensitive to this. You should do what you think is right, and all I'm saying is be sensitive to what the consequences are. You have to focus on these cases—these five percent of the cases. I don't know how to identify the five percent, Patrick, but we all know they're out there.

Why are they important? Because there are hundreds of millions of dollars at stake in those cases. And both from the plaintiff's bar point of view and from the business community's point of view, those sort of things are not going to go unnoticed. And they're going to try to win those cases wherever they can. They're going to try to win them in court. They're going to try to win them in Congress. They're going to try to win them in this Committee.

So you've got to figure a way to solve that problem. I think that Judge Niemeyer and his dialogue with this prior panel began to lay out some ideas to begin to focus on. I think the ultimate solution is going to be—I know judges don't like to get in the middle of those fights—but they're going to have to get in the middle of those fights to resolve the discovery disputes. Because I think it's the discovery disputes and the expense of discovery that is driving a lot of the controversy.

JUDGE BECKER: As the moderator for the last session, I will take the liberty of speaking for everyone who has participated in this conference, and by definition or by invitation all of us are those who have a deep and abiding interest in the well-being of the federal judicial system and the administration of justice in the federal courts in this country. This kind of dialogue is very important. Unless you know what the folks are thinking, it's very difficult for you to do your job. So I commend you.

JUDGE NIEMEYER: I do want to first thank you, Judge Becker, and the panel. Because the wisdom that we heard this afternoon is something that we have to pay heed to. I'd like to also thank the other panels and the other presenters. I can't tell you how valuable the information, the opinions and the advice that we received is.

If we hear correctly, it's not so far afield. I think there is a core consensus. I hear that uniformity is demanded. Some form of disclosure seems to be acceptable. The people that are doing it seem to like it. There seems to be problems maybe with interference with the

attorney/client relationship. Maybe calculating damages up front, maybe selecting an expert up front. Those are modifications to disclosure that might make it universally acceptable. The benefits of disclosure might be the identification of the issues in the case. The early look in a case, the early resolution in a case.

It seems to me that we seem to hear that core discovery works now in many of the cases, and that we ought to somehow preserve the discovery as it's working in those cases. There's probably room, it seems to me, for limiting depositions and documents in core discovery, provided we provide an exit route to the court for broader discovery, broader depositions, broader document production, which is under court management. That may be the natural way to break this dilemma down between those cases where discovery is working, and the expert cases. It seems to me judicial involvement is demanded. We can't pass a rule that tells judges to do that, but we can pass a rule that gives the attorneys the right of access to the court, and to the judges, and let them initiate it.

It seems to me that we have a couple of wild cards that everybody seems to come down on some benefit on. Discovery cut off, an early trial date. This came out of the RAND study, but it also seems to be anecdotally supported with different force from different people.

And finally I think we have to recognize that we're not wedded to making a change, except maybe with the possibility of uniformity. I'm not sure what the Committee's will will be on that. But we're not wedded to make a change.

If we do make a change, I think we have to recognize that it's a matter of delicacy, that the question is no longer a committee huddling in a high lodge in Utah and deciding what to do, but we're before the eyes of Congress, and whatever we do is going to have to be sellable to this whole group, and to the public and Congress. And I think the Committee is fully aware of that new role. That seems to be coming forward, and we intend to take steps beyond the Committee to help pave the way for that type of acceptance. But it's only through this process, and Pat Higginbotham is the architect of this type of process, and I thought it was a good one, and I intend to continue it, that we get the full input of just about every sector that I can think of.

We stand adjourned.

[The conference was concluded.]