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FOREWORD

IN DEFENSE OF DISCOVERY REFORM

*Ralph K. Winter**

INTRODUCTION

In private conversations with lawyers and judges, I find precious few ready to argue that pretrial discovery involves less than considerable to enormous waste. Yet, the reaction to recently proposed amendments to the Federal Rules of Civil Procedure suggests that even amendments best characterized as trivial or incremental may encounter enormous resistance. Before examining the sources of this resistance to change, I will describe the principal proposals for reform, the reasons for their adoption by the Advisory Committee on Civil Rules, the criticism they received, and the Committee's response.¹

In proposing these amendments, the Committee perceived

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¹ I was a member of the Advisory Committee. Much of what follows is based upon my observations and participation at Committee meetings and public hearings. Also sitting on the Committee at pertinent times were Hon. Sam C. Pointer, Jr., Chairman; Hon. John F. Grady, former Chairman; Hon. James Dickson Phillips, Jr.; Hon. Joseph E. Stevens, Jr.; Hon. Richard W. Holmes; Hon. Wayne D. Brazil; Hon. Mariana R. Pfaelzer; Hon. Michael D. Zimmerman; Larrine S. Holbrooke; Professor Arthur R. Miller; Dennis G. Linder; Dean Mark A. Nordenberg; Assoc. Dean Edward H. Cooper; James Powers; Carol J. Hansen Fines; and Professor Paul D. Carrington, Reporter.

the problems arising from pretrial discovery as twofold. First, a no-stone-left-unturned (sometimes a no-grain-of-sand-left-unturned) philosophy of discovery governs much litigation and imposes costs, usually without corresponding benefits. Costly discovery undertaken with only a marginal effect on the outcome of litigation constitutes an economic loss to society. Like any wasteful practice, it uses up resources that could be put to a more productive use.

Second, discovery is sometimes used as a club against the other party. Unlimited discovery allows a party to impose costs upon an adversary solely to increase the adversary's expenses. The anticipation that bringing or defending a lawsuit will be costly, regardless of the merits, may cause a party with a meritorious claim or defense either not to sue, to give up early, or to settle for an amount less than defense costs.

The Committee undertook to address these problems through a number of proposed amendments to the Federal Rules of Civil Procedure. Four principal reforms were proposed. The first was an amendment to Rule 26(b)(1)(a)(iii) that would authorize district courts to limit discovery where "the burden or expense of the proposed discovery outweighs its likely benefit."² The second, also involving an amendment to Rule 26, would provide for the automatic disclosure of certain core information without requiring a request from the other party. The third approach was to impose numerical limits upon the number of depositions to be taken or interrogatories to be propounded in a particular action without leave of court. The fourth proposed amendment was to Rule 30 and provided that parties may forgo stenographic transcription of a deposition and instead use video or audio methods of recording. This Foreword addresses each proposal in turn.

I. THE PROPOSED REFORMS

A. *Limits on the Scope of Discovery*

The proposed amendment to Rule 26(b)(1)(a)(iii)³ (Rule

² Rule 26(b)(1)(a)(iii) presently states that the court shall limit discovery where "the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation." FED. R. CIV. P. 26(b)(1)(a)(iii).

³ See *id.*

26(b)(2)(iii) under the proposed amendment) provides that a court shall limit discovery where

the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.⁴

This amendment adds to the present rule two factors to be considered: the burden or expense of the proposed discovery weighed against its likely benefit and its importance in resolving disputed issues. The amendment seeks to address both the problem of waste as a result of a no-stone-left-unturned philosophy and the problem of costly discovery being used as a club against the other party. If ultimately adopted, the amendment's impact is uncertain. In cases in which counsel for all parties agree to excessive discovery, the amendment by itself will have no effect. Where a party objects to discovery, it will have an effect only if district and magistrate judges give the requisite scrutiny to discovery demands. This scrutiny may be no easy task because the expense and likely benefits of discovery and the importance of the proposed discovery in resolving disputed issues cannot be determined without a considerably more searching inquiry into the case than is required under present rules. Moreover, where the balance does not tip decidedly against the proposed discovery, past habit is likely to cause the court to permit it. In any event, this proposal has been relatively noncontroversial. Of course, it makes such common sense that it is difficult to make a straight-face argument against it.

B. *Automatic Disclosure*

On the other hand, the proposal to amend Rule 26 to provide for the automatic disclosure of certain core information

⁴ Proposed FED. R. CIV. P. 26(b)(2)(iii). See PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE AND THE FEDERAL RULES OF EVIDENCE, SUBMITTED TO STANDING COMMITTEE ON RULES OF PRACTICE AND PROCEDURE BY ADVISORY COMMITTEE ON CIVIL RULES, May 1992 [hereinafter *Advisory Committee Proposed Amendments*].

All of the proposed amendments discussed in this article have been passed by the Judicial Conference and submitted to the Supreme Court for consideration. See PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE AND FORMS, SUBMITTED TO THE JUDICIAL CONFERENCE OF THE UNITED STATES BY STANDING COMMITTEE ON RULES OF PRACTICE AND PROCEDURE (Sept. 1992).

without a request by the other party has been exceedingly controversial. Automatic disclosure is based on the conviction that some matters—the names of the locomotive engineer in litigation over a railroad-crossing accident or the plaintiff's employment records in an employment discrimination case—must inevitably be disclosed under present rules. Disclosure being inevitable, the Committee saw little purpose in continuing to require that parties make a superfluous formal request for such discovery, which is costly and may generate hopeless, but also costly, opposition.

Much of the controversy surrounding this proposal stems from its history. The original proposal submitted for public comment required automatic disclosure of, among other things, the names of witnesses and a description by category and location of documents.⁵ The scope of the automatic disclosure was governed

⁵ As then proposed, Rule 26(a)(1) read:

(a) Required Disclosures; Methods to Discover Additional Matter.

(1) Initial Disclosures. Except in actions exempted by local rule or when otherwise ordered, each party shall, without awaiting a discovery request, provide to every other party:

(A) the name and, if known, the address and telephone number of each individual likely to have information that bears significantly on any claim or defense, identifying the subjects of the information;

(B) a copy of, or a description by category and location of, all documents, data, compilations, and tangible things in the possession, custody, or control of the party that are likely to bear significantly on any claim or defense;

(C) a computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34 the documents or other evidentiary material on which such computation is based, including materials bearing on the nature and extent of injuries suffered; and

(D) for inspection and copying as under Rule 34 any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment.

Unless the court otherwise directs or the parties otherwise stipulate with the court's approval, these disclosures shall be made (i) by a plaintiff within 30 days after service of an answer to its complaint; (ii) by a defendant within 30 days after serving its answer to the complaint; and, in any event, (iii) by any party that has appeared in the case within 30 days after receiving from another party a written demand for accelerated disclosure accompanied by the demanding party's disclosures. A party is not excused from disclosure because it has not fully completed its investigation of the case, or because it challenges the sufficiency of another party's disclosures, or, except with respect to the

by the phrase "likely to bear significantly on any claim or defense," or similar language. The Bar, particularly defense attorneys, registered strong objections to the proposal at two public hearings⁶ by oral testimony from a large number of witnesses and by written comment from a multitude of individuals and organizations.

The objections were along the following lines. First, the language "likely to bear significantly on a claim or defense" was said to be intolerably ambiguous, particularly as a guide to the conduct of parties at the pleading stage. It was argued that, under notice pleading, claims and defenses need be stated in only the most general terms. Therefore, a party who failed to appreciate the breadth or nature of its adversary's claims and defenses might fail to make a full disclosure and thus be subject to sanctions. Actual complaints that had survived motions to dismiss were produced as examples of pleadings that were useless as guides to disclosure of matters "bear[ing] significantly on a claim or defense."⁷ It was also argued that pleadings which contain only generalities might cause vast disclosure of materials irrelevant to the actual dispute at issue, thus increasing rather than lowering costs.

Second, opponents argued that, because notice pleading does not require a party to detail facts or the legal theories of its claims or defenses, the other party—particularly defense counsel—would be compelled to respond to every legal theory that might support the complaint. This response might alert adversary counsel to legal theories they had not considered. Defense counsel understandably did not want to do the work of plaintiff's counsel.

The final objection to the proposals for automatic disclosure was directed particularly to the disclosure of information damaging to a lawyer's client. It was argued that such disclosure would interfere with attorney-client relationships and lead to the disclosure of information subject to privilege or the work-

obligations under clause (iii), because another party has not made its disclosures.

The Committee also proposed mandatory disclosure regarding expert witnesses and other noncontroversial issues, not discussed in this article.

⁶ These hearings took place in Atlanta, Georgia on February 19-21, 1992 and in Los Angeles, California on November 20-23, 1991.

⁷ Proposed Rule 26(a)(1)(A).

product immunity.

There was some doubt that the problems were as insurmountable as claimed, or that they would arise in the typical, garden-variety case rather than in complex litigation, such as a products-liability claim involving sophisticated technology. Nevertheless, the Committee decided that the "likely to bear significantly on any claim or defense" standard was flawed for many of the reasons stated by its critics. After the public hearings, the Committee, by a close vote, decided to abandon the disclosure project.

However, at a later meeting, it reopened the issue and undertook to reexamine the language governing the scope of disclosure. The flaw was perceived to arise from the use of notice pleading, which does not require the pleader to allege facts or specific legal theories. The Committee had no desire to abandon notice pleading, but given that pleadings often do allege facts, it undertook to draft a proposal limiting automatic disclosure to facts that are actually pled. It thus proposed an amendment requiring disclosure—after counsel have met and conferred⁸—of the names of witnesses and location and categories of documents "relevant to disputed facts alleged with particularity in the pleadings."⁹ This language was taken from Rule 9(b) and thus

⁸ Proposed Rule 26(f) provides in pertinent part that "the parties shall . . . meet . . . to make or arrange for the disclosures required by subdivision (a)(1)." *Advisory Committee Proposed Amendments*, *supra* note 4.

⁹ The Committee's proposed amendment to Rule 26(a) reads:

(a) Required Disclosures; Methods to Discover Additional Matter.

(1) Initial Disclosures. Except to the extent otherwise stipulated or directed by order or local rule, a party shall, without awaiting a discovery request, provide to other parties:

(A) the name and, if known, the address and telephone number of each individual likely to have discoverable information relevant to disputed facts alleged with particularity in the pleadings, identifying the subjects of the information;

(B) a copy of, or a description by category and location of, all documents, data compilations, and tangible things in the possession, custody, or control of the party that are relevant to disputed facts alleged with particularity in the pleadings;

(C) a computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34 the documents or other evidentiary material, not privileged or protected from disclosure, on which such computation is based, including materials bearing on the nature and extent of injuries suffered; and

(D) for inspection and copying as under Rule 34 any insurance

has a body of caselaw defining it.¹⁰

The revised proposal was regarded by all but one member of the Committee as responsive to the legitimate concerns of critics. First, the redrafted amendment enormously reduces the ambiguity that concerned critics. A general allegation that a product injured a person through "a design defect" will not trigger disclosure concerning the design because the allegation does not involve facts pled with particularity. An allegation that a railroad crossing on Main Street, Everytown, Connecticut, was unattended and the scene of a collision between Amtrak locomotive No. 7694 and plaintiff's auto at 2:15 a.m. on July 15, 1992, would trigger disclosure. There is, of course, an inevitable area of ambiguity, but no more than the irreducible ambiguity that dogs any rule.

Second, because disclosure is required only as to matters relevant to facts, a disclosing party need not concern itself with divining the other party's legal theories. A party who believes a fact pled with particularity to be irrelevant is free to make a motion to strike under Rule 12(f).¹¹ If the motion is granted, disclosure need not be made. If it is denied, then disclosure as to that allegation of fact must proceed. In either event, parties do not risk alerting their adversaries to new legal theories by disclosure.

Finally, the Committee was not persuaded by the objection that the proposed amendments would interfere with the relationship between attorneys and clients or compel the production

agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment.

Unless otherwise stipulated or directed by the court, these disclosures shall be made at or within 10 days after the meeting of the parties under subdivision (f). A party shall make its initial disclosures based on the information then reasonably available to it and is not excused from making its disclosures because it has not fully completed its investigation of the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

Advisory Committee Proposed Amendments, supra note 4.

¹⁰ The rule provides: "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." FED. R. CIV. P. 9(b).

¹¹ The rule provides: "Upon motion made by a party before responding to a pleading . . . the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." FED. R. CIV. P. 12(f).

of materials subject to privilege or the work-product immunity. In fact, this objection, although repeatedly voiced, was based on a misunderstanding of the proposed amendments and on a very undesirable view of the attorney-client relationship.

The objection mistakenly assumes that privileged or work-product materials must be automatically disclosed under the proposals. That is a plain misreading of the proposed amendments that should be obvious to any lawyer who claims to have studied them. Rule 26(b)(5) of the proposed amendment specifically allows parties to assert a work-product or privilege claim before materials subject to such a claim need be disclosed or before a party is allowed to depose a witness.¹² Although the proposed amendment is absolutely clear, the notion that the attorney-client or work-product immunity is overridden by the disclosure requirement continues to appear in the legal press.¹³

¹² Proposed Rule 26(b)(5) provides:

Claims of Privilege or Protection of Trial Preparation Materials. When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

Advisory Committee Proposed Amendments, supra note 4.

¹³ See, e.g., Laura A. Kaster & Kenneth A. Wittenberg, *Rulemakers Should be Litigators*, NAT'L L.J., Aug. 17, 1992, at 15. The authors state:

[R]evised Rule 26 will, if adopted, require attorneys to disclose, without request or definition by their opponents, all potential witnesses and all potentially relevant documents, whether or not supportive of their cause. What the attorney considers relevant (work product) and what the client directs the attorney to consider (attorney-client privilege) will have to be disclosed Ethical rules and long-held assumptions fostered by Supreme Court opinions about the importance of the attorney-client privilege have been sacrificed to the judicial agenda [of reducing the workload of the courts] without any airing of the issues.

Id. at 16.

For reasons stated in the text, this criticism is off the mark. Although the claim that the revised rule compels disclosure "without . . . definition" of "all potentially relevant" materials might be legitimately leveled at the original proposal, it is hardly a fair description of the revised amendment. Perhaps the authors were unaware of the revision. The criticism regarding the effect on the attorney-client privilege is simply wrong, as explained in the text.

I must also comment on the authors' assertion that there has not been an "airing of the issues." The Committee not only gave the requisite public notice but also held three full days of public hearings in Los Angeles and Atlanta. The number of comments received created a mini-filing emergency in my chambers. Moreover, because many of the comments voiced identical criticisms in identical language, it was obvious that critics

The second flaw in the disrupt-the-attorney-client-relationship argument is that it is based on the premise that a legal obligation to disclose should not be imposed because lawyers do not want to tell clients that they have such an obligation—the most peculiar view of the role of a lawyer that I have ever heard. It also reflects the notion that the attorney-client relationship is enhanced by charging substantial sums to a client for the fruitless defense of a request for discovery resulting in a direct order that specified matters be disclosed. Indeed, the very argument—that formal and costly but useless proceedings are necessary—is itself an admission that wasteful discovery routinely occurs.

Beyond the fact that the redrafted amendments meet the legitimate criticisms leveled against the original proposals, the disclosure amendments as presently drafted have benefits beyond saving core discovery expenses. For example, the parties themselves can choose to trigger disclosure from their adversary simply by pleading facts. They are not required to plead facts, but if they do, disclosure follows. Some parties will thus have an incentive to plead facts. Such pleading not only avoids costs to everyone but also narrows the issues with regard to claims and defenses at an early stage of the litigation. By encouraging, without requiring, fact pleading and by requiring counsel to meet and confer about a plan of discovery before the requisite disclosure, the proposed amendments may well reduce the amount of discovery following disclosure and encourage early settlement.

An objective description of the disclosure amendments might well be “incremental” or “a first step” or “barely non-trivial.” They require the disclosure of nothing that is not mandatory under the present rules. They have no effect on work-product or privileged information. They simply do away with the need for a party to make a formal request for discovery and with the opportunity for the adversary to resist. They also create incentives for parties to narrow the issues early in the litigation.

across the country had sufficient notice to mount a coordinated response. Indeed, the repetitive misreading of the effect of the proposals on the attorney-client privilege may well have resulted from the parroting of criticisms made by others, rather than an actual examination of the proposals.

C. *Deposition and Interrogatory Limits*

The third set of proposals limits the number of depositions and interrogatories in an action. Originally, the Committee proposed to limit depositions by each side to ten and interrogatories by each party to fifteen.¹⁴ In either case, the limits could be lifted by leave of court. An amendment limiting the length of depositions to six hours without leave of court was also proposed.¹⁵ The goals of these proposals were to limit both wasteful discovery and the use of discovery as a means of driving an adversary from the field.

These proposals also drew criticism, notwithstanding the fact that the vast majority of cases in federal courts should not involve more than ten depositions, fifteen interrogatories, or depositions lasting more than six hours. In response to the criticism, the Committee raised the limits on interrogatories to twenty-five,¹⁶ although the limit of ten depositions remained.¹⁷ The Committee also eliminated entirely the limits on the length of depositions because of the apprehension that parties who

¹⁴ *Advisory Committee Proposed Amendments, supra* note 4; currently, the rules do not explicitly limit the number of depositions or interrogatories in an action. FED. R. CIV. P. 30 & 33.

¹⁵ *Advisory Committee Proposed Amendments, supra* note 4; the current rule does not limit depositions solely on length of time. FED. R. CIV. P. 30.

¹⁶ Proposed Rule 33(a) provides in pertinent part: "Without leave of court or written stipulation, any party may serve upon any other party written interrogatories, not exceeding 25 in number including all discrete subparts . . . Leave to serve additional interrogatories shall be granted to the extent consistent with the principles of Rule 26(b)(2)." *Advisory Committee Proposed Amendments, supra* note 4.

Proposed Rule 26(b)(2) provides that a court may limit discovery if it determines that "(i) the discovery sought is unreasonable, cumulative, or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit . . ." *Advisory Committee Proposed Amendments, supra* note 4.

¹⁷ Proposed Rule 30(a)(2) provides in pertinent part:

(2) A party must obtain leave of court, which shall be granted to the extent consistent with the principles stated in Rule 26(b)(2), . . . if, without the written stipulation of the parties,

(A) a proposed deposition would result in more than ten depositions being taken under this rule or Rule 31 by the plaintiffs, or by the defendants, or by third-party defendants[.]

Advisory Committee Proposed Amendments, supra note 4; see also proposed Rule 31(a)(2)(A) (using similar language in regard to Depositions Upon Written Questions). *Id.*

might not ordinarily question a particular witness would do so simply to take up time and thus limit the other party's time for examination. As an alternative, the Committee authorized limits on the length of depositions by local rule or by court order in a particular case.¹⁸

Whether these proposals will have an effect on the cost or outcome of litigation is doubtful. The limits are high and can be dispensed with by agreement among counsel. However, their existence does limit egregious use of discovery as a club.

D. *Recording Depositions*

A final proposed amendment allows parties to videotape or tape-record depositions without a stenographic transcription.¹⁹ The original impetus for this amendment came from a desire to allow parties to videotape and transcribe stenographically, depositions as a matter of right, thus eliminating the present need to seek leave of court or a stipulation from the other parties for videotaping.²⁰ There seems to be little controversy over that goal. Indeed, where a deposition is to be used at trial and the demeanor of the witness is important to a credibility determination, a videotaped deposition is far superior to a reading of the deposition by a non-witness.

Controversy has arisen because the Committee also decided that parties should be free, where they so agree, to use the cheapest method of recording depositions and to dispense with the requirement of a stenographic transcript. Stenographic recording is not in fact required under the present rules because

¹⁸ Proposed Rule 30(d)(2) provides in pertinent part: "By order or local rule, the court may limit the time permitted for the conduct of a deposition, but shall allow additional time consistently with Rule 26(b)(2) if needed for a fair examination of the deponent or if the deponent or another party impedes or delays the examination." *Advisory Committee Proposed Amendments*, *supra* note 4.

¹⁹ Proposed Rule 30(b)(2) provides in pertinent part:

The party taking the deposition shall state in the notice the method by which the testimony shall be recorded. Unless the court orders otherwise, it may be recorded by sound, sound-and-visual, or stenographic means, and the party taking the deposition shall bear the cost of the recording. Any party may arrange for a transcription to be made from the recording of a deposition taken by nonstenographic means.

Advisory Committee Proposed Amendments, *supra* note 4.

²⁰ See Fed. R. Civ. P. 30(b)(4).

the parties can stipulate otherwise.²¹ The proposed amendment thus provides that the party noticing a deposition state the means by which it shall be recorded—stenographic transcription, videotape or audio recording.²² Any other party may provide additional means of recording as they choose.²³ A transcript must be made of videotaped or audio-recorded depositions before they can be used at trial.²⁴

This amendment has been strenuously opposed by court reporters. Their opposition seems in part economic; they may perceive the rule as drastically limiting their work. If so, they may exaggerate the effects of the proposal. The proposal changes the present rule by allowing the party noticing the deposition to forgo stenographic transcription. It does not allow that party to prevent another party from requiring such transcription. Because the parties may agree to forgo stenographic transcription under the present system, predictions of substantial decline in the use of that method seem exaggerated.

Court reporters also argue that endless disputes will arise over what a witness actually said if there is no official stenographic transcript. There is merit in this objection, but the Committee believed it was outweighed by other factors. First, most depositions are never actually transcribed, much less used in court, and thus disputes over what was said will involve a relatively small number of depositions. Second, the Committee believed that the parties were in the best position to know the likelihood of a deposition's use in court and the likelihood or importance of disagreements over its contents.

II. THE FUTURE OF DISCOVERY REFORM

I am convinced that discovery reform is doomed to much organized resistance and little organized support. Notwithstanding the Committee's efforts to respond to well-taken objections, the revised amendments regarding automatic disclosure encoun-

²¹ See *id.*

²² See *supra* note 19.

²³ See *supra* note 19.

²⁴ Proposed Rule 32(c) provides in pertinent part: "Form of Presentation. Except as otherwise directed by the court, a party offering deposition testimony pursuant to this rule may offer it in stenographic or nonstenographic form, but, if in nonstenographic form, the party shall also provide the court with a transcript of the portions so offered." *Advisory Committee Proposed Amendments, supra* note 4.

tered a loud, and thoroughly reactionary, response. It has been said, for example, that the Committee did not listen to its "customers," the Bar.²⁵ As one member of the Committee, I can say that the views of the Bar were very important to me. However, I did not, and do not, regard the Bar as universally opposed to the proposals. More importantly, I regarded my customers as the people of the United States.

Others complained that the proposals were adopted because there are too few litigators on the Committee and that its domination by judges caused the Committee to advance only the judges' "vested interest in reducing the workload of the courts."²⁶ The same critics, misunderstanding the amendment's effect on the attorney-client privilege and work-product immunity, also argued the Committee is not "sensitiv[e] to the impact on the system as a whole, particularly the impact on the attorney-client relationship."²⁷

As one who often regards the word "reform" as a password triggering The Law of Unintended Consequences and who, alone on the Committee, opposed the amendments as originally drafted, I nevertheless find two aspects of the criticism distressing. First, for all the criticism of automatic disclosure, there was virtually no proffer of alternative constructive proposals. The critics would thus leave the system in a status quo that they do not defend even as adequate, much less desirable. Second, because the Committee gave considerable heed to the legitimate criticisms voiced at the public hearings, continued controversy based on a misreading of the revised proposals will deter further attempts at reform.

Nevertheless, many aspects of the criticisms are understandable. The Committee and the great bulk of the critics have different goals. The critics, whether litigators or court reporters, are concerned not with the overall effect of the proposed amendments, but with their perceived effect in a small number of cases. The litigators who attacked the proposed amendments regarding automatic disclosure were largely products-liability-defense attorneys; they gave examples that were almost universally

²⁵ Ann Pelham, *Discovery Reform OK'd Despite Widespread Opposition*, CONN. L. TRIB., Apr. 27, 1992, at 3.

²⁶ Kaster & Wittenberg, *supra* note 13, at 16.

²⁷ *Id.*

of complex litigation in which the plaintiffs' allegations were largely conclusory and potentially involved thousands of documents at various places on the planet. The court reporters were concerned with the small number of cases in which a video or audio recording of a deposition might lead to a dispute in court over what was said in a deposition. Thus, there was no attack on the general idea of reform in contrast to its proposed implementation, no defense of the present system of discovery and no offer of constructive alternatives.

The Committee's eye cast a wider view that took into account not only the effects on certain kinds of cases, but also of the impact of discovery rules on the overall system. If one assumes that a litigation practice costs parties and the economy \$10 million annually and that this cost can be reduced or eliminated with only a marginal effect on the accuracy and even-handedness of the process as a whole, that marginal effect should not be allowed to prevent the cost reduction. Nevertheless, those litigators and court reporters in a position to feel that marginal effect will perceive it as large indeed, as in fact it is from the perspective of their tiny fraction of federal court caseload.²⁸ In any event, given the fact that the costs avoided by automatic disclosure are unnecessary but may be sufficient to prevent the litigation of some meritorious claims, the proposed amendments decrease costs while increasing the accuracy and even-handedness of the system. Finally, there is the issue of institutional self-interest—of judges who want to lessen their workload and of lawyers who profit from discovery. Like anyone who works, judges may well have a preference for rules that give them more leisure time. It is thus legitimate to scrutinize amendments supported by judges to determine whether the proposals further only the private interests of judges or whether they serve a broader public interest. We may put aside the fact that only three members of the Committee (two district judges and one magistrate judge) could conceivably have their personal workload lessened by the proposed amendments and assume the

²⁸ For example, one defense lawyer (by way of explanation rather than defense) has told me that the reason her colleagues oppose automatic disclosure is that some plaintiff's lawyers are not very competent and do not make discovery requests for obvious matters. Given an adversary system, that opposition is understandable. However, the costs of unveiling incompetents may be one (or two or three) hundred thousand unnecessary requests for discovery.

worst, namely that all judges share a compelling kinship in desiring the reduction of the other's workload (a behavioral assumption that few trial judges believe is valid as to appellate judges).

In the case of the proposals described above, however, there is little reason to believe that a reduction of work resulting from the automatic disclosure provisions will not be offset by an increase of work in determining the costs and benefits of proposed discovery under proposed Rule 26(b)(2)(iii). Even if there is an anticipated net reduction of work, it must still be shown that the work eliminated had value, a showing that cannot be made with regard to adjudicating disclosure of core discovery.

Moreover, determining the value of discovery in a particular case is usually left by the client to the lawyer, who profits, if paid by the hour, from more discovery, or squabbling about discovery, rather than less. There is thus an inevitable divergence in interest between clients and lawyers who are paid by the hour. When such a conflict of interest occurs in other contexts, lawyers routinely seek to attach liability to it, or to invoke heightened judicial scrutiny.²⁹ Inside counsel increasingly monitors the work done by outside counsel for superfluous services, and commercial firms have developed whose sole work is the auditing of legal bills. These are all signs that corporate clients believe that the lack of monitoring will lead to payment for excessive legal services. Such monitoring is expensive. If changes in procedural rules can eliminate the need for such monitoring, society benefits.

This is not intended as a comment on the motives of critics who appeared before the Committee. They had largely legitimate criticisms to make and the Committee responded. However, important segments of the organized Bar have little incentive to lessen the cost of litigation by reducing the need for unnecessary legal services. Those who seek to reform discovery are, therefore, unlikely ever to find their proposals commanding enthusiastic support among the organized Bar. On the contrary, such reform will usually generate organized opposition among some lawyers and adjuncts to litigation, such as court reporters.

²⁹ See, e.g., AMERICAN LAW INSTITUTE, PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATION § 5.03 (forthcoming 1993) (stating that compensation be fair to the corporation and authorized by disinterested directors, superiors, or shareholders).

In contrast, such reform ultimately benefits only a diffuse and unorganized public and therefore will never find organized support. Future reformers should be prepared for a long, lonely road.